Great Debates

Paul M. Nussbaum, Moderator
Whiteford Taylor Preston, LLP; Baltimore

Resolved: A structured dismissal that violates the absolute priority rule should never be permitted.

Pro: Craig Goldblatt
WilmerHale; Washington, D.C.

Con: Hon. Kevin J. Carey
U.S. Bankruptcy Court (D. Del.); Wilmington

Resolved: Asset sales under § 363 should lawfully be free and clear of successor-liability claims.

Pro: Hon. Robert E. Gerber (ret.)
U.S. Bankruptcy Court (S.D.N.Y.); New York

Con: William P. Weintraub
Goodwin Procter LLP; New York

No. 15-649

IN THE

Supreme Court of the United States

CASIMIR CZYZEWSKI, *et al.*,
Petitioners,

v.

JEVIC HOLDING CORP., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a Chapter 11 case may be terminated by a "structured dismissal" that distributes estate property in violation of the Bankruptcy Code's priority scheme.

PARTIES TO THE PROCEEDING

Petitioners, appellants below, are Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard, Daniel C. Richards, and a certified class of all others similarly situated.

Respondents, appellees below, are Jevic Holding Corp.; Jevic Transportation, Inc.; Creek Road Properties, LLC; the CIT Group/Business Credit, Inc.; Sun Capital Partners, Inc.; Sun Capital Partners IV, LP; Sun Capital Partners Management IV, LLC; and the Official Committee of Unsecured Creditors.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 787 F.3d 173. The opinion of the district court (Pet. App. 35a-43a) is unreported but available at 2014 WL 268613. The opinion of the bankruptcy court (Pet. App. 53a-66a) is unreported.

JURISDICTION

The court of appeals entered judgment on May 21, 2015, and denied a timely petition for rehearing en banc on August 18, 2015. Pet. App. 1a, 67a-68a. Petitioners filed a timely petition for certiorari on November 16,

2015, which this Court granted on June 28, 2016. The Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

The appendix reproduces §§103, 105, 349, 363, 507, 726, 1112, and 1129 of the Bankruptcy Code (11 U.S.C.) and Federal Rule of Bankruptcy Procedure 9019.

INTRODUCTION

Petitioners represent a certified class of nearly 1,800 truck drivers who were fired without warning when their employer, Jevic Transportation, filed for Chapter 11 bankruptcy. As a result of their sudden termination, the drivers had claims against Jevic's bankruptcy estate that were entitled to priority under the Bankruptcy Code. Yet the drivers received nothing for those claims, even though lower-priority general unsecured creditors were paid by the estate. That outcome would have been impermissible in a Chapter 11 plan or a Chapter 7 liquidation. The bankruptcy court allowed it here as part of a so-called "structured dismissal" that approved a settlement of the estate's pending claims against its two largest creditors; distributed the settlement proceeds in violation of the Code's priority scheme, deliberately skipping over petitioners; and dismissed the Chapter 11 case. The Bankruptcy Code does not permit that result.

The Bankruptcy Code establishes a comprehensive process for distributing the value of a business when its assets may be insufficient to pay all creditors in full. Under either Chapter 7 or Chapter 11, that value is distributed according to a strict and detailed scheme of priority. Secured creditors are paid first, up to the value of their collateral and in accordance with the priority of their liens; unsecured creditors are paid next; and

equity-holders receive value only after creditors are paid in full. As among unsecured creditors, the Bankruptcy Code grants priority to specific categories of claims, including the employee claims at issue here, which must be paid in full before unsecured creditors without priority—general unsecured creditors—are paid anything. In a Chapter 7 liquidation, this order of priority cannot be varied. In a Chapter 11 plan, it can be varied only with the affected creditors' consent. As the Court has repeatedly recognized, this priority structure is the backbone of Chapter 11 and the ultimate safeguard of bankruptcy's core purpose to distribute a debtor's value fairly among its stakeholders.

A debtor can be reorganized under Chapter 11 only through a plan, which must satisfy detailed substantive and procedural requirements—including compliance with priority. Not uncommonly, as here, businesses seek protection under Chapter 11 and then prove unable to confirm a plan. When that happens, the Bankruptcy Code provides two options: The court may either convert the case to Chapter 7, where the debtor's assets are liquidated and distributed according to priority, or dismiss the case, in which event the parties revert to their prebankruptcy positions and creditors can pursue the debtor outside bankruptcy to collect on their claims. Nothing in the Bankruptcy Code contemplates or suggests that a failed Chapter 11 case can be resolved through a "structured dismissal" that distributes the debtor's assets, yet ignores the Bankruptcy Code's requirements for doing so. Basic principles of statutory construction compel the conclusion that Congress did not spell out a mandatory priority scheme in granular detail while at the same time silently conferring the power to disregard that scheme when it proves inconvenient.

The courts below approved the structured dismissal, calling this a "rare" case, because the senior creditors claimed they would not settle if petitioners received any of the settlement proceeds. Of course, there is no way to know whether the parties would have settled had they been required to respect priority. But setting that aside, some parties to a Chapter 11 case may stand to benefit from violating priority and may be able to reach a deal more easily if they are permitted to do so. That is precisely why the Bankruptcy Code requires strict adherence to priority—so that senior creditors will not collaborate with junior creditors or equity-holders to squeeze out disfavored intermediate creditors, as happened here. If a bankruptcy court can approve a structured dismissal violating the priority rights of an objecting creditor because other parties assert that they cannot reach a deal if that creditor's priority is respected, bargaining in every Chapter 11 case will be compromised because it will no longer take place against the backdrop of a clear legal rule. The priority-violating structured dismissal the courts approved here thus undermines the very core of Chapter 11 as Congress envisioned it.

STATEMENT

I. STATUTORY BACKGROUND

A. The Structure And Purpose Of Bankruptcy

The basic function of business bankruptcy law is the creation of an orderly process for distributing an insolvent corporation's value among its creditors. Outside bankruptcy, when a corporation's assets are insufficient to pay all the claims against it in full, there is a danger that creditors will not be treated fairly. For instance, a debtor might seek to pay off favored creditors, or the prospect of insolvency could precipitate a race to

the courthouse, in which creditors who win the race are paid and those who lose the race are not. That in turn can result in the piecemeal dismemberment of the debtor's business and the loss of any going-concern value the business may have, which can reduce the total recoveries for creditors as a group. *See, e.g.*, Jackson, *The Logic and Limits of Bankruptcy Law* 7-19 (1986).

The Bankruptcy Code's response to this problem is to establish a distribution scheme that is "designed to enforce a distribution of the debtor's assets in an orderly manner in which the claims of all creditors are considered fairly, in accordance with established principles rather than on the basis of the inside influence or economic leverage of a particular creditor." H.R. Rep. No. 103-835, at 33 (1994); *see also, e.g.*, Baird, *Elements of Bankruptcy* 59 (6th ed. 2014).

The Code accomplishes this end through several interlocking devices. When a debtor files a petition for bankruptcy, an estate is created comprising all the debtor's prepetition property, tangible and intangible, and any proceeds of that property. §541(a).[1] The bankruptcy trustee or (in most Chapter 11 cases) the debtor-in-possession is required to manage that property for the benefit of the creditor group as a whole, §§704, 1106, 1107(a), and can recover certain payments the debtor made or assets it transferred before bankruptcy that unfairly preferred particular creditors (preferences), §547, or for which the debtor did not receive fair value in return (fraudulent transfers), §§544, 548.

[1] All statutory citations are to the Bankruptcy Code (11 U.S.C.), unless otherwise noted.

The bankruptcy filing also gives rise to an "automatic stay" of any actions by creditors to seize estate assets or to collect on claims against the debtor that arose before the filing. §362(a), (c). By halting collection activities during the bankruptcy, the automatic stay ensures that the estate's value can be maximized and distributed fairly among creditors in accordance with the Code's priority scheme. Creditors can file claims against the estate, which are typically allowed or disallowed—that is, held valid or invalid—according to nonbankruptcy law. §§501, 502.

There are two types of business bankruptcies: liquidation under Chapter 7 and reorganization under Chapter 11. Chapter 7 is designed for circumstances in which the debtor's business cannot be rehabilitated. A Chapter 7 trustee will liquidate the assets of the estate and distribute them to creditors according to specific and unvarying rules of priority, set out in part in §507 of the Bankruptcy Code and described further below. §§704(a), 724, 726.

Chapter 11 is more complex and is typically used when there is a prospect of reorganizing the debtor's business and continuing it as a going concern after the bankruptcy (although Chapter 11 may also be used to liquidate a debtor's business). Chapter 11 recognizes that some debtors may have a business that is suffering from temporary financial distress but can be saved if that distress is resolved. Preserving a debtor's business, in turn, can benefit creditors because a business is typically worth more as a going concern than as a piecemeal collection of assets, and that "going-concern surplus" can be distributed to creditors in satisfaction of their claims. *See, e.g.*, Jackson 14. Unlike in Chapter 7, in Chapter 11 the debtor's management usually remains in place and operates the business during the

bankruptcy case, taking on the obligations of a bankruptcy trustee. §1107(a). And, unlike in Chapter 7, the debtor-in-possession and the various stakeholders can negotiate with one another over how best to maximize the value of the debtor's business (whether in a traditional reorganization or through a sale and liquidating plan), and creditors can consent to different treatment than the Bankruptcy Code would otherwise require if they determine it is in their interest to do so.

The culmination of the Chapter 11 process is the plan, which governs the distribution of the value of the estate to stakeholders. The plan process gives creditors numerous substantive and procedural protections. Most significantly, absent creditors' consent to different treatment, a plan must comply with the Bankruptcy Code's priority scheme, as described below. §1129.

The goal of a Chapter 11 case is usually confirmation of a plan of reorganization, following which the reorganized debtor emerges from bankruptcy protection unencumbered by its prebankruptcy obligations, except as provided in the plan. §1141(d). However, Chapter 11 debtors who are unable or do not want to reorganize may liquidate and distribute the resulting value through a liquidating Chapter 11 plan. §1123(b)(4). In such cases, the debtor does not receive a discharge of any debt, §1141(d)(3), but the requirements of §1129, including compliance with priority, must still be met.

Sometimes Chapter 11 debtors are unable to confirm any plan. For instance, a debtor may be unable to comply with the Bankruptcy Code's requirement that administrative and priority claims be paid in full on the effective date of the plan, §1129(a)(9)—a circumstance known as "administrative insolvency." In such circumstances, the Code provides that the Chapter 11 case is

either converted to Chapter 7—where the estate will be liquidated and distributed as described above—or dismissed. §1112(b). If the case is dismissed, unless the court orders otherwise "for cause," estate property is returned to the debtor, and creditors can once again pursue the debtor and its assets for payment on their claims outside bankruptcy. §349(b).[2]

B. The Priority Scheme

The Bankruptcy Code's priority scheme is central to both Chapter 7 and Chapter 11. Higher-priority claims are entitled to be paid in full before lower-priority claims are paid anything—a system often likened to a waterfall, in which payments cascade down to lower levels only after higher-priority claims are fully satisfied. *See, e.g.*, 4 *Collier on Bankruptcy* ¶507.02[1] (16th ed. 2016); 3 *Norton Bankruptcy Law and Practice* §49:1 (3d ed. 2016).

The overall priority scheme in bankruptcy is a function of both bankruptcy and nonbankruptcy law. In

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[2] In recent years, it has become increasingly common for failed Chapter 11 cases to be resolved by "structured dismissals," in which the order dismissing the case is accompanied by other ancillary relief. *See* American Bankruptcy Institute Commission To Study the Reform of Chapter 11, *2012-2014 Final Report and Recommendations* 269-271 (2014) (enumerating common features of structured dismissals). While structured dismissals have occasioned some controversy, this case does not present the question whether structured dismissals are ever permissible. To the extent that structured dismissals are consensual and consistent with the Bankruptcy Code, they might be an appropriate exercise of the court's equitable authority. The narrow question here is only whether a nonconsensual structured dismissal can distribute the value of the bankruptcy estate in a way that violates the Code's priority scheme.

Chapter 7, that priority scheme cannot be altered. As they would be outside bankruptcy, secured creditors are entitled to be paid first from the proceeds of their collateral, according to the priority of their liens. §§103(a), 361, 362(d), 363(e), 725. Unsecured creditors are then paid according to a carefully delineated statutory scheme of priority, set out in §507 of the Bankruptcy Code. §726(a)(1). Unsecured creditors without priority—"general unsecured creditors"—are paid only after priority unsecured creditors. §726(a)(2). Equity-holders receive nothing unless all creditors are paid in full. §726(a)(6).

As noted above, Chapter 11 plans permit creditors to consent to deviations from priority. Absent consent, however, Chapter 11 plans are governed by the principle of "absolute priority," under which junior classes of claims cannot receive anything until senior classes of claims are paid in full, and equity-holders cannot retain any value unless all creditors are paid in full. *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 202 (1988). That principle is codified in §1129(b) of the Bankruptcy Code through the requirement that plans must be "fair and equitable" to nonconsenting classes of claims. §1129(b)(2)(A) (defining "fair and equitable" for classes of secured claims); §1129(b)(2)(B) (defining "fair and equitable" for classes of unsecured claims).

Chapter 11 plans must also abide by the statutory priorities for unsecured creditors set out in §507. Absent consent, priority unsecured creditors must be paid in cash in full, in most cases on the effective date of the plan. §1129(a)(9). Section 507 currently contains ten categories of unsecured claims accorded priority because of their "special social importance," S. Rep. No. 95-1106, at 4 (1978), or their critical role in facilitating the resolution of a bankruptcy case. Priority is afford-

ed to, for example, expenses incurred in administering the bankruptcy estate, §507(a)(2), and many federal, state, and local taxes, §507(a)(8).

Petitioners in this case have claims against Jevic for severance pay for firing them without warning immediately before the bankruptcy. Those claims are entitled to priority under the Bankruptcy Code, which grants priority to certain unpaid employee wages and benefits, including severance pay. §507(a)(4), (5). Congress established those priorities "to alleviate in some degree the hardship that unemployment usually brings to workers and their families" when a business enters bankruptcy. *United States* v. *Embassy Rest., Inc.*, 359 U.S. 29, 32 (1959); *see also Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 658-659 (2006). Indeed, "[e]mployees are usually the hardest hit financially by a bankruptcy," as they often have no other source of income. 4 *Collier* ¶507.06[1]. The wage priority is also an important inducement to employees not to "abandon a failing business for fear of not being paid," which would imperil the chances of rehabilitation and worsen the prospects of repayment for all other creditors. H.R. Rep. No. 95-595, at 187 (1977). Accordingly, either in Chapter 7 or (absent consent) under a Chapter 11 plan, priority claims for unpaid wages and employee benefits must be paid in full before general unsecured claims are paid anything.

II. THE JEVIC BANKRUPTCY

A. Jevic's Bankruptcy Filing And The Fraudulent Transfer Suit

1. The debtor in this Chapter 11 case, Jevic Transportation, was a New Jersey-based trucking company. Pet. App. 2a. In 2006, Sun Capital Partners, a private equity firm, acquired Jevic in a leveraged

buyout. *Id.* In substance, Sun financed the acquisition of Jevic by borrowing against Jevic's own assets. Shortly after the buyout, Jevic refinanced the acquisition debt with an $85 million loan from a consortium of lenders led by the CIT Group, secured by a lien on all of Jevic's assets. JA22.

Jevic soon defaulted on the loan. JA22. By the end of 2007, CIT had obtained a guarantee from Sun for $2 million of Jevic's debt and had entered into a forbearance agreement with Jevic. Pet. App. 2a. But Jevic remained in default when the forbearance agreement expired in May 2008. *Id.*; JA23. On May 19, 2008, Jevic terminated petitioners and similarly situated employees without notice. It filed a Chapter 11 petition the next day. Pet. App. 2a-3a.

2. Petitioners are representatives of a certified class of nearly 1,800 truck drivers and other employees whom Jevic fired without warning immediately before entering bankruptcy. Petitioners sued Jevic and Sun for violations of the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§2101-2109, and an analogous New Jersey law, N.J. Stat. Ann. §§34:21-1 to -7, which require employers to provide advance notice of such a termination. CAJA1087-1099 (complaint), 1137-1138 (class certification).

Petitioners prevailed on their state-law claims against Jevic but not on their claims against Sun. *In re Jevic Holding Corp.*, 496 B.R. 151, 165 (Bankr. D. Del. 2013); *In re Jevic Holding Corp.*, 492 B.R. 416, 433 (Bankr. D. Del. 2013), *aff'd*, 526 B.R. 547 (D. Del. 2014), *aff'd*, 2016 WL 4011149 (3d Cir. July 27, 2016). For reasons described below, petitioners "never got the chance to present a damages case in the Bankruptcy Court, but they estimate their claim to have been worth

$12,400,000, of which $8,300,000 was a priority wage claim under" §507(a)(4). Pet. App. 6a.

3. Failed leveraged buyouts such as the one here are commonly challenged in bankruptcy court as fraudulent transfers. Generally, such suits allege that assets that otherwise would have been available to satisfy unsecured creditors' claims were fully encumbered by liens granted to finance the buyout of the debtor's old equity-holders and that the debtor did not receive reasonably equivalent value in return. *See* §§544(b), 548(a). Fraudulent transfer suits are assets of the bankruptcy estate, as are any funds recovered through such a suit; they are typically prosecuted by a trustee or debtor-in-possession. A debtor-in-possession, however, may not want to bring a fraudulent transfer suit arising from a transaction in which the debtor's management participated. When a debtor-in-possession declines to bring an estate cause of action, an official creditors' committee may seek leave to bring the suit on the estate's behalf. *See generally Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp.* v. *Chinery*, 330 F.3d 548 (3d Cir. 2003) (en banc).

In this case, an official committee of Jevic's unsecured creditors was authorized to litigate fraudulent transfer claims on behalf of Jevic's bankruptcy estate. JA56-57; CAJA342. The committee sued CIT and Sun, asserting that the leveraged buyout fraudulently transferred Jevic's value to them and left Jevic unable to pay its other creditors. The committee alleged that Sun, with CIT's active assistance, "acquired Jevic with virtually none of its own money" and "leverag[ed] all of [Jevic's] assets to the maximum extent possible," based on "ever more optimistic and aggressive" financial projections. JA54, 58, 66; *see also* JA70-73. Sun itself

"contribut[ed] only $1 million in equity, most of which it got back in 'fees.'" JA54-55. As a result, the suit alleged, Jevic's ultimate failure "was the foreseeable end of a reckless course of action in which Sun and CIT bore no risk but all other constituents did." JA80.

Based on those allegations, the committee asserted fraudulent transfer claims under both §548 and §544(b) of the Bankruptcy Code, seeking to avoid the liens that Sun and CIT asserted on Jevic's assets and to recover other assets transferred in connection with the leveraged buyout. JA82-98, 102-131. Under §548, a debtor-in-possession can unwind certain transfers of property that did not give the debtor reasonably equivalent value in return or that were undertaken to hinder, delay, or defraud creditors. Under §544(b), the debtor-in-possession can avoid any fraudulent transfer that would be avoidable by an unsecured creditor under state law—which gives individual creditors the ability to unwind fraudulent transfers in similar circumstances outside bankruptcy.

In September 2011, the bankruptcy court denied a motion to dismiss, holding that the committee had stated claims for fraudulent transfer, as well as other causes of action. JA36-47. The court dismissed certain other claims without prejudice (JA51-52), and the committee responded in October 2011 by filing an amended complaint (JA13). Had the committee prevailed, it would have been able to avoid all of CIT's and Sun's liens on Jevic's assets and could have recovered for the estate the value of the property Jevic transferred to CIT and Sun to finance the buyout—potentially more than $100 million. JA54-56.

B. The Settlement And Structured Dismissal

In June 2012, Jevic, Sun, CIT, and the committee of unsecured creditors filed a joint motion "pursuant to sections 105(a), 349 and 1112(b)" of the Code and "Rule 9019(a) of the Federal Rules of Bankruptcy," seeking approval of a settlement and structured dismissal that would settle the estate's claims against Sun and CIT, distribute the settlement proceeds, and dismiss the bankruptcy case. JA159.

Under the terms of the proposed order, the estate would dismiss its lawsuit and release all fraudulent transfer claims against Sun and CIT, including the state-law fraudulent transfer claims that Jevic's creditors could otherwise bring outside bankruptcy. JA162-163. In exchange, CIT would pay $2 million to Jevic to satisfy various administrative priority claims, including the committee's attorneys' fees. JA163-165, 185-186. Sun would assign a lien it claimed to hold on Jevic's remaining $1.7 million in cash to a trust to pay certain other priority claims, including tax claims, and then to pay general unsecured claims on a pro rata basis. JA163, 166-167, 192. The Chapter 11 case would then be dismissed. JA167-168.

The proposed structured dismissal deliberately skipped over petitioners in the distribution of estate assets. It is undisputed that petitioners had priority wage claims against the estate. *Supra* pp.11-12. Yet petitioners were to receive nothing on account of those claims, even though lower-priority general unsecured creditors would be paid. Sun apparently insisted on that arrangement because petitioners were still suing Sun for violating the WARN Act, and Sun refused to

provide petitioners any payments that could be used to fund that litigation. Pet. App. 6a n.4.[3]

Both petitioners and the U.S. Trustee objected to the settlement and structured dismissal on the ground that it violated the §507 priority scheme. Pet. App. 7a. As the U.S. Trustee explained, the fraudulent transfer action had been brought by the committee *on behalf of the estate*; the settlement proceeds accordingly "must be for the benefit of the estate" and subject to the Code's priority scheme governing distribution of estate property. CAJA530; *see* §541(a)(3), (6) (interests recovered through avoided transfers and proceeds of estate property are themselves estate property).

The bankruptcy court nevertheless approved the settlement and structured dismissal. Pet. App. 45a-52a. The court "acknowledge[d] that the proposed distributions are not in accordance with the absolute priority rule." *Id.* 58a. But in the court's view, the Code's priority rules were inapplicable "because this is not a plan, and there is no prospect here of a confirmable plan." *Id.* The court was also swayed by what it perceived as the "dire circumstances" of the case. *Id.* 57a. Jevic's only remaining cash was subject to the disputed liens held by CIT and Sun—leaving, in the court's opinion, insufficient resources to prosecute the fraudulent

[3] Notably, the original proposed distribution also would have skipped over claims held by prepetition tax creditors—entitled to priority under §507(a)(8)—on the basis that there were "no available assets" to pay those claims. JA164. After those creditors objected, the settlement was revised to include partial payment of various prepetition tax claims among the distributions to be made from the settlement trust. JA197-204.

transfer action against Sun and CIT "creditably" or to confirm a Chapter 11 plan. *Id.* 56a.[4]

The bankruptcy court considered but rejected several alternatives to the structured dismissal. It acknowledged that the case could be converted to Chapter 7, where the estate would be liquidated according to the Code's priority scheme. However, the court accepted Sun's assertion that Sun "would not do this [settlement] in a Chapter 7" case, and that the estate would have no unencumbered assets for a Chapter 7 trustee to use to pursue litigation. Pet. App. 58a. The court also noted that counsel might be retained to litigate the fraudulent transfer suit on a contingency basis, but it asserted that "any lawyer" who took the case on contingency "should have his head examined"—notwithstanding the fact that the suit survived a motion to dismiss and Sun and CIT paid $3.7 million to settle it. *Id.* 60a-61a. The court therefore concluded that it could approve the structured dismissal's settlement and priority-skipping distribution pursuant to its authority under Federal Rule of Bankruptcy Procedure 9019 to "approve a compromise or settlement." *See id.* 56a, 61a.

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[4] The bankruptcy court also reasoned that because the priority-skipping distribution would be made from the estate's $1.7 million in remaining cash on which Sun supposedly held a lien, Sun could "dispose of its collateral as it wishes." Pet. App. 58a; *see also* JA192. That rationale is mistaken, and respondents did not defend it in the court of appeals or in their brief in opposition. Even if Sun held a lien on the cash, it relinquished that lien to settle *the estate's* avoidance action against it, and the proceeds of a settlement of an estate cause of action are estate property, §541(a)(6). Thus, earmarking those proceeds for general unsecured creditors was a disposition of estate assets, not of Sun's property. As discussed below (at 18), the Third Circuit resolved the case on that premise.

If the court had enforced the Code's priority scheme, no general unsecured creditors could have received any distributions until petitioners' higher-priority wage claims were paid in full (absent petitioners' consent to different treatment). Alternatively, if the court had simply dismissed the case, without approving the estate's release of the state-law fraudulent transfer claims belonging to Jevic's creditors, petitioners—as creditors of Jevic—would have been free to pursue such actions against Sun and CIT.[5] Instead, they were left with no recovery, and no means of recovering anything, on their New Jersey WARN Act claims.

C. Appeal

The district court affirmed. Like the bankruptcy court, the district court acknowledged that the settlement "does not follow the absolute priority rule" but reasoned that the settlement need not do so because "it is not a reorganization plan." Pet. App. 42a.

A divided panel of the Third Circuit also affirmed. The majority began by acknowledging that "the Code does not expressly authorize structured dismissals,"

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[5] Most States, including New Jersey, recognize such a cause of action for creditors outside bankruptcy. N.J. Stat. Ann. §§25:2-20 to-34. In bankruptcy, however, as noted above (at 12), the estate has the right to bring such claims, and the estate's settlement and release of such claims precludes creditors from bringing them after bankruptcy. *See, e.g.*, *In re PWS Holding Corp.*, 303 F.3d 308, 314-315 (3d Cir. 2002). Thus, when the committee, acting for the estate, settled and released the state-law fraudulent transfer claims, it extinguished rights petitioners otherwise could have invoked after dismissal to look to Sun and CIT for satisfaction of Jevic's debts to petitioners. *See* JA186-191 (releases).

and that dismissal ordinarily results in a "hard reset" to the prepetition status quo. Pet. App. 13a, 14a. But, noting that the Code "authorizes the bankruptcy court to alter the effect of dismissal 'for cause,'" it reasoned that a structured dismissal is permissible if it is not "used to circumvent" the Code's procedures "govern[ing] plan confirmation and conversion to Chapter 7." *Id.* 14a (quoting §349(b)).

The majority was "troubled" by the structured dismissal's departure from priority, noting that "[s]ettlements that skip objecting creditors in distributing estate assets raise justifiable concerns about collusion among debtors, creditors, and their attorneys and other professionals." Pet. App. 20a, 22a. But it reasoned that the absolute priority rule codified in §1129(b)(2) applies by its terms to plans, and that no Code provision explicitly prohibits priority-skipping distributions of settlement proceeds made outside a plan. *Id.* 17a. As to that question, the majority recognized that two other courts of appeals had reached divergent results, and opted to follow what it perceived to be the more "flexible" approach of the Second Circuit. *Id.* 17a-19a (discussing *In re AWECO, Inc.*, 725 F.2d 293 (5th Cir. 1984), and *In re Iridium Operating LLC*, 478 F.3d 452 (2d Cir. 2007)). Thus, it held that settlements that "distribut[e] estate assets" but "deviate from the priority scheme" may be approved under Rule 9019 in "rare instances," if the bankruptcy court has "'specific and credible grounds to justify [the] deviation.'" *Id.* 12a, 21a (alteration in original). And the majority found such grounds here, endorsing the bankruptcy court's view that the settlement and structured dismissal were the "least bad alternative." *Id.* 21a-22a.

Judge Scirica dissented. In his view, "the bankruptcy court's order undermined the Code's essential

priority scheme" by "skip[ping] over an entire class of creditors" in distributing estate property. Pet. App. 23a, 29a-30a. While he left open the possibility that in "extraordinary circumstances" the Code might permit a settlement that deviates from the priority scheme, he found that the settlement and structured dismissal here were designed as "an impermissible end-run around the carefully designed routes by which a debtor may emerge from Chapter 11 proceedings." *Id.* 24a, 27a-28a. Judge Scirica also warned that, contrary to the majority's assertion, the circumstances here were not "*sui generis*" and that it is "not difficult to imagine another secured creditor who wants to avoid providing funds to priority unsecured creditors." *Id.* 31a.

SUMMARY OF ARGUMENT

I. The Bankruptcy Code does not permit a bankruptcy court to approve a "structured dismissal" of a Chapter 11 case that distributes the estate to creditors in violation of the Code's priority scheme. The Code provides three, and only three, ways to resolve a Chapter 11 case: through a confirmed Chapter 11 plan, which must comply with priority, absent consent; through conversion to Chapter 7, which must also comply with priority; or through dismissal, which returns the estate's assets to their prebankruptcy owners and restores creditors' rights to pursue the debtor and its assets to recover on their claims. Nothing in the Code authorizes the court to distribute the estate to creditors through a "structured dismissal" that violates the Code's basic priority scheme.

In approving the settlement and structured dismissal, the bankruptcy court relied on Federal Rule of Bankruptcy Procedure 9019, which gives courts the power to "approve a compromise or settlement" of es-

tate claims. But both Rule 9019 and the underlying statutory authority for settlement, the power to approve the use or sale of estate property under §363(b), govern the *liquidation* of estate assets. They do not govern distribution of the proceeds—let alone provide authority to distribute them in violation of the priority scheme. Likewise, the authority under §349(b) to order limited departures for "cause" from the rule that dismissal returns estate property to its prebankruptcy owner does not permit the court to distribute the estate in violation of Chapter 11's priority scheme. Nor does §105(a), which codifies bankruptcy courts' residual equitable powers and provides that they may enter orders "necessary or appropriate to carry out the provisions" of the Code, confer such authority. This Court has squarely rejected the proposition that the Code permits bankruptcy courts to depart from the priority scheme to achieve what they consider more "equitable" or more practical outcomes.

Basic principles of statutory construction—that statutes must be read as a whole, and that specific provisions control over general provisions—compel this conclusion. The Code provides specific, limited authorization to distribute estate assets in accordance with priority—the central organizing principle of bankruptcy—or to dismiss a case without distributing assets. It does not, through general provisions or interstitial "equitable" authority, grant the power to dismiss a case while distributing assets in violation of priority.

II. Upholding the court of appeals' contrary rule would threaten the judgments that Congress made in §507 to protect employees from the disproportionate harm they suffer when their employer files for bankruptcy and to encourage employees not to flee when a business is failing—an inducement that is severely un-

dercut if its application is uncertain. It would also invite the same dangers of collusion among senior and junior stakeholders to squeeze out disfavored intermediate creditors that first motivated this Court to develop the absolute priority rule, and later motivated Congress to codify that rule in the current Bankruptcy Code. The court of appeals was mistaken in suggesting that giving bankruptcy courts the "flexibility" to depart from that rule would facilitate settlement; rather, it would simply redistribute settlement proceeds away from the priority creditors whom Congress intended to protect. And the effects of such departures would not be limited to the "rare" case in which there was no better alternative—a circumstance that the debtor and favored creditors would have substantial incentive and ability to concoct. The threat of a priority-skipping distribution in a structured dismissal would profoundly undermine the bargaining position of all priority creditors in all Chapter 11 cases, as they would never be certain that their priority status is, in fact, absolute.

ARGUMENT

I. Structured Dismissals Must Respect The Code's Priority Scheme

The Code does not permit a bankruptcy court to approve a structured dismissal that distributes estate assets to creditors in violation of the priorities that would govern an analogous distribution under a confirmed Chapter 11 plan or upon conversion to Chapter 7 for liquidation. Chapter 11 specifies in "meticulous" and "detailed" fashion, *Law* v. *Siegel*, 134 S. Ct. 1188, 1196 (2014), the procedures and requirements for confirmation of a plan, including compliance with the priority scheme. If a plan cannot be confirmed, the Chapter 11 case can be converted to Chapter 7, where again the

Code makes clear that Congress's priority scheme must be respected. The same must be true when a Chapter 11 case is dismissed. Nothing in the Code allows select creditors to agree with the debtor to "structure" the dismissal to secure for themselves a distribution the Code forbids in a confirmed plan or liquidation.

Respondents argue that nothing in the Code in so many words requires compliance with the priority scheme when a bankruptcy court approves a settlement of estate litigation, or when the court dismisses a Chapter 11 case. Opp. 1, 16-23. That is irrelevant. The Code does not expressly require compliance with the priority scheme in its provisions authorizing dismissal or settlement because those provisions were never intended to authorize a plan-like distribution of estate assets to creditors, like the one approved here. By providing a detailed and comprehensive structure for the distribution of estate assets at the end of a bankruptcy case—one that requires, as an indispensable component, compliance with the priority scheme—Congress unmistakably forbade deviations from that structure under the guise of dismissals, settlements, or any other device respondents might invoke.

"Statutory construction," the Court has explained, "is a holistic endeavor," in which individual provisions must be understood in the context in which Congress placed them. *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). An interpretation of a given provision is permissible only if it "produces a substantive effect that is compatible with the rest of the law." *Id.*; *see also, e.g.*, *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (rejecting "hypertechnical reading" that was "not inconsistent with the language of [the] provision examined in isolation," but that was contradicted by "context" and "the

overall statutory scheme"); *Kelly* v. *Robinson*, 479 U.S. 36, 43 (1986) ("[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its objects and policy." (internal quotation marks omitted)); *infra* pp.38-41. Reading into the Code's provisions for dismissal or settlement a power to achieve what would be unlawful in a plan or liquidation fails to honor that basic precept.

A. A Distribution Of The Debtor's Estate Under A Plan Or In Chapter 7 Must Comply With §507, And A Dismissal Must Reinstate Creditors' Prebankruptcy Property Rights

Chapter 11 provides only three ways for a debtor to exit bankruptcy: confirmation of a Chapter 11 plan of reorganization or liquidation; conversion to Chapter 7; or dismissal. Under either a Chapter 11 plan, absent consent, or Chapter 7, estate assets must be distributed in accordance with priority; under a dismissal, estate assets are not distributed to creditors at all, and the parties regain their prebankruptcy rights insofar as that is possible. Those carefully specified options for exiting bankruptcy, and the strict and reticulated priority scheme that accompanies them, foreclose a debtor from creating its own, different priority scheme and implementing it through a "structured dismissal."

1. The Chapter 11 plan

a. Chapter 11 contains an intricate set of rules governing the formulation and confirmation of a plan for distributing the estate's value to creditors. The Code sets out detailed provisions governing who may file a plan, including when the debtor has the exclusive right to do so, §1121; the contents of the plan itself, §§1122-1123; the disclosures required to ensure credi-

tors can make an informed judgment about the plan, §1125; procedures for creditors to vote on the plan, §1126; and the substantive requirements for confirmation of the plan, including the priority scheme, §1129. These provisions create a framework through which the debtor and its stakeholders may seek to negotiate a consensual plan for distribution of the debtor's value. And they clearly set out creditors' default entitlements, which form the substantive backdrop of those negotiations.

Chapter 11 is intended to "preserv[e] going concerns" that are worth more if reorganized or sold as operating businesses than if liquidated piecemeal and to "maximiz[e] [the] property available to satisfy creditors." *Bank of Am. Trust & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999). Accordingly, the Bankruptcy Code provides the debtor and its stakeholders substantial flexibility in designing the terms of a Chapter 11 plan. The plan may vest the estate in the debtor and give creditors new securities in the reorganized enterprise in satisfaction of their old interests. §1123(a)(5)(A), (J). It may provide for the sale of property of the estate and distribution of the proceeds among creditors. §1123(a)(5)(D), (b)(4). It may modify the terms of loans. §1123(a)(5)(E)-(H), (b)(5). It may provide that claims belonging to the estate—like the fraudulent transfer suit against CIT and Sun in this case—will be litigated after confirmation, or alternatively, for the "settlement or adjustment" of such claims and distribution of the proceeds. §1123(b)(3)(A). And the plan may allocate the value of the estate's assets among creditors in any way agreed upon by the parties, so long as all affected classes of creditors consent. §1129(a)(7)-(9).

But a plan cannot be confirmed over the objection of a class of creditors unless the plan complies with both the absolute priority rule and the §507 priority scheme. §1129(a)(1), (9), (b)(1)-(2). If the settlement and distribution of estate assets approved here had been embodied in a Chapter 11 plan, it is undisputed that the plan could not have been confirmed. The settlement of the estate's suit against CIT and Sun could have been provided for in a plan, §1123(b)(3)(A), but the settlement proceeds could not have been distributed to general unsecured creditors over petitioners' objection unless their higher-priority claims were paid in full on the effective date of the plan, §1129(a)(9), (b)(2)(B).

Because bankruptcy cases frequently involve competition among different constituencies for limited value, creditors or equity-holders will at times attempt to subvert the statutory priority structure in favor of some other scheme of distribution more favorable to them. *See* Roe & Tung, *Breaking Bankruptcy Priority*, 99 Va. L. Rev. 1235, 1246, 1279 (2013). But despite the considerable flexibility that Congress built into the Chapter 11 plan process, it made a clear judgment that priority must be respected in the distribution of the value of the estate, absent creditors' consent to different treatment. That is the case even where, as here, the court believes that departing from priority would be the "least bad alternative" and would better serve the interests of creditors. *See Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 206-207 (1988) (equitable considerations cannot justify a violation of the absolute priority rule in a Chapter 11 plan).

b. In a few instances, the Code authorizes the distribution of estate assets to a creditor during an ongoing case, rather than through a plan. For example, a bankruptcy court may authorize cash payments to a

prepetition secured creditor as "adequate protection" against diminution in the value of its collateral during the bankruptcy case. §361(1). The court may also authorize a debtor to assume an executory contract before confirmation of a plan, provided that the debtor promptly cures any default under the contract and compensates the counterparty, including paying any prepetition claim resulting from the default. §365(a)-(b), (d)(2). And a Chapter 11 debtor-in-possession may operate its business during the case and pay postpetition expenses incurred in the ordinary course of business during the bankruptcy case. §§363(c)(1), 1108.

Those provisions are narrow in scope and are designed to enable the debtor to continue operating as a going concern in bankruptcy, while compensating the affected parties. Moreover, unlike the distribution here, each provision is consistent with the Code's priority scheme. Secured creditors have priority in the proceeds of their collateral, §§725, 1129(b)(2)(A); claims arising under assumed contracts are administrative expenses entitled to priority, §§503(b), 507; and postbankruptcy claims incurred in the ordinary course of business to preserve the estate are likewise administrative expenses entitled to priority, §§364(a), 503(b), 507(a)(2). These limited provisions for distribution of assets outside a plan thus only underline the centrality of the Code's priority scheme to all bankruptcy cases, however resolved.

2. Conversion to Chapter 7

If a plan cannot be confirmed, the debtor may convert the case to Chapter 7, or the court may do so for cause. §1112(a), (b)(1). Upon conversion, the Chapter 7 trustee must "collect and reduce to money the property of the estate." §704(a)(1). That includes pursuing to

judgment, or negotiating a settlement of, any legal claims held by the estate. *See infra* pp.30-31.

Once the Chapter 7 trustee has accounted for all assets of the estate, the trustee distributes to secured creditors the value of any property encumbered by their security interest (up to the value of their secured claim). §725 (trustee "shall dispose of any property in which an entity other than the estate has an interest, such as a lien"). After secured creditors receive the proceeds of their collateral, the trustee distributes any remaining property of the estate "first, in payment of claims of the kind specified in, and in the order specified in" §507—*i.e.*, to priority unsecured creditors. §726(a)(1). Only if all such claims are paid in full may the trustee distribute any remaining assets to general unsecured creditors. §726(a)(2).

As in Chapter 11, Congress denied bankruptcy courts any authority in Chapter 7 to order *ad hoc* departures from the Code's priority scheme. The only exceptions to the priority "waterfall" described above are expressly set out and narrow in scope. Thus, §726(a) provides that a priority claim may receive less favorable treatment if it is subject to legal or equitable subordination under §510. And §726(b) provides that, when a case has been converted from Chapter 11 to Chapter 7, priority claims for the cost of administering the Chapter 7 estate are paid before priority claims for administrative expenses incurred in the preceding Chapter 11 case. No provision of the Code permits the trustee or the bankruptcy court to deviate from Chapter 7's prescribed hierarchy of payments simply to produce a result perceived as more equitable. Thus, it is undisputed that the distribution ordered in this case also could not have occurred in Chapter 7.

3. Dismissal

If a Chapter 11 plan cannot be confirmed and the case is not converted to Chapter 7, the last option for exiting Chapter 11 is dismissal of the bankruptcy case in its entirety. §1112(b). Dismissal is fundamentally different from either confirmation of a Chapter 11 plan or conversion to Chapter 7. It is a backward-looking rather than a forward-looking exit from bankruptcy. The "day of reckoning" on which all of the estate's value is tallied up and redistributed does not occur. *Cf.* Baird, *Elements of Bankruptcy* 59 (6th ed. 2014). Thus, dismissal does not involve any distribution of the estate to creditors. Instead, estate assets revert to their prior owners.

The Code provides that dismissal of a bankruptcy case ordinarily "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case." §349(b)(3). The Code thus "contemplates that on dismissal a bankrupt is reinvested with the estate" property it possessed before bankruptcy, "subject to all encumbrances which existed prior to the bankruptcy." *In re Income Prop. Builders, Inc.*, 699 F.2d 963, 965 (9th Cir. 1982) (per curiam). In addition, any property that the estate has recovered from third parties pursuant to fraudulent transfer and preference actions is typically returned to the third party in question. §349(b)(1)(B). Creditors' claims against the debtor are not discharged, and creditors' rights to collect those claims from third parties under state fraudulent-transfer law are reinstated. Revesting under §349(b) therefore permits creditors to pursue their claims against both the debtor and third parties according to their nonbankruptcy rights.

As discussed below, a bankruptcy court has limited authority to depart from this revesting rule "for cause." "Cause" means "an acceptable reason," *In re Sadler*, 935 F.2d 918, 921 (7th Cir. 1991), such as protecting a third party who changed position irreversibly in reliance on the bankruptcy. "The basic purpose of [§349(b)] is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case." H.R. Rep. No. 95-595, at 338 (1977). The "cause" exception allows the court to "make the appropriate orders to protect rights acquired in reliance on the bankruptcy case," *id.*, while otherwise restoring the parties as much as possible to the status quo ante.

* * *

In contrast to the three alternatives discussed above, what happened here is contemplated nowhere in the Bankruptcy Code. No provision of the Code permits nonconsensual deviations from the otherwise mandatory priority scheme simply because the value of the estate is being distributed through a structured dismissal. The priority scheme is the way the Bankruptcy Code implements its primary purpose—the equitable distribution of estate property to creditors. Its careful and detailed provisions preclude any inference that debtors can cooperate with junior creditors to create an exit from Chapter 11 that excludes senior creditors from the distributions to which they are entitled.

B. No Other Provision Of The Bankruptcy Code Or Rules Grants Authority For A Priority-Skipping Structured Dismissal

Neither the bankruptcy court's power to approve a settlement under Federal Rule of Bankruptcy Procedure 9019 or §363 of the Bankruptcy Code, nor its pow-

er to dismiss a Chapter 11 case under §1112(b) and §349(b) of the Code, provides the authority to circumvent the Bankruptcy Code's priority scheme through a structured dismissal.

1. Settlement

a. The lower courts relied primarily on Federal Rule of Bankruptcy Procedure 9019 as the authority for the settlement and priority-skipping structured dismissal here. Pet. App. 11a, 60a. Rule 9019(a) provides that "[o]n motion by the trustee [or debtor-in-possession] and after notice and a hearing, the court may approve a compromise or settlement." It confers no authority to distribute estate value in violation of priority. In the first place, Rule 9019 is merely a rule of procedure, and as such cannot provide any basis to depart from the statutory priority scheme that Congress has enacted. *See* 28 U.S.C. §2075 (authorizing promulgation of procedural rules that do not "abridge, enlarge, or modify any substantive right").

Nor does Rule 9019 purport to govern the distribution of estate value. It applies to the settlement of contested claims, not the distribution of settlement proceeds. That is consistent with the Bankruptcy Code's basic division between the process of marshaling the estate's assets and maximizing their value, on the one hand, and the priority scheme for distributing that value to creditors at the end of the case, on the other. *See, e.g.*, Jackson, *The Logic and Limits of Bankruptcy Law* 7-19 (1986).

When the estate's assets include an unliquidated cause of action, the value of that cause of action can be maximized through two alternative means: litigation or settlement. If the estate litigates and prevails, it will

obtain a judgment requiring the defendant to pay the estate a judicially determined sum. But whether the estate will win, and the size of any damages award, may be uncertain. Moreover, litigating the claim could require the estate to incur significant litigation expenses, which have priority over general unsecured claims, §§330, 503(b)(2), 507(a)(2), and could take months or even years, delaying the distribution of any ultimate recovery.

Accordingly, "[i]n administering reorganization proceeding in an economical and practical manner it will often be wise to arrange the settlement of claims." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U.S. 414, 424 (1968). When a bankruptcy court is asked to approve a settlement, it should make a "full and fair assessment of the wisdom of the proposed compromise," informed by "all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated," as well as "an educated estimate of the complexity, expense, and likely duration of such litigation" and "the possible difficulties of collecting on any judgment." *Id.*

If the settlement is approved, the value of the estate's claim will be fixed at the amount of the settlement, and the proceeds will become part of the bankruptcy estate. §541(a)(1), (3), (6). The distribution of those proceeds is then governed by the Code's priority scheme. Thus, while Rule 9019 sets out the procedure for a court to approve the compromise of a claim of uncertain value, it provides no basis to "compromise" the Code's specific priority scheme in the absence of priority creditors' consent. Nor can parties to a bankruptcy, merely by agreeing to contravene that scheme as part of a "settlement," give the Court the authority to do

what Congress otherwise specifically prohibited. *Cf. In re Zale Corp.*, 62 F.3d 746, 754-757, 759-766 (5th Cir. 1995) (holding that authority to approve settlement of estate's claims did not permit court to approve settlement term barring nondebtor third party's claim against defendant over which court lacked jurisdiction; "parties c[an] not accomplish through settlement what they c[an] not attain directly").[6]

The court of appeals majority here reasoned that "it would make sense for the Bankruptcy Code … to leave bankruptcy courts more flexibility" to authorize departures from the priority scheme when approving settlements outside a plan. Pet. App. 20a. But it failed to cite any provision of the Code permitting such a departure, and there is none.

b. Neither respondents nor the courts below identified or relied on the *statutory* authority for settling an estate cause of action, which Rule 9019, as a rule of procedure, cannot provide on its own. The relevant provision is §363 of the Bankruptcy Code, which grants the

[6] In *TMT Trailer*, the Court held that a settlement approved as part of a reorganization plan must be "fair and equitable" to all creditors, a term of art incorporating "the absolute priority doctrine." 390 U.S. at 424, 441. The Fifth Circuit has interpreted that decision to require compliance with the priority scheme whenever a bankruptcy court approves a settlement that entails the distribution of estate assets to creditors, whether as part of or before the confirmation of a Chapter 11 plan. *In re AWECO, Inc.*, 725 F.2d 293, 298 (5th Cir. 1984) (citing *TMT Trailer*, 390 U.S. at 424, 441). The rule adopted in *AWECO* is sound in the context of structured dismissals for the reasons discussed above. That said, the relevant consideration is not whether the bankruptcy court is approving a settlement, but rather whether it is distributing estate assets—such as the proceeds of settling an estate cause of action—to creditors in satisfaction of their claims.

debtor-in-possession limited authority to use, sell, or lease property of the estate. A cause of action belonging to the estate is estate property. §541(a). The settlement of an estate cause of action is thus, in substance, a sale of estate property and is subject to the requirements of §363. *See, e.g.*, *In re Moore*, 608 F.3d 253, 263-265 (5th Cir. 2010); *Northview Motors, Inc.* v. *Chrysler Motors Corp.*, 186 F.3d 346, 350-351 & n.4 (3d Cir. 1999); *In re Martin*, 91 F.3d 389, 394-395 & n.2 (3d Cir. 1996). Like Rule 9019, §363 provides no authority to contravene the priority scheme.

Section 363 permits a Chapter 11 debtor-in-possession to use and sell estate property in the ordinary course of business without court approval, §§363(c)(1), 1107(a), 1108, but requires "notice and a hearing" before the debtor may "use, sell, or lease" estate property outside the ordinary course of business, §363(b)(1); *In re Roth Am., Inc.*, 975 F.2d 949, 952 (3d Cir. 1992). While Chapter 11 contemplates that disposition of significant estate assets will occur under a plan, §363(b) authorizes the debtor to dispose of such assets before a plan is confirmed where doing so will maximize the value realized from those assets. *See In re Lionel Corp.*, 722 F.2d 1063, 1069-1071 (2d Cir. 1983) (§363(b) authorizes preconfirmation sales where a "good business opportunity" may be lost unless "parties could act quickly"); *In re Chrysler LLC*, 405 B.R. 84, 96 (Bankr. S.D.N.Y. 2009) (authorizing preconfirmation sale "to preserve … the going concern value of the [debtor's] business and to maximize the value of the Debtors' estates" where debtor lacked funding to continue operations); *In re General Motors Corp.*, 407 B.R. 463, 474, 491-492 (Bankr. S.D.N.Y. 2009) (same), *aff'd on other grounds*, 428 B.R. 43 (S.D.N.Y. 2010).

While §363(b) authorizes the debtor, through sale or settlement, to reduce the assets of the bankruptcy estate to cash value, it says nothing about how the proceeds are to be distributed among creditors. The Bankruptcy Code's provisions governing priority, by contrast, establish a comprehensive, detailed scheme that specifically addresses how the estate is to be distributed among creditors. Whatever authority §363 may give a bankruptcy court to approve settlements outside a plan, it does not and cannot confer the authority to distribute the estate in contravention of that scheme. *See, e.g.*, *In re Braniff Airways, Inc.*, 700 F.2d 935, 939-940 (5th Cir. 1983) (§363(b) does not authorize a sale and settlement dictating distribution of proceeds contrary to the Code's absolute-priority rule); *In re Cajun Elec. Power Coop.*, 119 F.3d 349, 354 (5th Cir. 1997) (§363(b) "does not authorize the trustee to enter a settlement" that "'short circuit[s] the requirements of Chapter 11 for confirmation of a reorganization plan'"); *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1224, 1226-1228 (5th Cir. 1986) (§363(b) does not permit "an end run around the protection granted creditors in Chapter 11"); *Lionel*, 722 F.2d at 1069-1071 (§363(b) does not "grant[] the bankruptcy judge *carte blanche*" to "swallow[] up Chapter 11's safeguards"); *In re Westpoint Stevens, Inc.*, 333 B.R. 30, 50-54 (S.D.N.Y. 2005) (§363 did not authorize distribution of sale proceeds to junior creditors, over objection of senior secured creditors, contrary to Chapter 11's absolute priority rule), *aff'd in part & rev'd in part on other grounds*, 600 F.3d 231 (2d Cir. 2010).

2. Dismissal

Nor did the bankruptcy court's authority to dismiss a Chapter 11 case give it the power to distribute the estate in violation of the Code's priority scheme.

If a Chapter 11 debtor cannot confirm a plan, the court may convert the case to Chapter 7 or dismiss it. §1112(b). As discussed above (at 28-29), §349 provides that dismissal of a Chapter 11 case revests estate assets in the entities that owned those assets before the bankruptcy, returning the debtor and its creditors to the prebankruptcy status quo. §349(b).

A bankruptcy court may depart from §349's revesting rule only for "cause." §349(b). For instance, a bankruptcy court might choose, in order to protect creditors' interests, not to unwind a fraudulent-transfer or preference recovery by the estate. *Sadler*, 935 F.3d at 921. Or it might not reinstate a debtor's cause of action against a defendant who, in reliance on a release of that claim in the debtor's plan, gave up a lien on cash that was subsequently dispersed in the bankruptcy. *See Wiese* v. *Community Bank of Cent. Wis.*, 552 F.3d 584, 590 (7th Cir. 2009). But "'[c]ause' under §349(b) means an acceptable reason. Desire to make an end run around a statute is not an adequate reason." *Sadler*, 935 F.3d at 921.

Sadler involved family farmers who filed for Chapter 13 bankruptcy before the enactment of Chapter 12, which is specifically designed for family farms. In the Chapter 13 case, the debtors avoided a bank lien on their property through a preference action. After Chapter 12 was enacted, the debtors wanted to obtain its benefits, but the statute prohibited converting a Chapter 13 case pending on the date of enactment to a Chapter 12 case. The lower courts nonetheless permit-

ted the debtors to achieve the same result by dismissing their Chapter 13 case and filing a new Chapter 12 case. Under §349(b), dismissal of the Chapter 13 case would unwind the avoidance of the bank's lien, and the lien could not have been avoided in the new Chapter 12 case. But the district court reasoned that "the benefits of conversion to Chapter 12, coupled with the desire to avoid a windfall for the Bank, were 'cause' to specify that the dismissal did not reinstate the Bank's lien." *Sadler*, 935 F.3d at 920. The Seventh Circuit reversed, explaining that the debtors could not achieve the equivalent of conversion through a dismissal whose effects had been modified for "cause." "It is not part of the judicial office to seek out creative ways to defeat statutes. Although the [debtors] contend that equities cut in their favor, there is no equitable claim to achieve what Congress forbade." *Id.* at 921.

So too here. By authorizing limited departures from a "hard reset" of creditors' prebankruptcy rights upon dismissal (Pet. App. 14a), Congress did not grant bankruptcy courts the authority to distribute the estate's remaining assets to prepetition creditors in a way that would be flatly unlawful under any Chapter 11 plan that could be proposed.

The harm of allowing §349(b) to become a means of distributing estate assets, without complying with the Code's priority scheme, is well illustrated by this case. Had the Jevic bankruptcy case simply been dismissed, the estate's remaining assets would have revested in their prepetition owners, thereby restoring the estate's cash to Jevic and the state-law fraudulent-transfer claims to Jevic's creditors, who would have retained their state-law rights. Petitioners could have then pursued Sun and CIT under state fraudulent-transfer law for satisfaction of Jevic's unpaid debts to petitioners.

Supra p.17 & n.5. Instead, Sun and CIT were able to obtain a release of liability from the estate within the bankruptcy case, extinguishing petitioners' state-law remedies, in exchange for a distribution of estate property that deliberately skipped over petitioners. Section 349 cannot be read to permit such an evasion of the priority scheme.[7]

C. The Bankruptcy Code's Intricate Priority Scheme And Limited Options For Exiting Chapter 11 Foreclose A Priority-Skipping Structured Dismissal

Ordinary principles of statutory interpretation and this Court's precedent reinforce the common-sense conclusion that the general provisions granting authority to approve settlements and dismiss cases cannot override the specific priority scheme that applies to every Chapter 7 case and every Chapter 11 plan. Nor

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[7] The bankruptcy court also lacked authority to approve the priority-skipping structured dismissal under its alternative rationale that secured creditors may dispose of their collateral as they wish. As an initial matter, respondents abandoned this argument on appeal, *see, e.g.*, Resp. C.A. Br. 15-17, and the court of appeals did not address it, resolving the case instead on the premise that the funds at issue were unencumbered estate assets. In any event, as noted, Sun relinquished its interest in the estate's remaining cash to settle the estate's action to avoid its liens and recover other transfers (*supra* n.4), and the settlement proceeds were accordingly estate property subject to the priority scheme—not Sun's property, §541(a)(3), (6). This case therefore does not present the question whether secured creditors may "gift" property to which they would otherwise be entitled to junior creditors while skipping an intermediate class of creditors. *See* American Bankruptcy Institute Commission To Study the Reform of Chapter 11, *2012-2014 Final Report and Recommendations* 237-238 (2014) (discussing division of authority over such "gifting" cases).

can any residual equitable authority the bankruptcy court might have provide a basis for rewriting the priority scheme Congress enacted.

1. The Bankruptcy Code's specific provisions governing distribution of estate assets trump general provisions permitting settlement and dismissal

"[I]t is a commonplace of statutory construction that the specific governs the general." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *accord Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974); *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 206-209 (1932). "'[G]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012); *see, e.g.*, *Hinck* v. *United States*, 550 U.S. 501, 506-507 (2007) (holding Tax Court jurisdiction exclusive, "despite Congress's failure explicitly" to say so, under "well-established principle" that "a precisely drawn, detailed statute pre-empts more general remedies" (internal quotation marks omitted)); *United States* v. *Fausto*, 484 U.S. 439, 453-455 (1988) (holding that Congress's decision in the Civil Service Reform Act to provide judicial review of adverse personnel actions only for certain federal employees impliedly forbade other employees from seeking review under more general remedies predating CSRA).

Relatedly, as this Court has explained, "[s]tatutory construction … is a holistic endeavor," and statutory provisions should be construed in a way that "produces a substantive effect that is compatible with the rest of the law." *Timbers*, 484 U.S. at 371; *see also King* v.

Burwell, 135 S. Ct. 2480, 2489 (2015) ("[W]e must read the words [of a statute] 'in their context and with a view to their place in the overall statutory scheme.'"); *Kelly*, 479 U.S. at 43 ("In expounding [the Bankruptcy Code], we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." (internal quotation marks omitted)).

In *Timbers*, this Court applied these principles to reject a construction of the Bankruptcy Code that would read a general administrative provision to authorize a result inconsistent with a specific provision elsewhere in the Code. The question in *Timbers* was whether the Bankruptcy Code's provisions for adequate protection for secured creditors required that undersecured creditors be paid postpetition interest to account for the time value of money. 484 U.S. at 369. Although §362(d)(1)'s broad language protecting a secured creditor's "interest" in collateral "could reasonably … mean[]" that undersecured creditors must receive postpetition interest, this Court rejected that reading because it would "contradict[] the carefully drawn disposition of §506(b)," which authorizes postpetition interest only for oversecured creditors. *Id.* at 371, 373.

Likewise, in *Hartford Underwriters Insurance Co.* v. *Union Planters Bank, N.A.*, this Court construed §506(c) of the Bankruptcy Code, which provides that "[t]he trustee may recover" from a secured creditor certain costs incurred to preserve the creditor's collateral. 530 U.S. 1, 5 (2000). Petitioner, an unsecured creditor, claimed that it was entitled to such a recovery, arguing that the statute said only "that the trustee may seek recovery …, not that others may not." *Id.* at 6. This Court had "little difficulty" rejecting that position,

noting that "[s]everal contextual features" of the Code demonstrated that it is a "proper inference that the trustee is the only party empowered to invoke the provision." *Id.* Here too, respondents contend that the Bankruptcy Code does not expressly forbid priority-violating distributions outside a plan. And here too, the provisions of the Code give rise to a clear negative inference prohibiting such distributions. Chapter 11 does not specify any means of distributing the estate's value at the end of the case except a plan, and a plan must respect priority; the common-sense conclusion is that Chapter 11 does not permit what was done here.

More recently, in *RadLAX*, this Court addressed a closely analogous question. There, the debtors argued that the Code provides two options for selling a creditor's collateral under a plan—in a sale meeting specified conditions or on other terms giving the creditor the "indubitable equivalent" of its secured claim—and that the Code expressly grants the creditor the right to credit-bid only under the first option. They reasoned that creditors may thus be forbidden to credit-bid under the second option as long as the sale satisfies the "'indubitable equivalent'" standard. 132 S. Ct. at 2070; *see* §1129(b)(2)(A)(ii)-(iii). This Court rejected that reading as "hyperliteral and contrary to common sense," holding that where "a general authorization and a more limited, specific authorization exist side-by-side," the "terms of the specific authorization must be complied with." *RadLAX*, 132 S. Ct. at 2070, 2071. "That is particularly true where, as in §1129(b)(2)(A), 'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" *Id.* at 2071.

Respondents here similarly argue that Chapter 11 requires compliance with priority when the estate's

value is distributed under a plan but not when the bankruptcy court is using its power to approve settlements or dismiss a case. That argument fails here just as it did in *RadLAX*. The Bankruptcy Code establishes a comprehensive scheme that targets a specific problem—a debtor whose assets may prove insufficient to pay all creditors in full—and responds with a specific solution—a detailed regime for distributing the debtor's value among competing stakeholders. Indeed, that is bankruptcy's core function. The Bankruptcy Code largely leaves the substance of creditors' claims to nonbankruptcy law; its primary object is to apportion the debtor's limited value in satisfaction of those claims. §502(b)(1); *Butner* v. *United States*, 440 U.S. 48, 54-57 (1979); Jackson 7-19; Baird 57-75.

"Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). The Code cannot sensibly be read to give bankruptcy courts the authority to override the priority scheme Congress mandated through ancillary provisions governing the settlement of disputed claims or dismissal of failed Chapter 11 cases.

2. The bankruptcy court's "equitable" powers do not authorize departures from the priority scheme

The bankruptcy court believed that its departure from the Code's priority scheme would better serve "the paramount interest of the creditors." Pet. App.

61a.[8] Likewise, the Third Circuit defended the bankruptcy court's decision on the ground that, while "unsatisfying," it was the "least bad alternative." *Id.* 21a.

But this Court has repeatedly held that equitable considerations—a bankruptcy judge's own personal evaluation of the best or "least bad" result in a given case—cannot justify departures from the statutory priority scheme. In *Ahlers*, the Court reversed a decision of the Eighth Circuit approving a plan permitting equity owners of a farming business to retain property even though unsecured claims were not paid in full. 485 U.S. at 200-201, 207. The Court considered and rejected arguments that the equitable power of the bankruptcy court justified this "exception" to absolute priority. *Id.* at 206-207. "The Court of Appeals may well have believed that petitioners or other unsecured creditors would be better off if respondents' reorganization plan was confirmed. But that determination is for the creditors to make in the manner specified by the Code." *Id.* at 207. "[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Id.* at 206.

Similarly, in *United States* v. *Noland*, the Court rejected a bankruptcy court's effort to "equitably subordinate" claims with statutory priority to lower-priority claims. 517 U.S. 535, 536, 540 (1996). In *Noland*, the United States had claims for taxes, interest, and penal-

[8] The bankruptcy court's order (Pet. App. 45a-46a) invoked §105(a), which codifies the bankruptcy court's residual equitable authority to enter orders "necessary or appropriate to carry out the provisions" of the Bankruptcy Code. Respondents have since disclaimed any reliance on §105(a). Opp. 18 n.3.

ties entitled to priority under §503 and §507. *Id.* at 537. While acknowledging the claims' priority status, the bankruptcy court nonetheless ruled that the claim for tax penalties should be subject to equitable subordination under §510(c) of the Code based on the "relative equities" of the matter. *Id.* In its view, affirmed by the Sixth Circuit, estate assets were better used for "'compensating actual loss claims,'" rather than providing additional recovery for the IRS. *Id.* This Court soundly rejected that effort to second-guess Congress's judgment, holding that courts cannot rewrite the Code's priority scheme to produce outcomes that they believe to be fairer. *Id.* at 540-541, 543.

Most recently, in *Law*, this Court rejected an attempt to use §105(a) in a way that contravened provisions of the Code, explaining that §105(a) "confers authority to 'carry out' the provisions of the Code, but it is quite impossible to do that by taking action that the Code prohibits." 134 S. Ct. at 1194. In *Law*, the Court held that a bankruptcy court could not sanction a debtor for egregious misconduct by denying him the benefit of the homestead exemption granted by the Code. *Id.* at 1198. Because the Code already contained a "mind-numbingly detailed[] enumeration" of the circumstances in which exemptions are available, this Court concluded, the bankruptcy court could not, based on its own assessment of the equities, vary from those provisions. *Id.* at 1196. "That is simply an application of the axiom that a statute's general permission to take actions of a certain type must yield to a specific prohibition found elsewhere." *Id.* at 1194.

The same is true here. Congress has determined that the value of a bankruptcy estate should be distributed in accordance with the priorities it has specified, and the bankruptcy court lacked any equitable authori-

ty to contravene that priority scheme. Contrary to the court of appeals' characterization, there is nothing "nihilistic" about that conclusion. Pet. App. 23a. Congress considered the matter and, notwithstanding the significant flexibility Chapter 11 provides, it chose not to give bankruptcy courts the discretion to alter priority without the consent of the affected class of creditors. In choosing to specify exactly how estate assets must be distributed, rather than grant bankruptcy courts leeway to vary that distribution to "serv[e] the interests of the estate and its creditors" (*id.*), Congress chose a clear default rule, rather than a murky standard, to govern the parties' dealings in bankruptcy. That choice must be respected.

II. A Contrary Rule Would Threaten The Judgments Congress Made In §507 And Would Invite Collusion To Squeeze Out Disfavored Creditors

Allowing debtors and select creditors to avoid the priority scheme by structured dismissal not only violates the text and overall structure of Chapter 11, but is also inconsistent with the history and purpose of the priority scheme. The rule of absolute priority took hold in this Court's decisions and was later enshrined in the Code to prevent precisely the same dynamic that occurred here: collaboration between senior creditors and junior creditors or equity-holders to squeeze out disfavored intermediate creditors. Congress also made a principled judgment to prefer some unsecured claims over others in the priority scheme. The decision below wrongly licenses private parties and bankruptcy courts to disregard those policy choices.

Against those significant costs, the rule adopted below has virtually no countervailing benefits. Allowing priority-skipping settlements and structured dismissals

will not facilitate settlement, as the panel majority claimed, but will merely redistribute the proceeds of settlement away from the priority creditors whom Congress sought to protect. Nor will such an outcome be confined to the occasional "rare" case in which there are no better alternatives (a criterion not even met in this very case). The threat of a priority-skipping distribution in a structured dismissal over the objection of an impaired class of priority creditors will profoundly alter Chapter 11 plan negotiations in a manner Congress did not anticipate and the Code does not condone.

A. The Priority Scheme Plays An Essential Role In Chapter 11

1. Strict adherence to the priority scheme when distributing estate assets to creditors is critical to effectuate and protect the choices Congress made in that scheme. The decision to prefer an entire category of unsecured claims over others is quintessentially "a legislative type of decision." *Noland*, 517 U.S. at 541. Allowing bankruptcy courts to approve structured dismissals that violate the priority scheme will undermine those legislative decisions and upset the policy commitments embedded in §507.

The claims at issue here are illustrative. Congress has long given priority to claims by employees of the debtor for unpaid wages, salaries, or commissions, §507(a)(4), and unpaid contributions to an employee benefit plan, §507(a)(5). Indeed, a "preferred position" for claims for unpaid "wages … due to workmen" has been a feature of bankruptcy law since 1841. *United States* v. *Embassy Rest., Inc.*, 359 U.S. 29, 31 & n.4 (1959); *see also* Bankruptcy Act of July 1, 1898, ch. 541, §64(b)(4), 30 Stat. 544, 563 (priority for "wages due to workmen, clerks, or servants"). As Judge Hand ex-

plained, Congress extended that special treatment in part because employees, unlike other creditors, often cannot "be expected to know anything of the credit of their employer" and instead "accept a job as it comes." *In re Lawsam Elec. Co.*, 300 F. 736, 736 (S.D.N.Y. 1924). Employees also likely have no other sources of income and no means of demanding security from their employer when extending credit, so they and their families are especially harmed by an employer's failure. Kauper, *Insolvency Statutes Preferring Wages Due Employees*, 30 Mich. L. Rev. 504, 507-508 (1932). And, finally, the wage priority encourages employees not to jump ship when a business is failing—a prospect that could both hasten bankruptcy and make a successful reorganization more difficult, harming all creditors. *See supra* p.10.

Nothing in the Code suggests that Congress intended those protections to apply in Chapter 11 cases that result in a confirmed plan, but not in Chapter 11 cases that result in a structured dismissal—an outcome employees cannot predict in advance, when they must decide whether to join or stay with a financially distressed business.[9] If anything, a bankruptcy that ends in a structured dismissal is likely to leave employees

[9] The same timing concern applies to other claims as well. For example, Congress gave superpriority to certain postpetition financing, §364(d), to encourage such lending as a means of preserving and maximizing the value of the estate. That incentive to extend credit will be substantially undercut if a lender must guess, in advance, whether its priority will actually be honored. The same is true for the priority given to postpetition administrative expenses, §§503(b), 507(a)(2), which encourages counterparties to continue doing business with the debtor during its reorganization efforts.

worse off than a successful reorganization, insofar as the debtor ceases to do business entirely, thus making a small measure of protection for the employees' prepetition unpaid wages even more important.

Allowing structured dismissals to evade §507 would also be inconsistent with the priority scheme's broader place in the architecture of the Code. *See supra* pp.23-29. In fact, in defending the settlement and dismissal that occurred below, even respondents recognized "the importance of the priority system," and they urged a rule under which "'compliance with the Code priorities *will usually be dispositive* of whether a proposed settlement is fair and equitable'" to all creditors. Opp. 19 (quoting Pet. App. 20a). If it were true, as respondents contend, that compliance with the priority scheme is not required for a settlement and structured dismissal because no provision of the Code says so expressly, it is hard to see why compliance would nevertheless "usually" be required. A far more compelling reading of the Code is that compliance is always required, in order to protect the categorical judgments Congress made.

2. Allowing priority-skipping distributions like the one that occurred here would also invite the same dangers of collusion that motivated the Court to develop and apply the concept of absolute priority. The doctrine originated in equity receivership cases, largely involving railroads, to protect junior creditors from the danger that senior creditors, corporate insiders, and stockholders—sometimes the same persons—would collude during reorganizations to benefit themselves while cutting junior creditors out of the process. *See, e.g.*, *Louisville Trust Co.* v. *Louisville, New Albany & Chi. Ry.*, 174 U.S. 674, 684 (1899); *Northern Pac. Ry.* v. *Boyd*, 228 U.S. 482, 504-508 (1913); *see also* Baird 59-67. To forestall such collusion, the Court required "rigid

adherence" to the "'fixed principle'" that stockholders (having the lowest priority) could not receive any of the value of the reorganized enterprise over the objection of more senior creditors unless those creditors were paid in full. *Kansas City Terminal Ry.* v. *Central Union Trust Co. of N.Y.*, 271 U.S. 445, 454 (1926) (quoting *Boyd*, 228 U.S. at 507).

In *Case* v. *Los Angeles Lumber Products Co.*, the Court held that Congress codified the rule of absolute priority by amending the Bankruptcy Act of 1898 to require that any plan of reorganization be "fair and equitable" to creditors. 308 U.S. 106, 114-115 & n.6 (1939). The Court explained that "[t]he words 'fair and equitable' … are words of art," meaning a "rule of full or absolute priority." *Id.* at 115, 117; *accord Marine Harbor Props., Inc.* v. *Manufacturers Trust Co.*, 317 U.S. 78, 85 (1942). The modern Code, unlike the Bankruptcy Act, spells out in detail the requirement for compliance with absolute priority in meeting the "fair and equitable" standard, §1129(b)(2), but the underlying principle has remained unchanged. A "'dissenting class of [senior] creditors must be provided for in full before any junior class can receive or retain any property'" in a reorganization, absent consent to different treatment. *Ahlers*, 485 U.S. at 202.

As a result, absolute priority "has been the cornerstone of reorganization practice and theory" for over 75 years. Markell, *Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 Stan. L. Rev. 69, 123 (1991); *see* Roe & Tung, 99 Va. L. Rev. at 1236 ("Absolute priority is central to the structure of business reorganization and is, quite appropriately, bankruptcy's most important and famous rule."). It has remained so important in theory and practice because of the "danger inherent in any reorganization plan pro-

posed by a debtor, then and now, that the plan will simply turn out to be too good a deal for the debtor's owners," at the expense of disfavored creditors. *203 N. LaSalle*, 526 U.S. at 444 (citing H.R. Doc. No. 93-137, pt. I, at 255 (1973) (absolute priority rule developed to protect against "the ability of a few insiders, whether representatives of management or major creditors, to use the reorganization process to gain an unfair advantage")); *see also In re Hutch Holdings, Inc.*, 532 B.R. 866, 884 (Bankr. S.D. Ga. 2015) (Bankruptcy Code's enactment was driven in part by "'the need for greater transparency and dismantling of the 'bankruptcy ring' of perceived insiders among bankruptcy specialists and the courts'"); H.R. Rep. No. 95-595, at 92 (Congress was addressing concern that "the bankruptcy system operates more for the benefit of attorneys than for the benefit of creditors").

Precisely those same dangers are present for structured dismissals, as illustrated by this case. If senior creditors and general unsecured creditors can arrange to dismiss a Chapter 11 case and distribute the estate's remaining property in violation of the priority scheme, squeezing out disfavored intermediate priority creditors, they will have substantial incentives to do so in many cases. Here, the committee of general unsecured creditors was allowed to settle the estate's claims and to agree with the debtor and senior creditors to a distribution of estate assets that paid the committee's attorneys' fees and a portion of general unsecured creditors' claims, while skipping over petitioners' higher-priority claims. *Supra* pp.14-15. Sun and CIT received a full release of the estate's claims against them; the committee's lawyers and certain other administrative and priority claimants were paid; the committee arranged for general unsecured creditors to be paid; but

petitioners' priority claims were deliberately left unpaid, and petitioners were barred from pursuing fraudulent-transfer claims against Sun and CIT that might have given them a recovery. The Code's priority scheme is intended to prevent just this kind of outcome.

Even the court of appeals acknowledged the "justifiable concerns about collusion" raised by a priority-skipping distribution. Pet. App. 20a. The lesson of history, drawn from this Court's precedent, is that "rigid adherence" to the priority scheme is necessary to prevent such collusion. *Kansas City Terminal Ry.*, 271 U.S. at 454.

B. Compliance With The Priority Scheme Promotes Settlement

The court of appeals reasoned that bankruptcy courts need "more flexibility in approving settlements than in confirming plans" and therefore that they should be permitted to approve nonconsensual departures from the priority scheme to promote settlement. Pet. App. 20a. There is no basis for that view. To the contrary, in bankruptcy as elsewhere, clear and stable rules facilitate settlement by making the law more predictable to all parties in advance. *See, e.g.*, Landes & Posner, *Legal Precedent*, 19 J.L. & Econ. 249, 271 (1976) (noting that "the ratio of lawsuits to settlements is mainly a function of the amount of uncertainty, which leads to divergent estimates by the parties of the probable outcome"); *cf. Blue Cross & Blue Shield Ass'n* v. *American Express Co.*, 467 F.3d 634, 640 (7th Cir. 2006) ("In the long run, everyone gains from predictability (and from rules that reduce the expense of litigating about such transactions)."). Having such clear rules is particularly valuable in the "unruly" context of bankruptcy law. *RadLAX*, 132 S. Ct. at 2073. Uncertainty

as to whether priority will be respected would affect the terms and pricing of loans to many companies outside of bankruptcy; and once in bankruptcy, the additional litigation promoted by such uncertainty "takes money directly out of the pockets of creditors." *General Motors*, 407 B.R. at 504.

The court of appeals' concern for additional flexibility was thus misplaced. All settlements are negotiated against the backdrop of legal rules. There is no reason to believe that respecting those rules in bankruptcy will prevent parties from reaching consensual settlements. Disregarding absolute priority in some unspecified set of "rare" cases (Pet. App. 2a) will simply result in settlements that are more favorable to the settling parties at the expense of disfavored priority creditors.

This case is again illustrative. To the panel majority and the bankruptcy court, the settlement approved here was defensible because there was no "viable alternative," meaning no other possible settlement and no prospect of a confirmable plan. Pet. App. 22a. However, as Judge Scirica correctly perceived in dissent, the putative impossibility of alternative arrangements was "at least in part, a product of [respondents'] own making." *Id.* 25a. Sun, one of the defendants in the estate's fraudulent conveyance action, claimed it would not agree to any settlement of that action that provided funds to petitioners, who were separately suing Sun for violating the WARN Act (*id.* 6a n.4); but it is highly implausible that Sun would have paid *nothing* to achieve the benefits it obtained through the settlement if the bankruptcy court had required that priority be respected. Permitting courts to approve departures from priority allows settling parties to avoid complying with the priority scheme merely by making such self-serving statements. And even if such a settlement had

truly been impossible, the answer would not have been to disregard the Code's requirements. Rather, the Code already provides ready alternatives if a Chapter 11 plan cannot be confirmed: conversion to Chapter 7 for liquidation or dismissal of the case, with a return to the prepetition status quo. §1112(a)-(b); *supra* pp.26-29.

C. Allowing Priority-Skipping Structured Dismissals In "Rare" Cases Is Untenable

The court of appeals asserted that its decision should be read to permit a priority-skipping settlement and structured dismissal only in a "rare case" (Pet. App. 2a), but that putative limitation is untenable.

First, allowing priority-skipping structured dismissals in *any* Chapter 11 cases will profoundly undermine the bargaining position of priority creditors in *all* cases. The absolute priority rule and the associated hierarchy of priorities provide the backbone for Chapter 11 plan negotiations. *See* Blum & Kaplan, *The Absolute Priority Doctrine in Corporate Reorganizations*, 41 U. Chi. L. Rev. 651, 653 (1974) (absolute priority is "a way of structuring negotiations so that they are sufficiently disciplined to be held within permissible areas"). The certainty that a plan cannot be confirmed over the objection of an impaired class of creditors if any lower-priority claims are paid provides "the heart of the leverage" these creditors are given by the Code in negotiations. Warren, *A Theory of Absolute Priority*, 1991 Ann. Surv. Am. L. 9, 30. "All negotiations" take place around that leverage, and, "[t]o the extent that each party has the power under the Bankruptcy Code to force the other to yield, that power is reflected in the terms of any consensual plan." *Id.*

That framework explains why creditors in Chapter 11 are free to consent to less favorable treatment than the absolute priority rule might otherwise require. Congress envisioned Chapter 11 as a process in which interested parties, not courts, decide for themselves "how the value of the reorganizing company will be distributed," through consensual negotiations after full disclosure. H.R. Rep. No. 95-595, at 224. Particular creditors may well decide that a mutually beneficial plan that does not comply in all respects with absolute priority is preferable to other options. But the Code leaves that decision to the creditors.

Allowing priority-skipping structured dismissals will profoundly affect those negotiations, even if such departures from the priority scheme in fact remain rare. The background threat of such a distribution will hang over the parties' bargaining and will erode the leverage that Congress intended to provide in affording some unsecured claims priority over others. Priority creditors such as petitioners will never know whether their priority status is really absolute.

Second, as many commentators have already recognized, allowing priority-skipping structured dismissals in "rare" cases is an invitation to interested parties to try to *create* "rare" cases: "[O]nce the floodgates are opened, debtors and favored creditors can be expected to make every case that 'rare case.'" Rudzik, *A Priority Is A Priority Is A Priority—Except When It Isn't*, 34 Am. Bankr. Inst. J. 16, 17 (Sept. 2015).[10] And the

[10] *See also* Lipson & Walsh, ABA Business Bankruptcy Committee Newsletter, *In re Jevic Holding Corp.* 3 (May 21, 2015), http://apps.americanbar.org/buslaw/committees/CL160000pub/newsletter/201507/fa_3.pdf ("While [the Third Circuit's deci-

more willing judges appear to be to approve a priority-skipping structured dismissal as the best option among bad options, the "more likely that parties will find ways to orchestrate an environment in which it is the best option." Baird, *Bankruptcy's Quiet Revolution*, U. Chi. Coase-Sandor Inst. L. & Econ. Working Paper No. 755, at 13 (Apr. 2016). "The rationale for refusing to enforce such [settlement] agreements is the same as the rationale for outlawing the payment of ransom or putting in place a policy of never negotiating with terrorists." *Id.*

That is not mere speculation. Bankruptcy law is replete with examples of remedies initially approved only as "exceptional," but that ultimately become commonplace. The Third Circuit's own case law holds, for instance, that a nonconsensual release of the claims of a third party against a nondebtor entity is permitted only in "extraordinary cases," *In re Continental Airlines*, 203 F.3d 203, 212 (3d Cir. 2000), but such releases are now routinely included in large Chapter 11 plans of reorganization, *see* Silverstein, *Hiding in Plain View*, 23

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sion] purports to be narrow, it would seem to invite further litigation to test its boundaries."); Goffman et al., *Third Circuit Provides Road Map for Structured Dismissals* (May 28, 2015), https://www.skadden.com/sites/default/files/publications/Third_Circuit_Provides_Road_Map_for_Structured_Dismissals.pdf (similar); Swett, *Supreme Court to Review Priority-Skipping Settlement and Structured Dismissal of Chapter 11 Case* (Aug. 5, 2016), http://www.capdale.com/files/18529_Supreme_Court_to_review_priority-skipping_settlement_and_structured_dismissal_of_Chapter_11_case.pdf (*Jevic* "invites parties to devote their energies [to] 'gaming' bankruptcy cases without fully submitting either to Chapter 11 or Chapter 7, rather than negotiating or litigating within the prescribed framework").

Emory Bankr. Dev. J. 13, 18 (2006) (describing third-party releases as "increasingly common").

Third, bankruptcy judges will not be well positioned to judge whether a structured dismissal like this one is truly the option of last resort—whether there are, in the court of appeals' formulation, "'specific and credible grounds'" (Pet. App. 21a) to distinguish a given case from the mine run of failed Chapter 11 cases. "A mass of experience" in bankruptcy practice "reveals that courts have generally been prone to accept compromises in order to expedite termination of lengthy proceedings over complicated corporate financial matters," Blum & Kaplan, 41 U. Chi. L. Rev. at 664, and understandably so. The parties seeking approval of a structured dismissal have substantial control over how the circumstances are framed for the court, and many of the disfavored priority creditors who are likely to be squeezed out—employees, farmers, consumers, §507(a)(4)-(7)—are also likely to lack the means to contest that framing effectively. Nor should they be forced to do so, under the correct interpretation of the Code.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

11 U.S.C. § 103. Applicability of chapters

(a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title, and this chapter, sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15.

(b) Subchapters I and II of chapter 7 of this title apply only in a case under such chapter.

(c) Subchapter III of chapter 7 of this title applies only in a case under such chapter concerning a stockbroker.

(d) Subchapter IV of chapter 7 of this title applies only in a case under such chapter concerning a commodity broker.

(e) Scope of Application.—Subchapter V of chapter 7 of this title shall apply only in a case under such chapter concerning the liquidation of an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991.

(f) Except as provided in section 901 of this title, only chapters 1 and 9 of this title apply in a case under such chapter 9.

(g) Except as provided in section 901 of this title, subchapters I, II, and III of chapter 11 of this title apply only in a case under such chapter.

(h) Subchapter IV of chapter 11 of this title applies only in a case under such chapter concerning a railroad.

(i) Chapter 13 of this title applies only in a case under such chapter.

(j) Chapter 12 of this title applies only in a case under such chapter.

(k) Chapter 15 applies only in a case under such chapter, except that—

(1) sections 1505, 1513, and 1514 apply in all cases under this title; and

(2) section 1509 applies whether or not a case under this title is pending.

11 U.S.C. § 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest—

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title—

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

11 U.S.C. § 349. Effect of dismissal

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

(1) reinstates—

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

11 U.S.C. § 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b) (1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

> (A) such sale or such lease is consistent with such policy; or
>
> (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—
>
> > (i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended—

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c) (1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section—

(1) in the case of a debtor that is a corporation or trust that is not a moneyed business, commercial corporation, or trust, only in accordance with nonbankruptcy law applicable to the transfer of property by a debtor that is such a corporation or trust; and

(2) only to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any com-

pensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(*l*) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) 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.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value

of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(*o*) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

(p) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

11 U.S.C. § 507. Priorities

(a) The following expenses and claims have priority in the following order:

(1) First:

(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

(C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee allowed

under paragraphs (1)(A), (2), and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

(2) Second, administrative expenses allowed under section 503(b) of this title, unsecured claims of any Federal reserve bank related to loans made through programs or facilities authorized under section 13(3) of the Federal Reserve Act (12 U.S.C. 343), and any fees and charges assessed against the estate under chapter 123 of title 28.

(3) Third, unsecured claims allowed under section 502(f) of this title.

(4) Fourth, allowed unsecured claims, but only to the extent of $10,000 for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for—

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor.

(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan—

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of—

(i) the number of employees covered by each such plan multiplied by $10,000; less

(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(6) Sixth, allowed unsecured claims of persons—

(A) engaged in the production or raising of grain, as defined in section 557(b) of this title, against a debtor who owns or operates a grain storage facility, as defined in section 557(b) of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who is engaged in operating a fish produce storage or processing facility—

but only to the extent of $4,000 for each such individual.

(7) Seventh, allowed unsecured claims of individuals, to the extent of $1,800 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the

purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition—

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of—

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax incurred before the commencement of the case and last payable

without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on—

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise—

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days; plus any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

(9) Ninth, allowed unsecured claims based upon any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution.

(10) Tenth, allowed claims for death or personal injury resulting from the operation of a motor vehicle or vessel if such operation was unlawful because

the debtor was intoxicated from using alcohol, a drug, or another substance.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(2) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(1), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

11 U.S.C. § 726. Distribution of property of the estate

(a) Except as provided in section 510 of this title, property of the estate shall be distributed—

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title, proof of which is timely filed under section 501 of this title or tardily filed on or before the earlier of—

(A) the date that is 10 days after the mailing to creditors of the summary of the trustee's final report; or

(B) the date on which the trustee commences final distribution under this section;

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is—

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title; or

(C) tardily filed under section 501(a) of this title, if—

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damag-

es are not compensation for actual pecuniary loss suffered by the holder of such claim;

(5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and

(6) sixth, to the debtor.

(b) Payment on claims of a kind specified in paragraph (1), (2), (3), (4), (5), (6), (7), (8), (9), or (10) of section 507(a) of this title, or in paragraph (2), (3), (4), or (5) of subsection (a) of this section, shall be made pro rata among claims of the kind specified in each such particular paragraph, except that in a case that has been converted to this chapter under section 1112, 1208, or 1307 of this title, a claim allowed under section 503(b) of this title incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title or under this chapter before such conversion and over any expenses of a custodian superseded under section 543 of this title.

(c) Notwithstanding subsections (a) and (b) of this section, if there is property of the kind specified in section 541(a)(2) of this title, or proceeds of such property, in the estate, such property or proceeds shall be segregated from other property of the estate, and such property or proceeds and other property of the estate shall be distributed as follows:

(1) Claims allowed under section 503 of this title shall be paid either from property of the kind specified in section 541(a)(2) of this title, or from other property of the estate, as the interest of justice requires.

(2) Allowed claims, other than claims allowed under section 503 of this title, shall be paid in the order specified in subsection (a) of this section, and, with respect to claims of a kind specified in a particular paragraph of section 507 of this title or subsection (a) of this section, in the following order and manner:

(A) First, community claims against the debtor or the debtor's spouse shall be paid from property of the kind specified in section 541(a)(2) of this title, except to the extent that such property is solely liable for debts of the debtor.

(B) Second, to the extent that community claims against the debtor are not paid under subparagraph (A) of this paragraph, such community claims shall be paid from property of the kind specified in section 541(a)(2) of this title that is solely liable for debts of the debtor.

(C) Third, to the extent that all claims against the debtor including community claims against the debtor are not paid under subparagraph (A) or (B) of this paragraph such claims shall be paid from property of the estate other than property of the kind specified in section 541(a)(2) of this title.

(D) Fourth, to the extent that community claims against the debtor or the debtor's spouse are not paid under subparagraph (A), (B), or (C) of this paragraph, such claims shall be paid from all remaining property of the estate.

11 U.S.C. § 1112. Conversion or dismissal

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title unless—

(1) the debtor is not a debtor in possession;

(2) the case originally was commenced as an involuntary case under this chapter; or

(3) the case was converted to a case under this chapter other than on the debtor's request.

(b) (1) Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

(2) The court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or any other party in interest establishes that—

(A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and

(B) the grounds for converting or dismissing the case include an act or omission of the debtor other than under paragraph (4)(A)—

(i) for which there exists a reasonable justification for the act or omission; and

(ii) that will be cured within a reasonable period of time fixed by the court.

(3) The court shall commence the hearing on a motion under this subsection not later than 30 days after filing of the motion, and shall decide the motion not later than 15 days after commencement of such hearing, unless the movant expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits established by this paragraph.

(4) For purposes of this subsection, the term "cause" includes—

(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;

(B) gross mismanagement of the estate;

(C) failure to maintain appropriate insurance that poses a risk to the estate or to the public;

(D) unauthorized use of cash collateral substantially harmful to 1 or more creditors;

(E) failure to comply with an order of the court;

(F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;

(G) failure to attend the meeting of creditors convened under section 341(a) or an exam-

ination ordered under rule 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor;

(H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any);

(I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;

(J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;

(K) failure to pay any fees or charges required under chapter 123 of title 28;

(L) revocation of an order of confirmation under section 1144;

(M) inability to effectuate substantial consummation of a confirmed plan;

(N) material default by the debtor with respect to a confirmed plan;

(O) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; and

(P) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

(c) The court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor is a farmer or a corporation that is not a mon-

eyed, business, or commercial corporation, unless the debtor requests such conversion.

(d) The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if—

(1) the debtor requests such conversion;

(2) the debtor has not been discharged under section 1141(d) of this title; and

(3) if the debtor requests conversion to chapter 12 of this title, such conversion is equitable.

(e) Except as provided in subsections (c) and (f), the court, on request of the United States trustee, may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate if the debtor in a voluntary case fails to file, within fifteen days after the filing of the petition commencing such case or such additional time as the court may allow, the information required by paragraph (1) of section 521(a), including a list containing the names and addresses of the holders of the twenty largest unsecured claims (or of all unsecured claims if there are fewer than twenty unsecured claims), and the approximate dollar amounts of each of such claims.

(f) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

11 U.S.C. § 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5) (A) (i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate

change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive—

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash—

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domes-

tic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan—

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16) All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

(b) (1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with re-

spect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests—

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of

subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

(e) In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).

Fed. R. Bankr. P. 9019. Compromise and Arbitration

(a) Compromise. On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

(b) Authority to Compromise or Settle Controversies within Classes. After a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the trustee to compromise or settle controversies within such class or classes without further hearing or notice.

34a

(c) Arbitration. On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.

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

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

[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.

creditors of Old GM and the public at large. Certain creditors of Old GM, who would not be 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.

[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]

FACTS

In late 2008, "[a]t the time that the U.S. Treasury first extended credit to [Old] GM, there was absolutely no other source of financing available. No party other than Treasury conveyed its willingness to loan funds to [Old] GM and thereby enable it to continue operating." New GM Agreed-Upon Stipulations of Facts ("**New GM SOF**") (**Appendix, Exh. "K"**), ¶ 4. In March 2009, the U.S. Government gave Old GM sixty days to submit a viable restructuring plan or Old GM would be forced to liquidate. *Id.* ¶ 1. It thereafter became evident that Old GM would not be able to achieve an out-of-court restructuring. *Id.* ¶ 3. The only viable option was to sell Old GM's assets through the 363 Sale to a newly-formed company sponsored by the Governments, which ultimately became New GM. *Id.* ¶ 2.

On June 1, 2009 ("**Petition Date**"), Old GM and three of its direct and indirect subsidiaries (collectively, the "**Debtors**") commenced cases under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the Southern District of New York ("**Bankruptcy Court**" or "**Court**"). *Id.* ¶ 2. On that same day, Old GM filed a motion ("**Sale Motion**") (**Appendix, Exh. "L"**) seeking approval of the original version of the Sale Agreement, pursuant to which substantially all of Old GM's assets were to be sold to New GM. *See In re Gen. Motors Corp.*,

[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.

407 B.R. 463, 473 (Bankr. S.D.N.Y. 2009). Old GM (***not*** New GM) was the proponent of the Sale Motion and had the burden of seeking its approval and complying with all due process requirements. *See generally* Sale Motion.

A. The Sale Notice

In the Sale Motion, Old GM requested, and the Court authorized, the service of direct mail notice of the Sale Motion and the relief requested therein on the categories of individuals and entities listed on Exhibit "4" annexed to New GM's Agreed-Upon Stipulations of Fact. New GM SOF, ¶ 19. Old GM's noticing agent, the Garden City Group ("**GCG**"), provided direct mail notice of the 363 Sale in accordance with the Court's directive to over 4 million persons and entities at a cost of approximately $3 million. *See* Declaration of Scott Davidson ("**Davidson Declaration**") (**Appendix, Exh. "1**"), ¶ 5. New GM did not decide which parties would receive direct mail notice of the Sale Motion or how notice would be provided. New GM SOF, ¶ 17. That decision was made by Old GM, which sought and obtained approval of the notice procedures from the Court. Old GM represented to New GM under the Sale Agreement that it would follow the sale procedures approved by the Court (s*ee* Sale Motion, ¶¶ 49-57), and it did.

Old GM also stated in the Sale Motion (¶¶ 46 and 55) that it was not practicable to provide direct mail notice to contingent creditors, and that publication notice should be sufficient under the circumstances. At that time, approximately 70 million Old GM vehicles were in use in the United States. *See* Declaration of Michael Yakima ("**Yakima Declaration**") (**Appendix, Exh. "2**"), ¶ 5.

Old GM considered vehicle owners who were not involved in actual litigation with Old GM at the time of the 363 Sale to be unknown, contingent creditors. That was consistent with Old GM's books and records, which did not reflect the names of Old GM vehicle owners as being creditors of Old GM (unless there was a fixed monetary obligation owed to them). *See*

Declaration of Herb Kiefer ("**Kiefer Declaration**") (**Appendix, Exh. "3**"), ¶ 3. Old GM was not required to provide direct mail notice to unknown creditors, which included holders of contingent warranty claims. *See* Sale Procedures Order (**Appendix, Exh. "M"**), ¶ E; Sale Order and Injunction, ¶ E. This Court previously ruled in the *Robley* matter (discussed *infra*) that Old GM did not have to mail notices of the 363 Sale to Old GM vehicle owners who had not yet sued Old GM, and that publication notice of the 363 Sale in the form approved by the Court was sufficient for due process purposes. Hr'g Tr. (**Appendix, Exh. "N"**) 59:19-61:13, June 1, 2010.

On or before June 11, 2009, pursuant to the Court's directive, Old GM published extensive notice of the Sale Motion in (a) the global edition of *The Wall Street Journal*, (b) the national edition of *The New York Times*, (c) the global edition of *The Financial Times*, (d) the national edition of *USA Today*, (e) *The Detroit Free Press/Detroit News*, (f) *Le Journal de Montreal*, (g) *The Montreal Gazette*, (h) *The Globe and Mail*, and (i) *The National Post*, and (j) on the website of GCG (the "**Publication Notice**"). New GM SOF, ¶¶ 22-23.

In the Sale Procedures Order, the Bankruptcy Court approved the form and content of the direct mail notice and the Publication Notice. Sale Procedures Order, ¶ 9. The 363 Sale notices did not discuss or identify the liabilities or the potential liabilities of Old GM. The Sale Procedures Order (¶ 12) provided that the failure to timely object to the Sale Motion would bar "the assertion, at the Sale Hearing or *thereafter*, of any objection to the Motion, to the consummation and *performance of the 363 Transaction* contemplated by the MPA . . . ." (emphasis added). The Sale Procedures Order was never appealed. New GM SOF, ¶ 24.

In addition to direct mail and Publication Notice, there was a tremendous amount of media coverage of the Old GM bankruptcy and the contemplated sale to New GM.[8] The U.S. Government's financing and the purchase of Old GM's business was a controversial subject that

[8] *See* Declaration of Andrew Bloomer ("**Bloomer Declaration**"), contained in the Appendix as **Exhibit "4"**.

was widely discussed in the media. Indeed, there was never an issue as to whether the public would become aware of Old GM's bankruptcy filing and the 363 Sale—that was a given. In fact, because of this wide public awareness, there was concern that consumer confidence would be eroded if Old GM lingered in bankruptcy (*see Gen. Motors Corp.*, 407 B.R. at 492); widespread notice of the 363 Sale was therefore provided so the public would know of the contemplated prompt "bankruptcy exit" for Old GM's business. Any notion that the public at large (especially an Old GM vehicle owner or his/her attorney) was caught unaware of Old GM's bankruptcy filing and the sale of its business to the Governments-sponsored entity is not credible. The District Court aptly summarized this point: "[n]o sentient American is unaware of the travails of the automobile industry in general and of General Motors Corporation . . . in particular." *In re Gen. Motors Corp.*, No. M 47(LAK), 2009 WL 2033079, at *1 (S.D.N.Y. July 9, 2009).

B. <u>The Sale Agreement</u>

Old GM sold its core assets in the 363 Sale. The claims related thereto are expressly allocated in the Sale Agreement. Under the Sale Agreement, claims arising from or based on Old GM vehicles, parts, or conduct fall within one of two categories: either they are an Assumed Liability that went to New GM, or a Retained Liability that stayed with Old GM. It is a binary choice; there is no third option for claims relating to Old GM vehicles, parts, or conduct, including for Old GM vehicles that were resold in a used vehicle transaction after the 363 Sale. New GM's liability for an Old GM vehicle or part was limited to only the three categories of contractually-defined Assumed Liabilities: (a) post-sale accidents or incidents involving 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 claims. Every claim based on an Old

GM vehicle, part or conduct that was not specifically listed as an Assumed Liability is, by definition, a Retained Liability of Old GM. *See* Sale Agreement, § 2.3(b).

These classifications on their face do not depend on whether an Old GM vehicle sold before the 363 Sale was later re-sold after the 363 Sale by someone other than New GM (*i.e.*, a dealer or a third party). Stated otherwise, the resale of an Old GM vehicle did not, and could not, transform a Retained Liability into an Assumed Liability.

By way of illustration, according to the Post-Sale Consolidated Complaint, Named Plaintiff Barry Wilborn, after the 363 Sale, bought a 2007 used Chevrolet Cobalt in a private sale for $4,000, with no warranty. Post-Sale Consolidated Complaint, ¶ 43. Whatever economic loss claim is associated with that Old GM vehicle is a Retained Liability, no matter when, or how many times, that vehicle was sold by a dealer or a third party. By way of further example, the same result would apply to Named Plaintiff Rafael Lewis who, after the 363 Sale, purportedly bought a 2006 Chevrolet Cobalt at auction for $2,800, with no warranty. *Id.* ¶ 56; *see also id.* ¶ 29 (Named Plaintiff Barbara Hill who bought a 2007 Chevy Cobalt, after the 363 Sale, from Auto Nation (a Nissan dealer)); *id.* ¶ 51 (Named Plaintiff Lisa West who bought a 2008 Chevy Cobalt, after the 363 Sale, from All Star Hyundai).

Moreover, the fact that some Old GM employees, who were investigating alleged product defects while at Old GM, became Transferred Employees (as defined in the Sale Agreement) after the closing of the 363 Sale did not expand the scope of liabilities assumed by New GM with respect to Old GM vehicles or parts. The Sale Agreement expressly contemplated that Old GM employees would be hired by New GM. *See* Sale Agreement, § 6.17(a). Thus, the explicit allocation of liabilities for Old GM vehicles, parts, and conduct as set forth in the Sale

Agreement was not affected by the hiring of employees (as contemplated by the same Agreement).

Further, the Sale Order and Injunction is equally clear that, except for Assumed Liabilities (not applicable here), New GM is ***not liable*** for any claims arising in any way in connection with any ***acts, or failures to act*** of Old GM, whether ***known or unknown***, contingent or otherwise, whether arising before ***or after*** Old GM's bankruptcy, including claims arising under doctrines of successor or transferee liabilities. Sale Order and Injunction, ¶ AA. Thus, it is not Old GM's conduct (*i.e.*, the purported knowledge of Old GM's employees) that determines whether New GM assumed liabilities relating to Old GM vehicles. It is the express terms of the Sale Agreement and the Sale Order and Injunction that sets forth the Assumed Liabilities of New GM. Plaintiffs' attempt to shift the argument to the purported knowledge of Old GM employees when they were hired by New GM is simply another way of making a "successor liability" claim, which is proscribed by the Sale Order and Injunction.

In addition, Plaintiffs' attempt to make New GM's covenant to comply with the recall requirement of the National Traffic and Motor Vehicle Safety Act the equivalent of an Assumed Liability is contrary to the express terms of the Sale Agreement and the Sale Order and Injunction. Assumed Liabilities are set forth in Section 2.3(a) of the Sale Agreement. The recall covenant is in Section 6.15 of the Sale Agreement. The Sale Order and Injunction (¶ 7) is clear that New GM acquired the Purchased Assets free and clear of all claims. The only exception is the contractually defined "Assumed Liabilities"—that term does not include alleged breaches of the recall covenant. And, the alleged failure to comply with the recall covenant is not a back door opportunity to transform that Retained Liability into an Assumed Liability. New GM's separate covenant to comply with certain federal statutes does not modify the explicit Assumed

Liability construct in the Sale Agreement. Especially since, as shown *infra*, such federal statutes do not provide for a private right of action.

C. Vehicle Owners' Objections To The 363 Sale And Their Disposition By The Court

The Sale Motion engendered a number of objections by entities speaking on behalf of vehicle owners. Consumer organizations representing vehicle owners, plaintiffs' lawyers representing vehicle owners, States' Attorneys General representing their public constituencies including vehicle owners, and the Creditors' Committee representing all unsecured creditors, including vehicle owners, each objected to the 363 Sale.[9]

The Center for Auto Safety[10] (and other consumer advocacy groups) filed an objection to the Sale Motion arguing that the Court should make clear that the sale process "does not release the claims of consumers who will be injured ***or suffer losses*** as a result of defects in GM Vehicles." Consumer Advocacy Memo of Law, at 24 (emphasis added).

The States' Attorneys General filed an objection to the Sale Motion arguing that New GM should assume consumer claims, including implied warranty claims, additional express warranties, and statutory warranties. *See* First AG Objection, Second AG Objection. They noted their concern that the Retained Liability provision taken as a whole "divests consumers of legal

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[9] *See* Limited Objection and Memorandum of Law of Personal Injury Claimants, Center for Auto Safety, *et al*. [Dkt. Nos. 2176 ("**Consumer Advocacy Limited Objection**") (**Appendix, Exh. "O"**) & 2177 ("**Consumer Advocacy Memo of Law**") (**Appendix, Exh. "P"**)]; Objection of Ad Hoc Committee of Consumer Victims [Dkt. No. 1997] ("**Consumer Victims Objection**") (**Appendix, Exh. "Q"**); States Attorneys General Objections [Dkt. Nos. 1926 ("**First AG Objection**") (**Appendix, Exh. "R"**) & 2043 ("**Second AG Objection**") (**Appendix, Exh. "S"**)]; and Limited Objection of Official Committee of Unsecured Creditors [Dkt. No. 2362 ("**Creditors Comm. Objection**") (**Appendix, Exh. "T"**)].

[10] The Center for Auto Safety is a non-profit consumer advocacy organization for vehicle owners. The other consumer advocacy groups were (i) Consumer Action, (ii) Consumers for Auto Reliability and Safety, which is dedicated to preventing, among other things, economic losses by vehicle owners (*see* Consumer Advocacy Limited Objection, ¶ 5), (iii) National Association of Consumer Advocates, which represents consumers "in the ongoing struggle to curb unfair or abusive business practices . . ." (*id.*), and (iv) Public Citizens, which "has a long history of advocacy on matters related to auto safety" (*id.*) (collectively, the "**Consumer Advocacy Groups**"). The Consumer Advocacy Groups worked to protect consumers who would be affected by Old GM's bankruptcy case. *See* New GM SOF, ¶¶ 36-37.

rights, without regard to state laws, that may, when a claim is eventually made, be read to hold otherwise." First AG Objection, at 4.

The Ad Hoc Committee of Consumer Victims[11] filed an objection to the 363 Sale arguing that if the pre-petition bond exchange offer had been successful, all consumer claims would have been assumed, and that the 363 Sale should achieve the same result. *See* Consumer Victims Objection, ¶ 34. They also argued that since New GM's viability did not rest on rejecting consumer claims, New GM should assume such claims. *Id.* ¶ 35. In addition, they contended that assuming the glove box warranty, but not prepetition accident claims, made little sense. *Id.* ¶ 37. Each of these objectors, along with the Creditors Committee, raised the issue that New GM should be liable for successor liability claims.

The three-day Sale Hearing took place from June 30 through July 2, 2009. New GM SOF, ¶ 48. Counsel for the Consumer Advocacy Groups, the Ad Hoc Committee of Consumer Victims, the States' Attorneys General, and the Creditors Committee all appeared at the Sale Hearing. *Id.* ¶ 39. The Personal Injury Claimants[12] and the Consumer Advocacy Groups argued, *inter alia*, that New GM should assume broader warranty-related claims, and that New GM should not be shielded from successor liability claims. *Id.* ¶ 44. U.S. Treasury Representatives declined to make further changes to the Sale Agreement with respect to Assumed Liabilities and Retained Liabilities. *Id.* ¶ 47. Auto Task Force member and U.S. Treasury official Harry Wilson testified that "[o]ur thinking [as] a commercial buyer of the assets that will constitute [New GM] was to assess what [l]iabilities were commercially necessary for the success of [New GM]." *Id.* ¶ 6.

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[11] The Ad Hoc Committee of Consumer Victims asserted that they represented more than 300 members who each had product liability claims involving personal injuries against Old GM. *See* New GM SOF, ¶ 38.

[12] The Personal Injury Claimants are defined in New GM SOF, ¶ 32 n.8.

Old GM's counsel argued at the Sale Hearing that it was unnecessary to decide how to deal with vehicle owner claims against Old GM as part of the 363 Sale. Old GM would have sale proceeds and could deal with that issue as part of its liquidating plan. Hr'g Tr. (**Appendix, Exh. "U"**) 262:14-25, July 1, 2009. Counsel for Wilmington Trust[13] echoed that sentiment at the Sale Hearing, stating that the 363 Sale created a pie, and that the creditors could fight about how that pie should be allocated after the 363 Sale closed. Hr'g Tr. (**Appendix, Exh. "V"**) 109:15-24, July 2, 2009. In the Sale Decision, the Court endorsed this theme: "GM's assets simply are being sold, with the consideration to be hereafter distributed to stakeholders, consistent with their statutory priorities under a subsequent plan." *Gen. Motors*, 407 B.R. at 474. The Court also stated that the Sale Agreement did not seek to restructure the rights of creditors; it merely brought in value that creditors would share in a plan. *Id.* at 495-96.

Counsel for Old GM also emphasized at the Sale Hearing that Old GM and New GM were separate, distinct entities. It was clear that Old GM and New GM had different ownership, and engaged in "intense arms' length negotiations" that culminated in the 363 Sale. *Id.* at 494. This separation was further illustrated by the fact that Old GM made requests for provisions in the Sale Agreement that were rejected by the U.S. Treasury. Hr'g Tr. 151:20-152:3, July 2, 2009. In fact, the vehicle owner objectors tried to show at the Sale Hearing that Old GM recommended that New GM assume certain vehicle owner claims as being commercially necessary, but New GM had a differing view, which prevailed. Hr'g Tr. (**Appendix, Exh. "W"**) 174:12-22, June 30, 2009. The Sale Order and Injunction expressly held that neither New GM nor U.S. Treasury was an "insider" of any of the Debtors. *See* Sale Order and Injunction, ¶ S.

[13] Wilmington Trust was at that time, the indenture trustee for Old GM bonds with a face value of approximately $24 billion and the chairman of the Creditors Committee. It is now the GUC Trust Administrator.

D. Sale Decision and Sale Order and Injunction

On July 5, 2009, the Court issued the Sale Decision and Sale Order and Injunction, approving the Sale Agreement. The Court overruled all of the remaining objections. It held that the 363 Sale was the only viable alternative. *See Gen. Motors*, 407 B.R. at 485. It found that if Old GM had liquidated its assets, unsecured creditors would have received nothing from the Old GM bankruptcy estate. New GM SOF, ¶ 50. As of March 31, 2009, Old GM had consolidated reported global assets and liabilities of approximately $82,290,000,000 and $172,810,000,000, respectively. *Id.* ¶ 51. The Court found that, as of the Petition Date, if Old GM had liquidated its assets, its liquidation asset value would have been less than 10% of $82 billion. *Id.* ¶ 52. The Court further found that the consideration transferred by New GM to Old GM under the Sale Agreement was estimated to be worth not less than $45 billion, plus the value of equity interests in New GM. *Id.* ¶ 53.[14]

In the Sale Decision, the Court held that Old GM had the legal basis under section 363(f) of the Bankruptcy Code to sell its assets "free and clear" of successor liability claims. *Gen. Motors*, 407 B.R. at 505-06. Importantly, the Court also found that the purchaser would ***not*** have consummated the Sale Agreement without this protection. *See* Sale Order and Injunction, ¶ DD. The Sale Decision also provided that New GM had the ability, in its sole discretion, to "pick and choose" which Old GM liabilities it would assume. The Court found "it was the intent and structure of the 363 Sale, as agreed on by the [U.S. Treasury] and Old GM, that the New GM would start business with as few legacy liabilities as possible, and that presumptively, liabilities would be left behind and not assumed." New GM SOF, ¶ 5. The Court recognized that New

[14] The Sale Decision specifically noted that: "Only the U.S. and Canadian Governmental authorities were prepared to invest in GM—and then not so much by reason of the economic merit of the purchase, but rather to address the underlying societal interests in preserving jobs and the North American auto industry, the thousands of suppliers to that industry, and the health of the communities, in the U.S. and Canada, in which GM operates." *Gen. Motors*, 407 B.R. at 480.

GM was not assuming, among other things, (a) product liability claims from accidents or incidents before the sale, (b) liabilities to third parties for claims based upon contract, tort or other basis, or (c) liabilities related to any implied warranty or implied obligation under statutory or common law. *Gen. Motors*, 407 B.R. at 482. The Court understood the circumstances of the tort claimants and that they would not be able to collect from New GM, but found that the law in this Circuit clearly supported that result. *See id.* at 505. In addition, the Court found that New GM (essentially the Governments) was a "good faith purchaser" and was entitled to the protections of section 363(m) of the Bankruptcy Code. *Id.* at 494; Sale Order and Injunction, ¶ R. On July 10, 2009, New GM consummated the 363 Sale. New GM SOF, ¶ 56.

The Personal Injury Claimants and a bondholder separately appealed the Sale Order and Injunction. *See Campbell v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 428 B.R. 43 (S.D.N.Y. 2010) (Buchwald, J.); *Parker v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 430 B.R. 65 (S.D.N.Y. 2010) (Sweet, J.). The Sale Order and Injunction was upheld on appeal by at least two different District Court judges. *See id.* Millions of transactions have since been entered into by New GM, and others, based on the rights and provisions contained in the Sale Agreement and the Sale Order and Injunction. One of the appeals of the Sale Order and Injunction was dismissed by the Second Circuit more than three years ago on the grounds that it was equitably moot. New GM SOF, ¶ 64.

Old GM filed a certificate of dissolution on or about December 15, 2011, and, pursuant to an Assignment and Assumption Agreement dated December 15, 2011, Old GM assigned to the GUC Trust certain assets and agreements and the GUC Trust assumed certain obligations of Old GM. *Id.* ¶ 65. As of June 30, 2014, the GUC Trust held, in the aggregate, approximately $1.1 billion in assets that remained from the proceeds of the 363 Sale. *See Motors Liquidation*

Company GUC Trust Quarterly GUC Trust Report as of June 30, 2014, dated August 13, 2014 [Dkt. No. 12838] (**Appendix, Exh, "X"**), at 11. On October 24, 2014, the GUC Trust filed a quarterly report with the Court indicating, among other things, that it anticipated making an additional distribution to GUC Trust beneficiaries of securities with an estimated value of $225 million on or about November 12, 2014, notwithstanding that the Four Threshold Issues have yet to be decided by the Court. *See Motors Liquidation Company GUC Trust Quarterly Section 6.2(c) Report and Budget Variance Report as of September 20, 2014* [Dkt. No. 12963] ("**GUC Trust Section 6.2(c) Report**") (**Appendix, Exh. "Y"**), at notes 1, 2.

The GUC Trust is the successor to the Old GM estate. *See* Disclosure Statement, at 93; Old GM's Second Amended Chapter 11 Plan, § 1.115 (relevant excerpts are contain in the **Appendix, Exh. "Z"**); GUC Trust Form 10-K for the period ending March 31, 2014 (relevant excerpts are contained in the **Appendix, Exh. "AA"**), at 2; Amended and Restated GUC Trust Agreement, dated as of June 11, 2012 (relevant excerpts are contained in the **Appendix, Exh. "BB"**), at § 6.5. The GUC Trust is subject to the positions previously taken by its predecessor(s).

E. The Actions and Consolidated Complaints

All of the Actions include, in whole or part, vehicles and/or parts designed and manufactured by Old GM. *See* New GM SOF, ¶ 66; Consolidated Complaints; Pre-Closing Accident Motion to Enforce. At the time of the 363 Sale, the Named Plaintiffs in the Ignition Switch Actions and Non-Ignition Switch Actions (i) had not sued Old GM on account of the purported defect in their vehicle (*id.* ¶¶ 11-12), and (ii) were not listed as creditors in the books and records of Old GM as a result of their vehicle ownership. *See* Kiefer Declaration, ¶ 3.

On June 9, 2014, the Judicial Panel on Multidistrict Litigation established MDL 2543 and designated the United States District Court for the Southern District of New York as the MDL

court, assigning the Honorable Jesse M. Furman to conduct coordinated or consolidated proceedings for the actions assigned to the MDL. More than 130 cases are pending in MDL 2543. Many involve economic loss claims based on vehicles with allegedly defective parts, and some involve claims for personal injuries.

At an August 11, 2014 initial case conference, the District Court discussed the filing by Lead Counsel of a consolidated master complaint for all economic loss actions. On October 14, 2014, Lead Counsel filed two Consolidated Complaints. The Pre-Sale Consolidated Complaint is based on a successor liability theory and concerns Plaintiffs who purchased a vehicle with a purported Old GM defective part prior to the closing of the 363 Sale and are asserting an economic loss claim against New GM.

The Post-Sale Consolidated Complaint concerns Plaintiffs who assert economic loss claims against New GM and purchased vehicles after the closing of the 363 Sale. The putative classes defined in the Consolidated Complaints encompass all Old GM and New GM vehicles sold during a defined time period (not just vehicles that have been recalled). Notwithstanding its label, a substantial majority of Plaintiffs named in the ***Post-Sale Consolidated Complaint*** seek economic loss damages for vehicles ***manufactured by Old GM***. *See* Post-Sale Consolidated Complaint, § III.A. In other words, those Named Plaintiffs allege that they bought a used Old GM vehicle from a third party—not from New GM. In such circumstance, for those Named Plaintiffs, the purported basis of New GM's liability is the same flawed theory of successor liability that is used for the Pre-Sale Consolidated Complaint.

The Post-Sale Consolidated Complaint violates the Sale Order and Injunction to the extent it seeks to recover various Retained Liabilities from New GM. For example, it contains causes of action predicated on an alleged design defect in an Old GM vehicle (*see* ¶ 910); it

seeks rescission against New GM for amounts paid to Old GM (*see* ¶ 898); and it refers to an implied warranty when the Old GM vehicle was purchased (*see* ¶ 904). Such claims as they relate to Old GM vehicles are subject to the Motions to Enforce, whether they are stated in the Pre-Sale Consolidated Complaint or the Post-Sale Consolidated Complaint.

F. Old GM Administration and Claims

As of the time of the 363 Sale, Old GM retained AP Services, LLC ("**APS**") to provide interim management and restructuring services. Old GM also retained Weil Gotshal & Manges ("**WGM**") as its counsel to handle, among other things, the 363 Sale. Both APS and WGM advised Old GM in connection with the Sale Motion and the Sale Hearing.

As of the time of the 363 Sale, Old GM had not filed its schedules of assets and liabilities with the Court, there was no deadline or bar date for general unsecured creditors to file claims, and no disclosure statement or plan of reorganization had been filed.[15]

At some point ***after*** the 363 Sale was consummated, the $270 billion of claims filed against Old GM were substantially reduced. As of this date, there have been approximately $31 billion of general unsecured claims allowed, and there are less than $2 billion of disputed general unsecured claims pending against Old GM. *See* GUC Trust Section 6.2(c) Report. Plaintiffs have not filed proofs of claims against the *Old GM* bankruptcy estate. Nor have they filed a motion for authority to file a late proof of claim against the *Old GM* bankruptcy estate.

[15] The Debtors' initial bankruptcy schedules were filed with the Court on September 15, 2009. *See* Dkt. Nos. 4060 *et seq.* The Order establishing the bar date for filing proofs of claims was entered on September 16, 2009. *See* Dkt. No. 4079. The Debtors' Second Amended Chapter 11 Plan was confirmed on March 29, 2011. *See* Dkt. No. 9941.

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.[16] 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)

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

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

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"**).[17]

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.[18] Judge Bernstein rejected the plaintiffs' due process 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.

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[17] 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.

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

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.[19]

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.

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

[19] 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.

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.[20] 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:

> [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.

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

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.[21] 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. 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:

[21] 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.

> 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).[22] 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 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.

[22] 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.

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.[23] 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.[24] As the Court in *In re White Motor Credit Corp.*, 75 B.R. 944, 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.

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[23] 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.

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

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.[25]

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

[25] *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").

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.[26] As noted, assuming the due process argument is resolved against Plaintiffs, it is anticipated that Plaintiffs will dismiss the Pre-Sale Consolidated Complaint.[27]

[26] 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.*

[27] 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

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 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).

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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.

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.[28]

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.[29]

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

[28] *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).

[29] *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 . . . .").

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.[30]

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

[30] 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).

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.

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[31]), (iii) implied warranty claims, which include the implied warranty of merchantability, or (iv) Old GM's conduct including Old GM's failure to disclose.

[31] 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.

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, 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[32] and redhibition[33] (each of which 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).

[32] 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 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.

[33] 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 . . .").

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

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.

3. Plaintiffs' Unjust Enrichment Claims Are Not Credible

The United States Supreme Court has held that a complaint must allege "enough facts to state a claim to relief that is plausible on its face" (*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)), so that the court can "draw the reasonable inference that the defendant is liable for the misconduct alleged" (*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Here, Plaintiffs' unjust enrichment claims with respect to Old GM vehicles sold by dealers and third parties after the 363 Sale are simply not plausible. There is no explanation for the theory and it seems like a carryover from the Pre-Sale Consolidated Complaint. Plaintiffs allege without any support that

"New GM was benefitted from selling defective cars for more than they were worth, at a profit, and Plaintiffs have overpaid for the cars and been forced to pay other costs." Post-Sale Consolidated Complaint, ¶ 881. Significantly, however, approximately 65% of the Named Plaintiffs in the Post-Sale Consolidated Complaint—and likely substantially more—own pre-363 Sale vehicles which were originally sold by Old GM and purchased used on the secondary market.[34] As a threshold matter, New GM receives no benefit or other consideration when an Old GM vehicle is sold on the secondary market. In fact, there is nothing but downside for New GM under these circumstances as conclusively shown by the fact that New GM is bearing all of the costs of recalling Old GM vehicles. Moreover, New GM did not directly sell an Old GM vehicle and receive anything of value from any Plaintiff who purchased an Old GM vehicle. Plaintiffs' unjust enrichment claims are just another form of successor liability that is barred.

4. Plaintiffs' Reliance On Restatement (Second) of Torts Is Erroneous

Plaintiffs also allege that New GM is liable under the doctrine of negligent undertaking, citing *Restatement (Second) of Torts* § 324A. *See* Post-Sale Consolidated Complaint, ¶ 912; Pre-Sale Consolidated Complaint ¶¶ 776-78, 2850. As a threshold matter, this Restatement section concerns "Good Samaritan liability." *Dorking Genetics v. United States*, 76 F.3d 1261, 1267 (2d Cir. 1996). Plaintiffs do not allege that New GM undertook any Good Samaritan duties, which is fatal to any claim based on Section 324A. *See Matthews v. United States*, 150 F. Supp. 2d 406, 413-14 (E.D.N.Y. 2001).

[34] Of the 68 Named Plaintiffs in the Post-Sale Consolidated Complaint, (i) 44 (approximately 65%) own vehicles that are Model Year 2009 or earlier (and thus were likely manufactured by Old GM); (ii) 13 own vehicles that are Model Year 2010 (some or all of which may have been manufactured by Old GM); (iii) 2 do not provide information on the Model Year of the vehicle identified; and (iv) 9 (approximately 13%) own vehicles that are Model Year 2011 or later. *See* Post-Sale Consolidated Complaint, ¶¶ 27-93. Without vehicle identification numbers, it is impossible for New GM to ascertain whether a particular 2009 and 2010 vehicle was manufactured by Old GM or New GM.

Moreover, as the *Restatement* makes clear, a defendant can only be liable under Section 324A "***for physical harm*** resulting from his failure to exercise reasonable care to protect his undertaking." *Restatement (Second) of Torts* § 324A (emphasis added); *see also Garland Dollar Gen. LLC v. Reeves Dev., LLC*, No. 3:09-CV-0707-D, 2010 WL 4259818, at *4 (N.D. Tex. Oct. 21, 2010) ("[T]he Restatement (Second) of Torts § 324A only recognizes negligence liability to a third person when physical harm results."). Plaintiffs in the Ignition Switch Actions and Non-Ignition Switch Actions, however, do not allege any accident-based injuries—they merely allege economic losses. Courts overwhelmingly hold that Section 324A does ***not*** permit recovery for purely economic losses. *See Schaefer v. IndyMac Mortg. Servs.*, 731 F.3d 98, 104 (1st Cir. 2013) ("[C]ourts in a large number of jurisdictions have read the references to 'physical harm' in § 323 and § 324A of the Restatement as affirmatively precluding recovery for economic losses in such cases."). Because Plaintiffs here are suing for economic losses—not personal injuries—New GM cannot be liable under a theory of negligent undertaking.

Additionally, a subset of Plaintiffs who reside in four states—Arkansas, Louisiana, Maryland, and Ohio—rely upon *Restatement (Second) of Torts* § 395 to bring negligence-based claims. *See* Pre-Sale Consolidated Complaint, ¶¶ 2850-2854; Post-Sale Consolidated Complaint, ¶¶ 912-916. Yet, the plain language of Section 395 makes clear that it only applies to ***manufacturers***. *See Restatement (Second) of Torts* § 395 (imposing liability upon "[a] ***manufacturer*** who fails to exercise reasonable care *in the manufacture* of a chattel . . . ." (emphasis added)). New GM had no involvement in the manufacturing of Old GM vehicles and, thus, cannot be liable under Section 395 of the *Restatement*.

F. There Is No Private Cause of Action Based On A Failure To Recall And Any Such Claims Are Not Assumed Liabilities Under The Sale Agreement

The Consolidated Complaints appear to be based, at least in part, on the assertion that New GM should have issued the Subject Vehicle recall sooner. Decisively, as a matter of law, individual consumers do not have standing to seek damages for alleged violations of a car manufacturer's reporting and recall-related obligations to NHTSA. Indeed, the Ninth Circuit has held that "Congress did not intend to create private rights of action in favor of individual purchasers of motor vehicles when it adopted the comprehensive system of regulation to be administered by NHTSA." *Handy v. Gen. Motors Corp.*, 518 F.2d 786, 788 (9th Cir. 1975) (*per curiam*); *see also Ayres v. GMC*, 234 F.3d 514, 522 (11th Cir. 2000) (stating that the Safety Act confers no private right of action).

In an attempt to end-run around this obvious problem, Plaintiffs assert that New GM, pursuant to the Sale Order and Injunction and Sale Agreement, agreed to comply with certain laws and to conduct appropriate recalls with respect to Old GM vehicles. Specifically, Section 6.15(a) of the Sale Agreement provides as follows:

> From and after the Closing, Purchaser shall comply with the certification, reporting and recall requirements of the National Traffic and Motor Vehicle Safety Act, the Transportation Recall Enhancement, Accountability and Documentation Act, the Clean Air Act, the California Health and Safety Code and similar Laws, in each case, to the extent applicable in respect of vehicles and vehicle parts manufactured or distributed by Seller.[35]

There is a corresponding provision in the Sale Order and Injunction (¶ 17). Notably, however, the recall obligation is not contained in the Assumed Liability section of the Sale Agreement. The Sale Agreement and the Sale Order and Injunction are explicit that the only exception to the

[35] The Transportation Recall Enhancement, Accountability and Documentation Act ("**TREAD Act**") amended the Safety Act and became incorporated therein. *See Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 811 (D.C. Cir. 2008). Thus, if the Safety Act confers no private right of action, the same is true of the TREAD Act. The Sale Agreement's inclusion of language concerning the Clean Air Act and the California Health and Safety Code refers to emissions-related recall and reporting obligations which are not at issue in the Ignition Switch Actions or the Non-Ignition Switch Actions.

"free and clear" of claims language relates to Assumed Liabilities (which is a contractually-defined term that does not include the recall covenant). Accordingly, New GM's covenant to comply with the federal recall statute is not an Assumed Liability under the Sale Agreement.

In sum, New GM's recall covenant is not a "back-door" assumption by New GM of what otherwise are Retained Liabilities under the Sale Agreement.

IV. "FRAUD ON THE COURT" LEGAL STANDARD

Fed. R. Civ. P. 60(d)(3) provides, in relevant part, that a court can "set aside a judgment for fraud on the court." While Fed. R. Civ. P. 60(b) motions are closely scrutinized and rarely granted, relief under Fed. R. Civ. P. 60(d)(3)[36] is even ***more limited*** and "is reserved for only the most egregious misconduct, and requires a showing of an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir. 1989); *State Street Bank & Trust, Co. v. Inversions Errazuriz Limitada*, 374 F.3d 158, 176 (2d Cir. 2004).

A "fraud on the court" under Fed. R. Civ. P. 60(d)(3) relates to:

> 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 that are presented for adjudication.

Kupferman v. Consol. Research and Mfg. Corp., 459 F.2d 1072, 1078 (2d Cir. 1972) (quotation marks omitted); *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1325 (2d Cir. 1995); *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457, 460 (2d Cir.) *on reh'g in part sub nom. Transaero, Inc. v. La Fuerza Aerea Boliviana*, 38 F.3d 648 (2d Cir. 1994); *Gleason v. Jandrucko*, 860 F.2d 556, 558 (2d Cir. 1988); *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 702 (2d Cir. 1972).

[36] Plaintiffs cannot use Fed. R. Civ. P. 60(b)(3) "fraud" because the limitation period long ago expired and there is no equitable tolling. *Campaniello Imps., Ltd. v. Saporiti Italia S.p.A*, 117 F.3d 655 (2d Cir. 1997).

Fraud on the court under Fed. R. Civ. P. 60(d)(3) involves ***intentional conduct*** that "seriously affects the integrity of the normal process of adjudication." *Gleason*, 860 F.2d at 559; *Lehman Bros., Inc. v. Maselli*, No. 93 Civ. 4478 AGS RJW, 1998 WL 531831, at *6 (S.D.N.Y. Aug. 24, 1998) (quoting *United States v. Beggerly*, 524 U.S. 38, 47 (1998)); *see also SEC v. ESM Grp., Inc.*, 835 F.2d 270 (11th Cir. 1988) (holding that fraud on the court is the type of fraud which prevents or impedes the proper functioning of the judicial process, and it must threaten public injury, as distinguished from injury to a particular litigant), *cert denied, sub. nom., Peat Marwick Main & Co. v. Tew*, 486 U.S. 1055 (1988). It encompasses conduct that prevents the court from fulfilling its duty of impartially deciding cases. *In re Ticketplanet.com*, 313 B.R. 46, 64 (Bankr. S.D.N.Y. 2004).

Unlike fraud that can be remedied under Fed. R. Civ. P. 60(b)(3), to obtain relief under Fed. R. Civ. P. 60(d)(3), the movant must allege a fraud perpetrated by an officer of the court and it must be directed at the judicial process itself, not just to other litigants. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-46 (1944) (fraud directed to other litigants does not constitute a fraud on the court); *Kupferman*, 459 F.2d at 1078; *Syarns v. H.E. Avent*, 96 B.R. 620 (M.D. La. 1989); *see also In re Food Mgmt. Grp., LLC*, 380 B.R. 677, 714-15 (Bankr. S.D.N.Y. 2008) ("Successfully alleging fraud on the court requires (1) a misrepresentation to the court by the defendant; (2) a description of the impact the misrepresentation had on proceedings before the court; (3) a lack of an opportunity to discover the misrepresentation and either bring it to the court's attention or bring an appropriate corrective proceeding; and (4) the benefit the defendant derived from the misrepresentation."). Typical examples of "fraud on the court" include bribery of a judge or members of a jury, or fabrication of evidence by a party in which an attorney, as an officer of the court, is involved. *Weese v. Schukman*, 98 F.3d 542, 552-53 (10th

Cir. 1996); *United States v. Int'l Tel. & Tel. Corp.*, 349 F. Supp. 22, 29 (D. Conn. 1972), *aff'd mem. sub. nom., Nader v. United States*, 410 U.S. 919 (1973).

The failure to disclose pertinent facts relating to a controversy before the court, or even perjury regarding such facts, whether to an adverse party or to the court, does not without more constitute "fraud upon the court" and does not merit relief under Fed. R. Civ. P. 60(d)(3). *E.g.*, *Gleason*, 860 F.2d at 559-60; *In re Hoti Enters., LP*, No. 12-CV-5341 (CS), 2012 WL 6720378, at * 3-4 (S.D.N.Y. Dec. 27, 2012). Instead, such conduct would only be covered by Fed. R. Civ. P. 60(b)(3). *Id*.

In *Hoti Enterprises*, the district court affirmed the bankruptcy court's denial of reconsideration of a cash collateral order based on alleged fraud by a lender in its representation that it had a secured claim. It held that "neither perjury nor non-disclosure by itself amounts to anything more than fraud involving injury to a single litigant" covered by Fed. R. Civ. P. 60(b)(3), and therefore, is not the type of egregious misconduct necessary for relief under Fed. R. Civ. P. 60(d). *Hoti Enters.*, 2012 WL 6720378, at *3-4.[37]

The burden of proof in establishing fraud upon the court is on the movant. The threshold for the burden is "clear and convincing" evidence. *King v. First American Investigations, Inc.*, 287 F.3d 91 (2d Cir. 2002). Further, fraud on the court requires the moving party to establish that the other party (here, Old GM) benefited, or could have benefited, from the alleged fraud. *See In re Food Mgmt. Grp. LLC*, 380 B.R. at 714-15.

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[37] Courts from other jurisdictions have reached the same conclusion. *In re Tevis*, BAP No. EC-13-1211 KiKuJu, 2014 WL 345207 (B.A.P. 9th Cir. Jan. 30, 2014) ("Mere nondisclosure of evidence is typically not enough to constitute fraud on the court, and 'perjury by a party or witness, by itself, is not normally fraud on the court."); *In re Andrada Fin., LLC*, No. AZ-10-1209-JuMkPa, 2011 WL 3300983, at *7 (B.A.P. 9th Cir. Apr. 7, 2011); *In re Levander*, 180 F.3d 1114, 1119 (9th Cir. 1999); *Simon v. Navon*, 116 F.3d 1, 6 (1st Cir. 1997); *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir. 1989); *In re Mucci*, 488 BR 186, 193-94 & n.8 (Bankr. D. N.M. 2013); *In re Galanis*, 71 B.R. 953, 960 (Bankr. D. Conn. 1987) ("It is well established that the failure to disclose allegedly pertinent facts relating to a controversy before the court, whether to an adverse party or to the court, does not constitute "fraud upon the court" for purposes of setting aside a judgment . . . .").

In reality, the factual predicate for Plaintiffs' fraud on the court theory (a purposeful failure to disclose an alleged product defect that was not being assumed by the purchaser as part of a 363 Sale) is nothing more than a re-casted formulation of the due process argument. And, since that argument fails, so does the more limited and rarely granted "fraud on the court" argument.

In the Sale Order and Injunction, the Court found that neither Old GM nor New GM entered into the Sale Agreement or consummated the 363 Sale "for the purpose of hindering, delaying or defrauding the Debtors' present or future creditors." Sale Order and Injunction, ¶ M.

CONCLUSION

Plaintiffs cannot satisfy their burden of showing that they were denied due process in connection with the 363 Sale. Even assuming that Plaintiffs could establish that they were entitled to direct mail notice of the 363 Sale, they cannot carry their burden of demonstrating prejudice—showing that the outcome of the 363 Sale would have been different. And, even if there were a due process violation in connection with the 363 Sale, the proper remedy would be to penalize the actor that committed that violation—Old GM—and not New GM who this Court found to be a good faith purchaser. Plaintiffs similarly cannot meet their burden of showing how the legal standard for fraud on the Court is satisfied based on the factual predicate alleged against Old GM. In the end, it is patently evident that Plaintiffs have improperly asserted Retained Liabilities against New GM in the Consolidated Complaints. They have violated the Sale Order and Injunction, and the Motions to Enforce should be granted to prevent their improper conduct from continuing.

Dated: New York, New York
November 5, 2014

Respectfully submitted,

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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)**

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

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INTRODUCTION[1]

The Responses[2] try to make this case into something it is not. This matter is not about whether Old GM should have done a better investigation of the ignition switch issue. Rather, this case is about (i) whether, in the context of a 363 sale, under the dire circumstances of *Old GM's* bankruptcy case, the 363 Sale notice given to Plaintiffs by Old GM was not sufficient and Plaintiffs were prejudiced thereby such that they were deprived of due process (and, if so, the remedies for Old GM's infraction), and (ii) whether Plaintiffs are asserting claims against New GM in the Consolidated Complaints that are barred by the Sale Order and Injunction.

Based on the stipulated factual record and the uncontroverted facts, it is clear that, as of the 363 Sale: (a) none of the Named Plaintiffs had brought litigation against Old GM with respect to the ignition switch in their vehicles (New GM SOF, ¶ 11), (b) Old GM's books and records did not reflect any liabilities to vehicle owners relating to their ignition switch (*see* Kiefer Decl., **Opening Brief Appendix, Exh. "3."**), (c) the disclosure schedules to the Sale Agreement did not reference any issues with respect to the ignition switches,[3] and (d) Old GM

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in the *Opening Brief by General Motors LLC on Threshold Issues Concerning Its Motions to Enforce the Sale Order and Injunction* [Dkt. No. 12981] ("**New GM Opening Brief**"). The Appendix of Exhibits filed with the New GM Opening Brief is referred to herein as the "**Opening Brief Appendix**." Exhibits referenced in this Reply are contained in the Reply Appendix ("**Reply Appendix**"), which is being filed simultaneously herewith.

[2] The Responses to the Old GM Opening Brief were: (a) *Responsive Brief by Designated Counsel for Pre-Closing Accident Plaintiffs on Threshold Issues Concerning New GM's Motions to Enforce the Sale Order and Injunction* [Dkt. No. 13021] ("**Accident Plaintiffs' Brief**"), (b) *Designated Counsel's Opposition to New GM's Motions for Enforcement of Sale Order and Injunction* [Dkt. No. 13025] ("**Economic Loss Plaintiffs' Opposition**"); (c) *Response of GUC Trust Administrator and Participating Unitholders to New GM's Opening Brief on Threshold Issues Concerning Its Motions to Enforce the Sale Order and Injunction* [Dkt. No. 13030] ("**GUC Trust Brief**") (when applicable, the three responses will be collectively referred to as the "**Responses**"); and (d) *The Groman Plaintiffs' Response to That Part of New GM's Opening Brief Regarding the "Fraud on the Court Legal Standard"* [Dkt. No. 13028] ("**Groman Plaintiffs' Supplemental Brief**").

[3] Under Section 4.18 of the Sale Agreement and Disclosure Schedule 4.18 relating thereto, Old GM was required to disclose to New GM potential issues relating to products it manufactured. The fact that many vehicles were listed on Disclosure Schedule 4.18 (involved in product recalls, special coverage programs and customer satisfaction programs), but the alleged ignition switch issue was not, strongly indicates that Old GM had not determined at the time of the 363 Sale that there allegedly was a widespread ignition switch defect, and that such vehicle owners were

had not concluded there was a wide-spread problem with the ignition switches it was then investigating.[4]

Plaintiffs' only basis for suing New GM for damages based on Old GM vehicles is on a "successor liability" theory. Significantly, however, this Court previously found that a successor liability claim would not be viable based on, among other things, the structure of the 363 Sale transaction (*e.g.*, the purchaser was an unrelated entity then owned primarily by the Governments). *See, e.g.*, Sale Order and Injunction, ¶¶ R, 47, 48. In addition, this Court previously ruled that if a successor liability claim existed at all, it was not extinguished,[5] but attached to the proceeds of the 363 Sale pursuant to Section 363(f) of the Bankruptcy Code. *See In re Gen. Motors Corp.*, 407 B.R. 463, 500-01 (Bankr. S.D.N.Y. 2009); *see also* Sale Order and Injunction, ¶¶ BB, 7.

Plaintiffs' argument as to why the Court's "no successor liability" finding should not be binding on them glosses over two critically important points. ***First***, successor liability, in the bankruptcy context, is a derivative claim (not a direct claim[6]) that was held by the Old GM bankruptcy estate (not Plaintiffs); it was deemed released by the Estate as part of the 363 Sale.

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creditors. A copy of Disclosure Schedule 4.18, filed with the Court on June 27, 2009 [Dkt. No. 2649-1] is contained in the **Reply Appendix as Exhibit "A."**

[4] Plaintiffs' reference to selected documents describing isolated instances of a malfunctioning vehicle only show that either Old GM had no answers for the problem being reviewed, or such instances were explained by factors other than an alleged widespread design defect relating to the ignition switch. Moreover, the fact that certain Old GM employees investigated ignition switch-related concerns, years before the 363 Sale, does not mean, as Plaintiffs have suggested, that such investigations caused Old GM to conclude in June 2009 there allegedly was a widespread ignition switch defect.

[5] Economic Loss Plaintiffs concede this point when, among other things, they argue that their remedies against Old GM are extant, and not "equitably moot." *See Designated Counsel's Response to the Participating Unitholders' and GUC Trust Administrator's Opening Memorandum of Law Respecting the Equitable Mootness Threshold Issue* [Dkt. No. 13029] ("**Economic Loss Plaintiffs' Equitable Mootness Brief**").

[6] In this context, "direct claim" means a claim individualized to the claimant, as compared to a claim held by all creditors of Old GM (a derivative claim). This Court held that, even if the successor liability claim was individualized, principles of federal preemption (Section 363(f)) would insulate the buyer from such liability. *Gen. Motors*, 407 B.R. at 503 n.99.

Second, the successor liability issue against New GM only exists because the 363 Sale closed. Plaintiffs' due process argument is that, if proper notice had been given, they would have successfully opposed the 363 Sale. However, the consequences of defeating the 363 Sale would have been: (a) New GM would have purchased nothing, so there would be no claim against it, (b) their claim against Old GM would have been extant (the same result as when the 363 Sale closed), and (c) Old GM would have liquidated and their alleged claims would have been worthless (as contrasted to having a recovery against the 363 Sale proceeds because the transaction closed).

There is no question that Old GM provided extensive publication notice of the 363 Sale, and there was extensive media coverage relating to the 363 Sale. Notably, while complaining about the 363 Sale notice given, Plaintiffs do not contend that their purported class was unaware of the 363 Sale (and Plaintiffs would know). Rather, they complain that the Court-approved Sale notice should have been delivered in a different manner (direct mail instead of publication), and the notice was deficient because they were unaware (and should have been made aware in the Sale notice) of the ignition switch or other alleged defects in their vehicles. But such detail is not required. The 363 Sale notice informed Plaintiffs of the relevant facts regarding the 363 Sale: (a) the 363 Sale would be free and clear of claims and other interests (*i.e.*, successor liability claims), and (b) the Sale Agreement was available for review, and that Agreement clearly provided that New GM would not assume the precise claims that Plaintiffs now assert. Plaintiffs argue that they should have had the right to argue the successor liability point for themselves, but they do not, and cannot dispute, that their position was extensively briefed and argued at the Sale Hearing by States' attorneys general, consumer advocacy groups, and members of the plaintiffs'

bar. And, conspicuously, Plaintiffs proffer nothing new that they would have argued at the Sale Hearing that would have changed the result.[7]

In ***Reply Point I*** (Due Process Threshold Issue), New GM rebuts Plaintiffs' contention that they were "known" creditors of Old GM entitled to direct mail notice of the 363 Sale. Additionally, there is no basis for Plaintiffs' alternative, novel argument that the Court-approved publication notice received by them should now be determined, over five and half years after the fact, to be insufficient because it did not identify in detail the claims that Plaintiffs assert they have against Old GM. Numerous courts, including this one, have found that notices, like the one provided to Plaintiffs, imparted sufficient information regarding 363 sales.

New GM also demonstrates why a showing of prejudice is necessary to overturn a 363 sale order on due process grounds, and that Plaintiffs cannot make this showing. Plaintiffs' contention that their arguments on successor liability could have swayed the Court is belied by both the uncontroverted facts, and their failure to identify any new, meritorious argument. It is indisputable that New GM would only assume liabilities of Old GM that it believed were commercially necessary;[8] it was not assuming economic loss claims against Old GM;[9] it was not assuming pre-363 Sale accident claims;[10] and it was not going forward with the 363 Sale unless it

[7] Plaintiffs gloss over the fact that the 363 Sale notice given was sufficiently wide-spread that it engendered numerous objections from similarly situated parties making the same arguments that they claim they would have made.

[8] *See Trusky v. Gen. Motors LLC (In re Motors Liquidation Co.),* Adv. Proc. No. 09–09803, 2013 WL 620281, at *8 (Bankr. S.D.N.Y. Feb. 19, 2013).

[9] *Id.* at *2. Prior to the 363 Sale, Old GM disclosed to New GM that there were class actions for economic losses based on other claimed product defects. Significantly, the Governments refused to assume such additional monetary liabilities. Plaintiffs' speculation that they would have fared differently has no basis. To the contrary, at the Sale Hearing, the Governments rejected other tort claimants' requests for special treatment of their claims. *See* New GM SOF, ¶¶ 36-47.

[10] *See Gen. Motors*, 407 B.R. at 482, 500.

received the "no successor liability" finding.[11] And, without the 363 Sale, it was clear that Old GM would have liquidated and unsecured claimants (as Plaintiffs purport to be) would have received nothing.

In ***Reply Point II*** (Remedies Threshold Issue), New GM highlights that the Responses fail to answer New GM's argument that there is no basis for a revocation of a final 363 sale order, and Plaintiffs transparent attempt to side-step the issue, by arguing that the Sale Order and Injunction should simply not be applied to them, is unavailing. Saddling New GM, a good faith purchaser for value, with an alleged flaw in a notice procedure that it did not cause, with substantial dollars of claimed new liabilities that it never agreed to assume, was not the deal the Court approved. To rewrite this material term now, years after the fact, and contrary to the integration clause in the Sale Agreement, is an impermissible revocation of the Sale Agreement and the "final and non-appealable" Sale Order and Injunction. Under the governing law, Plaintiffs have no remedy against New GM if it is determined that Old GM failed to provide them with proper notice of the 363 Sale. Assuming Plaintiffs can show prejudice, their remedy would be against the Old GM bankruptcy estate and the 363 Sale proceeds, not New GM.

In ***Reply Point III*** (Old GM Claim Threshold Issue), New GM shows that with respect to the Pre-Sale Consolidated Complaint, Plaintiffs never had a successor liability claim. With respect to the Post-Sale Consolidated Complaint, New GM shows that it had no independent duty to owners of Old GM vehicles who bought in the secondary market after the 363 Sale ("**Used Car Purchasers**"). The Sale Agreement and Sale Order and Injunction is clear that,

[11] *Id.* at 500; *see also* Sale Order and Injunction, ¶ DD ("Purchaser would not have entered into the [Sale Agreement] and would not consummate the 363 [Sale] (i) if the sale of the Purchased Assets was not free and clear of all liens, claims, encumbrances, and other interests (other than Permitted Encumbrances), including rights or claims based on any successor or transferee liability or (ii) if the Purchaser would, or in the future could, be liable for any such liens, claims, encumbrances, and other interests, including rights or claims based on any successor or transferee liability . . ., other than, in each case, the Assumed Liabilities.").

with respect to Old GM vehicles (or parts sold by Old GM to a third party), there can only be two alternatives: either the resulting claim is an Assumed Liability (which Plaintiffs concede is not the case), or *all* other claims relating to Old GM vehicles or parts are Retained Liabilities of Old GM. There is no third option; the Sale Agreement was drafted to cover all permutations. Further, Plaintiffs' attempt in the Post-Sale Consolidated Complaint to hold New GM liable to Used Car Purchasers improperly exalts "form over substance." Simply alleging that New GM has a "duty" under state consumer protection laws does not make it so. Indeed, no statute cited by Plaintiffs purports to extend duties to an entity, like New GM, that did not design, manufacture, sell, distribute or advertise the Used Car Purchasers' vehicles. Simply stated, Used Car Purchasers are seeking damages for a design defect in Old GM vehicles.[12] Such claims are Retained Liabilities under the Sale Agreement (*see* Sale Agreement, § 2.3(b)), and remain so after the 363 Sale. The fact that after the 363 Sale (a) the owner may have sold the Old GM vehicle in the secondary market, (b) the Used Car Purchaser discovers the design defect, and (c) the Used Car Purchaser believes that the brand related to its mature Old GM vehicle was "tarnished," does not alter the status of the claim—it remains a Retained Liability of Old GM. New GM also shows that the covenant to comply with federal law relating to recalls does not create a private right of action for Used Car Purchasers. Moreover, a Sale Agreement covenant is unrelated to the determination of whether a claim is a Retained Liability under the Sale Agreement.

In ***Reply Point IV*** ("Fraud on the Court"—Legal Standard), New GM explains that the parties largely agree on the standard, and reiterates the point (which all parties essentially

[12] *See*, *e.g.*, Post-Sale Consolidated Complaint, ¶ 892 ("Without limitation, the Defective Ignition Switch Vehicles share common design defects . . . ."), ¶ 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.").

concede), that the factual predicate for Plaintiffs' alleged "fraud on the court" allegation is the same as the predicate for Plaintiffs' meritless, due process argument.

ARGUMENT

I. DUE PROCESS THRESHOLD ISSUE: PLAINTIFFS HAVE NOT DEMONSTRATED A DUE PROCESS VIOLATION

A. Old GM Provided Plaintiffs With Proper Notice Of The 363 Sale

1. Plaintiffs Were "Unknown" Creditors

At the time of Old GM's bankruptcy, Old GM had sold millions of vehicles that contained the ignition switch that New GM later recalled. In the Responses, Plaintiffs identify only a relatively small number of accidents and complaints that were reported to Old GM that purportedly related to vehicles with the ignition switch. Indeed, Plaintiffs concede that millions of consumers drove these vehicles, for years, with no indication that they had an ignition switch issue.[13] Thus, at the time of the 363 Sale, the alleged defective ignition switch had generally functioned properly for the overwhelming majority of Old GM vehicle owners.

There is nothing in the stipulated factual record to support Plaintiffs' contention that Old GM had determined that the alleged ignition switch defect was a systematic safety defect affecting vehicle owners such that they were known creditors of Old GM entitled to direct mail notice of the 363 Sale. This Court's ruling in *Morgenstein*[14] is directly on point. This Court held that publication notice was sufficient for the Morgenstein plaintiffs, who were deemed unknown creditors. *Id.*, 462 B.R. at 506 n.55. The Court rejected the Morgenstein plaintiffs' argument that, even if the spindle rod defect in other vehicles (which was known to Old GM) was similar to the alleged undisclosed defect in their vehicles, they should have been treated as known

[13] Economic Loss Plaintiffs' "claim specific" sale notice argument is predicated on them not knowing that there was an ignition switch issue and, thus, not knowing that they were creditors of Old GM at the time of the 363 Sale.

[14] *See In re Motors Liquidation Co.*, 462 B.R. 494 (Bankr. S.D.N.Y. 2012) ("***Morgenstein***").

creditors for (claim/plan discharge) notice purposes. Plaintiffs try to distinguish *Morgenstein* on the basis that the Morgenstein plaintiffs' factual allegations were conclusory and insufficient, but their arguments fail for the same reason. Moreover, unlike in *Morgenstein* where the plaintiffs' claims were extinguished, here, Plaintiffs' claims are not; Plaintiffs retain the ability to assert claims against the Old GM bankruptcy estate and the 363 Sale proceeds.[15]

The holding in *Burton v. Chrysler Group, LLC* (*In re Old Carco*), 492 B.R. 392 (Bankr. S.D.N.Y. 2013) ("***Burton***") is also on point. In that case, the debtor sold its assets in a 363 sale free and clear of claims, including successor liability claims. The court held that "non-claim specific" sale notice to vehicle owners, by publication, was appropriate.[16] Judge Bernstein rejected the Burton plaintiffs' argument that they were deprived of due process because they did not receive adequate notice.[17] Plaintiffs try to distinguish *Burton* on the grounds that the Burton plaintiffs mistakenly argued that they held future claims,[18] but that is a distinction without a difference. To render his ruling, Judge Bernstein necessarily had to analyze the nature of the

[15] *See Gen. Motors*, 407 B.R. at 495-96 (the Sale Agreement "does not dictate the terms of a plan of reorganization, as it does not attempt to dictate or restructure the rights of the creditors of this estate. It merely brings in value. Creditors will thereafter share in that value pursuant to a chapter 11 plan subject to confirmation by the Court.").

[16] *See generally In re Chrysler LLC*, 405 B.R. 84, 109 (Bankr. S.D.N.Y. 2009), *aff'd*, (2d Cir. 2009); *see also In re Chrysler LLC*, Case No. 09-50002 (AJG), Sale Procedures Order, ¶ K [Dkt. No. 492] (Bankr. S.D.N.Y. May 8, 2009) (**Reply Appendix, Exh. "B"**).

[17] *Burton*, 492 B.R. at 402-03; *see also Burton Plaintiffs' Opposition to Motion to Dismiss* (**Opening Brief Appendix, Exh. "DD"**), dated March 21, 2012, ¶¶ 41, 66.

[18] Economic Loss Plaintiffs' Opposition, at 45. Ironically, the GUC Trust makes the same future claims argument as the Burton plaintiffs. As noted in *White v. Chance Indus., Inc. (In re Chance Indus., Inc.)*, 367 B.R. 689, 705 (Bankr. D. Kan. 2006), "[u]nknown future claimants" are those claimants who "have not had any pre-petition contact with debtor or debtor's product . . . ." *Id.* at 705. That is not the Plaintiffs (or their predecessors). They held a claim against Old GM within the meaning of Section 101(5) of the Bankruptcy Code. *See e.g., In re Chemtura Corp.*, Case No. 09-11233, Hr'g Tr. 33:11-21, February 4, 2013 [Dkt. No. 5818] ("Judges in this Court have consistently held that claims for injuries from [prepetition] exposure to products alleged to cause tort injuries are prepetition claims. The claim arises at the time of exposure regardless of when the injury manifests or when the claimant receives a formal diagnosis. *See In re Chateaugay Corp.*, 2009 Westlaw 367490 at *6 (Bankr. S.D.N.Y. 2009) (Lifland J.) *In re Quigley Company Inc.*, 383 Br. 19, 27 (Bankr. S.D.N.Y. 2008) (Bernstein J) both holding that if a plaintiff was exposed to asbestos before the petition date, he or she held a prepetition claim.").

Burton plaintiffs' claims and make a determination that the sale notice was sufficient to satisfy due process.

The Responses also attempt to distinguish *Burton* on the grounds that fuel-spit-back recalls were issued prior to Chrysler's bankruptcy. That distinction actually undermines Plaintiffs' position.[19] Presumably, if the owner of a prepetition recalled vehicle is an unknown creditor for purposes of a 363 sale notice, then certainly an owner whose vehicle was not recalled should be treated the same way. Even more telling, however, is that most of the Burton plaintiffs' vehicles were ***not*** the subject of a recall notice. Specifically, the Burton plaintiffs included owners of certain model year Dodge Durangos and Jeep Wranglers. *Id*. at 399-400. Prior to bankruptcy, the Dodge Durango had been subject to a fuel-spit back recall (*id.* at 395); but the Jeep Wranglers at issue had not.[20] Judge Bernstein dismissed the Jeep Wrangler owners' economic loss claims even though no prior recall had been issued for those vehicles.[21] Thus, the occurrence of prior recalls did not affect the *Burton* holding. As Judge Bernstein noted, which is equally applicable here, "[a]nyone who owns a car contemplates that it will need to be repaired." *Id.* at 403.

Finally, with respect to owners who purchased their used vehicles from third parties after the Chrysler 363 sale, Judge Bernstein noted that "[t]he 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." *Id.* (emphasis added). Judge Bernstein treated these claimants the same as owners who had bought their vehicles from the debtor—their claims

[19] Economic Loss Plaintiffs' Opposition, at 46 n.52; Accident Plaintiffs' Brief, at 24; GUC Trust Brief, at 18.

[20] Seven of the nine named plaintiffs owned Jeep Wranglers that were not subject to a recall. *Id.* at 399.

[21] While a "Technical Service Bulletin" was issued with respect to certain Jeep Wranglers, the court in *Burton* specifically noted that it was "not a safety recall, did not advise current owners of a flaw, safety defect or hazard, and the customer had to complain about the problem in order to take advantage of the extended warranty." *Burton*, 492 B.R. at 396.

were dismissed. The same result should hold for the Used Car Purchasers, who wrongfully claim they are not bound by the Sale Order and Injunction.

Plaintiffs' claims here are also similar to the allegations made by the "unknown" creditor plaintiff, Ms. Cromwell, in *In re New Century TRS Holdings, Inc*., No. 07-10416 (BLS), 2014 WL 842637 (Bankr. D. Del. Mar. 4, 2014). Plaintiffs attempt to distinguish *New Century* by asserting that Ms. Cromwell's claims did not "arise" until after the bar date, but they are wrong.[22] In *New Century*, the court expressly held to the contrary: "Ms. Cromwell's claim is a pre-petition claim because it is based completely upon events that occurred as of the pre-petition loan closing." *Id.* at *8 n.13. Plaintiffs also attempt to distinguish *New Century* on the grounds that "the circumstances of each loan were different" or "unique,"[23] but that was not a finding made by the court nor is it supported by the record. To the contrary, Ms. Cromwell contended that New Century's pre-petition fraudulent lending practices were systemic, and they impacted an entire class of customers. *Id.* at *5. The court rejected the plaintiff's contention that an entire class of customers with un-asserted claims were "known" creditors, even though New Century employees knew there were problems due to the pendency of existing litigation. *Id*. at *6. The *New Century* decision refutes Plaintiffs' imputation argument.[24] Clearly, New Century employees knew information relating to potential wrong-doing as reflected in the existing litigation. But that was not sufficient, from New Century's corporate perspective, to alter the status of customers, for notice purposes, from unknown creditor to known creditor status.

[22] Economic Loss Plaintiffs' Opposition, at 51.

[23] Accident Plaintiffs' Brief, at 25-26.

[24] Plaintiffs' imputation argument is that information known to *any* of the tens of thousands of Old GM employees should be imputed to Old GM so that such isolated pieces of information are bundled together so as to constitute the collective corporate knowledge of Old GM. Based on that artificial construct, Plaintiffs contend that they were known creditors as of the 363 Sale.

Tellingly, Plaintiffs do not attempt to distinguish *In re Enron Corp.*, No. 01-16034 (AJG), 2006 WL 898031, at *4-5 (Bankr. S.D.N.Y. Mar. 29, 2006),[25] in which the court held that victims of Enron's electricity market manipulation with un-asserted claims were not "known" creditors to Enron, notwithstanding that prior to the bar date, Enron had actual knowledge that the federal government was investigating it for such market manipulation. Judge Gonzales' ruling also undercuts Plaintiffs' "imputation" argument. Clearly, certain employees had knowledge of the government's pending investigation. That knowledge, however, was not determinative as to the Court's ruling that, from the employer's perspective, holders of un-asserted claims were unknown creditors for notice purposes.

2. The Purpose of Notice in the 363 Sale Context

As discussed in New GM's Opening Brief, the nature of the notice for due process purposes depends on the bankruptcy event at issue. *See Doolittle v. Cnty. of Santa Cruz (In re Metzger)*, 346 B.R. 806, 818 (Bankr. N.D. Cal. 2006) (discussing how different bankruptcy events "give rise to different due process standards"). Notice of a 363 sale is markedly different than notice of a claims bar date or plan discharge. In a claims bar date/plan discharge situation, if a claim is not timely asserted, it is extinguished. In a 363 sale, the claim or interest is generally not lost, but instead, as here, attaches to the proceeds of sale. As explained by the court in *In re Eveleth Mines, LLC*:

> Through [a 363 Sale], third parties' "interests" in property are detached from the asset to be sold, and then may be reattached to the cash or in-kind proceeds of sale that the trustee receives. As a matter of statute or under general equitable principles, the remedy has been a part of American bankruptcy law for well over a century. By affording clear title to purchasers from the estate, sales under § 363(f) make the estate's assets more attractive in the market. This, in turn, can "maximize the value of the asset[s], and thus enhance the payout made to creditors" on a full administration of the estate.

[25] *Enron* is cited in the New GM Opening Brief on pages 28 and 31.

312 B.R. 634, 649-50 (Bankr. D. Minn. 2004) (internal citations omitted); *see also In re The Lady H Coal Co., Inc*., 199 B.R. 595, 605 (S.D. W. Va. 1996) ("Extensive case law exists that claims are directed to the proceeds of a free and clear sale of property and may not subsequently be asserted against a successor."). In *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988), the court held that "[i]t has long been recognized that when a debtor's assets are disposed of free and clear of third-party interests, the third party is adequately protected if his interest is assertable against the proceeds of the disposition." *Id.* at 93; *see also* Sale Order and Injunction, ¶ P ("The 363 Transaction in no way dictates distribution of the Debtors' property to creditors and does not impinge upon any chapter 11 plan that may be confirmed."); *Wolff v. Chrysler Group LLC*, Adv. Proc. 10-05007, *Opinion Granting Defendant's Motion to Dismiss* (Bankr. S.D.N.Y. July 30, 2010) [Dkt. No. 43] ("***Wolff* Opinion**") (**Reply Appendix, Exh. "C"**), at 22 ("The purpose of the sale was not to effect a plan of reorganization and set distributions to classes of claimants, but to maximize the value of the estate and support the best possible recoveries under a separately confirmed plan." (citation omitted)).

These holdings are consistent with *Paris Manufacturing Corp. v. Ace Hardware Corp. (In re Paris Industries Corp.),* 132 B.R. 504 (D. Me. 1991), which recognizes the principle that the function of a 363 sale is to maximize the value of the debtor's assets, convert those assets to cash, and then distribute the proceeds pursuant to the statutory priorities of creditors in bankruptcy. In *In re Chateaugay Corp*., Judge Lifland approved the reasoning in *Paris Industries*:

> *Paris Indus. Corp*., supra, 132 B.R. 504, is also on point. … After the sale, the state court plaintiffs were injured while using one of the debtor's products. The bankruptcy court enjoined the plaintiffs' state court claim against the purchaser—even though they had no other recourse—because if the state court held that the sale order was ineffective in protecting the purchaser from these claims, the purchaser "would have grounds for seeking rescission of the 1987 sale, having

> bargained for a sale free and clear of liability." 132 B.R. at 507. The court rejected the notion that the sale order did not apply to the product liability claim because the incident took place after the sale. ***The court also held that the plaintiffs were not prejudiced by the sale because all the sale did was take a pot of assets and convert them into cash.*** The fact that the cash was subsequently distributed to creditors in accordance with bankruptcy law and that left the plaintiffs without recovery on a claim did not mean that they were adversely affected by the sale. [citation omitted]

201 B.R. 48, 64 (Bankr. S.D.N.Y. 1996) (emphasis added).

Plaintiffs ignore Judge Lifland's decision and seek to discredit *Paris Industries* by misrepresenting holdings from other jurisdictions. They state that "the First Circuit itself has rejected the district court's reasoning in *Paris Indus.*" Economic Loss Plaintiffs' Opposition, at 34 n.42 (citing *Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Industries, Inc.)*, 43 F.3d 714, 721-22 (1st Cir. 1994)). However, Plaintiffs misconstrue *Savage Industries*. There, the debtor, a gun manufacturer, purportedly sold its assets in a free and clear sale. The court approved the sale in principle, but did not approve the terms of the asset sale or the sale agreement itself. The debtor provided no notice of the sale to a consumer injured by a gun manufactured by the debtor, or to its distributor. The debtor did not provide notice by publication or any other means. The court briefly discussed whether the claimants before it were known or unknown creditors, but made no ruling on that issue because the sale procedure was so deeply flawed (*i.e.*, no notice whatsoever and a private, non-court approved sale). The First Circuit opinion in *Savage Industries* in no way diminishes *Paris Industries*. In fact, it approvingly cites to *Paris Industries* as an illustration of a proper sales procedure. *Savage Industries*, 43 F.3d at 722 n.10.

The only other case that Plaintiffs cite as "rejecting" *Paris Industries* is *Ninth Avenue v. Remedial Group*, 195 B.R. 716 (N.D. Ind. 1996) (*see* Economic Loss Plaintiffs' Opposition, at 34 n.42), but it does no such thing. The holding in *Ninth Avenue* merely distinguishes *Paris*

Industries to the extent that it could be construed as support for the proposition that a 363 sale can extinguish "future claims that did not arise until after the bankruptcy proceedings concluded." *Id.* at 732. The court in *Ninth Avenue* cited approvingly to *Paris Industries* for the proposition that the court properly "enjoin[ed] creditors from filing a suit against the asset purchaser when they can file a claim against the predecessor in the bankruptcy court." *Id.* Plaintiffs in this case are not future claimants. In fact, by labelling themselves as known creditors (albeit improperly), they have conceded that their claims arose before the bankruptcy proceeding and may be asserted against Old GM.[26] Thus, *Ninth Avenue* is actually supportive of New GM's position.

As demonstrated in the next sections, the due process cases that Plaintiffs cite are not in the 363 sale context where, as here, claims were transferred to the sale proceeds, and not extinguished.

3. Plaintiffs' Claims Were Not Ascertainable In the 363 Sale Context

It is well-settled law that a debtor's general ledger is critical to determining a company's known creditors for 363 sale notice purposes. In their Responses, Plaintiffs identify limited examples in which courts have looked at facts outside a company's general ledger to determine if a claimant was otherwise known to the noticing party.[27] The cases Plaintiffs cite are all distinguishable. They demonstrate that, in circumstances far different from the matter at hand, a claimant may still be "known" to the noticing party without regard to the debtor's books and records: (i) where the claimant affirmatively communicated to the debtor that a claim existed,[28]

[26] Also, this concession is evidenced by the fact that the Economic Loss Plaintiffs unequivocally assert their right to make claims against the GUC Trust and the 363 Sale proceeds. *See* Economic Loss Plaintiffs' Equitable Mootness Brief, at 2-3, 19-22.

[27] Economic Loss Plaintiffs' Opposition, at 26-31, 39-47; Accident Plaintiffs' Brief, at 13-19.

[28] *In re Arch Wireless*, 332 B.R. 241, 254 (Bankr. D. Mass. 2005), *aff'd*, 534 F.3d 76 (1st Cir. 2008); *In re Feldman*, 261 B.R. 568, 576-77 (Bankr. E.D.N.Y. 2001); *Solow Bldg. Co., LLC v. ATC Assocs. Inc*., 175 F. Supp. 2d 465,

(ii) in a proceeding relating to real property where the claimant held a recorded interest in the real property records,[29] (iii) where the debtor had a clearly defined contractual obligation to pay the claimant,[30] or (iv) where an outstanding lawsuit filed by the claimant existed against the debtor.[31]

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), does not support Plaintiffs' position. *Mullane* is not a sale case, nor is it a bankruptcy case. It is a matter that involved extinguishing a claim and the constitutionality of a state statute. In *Mullane*, a trustee bank sent notice by publication to the trust beneficiaries regarding judicial settlement of the trust. *Id*. at 309-10. The notice complied with the New York statutory scheme, but the Supreme Court held that the state statutory scheme of publication notice violated due process. Notably, the trust beneficiaries were *included* in the books and records of the trustee. *Id.* at 318-19. Moreover,

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471-72 (E.D.N.Y. 2001); *Brunswick Hosp. Ctr., Inc. v. New York Dep't of Health* (*In re Brunswick Hosp. Ctr*.), No. 892-80487-20, 1997 Bankr. LEXIS 2184, at *13-*14 (Bankr. E.D.N.Y. Sept. 12, 1997).

[29] *Koepp v. Holland*, 688 F. Supp. 2d 65, 92 (N.D.N.Y. 2010), *aff'd*, 2014 U.S. App. LEXIS 22108 (2d Cir. Nov. 21, 2014); *Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791, 800 (1983); *In re Feldman*, 261 B.R. 568, 576 -77 (Bankr. E.D.N.Y. 2001); *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 297 (1953).

[30] For example, in *In re Drexel Burnham Lambert Group Inc.*, 151 B.R. 674, 680 (Bankr. S.D.N.Y. 1993), *aff'd*, 157 B.R. 532 (S.D.N.Y.), the debtor executed an unconditional guaranty in favor of the claimant. In analyzing the distinction between known and unknown creditors in the bar date context, the court made the following observations: (i) "[r]easonable diligence in ferreting out known creditors will, of course, vary in different contexts and may depend on the nature of the property interest held by the debtor," (ii) "[w]hat is reasonable depends on the particular facts of each case," and (iii) a "debtor need not be omnipotent or clairvoyant." *Id.* at 680-81. In addition, "[o]bviously, a debtor need not notify all entities with which it has had contractual relations." *Id*. at 682. However, "[w]hen comparing a guaranty to any other contract in which a debtor is a party, we conclude that the obligation under an unconditional guaranty puts the guarantor on continuing notice that a contingent claim exists for the payment of a debt." *Id.* A claim based on an unconditional guaranty is obviously very different from the types of claims that Plaintiffs allege here.

The other cases of this ilk that Plaintiffs cite are similarly distinguishable. *See Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988), on remand, *Matter of Estate of Pope*, 808 P.2d 640 (1990) (in non-bankruptcy proceeding concerning Oklahoma probate laws, where only publication notice was given, hospital that provided extended services to decedent immediately prior to his death was a known creditor and therefore entitled to actual notice of deadline to assert a claim); *In re Thomson McKinnon Secs. Inc.*, 130 B.R. 717, 720 (Bankr. S.D.N.Y. 1991) (customer who purchased securities from debtor, but never received the securities, was a known creditor as reflected on the debtor's books and thus entitled to actual notice of the bar date).

[31] *Nat'l Pipe & Plastics, Inc. v. N.P.P. Liquidation Co*., No. 96-1676 (PJW), No. 96-1676 (PJW), 2000 WL 33712292, at *32 (Bankr. D. Del. Sept. 25, 2000).

there were only a limited number of beneficiaries, and the transaction irrevocably affected their pecuniary rights. *Id.*

Here, in contrast, there are millions of vehicle owners at issue, they were not included on Old GM's general ledger, they had not commenced litigation against New GM with respect to the ignition switch, the 363 Sale did not strip them of any rights, and they had no direct rights against New GM at the time of the 363 Sale. In fact, as noted, the 363 Sale gave Plaintiffs an opportunity for a recovery from the sale proceeds that they would not have had if the 363 Sale did not go through.

Louisiana Department of Environmental Quality v. Crystal Oil Co. (*In re Crystal Oil Co.*), 158 F.3d 291 (5th Cir. 1998), a case cited by Plaintiffs (*see* Economic Loss Plaintiffs' Opposition, at 28, 39), actually supports New GM's position that Plaintiffs were unknown creditors entitled to publication notice only. In *Crystal Oil*, the Fifth Circuit affirmed the bankruptcy court's holding that the Louisiana Department of Environmental Quality (LDEQ) was an unknown creditor with respect to an environmental liability claim arising from a release at a site owned by the debtor. *Id.* at 297-98. The Fifth Circuit so held even though prior to the debtor's bankruptcy (1) the debtor received a phone call from LDEQ investigating the site, (2) the debtor erroneously informed LDEQ that it had no connection to the site (it was a previous owner of the site); and (3) after the inquiry from LDEQ, the debtor's security/environmental compliance officer drafted an internal memo stating "[y]ou may want to use caution in releasing any information as there could be environmental problems." *Id.* at 293-94, 296-98. The court's holding demonstrates that a governmental and internal company investigation into a possible

claim, without more, is not sufficient to make a claim "reasonably ascertainable" or "known."[32] *Crystal Oil* also further debunks Plaintiffs' imputation argument.

In re Interstate Cigar Co., 150 B.R. 305 (Bankr. E.D.N.Y. 1993), is similarly of no help to Plaintiffs. In that case, there was no question that the debtor knew it had a liability to the Pension Benefit Guaranty Corporation ("**PBGC**") and, presumably, the books and records reflected that claim. The creditors committee sought to expunge the claim as being untimely, while acknowledging that PBGC's claim was known to the debtor at the time of the bankruptcy filing. *Id*. at 310. It nevertheless contended that notice of the bar date was proper because, based on the ERISA statutory scheme, it had provided notice to the plan administrator (who had the obligation to report bankruptcy events to PBGC), and that was sufficient. *Id*. at 309. The court rejected that argument, holding that PBGC should have received direct notice. *Id.* at 309-10. *Interstate Cigar* involved an indisputably known creditor as reflected on the debtor's books, and is therefore readily distinguishable from Plaintiffs' contentions.

Folger Adam Security, Inc. v. DeMatteis/MacGregor, JV, 209 F.3d 252 (3d Cir. 2000), is also readily distinguishable. In *Folger*, the Third Circuit did not address whether the claimant was known or reasonably ascertainable to the debtor. There, a notice of auction provided that a 363 sale would be free and clear of all liens, claims and interests. *Id.* at 265. The primary issue in the case was whether "interests" as used in Section 363(f) of the Bankruptcy Code included affirmative defenses held in connection with a contract dispute. The Third Circuit found that it did not, and that such defenses could not be extinguished in a Section 363(f) sale. Here,

[32] The case law is clear that "reasonably ascertainable" does not mean "reasonably foreseeable." *Chemetron Corp. v. Jones*, 72 F.3d 341, 347 (3d Cir. 1995); *In re XO Commc'ns. Inc.*, 301 B.R. 782, 793 (Bankr. S.D.N.Y. 2003) (citing *Chemetron*). Creditors will be deemed "unknown even if they "could be discovered upon investigation, [but] do not in due course of business come to [the] knowledge [of the debtor.]" *Mullane*, 339 U.S. at 317. Plaintiffs are such unknown creditors.

Plaintiffs' claims (which are not affirmative defenses) are clearly encompassed within the term "interests" as used in Section 363(f).[33]

The Accident Plaintiffs' reliance on *Zurich Am. Ins. Co. v. Tessler (In re J.A. Jones, Inc.)*, 492 F.3d 242 (4th Cir. 2007) (Accident Plaintiffs' Brief, at 14) is likewise misplaced. In *J.A. Jones*, a bar date case, the debtor was a general contractor who worked on the interstate highway where an accident occurred. *Id.* at 245. The court held that the estate of one of the victims was a "known" creditor to the debtor even though the estate had not yet filed a lawsuit prior to the bar date (*id.* at 252-53) because, among other reasons, prior to its bankruptcy, (i) the debtor had extensive information about the well-publicized, horrific accident and reported to its insurer its expectation that the accident would result in a claim against the debtor (*id.* at 246-47), (ii) the insurer took extensive steps to prepare for the litigation that it expected to ensue (*id.* at 251-52), and (iii) the debtor's project manager assigned to the construction project where the accident occurred testified that the debtor "anticipated" a lawsuit based on the accident (*id*. at 247, 251). There is nothing in the stipulated factual record that is anything like the facts in *J.A. Jones*.

Decisively, the Economic Loss Plaintiffs have not provided this Court with any applicable precedent that supports a finding that they were "known" to Old GM at the time of the 363 Sale. New GM is not aware of any such precedent.

B. The Publication Notice Approved By The Court And Served By Old GM Satisfied Due Process For Unknown Creditors Such As Plaintiffs

1. The Publication Notice Encompassed Plaintiffs' Claims

Old GM gave publication notice of the 363 Sale in accordance with the Sale Procedures Order,[34] and thus, Old GM vehicle owners received constructive notice of the 363 Sale.[35] The

[33] *See Gen. Motors*, 407 B.R. at 501-505.

[34] Plaintiffs have not moved to vacate the Sale Procedures Order (which approved the form of Publication Notice).

Publication Notice listed a website where GM's Sale Motion and the Sale Agreement were available. These documents made clear that the purchaser was only taking responsibility for certain defined "Assumed Liabilities" and was seeking protection from all other Old GM liabilities, including successor liability claims. Therefore, all Old GM vehicle owners had notice that the purchaser would not assume a wide-range of liabilities that Old GM arguably owed to them, including the claims that Plaintiffs now assert. All Old GM vehicle owners had the opportunity to object to the 363 Sale. As discussed in New GM's Opening Brief, and not refuted by the Responses, Old GM's wide-spread notice, and the extensive media attention to this matter, was sufficient to engender numerous objections, including those made on behalf of vehicle owners (similarly situated to Plaintiffs) by government agencies, non-profit organizations, and plaintiffs' attorneys. In particular, the issue of successor liability in the context of a vehicle owner who had not yet experienced any problem with his car was explicitly raised and argued—but rejected by this Court. *See* New GM Opening Brief, at 41-43. These objectors also argued due process concerns that consumers might not understand the full impact of the 363 Sale. *Id.* This Court overruled those arguments as well.

2. For A Sale Notice, There Is No Requirement That A Debtor Identify Every Type Of Putative Claim And How That Claim May Be Impacted In A Section 363 Transaction

In the bar date context, the Fifth Circuit recently held, as a general matter, that claim-specific notice is not required for unknown creditors. Specifically,

> We have never required bar date notices to contain information about specific potential claims. To the contrary, we have determined that publication in the national edition of the *Wall Street Journal* discharges the pre-confirmation claims of unknown creditors. *In re Crystal Oil*, 158 F.3d at 295, 297–98.

[35] Plaintiffs' argument that a claimant's knowledge of a debtor's bankruptcy proceeding does not relieve the debtor of providing notice of a 363 Sale (Economic Loss Plaintiffs' Opposition, at 31), is irrelevant since (i) they do not contend that their purported class was unaware of the 363 Sale, (ii) notice of the 363 Sale was given and widely published, and (iii) the 363 Sale was widely reported in the media.

> Furthermore, neither the Bankruptcy Code nor Rules require bar date notices to apprise creditors of potential claims. *See* Fed. R. Bankr. P. 2002(f) (requiring only that notice state "time allowed for filing claims").
>
> We hold that because a bar date notice need not inform unknown claimants of the nature of their potential claims, Placid's notices were substantively sufficient to satisfy due process. Placid's notice informed claimants of the existence of the bankruptcy case, the opportunity to file proofs of claim, relevant deadlines, consequences of not filing a proof of claim, and how proofs of claim should be filed. We decline to articulate a new rule that would require more specific notice for unknown, potential asbestos claimants.

See In re Placid Oil Co., 753 F.3d 151, 158 (5th Cir. 2014). The same reasoning applies here.

If anything, claimants in the bar date/plan discharge context (where their claims can be extinguished) may be entitled to more claim-specific notice than claimants in the 363 sale context (where the claims are not discharged, but attach to the proceeds of sale). But even in the bar date notice context, claim-specific notice is generally not required. In *In re Jamesway Corp.*, Nos. 95B 44821 (JLG), 96/8389A, 1997 WL 327105 (Bankr. S.D.N.Y. 1997), for example, plaintiffs who sought class certification in connection with alleged violations of the WARN Act, argued that the bar date notice was "inadequate because it [did] not specifically advise former employees that they might need to file WARN Act claims." *Id.* at *9. The court disagreed, finding that the debtor "was not bound to advise the employees of the exact nature of their claims." *Id.* at *9; *see also In re Agway, Inc.*, 313 B.R. 31, 43 (Bankr. N.D.N.Y. 2004) ("The Debtors' obligation to provide Empire notice of the Bar Date does not require them, as Empire otherwise argues, to spoonfeed Empire—one of literally thousands of creditors in this case—the nature and amount of its contingent claim against them.").

This issue was specifically raised in Old GM's bankruptcy case in connection with an objection to class proofs of claim ("**Saturn Claim Objection**") filed by a putative class of Saturn owners ("**Saturn Plaintiffs**"). The claims allegedly arose from the timing chain in

certain Saturn vehicles, with the Saturn Plaintiffs alleging causes of action (similar to those asserted by Plaintiffs here) for unjust enrichment, breach of warranty of merchantability and violations of various consumer protection statutes.[36] Old GM argued that "the notice [provided] was adequate and the debtors are not obligated to provide every unknown claimant with a notice that sets forth the bases for every potential claim they could have against the estates."[37] At the hearing on the Saturn Claim Objection, this Court approved the publication notice given:

> [T]he quality of the notice here is not even debatable. The notice within the United States was unquestionably satisfactory. And as I noted before, . . ., the filing of the GM Chapter 11 case was well known. Paraphrasing Judge Kaplan's observation back in July 2009, on a stay application from my 363 decision, the filing of the GM Chapter 11 case was an event of which no sentient American was unaware.
>
> Here, the class is made up of U.S. citizens who are car owners and who, it may reasonably be inferred, watch television, listen to the radio, read newspapers and knew any problems that had infected GM and had resulted in GM's bankruptcy. It would be incorrect to argue that they did not have notice. I'm not persuaded by the distinction that I heard in oral argument that I should consider notice of GM's bankruptcy to be an unsatisfactory substitute for telling people that they have problems in their vehicles with respect to their bad timing chains. If anyone had a problem with a failed timing chain, he or she would know that and could easily file a regular proof of claim in this case.

Hr'g Tr. 41:16-42:10, February 10, 2011.[38]

Plaintiffs do not cite a single case, and New GM is not aware of any, in which the court held that, in a 363 sale context, an unknown creditor was entitled to claim-specific notice. All of the notices attached as exhibits to the Economic Loss Plaintiffs' Opposition involved bar date notices in toxic tort cases. *See* discussion in Section I.B.3, *infra*. Plaintiffs' argument about the

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[36] *See Debtors' Objection to Proofs of Claim Nos. 16440 and 16441 filed by Michael A. Schwartz*, dated December 17, 2010 [Dkt. No. 8179] (**Reply Appendix, Exh. "D"**).

[37] *Debtors Reply in Support of Objection to Proofs of Claim Nos. 16440 and 16441 filed by Michael A. Schwartz*, dated January 31, 2011 [Dkt. No. 8973], ¶ 17 (**Reply Appendix, Exh. "E"**).

[38] Relevant excerpts of the February 10, 2011 transcript are contained in the **Reply Appendix as Exhibit "F."**

adequacy of the 363 sale notice provided is also based on a faulty premise. There were no claims being "taken away" from Plaintiffs as part of the 363 Sale.

Schroeder v. City of New York, 371 U.S. 208 (1962), and *Covey v. Town of Somers*, 351 U.S. 141 (1956), offer no support for Plaintiffs. Neither case concerns a bankruptcy or a 363 sale. In addition, in both cases, the plaintiffs were known to have an interest in property and there was an attempt to extinguish their rights. *Schroeder* was a condemnation proceeding where appellant's property interest was clearly known. *Covey* concerned the foreclosure of a tax lien, the appellant was known by town officials to be incompetent, and the Supreme Court found that notice on a known incompetent did not satisfy due process. *Covey*, 351 U.S. at 146. Neither case supports the proposition that publication notice in the 363 Sale context has to contain claim specific information for unknown creditors.

Plaintiffs' reliance on *Travelers Casualty & Surety Co. v. Chubb Indemnity Insurance Co.* (*In re Johns-Manville Corp.*), 600 F.3d 135 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 644 (2010) ("***Manville IV***") underscores the absence of authority supporting Plaintiffs' position. In *Manville IV*, the court did not hold that the debtor should have given claim-specific notice to Chubb, nor did the court suggest that some other form of notice could have barred Chubb's claims against Travelers. Instead, the court held that "Chubb was not an interested party in Manville's chapter 11 proceedings" (*id.* at 157), and that the bankruptcy court did not have jurisdiction to enjoin the types of claims asserted by Chubb against non-debtor Travelers. Chubbs' claims (unlike the situation for an injunction arising from a 363 sale) were not part of or related to the *res* of the debtor's bankruptcy estate. *Id.* at 152-53. The court found that the types of claims that Chubb brought against Travelers were unimaginable at the time the bankruptcy court issued its orders years before, that no one involved with the orders contemplated these

types of claims or that they would be forever barred, and that the claims were not encompassed by the terms of the prior notices/orders. *Id*. at 156-58.

Unlike *Manville IV*, Plaintiffs assert that Old GM should have given them better notice of the 363 Sale—not that no notice could have been provided. Thus, Plaintiffs' position is diametrically opposite to Chubb's situation in *Manville IV*. Moreover, nothing in *Manville IV* even remotely suggests that "unknown" claimants should be given claim-specific notice. Also, unlike *Manville IV*'s unimaginable claims, successor liability claims and other consumer-oriented claims were not only imagined, they were expressly addressed at the Sale Hearing and ruled upon. Lastly, as contrasted to *Manville IV*, the no successor liability finding made in the context of the 363 Sale was related to a sale of the res of Old GM's bankruptcy estate.[39]

Plaintiffs' reliance on *Tillman v. Camelot Music, Inc.*, 408 F.3d 1300 (10th Cir. 2005) is also unavailing. *Tillman* is a plan discharge case and not a 363 sale notice case. In addition, the Tenth Circuit did not hold that notice to an "unknown" claimant had to contain any specific language to apprise it of its claims. *Tillman* concerned a debtor that took life insurance policies out on its employees. The debtor knew that the policies existed and that its employees held an interest in them, but actively prevented the employees and their families from discovering the policies. The court ultimately found that "[b]ecause [the debtor] actively concealed the existence of the [insurance] policies from all potential plaintiffs, publication by notice did not discharge

[39] The GUC Trust's reliance on *In re Hexcel Corp.*, 239 B.R. 564 (N.D. Ca. 1999) is also misplaced. *Hexcel* concerned a plan discharge, and not a 363 sale. In addition, *Hexcel* involved a contribution claim arising from a class action toxic tort case which was filed years after the debtor's plan was confirmed. There, the court found that a claim should not be discharged "if the parties could not reasonably contemplate the potential existence of the future claim prior to the reorganization." *Id.* at 567. That is not Plaintiffs' contention here.

Plaintiff's claim." *Id.* at 1308. *Tillman* is thus inapposite; it holds essentially that a fraud-doer (who was responsible for giving notice) should not profit from his bad acts.[40]

Plaintiffs' other cited cases relating to adequate notice (all claim extinguishment cases) are distinguishable from the controversy herein. For example, in *Citicorp Mortgage, Inc. v. Brooks (In re Ex-Cel Concrete Co.)*, 178 B.R. 198, 205 (B.A.P. 9th Cir. 1995), a known secured creditor did not get notice of a sale and the sale proceeds were insufficient to satisfy its lien. In *National Pipe & Plastics, Inc. v. N.P.P. Liquidation Co.*, No. 96-1676 (PJW), 2000 WL 33712292, at *10 (Bankr. D. Del. Sept. 25, 2000), the court found that the creditor was clearly a known creditor (even though not scheduled by the debtor), having commenced a lawsuit against the debtor pre-petition, and its claim, if allowed, would have ranked among the debtor's twenty largest creditors. In *Doolittle v. County of Santa Cruz (In re Metzger)*, 346 B.R. 806, 819 (Bankr. N.D. Cal. 2006), a county with a covenant as to land development was a known creditor entitled to direct notice that was not provided. In *Acevedo v. Van Dorn Plastic Machinery Co.*, 68 B.R. 495 (Bankr. E.D.N.Y. 1986), the debtor was aware that there would be an indemnity claim filed against it and, thus, should have given notice of the bar date to such claimant.

Other cases cited by Plaintiffs that actually involved 363 sales are not relevant because they purported to sell property that did not belong to the debtor in the first instance, so Section 363(f) was not applicable. *See In re Polycel Liquidation, Inc.*, No. 00-62780, 2006 WL 4452982, at *9, *11 (Bankr. D. N.J. Apr. 18, 2006), *aff'd*, 2007 WL 77336 (D.N.J. Jan. 8, 2007); *Metal Founds. Acquisition, LLC v. Reinert (In re Reinert)*, 467 B.R. 830, 831-32 (Bankr. W.D.

[40] *DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 871 F. Supp. 2d 143 (E.D.N.Y. 2012), *rev'd*, 747 F.3d 145 (2d Cir. 2014 is similar to *Tillman* in that it is a plan discharge case. There, it was alleged that the debtor was involved in an antitrust conspiracy and the claimant was not aware of it and could not have learned of it "through the exercise of reasonable diligence until after the confirmation of the reorganized plan." *DPWN Holdings*, 871 F. Supp. 2d at 157. It is worth noting that the Second Circuit reversed and remanded the decision of the district court because it was "skeptical of [the claimant's] contention that it was not aware of, or with reasonable diligence could not have become aware of, its antitrust claim in time to assert it in the bankruptcy proceeding." *DPWN Holdings*, 747 F.3d at 152.

Pa. 2012). The remaining cases cited by Plaintiffs did not hold that unknown creditors were entitled to claim-specific notice. *See Savage Industries*, 43 F.3d at 721-22 (holding that purchaser did not obtain debtor's assets "free and clear" where debtor gave no notice, including publication notice, of the sale); *In re Grumman Olson Indus., Inc.*, 467 B.R. 694 (S.D.N.Y. 2012) (no notice could have been given to future creditor with no connection to the debtor who was injured after plan confirmation).

3. The Toxic Tort Cases In the Bar Date Context Are Inapposite

The cases that Plaintiffs cite, *Waterman Steamship Corp. v. Aguiar (In re Waterman S.S. Corp.)*, 141 B.R. 552 (Bankr. S.D.N.Y. 1992), *aff'd in part, vacated and remanded*, 157 B.R. 220 (S.D.N.Y. 1993), and *Gabauer v. Chemtura Corp. (In re Chemtura Corp.)*, 505 B.R. 427 (S.D.N.Y. 2014), do not support Plaintiffs' contentions that they were entitled to direct mail notice. In those cases, the alleged victims were clearly unknown creditors and they were entitled to publication notice only. The issue in those cases was the form of publication notice. However, *Waterman* and *Chemtura* are totally different situations from the one at issue. They are bar date cases involve debtors that knew that they had a toxic tort problem that needed to be addressed in their plan. The purpose of the bar date and discharge publication notice was to make sure that claims were filed by victims who may not have known that they were exposed,[41] so that their claims could be extinguished under the debtors' plan. The notices were not sent out, as here, in the context of a business facing immediate liquidation if its assets were not promptly sold. Rather, the notices were part of the more deliberate claims resolution process, central to the plan process, where the consequences of failing to timely file a claim were fatal to the creditor. The broad notice provisions may well have been beyond what was strictly required for

[41] As the *Burton* court noted, every vehicle owner knows that there may ultimately be a repair issue relating to their vehicle. *See Burton*, 492 B.R. at 403.

due process purposes. But, like in a class action settlement, they were prepared to be overly inclusive to ensure that all possible claimants to a settlement fund have an opportunity to participate therein.

In contrast, the purpose of the 363 Sale notice was far different. The only unknown in *Waterman* and *Chemtura* was which persons would be impacted by the latent disease—in other words the identity of the claimants themselves.[42] Here, Old GM had not determined that there was a pervasive ignition switch safety problem and that claims would inevitably be brought against it.

The same fact pattern in *Waterman* and *Chemtura* is present in the other toxic tort cases that Plaintiffs cite. In *In re Tronox Inc*., Case No. 09-10156 (Bankr. S.D.N.Y. May 28, 2009), the debtors were liable for various legacy liabilities assumed in connection with a spinoff from their former parent company, and those legacy liabilities were known to the debtor and a primary reason for the bankruptcy filing. Tronox was aware of approximately 120 tort suits related to such liabilities, but it did not know all potential claim holders. That is not the situation here.

Similarly, in *In re Freedom Industries*, Case No. 14- 20017 (Bankr. S.D. W. Va. Jan. 17, 2014), the debtor was responsible for a catastrophic chemical release. Within weeks of the spill, numerous lawsuits were filed causing Freedom Industries to file for bankruptcy. Although Freedom Industries did not know who precisely was damaged by the chemicals it had released, it unquestionably knew that harm was inflicted on people and property impacted by the release,

[42] In *Waterman*, based on well-documented, well-publicized and well-known industry wide asbestos problems stretching back decades, the debtor unquestionably knew that the asbestos on board its vessels would inflict harm on persons who came into contact with it. 141 B.R, at 557. In *Chemtura*, the debtor also unquestionably knew that it faced an onslaught of litigation relating to diacetyl based on a wave of claims filed against it (and other companies) years before it filed for bankruptcy. In its bankruptcy, Chemtura told the court that "the diacetyl-related claims are potentially among the largest unsecured claims pending against the estate." *See Chemtura's Memorandum of Law in Support of Chemtura Corporation's Motion for a Temporary Restraining Order and Preliminary Injunction Staying the Diacetyl Litigation and Future Diacetyl Actions, Chemtura Corp. v. Smith (In re Chemtura Corp.)*, Adv. Proc. No. 09-01282-REG (Bankr. S.D.N.Y. June 17, 2009) [Dkt. No. 3], at 1 (**Reply Appendix, Exh "G"**).

and that litigation was already underway. Again, the debtor had actual knowledge of the putative claims that were central to its case, but not the identity of the claimant. Thus, *Freedom Industries* is not analogous.

C. It Would Have Been Impractical And Unduly Expensive For Old GM To Identify In Its Notice Every Specific Type Of Putative Claim Against It And How That Claim Might Be Impacted In The 363 Sale

Plaintiffs' suggestion of an unwieldy, expensive and time-consuming notice was simply not required or appropriate. Issuing a notice that identifies every specific potential type of putative unknown claim and how that claim may be impacted by a 363 sale transaction makes little sense. There also would have been a dramatic increase in the cost of mailing and publishing such a notice, and a critical delay in creating and serving such a notice. The resultant delay and expense would have caused further deterioration of the Old GM estate. Due process does not require such an unworkable or wasteful notice procedure, particularly where such extensive notice would not have had any impact on the outcome of the 363 Sale. Courts have routinely held that bankruptcy judges have an obligation to avoid wasteful notice procedures that diminish the resources available to the estate. *See Vancouver Women's Health Collective Soc. v. A.H. Robins Co., Inc.*, 820 F.2d 1359, 1364 (4th Cir. 1987) ("In bankruptcy, the court has an obligation not only to the potential claimants, but also to existing claimants and the petitioner's stockholders. The court must balance the needs of notification of potential claimants with the interest of existing creditors and claimants. A bankrupt estate's resources are always limited and the bankruptcy court must use discretion in balancing these interests when deciding how much to spend on notification."); *see also* Sale Procedures Order, ¶ C ("The Purchased Assets are 'wasting assets' that will not retain going concern value over an extended period of time. As such, the Debtors' estates will suffer immediate and irreparable harm if the relief requested in the Motion is not granted on an expedited basis consistent . . . ."); *id.*, ¶ E (contemplating that there

could be contingent warranty claims and they would be treated as unknown creditors for 363 Sale notice purposes); *see also Wolff* Opinion, at 21-22 (discussing due process concerns, and finding that the "circumstances of the bankruptcy necessitated the form of the sale; Old Carco could not meet all of its obligations and was rapidly losing value . . . .").

D. Plaintiffs Cannot Demonstrate That They Were Prejudiced By The Publication Notice

1. The Case Law Is Clear That A Showing Of Prejudice Is Required To Establish A Due Process Violation In The Bankruptcy Sale Context

As contrasted to Plaintiffs' inapposite cases, New GM's Opening Brief provided specific, on-point, authority showing that prejudice is required to establish a due process violation in the bankruptcy sale context. Plaintiffs' attempt to distinguish those cases fails.

For example, *Caldor* confirms that a showing of prejudice is required for a party to establish that it has been deprived of due process:

> Even if a party is not afforded prior notice, a subsequent finding against it on the merits of the underlying litigation can overcome its objection on due process grounds. . . . Thus, in addition to establishing that the means of notification employed by Caldor was inadequate, Pearl must demonstrate ***that it was prejudiced*** because it did not receive adequate notice.

In re Caldor, Inc., N.Y., 240 B.R. 180, 188 (Bankr. S.D.N.Y. 1999), *aff'd sub nom., Pearl-Phil GMT (Far E.) Ltd. v. Caldor Corp.*, 266 B.R. 575 (S.D.N.Y. 2001) (emphasis added). While the plaintiff in *Caldor* had the opportunity to later contest the wind-down-order after it was issued, the court did not indicate that the prejudice requirement was impacted by that fact. In fact, in the district court affirmance, the principle was again enunciated: "[E]ven if notice was inadequate, the objecting party must demonstrate ***prejudice*** as a result thereof." *Pearl Phil*, 266 B.R. at 585 (emphasis added); *see also Wolff* Opinion, at 21, 23 ("Mr. Wolff requests modification of the Sale Order based on due process concerns possibly related to the speed of the sale, but his legal argument would not have prevailed even had he made a timely objection before entry of the Sale

Order" and "Mr. Wolff challenges the sale process on a general level, but absent New Chrysler's involvement in this case, Old Carco would have been in no better position to pay Mr. Wolff's claim than it is now.").[43]

Plaintiffs' criticism of *In re Edwards*, 962 F.2d 641 (7th Cir. 1992), is misguided. As demonstrated on pages 57-59 hereof, unlike the claimants in *Edwards*, Plaintiffs had no individualized claim. Even if they did, unlike in *Edwards*, they are protected by their claim attaching to the proceeds of sale.[44]

Plaintiffs' critique of *In re Paris Industries* misses the mark; the case is on point:

> The question is whether their lack of notice [of the bankruptcy court's order of sale] somehow prevents the bankruptcy court from issuing its injunction to enforce the prior order and requires it to defer to Illinois state proceeding. I conclude that [plaintiffs] were not ***prejudiced*** by their lack of notice. . . . Since they have shown no prejudice, there was no need for the bankruptcy court to vacate its earlier order as it applies to [plaintiffs].

Paris Mfg. Corp. v. Ace Hardware Corp. (In re Paris Indus. Corp.), 132 B.R. 504, 509-10 (D. Me. 1991) (emphasis added). While Plaintiffs are correct that the court noted in *Paris Industries* that the plaintiffs "lost nothing by virtue of the sale,"[45] it is also true that the *Paris Industries* court found that plaintiffs "have made no showing that, if they had been notified and 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*. at 510. A lack of economic hardship is one form of showing no prejudice, and thus no due process violation. Indeed, the *Paris Industries* court made clear that the no-notice argument does not serve as a justification for imposing

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[43] Plaintiffs' attempt to distinguish *Caldor* on the grounds that the "no prejudice" argument is only applicable where there was no deprivation of property makes little sense. The "actual deprivation" discussion precedes the due process analysis, which is contained in a separate section of the opinion.

[44] Plaintiffs cited no case law that holds *Edwards* has somehow been rejected in the Second Circuit.

[45] Another court later clarified that the plaintiffs remained without recovery on their claim when the cash from the bankruptcy sale was subsequently distributed to creditors in accordance with bankruptcy law. *LTV Corp. v. Back (In re Chateaugay Corp.)*, 201 B.R. 48, 64 (Bankr. S.D.N.Y. 1996).

successor liability, which is exactly what Plaintiffs are trying to do here. *Id.* at 510 & n.13 (citing *Conway v. White Trucks*, 885 F.2d 90, 96 (3d Cir. 1989)).

The GUC Trust's passing attempt to distinguish the case law requiring prejudice by pointing to the harmless error rule under Fed. R. Bankr. Proc. 9005 is off-the-mark. Fed. R. Bankr. Proc. 9005, which incorporates Fed. R. Civ. Proc. 61, allows a court to correct an error in a prior order if the correction does not affect substantial rights. Plaintiffs have not sought to invoke Rule 61 and neither has New GM. The GUC Trust's attempt to conflate two separate concepts—harmless error standard, which is not sought, with the prejudice element of a bankruptcy sale due process argument—should be rejected.

Finally, the GUC Trust undermines its argument when it cites to *In re Bartle*, which supports New GM's position:

> Bartle did not indicate to the district court what argument or evidence he would have presented in opposition to the government's motion. Even in his briefing to this court he has not done so. Instead, he has characterized his appeal as presenting a purely procedural argument. ***But procedures do not exist for their own sake; they exist to protect the parties' rights.*** We cannot say that Bartle's substantial rights were affected by an erroneous deprivation of an opportunity to be heard on the government's motion to dismiss ***when he has not set forth what he would have brought to the court's attention in opposition to that motion***.

In re Bartle, 560 F.3d 724, 730 (7th Cir. 2008) (emphasis added).

2. Plaintiffs Incorrectly Contend That Prejudice Is Not Necessary To Establish A Due Process Violation In The Bankruptcy Sale Context

Plaintiffs rely on the wrong standard when attempting to refute New GM's position that the party must show that it suffered prejudice as a result of an allegedly insufficient notice to be deprived of due process. Plaintiffs argue that no such showing of prejudice is required, relying heavily on inapposite, non-bankruptcy cases. Economic Loss Plaintiffs' Opposition, at 36-37. Since the Fifth Amendment due process analysis is fact- and context-specific, Plaintiffs' non-bankruptcy cases are not persuasive precedent for ignoring the prejudice requirement long

recognized by numerous courts specifically in the bankruptcy sale order context. *See, e.g., J. Andrew Lange, Inc. v. FAA*, 208 F.3d 389, 392 (2d Cir. 2000) ("The due process clause is 'flexible and calls for such procedural protections as the particular situation demands.'") (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)).

3. Plaintiffs' Non-Bankruptcy Cases Are Inapposite

Plaintiffs cite to *Lane Hollow Coal Co. v. Director, Office Of Workers' Compensation Programs, United States Department Of Labor*, 137 F.3d 799 (4th Cir. 1998) (*see* Economic Loss Plaintiffs' Opposition, at 36), which has nothing to do with a bankruptcy sale order, and actually recognizes the prejudice element by the delay in notifying the defendant of its liability. In *Lane Hollow*, the Department of Labor's Benefits Review Board awarded black lung and survivor's benefits to the widow of a former coal miner and directed that liability for these benefits should rest upon an operator who had not been named in the proceeding until more than ten years had passed and was not notified that it had been named for another five years. Given the extraordinary delay in notifying the operator of its potential liability, the court held that the operator had been precluded from mounting a defense because evidence disproving a connection between the mine operation and the lung condition had become unavailable. It is in that context of a two-party dispute (and not in the context of a 363 Sale involving potentially millions of parties) that the Fourth Circuit held that it would "not require a showing of 'actual prejudice' in the sense that there is a reasonable likelihood that the result of this claim would have been different absent the violation." *Id.* at 807.

This case is quite different than *Lane Hollow*. Notably, *Lane Hollow* specifically acknowledged that in other types of due process cases, prejudice is required: "To be sure, there are 'due process' cases in which we require a showing that the error complained of actually

prejudiced the result on the merits, but these cases are of a much different ilk." *Lane Hollow*, 137 F.3d at 808.[46]

Similarly, Plaintiffs cannot rely on *Fuentes v. Shevin,* 407 U.S. 67 (1972), in support of their argument that no prejudice should be required for a due process violation in the context of a bankruptcy sale order. In *Fuentes* (a non-bankruptcy case), two individuals bought household goods under installment contracts. After they defaulted, the sellers—under applicable state statutes—recovered the goods without any notice to the purchasers. The Supreme Court found that the state statutes authorizing summary seizure of goods by state agents with no notice violated the due process clause under the Fourteenth Amendment. It was in that context—the constitutionality of a state statute and the seizure of property without notice—that the Supreme Court noted the right to be heard does not depend upon an advance showing that one will surely prevail at the hearing.

In the same vein, the GUC Trust's reliance on *Mullane v. Central. Hanover Bank & Trust Co.* for the proposition that no prejudice should be required for a due process violation in the bankruptcy sale context is misguided. Similar to *Fuentes*, the Supreme Court in *Mullane* analyzed the constitutionality of a state statute. Moreover, *Mullane* is not a bankruptcy case, and it never addressed the prejudice requirement because, like *Fuentes*, the case is about the general inadequacy of a statutory notice requirement, not its application to a particular claimant.

Plaintiffs' reference to *New Concept Housing, Inc. v. Poindexter (In re New Concept Housing, Inc.)*, 951 F.2d 932, 942 (8th Cir. 1991) (*see* Economic Loss Plaintiffs' Opposition, at

[46] *Lane Hollow* has not been cited in a single bankruptcy decision published on LEXIS or Westlaw. *Consolidated Coal Co. v. Borda*, 171 F.3d 175 (4th Cir. 1999), is another black lung case and inapplicable for the same reasons as *Lane Hollow.* There, the coal mine operator was similarly not timely informed of its liability for black lung benefits awarded to a former coal miner. The court cited to *Lane Hollow* in support of its conclusion that while the award of benefits is affirmed, the operator cannot be held responsible because the 15+ year delay *prejudiced* the operator's opportunity to defend against the allegations.

37), supports New GM's position that, to establish a due process violation, Plaintiffs must show that they would have made a material difference to the outcome of the proceeding. Remarkably, without noting it as such, Plaintiffs cited to the dissent. The majority decision in *New Concept Housing* did not find a due process violation:

> We conclude, however, that failure to give the Debtor notice of the hearing, in this case, constitutes harmless error. . . . Because we believe that the bankruptcy court would have approved the proposed settlement between Claimants and the Trustee even if the Debtor had been given notice and appeared at the hearing, we find that upholding the bankruptcy court's order allowing the Claim and approving the settlement is not inconsistent with substantial justice.

Id. at 937-38.

Finally, the only bankruptcy-related sale case that Plaintiffs cite, *White v. Chance Indus., Inc. (In re Chance Indus., Inc.)*, 367 B.R. 689 (Bankr. D. Kan. 2006), is readily distinguishable. In *Chance*, the defendant bought an amusement ride called the Zipper from a company that later filed for Chapter 11. No future claims fund was established, and the bankruptcy plan did not provide for a future claims representative. The debtor's assets were transferred under the plan to an entity owned by the debtor's equity holder. After the plan was confirmed, a child was injured on the Zipper ride. The court found that the minor's claim was not a "claim" within the meaning of 11 U.S.C. § 101(5). The court could have ended its analysis there. However, in *dictum*, the court observed that even if the minor had a claim, it could not have been constitutionally extinguished because no future claims fund was established and no future claims representative was appointed or provided any notice. The case concerns a post-363 sale accident with a victim who never had any relationship with the debtor. Here, it was up to Old GM, after the 363 Sale, to deal with the future claim representative issue referred to in *Chance*; that was never a New

GM issue. In any event, here, that type of controversy would not have arisen because New GM assumed the type of claim (*i.e.*, a post-sale accident) that was asserted in *Chance*.[47]

4. Plaintiffs Cannot Demonstrate That They Were Prejudiced By The Allegedly Insufficient Notice

Plaintiffs do not even attempt to show that they were prejudiced by the allegedly insufficient notice, nor could they. *See* New GM Opening Brief, at 40-50. The record demonstrates that Plaintiffs' argument on successor liability, including the insufficient notice argument, had been previously made to and rejected by this Court. *See, e.g.*, Hr'g Tr. 59:9-62:12, June 1, 2010 [Dkt. No. 5961] (rejecting Mr. Shane Robley's arguments); *see also id.* at 56:4-25, 62:13-64:24 (rejecting Mr. Deutsch's arguments); *see also* New GM Opening Brief, at 40-50. Plaintiffs completely fail to identify any new fact or legal argument they would have raised to object to the 363 Sale that was not already presented by others and considered but rejected by the Court. *Id.*; *see, e.g.*, *Paris Industries*, 132 B.R. at 510 ("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.").

The Court should reject the Accident Plaintiffs' attempt to introduce a novel, and unsupported concept of "prejudice" in the bankruptcy sale context. They argue prejudice because "they were deprived of a meaningful day in court to argue the true state of affairs with the knowledge that they were injured." Accident Plaintiffs' Brief, at 36. Cases such as *Bartle*

[47] It bears noting that in *Chance*, in reviewing the prepetition relationship test, the court stated that "[t]here must be some connection or nexus between the pre-petition relationship and the pre-petition conduct giving rise to the claim." *Id.*, 367 B.R. at 706. The court then stated, "[i]n other words, the debtor's prepetition conduct (*i.e.* designing, manufacturing and selling an allegedly defective or dangerous product) must be the basis for liability." *Id.* Old GM's designing, manufacturing and selling the allegedly defective vehicles is precisely the conduct that gives rise to the claim of Plaintiffs (or their successors) against Old GM, and is a firm basis to enforce the Sale Order and Injunction against them.

refute their position. Clearly, there were lawyers at the Sale Hearing representing individuals involved in pre-Sale accidents. The issue they presented was whether New GM should assume their claims. Piling on more claims (such as Plaintiffs) would not have increased the likelihood of the Governments assuming all pre-Sale accident claims. Indeed, at some point in the Sale Hearing, they tried to argue (to no avail) the opposite. (*i.e.*, the tort claims were sufficiently small that the Governments should just assume them all). *See* Hr'g Tr. 157:15-165:19, June 30, 2009.[48]

The GUC Trust's citation to *In re Heiney*, 194 B.R. 898 (D. Col. 1996) is irrelevant to the due process/prejudice argument in the sale context. In *Heiney*, the court never addressed the prejudice criteria and it was not a 363 sale case. As always, context is important. In *Heiney*, a request was made for an extension of time to file a non-dischargeability complaint on behalf of a known creditor whom the debtor had failed to provide any notice. The court in *Heiney* reversed the denial of the time extension request based on the facts specific to that case.

Plaintiffs' meritless contentions should be put in context. At the time of Old GM's bankruptcy, in the face of Old GM having to liquidate while being insolvent by billions of dollars, Plaintiffs presumably contend that they would have wanted to make their tarnished GM-brand argument (asserting an unsecured claim for monetary damages) at the 363 Sale Hearing.[49] But for what purpose? To oppose the 363 Sale to seek a better deal knowing if the deal failed or if the sale was delayed any further, they would get nothing? Others (like numerous state attorneys general, consumer groups, plaintiffs lawyers, *etc.*), in the exact same position as

[48] It should not be forgotten that the Governments were insisting on a very firm and short deadline by which the Court would have to approve the 363 Sale. *See Gen. Motors*, 407 B.R. at 484-85. If the deadline was not met, the Governments reserved the right to withdraw their offer. The Court was not willing to play "Russian roulette." *See id.* at 493. Time was of the essence, and protracted creditor negotiations would have been unavailing. The Governments were firm on the type of liabilities New GM was willing to assume, and the economic loss claims and the pre-363 Sale accident claims asserted by Plaintiffs were not among them.

[49] As of such time, the bankruptcy filing and uncertainty whether Old GM would liquidate had, in some respects "tarnished" its brand already.

Plaintiffs, tried that precise litigation strategy and failed. Judge Kaplan referenced this point when he denied a stay of the Sale Decision sought by the Ad Hoc Committee of Asbestos Personal Injury Claimants. *See In re Gen. Motors Corp.*, No. M. 57(LAK), 2009 WL 2033079, at *1 (S.D.N.Y. July 9, 2009) ("[T]his case evokes the old adage that one ought to be careful of what one wishes. I say that because there is every reason to believe that the individuals the Committee represents would be worse off, and certainly not better off, if it were to obtain a stay than if a stay were denied.").

II. REMEDIES THRESHOLD ISSUE: IF A REMEDY IS WARRANTED, THE COURT SHOULD NOT REVOKE THE SALE ORDER AND INJUNCTION, BUT INSTEAD SHOULD ALLOW PLAINTIFFS TO SEEK A RECOVERY FROM THE PROCEEDS OF THE 363 SALE

Assuming *arguendo* that Plaintiffs can establish a due process violation that caused them prejudice, which they cannot, revoking the Sale Order and Injunction as to Plaintiffs is not the proper remedy. The cases Plaintiffs cite in support of that remedy are all distinguishable. For the most part, those cases involved situations where the bankruptcy court's order ***completely extinguished*** the creditor's property interest. Here, in contrast, Plaintiffs had no property interest that was extinguished.[50] To the extent they had any claim, it was against Old GM and they retained that claim after the 363 Sale.[51]

According to Plaintiffs, they are not seeking to vacate the Sale Order and Injunction; they just do not want that Order to apply to them. But were the Court to strip New GM of the protections contained in the Sale Order and Injunction, including the "no successor liability"

[50] The Sale Order and Injunction found that there was no viable successor liability claim. Even if it did exist, the successor liability claim belonged to the bankruptcy estate, not Plaintiffs, and Old GM, as the holder of that claim released it as part of the 363 Sale.

[51] *See Gen.* Motors, 407 B.R. at 474 ("GM's assets simply are being sold, with the consideration to GM to be hereafter distributed to stakeholders, consistent with their statutory priorities, under a subsequent plan."). This principle was also recognized in the *Chrysler* case. *See Wolff* Opinion, at 22 ("The sale did not discharge any liabilities; instead, it left some liabilities as obligations of Old Carco for resolution under a plan.").

finding, and expose it to substantial dollars of alleged claims, that is exactly the result that would ensue. New GM has cited clear authority supporting the proposition that, in the Section 363 sale context, where notice was provided, it is improper to revoke or void a sale order as to a single creditor or certain group of creditors just because they did not receive adequate notice of the sale. Rather, the appropriate remedy in such a situation is for those creditors to seek a recovery against the proceeds of sale, just like other creditors of the debtor.[52] This remedy is consistent with sound congressional policy of promoting finality for 363 sale orders, and protecting *bona fide* purchasers like New GM. It serves to maximize the value of the bankruptcy estate for creditors, and it prevents general unsecured creditors like Plaintiffs from unjustifiably catapulting themselves into a more favorable position compared to similar-priority and even higher-priority creditors.

Plaintiffs' proposed remedy is as unworkable as it is improper. As courts have recognized, it is not possible to exempt just some creditors from the reach of a sale order, especially where (as here) the sale order was crafted to balance myriad competing interests and the creditors claiming exemption are a large, amorphous class of claimants with as-of-yet unquantifiable claims. Indeed, by approving an express integration clause in the Sale Agreement, this Court recognized the impossibility of exempting just some claims and creditors from the Sale Order and Injunction.[53] Accordingly, if the Plaintiffs can demonstrate that Old GM committed a due process violation that prejudiced Plaintiffs, the Court should hold that Plaintiffs' remedy is to seek a recovery from the proceeds of the sale.

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[52] According to the *Motors Liquidation Company GUC Trust Quarterly GUC Trust Reports As Of September 30, 2014*, filed on November 12, 2014 [Dkt. No. 12997], as of September 30, 2014, the value of New GM Securities held by the GUC Trust was approximately $1 billion. *Id.* at p. 11. This amount does not take into consideration a distribution (valued at over $200 million) made by the GUC Trust in November, 2014, while the briefing on the Four Threshold Issues was underway.

[53] *See* Sale Order and Injunction, ¶ 69 ("The provisions of this Order are nonseverable and mutually dependent on each other.").

A. Plaintiffs Seek To Avoid Their Burden Under Fed. R. Civ. P. 60(b)

As an initial matter, the Responses do not even attempt to satisfy the extraordinarily high burden for seeking relief from an order under Fed. R. Civ. P. 60(b), which may be granted in only the "most exceptional of circumstances" *and* cannot "impose undue hardship on other parties." *See* New GM Opening Brief, at 23 (citing, *e.g.*, *Mauro Motors Inc. v. Old Carco LLC*, 420 Fed. App'x 89 (2d Cir. 2011)). Plaintiffs concede that the Fed. R. Civ. P. 60(b) standard is the "standard applicable here." Economic Loss Plaintiffs' Opposition, at 64 n.71. Importantly, Plaintiffs never explain how the remedy that they propose satisfies Rule 60(b); their proposed remedy undoubtedly imposes an "undue hardship" on New GM, and they have not presented the "most exceptional of circumstances."

Plaintiffs also eventually concede, as they must, that courts have applied Fed. R. Civ. P. 60(b) in determining whether a sale order should be voided to remedy a due process violation. Economic Loss Plaintiffs Opposition, at 64 & n.71. Plaintiffs, however, seek to distinguish those cases on the basis that the courts allegedly did not have available the remedy of finding that the sale order was unenforceable against the objecting party only because that would not have granted such party "complete relief." Economic Loss Plaintiffs' Opposition, at 64. Nothing in their cited cases remotely support this distinction.

B. Plaintiffs' Cases Are Inapposite And Do Not Mandate Exempting Plaintiffs From The Sale Order And Injunction As A Remedy

Plaintiffs contend that voiding the Sale Order and Injunction as to them is the only proper remedy for Old GM's alleged violation of Plaintiffs' due process rights. But, as discussed in New GM's Opening Brief and Sections III.C.1, III.C.2 and III.C.3 below, Plaintiffs' proposed remedy is improper. Only two possible remedies can be applied for a due process violation in the context of a sale order: (1) voiding the entire sale and putting the parties all back to square

one, or (2) allowing the claimant to proceed against the proceeds of the sale. *See* New GM Opening Brief, at 52, 56; *Factors' & Traders' Ins. Co. v. Murphy*, 111 U.S. 738, 742-43 (1884); *Cedar Tide Corp. v. Chandler's Cove Inn, Ltd.*, 859 F.2d 1127, 1128 (2d Cir. 1988). The cases Plaintiffs cite in support of their argument do not provide otherwise. Each of their cases is easily distinguished.

The vast majority of the cases that Plaintiffs cite do not involve a 363 sale order at all, but rather a plan discharge (or some other form of bankruptcy relief). *See DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 747 F.3d 145 (2d Cir. 2014) (discharge); *Arch Wireless, Inc. v. Nationwide Paging, Inc. (In re Arch Wireless)*, 534 F.3d 76 (1st Cir. 2008) (discharge); *Waterman S.S. Corp. v. Aguiar (In re Waterman S.S. Corp.)*, 157 B.R. 220 (S.D.N.Y. 1993) (discharge); *City of New York v. N.Y., N.H. & H.R. Co.*, 344 U.S. 293 (1953) (discharge); *In re Savage Indus.*, 43 F.3d 714 (1st Cir. 1994) (injunction); *Schwinn Cycling & Fitness Inc. v. Benonis*, 217 B.R. 790 (N.D. Ill. 1997) (plan confirmation). In those circumstances, the remedy is fashioned against the party who caused the notice deficiency and is seeking to have the claim against it extinguished.

Manville IV is inapposite in that the court in that case held that the settlement order in the plan could not bar claims against the non-debtor insurer that the plan injunction did not contemplate. *Manville IV* is also distinguishable because there was an utter lack of notice in the case. *See Manville IV*, 600 F.3d at 151. *Koepp v. Holland*, No. 13-4097, 2014 U.S. App. LEXIS 22108, at *5-6 (2d Cir. Nov. 21, 2014), was decided for a similar reason (no notice given to easement holder whose interest appeared in the real property records and was therefore a known creditor entitled to actual notice). The same is true for *Savage Industries*, 43 F.3d at 722 (no notice whatsoever given to creditor, not even an attempt to provide notice—debtor had

"dispense[d] with all notice and opportunity to be heard on the part of potential claimants") and *Polycel*, 2006 WL 4452982, at *8 n.6 ("The issue in this case is the lack of notice, not the adequacy.").[54] And, certain of Plaintiffs' cases were not decided in the bankruptcy context at all, nor did they even address the issue of what is the proper remedy for a due process violation in a sale context. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (non-bankruptcy context; no discussion of remedy for due process violation); *Richards v. Jefferson Co.*, 517 U.S. 793, 798 (1996) (non-bankruptcy context; issue related to claim preclusion); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) (non-bankruptcy context; no discussion of remedy for due process violation).[55]

The Sale Order and Injunction entered in this case presents different considerations. This is not a situation where a remedy can be fashioned against the good-faith purchaser, who was not responsible for the alleged notice infraction. As properly reflected in *Lehman*, "the Court views final Sale Orders 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." *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). Allowing for the revocation of a 363 sale, either in whole or in part, years after its consummation would jettison well-established policies promoting asset purchases, which are necessary to maximize the value of the bankruptcy estate for creditors and appropriately prioritize creditor recovery.

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[54] *Polycel* is also distinguishable because it involved a 363 sale that purported to sell property that did not belong to the debtor.

[55] *In re Ritchie Risk-Linked Strategies Trading (Ir.) Ltd.*, 471 B.R. 331 (Bankr. S.D.N.Y. 2012), is cited for the proposition that Plaintiffs should not be bound by the Sale Order and Injunction because of improper notice. *See* GUC Trust Br., at 19. Although that case did involve a sale order, the language cited by Plaintiffs was clearly *dicta* because the court there found that the allegedly aggrieved creditor received proper notice of the sale and that there was no due process violation. *Ritchie Risk-Linked Strategies*, 471 B.R. at 338.

The discharge cases, in particular, are inapposite in the context of a 363 sale. *See Molla v. Adamar of N.J., Inc.*, No. 11-6470 (JBS/KMW), 2014 WL 2114848, at *4 (D. N.J. May 21, 2014) (distinguishing discharge cases in holding that 363 buyer who purchased assets "free and clear" cannot be held liable for the claims of a creditor who did not have notice of the sale). As noted above, in a discharge case, the creditor's property right is ***entirely extinguished*** by the discharge order; in contrast, property rights in a sale order are generally not extinguished but, like here, are transferred to the sale proceeds. The focus of the discharge case, for notice purposes, is the liability at issue. In a 363 sale, for notice purposes, the focus is on the propriety of the sale and the sale terms.

Thus, unlike the situation here where creditors with economic loss claims like Plaintiffs can seek to recover against the proceeds of the bankruptcy sale (just like other creditors), there are no sale proceeds in a discharge case against which a creditor allegedly deprived of due process can recover. Unlike a 363 sale order, a discharge "destroys" the creditor's claim, and there is no alternative remedy for a due process violation in such cases other than non-enforcement of the discharge order as to the aggrieved creditor. *See, e.g., City of New York, N.H. & H.R. Co.*, 344 U.S. at 294 ("reorganization of [a] railroad under § 77 of the Bankruptcy Act destroyed and barred enforcement of liens which New York City had imposed on specific parcels of the railroad's real estate for street, sewer and other improvements"); *Arch Wireless*, 534 F.3d at 83 (discharge would have "abolishe[d] the property rights of [the] creditors" in question).[56]

[56] Notably, in *DPWN Holdings*, 747 F.3d at 150, 153 (a plan discharge case), although the court said that "a claim cannot be discharged if the claimant is denied due process because of lack of adequate notice," that was *dicta*, as the court did not find a due process violation or fashion a remedy for any such violation, but rather "remand[ed] for further consideration." The matter was remanded to determine if a claimant (DPH) had knowledge or reasonably could have obtained knowledge of the debtor's (United) alleged antitrust violations prior to confirmation of the debtor's plan. Unlike here, *DPWN Holdings* concerned a tension between the enforcement of two federal laws (bankruptcy law and antitrust law). In addition, the Second Circuit specifically stated that the "issue here is not whether the known facts would have permitted pleading a sufficient antitrust claim outside of bankruptcy, but only whether such a claim could have been filed within a bankruptcy proceeding where the 'fresh start' principle operates

The same reasoning applies to cases involving a 363 sale order where the sale order purported to completely extinguish a property right of the creditor—one that arguably could never be covered by the 363 sale proceeds. *See Compak Cos., LLC v. Johnson*, 415 B.R. 334, 342 (N.D. Ill. 2009) (patent license extinguished); *Polycel Liquidation*, 2006 WL 4452982, at *11 (right to proprietary pool molds belonging to claimant, not the debtor, extinguished); *Doolittle v. Cnty. of Santa Cruz (In re Metzger)*, 346 B.R. 806, 819 (Bankr. N.D. Cal. 2006) (county's right to enforce affordable housing covenant requiring owner of real estate development to make certain units available at low cost extinguished). Here, the 363 Sale did not "destroy" any creditor claims; instead, it converted Old GM's assets into a pool of cash and other consideration that would later, through the plan process, be allocated to creditors.

For example, in *Compak*, the creditor who allegedly did not receive notice held a license to a patent owned by the debtor. The sale order in that case entirely extinguished the creditor's patent license. 415 B.R. at 343. Because the creditor would have no alternative remedy for the loss of the patent license (a unique property interest), and because the "Bankruptcy Code contains special protections for patent licensees," the court held that the sale order could not be enforced to terminate the creditor's license. *Id.*

Likewise, in *Polycel*, the sale order purported to extinguish an un-notified creditor's ownership interests in proprietary "molds" used in constructing swimming pools. 2006 WL 4452982, at *11. In holding the sale order inapplicable to this creditor, the court stressed that (i) "[t]he Molds are unique," (ii) the "debtor did not own" the molds, (iii) the creditor "has a strong interest in regaining ownership of the Molds as they are a significant part of the company's assets," (iv) "the Molds were not listed on the appraisal" documents that the buyer reviewed

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to channel all 'claims' broadly defined by the Bankruptcy Code, into a forum well suited to determine whether such claims deserve exploration and adjudication." *Id.* at 152.

when considering the purchase, (v) the buyer explicitly purchased the debtor's assets "subject to the rights of third party persons who [(like the creditor there)] can prove an unencumbered ownership interest in same," (vi) no sale proceeds would be available to compensate the creditor, and (vii) the molds would be "useless" in the hands of the buyer because the buyer and creditor would no longer be doing business together. *Id.* The court observed further that it had fashioned this remedy "based upon the unique factual matrices underlying" the dispute and that it arrived at this remedy after "weighing [the relevant] factors." *Id.*; *see also Metzger,* 346 B.R. at 819 (where sale order purported to extinguish county's right to enforce affordable housing covenant requiring owner of real estate development to make certain units available at low cost, court held that county was not bound by sale order because there was no alternative remedy—monetary compensation to the county was not a viable remedy given the nature of the county's lien); *Koepp v. Holland*, No. 13-4097, 2014 U.S. App. LEXIS 22108, at *8-9 (2d Cir. Nov. 21, 2014) (finding non-enforcement remedy appropriate as to claimant whose easement could not be extinguished by the sale).

Similarly, in other cases that Plaintiffs cite involving a 363 sale, the court did not void the sale order itself—partially or otherwise—because the sale order ***did not preclude the claims at issue.*** Contrary to Plaintiffs' contention, these cases do not hold that a creditor deprived of due process must be excepted from the terms of the sale order; they simply held that the creditor's claims survived and could be pursued against the purchaser. And that is because of the common-sense notion that a creditor cannot be bound by an order that did not address its interests in the first place.[57] For example, as discussed above, in *Savage Industries*, the terms of the sale that

[57] As addressed above, *Manville IV* deals with an order approving a settlement rather than a 363 sale order and involved a situation where orders approving a settlement between the estate and its insurer several years earlier were interpreted to preclude Chubb's direct claims against Travelers. Chubb, who challenged the settlement order for

barred the claimant's successor liability claim against the purchaser were privately negotiated ***subsequent*** to the sale order; they were ***not*** court-approved, and never addressed successor liability. 43 F.3d at 717. Thus, there was nothing in that sale order to revoke or unwind under Rule 60(b). The order that the *Savage Industries* court ultimately determined was not enforceable as to the claimant was the bankruptcy court's subsequent injunction of the claimant's prosecution of successor liability claims. The court there did not determine that the sale order was unenforceable as to the claimant; it merely held that its successor liability claims survived under those facts.

Likewise, in *Metal Foundations Acquisition, LLC v. Reinert (In re Reinert)*, 467 B.R. 830, 831-32 (Bankr. W.D. Pa. 2012), the court specifically stated that the basis for its decision that the un-notified creditor was not bound by the sale order was that there was no determination made in connection with the sale order that the property at issue (domain names) was actually owned by the estate: "Nothing in the Sale Motion itself sought a determination or declaratory judgment that the bankruptcy estate actually owned the unspecified domain names at issue. As a result, Baha is not bound by the terms of the order approving the Sale Motion (because there is no affirmative relief contained in it which consists of a determination of Baha's rights vis-à-vis the estate's interest)." *Id.* at 832.

And, as discussed in New GM's Opening Brief, the decision in *Grumman* is inapposite because it involved "future" claims by claimants who were unidentifiable at the time of the sale order and who had no relationship with the debtor. 467 B.R. at 706-07. These future claims were not viewed as "claims" under the Bankruptcy Code. *Id.*; s*ee also Schwinn Cycling & Fitness Inc. v. Benonis*, 217 B.R. 790 (N.D. Ill. 1997) (same). Of course, that issue is not present

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lack of notice, did not hold a claim against the estate and instead sought to pursue its own claim based on the independent wrongdoing of Travelers. *See* 600 F.3d at 153.

in this case because New GM assumed the *Grumman* type claim (*i.e.*, a post-sale accident claim).[58] Moreover, Plaintiffs concede that their Pre-Sale Consolidated Complaint claims are not future claims, thus rendering *Grumman* entirely inapplicable. And, with respect to their Post-Sale Consolidated Complaints, while Used Car Purchasers were not known as of the 363 Sale, they are nevertheless not future creditors in the manner discussed in *Grumman*. The original owners of the used vehicles were known to Old GM and they had a legal relationship with Old GM. When Used Car Purchasers bought their Old GM vehicles, that did not create a new legal relationship with New GM. In other words, a Retained Liability remained so, notwithstanding any subsequent transfer of an Old GM vehicle.

Moreover, all of Plaintiffs' cases involve either a single creditor or a very limited number of creditors. They do not, as here, involve a purported class of claimants with as-of-yet unquantifiable claims. There are over 140 class action lawsuits currently pending against New GM, with more being filed. Potentially millions of Old GM vehicle owners purport to assert economic loss claims against New GM. If excepting a single creditor from the Sale Order and Injunction would effectively rewrite the Order, as the Court held in *Parker v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 430 B.R. 65, 81-82 (S.D.N.Y. 2010) (finding that rewriting terms of Sale Order to place on New GM responsibility to pay Parker would "knock the props out from under the authorization for every transactions that have occurred since the sale was consummated"), there can be no doubt that excepting this large amorphous class from the Sale Order and Injunction would do so as well. The entire package of consideration for the 363 Sale was extensively negotiated and finalized on the condition that New GM would be responsible

[58] For this reason, the GUC Trust's reliance on *In re Kewanee Boiler Corp.*, 198 B.R. 519 (Bankr. N.D. Ill. 1996) is also misplaced. There, the claimant was injured by an allegedly defective boiler many months after the debtor's plan was confirmed, and the debtor had made no attempt to provide future tort creditors with a special representative. In contrast, here, New GM agreed to assume these types of post-sale accident product liabilities.

only for "Assumed Liabilities"—not the unquantifiable potential liabilities for the alleged economic loss claims at issue here. Converting these alleged claims against Old GM into "Assumed Liabilities" would rewrite the Sale Agreement.

C. Plaintiffs' Proposed Remedy Would Be Improper In This Case

1. Plaintiffs' Proposed Remedy Is At Odds With Governing Case Law

Plaintiffs' requested remedy—a "determination that [Plaintiffs] are not bound by [the] terms [of the Sale Order]" but that other creditors continue to be bound by it—should be rejected. Accident Plaintiffs' Brief, at 41. Contrary to Plaintiffs' contention, ample governing precedent, including long-standing Supreme Court precedent, provides that Plaintiffs' proposed remedy is inappropriate in the circumstances of this case. The Supreme Court addressed this issue in *Factors' & Traders' Insurance Co. v. Murphy*, 111 U.S. 738 (1984). Like Plaintiffs here, the creditor there argued "[t]hat the [free and clear] sale under the order in bankruptcy ***was not binding on her***, because she was not made a party to the proceeding and ***had no notice of it,*** while it was binding on all the other lienholders whose liens were thereby discharged." *Id.* at 740 (emphasis added). The Court *rejected* that proposed remedy as untenable. *Id.* at 741 ("[I]t is impossible to shut one's eyes to the injustice of the [creditor's remedy]."). As the Court explained, the creditor could not "affirm th[e] sale as free from all incumbrances except her own, thereby assuming the benefit of a decree to which she was not a party [for lack of notice], while denying its obligation on herself, without which the decree would not have been made." *Id.* at 743. The Court concluded, therefore, that the creditor's proposed partial revocation remedy was improper: "[I]t is not possible . . . to hold that this sale discharged part of the liens against the property, and increased thereby the value of other liens at the expense of the purchasers." *Id.*

Likewise, numerous other courts have rejected a creditor's attempt to be treated as exempt from a 363 sale order. *See, e.g., Douglas v. Stamco*, 363 F. App'x 100, 102 (2d Cir. 2010) (rejecting plaintiff's attempt to assert successor-liability claim against buyer as contrary to the sale order); *In re Trans World Airlines, Inc.*, 322 F.3d 283, 292-93 (3d Cir. 2003) (holding that "[t]o allow claimants to assert successor liability claims against [the buyer] while [applying the sale order to] other creditors . . . would be inconsistent with the Bankruptcy Code's priority scheme"); *In re Fernwood Markets*, 73 B.R. 616, 621 (Bankr. E.D. Pa. 1987) (holding that a sale order cannot simply be held inapplicable to creditor who did not receive notice of sale; sale order cannot "be valid, or 'reaffirmed,' as to one lienholder and not to another");[59] *Molla*, 2014 WL 2114848, at *5 (rejecting creditor's argument that he should be exempt from sale order because he did not receive notice of sale); *see also Morgenstein*, 462 B.R. at 497 (rejecting creditor's argument that "the Court can cherry pick, or otherwise choose, the components of [a] confirmation order that the Court desires to revoke").

Plaintiffs try to distinguish *Douglas*, *Trans World* and *Molla* on the basis that these cases did not involve due process violations. For starters, Plaintiffs are incorrect as to *Molla*, which involved inadequate due process notice to a creditor. *Molla*, 2014 WL 2114848, at *2 ("Plaintiffs emphasized that . . . they never received adequate due process notice of the bankruptcy proceedings."). And although *Douglas* and *Trans World* did not involve due process violations, those cases amply support the broader point that selective non-enforcement of a 363 sale order is an improper remedy regardless of the context.

[59] The GUC Trust incorrectly states that "no Court in the Second Circuit has embraced th[e] aspect of *Fernwood*" rejecting a partial revocation remedy. GUC Trust Brief, at 36 n.16. Not only did the Supreme Court reject a partial revocation remedy in *Factors' v. Murphy*, by which courts in this Circuit are bound, but the Second Circuit prohibited a creditor from evading a 363 sale order in *Douglas v Stamco*. In any event, as shown above, none of the cases the GUC Trust cites as authorizing a partial revocation remedy control the remedy question here.

Finally, Plaintiffs cannot have it both ways. They seek to obtain the benefits that New GM agreed to provide under the Sale Agreement (*i.e.*, the repair obligation under the recall covenant) but avoid the other provisions of the Sale Order and Injunction. That clearly is not appropriate under any circumstance, but is especially unfair to New GM, a good-faith purchaser for value who was never responsible for any alleged due process violation.

2. Plaintiffs' Proposed Remedy Would Impermissibly Rewrite The Sale Order And Injunction

Independently, the Sale Order and Injunction expressly prohibits the partial revocation remedy that Plaintiffs seek. As explained in the New GM Opening Brief, the Sale Order and Injunction's integration clause provides that all of its terms are non-severable and mutually dependent on each other, and it prohibits changing or partially revoking the Order's terms. *See* New GM Opening Brief, at 25, 51, 55 (citing Sale Order and Injunction, ¶ 69). Plaintiffs' only response is that exempting certain creditors from the Sale Order and Injunction (which they request) is somehow materially different from changing that Order (which they concede is impermissible). *See* Accident Plaintiffs' Brief, at 41-43 (stating these are "two distinct concepts").[60] This is formalistic double-talk. There is no difference between partially revoking/amending the Sale Order and Injunction so as to render it inapplicable as to certain creditors and entering an order holding the Sale Order and Injunction inapplicable to those

[60] Plaintiffs cite *In re Johns-Manville Corp.*, 759 F.3d 206 (2d Cir. 2014) ("***Manville V***"), in support of their argument that exempting certain claimants from a sale order does not amount to rewriting that order. But *Manville V* only concerned whether certain conditions precedent had been satisfied in connection with a previous agreement. One of those conditions concerned whether the breadth of an injunction met the requirements in the parties' agreement. The insurer (Travelers) argued that, based on the Second Circuit's holding in *Manville IV*, the condition did not occur because Chubb was permitted to maintain a suit against Travelers. *Id.* at 216-18. The Second Circuit disagreed, reasoning that sophisticated parties would not have bargained for an impermissible injunction. *Id.* at 215-16. Here, in contrast, the Sale Order and Injunction can be enforced to bar Plaintiffs' claims against New GM consistent with due process. A 363 Sale is different than a plan injunction which extinguishes the claim. Moreover, Plaintiffs concede they are not future claimants. As a result, *Manville V* in no way supports Plaintiffs' argument that exempting claimants from a sale order (especially a large amorphous class of claimants like Plaintiffs here) does not constitute an amendment or partial revocation of the order.

creditors. In both situations, the effect is the same—to remove the Plaintiffs' claims from the scope of the Order. *See Parker*, 430 B.R. at 81 (holding that plaintiff's request that he be exempted from Sale Order and Injunction was the same as a request that "the terms of a carefully negotiated [Sale Order] ***be rewritten*** to place on New GM the responsibility to pay [him]") (emphasis added)); *Campbell v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 428 B.R. 43, 60-62 (S.D.N.Y. 2010) (refusing to enter order that would "rewrite," "unravel," or "carve out" any provisions from the "integrated terms of this extensively negotiated transaction"); New GM Opening Brief, at 25, 54-55;[61] *cf. Morgenstein*, 462 B.R. at 504 ("The Morgenstein Plaintiffs further contend, or at least imply, that they are not seeking 'partial revocation,' but instead are seeking 'limited revocation,' or 'carefully crafted' revocation. That is simply a play on words. Aside from the lack of distinction in any of the alternative euphemisms that the Morgenstein Plaintiffs choose to describe the relief they seek, the underlying goal, and problem, remains the same.").

3. Plaintiffs' Proposed Remedy Would Give Them An Improper Windfall

Plaintiffs also fail to meaningfully respond to New GM's argument that allowing Plaintiffs to partially revoke the Sale Order and Injunction, while continuing to enforce that Order against other creditors, would give Plaintiffs an improper windfall. *See* New GM Opening Brief, at 55 & n.25. As the court in *Fernwood* explained:

> [A]llowing [a creditor who did not receive notice of a 363 sale] to . . . pursue a claim against the [buyer] while requiring other lienholders, who may be senior to [that creditor], to resort to the sale proceeds just because of the fortuitous circumstance that [this creditor] failed to get proper notice of the sale would be to provide [the creditor] with an unjustified and unjustifiable windfall.

[61] Plaintiffs say *Campbell* and *Parker* are not the law of the case because that doctrine "applies within the confines of one action only and does not apply to new proceedings." Economic Loss Plaintiffs' Opposition, at 68 n.76. This argument, however, is at odds with the Second Circuit's decision in *In re PCH Associates*, 949 F.2d 585, 592 (2d Cir. 1991), which held that "[w]hile the [law of the case] doctrine is ordinarily applied in later stages of the same lawsuit, it also has application to different lawsuits between the same parties."

73 B.R. at 621; *see also Douglas*, 363 F. App'x at 102 (holding, in 363 sale case, that "[a]llowing the plaintiff to proceed with his tort claim against [the buyer] would be inconsistent with the Bankruptcy Code's priority scheme because plaintiff's claim is otherwise a low-priority, unsecured claim"); *Trans World*, 322 F.3d at 292 (same). Plaintiffs' only response is to claim that they "did not choose to have their due process rights violated." Accident Plaintiffs' Brief, at 46-47. Plaintiffs miss the point. Neither did New GM seek to enter into a transaction where it did not obtain what it bargained for. The issue is not whether Plaintiffs chose to have their due process rights violated, but whether the remedy they propose for that alleged violation would give them an unjustified windfall in violation of the Bankruptcy Code's priority scheme. As expressly held in *Fernwood*, *Douglas*, and *Trans World*, Plaintiffs' proposed remedy would do exactly that.

D. Plaintiffs' Remedy Should Be To Seek A Recovery From The Proceeds Of The Sale, Just As Other Creditors Of Old GM Have Done

As a general matter, where a debtor fails to give a creditor notice of a 363 sale in violation of due process, the court may grant the creditor one of two remedies: (1) in extreme circumstances where no notice is provided, the court may void the entire sale, place all the parties back to square one and do it over, thereby enabling the un-notified creditor to participate in a proper sale proceeding, or (2) the court may allow the creditor to seek a recovery from the proceeds of the sale. *See* New GM Opening Brief, at 52, 56; *see Factors*, 111 U.S. at 742-43; *Cedar Tide*, 859 F.2d at 1128; *Fernwood*, 73 B.R. at 621.

1. Plaintiffs Do Not Seek The Remedy Of Voiding The Entire Sale, And That Remedy Is Unavailable In Any Event

Plaintiffs have not requested, and indeed have disavowed, the remedy of voiding the entire sale to New GM, and for good reason. As New GM aptly demonstrated in its Opening Brief, at this late date, it would not be possible to "undo" the 363 Sale, and any challenge

seeking to overturn the Sale Order and Injunction is equitably moot. *See* New GM Opening Brief, at 24-25, 54; *see also Parker*, 430 B.R. at 80-83 ("[T]he 363 Transaction . . . 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 re BFW Liquidation, LLC*, 471 B.R. 652, 673 (Bankr. N.D. Ala. 2012).[62] Thus, because the remedy of voiding the entire sale is off the table, the proper remedy for any due process violation in this case is to allow Plaintiffs to pursue a recovery against the proceeds of the sale.

2. Allowing Plaintiffs To Pursue A Recovery Against The Sale Proceeds Is A Proper And Adequate Remedy

Contrary to Plaintiffs' argument, there is ample authority for the proposition that, where a creditor fails to receive constitutionally adequate notice of a 363 sale, the proper remedy is to permit the creditor to pursue a recovery against the proceeds of the sale. *See* New GM Opening Brief, at 56. Indeed, the two Circuit Courts of Appeals to have considered the issue have approved this remedy. *Conway v. White Trucks*, 885 F.2d 90, 96-97 (3d Cir. 1989); *In re Edwards*, 962 F.2d 641, 643-45 (7th Cir. 1992). In *Conway*, the Third Circuit rejected the argument that a creditor in a bankruptcy sale case "should be able to sue [the buyer], despite the availability of a remedy against [the debtor], because he had no notice of any of the relevant bankruptcy proceedings." 885 F.2d at 96. The Court explained that "if [the creditor's] notice

[62] Remarkably, the Economic Loss Plaintiffs contend that the *BFW Liquidation* opinion "was not a sale 'free and clear' of liens and interests under Section 363(f), and thus did not implicate the due process standard from *Mullane*." Economic Loss Plaintiffs' Opposition, at 66. The *BFW Liquidation* decision did arise from a section 363(f) sale of numerous grocery stores' assets along with the assignment and assumption of a large number of store leases as noted not only in the opinion itself but also in the court's docket. 471 B.R. at 669-674. Notably, the name of the debtor and the case had to be changed from Bruno's Supermarkets, LLC to BFW Liquidation because the §363(f) purchaser, Southern Family Markets, bought the debtor's name. Moreover, the alleged creditor argued that she had not received proper notice and thus could maintain an action against the good faith purchaser. The court easily rejected that remedy. *Id.*

argument is meritorious, then he had a remedy against [debtor] ***and the imposition of successor liability on [buyer] is inappropriate as a matter of law***." *Id.* at 97 (emphasis added). So too here. Even assuming Plaintiffs did not receive adequate notice of the 363 Sale, they had a remedy against the proceeds of the sale, and the imposition of successor liability on New GM—a *bona fide* purchaser of Old GM's assets—is "inappropriate as a matter of law." *Id.*[63]

Likewise, in *Edwards*, the Seventh Circuit held that a *secured* creditor who failed to receive notice of a 363 sale could not pursue a claim against the *bona fide* purchaser, but could pursue a recovery against the proceeds of the sale. *See* 962 F.2d at 643-45. As Judge Posner explained, "[t]he law balances the competing interests but weighs the balance heavily in favor of the bona fide purchaser." *Id.* at 643.[64] *Edwards* recognized that voiding a 363 sale order as to an un-notified lienholder would chill asset sales, undermining the policy objectives underlying the Bankruptcy Code to maximize the value of a bankrupt estate for creditors and to appropriately prioritize creditor recovery. *See id.* at 643-44; *see also In re Lehman Bros. Holdings, Inc.*, No. 08-13555, 2014 WL 7229473, at *13 (S.D.N.Y. Dec. 18, 2014) ("Strong policy reasons exist to protect a purchaser of [bankruptcy] estate assets from future litigation costs."). That is why Section 363(m) expressly prohibits modification of an un-stayed sale order on appeal for a good faith purchaser. While Plaintiffs contend that Section 363(m) policy considerations are inapplicable here because that Code section applies only to appeals, remarkably, the case they cite to support their argument—*Tri-Cran, Inc. v. Fallon (In re Tri-Cran, Inc.)*, 98 B.R. 609 (Bankr. D. Mass. 1989)—stands for the ***exact opposite*** proposition. Economic Loss Plaintiffs'

[63] It is irrelevant whether Plaintiffs now, as compared to just after the 363 Sale, had a remedy against Old GM and the 363 Sale proceeds. New GM was not responsible for how the 363 Sale proceeds were disbursed by Old GM.

[64] Although the decision in *Citicorp Mortgage, Inc. v. Brooks (In re Ex-Cel Concrete Co.)*, 178 B.R. 198 (9th Cir. B.A.P. 1995), contained *dicta* critical of *Edwards*, the holding in that decision is fully consistent with *Edwards*. The buyer in *Ex-Cel Concrete* was *not* a *bona fide* purchaser (*id.* at 201-02 & n.6), and *Edwards* was clear that its holding applied only to *bona fide* purchasers (like New GM). Likewise, *Polycel* is distinguishable because, among other things, the debtor there had no right to sell the claimant's property.

Opposition, at 69. Though *Tri-Cran* stated that Section 363(m) itself did not apply because the issue was not brought on an appeal but rather pursuant to a Fed. R. Civ. P. 60 motion,[65] the court explicitly held that the *policy* underlying Section 363(m) nonetheless applied and then *rejected* the claimant's attempt to void the sale order:

> Nonetheless, the policy [Section 363(m)] implements ***is as relevant and as applicable to a motion to set aside a sale as it is to an appeal from an order authorizing a sale***. In deciding whether to grant the equitable relief the Trustee seeks, the Court recognizes that the finality of bankruptcy sales serves an important policy of the Bankruptcy Code. ***Therefore, even if section 363(m) does not itself apply to the Trustee's cause of action, the policy and the rule it states must be respected.*** The Court cannot and will not vacate the sale to Fallon, which was not stayed, unless the Trustee alleges and proves that Fallon was not a purchaser in good faith.

Tri-Cran, Inc., 98 B.R. at 618 (emphasis added). In light of the court's holding in *Tri-Cran*—that is, that the policy underlying Section 363(m) holds true, even outside of the appeal context—it is clear that Section 363(m) can be considered in fashioning an appropriate remedy for inadequate notice of a 363 sale. *See also Edwards*, 962 F.2d at 645 ("The strong policy of finality of bankruptcy sales embodied in section 363(m) provides, in turn, strong support for the principle that a bona fide purchaser at a bankruptcy sale gets good title[, and t]he policy would mean rather little if years after the sale a secured creditor could undo it by showing that . . . he hadn't got notice of it.").[66]

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[65] Plaintiffs tap dance around what statutes, procedural or otherwise, apply. To avoid the burden under Fed. R. Civ. P. 60(b), they claim resort to Fed. R. Civ. P. 60(b) is unnecessary. But to avoid cases holding that Section 363(m) prohibits the invalidation of a sale order, even in the wake of a due process violation, they cite cases saying Section 363(m) is inapplicable where a motion is brought under Fed. R. Civ. P. 60(b). They have created a "Catch-22" situation for themselves.

[66] The GUC Trust attacks a straw-man when it accuses New GM of arguing that its proposed remedy should be adopted because bankruptcy policy objectives should "supplant" the Due Process Clause. GUC Trust Brief, at 38. New GM argues nothing of the sort. What GM does argue is that allowing Plaintiffs to pursue a recovery against the proceeds of the sale is an adequate and appropriate remedy for the alleged due process violation, as numerous courts have determined. New GM notes further that bankruptcy policy objectives fully support this remedy and, conversely, is contrary to Plaintiffs' proposed partial revocation remedy.

In keeping with *Conway*, *Edwards* and the bankruptcy policy objectives outlined above, other courts agree that recovering against the proceeds of a bankruptcy sale is an appropriate remedy for a due process violation. *See, e.g.*, *Factors'*, 111 U.S. at 742 (due process violation can be remedied by allowing creditor "to accept such a part of the sum for which the property sold as her two notes would entitle her to"); *Molla*, 2014 WL 2114848, at *4-5 (holding that 363 sale order barred creditor's claim against buyer despite fact that creditor did not get notice of sale); *Fernwood*, 73 B.R. at 621 (creditor who did not receive notice may "attempt to attach its lien to the proceeds" of the 363 sale).

Although the Second Circuit has yet to expressly weigh in on this exact remedy question (*see Lehman Bros.*, 2014 WL 7229473, at *11 n.16 (noting "[t]his question is open in our Circuit")),[67] there is every reason to believe that it would agree with *Conway*, *Edwards* and the other cases cited above. Indeed, in *MacArthur*, the Second Circuit declared that recovering against the proceeds of a bankruptcy sale provides an aggrieved creditor with an adequate remedy: "It has long been recognized that when a debtor's assets are disposed of free and clear of third-party interests, the third-party is ***adequately protected if his interest is assertable against the proceeds of the disposition***." *MacArthur*, 837 F.2d at 94 (emphasis added).

Contrary to Plaintiffs' contention, affording the recognized remedy to Plaintiffs is not inequitable at all. Absent the 363 Sale, Plaintiffs would have had to pursue a recovery against Old GM's assets, and would have recovered nothing. By virtue of the 363 Sale, Old GM captured its going concern value to provide a meaningful recovery for its creditors. *See, e.g.*, *Edwards*, 962 F.2d at 642; *Paris Indus.*, 132 B.R. at 510 ("[T]he liquidation of the assets and

[67] As demonstrated above, and as reflected in the Southern District of New York's recent *Lehman Brothers* decision, Plaintiffs are wrong that the remedy question in this case is controlled by either the Second Circuit's *Manville IV* decision or *Koepp*.

their replacement with cash . . . has not affected [the creditors'] ability to recover on their claim."); *see also Wolff* Opinion, at 22.

Moreover, Plaintiffs do not contend that the sale price was inadequate, and the Sale Agreement provides for an upward adjustment to the purchase price if allowed claims exceed $35 billion. Thus, Plaintiffs have a remedy against the Old GM bankruptcy estate.

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

The Old GM Claim Threshold Issue is limited to (i) successor liability claims asserted in the Pre-Sale Consolidated Complaint, (ii) economic loss claims asserted in the Post-Sale Consolidated Complaint relating to vehicles or parts originally sold by Old GM, and (iii) damage demands (including punitive damages) asserted in the Post-Sale Consolidated Complaint to the extent predicated on Old GM's conduct.[68]

Plaintiffs' Consolidated Complaints are the operative documents that govern the Old GM Threshold Issue.[69] The GUC Trust's Brief raises claims and legal theories that are not asserted in

[68] The Pre-Closing Accident Plaintiffs never briefed the Old GM Claim Threshold Issue and thus concede that, assuming there was no due process violation relating to the Sale Order and Injunction as it applied to their claims, the claims asserted in the Pre-Closing Accident Cases are Retained Liabilities and cannot be asserted against New GM.

Similarly, the Economic Loss Plaintiffs never briefed the viability of the Pre-Sale Consolidated Complaint in the event the Court finds (as it should) that there was no due process violation as it applied to their claims. Thus, they concede that if the Court's prior ruling on "no successor liability" remains the law of the case (as it has been for the last five and half years), the claims asserted in the Pre-Sale Consolidated Complaint are Retained Liabilities and cannot be asserted against New GM.

[69] In the MDL, Judge Furman entered Order No. 29 on December 18, 2014, which, among other things, dismissed without prejudice all economic loss allegations and claims not then included in the Consolidated Complaints, with the right of plaintiffs to seek leave of the District Court to reinstate their allegations or claims upon a showing of good cause within 14 days of dismissal. *Order No. 29 Regarding the Effect of the Consolidated Complaints*, *In re Gen. Motors LLC Ignition Switch Litig.*, 1:14-md-02543-JMF (S.D.N.Y. Dec. 18, 2014) [Dkt. No. 477] (**Reply Appendix, Exh. "H"**). The deadline to seek reinstatement has passed, and the only plaintiffs to seek reinstatement are those represented by Mr. Peller. New GM reserves the right to seek further relief from this Court in the event additional claims are later added to the Consolidated Complaints.

the Consolidated Complaints. Their contentions (as a non-party to the Consolidated Complaints), which contradict the legal theories presented by Plaintiffs, should be disregarded.

In its Opening Brief, New GM explained why the Sale Agreement allocated *all* obligations related to Old GM vehicles and parts. *See* New GM Opening Brief, § III. There was nothing further to be addressed after the 363 Sale. The Sale Agreement specifies the limited categories of Assumed Liabilities; everything else, by definition, is a Retained Liability of Old GM. *See* Sale Agreement, §§ 2.3(a) and (b).

In the following sections, New GM will explain that: (a) this Court has subject matter jurisdiction to enjoin Plaintiffs' claims, (b) under the plain meaning of the Sale Agreement and Sale Order and Injunction, Plaintiffs' economic loss claims relating to Old GM vehicles, parts and conduct are not Assumed Liabilities, but Old GM's Retained Liabilities, (c) Plaintiffs have not pled viable direct claims against New GM based on secondary market sales to Used Car Purchasers, as New GM assumed no independent duties to Used Car Purchasers, and had no alleged relationship with these buyers from which an independent duty could arise; and (d) Plaintiffs cannot circumvent the Sale Order and Injunction by seeking to re-characterize Retained Liabilities related to a defective design as purported violations of New GM's recall covenant obligation.[70]

[70] New GM notes that the State of California and the State of Arizona (who are each represented by one of the Lead Counsel in the MDL) commenced Ignition Switch Actions against New GM, and those Actions have been made subject to the Ignition Switch Motion to Enforce. Likewise, other individual actions not subsumed in the MDL Consolidated Complaints (both inside and outside of the MDL) are subject to the Motion to Enforce. *See generally* Supplemental Schedules filed with respect to Motions to Enforce. However, neither the States nor such individual litigants have filed any pleading in response to the Motions to Enforce. Thus, the States and individual litigants presumably are relying on the arguments made by Designated Counsel (who were retained by Lead Counsel).

A. Any Successor Liability Theory Is Meritless And Thus The Claims Contained in the Pre-Sale Consolidated Complaint And The Pre-Sale Accident Cases Should Be Dismissed

In its Opening Brief, New GM demonstrated that the Sale Order and Injunction clearly provided that New GM is ***not*** a successor to Old GM and that New GM did not assume ***any*** successor or transferee liabilities. *See* New GM Opening Brief, at 63-66. The Court ruled: "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." *Gen. Motors*, 407 B.R. at 506; *see also* Sale Order and Injunction, ¶¶ AA, BB, DD, 6, 7, 8, 10, 46 and 47; Sale Agreement, § 9.19.

Plaintiffs have stated that regardless of the notice that they received relating to the 363 Sale, there is no reason to modify the Sale Order and Injunction. *See* Economic Loss Plaintiffs' Opposition, at 64-65. Based on that concession, the factual findings in the Sale Order and Injunction relating to the structure of the transaction, including the arms-length nature of the sale transaction, remain unmodified. Those factual findings firmly establish that there is no viable basis for Plaintiffs to assert a successor liability claim against New GM. Thus, under any circumstance, and regardless of the 363 Sale notice issue, Plaintiffs have no meritorious successor liability claim against New GM.

The reasoning 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), fully supports this Court's ruling regarding "no successor liability." Based on *Emoral*, the "no successor liability" holding would be binding on Plaintiffs without regard to the type of notice they received regarding the 363 Sale. That is because successor liability claims, rather than being individual claims of creditors, are general claims of the bankruptcy estate, such that a debtor can compromise them, and bind all creditors. *See id.* at 882. Here, successor liability claims against New GM based on

(a) economic losses relating to Old GM vehicles and parts, and (b) pre-Sale accidents, are general, derivative (as compared to individualized) claims, such that Old GM could and did, as part of the 363 Sale, release such successor liability claims (to the extent they ever existed) on behalf of its creditors.

Designated Counsel attempt to distinguish *Emoral* by arguing that courts in the Second Circuit have rejected this argument, but they are wrong. The Third Circuit in *Emoral* relied on *In re Keene Corp.*, 164 B.R. 844 (Bankr. S.D.N.Y. 1994), a case in this Circuit that represents the prevailing law, which found 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." *Emoral*, 740 F.3d at 880; *see also In re Alper Holdings USA*, 386 B.R. 441 (Bankr. S.D.N.Y. 2008) (successor liability and alter ego claims were of a generalized nature, and did not allege a particularized injury, and were thus property of the estate). Moreover, the Second Circuit has found that "[i]f a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action." *St. Paul Fire and Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 701 (2d Cir. 1989).[71]

Here, an economic loss claimant and a pre-Sale accident claimant have no better rights than any other Old GM creditor to assert a successor liability claim against New GM. Such

[71] Designated Counsel's reliance on *In re Bernard L. Madoff Investment Securities LLC*, 721 F.3d 54 (2d Cir. 2013) is misplaced. The Second Circuit noted that its ruling was different than the result in *St. Paul* because, among other things, "[t]he customers' claims against the Defendants are not 'common' or 'general'" and that the "Defendants' alleged wrongful acts . . . could not have harmed all customers in the same way." *Id.* at 71. But it also noted that the different result was reached in *Fox v. Picard (In re Madoff)*, 848 F. Supp. 2d 469 (S.D.N.Y. 2012): "the court found the claims to be 'general' in the sense articulated in *St. Paul*, in that they arose from a single set of actions that harmed BLMIS and all BLMIS customers in the same way." *Madoff*, 721 F.3d at 71 n.20.

Ahcom, Ltd. v. Smeding, 623 F.3d 1248 (9th Cir. 2010) also does not advance Designated Counsel's arguments because the court there found that, under California law, there was no general alter ego claim that could be brought. If there was a general alter ego claim, the estate's right to pursue it would have been "exclusive." *See id.* at 1250 ("When the trustee does have standing to assert a debtor's claim, that standing is exclusive and divests all creditors of the power to bring the claim.")(citation omitted).

claimants do not have a particularized injury they could assert against New GM as they cannot allege that New GM caused them any direct injury, given that it was Old GM (and not New GM) that manufactured and sold the allegedly defective vehicles and parts.[72] Any potential successor liability claim would only be based on New GM's status as a purchaser in the 363 Sale, which all unsecured creditors of Old GM commonly shared. Under such circumstance, any possible successor liability claim was property of the estate and the debtor waived such claim as part of the 363 Sale. The Court's findings as to the waiver of the successor liability claim were proper and should remain unchanged, notwithstanding the 363 Sale notice issue raised by Plaintiffs.

Specifically, in the Sale Order and Injunction (¶ R), the Court found that "[t]he purchaser is a newly-formed Delaware corporation that, as of the date of the Sale Hearing, is wholly-owned by the U.S. Treasury." It also found that:

> The Purchaser shall not be deemed, as a result of any action taken in connection with the MPA 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, merged with

[72] New GM is aware that in a few states there is case law to suggest a "product line" exception to the general rule against successor liability. This Court ruled in the Sale Decision that such case-law was pre-empted by Section 363 of the Bankruptcy Code. *See Gen. Motors*, 407 B.R. at 503 n.99. But even if there were no federal preemption, Plaintiffs have not cited any case to suggest that the product line exception applies to economic loss claims or pre-Sale accident claims like those at issue here. That is no surprise. The product line exception, "is informed by the concept of strict liability and the public policy determination that, if the requirements are met, the burden caused by defective products should fall to the successor rather than the injured party." William Hao, *The Effects of Bankruptcy Discharge and Sale on Successor Liability Claims*, 17 J. BANKR. L. & PRAC. 3 art. 4 (June 2008). Accordingly, "(w)ith respect to claims sounding in negligence, courts have unanimously declined to apply the product line exception, because the exception was derived from, and limited by principles of strict liability." David J. Marchitelli, Annotation, *Liability of Successor Corporation for Injury or Damage Caused by Product Issued by Predecessor, Based on the "Product Line" Successor Liability*, 18 A.L.R. 6th 629, § 2 (2006); *see id*. § 9. If the strict-liability-based rationale for the product line exception does not apply to a predecessor's *negligent* conduct, it equally should not impose liability on a successor for a predecessor's alleged violations of consumer protection laws. That would be true in any case but is particularly so where, as here, the consumer-protection law violations allegedly caused only economic losses (not damage to person or property). Beyond that, the "paradigm for successor liability for product liability claims is when the injury occurs ***after*** the sale and ***after*** the assets of the selling corporation have been distributed." *See* Ezra H. Cohen, *Successor Liability in § 363 Sales*, AM. BANKR. INS. J. 11, 46 (Nov. 2003) (emphasis supplied). Accordingly, the product line exception has no logical application to liabilities that accrued prior to the 363 Sale and thus no application to pre-Sale accident claims.

> or into the Debtors; or (iii) be a mere continuation or substantial continuation of the Debtors or the enterprise of the Debtors.

Sale Order and Injunction, ¶ 46.

In addition, the Sale Order and Injunction found that the "no successor liability" determination was binding on all creditors of Old GM, whether such claimants were known or unknown as of the 363 Sale, whether such claims existed or arose after the sale closing, whether such claims were fixed or contingent, asserted or unasserted, liquidated or unliquidated. *Id.*, ¶ 48. Plaintiffs have raised no issues to undermine or challenge such findings, which were based on a solid evidentiary basis and are binding on all creditors including Plaintiffs.

B. Claims Predicated On Old GM Vehicles, Parts Or Conduct Contained In The Post-Sale Consolidated Complaint Should Be Dismissed

1. The Bankruptcy Court Clearly Has Subject Matter Jurisdiction to Enjoin the Claims Asserted by Plaintiffs

As this Court previously found, Plaintiffs' argument that the Court does not have subject matter jurisdiction here simply assumes the conclusion, *i.e.*, that the Sale Order and Injunction does not in fact enjoin Plaintiffs' claims.[73] As the Court stated in the Elliott No Stay Decision:

> Nor is it an answer for the Elliott Plaintiffs to premise jurisdictional arguments on the conclusion they ultimately want me to reach—that upon construction of the Sale Order and the Sale Agreement, their claims would be permissible under each. That assumes the fact to be decided, in the proceedings the Elliott Plaintiffs wish to sidestep. Their argument conflates the conclusion I might reach after analysis of matters before me—that certain claims ultimately might not be covered by the Sale Order—with my jurisdiction to decide whether or not they are.

Elliott No Stay Decision, at 7. The Supreme Court has clearly stated that a court has special expertise regarding the meaning of its own orders and therefore its interpretations are entitled to deference. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 n.4 (2009). Thus, this Court can review and interpret its own Sale Order and Injunction, and if it determines that Plaintiffs' claims

[73] *See Decision With Respect To No Stay Pleading And Related Motion To Dismiss For Lack Of Subject Matter Jurisdiction (Elliott Plaintiffs)*, dated August 6, 2014 [Dkt. No. 12815] ("**Elliott No Stay Decision**"), at p. 7.

violate the injunction provisions contained in that Order, this Court may enforce it against Plaintiffs.[74]

Moreover, the Court clearly had jurisdiction, pursuant to Section 363(f) of the Bankruptcy Code, to enjoin claims (like Plaintiffs' claims) in connection with a "free and clear" sale with respect to the "res" of the bankruptcy estate, or claims related to the "res." Such an "injunction" is different from an injunction authorized in other sections of the Bankruptcy Code. As such, *Pfizer Inc. v. Law Offices of Peter G. Angelos (In re Quigley Co., Inc.)*, 676 F.3d 45 (2d Cir. 2012) provides no support for Plaintiffs' argument. The issue in *Quigley* concerned an interpretation of the language used in Section 524(g) of the Bankruptcy Code, and an injunction of asbestos-related lawsuits against the parent corporation of the debtor. This matter has nothing to do with Section 524(g). As the District Court noted in *Campbell v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 428 B.R. 43 (S.D.N.Y. 2010), the "Second Circuit had cited to the 'free and clear' provision of section 363(f) as analogous authority when initially affirming the channeling injunction, but noted that the Johns-Manville injunctions were distinct from the sort of free and clear injunctions typically authorized by 363(f)." *Id.* at 58 n.18 (referring to *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988)).

The argument Plaintiffs now make was in fact raised by the product liability claimants at the Sale Hearing (and rejected), and again in their appeal of the Sale Order and Injunction (also rejected). The District Court found in *Campbell*:

> Appellants challenge the Bankruptcy Court's "colorable" jurisdiction on the grounds that the Bankruptcy Court lacked authority to enjoin their *in personam* successor liability claims under section 363(f). However, at the time the Sale Opinion and Order were issued, the Bankruptcy Court's interpretation and

[74] The purpose of Designated Counsel agreeing to the Scheduling Order, entering into Stay Stipulations, and briefing the Four Threshold Issues was precisely for the Court to address these issues. To now suggest the Court does not have subject matter jurisdiction on the issues being briefed, especially after the Court's prior rulings on this issue, is highly improper.

> exercise of its authority under section 363(f) was consistent with the opinions of at least three Second Circuit judges—whose ranks have since expanded to include a panel of three different judges who also affirmed the proposition that section 363(f) authorizes the sale of assets "free and clear" of successor tort liability, another Bankruptcy Judge in this District, as well as panels of judges in other circuits including the Third and Fourth Circuits.

428 B.R. at 57-58. The District Court ultimately held that:

> In light of the foregoing historic and immediate precedent finding bankruptcy courts possessed of such authority pursuant to section 363(f), it is clear that the Bankruptcy Court had more than "colorable" jurisdiction to issue the Sale Order's injunctive provisions providing that the Purchased Assets would be transferred "free and clear of all liens, claims, encumbrances, and other interests ... including rights or claims based on any successor or transferee liability." Sale Order ¶ 7. Indeed, to contend otherwise is simply not a "colorable" argument.

Id. at 59. It is thus clear that Section 363(f) of the Bankruptcy Code provided subject matter jurisdiction to this Court.[75]

Plaintiffs' reliance on *Zerand-Bernal Grp., Inc. v. Cox*, 23 F.3d 159 (7th Cir. 1994), is misplaced because, as the District Court found in *Campbell*, that case is not followed in this District. *See Campbell*, 428 B.R. at 57 n.17 ("we note that courts in this District have declined to follow the more 'restrictive' interpretation of section 363(f) evinced in *Zerand–Bernal Group*" (citing *In re Portrait Corp. of Am., Inc.*, 406 B.R. 637, 641 (Bankr. S.D.N.Y. 2009)).

Accordingly, the Court has jurisdiction to enjoin claims against New GM that are based on vehicles and/or parts manufactured by Old GM, or that are based on Old GM's conduct.[76]

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[75] *See Campbell*, 428 B.R. at 59; *see also In re Tougher Industries, Inc.*, Nos. 06–12960, 07–10022, 2013 WL 1276501, at *6 (Bankr. N.D.N.Y. Mar. 27, 2013) ("A narrow reading of the statute [363(f)] limits the phrase 'interest in such property' to in rem interests. [citation omitted]. The Second Circuit, along with the Third, Fourth and Seventh Circuits, and the First Circuit BAP, however, have applied a more expansive interpretation to include not only in rem interests in property, but also other obligations that may 'arise from the property being sold.'" (citation omitted)); *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 582 (4th Cir. 1996) ("Yet while the plain meaning of the phrase 'interest in such property' suggests that not all general rights to payment are encompassed by the statute, Congress did not expressly indicate that, by employing such language, it intended to limit the scope of section 363(f) to in rem interests, strictly defined, and we decline to adopt such a restricted reading of the statute here.").

[76] The Sale Order and Injunction has been a final order for over five years and it is no longer subject to attack. Thus, any arguments regarding subject matter jurisdiction can no longer be asserted by Plaintiffs or any other party

2. The GUC Trust's Strained Reading Of Assumed Liabilities Is Erroneous

The GUC Trust Brief takes great pains to argue that Plaintiffs' claims in the Consolidated Complaints are Assumed Liabilities, and not Retained Liabilities. What is perhaps most telling is that the Plaintiffs themselves—the ones that have actually asserted claims against New GM in the Consolidated Complaints—do not agree with the GUC Trust's position. And for good reason. Even a cursory review of the GUC Trust's arguments demonstrate that they are not well-grounded in law or fact.

a. The Provision In The Sale Order And Injunction Regarding The Assumption Of Certain Product Liabilities Cannot Be Distorted To Include The Economic Loss Claims Asserted By Plaintiffs

The GUC Trust Brief selectively quotes from the section of the Sale Agreement that discusses New GM's assumption of Product Liabilities, and improperly attempts to shoehorn Plaintiffs' claims into this category of Assumed Liabilities. *See* GUC Trust Brief, Part III.A. However, from a review of the entire provision, and this Court's previous opinion interpreting this provision, it is clear that the GUC Trust is wrong—Plaintiffs' claims are not Assumed Liabilities.

Section 2.3(a)(ix) of the Sale Agreement provides that Assumed Liabilities include:

> all Liabilities to third parties for death, personal injury, or other injury to Persons or damage to property caused by motor vehicles designed for operation on public roadways or by the component parts of such motor vehicles and, in each case, manufactured, sold or delivered by Sellers (collectively, "Product Liabilities"),

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in interest in these proceedings. This is plain from a review of the Supreme Court's decision in *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137 (2009), a decision which ***reversed*** the very case cited by the Economic Loss Plaintiffs (*i.e.*, *Johns'-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.)*, 517 F.3d 52 (2d Cir. 2008)). *See Travelers*, 557 U.S. at 152 ("On direct appeal of the 1986 Orders, anyone who objected was free to argue that the Bankruptcy Court had exceeded its jurisdiction, and the District Court or Court of Appeals could have raised such concerns *sua sponte*. . . . But once the 1986 Orders became final on direct review (whether or not proper exercises of bankruptcy court jurisdiction and power), they became res judicata to the 'parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'" (citations omitted)).

> which arise directly out of death, personal injury or other injury to Persons or damage to property caused by accidents or incidents first occurring on or after the Closing Date and arising from such motor vehicles' operation or performance[.]

The GUC Trust focuses on the clause "or other injury to Persons," which, according to them, encompasses the economic losses asserted by Plaintiffs. GUC Trust Brief, at 40. This interpretation ignores the fact that the injuries contemplated by this Section must be "directly" tied to a vehicle "accident" or "incident"—*i.e.*, a discrete event in which the plaintiff suffered personal, property, or "other" injuries "caused" by an accident, crash, or other similar "incident." *See infra* pp. 65-66 (further discussing the meaning of " incidents"). None of the "economic losses" asserted by Plaintiffs meets this definition.

Beyond that, as noted by this Court in *In re Motors Liquidation Company*, 447 B.R. 142 (Bankr. S.D.N.Y. 2011) ("***Deutsch* Decision**"), under the canon of construction known as "*noscitur a sociis*," "words grouped in a list should be given related meanings." *Id.* at 148 (quoting *Dole v. United Steelworkers of Am.*, 494 U.S. 26 (1990)). Here, the clause at issue–"or other injury to Persons"—more appropriately means injuries such as mental anguish, loss of consortium, or other type of injury that may have been suffered by a person not directly involved in the accident or incident but that are nonetheless the direct result of the accident or incident. Pure economic losses—here, claims that vehicles are worth "less" than they should be—are not related to death, personal injury, damage to property, or any accident or related incident.

The Court should reject the GUC Trust's out-of-context reading of "other injury" for the additional reason that it cannot be squared with the text of the Sale Agreement and Sale Order and Injunction as a whole. Indeed, this interpretation would create a category of Assumed Liabilities so broad that it would encompass virtually any possible claim related to vehicles and parts, and therefore render meaningless other provisions in the Sale Agreement and Sale Order and Injunction that expressly define a Retained Liability. For example, Old GM expressly

retained liabilities relating to vehicles and parts sold by Old GM with a design defect[77] and liabilities based on the conduct of Old GM. But, under the GUC Trust's contorted view, the "other injury" clause of Section 2.3(a)(ix) would trump this express language and make New GM liable for, among other things, economic damages allegedly arising from design defects in vehicles made by Old GM.[78]

Even though the Court has previously found that, based on the canon of construction "*noscitur a sociis*," the term "incident" must have a similar meaning to the term "accident," (*i.e.*, that such terms must be "conceptually related") (*see Deutsch* Decision, 447 B.R. at 148), the GUC Trust makes no attempt to explain how a recall is in any way akin to an accident. It simply is not. Indeed, reference to an "incident"—which refers to a single discrete event (not a lengthy regulatory process with multiple steps like a recall)—merely prevents the term "accident" from being interpreted too narrowly. All vehicle "accidents" are "incidents," but there are a small category of other collisions or events involving personal injury or property damage that cannot properly be described as "accidents." *See, e.g., id.* ("The simple interpretation, and the one this Court ultimately provides, is that 'incidents,' while covering more than just 'accidents,' are similar; they relate to fires, explosions, or other definite events that *cause* injuries and *result* in the right to sue, as contrasted to describing the *consequences* of those earlier events, or that relate

[77] *Trusky*, 2013 WL 620281, at *2.

[78] *See also* Sale Agreement with respect to Retained Liabilities, § 2.3(b)(xvi) (implied warranties and obligations, and allegation, statement or writing by or attributable to Old GM); § 2.3(b)(xi) (liabilities of Old GM based upon contract, tort or any other basis); Sale Order and Injunction, ¶ AA (liabilities relating to vehicles and parts sold by Old GM with a design defect, and liabilities based on the conduct of Old GM); and ¶ 56 ("The Purchaser 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.").

to the resulting damages." (emphasis in original)). "Incident" captures those additional events (and nothing else).[79]

Accordingly, it is clear that Section 2.3(a)(ix) has nothing whatsoever to do with Plaintiffs' economic loss claims.[80] Such claims are not Product Liabilities as defined in the Sale Agreement and, thus, they are not Assumed Liabilities of New GM, but Retained Liabilities of Old GM.

b. New GM's Purchase Of Books And Records Does Not Mean That New GM Somehow Also Assumed Liabilities Merely Set Forth In Those Books And Records

Contrary to the GUC Trust's argument (GUC Trust Brief, at 41-42), nowhere in the Sale Agreement does it state that New GM assumed liabilities that were ***merely referenced*** in the books and records purchased by New GM. Such a strained reading would essentially mean that all of Old GM's known liabilities would be Assumed Liabilities, which clearly cannot be the case. The GUC Trust's interpretation of the Sale Agreement would completely eviscerate Section 2.3(b) of the Sale Agreement, which sets forth numerous categories of Retained Liabilities, many of which are detailed in the books and records purchased by New GM.[81] For example, as of the Petition Date, 24 tranches of unsecured Old GM debt securities

[79] This is consistent with findings made by the Court in its Sale Decision. *See In re Gen. Motors Corp.*, 407 B.R. 463, 482 (Bankr. S.D.N.Y. 2009) ("[A]n important change that was made in the [Sale Agreement] after the filing of the motion . . . 'broadening the first category [Product Liabilities] substantially, [to] all product liability claims arising from accidents or other discrete incidents arising from operation of GM vehicles occurring subsequent to the closing of the 363 Transaction, regardless of when the product was purchased.").

[80] As noted, Plaintiffs have never made this argument in the Consolidated Complaints or otherwise.

[81] The GUC Trust contends that New GM mistakenly relies on *Burton* because the definition of "Product Liability Claim" in the *Chrysler* sale agreement references product recalls, and the Chrysler estate retained recall claims arising from the sale of products prior to the closing of the Chrysler sale. GUC Trust Brief, at 42. This, however, is wrong. *See* Chrysler Sale Order, ¶ EE. A copy of the relevant excerpts from the Chrysler Sale Order are contained in the **Reply Appendix as Exh. "I."** Unlike New GM, New Chrysler actually agreed to take on as assumed liabilities Old Carco's recall obligations related to vehicles manufactured by Old Carco prior to the closing of the sale. *Id.* In contrast, New GM's recall obligations were set forth in the covenant section of the Sale Agreement (not the Assumed Liability section). This distinction is critical since the definition of Retained Liabilities is everything ***not*** an Assumed Liability.

(approximately $22.88 billion in principal amount) were issued and outstanding. These liabilities were referenced in Old GM's books and records. Wilmington Trust Company, which is now the GUC Trust Administrator, was the successor indenture trustee, and never took the absurd position (as it has now) that such liabilities were Assumed Liabilities merely because they were referenced in Old GM's books and records. In sum, the mere purchase of Old GM's books and records does not mean that New GM assumed all liabilities referenced therein.[82]

3. Plaintiffs Cannot Avoid The Sale Order And Injunction By Re-Characterizing Their Claims Arising From Old GM Vehicles As Direct Claims Against New GM, As New GM Assumed No Broad Duty To Buyers Of Old GM Vehicles And Plaintiffs Have Alleged No Relationship Between Themselves And New GM From Which Any Such Duty Could Arise

Plaintiffs assert causes of action against New GM in the Post-Sale Consolidated Complaint with respect to Old GM vehicles and parts only for: (i) violations of state law consumer protection statutes; (ii) fraudulent concealment; and (iii) unjust enrichment.[83] Economic Loss Plaintiffs' Opposition, at 70. Plaintiffs either disclaim or do not attempt to justify as permitted against New GM: (1) successor liability claims on behalf of the Post-Sale Plaintiffs; (2) warranty, design defect, negligence, or any other tort or contract claims (other than Assumed Liabilities which they concede are not implicated by their Consolidated Complaints) related to Old GM vehicles; or (3) punitive damages or other remedies based on Old GM conduct.

[82] As a practical matter, the GUC Trust's "books and records" argument does not get them anywhere since Old GM's books and records made no reference to Plaintiffs' alleged claims. *See* Kiefer Decl., **Opening Brief Appendix, Exh. "3**."

[83] Plaintiffs also state that "[m]embers 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." Economic Loss Plaintiffs' Opposition, at 70. New GM does not contend that claims based on sales of vehicles manufactured by New GM after the 363 Sale are barred by the Sale Order and Injunction, unless such claims are based on Old GM parts or conduct.

To the extent that the Economic Loss Plaintiffs bring claims on behalf of post-Sale purchasers of Old GM vehicles for "economic losses," these claims arise in connection with Old GM vehicles purchased as used on the secondary market from a third party, wherein New GM is not involved in the sale.

The term "Liabilities" is defined in the Sale Agreement to include known and unknown, disclosed and undisclosed, contingent, unmatured, and undeterminable claims. *See* Sale Agreement, § 1.1. Retained Liabilities are defined as "any Liability of any Seller, whether occurring or accruing before, at ***or after the Closing***, other than the Assumed Liabilities." *Id*., § 2.3(b) (emphasis added). The claims set forth in the Post-Sale Consolidated Complaint relating to Old GM's vehicles, parts and conduct necessarily were liabilities of Old GM. Plaintiffs have conceded that their claims are not Assumed Liabilities. Thus, by definition, Plaintiffs' claims in the Consolidated Complaints relating to Old GM vehicles, parts or conduct are Retained Liabilities.

Plaintiffs attempt to escape the Retained/Assumed Liability dichotomy, and the reach of the Sale Order and Injunction, by characterizing the claims in the Post-Sale Consolidated Complaint as direct claims against New GM, arising from New GM's independent conduct that allegedly violated New GM's duties to the secondary market purchasers of Old GM vehicles. But this attempt fails because New GM simply does not have independent duties to secondary purchasers of Old GM vehicles.[84] Nor did New GM allegedly do anything from which a duty could possibly arise. New GM did not design or manufacture Old GM vehicles. And, New GM did not receive any consideration from the resale to Used Car Purchasers. Thus, any consumer

[84] It bears repeating that the only "duties" to Old GM vehicle buyers assumed by New GM relate to (i) post-sale accidents involving Old GM vehicles causing personal injury, loss of life, or property damage; (ii) liabilities expressly arising from any unexpired portion of the "glove box warranty"; and (iii) Lemon Law obligations as defined in the Sale Agreement. Plaintiffs concede that their "economic loss" claims do not fall within any of these three categories.

protection, fraudulent concealment, or unjust enrichment claim based on a vehicle that Old GM designed, manufactured, and originally sold remains a Retained Liability of Old GM that cannot proceed against New GM.

Tellingly, Plaintiffs do not cite a single case in which a section 363 sale purchaser who did not assume its predecessor's liabilities (or a purchaser in any analogous situation) was held to be "directly" liable in connection with a secondary market sale of a used product initially designed, manufactured, advertised, and sold by the predecessor. Nor do they cite any even remotely analogous case in which a defendant, like New GM, that expressly disclaimed successor liability in a court-approved agreement, and otherwise had no relationship to the challenged consumer transaction, was nevertheless deemed liable to the plaintiff. And New GM is not aware of any such authority.

On the other hand, there is authority—including in at least one jurisdiction cited by Plaintiffs themselves—that even the *initial* manufacturer (*e.g.*, Old GM) has no duty or liability to a plaintiff who acquired a used vehicle in a secondary market transaction. *See Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 149 (Tex. 2004) (noting, in upholding dismissal of claims for fraud, negligent misrepresentation, and violation of the Texas consumer protection statute, that plaintiff "obtained her car from her parents six years after they bought it from [the manufacturer]; [the manufacturer] had no involvement or pecuniary interest in the transaction. There was no evidence of any specific warranty or representation [the manufacturer] ever made to her, ***and no duty to disclose either***." (emphasis added)). If the actual manufacturer like Old GM has no duty to secondary market vehicle buyers, then obviously an entity like New GM that merely purchased assets in a court-approved sale, who did not design, manufacture, advertise, or sell the vehicle has no duty either.

This result is also consistent with the *Burton* court's holding that "the Sale Order bars the claim that New Chrysler breached a duty to warn Old Carco customers that their vehicles had a design flaw." *Burton*, 492 B.R. at 405. Moreover, as stated in *Burton*, "[t]he 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." *Id.* at 403 (emphasis added). Just as in the *Burton* case, Plaintiffs here cannot avoid the Sale Order and Injunction by attempting to re-cast Retained Liabilities purportedly held by owners of Old GM vehicles as claims arising from New GM duties that do not exist.

Furthermore, neither the state consumer protection statutes cited by Plaintiffs nor the law of fraudulent concealment purport to impose liability relating to used, secondary market products upon entities that did not participate in the design, manufacture, advertising, or sale of the product. For example, interpreting the very Pennsylvania case cited by Plaintiffs, the Third Circuit observed, "[a]lthough *Valley Forge Tower*[85] held that strict privity is not always an element of the private cause of action [under the Pennsylvania Unfair Trade Practices and Consumer Protection Law], there is no indication that the court would have extended the private cause of action to a plaintiff lacking any commercial dealings with the defendant."[86] *Katz v. Aetna Cas. & Sur. Co.*, 972 F.2d 53, 57 (3d Cir. 1992). Similarly, the Vermont, New Jersey,

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[85] *Valley Forge Towers S. Condominium v. Ron-Ike Foam Insulators, Inc.*, 574 A.2d 641 (Pa. Super. Ct. 1990), *cited at* Economic Loss Plaintiffs Opposition, at 73-74. Moreover, unlike here, *Valley Forge Towers* involved a consumer protection statute claim based on an alleged failure to honor an express written warranty, and the plaintiff condominium association had quasi dealings with the manufacturer of the roof because, although the manufacturer sold the roof through a contractor, the manufacturer gave the plaintiff an express warranty pursuant to contractual terms. *Id.* at 642-43; *see Katz*, 972 F.2d at 57. Here, the owners of Old GM cars are not asserting warranty-based claims, and New GM had no involvement in the manufacture or sale of their vehicles.

[86] The Third Circuit also has ruled that the economic loss doctrine applies to Pennsylvania consumer protection statute and fraudulent concealment claims, barring recovery for purely economic losses including claims that "the product has not met the customer's expectations, or, in other words, that the customer has received 'insufficient product value.'" *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 670-81 (3d Cir. 2002) (quoting *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872 (1986)); *cf. Adams v. Copper Beach Townhome Communities, L.P.*, 816 A.2d 301, 305 (Pa. Super. Ct. 2003) (citing *Werwinski* favorably in context of another statute).

Texas and Iowa cases cited by Plaintiffs (*see* Economic Loss Plaintiffs' Opposition, at pp 73-74 & n.83) also involved consumer protection claims against defendants who were directly involved in the sale to plaintiffs; they did not find liability against parties who had no role in the transaction. *See e.g.*, *Inkel v. Pride Chevrolet-Pontiac, Inc.*, 945 A.2d 855, 856, 858-59 (Vt. 2008) (customers suing dealership that sold them a truck; statute requires misrepresentation that "affected the consumer's purchasing decision"); *Furst v. Einstein Moomjy, Inc.*, 860 A.2d 435, 438 (N.J. 2004) (customer suing store that sold him carpet);[87] *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 537, 541 (Tex. 1981) (homebuyer suing seller's real estate agent for alleged misrepresentation made to induce sale; statute's applicability limited to "deceptive trade practice made in connection with the purchase or lease");[88] *State of Iowa ex rel. Miller v. Cutty's Des Moines Camping Club, Inc.*, 694 N.W.2d 518, 520-24 (Iowa 2005) (action against camping club that charged and attempted to collect membership dues from owners of interests in campground resort).[89]

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[87] Additionally, the New Jersey Consumer Fraud Act claim in *Furst*, unlike here, was based on an alleged breach of an express written warranty, and the defendant did not contest the fact that it violated the Consumer Fraud Act, but only the method of determining damages. *Furst*, 860 A.2d at 439. Moreover, because the New Jersey Product Liability Act provides the sole remedy available under New Jersey law for any claim "for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty," N.J. Stat. Ann. § 2A:58C-1(b)(3), Consumer Fraud Act claims may not be maintained in cases involving products. *See Sinclair v. Merck & Co., Inc.*, 948 A.2d 587, 596 (N.J. 2008).

[88] Indeed, the Texas Deceptive Trade Practices-Consumer Protection Act does not "reach upstream manufacturers and suppliers when their misrepresentations are not communicated to the consumer" because such sellers are too remote, but rather "the defendant's deceptive conduct must occur in connection with a consumer transaction." *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649 (Tex. 1996); *see Bailey v. Smith*, No. 13–05–085–CV, 2006 WL 1360846, at *11-*12 (Tex. App. May 18, 2006) (holding upstream sellers who did not make misrepresentations to plaintiff at time of transaction not liable for consumer protection statute violation or fraud). Here, with respect to vehicles manufactured and sold by Old GM, New GM is not even in the chain of sale and, thus, is not even a remote upstream seller or anywhere in the commercial "stream" at all. Indeed, New GM did not even exist at the time such vehicles first were sold. For there to be any possibility that New GM has liability arising from the introduction of an Old GM vehicle to the consumer market, New GM must have acquired that liability expressly from Old GM in the Sale Agreement or the Sale Order and Injunction. It unquestionably did not.

[89] Plaintiffs certainly have no viable claim under the Iowa Consumer Fraud Act because that statute does not provide a private right of action, but only allows the Iowa Attorney General to initiate an action under the statute on behalf of Iowa residents. *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 228 (Iowa 1998). Indeed, the case Plaintiffs cited was itself brought by the Iowa Attorney General.

The law of unjust enrichment likewise cannot reach a purchaser like New GM for claims based on vehicles manufactured and sold by Old GM. Indeed, that law has even less relevance to New GM, as there is no assertion that New GM ever realized (much less unjustly "retained") any financial benefit from vehicles first sold by Old GM and then later re-sold used by third parties to Plaintiffs and putative class members. As explained in New GM's Opening Brief, the Post-Sale Plaintiffs' unjust enrichment claims based on Old GM vehicles are Retained Liabilities of Old GM that may not be brought against New GM. *See* New GM Opening Brief, at 72-73.

Plaintiffs cannot escape the Sale Order and Injunction simply by re-labeling claims otherwise cognizable (if at all) only against Old GM as claims against New GM. Nor should this Court accept Plaintiffs' invitation to pass on any further inquiry to the MDL Court. To do so would permit form to triumph over substance and "artful" pleading to evade (and undermine) this Court's orders and jurisdiction. No matter what Plaintiffs call them, all of the economic loss claims involving Old GM vehicles—violation of state consumer protection statutes, fraudulent concealment, and unjust enrichment—are, ***in substance***, Retained Liabilities of Old GM. And, as both this Court and the MDL Court[90] already have recognized, it is for this Court to decide in the first instance whether the Sale Order and Injunction bars those claims.

4. Neither Plaintiffs Nor The GUC Trust Have Asserted, Or Can Assert, Claims Based On A Violation Of The Recall Covenant

The GUC Trust asserts that New GM is "responsible for Plaintiffs' alleged economic losses from New GM's violation of federal recall laws." GUC Trust Brief, at 43. It bases the argument on an alleged violation of the recall covenant contained in the Sale Agreement and Sale Order and Injunction. Critically, Plaintiffs have not asserted such direct claims in the

[90] See Order No. 28, at 1, *In re Gen. Motors Ignition Switch Litig.*, No. 1:14-MD-02543-JMF (S.D.N.Y. Dec. 12, 2014 [Dkt. No. 474] (**Reply Appendix, Exh. "J"**).

Consolidated Complaints. As noted above, with respect to claims relating to vehicles manufactured by Old GM, Plaintiffs only assert claims against New GM for (1) violation of state law consumer protection statutes; (2) fraudulent concealment; and (3) unjust enrichment. *See* Economic Loss Plaintiffs' Opposition, at 70.[91] The claims asserted in the Consolidated Complaints are not anything like the hypothetical claims raised by the GUC Trust.

Moreover, as set forth in New GM's Opening Brief, as a matter of law, individual consumers (and certainly the GUC Trust) do not have standing to seek damages for alleged violations of a vehicle manufacturer's reporting and recall-related obligations under the statutory scheme administered by NHTSA. Indeed, the Ninth Circuit has held that "Congress did not intend to create private rights of action in favor of individual purchasers of motor vehicles when it adopted the comprehensive system of regulation to be administered by the NHTSA." *Handy v. Gen. Motors Corp.*, 518 F.2d 786, 788 (9th Cir. 1975) (*per curiam*); *see also Ayres v. GMC*, 234 F.3d 514, 522 (11th Cir. 2000) (holding that the Safety Act confers no private right of action).

Plaintiffs cite the California Unfair Competition Law ("**UCL**") as "proof" that individuals may recover under state law for alleged failures to comply with recall obligations under the Safety Act, but this does not save their argument. Economic Loss Plaintiffs' Opposition, at 77. New GM's agreement to fulfill Old GM's duties under the Safety Act with respect to Old GM vehicles is not an Assumed Liability in the Sale Agreement. *See* Sale Agreement § 2.3. It is a separate covenant that imposes obligations on New GM which can be enforced only by NHTSA. *See id.* § 6.15(a). This covenant does not purport to make New GM liable to ***consumers*** or any other third party for failing to fulfill Old GM's recall obligations.

[91] While Economic Loss Plaintiffs assert that a violation of the Safety Act could form the basis of a claim under a state's consumer protection statute (Economic Loss Plaintiffs' Opposition, at 74-76), no Plaintiff or other party in interest has actually asserted a claim based on a violation of the Sale Agreement, and the recall covenants contained therein.

Nor, as Plaintiffs would have it, does the covenant purport to go a giant step further and make New GM liable under state consumer protection laws like the UCL that allegedly make violations of the Safety Act actionable under state law. If the parties to the Sale Agreement had intended for New GM to assume such a broad new category of liability, they would have said so clearly and in the section of the Sale Agreement devoted to defining Assumed Liabilities. That they did not is fatal to Plaintiffs' argument.

Also, no California appellate court has held that individuals may use the UCL to make an end-run around the standing requirements of the Safety Act that preclude a private right of action. The only federal district court that has so held did so in an opinion that is in tension with both the law of the Ninth Circuit, *see Handy*, 518 F.2d at 786, and the opinion of the only other federal circuit to decide the issue, *see Ayres*, 234 F.3d at 522. *See also McCabe v. Daimler AG*, 948 F. Supp. 2d 1347, 1366 (N.D. Ga. 2013) (plaintiffs could not "overcome" the fact that Congress did not create a private right of action under the Safety Act by "fashioning an alternative [state law] claim that 'is in essence a suit to enforce the statute itself'" (quoting *Astra USA, Inc. v. Santa Clara County, Cal.*, 131 S. Ct. 1342, 1348 (2011))). Beyond that, the district court opinion did not recognize a Safety Act-based cause of action against an entity like New GM that covenanted to comply with the Safety Act in a 363 Sale but did not assume any liabilities to third persons under state law for alleged violations of the Safety Act.

Furthermore, even assuming a violation of the Safety Act could give rise to a private right of action under the UCL and that New GM somehow assumed liability for such actions under the Sale Agreement, Plaintiffs' UCL theory is a red herring that ultimately proves that Plaintiffs' attempt to characterize their claims arising from Old GM vehicles as direct claims against New GM is a sham. Individual plaintiffs may obtain only injunctive relief and restitution under the

UCL, but not damages. Cal. Bus. & Prof. Code § 17203; *Cel-Tech Comm'ns., Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 539 (Cal. 1999). Here, the claimed injunctive relief is moot since the notice and cost-free repairs offered under the recalls have long been underway. And, in the case of vehicles manufactured and sold by Old GM, restitution only can be obtained, if at all, from Old GM. As a matter of law, a claim for restitution only can be brought against a party that unlawfully retained money once belonging to the plaintiff. *See, e.g.*, *Colgan v. Leatherman Tool Grp., Inc.*, 38 Cal. Rptr.3d 36, 61 (Cal. App. Ct. 2006) (California Supreme Court has "made clear that the 'object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.' . . . These awards are for 'money that once had been in the possession of the person to whom it [is] to be restored.'" (citations omitted)). Plaintiffs and putative class members who purchased Old GM vehicles obviously did not pay New GM anything. And New GM did not allegedly retain or possess any money that once belonged to Plaintiffs. Accordingly, any claim Plaintiffs have for restitution can only be a Retained Liability of Old GM. Plaintiffs' UCL-based theory is yet another transparent attempt to improperly transform a claim against Old GM into a claim against New GM. But Plaintiffs cannot simply change the name of the nominal defendant and invent a viable claim outside the reach of the Sale Order and Injunction.[92]

The GUC Trust asserts that it is a third-party beneficiary of the Sale Agreement, and has authority to seek a remedy for its violation. *See* GUC Trust Brief, at 44 n. 21. As support for this statement, the GUC Trust cites to the Confirmation Order, which provides, in relevant part,

[92] Although Plaintiffs cite a recent remand decision in the MDL Court, Judge Furman did not actually make a substantive finding that the Orange County, California District Attorney (not an individual plaintiff), as a matter of California law, may pursue a state-based UCL claim for New GM's alleged violations of the Safety Act. Instead, Judge Furman, in the context of assessing federal jurisdiction, simply concluded that the allegation that the District Attorney's UCL claim was predicated, in part, on an alleged violation of the Safety Act—"only one small part of multiple [alleged] bases for liability"—was not enough to raise to a substantial federal question and thereby create federal removal jurisdiction. *People of the State of Cal. v. Gen. Motors L.L.C. (In re Gen. Motors Ignition Switch Litig.)*, No. 14cv7787, 2014 WL 6655796, at *7 (S.D.N.Y. Nov. 24, 2014).

as follows: "Notwithstanding any transfers and assignments of the MSPA-Related Agreements to the Environmental Response Trust, Post-Effective Date MLC and the GUC Trust shall be deemed, and shall be entitled as, a third-party beneficiary to enforce any provision of the MSPA necessary to carry out their respective duties." Confirmation Order [Dkt. No. 9941], at ¶ 11(b). The GUC Trust tellingly fails to identify what duty it has that would require it to seek a remedy against New GM for a purported violation of the recall covenant in the Sale Agreement. New GM knows of no such duty, and none has been asserted.

Under the Sale Agreement and Sale Order and Injunction, New GM agreed to comply with the Safety Act, and to conduct appropriate recalls with respect Old GM vehicles. New GM is complying with its recall obligations by providing free of charge repairs to owners of GM-branded vehicles. New GM simply did not agree to assume the type of economic loss claims that Plaintiffs assert concerning Old GM vehicles, parts and/or conduct. No amount of creative word-smithing by Plaintiffs can get around this ultimate fact.

IV. THERE IS NO MATERIAL DISPUTE REGARDING THE LEGAL STANDARD FOR "FRAUD ON THE COURT"

The parties generally agree as to the legal standard for "fraud on the court" under Fed. R. Civ. P. 60(d)(3). As New GM stated in its Opening Brief, "fraud on the court" is:

> 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 that are presented for adjudication.

Kupferman v. Consol. Research and Mfg. Corp., 459 F.2d 1072, 1078 (2d Cir. 1972) (quotation marks omitted). This same standard was set forth in the other Parties' briefs. *See* Economic Loss Plaintiffs' Opposition, at 78; GUC Trust Brief, at 45; Groman Plaintiffs Supplemental Brief, at 1.

The issue as to whether a debtor in possession or its officers may be considered an officer of the court for the "fraud on the court" standard, has not been squarely addressed in the Second Circuit. As noted in *In re Trico Marine Services, Inc.*, 360 B.R. 53, 63 n.1 (Bankr. S.D.N.Y. 2006), "[t]he breach of a heightened duty of disclosure may make a fraud finding more likely, but it does not follow that (1) a debtor in possession is an 'officer of the court' within the meaning of the requirements for 'fraud on the court,' (2) the officers of the debtor in possession are also 'officers of the court,' or (3) every isolated perjury by an 'officer of the court' automatically becomes converted into a 'fraud on the court[.]'"[93]

In addition, there is agreement regarding the factors necessary to establish "fraud on the court," which are: "(1) a misrepresentation to the court by the defendant; (2) a description of the impact the misrepresentation had on proceedings before the court; (3) a lack of an opportunity to discover the misrepresentation and either bring it to the court's attention or bring an appropriate corrective proceeding; and (4) the benefit the defendant derived from the misrepresentation." *In re Food Mgmt. Grp., LLC*, 380 B.R. 677, 714-15 (Bankr. S.D.N.Y. 2008) (cited in New GM's Opening Brief, at 77; Economic Loss Plaintiffs' Opposition, at 78; Groman Plaintiffs Supplemental Brief, at 1-2).[94]

As set forth in the New GM Opening Brief (p.78), the failure to disclose pertinent facts relating to a controversy before the court, or even perjury regarding such facts, whether to an adverse party or to the court, does not "without more" constitute "fraud upon the court." The cases cited by Designated Counsel and the Groman Plaintiffs are not to the contrary. *See, e.g.*, *Levander v. Prober (In re Levander)*, 180 F.3d 1114, 1120 (9th Cir. 1999) ("Generally, non-

[93] In any event, who may be considered an officer of the court and in what factual context is not the focus of the "fraud on the court" legal standard briefing.

[94] While the GUC Trust does not set forth the four factors referenced above, it does cite approvingly to *Food Mgmt.* *See* GUC Trust Brief, at 45.

disclosure by itself does not constitute fraud on the court" and, "[s]imilarly, perjury by a party or witness, by itself, is not normally fraud on the court.").[95]

No party has disagreed with New GM that the burden of proof in establishing fraud upon the court is on the movant and that the threshold for such burden is "clear and convincing" evidence. *See* New GM Opening Brief, at 78 (citing *King v. First Am. Investigations, Inc.*, 287 F.3d 91 (2d Cir. 2002)).

While the Groman Plaintiffs take issue with New GM's assertion that the factual predicate for the "fraud on the court" theory is essentially the same as the Plaintiffs' due process argument, the Groman Plaintiffs agree that the factual predicate for the "fraud on the court" theory and the due process theory "overlap[] substantially[.]" Groman Plaintiffs' Supplemental Brief, at 5. Designated Counsel also agrees. *See* Economic Loss Plaintiffs' Opposition, at 80 ("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").

CONCLUSION

None of the Responses demonstrate that Plaintiffs were denied due process in connection with the 363 Sale. Moreover, even if they could somehow overcome that burden, Plaintiffs cannot carry their additional burden of demonstrating prejudice—*i.e.*, that the outcome of the 363 Sale would have been any different. The Responses also do not refute New GM's argument that, in the 363 sale context, the proper remedy for a due process violation—if there was one (and there was not)—would be to penalize the actor that committed that violation (Old GM) and

[95] New GM did not contend in its Opening Brief, as the Groman Plaintiffs wrongly assert (*see* Groman Plaintiffs' Supplemental Brief, at 3), that under appropriate facts, nondisclosure and perjury could *never* constitute "fraud on the court." That is why New GM used the term "without more" in its Opening Brief and why New GM's discussion of the appropriate standard is consistent with *Levander*.

not the good faith purchaser for value (New GM). The Consolidated Complaints and the Pre-Sale Accident Cases assert claims against New GM that are clearly Retained Liabilities of Old GM. Such actions unquestionably violate the Sale Order and Injunction, and the Sale Agreement, and should be barred. Accordingly, the Motions to Enforce should be granted, and Plaintiffs directed to cease and desist from prosecuting their improper claims against New GM.

Dated: New York, New York
January 16, 2015

Respectfully submitted,

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15-2844(L)

15-2847(XAP), 15-2848(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN THE MATTER OF: MOTORS LIQUIDATION COMPANY,

Debtor.

CELESTINE ELLIOTT, LAWRENCE ELLIOTT, BERENICE SUMMERVILLE,

Creditors-Appellants-Cross-Appellees,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE-CROSS-APPELLANT GENERAL MOTORS LLC (NEW GM)

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SESAY and BLEDSOE PLAINTIFFS, IGNITION SWITCH PLAINTIFFS,
IGNITION SWITCH PRE-CLOSING ACCIDENT PLAINTIFFS,
DORIS POWLEDGE PHILLIPS,

Appellants-Cross-Appellees,

GROMAN PLAINTIFFS,

Appellants,

—against—

GENERAL MOTORS LLC,

Appellee-Cross-Appellant,

WILMINGTON TRUST COMPANY,

Trustee-Appellee-Cross-Appellant,

PARTICIPATING UNITHOLDERS,

Creditor-Appellee-Cross-Appellant.

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, General Motors LLC, a Delaware limited liability company, states that its only member is General Motors Holdings LLC. General Motors Holdings LLC's only member is General Motors Company, a Delaware corporation with its principal place of business in Wayne County, Michigan. General Motors Company has 100% ownership interest in General Motors Holdings LLC.

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INTRODUCTION[1]

This appeal arises from the collapse of the domestic auto industry during the severe economic recession of 2008 and 2009. During that time, the U.S. Government (through the Treasury Department) and the Canadian Government took action to prevent the dire consequences that would have resulted from the distressed liquidation of General Motors Corporation ("Old GM"). After exploring various options, the Governments decided the only path forward was for Old GM to file for bankruptcy, and for the Governments to form a new entity (which ultimately became General Motors LLC ("New GM")) to purchase the assets of Old GM. The Sale was effectuated through Section 363 of the Bankruptcy Code, a commonly used bankruptcy procedure that allows debtors to sell assets free and clear of liens and claims, prior to confirmation of a Chapter 11 plan.

The Sale was unquestionably the best alternative for Old GM's creditors, including alleged unsecured creditors like Appellants.[2] In

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[1] Unless otherwise indicated, New GM uses the definitions in the Glossary at the beginning of the Brief filed by the Ignition Switch Pre-Closing Accident Plaintiffs.

[2] The Appellants are three groups of Old GM vehicle owners: (1) the Ignition Switch Plaintiffs, asserting economic losses relating to

approving the Sale, the Bankruptcy Court found that if it had not been consummated, Old GM would have immediately liquidated with unsecured creditors receiving nothing. Instead, because of the Sale, Old GM creditors received a significant distribution under Old GM's plan of reorganization, which was funded primarily by the Sale proceeds.

Appellants now seek to rescind a key condition of New GM's asset purchase—that New GM would be shielded from Old GM's liabilities, including tort, contract, or successor liability claims. The Bankruptcy Court expressly approved this condition to the Sale as appropriate and reasonable. The Sale would not have occurred without this liability shield, and if there were no Sale, the impact on Appellants and the public—the resulting loss of jobs, the negative cascading effect on the vulnerable domestic economy, and the loss of value for Old GM creditors (and many others)—would have been catastrophic.

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an ignition switch that was recalled in early 2014 (these plaintiffs act through "Lead Counsel" and "Designated Counsel"; in addition, counsel for the Groman Plaintiffs and the Elliott, Sesay and Bledsoe Plaintiffs have advocated, at times, on behalf of their individual clients); (2) the Pre-Closing Accident Plaintiffs, generally acting through Designated Counsel, contending that a manufacturing defect caused an accident before the closing of the Sale; and (3) a handful of Old GM vehicle owners that did not have a vehicle subject to the ignition switch recall claiming economic losses.

In early 2014, New GM announced recalls relating to Old GM vehicles. Shortly thereafter, contravening the Sale Order's explicit free-and-clear provision and its injunction proscribing lawsuits against New GM, Appellants, owners of Old GM vehicles, sued New GM arguing that it was the successor to the liabilities of Old GM. When New GM moved in the Bankruptcy Court to enjoin these actions as violating the Sale Order, Appellants responded that their violations were justified because they had not received sufficient notice of the Sale in 2009.

The central issue before this Court is whether Old GM violated the due process rights of Appellants who received court-approved publication notice and media notice of Old GM's Sale, but did not receive direct-mail notice. Certain Appellants also argue that Old GM should have provided them with a more detailed notice than the one approved by the Bankruptcy Court. They argue that Old GM notifying them of the bar against successor liability claims was not sufficient; they should also have been told as part of the Sale notice that their Old GM vehicle had an ignition-switch defect, and that any monetary-damage claim related thereto would be paid solely by Old GM as part of the bankruptcy proceeding. As a result of this allegedly insufficient

notice by Old GM, Appellants argue they should be entitled to a remedy against New GM, a separate entity, that was a good-faith purchaser for value.

Based on well-established due process principles in bankruptcy cases, the specific facts and circumstances of the debtor's bankruptcy dictate the content of the bankruptcy notice and the notice's recipients. Here, the Sale involved a "melting ice cube" business and a debtor with millions of creditors and equity holders, which required the Bankruptcy Court to focus on, among other things, time and cost factors relating to the Sale notice. Old GM had no meaningful funds other than what the U.S. and Canadian Governments lent to it, and there was a strict deadline as to when the Sale needed to be consummated—or else Old GM and its creditors faced a calamitous fire-sale liquidation.

In approving the form of notice to be sent by mail and publication, the Bankruptcy Court directed Old GM to provide "known" creditors with direct-mail notice of the Sale; "unknown" creditors (*e.g.*, contingent creditors) were provided publication notice. Whether a creditor was "known" or "unknown" to Old GM was determined at the time of the

Sale notice, based on what Old GM's books and records indicated.[3] And the Bankruptcy Court concluded in 2009 that all Old GM vehicle owners who had not made a demand or filed a lawsuit against Old GM—like Appellants—were unknown creditors. A-7765–7797.

Appellants do not, and cannot argue that they received *no* notice of the Sale or were actually unaware of the Sale. As Judge Kaplan observed, "[n]o sentient American is unaware of the travails of the automotive industry in general and of General Motors Corporation, . . . in particular." *In re Gen. Motors Corp.*, No. M 47 (LAK), 2009 WL 2033079, at *1 (S.D.N.Y. July 9, 2009). Rather, they contend that they should be treated better than all other Old GM unsecured creditors because, even though they were aware of Old GM's bankruptcy, they did not receive direct-mail notice of the Sale Motion. Essentially, Appellants want to be exempted from the fundamental free-and-clear condition of the binding Sale Order. And they want this special treatment even though the free-and-clear provision has been in effect

[3] If a party was injured in an accident prior to the Sale and notified Old GM, they were "known" and received direct-mail notice. Certain liabilities relating to accidents that occurred after the Sale are Assumed Liabilities and not implicated by this Appeal.

for over six years, and countless transactions with third parties have occurred based on the validity of this provision.

Appellants are asking for an extraordinary, one-sided "do-over" of the Sale solely for their benefit. Their position is essentially that New GM, the good-faith purchaser for value, should bear the ultimate burden for Old GM's alleged Sale notice transgressions.

The Bankruptcy Court largely rejected Appellants' due process claims because they were not prejudiced by their failure to receive direct-mail notice of the Sale. In particular, the same bankruptcy judge who presided over the Sale Hearing in 2009, concluded in 2015 that the Appellants' objections to the Sale were substantially the same as the objections that he heard and were litigated by many others in 2009 (including by numerous State Attorneys General, consumer advocacy groups, and the Official Committee for Unsecured Creditors, which all represented the interests of Old GM vehicle owners, like Appellants). Since those objections had been previously rejected, the Bankruptcy Court concluded that the result of the Sale Hearing would have been the same had Appellants participated—the Sale would have been

approved, including the liability shield and its bar to successor liability claims.

In its July 2009 Decision, the Bankruptcy Court properly recognized that the Governments had sole discretion in deciding which Old GM liabilities to assume. Every other Old GM liability would be retained by Old GM. At the Sale Hearing, the U.S. Treasury (a significant owner of New GM) refused to allow New GM to assume additional liabilities, including liability for pre-sale accident plaintiffs and economic-loss claims brought by owners of Old GM vehicles. Appellants' claims here are the same as those that the Governments (on behalf of New GM) expressly refused to assume in 2009. Appellants, thus, received due process—*i.e.*, consideration of their objections (made by others who appeared and who shared and represented their interests).

Nonetheless, in reviewing the record from 2009, the Bankruptcy Court in 2015 identified (improperly, in New GM's view) one issue on which some Appellants may have been prejudiced. To cure that purported harm, it carved-out from the liability shield "Independent Claims" relating to Old GM vehicles that are premised solely on New

GM conduct.[4] The Bankruptcy Court held that the Ignition Switch Plaintiffs (and no other claimant) may "assert otherwise viable claims against New GM for any causes of action that might exist arising solely out of New GM's own, independent, post-Closing acts, so long as those Plaintiffs' claims do not in any way rely on any acts or conduct by Old GM." *In re Motors Liquidation Co.*, 529 B.R. 510, 598 (Bankr. S.D.N.Y. 2015) ("*Opinion*"). The Bankruptcy Court's decision to modify the Sale Order six years after it was entered to allow so-called "Independent Claims" was clearly erroneous for at least three reasons.

First, there was no due process violation (which is the predicate for modifying the Sale Order) because the Appellants were "unknown" creditors of Old GM at the time of the Sale and, therefore, the widespread publication and media notice of the Sale satisfied due process. None of the Appellants receiving publication notice had asserted any claim against Old GM at the time of the Sale. The books and records of Old GM did not list their claims as liabilities. And while it is true that some Old GM employees were aware in July 2009 of unresolved airbag non-deployment and stall issues with certain Old GM

[4] The carve-out for Independent Claims is one of the issues raised by New GM in its cross-appeal.

vehicles, that does not mean that Old GM had sufficient knowledge in connection with the Sale notice to identify Appellants (asserting an ignition switch defect) as "known" creditors.

Second, and more fundamentally, Appellants *never* had any claim against the newly formed *New GM*. Their claims, if any, were against Old GM. Appellants are not entitled to a due process remedy that transforms their claims against Old GM into claims against New GM, the good-faith purchaser for value, simply because Old GM did not provide them with direct-mail notice of the Sale Hearing.

Third, to the extent that any Appellant has a viable claim against New GM due solely to a new and separate post-Sale agreement between New GM and the Old GM vehicle owner (for example, a claim against New GM because a New GM dealer sold an Old GM vehicle after the Sale under New GM's Certified Pre-Owned Program, which included a new vehicle warranty), the Sale Order did not need to be (and should not have been) modified to allow this new and separate claim to proceed against New GM.

In sum, this Court should enforce the liability shield including the bar on successor liability as to all Appellants' claims against New GM

and overturn the *Opinion* to the extent that it modified the Sale Order to allow Ignition Switch Plaintiffs to assert so-called "Independent Claims." Further, this Court should affirm that New GM cannot be liable for claims that in any way are based on Old GM's actions, duties or conduct (except for Assumed Liabilities pursuant to the Sale Agreement).

JURISDICTIONAL STATEMENT

This appeal arises from the Bankruptcy Court's *Opinion* and Judgment, granting in large part New GM's motions to enforce the Bankruptcy Court's prior Sale Order. Bankr. Docs. 13177, 13109. That Judgment is a final order that resolves the applicability of the Sale Order to Appellants' claims.[5] Certain Appellants filed motions for reconsideration, which the Bankruptcy Court denied on July 22, 2015. Bankr. Doc. 13313. Appellants timely filed their appeal and New GM timely filed its cross-appeal.

The Bankruptcy Court certified the Judgment for direct appeal under 28 U.S.C. §158(d) and Federal Rule of Bankruptcy Procedure 8006(e), which this Court granted on September 9, 2015. This Court has jurisdiction over these consolidated appeals under 28 U.S.C. §158(d)(1).

[5] The Groman Plaintiffs appeal the Bankruptcy Court's discussion relating to the legal standard for evaluating a claim for "fraud on the court" under Federal Rule of Civil Procedure 60(d)(3). That issue is not ripe for this Court's review because the Bankruptcy Court's ruling did not finally resolve the application of that standard to any of Appellants' claims.

STATEMENT OF ISSUES

1. Whether Appellants received appropriate notice of the Sale where, among other things, (a) Appellants were unknown creditors of Old GM; (b) there was wide-spread publication and media notice of the Sale; and (c) objections identical to those now raised by Appellants were fully briefed, argued and overruled by the Bankruptcy Court during the Sale approval process?

2. Whether the Bankruptcy Court had the authority to enforce the injunction in its Sale Order barring Appellants from suing New GM for Old GM's Retained Liabilities, including successor liability claims?

3. Whether the Bankruptcy Court erred in concluding that the Sale Order could be modified years after the appeal of the Sale Order had been finally resolved so that Ignition Switch Plaintiffs could assert so-called "Independent Claims" against New GM with respect to Old GM vehicles?

STATEMENT OF THE CASE[6]

I. Old GM's Dire Financial Position

By late 2008, Old GM was in extreme financial distress. A-1527–1528. In the first quarter of 2009, Old GM suffered negative cash flow of $9.4 billion. A-1534. To avoid a collapse of the U.S. auto-industry, Old GM received significant tax-payer funding, but that proved insufficient. A-1528–1533. In March 2009, the Governments gave Old GM 60 days to submit a viable restructuring plan or liquidate. A-5935. Old GM's only viable option became selling its assets under Bankruptcy Code Section 363 to a newly-formed entity (that became New GM) owned by the U.S. Treasury Department and the Canadian Government.

The negative consequences of an Old GM fire-sale liquidation (as opposed to a Section 363 sale of Old GM's ongoing business) cannot be overstated. *See Opinion*, 529 B.R. at 530. An immediate liquidation would have left unsecured creditors (including Appellants) with nothing, cost hundreds of thousands of jobs, and resulted in significant

[6] At the request of the Bankruptcy Court, all the parties agreed to a set of stipulated facts for the limited purpose of ruling on the Motions to Enforce. A-5781.

business losses to Old GM's direct and indirect suppliers. *Id.* The Sale avoided those calamitous results and provided a particularly favorable outcome under the circumstances because New GM was not a typical commercial buyer. It was a government-owned entity that was willing to pay far more than the liquidation value of Old GM's assets for "underlying societal interests in preserving jobs and the North American auto industry." A-1536.

II. Old GM Files for Bankruptcy and the Sale-Related Pleadings

On June 1, 2009, Old GM filed for bankruptcy under Chapter 11 of the Bankruptcy Code. That same day, Old GM filed a motion seeking approval of the Sale. A-109. In its Sale pleadings, Old GM explicitly stated that the Sale was to be "free and clear of liens, claims, encumbrances and interests pursuant to Section 363(f) of the Bankruptcy Code," including *all successor liability claims*. A-128–129.

The Bankruptcy Court understood that the Governments had agreed to continue financing Old GM's business for only a limited time in bankruptcy because it believed that Old GM's already deteriorating business would only worsen in bankruptcy. A-1544–1545. Consequently, the Governments set a strict deadline of just over a

month to consummate the Sale. A-1536, A-1544. If that deadline was not met, the Governments said they would stop financing Old GM's business, forcing Old GM to liquidate under fire-sale conditions. *Id.*

Old GM immediately sought approval from the Bankruptcy Court via the Sale Procedures Order as to how and to whom it should provide direct-mail and publication notice of the Sale. A-133–137. It was clear that direct-mail notice to the 70 million individuals who owned Old GM vehicles would be cost- and time-prohibitive. A-128, A-136. Specifically, it would have cost Old GM approximately $43 million for its court-approved noticing agent to have provided direct-mail notice to the owners of the 70 million Old GM vehicles. A-6250. More importantly, the burden of mailing 70 million individual notices would have delayed the Sale Hearing causing Old GM additional multi-million dollars in operating losses and jeopardizing the Sale itself. *Id.*

Accordingly, the Bankruptcy Court made prompt and precise decisions about the Sale Notice that Old GM had to provide. A-379. It ordered direct-mail notice for "known" creditors. A-385–386. Known creditors are those individuals and entities to whom Old GM owed debts (or could be liable), based on its books and records, including persons

who notified Old GM of their intention to assert a claim. Importantly, the Bankruptcy Court viewed Old GM vehicle owners who had not sued Old GM, or made written demands on Old GM, as contingent creditors.[7] Contingent creditors were deemed "unknown creditors" of Old GM. The Bankruptcy Court ordered publication notice to unknown creditors (A-385), which expressly included all contingent warranty creditors (A-1611–1612).

The Bankruptcy Court approved the form and content of both the direct-mail and publication notices. A-385. The Sale notices' content was consistent with the Official Form of Sale Notice approved by the Bankruptcy Courts for the Southern District of New York.[8] It notified parties in interest of the Sale Motion, the Sale Hearing, the terms of the Sale, the deadline to object, and the bidding procedures for Old GM's assets. A-398–405. The Sale Motion (and the Sale Agreement) made clear that the purchaser would be acquiring Old GM's assets free and

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[7] *See* A-7795–7797; *see also Morgenstein v. Motors Liquidation Co. (In re Motors Liquidation Co.),* 462 B.R. 494, 508 & n.68 (Bankr. S.D.N.Y. 2012).

[8] *See* Bankruptcy Court General Order M-331 (Sept. 5, 2006)(Bernstein, J.).

clear of all Liabilities (except Assumed Liabilities), including all successor liability claims. A-140–142; A-457, A-475, A-537.

The Sale Notice did not contain any creditor-specific information. A-398–405. Indeed, the resolution of Old GM claims was to be made after the Sale Hearing, pursuant to separate bankruptcy procedures to be administered by Old GM. *See In re Gen. Motors Corp.*, 407 B.R. 463, 474-75 (Bankr. S.D.N.Y. 2009). The form and substance of the Sale Notice was fully understood by, among others, the Creditors' Committee and the 44 State Attorneys General who objected to the Sale; a free-and-clear provision meant that all Old GM claims of whatever magnitude or type would be retained by Old GM, and not assumed by New GM.

Old GM published notice of the Sale in (1) the global edition of *The Wall Street Journal*, (2) the national edition of *The New York Times*, (3) the global edition of *The Financial Times*, (4) the national edition of *USA Today*, (5) *The Detroit Free Press/Detroit News*, (6) *Le Journal de Montreal*, (7) *The Montreal Gazette*, (8) *The Globe and Mail*, (9) *The National Post*, and (10) on the public website of Old GM's noticing agent (the "Publication Notice"). A-5939–5940. Old GM's widespread

Publication Notice was in addition to the extensive media attention that the Sale received. In fact, more than 1,250 news stories were written about Old GM's bankruptcy and the Sale in the five short weeks between the Petition Date and the Sale Hearing. A-6298. Unsurprisingly, given this widespread coverage, Appellants do not claim they were unaware of the Sale to New GM.

A. The Sale Agreement's Free-and-Clear Provision

New GM bought the assets of Old GM free and clear of claims or liabilities based on an Old GM vehicle, part, conduct or duty that is not specifically defined as an Assumed Liability. A-1648. New GM's Assumed Liabilities for Old GM vehicles are limited to the following:

(1) post-sale accidents/incidents involving personal injury, loss of life, or property damage;

(2) repairs or the replacement of parts (but not monetary damages) for a limited duration provided for under the "glove box warranty"; and

(3) Lemon Law claims, which are essentially related to a breach of the glove box warranty remedy.

A-1693–1695. All other liabilities relating to Old GM vehicles were Retained Liabilities of Old GM, including, among others: (1) product liability claims arising in whole or in part from any accidents prior to

the Sale; (2) liabilities to third parties (*i.e.*, Old GM vehicle owners) for claims based on contract, tort, or any other basis; and (3) liabilities related to implied warranty or obligations arising under statutory or common law. A-465–466.

B. Objections to the Sale by Various Groups Representing Vehicle Owners

The majority of the objections to the Sale challenged only limited aspects of the transaction. A-1571; A-5944–5946. Many of the objectors argued—like Appellants here—that New GM should assume more claims, and that the free-and-clear provisions—particularly with respect to successor liability—were improper or unfair. A-7814, A-7826, A-7866, A-7883, A-7900, A-7989.

The State Attorneys General objected to the Sale, arguing that New GM should assume all consumer claims, including implied warranty claims, additional express warranties, and statutory warranties. A-7883, A-7900. They took the position that the free and clear provision "divest[ed] consumers of substantial legal rights, without any regard for state laws that may, when a claim is eventually made, be read to hold otherwise." A-7887.

The Creditors' Committee, representing all unsecured creditors (including Appellants), objected to the Sale because, they argued, it would cut off state-law successor liability claims and limit any current or future claimants to a recovery from the Sale proceeds and other assets remaining with Old GM. A-7997.

The Ad Hoc Committee of Consumer Victims, attorneys for individual accident litigants, the Center for Auto Safety, Consumer Action, Consumers for Auto Reliability and Safety, the National Association of Consumer Advocates, and Public Citizen (collectively the "Vehicle Owner Objectors") objected to the Sale, arguing that Bankruptcy Code Section 363 did not authorize Old GM to sell its assets free and clear of successor liability. A-7824; *Opinion*, 529 B.R. at 532. The Vehicle Owner Objectors also claimed—just like Appellants—that (1) the Bankruptcy Court did not have jurisdiction to enjoin successor liability claims against a non-debtor (New GM), and (2) the free-and-clear provisions violated due process because vehicle owners who might have claims did not receive meaningful notice that the Sale would affect their rights as against the purchaser. *Id.*

On July 5, 2009, the Bankruptcy Court issued the Sale Order approving the Sale Agreement, and a separate decision supporting the Sale Order. A-1517; A-1609. The court overruled all remaining objections, including the due process and notice objections, made by vehicle owners and their advocates. A-1608. Citing the decision from the Chrysler bankruptcy (which was filed shortly before the Old GM bankruptcy, *see Gen. Motors*, 407 B.R. at 477-498), the Bankruptcy Court ruled that Bankruptcy Code Section 363 authorized the sale of Old GM's assets free and clear of successor liability claims and shielded the purchaser from creditor claims. A-1578–1582. The Sale Order was affirmed on appeal on the merits, and a separate appeal was dismissed years ago as being equitably moot. A-5948–5949. To date, countless transactions have occurred based on the validity and integrity of the Sale Order. *See Parker v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 430 B.R. 65, 82 (S.D.N.Y. 2010) ("In reliance on the Sale Order[] having become effective, countless new transactions have occurred . . . .").

III. The Ignition Switch Actions and Bankruptcy Litigation

Beginning in February 2014, New GM recalled certain vehicles, including vehicles manufactured by Old GM, many of which contained a defective ignition switch.[9] Immediately after New GM announced the first of the recalls, plaintiffs began suing New GM, ignoring the injunction provisions in the Sale Order shielding New GM from Old GM's Retained Liabilities, including successor liability claims.[10] *Opinion*, 529 B.R. at 521.

The claims at issue here fall into two categories: (1) claims by Old GM vehicle owners (Ignition Switch Plaintiffs and certain Non-Ignition Switch Plaintiffs) for "economic loss" associated with the purported post-recall diminution in value of their vehicle; and (2) pre-Sale accident

[9] Under the Sale Agreement, New GM agreed to abide by federal recall requirements relative to Old GM manufactured vehicles. *See* A-1734. Importantly, that obligation was not an Assumed Liability, nor did it change the fundamental structure of the Sale Agreement that all Liabilities (except for Assumed Liabilities) to third parties, including vehicle owners, based on contract, tort or otherwise remained with Old GM. A-1697. Also noteworthy, the Sale Agreement expressly prohibited third-party beneficiary claims. A-1763–1764.

[10] On June 9, 2014, the Judicial Panel on Multidistrict Litigation established MDL No. 2543, designating District Judge Jesse M. Furman of the Southern District of New York to conduct coordinated proceedings for the actions assigned to the MDL. More than 250 cases are pending in MDL No. 2543. There are also numerous state court proceedings filed by plaintiffs against New GM.

claims, which were expressly barred by the Sale Order. *Id.* at 521-23. Both categories seek recovery based on successor liability. *Id.* at 521-23, 526.

A. Motions to Enforce the Sale Order

Starting in April 2014, New GM filed three Motions to Enforce the Sale Order. *See Opinion*, 529 B.R. at 538-39. New GM's first motion related to Ignition Switch Plaintiffs seeking alleged economic losses for Old GM vehicles and parts. *Id.* New GM's second motion sought to enjoin parties who had asserted "economic loss" claims associated with Old GM vehicles that alleged a non-ignition switch defect. *Id.* at 522. New GM's third motion related to pre-Sale accident lawsuits filed against it. *Id.* at 523. The Motions to Enforce argued that these claims were barred by the Sale Order.

B. The *Opinion* and Judgment

After extensive briefing and two days of oral argument, the Bankruptcy Court issued its *Opinion*, enforcing the Sale Order's free-and-clear injunctive provisions. *See generally Opinion*, 529 B.R. 510. The Bankruptcy Court previously ruled that it had jurisdiction and authority to interpret and enforce its own Sale Order. *See In re Motors Liquidation Co.*, 514 B.R. 377, 379-382 (Bankr. S.D.N.Y. 2014).

Regarding due process, the Bankruptcy Court ruled that, although publication notice in a Section 363 sale is ordinarily satisfactory, it was insufficient here for vehicle owners that had a defect related to the Ignition Switch ("Ignition Switch Defect") because these vehicle owners were "known" creditors. *Opinion*, 529 B.R. at 525.[11] The Bankruptcy Court found that the notice of the Sale for other plaintiffs was sufficient, that they were unknown creditors and that the Sale Order remained fully enforceable as to those plaintiffs. *Id.* at 523-27.

The Bankruptcy Court also ruled that, to establish a due process violation, plaintiffs would have to—but could not—demonstrate prejudice as a result of the alleged insufficient Sale notice, except in one instance relating to the Ignition Switch Plaintiffs. *Id.* at 525-26. As to that one instance, the Bankruptcy Court found that the Sale Order should be modified to permit Ignition Switch Plaintiffs to assert so-called "Independent Claims" against New GM—*i.e.*, those claims "arising solely out of New GM's own, independent post-Closing acts"

[11] However, as demonstrated *infra* at Section I.A.3, the Bankruptcy Court's known-creditor finding is not supported by the stipulated factual record or the law.

relating to Old GM vehicles. *Id.* at 598. The Bankruptcy Court did not opine whether any plaintiff had viable Independent Claims.

The Bankruptcy Court's rulings regarding (i) the purported "known" creditor status of certain plaintiffs, and (ii) whether the Ignition Switch Plaintiffs' due process rights were violated requiring modification of the Sale Order to allow them to assert Independent Claims, are the subject of New GM's cross-appeal.

STANDARD OF REVIEW

This Court's review of a bankruptcy court's order is plenary. *See In re Palm Coast, Matanza Shores Ltd. P'ship*, 101 F.3d 253, 256 (2d Cir. 1996). A bankruptcy court's conclusions of law are reviewed *de novo*, and its factual findings for clear error. *In re Westpoint Stevens, Inc.*, 600 F.3d 231, 246-47 (2d Cir. 2010). This Court should defer to a lower court's interpretation of its own orders, as is the case here. *See id.* at 247; *Truskoski v. ESPN, Inc.*, 60 F.3d 74, 77 (2d Cir. 1995).

Factual findings, including those based on stipulated facts presented by the parties, are subject to a "clearly erroneous" standard of review. *In re Hamblin*, 251 B.R. 441, 2000 WL 297069, at *2 (B.A.P. 10th Cir. 2000); *see Anderson v. City of Bessemer City*, 470 U.S. 564,

573-75 (1985). "A finding is 'clearly erroneous' if it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with a definite and firm conviction that a mistake has been made." *Hamblin*, 2000 WL 297069, at *2.

SUMMARY OF ARGUMENT

1. The notice procedure for the Sale satisfied due process. Due process requires only the best practicable notice under the particular circumstances. The notice Old GM provided in 2009 satisfied that standard.

The Bankruptcy Court held in 2009 that Old GM need not provide direct-mail notice to the 70 million vehicle owners who may have had contingent claims against it. Instead, Old GM only needed to provide direct-mail notice to those entities whose claims were "known" to it. Known creditors, in this context, are those vehicle owners who had put Old GM on notice that they would be asserting a claim against it.

Regardless of the type of notice (direct-mail versus publication), its court-approved content told creditors what they needed to know about the Sale. Specifically, the notice, together with the Sale Agreement, explained, among other things, that the purchaser would

acquire Old GM's assets free and clear of whatever claims Appellants had, including all successor liability-type claims.

Appellants were not "known" creditors of Old GM; therefore, the widespread publication and media notice of the Sale satisfied Old GM's notice obligations. The Bankruptcy Court's finding that vehicle owners with an Ignition Switch Defect were "known" creditors is clearly erroneous. The court based this finding on an alleged "admission" that New GM did not make. Specifically, the stipulated facts do not provide that Old GM admitted it had knowledge of Appellants' claims; instead, the stipulated record only admits that some Old GM employees were aware of certain unresolved instances where certain vehicles had issues relating to airbag non-deployment, ignition switches or stalls. Old GM's books and records, on the date that Old GM filed for bankruptcy, did not show these vehicle owners as known claimants and they had not asserted any claims against Old GM at that time.

To provide adequate notice of an urgent bankruptcy sale to millions of creditors, the law does not require a mega-sized debtor to scour every corner of its global enterprise to uncover contingent tort claims, not yet asserted, and determine whether they might become

actual claims at some unspecified date in the future. Courts universally hold that publication notice is sufficient for such contingent claimants, like Appellants. And publication notice is particularly appropriate where, as here, there are millions of creditors, and significant costs and time pressures related to noticing and consummating the Sale.

Even if Appellants were "known" creditors, which they were not, they were not prejudiced by any due process violation by Old GM. As the Bankruptcy Court concluded, harm or prejudice is an element of any due process claim. Appellants' suggestion that prejudice is not required would lead to patently unfair results. This is especially true in the bankruptcy-sale context where there are many parties involved, including other creditors, and the good-faith purchaser who paid fair value was not involved in the alleged notice infirmity. Here, Appellants' Sale objections ***are the same*** as those litigated in 2009 on behalf of all vehicle owners, which were overruled by the Bankruptcy Court. The Bankruptcy Court determined that it would have reached the same result in 2009 if Appellants had added their voices to the chorus of objectors. Accordingly, there is no reason now to give them

preferential treatment over other similarly situated Old GM unsecured creditors.

As the Bankruptcy Court readily acknowledged, the choice before it was stark and binary: either approve the Sale monetizing Old GM's assets for significantly more than their fair market value, or liquidate the company, leaving Old GM's unsecured creditors (including the Appellants) empty handed. Even Appellants recognize that the Sale was the only viable option. A-5941. The free-and-clear provision was a fundamental element of the Sale, and there is no basis to speculate that these Appellants' objections would have changed its terms—especially when the Bankruptcy Court that ruled on the matter in 2009 has unequivocally confirmed in the *Opinion* that they would not have.

For these reasons—because Appellants were not known creditors entitled to direct-mail notice of the Sale and because Publication Notice caused them no prejudice—the Bankruptcy Court correctly enforced the liability shield against Appellants.

2. The Bankruptcy Court was well within its authority to enforce the provisions of its own Sale Order, including the injunction provisions therein. The Bankruptcy Court indisputably had jurisdiction

to interpret and enforce its own order, and Appellants' jurisdictional arguments are specious.

The Bankruptcy Court's enforcement process was sound, and the court properly exercised its discretion. The overwhelming majority of Appellants, including those represented by Designated Counsel, have not raised this issue on appeal. Indeed, they acknowledged the Bankruptcy Court's jurisdiction and endorsed the procedures used. The one group of Appellants (in a brief not joined by the others) arguing that the Bankruptcy Court lacked the power to enjoin them from their continuing violation of the Sale Order essentially makes an impermissible, misguided collateral attack on the Sale Order's "free and clear" provision. There is no question that this key term is valid. Recent case law, including *In re Chrysler LLC*, 576 F.3d 108, 119-20 (2d Cir. 2009), *vacated*, 558 U.S. 1087 (2009), and *Douglas v. Stamco,* 363 F. App'x 100 (2d Cir. 2010), confirm that a good-faith purchaser for value has the right to take assets free and clear of successor liability claims. That is exactly what happened here, and the Bankruptcy Court is unquestionably authorized to protect the integrity of its orders and their terms.

3. Although the Bankruptcy Court correctly enforced the plain terms of the Sale Order, it erred by modifying the Sale Order to permit certain Appellants (*i.e.*, the Ignition Switch Plaintiffs) to proceed with so-called "Independent Claims" against New GM related to Old GM vehicles. That category of claims finds no support in the Sale Agreement or the Sale Order. Claims related to Old GM vehicles are either on the narrow list of Assumed Liabilities of New GM (not at issue here), or Retained Liabilities of Old GM. There was no third category of liabilities in the Sale Agreement or the Sale Order relating to claims of Old GM vehicle owners. That was the fundamental structure of the Sale and it should not have been altered.

New GM, as the good-faith purchaser of Old GM's assets, bargained for the liability shield including the right to buy free and clear of successor liability claims, and the Sale Order unequivocally stated that its terms applied to any known or unknown Old GM creditor. *Any* modification of the Sale Order six years after the Sale would require extraordinary circumstances under either Rule 60(b) of the Federal Rule of Civil Procedure or Section 363(m) of the Bankruptcy Code—both of which generally bar collateral attacks to the terms of a

long-consummated sale. The prohibition of collateral attacks is even more important in this case because all appeals related to the Sale Order were fully and finally disposed of more than four years ago. Not only is there no permissible remedy against New GM because of statutory and equitable mootness, but the decisions affirming the Sale Order preclude Appellants' belated efforts to cherry pick the Sale Order's provisions, including those related to its "free and clear" conditions. Allowing the Sale Order to be modified now, six years later, would go against the appellate rulings affirming the Sale Order.

It would also fundamentally alter the bargain New GM struck when it purchased Old GM's assets. The Bankruptcy Code expressly contemplates that when a debtor needs to monetize its assets to preserve value for creditors, it may condition the asset sale to be free and clear of claims including successor liability claims. The free-and-clear provision trumps state law to the contrary. The Sale Order did not extinguish the creditors' claims, but it can, as it did here, channel recovery on such claims to the Sale proceeds only. This frees the *bona fide* purchaser for value, who the Bankruptcy Code protects, from post-Sale litigation and allows it to pay more to the debtor's estate for having

received the liability shield. In a bankruptcy sale, unsecured creditors' claims are preserved and the *res* from which they can seek recovery is transferred from wasting assets to stabilized sale proceeds.

It is a myth to suggest that the court can relieve a plaintiff from the free-and-clear provision without modifying the Sale Order. The Sale Order clearly states that it applies to all known and unknown creditors (A-1629–1630)—a provision that includes Appellants. Providing them relief against New GM would fundamentally alter the terms of the bargained-for transaction.

Finally, the remedy for an alleged due process violation by a debtor-seller to its creditors cannot be imposed on the good faith purchaser for value. New GM did not manufacture vehicles that were in prepetition accidents. Nor did it manufacture the vehicles that Appellants now contend have suffered diminished re-sale value. Their claims are only against the Old GM estate, and it would be highly prejudicial to New GM to make it responsible for claims that it never incurred, and which the liability shield was intended to protect it from.

ARGUMENT

I. The Old GM Sale Notice Procedures Satisfied Due Process.

In procedures approved by the Bankruptcy Court, Old GM provided direct-mail notice of the Sale Order to everyone who had sued or made a demand against Old GM and to any creditor listed on Old GM's books and records. This notice covered all contractual claims and tort claims that had been asserted against Old GM as of the Petition Date. In all, Old GM sent direct-mail notice to approximately four million parties at a cost of approximately $3 million. A-6249; A-6288. Old GM also provided publication notice to all of its potential creditors, including the owners of approximately 70 million Old GM vehicles. A-5940.

This notice was the most practicable notice that Old GM could send under the indisputably extraordinary circumstances it was experiencing in 2009. *See Parker*, 430 B.R. at 97-98. Time was of the essence, and costs were a significant factor. The cost to send direct-mail notice to all Old GM vehicle owners (without regard to the delay to the Sale Hearing caused by mailing so many additional notices) would have been $43 million. A-6250.

One year after it approved the Sale Order, the Bankruptcy Court explained, as part of its rejection of a similar due process challenge by an Old GM vehicle owner, that it simply was not feasible for Old GM to do anything more than it did in 2009 to put its contingent creditors on notice of the Sale. "[Old] GM didn't have the luxury of waiting to send out notice by mail to hundreds of thousands of [Old] GM car owners, and instead gave notice by publication." A-7796.

Despite these rulings, the Bankruptcy Court now has held that Old GM should have done more in 2009 to inform Old GM ignition switch vehicle owners that their claims could not be asserted against the purchaser of Old GM's assets. Not so. The court-approved notice procedures satisfied the parties' due process rights under the extraordinary circumstances of Old GM's Sale, and, regardless, any purported deficiency in those procedures did not prejudice Appellants.

A. Appellants Received The Requisite Notice Because None Were "Known" Creditors.

Appellants were all unknown creditors of Old GM who, at best, had contingent claims against Old GM. As a matter of law, they were not entitled to any more notice than they received—namely, publication

and media notice. That notice satisfied due process requirements in this complex bankruptcy sale.

1. "Unknown" Creditors With Contingent Claims Are Not Entitled To Direct-Mail Notice.

Whether a creditor receives direct-mail or publication notice of a bankruptcy sale depends on whether such party is a "known" or "unknown" creditor at the time of the sale. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 797 (1983); *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995). Appellants agree. *See* Pre-Closing Accident Plaintiffs' Br. 13-15.

Whether a creditor is "known" or "unknown" depends on whether the identity of the claim and the claimant is knowable from the debtors' books and records. *See In re New Century TRS Holdings, Inc.*, No. 07-10416 (BLS), 2014 WL 842637, at *3-6 (Bankr. D. Del. Mar. 4, 2014); *Louisiana Dept. of Environmental Quality v. Crystal Oil*, 158 F.3d 291 (5th Cir. 1998). Put differently, a debtor need not search beyond its own books and records to determine the identity of unknown creditors. *See 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).

In reviewing 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 has no "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)). The debtor need not conduct a vast open-ended investigation to identify potential creditors. *Id.*; *Chemetron Corp. v. Jones*, 72 F.3d 341, 347 (3d Cir. 1995).

Due process in the bankruptcy context presents a unique set of circumstances. Aside from the time and cost factors, unlike general civil litigation, bankruptcy proceedings rarely involve a single, readily identifiable plaintiff against a single, readily identifiable defendant.

Where, as here, the debtor was a multi-national corporation with tens of millions of creditors, contingent creditors (especially those with tort-based, unasserted claims) are, by definition, unknown creditors. Requiring debtors with limited financial resources to undertake extensive investigations among their hundreds of thousands of employees to investigate potential, unasserted claims 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. For this reason, the law does not charge a debtor "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).[12]

[12] The Pre-Closing Accident Plaintiffs argue that a "known

2. Appellants, Who Held Contingent Claims Against Old GM, Were "Unknown" Creditors As A Matter Of Law.

At the time of the Sale Hearing, almost none of the Appellants had submitted any notifications or made any expression of intent to file claims against Old GM.[13] Similarly, almost none of the Appellants had sued Old GM. Consequently, these Appellants had, at best, contingent claims against Old GM. Under the express terms of the Sale Order, holders of contingent claims (including contingent warranty claims) were unknown creditors. A-1611-1612.

That fact should end the "known" creditor analysis, as it did in *Morgenstein v. Motors Liquidation Co. (In re Motors Liquidation Co.)*,

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creditor" is one that is "reasonably ascertainable." Pre-Closing Accident Pl. Brief, at 13. However, the case law is clear that "reasonably ascertainable" does not mean "reasonably foreseeable." *Chemetron Corp. v. Jones*, 72 F.3d at 347; *In re XO Commc'ns. Inc.*, 301 B.R. at 793 (citing *Chemetron*). Creditors will be deemed "unknown" even if they "could be discovered upon investigation, [but] do not in due course of business come to [the] knowledge [of the debtor.]" *Mullane*, 339 U.S. at 317. Plaintiffs are such unknown creditors.

[13] The Powledge Appellant sued Old GM prior to the Petition Date, received direct-mail notice of the Sale and timely filed a proof of claim against Old GM. *See In re Motors Liquidation Co.*, 533 B.R. 46, 48-49 (Bankr. S.D.N.Y. 2015). Accordingly, the Powledge Appellant indisputably received proper due process.

462 B.R. 494 (Bankr. S.D.N.Y. 2012) ("*Morgenstein*").[14] There, the Bankruptcy Court held that other Old GM vehicle owners were "unknown" creditors at the time of the bankruptcy, despite their allegations that, before the bankruptcy, Old GM had knowledge of a "latent defect" in model year 2007 and 2008 Chevrolet Impalas vehicles, but concealed it. *Id.* at 505-08. The *Morgenstein* plaintiffs argued that the plan confirmation order should not apply to them or be modified as to them because they did not receive direct-mail notice of the plan. *Id.* at 497 n.6. The Bankruptcy Court rejected the argument that they were "known" creditors under their failure-to-disclose a latent-defect theory. *Morgenstein*, 462 B.R. at 508 & nn. 55, 67, 68. That ruling was upheld on appeal. A-8088–8092. The same rationale applies here.

Burton v. Chrysler Group, LLC (*In re Old Carco*), 492 B.R. 392 (Bankr. S.D.N.Y. 2013) ("*Burton*"), is also directly on point. *Burton* involves Old Carco's (Chrysler's) Section 363 sale and a similar due process challenge to the free-and-clear provision in the Chrysler sale order. The *Burton* plaintiffs claimed that vehicles they owned before the sale had a design flaw such that they were entitled to actual notice

[14] *Robley* is also directly on point for this issue. A-7795–7797.

of the sale or of the defect, which did not manifest itself until after the sale. *See* A-8117. The *Burton* court rejected their due process argument, finding that, under the sale order, New Chrysler was shielded from successor liability for alleged defects in prepetition vehicles. *See id.* at 402-03.

The *Burton* court ruled that, despite Old Carco's actual knowledge of the defect before the sale and its failure to put the plaintiffs on notice of the defect—which is what Appellants claim here—affected vehicle owners were not "known" creditors of Old Carco because they had not asserted any claims before the sale. As the court held, "[a]nyone who owns a car contemplates that it will need to be repaired . . . ." *Id.* at 403. In other words, all vehicle owners are necessarily aware that they may have claims against the bankrupt manufacturer, but those vehicle owners are unknown creditors holding contingent claims where their claims are not asserted prior to the sale. *Id.*

The Bankruptcy Court sought to distinguish *Burton* because at least some of plaintiffs' cars had been subject to a recall before Old Carco's 363 sale, while none of the Appellants' cars had been recalled prior to the Old GM sale. *Opinion*, 529 B.R. at 559-560. But the

prepetition recall notice in *Burton* said nothing about the defect that the plaintiffs in that case later complained about. *Burton*, 492 B.R. at 396. Moreover, the recall notice did not apply to *all* of those plaintiffs' vehicles and thus its existence was clearly not an outcome-distinguishing fact. *Id.* at 399-400. Finally, a prepetition recall notice says nothing about the terms of the sale (*i.e.*, who is purchasing the assets, when the sale hearing will take place or if the sale is free-and-clear of claims) and, therefore, has nothing to do with whether publication notice, as contrasted to direct-mail notice, is sufficient for a section 363 sale.

Numerous cases have reached similar holdings. *See In re Enron,* No. 01-16034, 2006 WL 898031, at *5 (Bankr. S.D.N.Y. Mar. 29, 2006) (establishing that even an ongoing formal FERC investigation does not transform a contingent creditor into a known creditor and that simply having an investigation ongoing does not mean it becomes part of the debtor's books and records); *In re New Century TRS Holdings, Inc.*, No. 07-10416 (BLS), 2014 WL 842637 (Bankr. D. Del. Mar. 4, 2014) (holding that an examiner's report highlighting issues with certain lending practices did not mean that a movant asserting some of those same

practices was a "known" creditor and further that the pendency of lawsuits does not make parties with similar but unfiled claims "known" creditors); *In re Spiegel, Inc.*, 354 B.R. 51, 56-57 (Bankr. S.D.N.Y. 2006) (holding that the plaintiffs were "unknown" creditors because even though the debtor knew about litigation by a different party with similar claims prior to confirmation, the plaintiffs themselves did not assert their litigation claims against the debtor until after the debtor's reorganization plan had been approved (citing *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988)); *In re Envirodyne Indus.*, 206 B.R. 468, 473-75 (N.D. Ill. 1997) (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).

Put simply, a debtor is "not required to employ a crystal ball" to determine whether any contingent or potential litigation claims against it exist. *In re Spiegel, Inc.*, 354 B.R. at 56-57. Vehicle owners like Appellants only have contingent claims against a manufacturer, even if

the manufacturer may have some reason to know of a possible defect. If the potential tort claimant has not put the debtor on notice of his claim, he or she is an unknown creditor.

Moreover, this rule is especially important in cases where the company's financial woes are not due to pervasive tort liability; in such circumstances, as it was with Old GM (*see In re Gen. Motors Corp.*, 407 B.R. 463, 476 (Bankr. S.D.N.Y. 2009)), it is appropriate to treat all potential tort claimants the same. The uniformity and simplicity of this contingent-claimant rule is particularly valuable in the bankruptcy-sale context (as compared to the claims-adjudication context), where the goal is maximizing value under extreme time pressures, and where creditor claims against the debtor are not extinguished, but are instead channeled from the debtor's assets to the sale proceeds.

3. The Bankruptcy Court's Factual Finding That Certain Appellants Were Known Creditors Was Clearly Erroneous.

The Bankruptcy Court erroneously ruled that certain Appellants with contingent claims against Old GM were "known" creditors. The evidentiary record simply does not support the Bankruptcy Court's conclusion that Appellants were known at the time of the Sale.

The parties agreed that the ruling on New GM's Motions to Enforce would be based upon the parties' stipulated facts. *Opinion*, 529 B.R. at 529 n.17. The Bankruptcy Court agreed that it could decide the Motions to Enforce based on the stipulated record.[15] *Id.* at 523, 529 n.17. Nevertheless, in concluding that the Ignition Switch Plaintiffs were "known" creditors, the Bankruptcy Court cited to portions of the

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[15] Inexplicably, the Groman Plaintiffs argue that the Bankruptcy Court erred by not permitting additional discovery. *See* Groman Br. 26-38. They are the *only* plaintiffs to preserve this issue—and they press the argument despite the fact that plaintiffs represented by Designated Counsel opposed their request for additional discovery because the issues could be decided on the stipulated record. A-6069–6070.

The Pre-Closing Accident Plaintiffs never requested discovery, but now assert a belated objection to the lack of discovery in a single sentence in their brief. *See* Pre-Closing Accident Plaintiffs Br. 38 n.9. Having not raised the issue below, they cannot do so now. *See, e.g.*, *Readco, Inc. v. Marine Midland Bank,* 81 F.3d 295, 302 (2d Cir. 1996) ("Ordinarily, we 'will not consider an issue raised for the first time on appeal.'").

The Bankruptcy Court ruled applying the summary judgment standard, concluding that no material facts were in dispute, so no further factual development was needed. Significantly, the Groman Plaintiffs did not need, nor seek, discovery with respect to whether they were prejudiced by not receiving the Sale Notice by direct mail, which was the predicate for the Bankruptcy Court's due process ruling. In any event, the Bankruptcy Court was well within its discretion to manage this complex litigation as it saw fit. *See, e.g.*, *In re World Trade Center Disaster Site Litig.*, 722 F.3d 483, 487 (2d Cir. 2013) (recognizing that courts are owed particular deference when reviewing discretionary decisions undertaken to manage especially complex litigation). The Groman Plaintiffs' outlier objection is meritless.

record that did not support this finding and mistakenly attributed "admissions" to New GM that were statements by plaintiffs' counsel.

Specifically, the Bankruptcy Court explained the basis for its "known" creditor ruling as follows:

> The parties stipulated that at least 24 Old GM personnel (all of whom were transferred to New GM), including engineers, senior managers, and attorneys, were informed or otherwise aware of the ignition switch defect prior to the Sale Motion, as early as 2003.
>
> ***New GM does not dispute*** that Old GM personnel knew enough as of the time of Old GM's June 2009 bankruptcy filing for Old GM to have been obligated, under the Safety Act, to conduct a recall of the affected vehicles.

Id. at 538 (emphasis added).

In its *Opinion*, the Bankruptcy Court cited the following portions of the record that it believed supported its conclusion,[16] but, on their face, none of them do:

- **Stipulated Facts, Exh. B, ¶ 14 (A-5981–6005):** This Stipulated Fact begins as follows: "Certain Old GM Personnel and New GM Personnel, as they relate to the Ignition Switch, are as follows," and then this "Stipulated Fact" lists various Old GM employees and what they knew with respect to certain investigations and accidents that occurred, over a span of years, prior to the Sale. That included references to certain air-bag non-deployment

[16] *See Opinion*, 529 B.R. at 538 nn. 60 & 61.

product liability cases and instances of stalls in vehicles. As to the latter, there was some information that the turning of the ignition switch out of the "run" position may have been caused by a knee hitting the switch. Notably, the term "Ignition Switch Defect" was never used in Pl. Stipulated Fact ¶ 14. And nowhere is it mentioned that Old GM knew there should have been an ignition switch recall prior to the Sale. In short, Paragraph 14 does not support the conclusion that New GM conceded that certain Old GM employees knew enough to begin a recall at the time of (or before) the Sale.

- **Ignition Switch Plaintiffs Opening Brief on the Four Threshold Issues, at 47:** This citation is to Appellants' opening brief below. It is not a Stipulated Fact and cannot be used to demonstrate that New GM "admitted" any fact.

- **Transcript of Oral Argument (Feb. 17, 2015), at 91:1-18 (A-11226):** The referenced passage is to statements made by counsel for the Ignition Switch Plaintiffs, not New GM.

- **Transcript of Oral Argument (Feb. 18, 2015), at 7:11-19 (A-10737):** The cited passage is as follows:

> Your Honor, yesterday when I was listening to the plaintiff's arguments it seemed that they were trying to make this case into something that it's not. This matter is not about whether Old GM personnel could have done a better investigation of the ignition switch issue or other parts that have been recalled. The issue of what Old GM knew is relevant in this hearing for a singular purpose, that being did Old GM have the requisite knowledge such that economic loss plaintiffs' unasserted tort claims were reasonably ascertainable. If it did, arguably the economic loss plaintiffs were entitled to direct-mail notice. If not, publication notice was sufficient.

> Counsel for New GM then made the argument that the claims were not reasonably ascertainable, and that publication notice was sufficient. Contrary to the court's holding, New GM never stipulated that Old GM employees "knew enough as of the time of Old GM's June 2009 bankruptcy filing for Old GM to have been obligated, under the Safety Act, to conduct a recall of the affected vehicles."[17]

Recognizing the Bankruptcy Court's error, Appellants invite this Court to engage in its own fact-finding to bolster the Bankruptcy Court's ill-founded conclusion. *See* Pre-Closing Accident Plaintiffs' Br. 15-20. The Court should decline their invitation for two reasons. ***First***, Appellants wrongly suggest that New GM does not dispute these findings (*id.* at 15, 20); it does.[18] ***Second***, New GM did not stipulate to these facts, and, therefore, they do not and cannot support the Bankruptcy Court's conclusions. And this Court, as a court of review,

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[17] The Bankruptcy Court's last citation is to the February 18, 2015 Transcript at 13:5-10, but this portion of the transcript concerns a discussion of the *Burton* case. It therefore appears that this citation was in error.

[18] In the briefing in the Bankruptcy Court, New GM unambiguously disputed this assertion. In its reply brief filed with the court, for example, New GM emphasized that "Old GM had not concluded there was a wide-spread problem with the ignition switches it was then investigating," and that the fact that some Old GM employees were investigating switch or airbag concerns *did not mean that Old GM had determined there was a "systematic safety defect.*" New GM Reply Br. 1-2, 7, 26 (emphasis added).

should not engage in its own fact finding. *See, e.g.*, *Gross v. Rell*, 585 F.3d 72, 75 n.1 (2d Cir. 2009) ("As an appellate court, we do not engage in fact-finding.").

To the extent Appellants argue that a "should have known" standard applies, they are wrong. That standard has been rejected by courts within this Circuit. *See, e.g., In re Spiegel, Inc.,* 354 B.R. 51, 57 (Bankr. S.D.N.Y. 2006) (rejecting contention that debtor should have known of plaintiff's claim since it was similar to other pending litigation). And even if "should have known" were enough (which it is not), vehicle owners do not become "known" creditors of a global corporate entity that had hundreds of thousands of employees just because a limited number of discrete employees, had knowledge of isolated incidents relating to certain vehicles, especially when such employees and Old GM had not concluded that there was a system-wide ignition switch safety defect. *See New Century*, 2014 WL 842637, at *5 (rejecting contention that the knowledge of some issues relating to mortgage loans by certain people translated into other customers with similar loan issues becoming known creditors of the debtor).

If the Court agrees with New GM that Appellants were not "known" creditors at the time of Old GM's bankruptcy, that ends the appeal, and the prejudice argument need not be addressed. Appellants admit that if they are "unknown" creditors, they received all the process due them through the widespread publication notice and media notice. Without an alleged due process violation, there is no basis to amend the Sale Order and the cross-appeal would also be resolved in New GM's favor.

B. The Alleged Insufficiency Of Publication Notice Is Irrelevent Because Appellants Did Not Suffer Any Prejudice.

Even if Appellants were "known" creditors of Old GM, none suffered any prejudice. Accordingly, they cannot maintain a due process claim.

1. A Due Process Claim Related To The Sale Notice Requires A Showing of Prejudice.

As an initial matter, Appellants are wrong to argue that prejudice has nothing to do with a due process claim. Under well settled law, a due process claim requires a showing of prejudice, and Appellants offer no reason to relieve them of this obligation. Indeed, in the context of a Section 363 sale, it is especially important to require a showing of

prejudice before a court can or should set aside bargained-for rights to a good faith purchaser in a sale order years after the sale.

Although this Court has not addressed this precise issue, all seven circuit courts that have addressed it uniformly require a showing of prejudice to sustain a due process claim. *See, e.g., Perry v. Blum*, 629 F.3d 1, 17 (1st Cir. 2010) ("[A] party who claims to be aggrieved by a violation of procedural due process must show prejudice."); *Rapp v. U.S. Dep't of Treasury, Office of Thrift Supervision*, 52 F.3d 1510, 1520 (10th Cir. 1995) ("In order to establish a due process violation, petitioners must demonstrate that they have sustained prejudice as a result of the allegedly insufficient notice."); *In re New Concept Housing, Inc.*, 951 F.2d 932, 939 (8th Cir. 1991) (noting that while the failure to notify debtor of a hearing contravened the Bankruptcy Rules, "violation of these rules constituted harmless error, because the Debtor's presence at the hearing would not have changed its outcome"); *In re Parcel Consultants, Inc.*, 58 F. App'x 946, 951 (3d Cir. 2003) (unpublished) ("Proof of prejudice is a necessary element of a due process claim."); *Cedar Bluff Broad., Inc. v. Rasnake*, 940 F.2d 651 (Table), 1991 U.S. App. LEXIS 17220, at *7, 1991 WL 141035, at *2 (4th Cir. 1991)

(unpublished) (holding that creditor asserting deficient notice failed to demonstrate "that it was prejudiced by the lack of notice to general creditors").[19]

Lower courts, including those within this Circuit, agree. *See Pearl-Phil GMT (Far East) Ltd. v. Caldor Corp.*, 266 B.R. 575, 583 (S.D.N.Y. 2001) ("[E]ven if notice was inadequate, the objecting party must demonstrate prejudice as a result thereof."); *Parker*, 430 B.R. 65, 97-98 (finding that a shortened notice period did not violate an unsecured creditor's due process rights because the 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"); *In re Caldor, Inc.-NY*, 240 B.R. 180, 188 (Bankr. S.D.N.Y. 1999) ("[I]n addition to establishing that the means of notification employed by [the debtor] was inadequate, Pearl must

[19] *See also 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 U.S. Kids, Inc.*, 178 F.3d 1297 (Table), 1999 WL 196509, at *5 (6th Cir. 1999) (unpublished); *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.").

demonstrate that it was prejudiced because it did not receive adequate notice."); *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."); *In re Vanguard Oil & Serv. Co.*, 88 B.R. 576, 580 (E.D.N.Y. 1988).

Appellants argue that all of these courts are wrong. In their view, the failure to receive direct-mail notice of the Sale is a harm in itself that demands a remedy, even if the lack of direct-mail notice did not affect an individual's substantive rights and even if Appellants actually read the Publication Notice. Their position defies logic and the law. In fact, Appellants seem to concede that in a case where some notice did occur, a showing of prejudice is appropriate. *See* Ignition Switch Plaintiffs' Br. 23.

Appellants rely on inapposite non-bankruptcy law. Their cases stand for the unremarkable proposition that a "root requirement" of due process requires "some notice and opportunity to be heard." *See* Ignition Switch Plaintiffs' Br. 17-24. These general statements of non-bankruptcy law shed no light on whether an individual—one of millions of unknown creditors of a multi-national corporation in a complex

bankruptcy—who received publication and media notice of a sale may sustain a due process claim without showing harm or prejudice.

Thus, cases like *Fuentes v. Shevin,* 407 U.S. 67 (1972), on which Appellants heavily rely, hold only that there must be *some* notice before depriving someone of recognized property rights. Appellants, of course, did receive some notice. And, they have never claimed that they were unaware of Old GM's bankruptcy proceeding or the Sale. Further, they did not have any property rights extinguished by the Sale Order.[20]

Appellants reliance on *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988) is also misplaced. Although the *Peralta* Court did not use the word "prejudice," it implicitly recognized that a due process violation requires some showing of resulting harm or injury. *Id.* at 85. *Peralta* involved a single plaintiff who sued a single defendant on a guaranty, but the defendant did not receive notice of the lawsuit or the later post-judgment collection action. After the court entered a default judgment, the plaintiff had the defendant's property levied and sold without any notice to the defendant. The due process violation by the party who

[20] The Ignition Switch Plaintiffs also rely on *Carey v. Piphus*, 435 U.S. 247 (1978), but *Carey* proves New GM's point. There, the Supreme Court recognized that any damages for a due process violation exceeding one dollar would require proof of injury. *Id.* at 262, 266-67.

committed the violation, and the prejudice, were clear. The Supreme Court's terse opinion rejected the notion that the lack of notice had no "serious consequences," because "appellant's property was promptly sold without notice." *Id.* at 85. Had he received notice, he might have chosen to defend the lawsuit, negotiate a settlement, or pay the debt if he received notice. *Id.*

The Bankruptcy Court noted that Appellants have little *bankruptcy* law to support their due process position.[21] *Opinion*, 529 B.R. at 562. The court analyzed, and rejected, the only bankruptcy-related authority that Appellants cited, *White v. Chance Indust., Inc.*, 367 B.R. 689 (Bankr. D. Kan. 2006). It correctly distinguished *White* because that case involved a claim by a *future* creditor (not an unknown, contingent creditor) challenging the notice received for a plan

[21] Appellants cite *Travelers Cas. & Sur. Co. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.)*, 600 F.3d 135 (2d Cir. 2010) ("*Manville IV*"), to argue that a due process violation in the context of a Section 363 sale does not require proof of prejudice or harm. *See* Ignition Switch Plaintiffs' Br. at 20. Appellants stretch *Manville IV* too far. *Manville IV* does not discuss prejudice because the harm to the known creditor was obvious, as no one had represented Chubbs' interests in the settlement proceeding, resulting in a waiver of claims that were not expressly disclosed and were never brought to the court's attention. Here, the Bankruptcy Court was well aware that the free-and-clear provision would extinguish successor liability claims across the class of Old GM vehicle owners, including Appellants.

confirmation (where claims were adjudicated), not a Section 363 sale (where claims are transferred to the sale proceeds).

What bankruptcy law Appellants do cite often involves a different context: the notice required in the claims-resolution or plan/discharge process, not in a Section 363 sale. Appellants' due process argument largely ignores the critical difference in bankruptcy law between the two. The notice required, and the consequence for failing to receive perfect notice, is different in each context for several reasons.

First, the scope of the court's inquiry in the Section 363 process is more limited. The critical questions for a bankruptcy court relating to a 363 sale are: (1) whether it was appropriate to sell the debtor's assets; (2) whether the sale process was properly conducted; (3) whether the overall consideration paid for the assets was reasonable under the circumstances; and (4) whether the purchaser acted in good faith. *See, e.g.*, *In re Med. Software Solutions*, 286 B.R. 431, 439-40 (Bankr. D. Utah 2002). The bankruptcy court is not focused on specific creditor claims or the substantive rights of creditors—issues to be resolved in the post-Sale, claims-resolution process.

Second, because of the difference in focus between the sale process and the claims-resolution process, the notice to creditors is different for each.[22] In the sale context, the notice relates primarily to the specifics of the sale. As is often the case in Section 363 sales, the type of notice Old GM provided in 2009 was dictated by extreme time deadlines/cost constraints, with the sale needing to close a little over a month from filing because of the dire nature of Old GM's financial condition. In the claims-resolution process, the notice generally relates to how, when, and what to include in a claim filed against the debtor. Compared to the Sale notice process, there typically is not the same time urgency relating to the claims resolution notice because there is not a hemorrhaging business and purchaser-imposed deadlines.[23]

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[22] Appellants' reliance on *DPWN Holdings (USA), Inc. v. United Airlines*, 871 F. Supp. 2d 143 (E.D.N.Y. 2012), *remanded*, 747 F.3d 145 (and its follow-up, No. 11-CV-564 (JG), 2014 U.S. Dist. LEXIS 130154, at *6 (E.D.N.Y. Sept. 16, 2014) illustrates their erroneous attempt to conflate notice in a sale context and notice in a claims-adjudication/plan context. Pre-Closing Accident Plaintiffs' Br. 29-31. The *DPWN Holdings* cases only dealt with claims-adjudication/plan issues. The alleged failure to provide notice was committed by the entity for which a remedy was sought and there was no final determination as to whether a remedy was appropriate. It is inapposite to the due process sale issues here.

[23] Ultimately, Appellants' prejudice argument presumes that the pursuit of a successor liability claim is a vested property right, like a

Third, lack of direct-mail notice in the context of a sales process has different consequences than in the claims-adjudication context. In the latter, an existing claim may get extinguished without direct-mail

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creditor's claim against the debtor's estate. This argument fails for three reasons. ***First***, Appellants could not have a property interest in their state-law successor liability claims because successor liability claims belong to the bankruptcy estate, as derivative claims for all creditors and do not belong to individual creditors. *See In re Emoral, Inc.*, 740 F.3d 875, 882 (3d Cir. 2014), *cert denied sub nom., Diacetyl Plaintiffs v. Aaroma Holdings, LLC*, 135 S. Ct. 436 (2014) (explaining that a "no successor liability" holding would be binding on plaintiffs without regard to the type of notice they received regarding the sale because successor liability claims are general claims of the bankruptcy estate); *see also id.* at 880 ("[S]tate law causes of action for successor liability . . . are properly characterized as property of the bankruptcy estate.") (citing *In re Keene Corp.*, 164 B.R. 844, 849 (Bankr. S.D.N.Y. 1994)).

Second, even if successor liability claims belonged to Appellants, the Bankruptcy Code preempts state law to allow "free and clear" sales and there can be no due process violation based on preempted state law. *See In re Gen. Motors Corp.*, 407 B.R. 463, 503 n.99 (Bankr. S.D.N.Y. 2009); *see also In re White Motor Credit Corp.*, 75 B.R. 944, 951 (Bankr. N.D. Ohio 1987) ("The effects of successor liability in the context of a corporate reorganization preclude its imposition. The successor liability specter would 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.").

Third, Section 363 does not extinguish claims at all, it merely transfers those claims to the Sale proceeds. Even a secured creditor with clear collateral rights can have its property interests forcibly transferred to the collateral proceeds under Section 363. Unsecured, contingent creditors should fare no better.

notice. In the former, no claim is extinguished—but the creditor's claim is merely channeled to the sale proceeds. A lack of direct-mail notice results only in the loss of the right to object to the sale itself (although here, others made the same objections as Appellants), not an extinguishment of a claim against the debtor.

Lastly, in the sale context, there is a third party involved (the *bona fide* purchaser for value) and any sale notice violation by the seller must not unfairly prejudice the rights of that third party purchaser who paid fair value for the assets sold including the liability shield. In contrast, the claims-adjudication process is largely a two-party dispute between the debtor (who sent the claims notice) and the creditor.

In sum, Appellants have no authority to support their counterintuitive contention that they need not show any harm or prejudice flowing from an alleged failure to receive direct-mail notice of the Sale.

2. Appellants Cannot Demonstrate Prejudice.

The Bankruptcy Court properly determined that the Non-Ignition Switch Plaintiffs, the Pre-Closing Accident Plaintiffs, and the Used Car Purchasers failed to show prejudice resulting from their not receiving

direct-mail, versus publication, notice of the Sale. This finding was not clearly erroneous, and Appellants fail to identify an error of law in the Bankruptcy Court's analysis.

To prove prejudice, a party must show that its participation could have made a material difference in the outcome of the proceeding. *In re Edwards*, 962 F.2d 641 (7th Cir. 1992); *In re Rosson*, 545 F.3d 764 (9th Cir. 2008). It is not enough to argue that the Bankruptcy Court would have had more information when it approved the Sale. Rather, Appellants must show that the Sale would not have occurred or its terms would have been different. *See, e.g.*, *In re Paris Indus. Corp.*, 132 B.R. 504, 509-10 (D. Me. 1991) (plaintiffs "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").

Appellants cannot meet this standard. The Bankruptcy Court decided the underlying issues back in 2009 and, therefore, it knows what it would have done had Appellants appeared at that time. That court was no stranger to the transaction, and Appellants agreed that

the Bankruptcy Court was free to consider its own knowledge of the case and its circumstances in evaluating prejudice. A-11067–11068.

Drawing on its knowledge of the facts and circumstances, the Bankruptcy Court reasonably concluded that Appellants' belated objections would not have changed its ruling approving the Sale. ***First***, the Bankruptcy Court knew the consequences of cutting off successor liability at the time it approved the Sale Order: "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 of any allowed claim." *Gen. Motors*, 407 B.R. at 505. Nevertheless, the court recognized that such tort claimants (including owners of Old GM vehicles) could not assert their claims against New GM. The Bankruptcy Court went on to rule, "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 . . . ." *Id.* at 505. There was no question as to the importance or legality of the successor liability shield. *See In re Chrysler LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009), *aff'd*, (2d

Cir. June 5, 2009); *Douglas v. Stamco,* 363 F. App'x 100, 102-03 (2d Cir. 2010).[24]

Second, the Bankruptcy Court knew that Old GM was selling vehicles up through the day of the Sale and it anticipated that design-related issues might emerge over time in some of those vehicles. Nonetheless, the Sale Agreement and the Sale Order are clear that implied warranty claims, and statutory and common law claims relating to third party claims (including vehicle owners) are Retained Liabilities of Old GM. A-1697. The Bankruptcy Court was clear: hindsight would not, and could not, change the final result, and it would have approved the Sale, and its "free and clear" provision, regardless. *Opinion*, 529 B.R. at 567.

As the Bankruptcy Court explained in in *Morgenstein*:

> We here had a plan of liquidation; Old GM would not survive. It would simply be taking whatever assets it

[24] The Elliott, Sesay and Bledsoe Plaintiffs' Brief suggests that there is an exception or carve-out from the free-and-clear bar on successor liability based on the theory of "continuation of an unlawful activity." Elliott, Sesay, and Bledsoe Plaintiffs' Br. 22-25. Not surprisingly, their brief fails to cite any legal authority whatsoever for this contention. Simply put, the finding to support a sale "free and clear" of successor liability must occur at the time of the sale based on the state of affairs at the time; post-sale events have no relevance to that ruling.

> 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 Bankruptcy Court, would be any different***.

Morgenstein, 462 B.R. at 506-07 (emphasis added).

Third, not only did the Bankruptcy Court appreciate the consequences of the free-and-clear provision on contingent claims, but during the Sale Order process it *repeatedly rejected* the exact same concerns that Appellants raise here. The Bankruptcy Court received objections to the Sale from many groups representing vehicle owners. Indeed, personal injury plaintiffs—some of whom are also represented here—actually appealed the free-and-clear provision, and lost. *See Campbell v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 428 B.R. 43 (S.D.N.Y. 2010).

Thus, this matter is not like *In re Johns-Manville Corp.*, 600 F.3d 135 (2d Cir. 2010) (*per curiam*) ("*Manville IV*"), where the interests of the party who did not receive notice went unrepresented. To the

contrary, Appellants' interests were fully heard, analyzed and rejected in 2009 by the same judge that ruled on these issues in 2015, and the reasons for that rejection have not changed. The Bankruptcy Court properly held that adding more voices to the cacophony of objectors it heard in 2009 asserting the same arguments, would have made no difference.

As discussed above, the Sale notice spurred comprehensive, substantive objections from a coalition of parties representing the interests of Old GM vehicle owners, including 44 State Attorneys General, and the Creditors' Committee.[25] Like Appellants, they argued that the Sale notice procedures were inadequate and violated due process, and that the successor liability shield should be limited.

Specifically, these groups argued that shielding New GM from successor liability claims arising from defects in vehicles manufactured by Old GM would violate due process because vehicle owners had not received direct-mail notice regarding specific claims relating to their

[25] The Creditors' Committee is an Estate fiduciary which in this case included three tort claimants. It is appointed in a bankruptcy case as the representative for all unsecured creditors. In this respect, Appellants' representatives did participate at the Sale Hearing to protect their interests.

vehicles that were not known to them at the time of the Sale Hearing. A-7814, A-7826, A-7866, A-7883, A-7900, A-7989. But the Bankruptcy Court properly rejected those arguments in 2009, and again in 2015.[26]

To be sure, certain objections did result in amendments to the Sale Order.[27] But New GM refused any further modifications concerning the type of vehicle-owner liabilities now asserted by Appellants. Specifically, New GM refused to assume, and was not required to assume, liabilities for pre-closing accidents (A-1966), or for unconsummated class action settlements relating to economic-loss

[26] The *Opinion* notes that, in the context of discussing holding a "do-over" hearing, the Bankruptcy Court was willing to hear and consider any new objections the Appellants wanted to assert that had not been asserted back in 2009. Appellants could not identify any. *Opinion*, 529 B.R. at 567, 571, 573. Their failure reflects that the original objections by parties representing vehicle owners were robust and thorough.

[27] For example, in negotiations with the State Attorneys General and the Creditors' Committee, New GM agreed to assume responsibility for (1) post-sale accidents and incidents involving Old GM vehicles causing personal injury or property damage, and (2) Lemon Law claims—in addition to the glove-box warranty of repair and replacement of parts (but not monetary damages) that was always a part of New GM's assumed liabilities.

claims.[28] The Governments were willing to take on only those categories of liabilities that were commercially necessary.

In the face of this record, some Appellants (those representing Used Car Purchasers) take a different tact, arguing that those who purchased a used Old GM vehicle after the Sale are "future claimants" that could not be subject to the free-and-clear provision. Ignition Switch Plaintiffs Br. 33-39. But claims by Used Car Purchasers who purchased their vehicles after the Sale are readily distinguishable from the "future" claims addressed in *In re Grumman Olson Indus., Inc.*, 467 B.R. 694 (S.D.N.Y. 2012), on which Appellants rely. *Grumman* involved a post-sale personal injury claim brought against the manufacturer of a product part incorporated into a Federal Express delivery truck. The plaintiff there had no prepetition relationship with the debtor, did not suffer her accident and injury until after the debtor's Section 363 sale,

[28] Classes of product liability claimants that had unconsummated settlements with Old GM, argued that their vehicle owner claims should be assumed. *See Castillo v. Gen. Motors Co. (In re Motors Liquidation Co.)*, No. 09-00509 (REG), 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 by summary order*, 578 Fed.Appx. 43 (2d Cir. 2014). The Governments said no. *Id.*

and had no reason to believe that the debtor's sale might impact her rights.

Here, Used Car Purchasers (or, for plaintiffs who purchased their Old GM vehicles after the Sale, their predecessors-in-interest) had a prepetition relationship with Old GM. They owned (and then perhaps sold) Old GM vehicles. Regardless of whether they knew of the specific defect, like all car owners, they had reason to know that Old GM's bankruptcy might impact whatever economic interest they had in their vehicles.[29] As the *Burton* court noted: "[P]laintiffs or their predecessors (the previous owners of the vehicles) had a prepetition relationship with Old Carco, and the design flaws that they now point to existed pre-petition." *Burton*, 492 B.R. at 403. 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.'" *Id.*

[29] Moreover, the circumstances of *Grumman* itself could not repeat here, as New GM assumed liability for post-sale accidents involving Old GM vehicles causing personal injury or property damage.

It would make no sense to hold that original owners of Old GM vehicles would be barred by the Sale Order, but that subsequent owners would not be barred; such subsequent owners stand in the shoes of the original owners and are equally bound by the Sale Order. In other words, claims against New GM for Old GM vehicles cannot be created post-Sale, merely because a vehicle owner sells its car to a third party.[30]

Finally, certain Appellants suggest that they were prejudiced by the *content* of the notice because, with more detail about the Ignition Switch Defect, they would have been able to avoid or reduce the scope of the successor liability shield. But the Bankruptcy Court approved the content of both the direct-mail notice and the Publication Notice. These notices informed claimants that no claims of any kind would be permitted against New GM, and that they should object if they sought to challenge this free and clear provision. A-384. Appellants' proposition that a debtor must provide detailed notice of each potential claim that would be subject to the liability shield finds no support in the

[30] As noted *supra*, New GM could only be potentially liable for claims based on a completely separate and new agreement with an owner of an Old GM vehicle that occurs after the Sale (*e.g.*, if a GM dealer resold the vehicle under New GM's Certified Pre–Owned Vehicle Program and New GM issued a new warranty to the buyer).

case law and would be utterly unworkable for debtors, who may face tens of thousands of different types of claims. The purpose of the Sale Notice related to the monetization of the debtor's assets—not the identity or amount of the claims against it.

* * *

Whenever a court approves a Section 363 sale free and clear of successor liabilities, it knows that it is preventing the purchaser from becoming a potential source of recovery for a tort victim. No matter the information that may come to light after the sale—whether a design defect or securities fraud—that claim must be made against the debtor in the bankruptcy-claims process and paid from the proceeds of the sale (or other bankruptcy estate assets). The consequence of the Sale to these Appellants is that, like all other unsecured creditors, including other Old GM vehicle owners, they have no remedy against New GM.

Without the Sale, however, they would have received nothing. Because of the Sale, they had a sizeable Estate (*i.e.*, the Sale proceeds) in which to share. That they did not receive direct-mail notice of the Sale is not a reason for Appellants to receive special treatment ahead of other unsecured creditors (or, for that matter, other Old GM vehicle

owners). It is also not a reason to prejudice the good faith, third party purchaser (New GM) years after the Sale. Appellants' claims are against Old GM, the manufacturer of their vehicles. New GM should not be made responsible for claims that it never incurred, and which the liability shield was intended to protect it from.

In sum, the fact that Appellants did not receive direct-mail notice informing them of (a) the possibility that their economic rights might be affected by Old GM's sale or (b) a possible defect in their vehicle, does not justify modifying the Sale Order as to them—without a showing that they could have somehow changed the outcome in 2009. Since they could not, the Sale Order should be binding on them in all respects.

II. The Bankruptcy Court Had The Authority To Remedy The Violations Of The Sale Order

Appellants filed complaints against New GM that plainly violated the Sale Order. It was well within the Bankruptcy Court's authority and power to enforce its own Sale Order and, as necessary, direct Appellants, who were subject to the jurisdiction of the Bankruptcy Court, to amend or withdraw their improper pleadings in other courts. Appellants—some of whom question the jurisdiction of the Bankruptcy Court (the Elliott, Sesay, and Bledsoe Plaintiffs) and others of whom

argue (for the first time on appeal) that the court exceeded its authority over the "*res* of the bankruptcy estate" (Ignition Switch Plaintiffs Br. 40)—are wrong to challenge the Bankruptcy Court's authority.

A. The Bankruptcy Court Had Jurisdiction To Enforce Its Order.

The Bankruptcy Court had jurisdiction over this proceeding. It is well-settled that it is within a bankruptcy court's core jurisdiction to resolve a dispute over the interpretation of its sale order. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009); *Luan Inv. S.E. v. Franklin 145 Corp. (In re Petrie Retail, Inc.)*, 304 F.3d 223, 229-30 (2d Cir. 2002); *In re Gen. Growth Properties, Inc.*, 460 B.R. 592, 598 (Bankr. S.D.N.Y. 2011). Only one group of Appellants, representing a handful of plaintiffs, even asserts this argument. *See* Elliott, Sesay, and Bledsoe Br. 10-18. The rest expressly disagree, conceding that the Bankruptcy Court had jurisdiction and authority to interpret and enforce its own order. *See* Ignition Switch Plaintiffs' Br. 40 ("a bankruptcy court assuredly has jurisdiction to interpret and enforce its own orders"); Pre-Closing Accident Plaintiffs' Br. 1 ("The Bankruptcy Court had subject matter jurisdiction to issue the Judgment pursuant to 28 U.S.C. §§ 157(a), (b) and 1334.").

The outlier Appellants argue that the Bankruptcy Court lacked "related to" jurisdiction and authority over their "*in personam*" claims (as opposed to "*in rem*" claims). That argument "misses the point." *In re Motors Liquidation Co.*, 514 B.R. 377, 381 (Bankr. S.D.N.Y. 2014). The Bankruptcy Court had "arising in" jurisdiction because it had to interpret and enforce its own order. *Id.* The cases on which these Appellants rely are inapposite in-so-far as they all involve "related to" jurisdiction. Likewise, the Bankruptcy Court (and the district court on appeal) rejected these same arguments years ago when it concluded that under well-settled Second Circuit law, Section 363(f) authorizes a sale of assets "free and clear" of successor tort liability. *Campbell v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 428 B.R. 43, 58 (S.D.N.Y. 2010). Clearly, the Bankruptcy Court had the authority and jurisdiction to enter and enforce the Sale Order—and the Elliott, Sesay, and Bledsoe Plaintiffs' jurisdictional objections lack merit.[31]

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[31] The Bankruptcy Court also properly rejected their additional argument that New GM's "exclusive" remedy for violation of the Sale Order was a contempt motion, and not a motion to enforce. *See* Elliott, Sesay, and Bledsoe Plaintiffs' Br. 28. New GM's Motions to Enforce did not seek a new or successive injunction; rather, they sought to enforce a *preexisting* injunction, which can be done by a motion to enforce. *See, e.g.*, *In re Ritchie Risk-Linked Strategies Trading (Ireland), Ltd.*, 471

B. The Bankrupcy Court Acted Within Its Discretion To Enforce The Sale Order Against Appellants.

The Bankruptcy Court reasonably exercised its discretion by enforcing the Sale Order's injunction. Indeed, the court afforded the parties additional protection in that, after the Judgment under review, the court permitted plaintiffs to file "No Stay," "No Strike," or "No Dismissal" pleadings to determine whether specific allegations and complaints violated the Sale Order. *See* SPA-256, SPA-257, SPA-258, SPA-260, SPA-263. Through that procedure, Appellants had a second chance to convince the Bankruptcy Court that a particular complaint did not violate the Sale Order. The Bankruptcy Court had the authority to require compliance with its own order, and its remedy for violating that order was not an abuse of discretion.

Other courts addressing similar motions to enforce have also ordered offending complaints dismissed or stricken. *See, e.g., Burton v. Chrysler Group, LLC (In re Old Carco LLC)*, 492 B.R. 392, 407 (Bankr. S.D.N.Y. 2013) ("[T]he plaintiffs have not asserted any assumed products liability claims, and the Sale Order bars all other pre-closing

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B.R. 331, 337 (Bankr. S.D.N.Y. 2012).

claims except Repair Warranty claims and Lemon Law claims relating to vehicles manufactured within five years of the Closing Date. Accordingly, the breach of implied warranty claims asserted in Counts VI, VII and VIII with respect to vehicles manufactured and sold before the closing are dismissed . . . ."); *In re USA United Fleet Inc.*, 496 B.R. 79, 80 (Bankr. E.D.N.Y. 2013) (the court concluded that "(i) it has subject-matter jurisdiction to interpret and enforce the Sale Order; (ii) the DOL has an interest in the assets purchased by Reliant within the meaning of Section 363(f); and (iii) this interest was subject to the 'free and clear' provisions of the Sale Order and Section 363(f)"). Accordingly, the relief New GM received was clearly appropriate.[32]

[32] Again, the Elliott, Sesay and Bledsoe Plaintiffs rely on inapposite cases. In *Alderwoods Grp., Inc. v. Garcia*, 682 F.3d 958, 968 (11th Cir. 2012), the debtors sought to enforce their bankruptcy discharge in a different court from where they obtained their discharge. The Eleventh Circuit specifically held that the second court lacked jurisdiction and did "not reach the other issues on appeal." *Id.* at 961. In *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002), the Ninth Circuit found that the remedy for a discharge violation could only be obtained through a contempt motion, not a claim for damages under the Fair Debt Collections Practices Act. *In re Haemmerle*, 529 B.R. 17 (Bankr. E.D.N.Y. 2015) is another discharge case. None of these cases address a bankruptcy court's interpretation and enforcement of its own sale order.

Perhaps because Appellants cannot in good faith attack the legality of the Sale Order's free-and-clear provision, *see In re Chrysler LLC*, 576 F.3d 108, 119-20 (2d Cir. 2009); *Douglas v. Stamco,* 363 F. App'x 100, 102-03 (2d Cir. 2010), they recast their challenge by questioning the Bankruptcy Court's ability to enjoin third party claims between non-debtor parties—*i.e.*, whether the Sale Order's language enjoining parties from asserting successor liability claims against New GM is enforceable against third parties. That argument is no different than arguing that the successor liability bar is itself invalid, for its only meaningful operation is to do exactly what the Bankruptcy Court held that it did—enjoin claims by third parties against New GM.

Appellants again rely on *Manville IV* (*see* Pre-Closing Accident Plaintiffs' Brief 40-48), but it does not support their position. In *Manville IV*, a non-settling insurer (Chubb) who received no actual notice of the settlement, had cognizable direct claims against one of the settling insurers, Travelers, based upon independent grounds that were separate from the debtor's claims against the settling insurers. Chubb received no consideration for and had no right to seek payment from the settlement funds paid by the settling insurers to the bankruptcy estate,

yet its claims were nevertheless compromised without any notice to it. *Id.* at 152-53. This Court held that Chubb was, therefore, not bound by the settlement agreement. *Manville IV*, 600 F.3d at 158.

Manville IV does not support Plaintiffs' assertion. Precedent limiting the enforcement of a settlement order between the debtor and certain of its third-party carriers with respect to *one* claimant, Chubb, with *non-derivative*, independent claims against another carrier, does not undermine the bankruptcy court's ability to approve a Section 363 sale free and clear of successor liability to a good-faith purchaser for value. *Manville IV* is not a due process case; it is a jurisdiction case that limits the bankruptcy court's ability to adjust rights that two non-debtors had *inter se*. Finally, it is significant that *Manville IV* does not "invoke Rule 60(b) in support of its decision, or even mention it." *Opinion*, 529 B.R. at 581.

The Bankruptcy Court correctly remedied the violations it found to its Sale Order. It unquestionably had the jurisdiction and authority not only to enforce its own order, but also to approve the Sale free and clear of successor liability back in 2009. This appeal is an impermissible, belated collateral attack on the free-and-clear provision

itself—an attack that this Court already rejected when it dismissed a previous appeal on equitable mootness grounds. *See Parker v. Motors Liquidation Co.*, Case No. 10-4882-bk (2d Cir. July 28, 2011).

III. The Bankruptcy Court Should Not Have Modified The Sale Order Six Years After Its Consummation.

To address the only due process violation it found (a separate error on which New GM cross-appeals), the Bankruptcy Court ordered the Sale Order modified to allow one group of Appellants—the Ignition Switch Plaintiffs—to assert so-called "Independent Claims" against New GM for alleged New GM conduct related to Old GM vehicles. Even assuming an alleged due process violation (and there was none), the Bankruptcy Court had no authority to modify the Sale Order six years after it was entered, and long after the Sale was substantially consummated. Indeed, "to modify the Sale Order would knock the props out of" the foundation on which the prior transaction was based. *Parker*, 430 B.R. at 82.

As an initial matter, there is no such thing as an "Independent Claim" related to Old GM vehicles that is not based upon a new and separate agreement between New GM and the Old GM vehicle owner after the Sale. The Sale Agreement expressly divided up all

responsibility for the approximately 70 million vehicles sold by Old GM that were still being driven as of the Sale. Whatever was not an Assumed Liability of New GM remained a Retained Liability of Old GM whether it was a known or unknown claim. A-1629. That was the purpose of the free-and-clear provision. The Sale Order eliminated all of New GM's obligations to Old GM vehicle owners, except for Assumed Liabilities.

And, if "Independent Claims" are viable due to New GM's post-Sale new and separate agreement with the Old GM vehicle owner, the Bankruptcy Court did not need to modify the Sale Order to allow for such claims. By unnecessarily modifying the Sale Order and creating an ill-defined category of Independent Claims, the Bankruptcy Court allowed a flood of new successor liability claims to be asserted in the guise of "Independent Claims," and undermined the liability shield, which was an essential part of New GM's bargained-for rights under the Sale Agreement and Sale Order.

Permitting supposedly "Independent Claims" to override the free-and-clear provision operates as an improper modification to the scope of the Assumed Liability provisions of the Sale Order, as well as a

modification of provisions binding any known or unknown creditor to its terms. The Bankruptcy Court lacked the authority to modify the order—either because the Ignition Switch Plaintiffs cannot satisfy the requirements of Rule 60(b), because Section 363(m) bars such belated modifications, or because this Court already dismissed challenges to the Sale Order years ago as being equitably moot.

A. Ignition Switch Plaintiffs Could Not Meet the High Bar of Rule 60(b).

Courts have held that Fed. R. Civ. P. 60(b)(4) may be used to set aside a Section 363 sale in its entirety in the extreme circumstance where no notice was provided. *See Cedar Tide Corp. v. Chandler's Cove Inn, Ltd*, 859 F.2d 1127, 1133 (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 corresponding notice requirements of Bankruptcy Rule 2002.

Here, Old GM provided extensive notice to parties in interest including over four million direct-mail notices, extensive Publication

Notice in nine major periodicals, and received broad and widespread media coverage of the Sale. Notice reached its intended audience, and parties in interest, including numerous vehicle owner constituencies and representatives, filed objections to the Sale. The Bankruptcy Court held extensive hearings over multiple days, and considered the objectors' arguments (including the successor liability bar and lack of due process) and the trial evidence. *See generally* A-2127, A-2466, A-1891. After this thorough process, the Bankruptcy Court determined that the consideration New GM offered was fair and provided the creditors with a much more favorable return than liquidation. *See Gen. Motors Corp.*, 407 B.R. at 494. Those findings were upheld on appeal and the Appellants here do not challenge them.

New GM is unaware of any legal authority that would permit the Bankruptcy Court to partially void the Sale Order (which is essentially what it did) under these circumstances simply because a single claimant, or group of claimants, may not have received one type of notice of the Sale. *See In re BFW Liquidation, LLC*, 471 B.R. 652, 669-74 (Bankr. N.D. Ala. 2012).

The Sale Order itself says that it cannot be partially revoked (its provisions are non-severable, ¶ 69), and the District Court readily agreed that it could not perform elective surgery on the Sale Order to carve out any purportedly offensive terms. *Parker*, 430 B.R. at 97. Allowing any partial revocation of the Sale Order years after its entry would violate the well-established bankruptcy policy objectives protecting asset purchasers to maximize the sale value of assets for the benefit of a debtor's creditors. *See, e.g.*, *Stamco*, 363 F. App'x at 102-03 (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).

Modifying the Sale Order itself was not a proper remedy because it undermines the well-established bankruptcy policy to avoid chilling any bidding for bankruptcy estate assets. If bidders knew that they would not be protected from successor liability claims whenever a

debtor's notice of a Section 363 sale was not perfect, then at best debtors would receive far less for their assets, and at worst debtors would be forced to liquidate because of uncertainties regarding whether their assets can be sold free and clear of liabilities. *See Doktor v. Werner Co.*, 762 F. Supp. 2d 494, 498-500 (E.D.N.Y. 2011). That untenable consequence would hurt *all* creditors for the benefit of a few.

B. The Statutory Mootness Bar Of Section 363(m) Prevents Modification Of The Sale Order.

Section 363(m) of the Bankruptcy Code also bars any belated attempt to modify the provisions of the Sale Order. To ensure finality for bankruptcy sales and encourage parties to bid for assets, 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.

11 U.S.C. § 363(m); *Licensing By Paolo, Inc. v. Sinatra (In re Gucci)*, 105 F.3d 837, 839-40 (2d Cir. 1997). By its terms, Section 363(m) does not permit the modification of a sale order on appeal except under

extremely limited circumstances not applicable here—to say nothing of modifying a sale order in a collateral attack years after its entry. *See Gucci*, 105 F.3d at 839-40.

The Bankruptcy Court concluded that the Governments and thus their assignee, New GM, were a good faith purchaser entitled to Section 363(m) protection. *Gen. Motors*, 407 B.R. at 494. The Sale was fully consummated years ago. Any argument seeking to modify it now would be statutorily moot and already has been determined to be equitably moot. *See, e.g., Gucci*, 105 F.3d at 839-40*; 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). By its own terms, therefore, the Sale Agreement cannot be modified as to New GM. *See Campbell*, 428 B.R. at 60-64.

In *Campbell*, Judge Buchwald refused to "rewrite," "unravel," or "carve out" any provisions from the "integrated terms of this extensively negotiated transaction." *Id.* at 60-61. Specifically, the *Campbell* court 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. Although *Campbell* involved a request to modify a sale order on appeal, the law provides that it is *harder*, not easier, to modify a Sale Order when collaterally attacking it under Rule 60(b).

In *In re Fernwood Markets*, the court explained 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. Appellants' suggestion that the Sale Order can be valid and binding against all of Old GM's creditors except them would result in an unjustified windfall.[33] If the Court is convinced that there was a due process violation and Appellants are entitled to seek a remedy, it should be only against the entity that was liable for the claim and that committed the due process violation; that being, the Old GM estate vis-à-vis the Motors Liquidation Company General Unsecured Creditors Trust ("GUC Trust").

Further, Appellants' request also ignores the language of the Sale Order itself, that the numerous terms of the final Sale cannot be selectively enforced. A-1656. The Sale Agreement was an "Integrated Transaction" and contained "Conditions to Closing" provisions in which New GM expressly conditioned its purchase on the enforceability of the entirety of the Sale Agreement. *See* A-1720, A-1751–A-1752. As such,

[33] *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").

the Appellants' relief is effectively the same as the request made in *Morgenstein* to rewrite the confirmation order, which was properly rejected. *See Morgenstein*, 462 B.R. at 500-05. The Bankruptcy Court's failure to follow its own prior ruling on this issue highlights the legal error.

The decision *In re BFW Liquidation, LLC*, 471 B.R. 652 (Bankr. N.D. Ala. 2012), arising from an analogous Section 363 context involving due process arguments by a contingent creditor, is instructive. Shortly after filing for bankruptcy, the debtor sold leases following an extensive sale process that included successor liability protection for the purchaser. The debtor provided comprehensive notice, including direct-mail and publication notice, to a substantial numbers of creditors. Following various court hearings, the court approved the asset sale under Section 363, free and clear of successor liability. *Id.* at 658. Well after the sale closed, a plaintiff asserting a contingent litigation claim, filed suit against the good-faith purchaser seeking to hold the purchaser liable under a successor theory for the debtor's alleged bad actions, and to set aside the sale on the grounds that she did not receive actual notice. *Id.* at 669.

The *BFW Liquidation* court distinguished the case before it from the ones where (i) no notice was given, (ii) there was a dispute as to the propriety of the sale process, or (iii) the consideration paid. *Id.* at 673. The court held that there was no basis to object to the sale itself and that plaintiff's interests had been protected by the creditors' committee and other parties. *Id.* In short, the *BFW Liquidation* 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 Liquidation* court held: "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 Bankruptcy Court erred in modifying the Sale Order so that Ignition Switch Plaintiffs can pursue claims against New GM for allegedly independent conduct related to Old GM vehicles as a remedy for Old GM allegedly providing defective notice. This remedy directly conflicts with controlling precedent protecting good-faith purchasers who acquire a debtor's assets "free and clear" of claims.

C. Modification Of The Sale Order Is Particularly Inappropriate Here.

The Bankruptcy Court's modification to the Sale Order six years later impermissibly weakens a cornerstone of the Sale: the free-and-clear bar. Appellants suggest that this Court can undo the alleged due process error simply by choosing not to enforce the Sale Order against them, without modifying its terms.[34] This argument is the functional

[34] Appellants cite to *In re Johns-Manville Corp.*, 759 F.3d 206 (2d Cir. 2014)("*Manville V*"), for this contention. However, *Manville V* does not support this contention; instead, the case dealt with whether certain conditions to the funding of a settlement occurred. As a follow-up to its earlier *Manville IV* decision, this Court rejected Travelers' position that Chubb's ability to pursue it equated to a failure to satisfy one of the

equivalent of modifying the Sale Order to weaken the liability shield that New GM bargained for in the Sale Agreement. Indeed, the Sale would not have closed without the "free and clear" provision. A-1623. Permitting Appellants to pursue liability claims against New GM would fundamentally alter one of the most significant provisions in the Sale Order. *See also infra* at Section III (arguing that Bankruptcy Court had no authority to modify the Sale Order to remedy a due process violation).

This Circuit and its brethren have repeatedly upheld the legality of "free and clear" provisions and protected good-faith purchasers of bankruptcy assets from collateral attacks. *See In re Chrysler LLC*, 576 F.3d at 119-20; *Douglas v. Stamco,* 363 F. App'x at 102-03.[35] For this

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funding conditions, noting that sophisticated parties would not have bargained for an impermissible injunction. *Id*. at 215. As cited above, this Court's rulings have agreed that a Section 363 sale can be free and clear of successor liability claims, thus an injunction in a sale order prohibiting those claims is permissible. *Manville V* is not applicable to the issues here.

[35] Appellants continued reliance on the dated decision in *Zerand-Bernal Grp. v. Cox*, 23 F.3d 159 (7th Cir. 1994) contravenes rulings by courts in this Circuit. *See Campbell*, 428 B.R. at 57 n.17 ("[W]e note that courts in this District have declined to follow the more 'restrictive' interpretation of section 363(f) evinced in *Zerand–Bernal Group*." (citing *In re Portrait Corp. of Am., Inc.,* 406 B.R. 637, 641 (Bankr. S.D.N.Y. 2009)).

reason, under Section 363(m) of the Bankruptcy Code, statutory mootness protects purchasers like New GM from having crucial sale terms overturned on appeal. *See In re Gucci*, 105 F.3d 837 (2d Cir. 1997); *Weingarten Nostat, Inc. v. Serv. Merch. Co.*, 396 F.3d 737 (6th Cir. 2005).

None of the Appellants discuss Rule 60(b) of the Federal Rule of Civil Procedure, which provides the *only* possible ground for modifying or amending the Sale Order to permit them to pursue successor liability claims against New GM. That omission is not surprising because a court may only grant Rule 60 relief 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 Bhd. 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. of Ford Heights, Ill.*, 32 F.3d 1114, 1116 (7th Cir. 1994).

Here, Rule 60(b) relief is impossible against New GM because it would impose undue hardship on New GM, which specifically bargained for the liability shield. Stripping New GM of the liability shield years later would have the effect of dramatically increasing the purchase price of the Sale, thrusting liability on New GM that it (and the Governments) did not agree to accept.

The Sale did *not* extinguish Appellants' claims against Old GM related to product defect or economic loss. The Sale Order simply ensured that these claims remained liabilities of Old GM's estate, not of New GM. Appellants could have asserted their claims against Old GM through the post-Sale bankruptcy-claims process, but chose not to.

Equally important, any infirmity in the Sale notices was not caused by New GM, and it would be unfair and prejudicial to impose a remedy on it for the acts of others. Moreover, what Appellants seek goes beyond a "do-over." Old GM and its creditors (including these Appellants) seek to retain the full benefits of the Sale, while depriving New GM of the benefit of its bargain. As explained *supra*, there cannot be a "do-over" six years later when countless transactions have occurred based on the integrity of the Sale Order.

Finally, the concept of a "do-over" makes little sense with respect to Appellants' claims. New GM simply never assumed any liability for the claims now advanced by Appellants for vehicles that it did not manufacture or sell. Appellants' attempt to foist Old GM's liabilities on New GM in contravention of the liability shield in the Sale Order is not, in any sense, a return to the *status quo*.

According to the Pre-Closing Accident Plaintiffs, the relief they seek "does not affect title to any of the assets sold to New GM in 2009." Pre-Closing Accident Plaintiffs' Br. 51 n.16. This contention ignores that New GM obtained title to the assets subject to certain terms, conditions, and, most importantly, protections. There is no ability to revise the basic Sale terms now, particularly the price that New GM paid and the successor liability shield that New GM bought.

Moreover, Section 363 sale orders and injunctions "fall[] within a select category of court orders that may be worthy of *greater* protection from being upset by later motions practice." *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). Even if a "more perfect hearing" might

have apprised the bankruptcy court of more details relevant to the sale, and even if "in retrospect" there may be "a glaring problem of flawed disclosure" relating to the assets sold, courts are exceedingly reluctant to modify or amend sale-order provisions to permit claims that otherwise would be barred. *Id.* at 150.

Here, the situation is much easier than in *Lehman* (which upheld the sale) because the issue is not the disclosure of the assets being sold. Instead, the issue is the impact of the "free and clear" provision on a subset of the billions of dollars in unsecured claims bound by the no-successor liability finding in the Sale Order.

Finally, not only would any modification of the Sale Order unfairly harm the good-faith purchaser of Old GM's assets, but it would also unfairly reward Appellants for sitting on the sidelines. ***First***, Appellants were aware of the Sale Motion. The law clearly places the burden on the individual creditor, not the debtor with millions of creditors, to determine how a widely-publicized sale might impact their rights. ***Second***, in the days and weeks after New GM initiated its recalls in 2014, Appellants filed suit against New GM claiming that their Old GM vehicles may have had a defect. Plainly, Appellants had

sufficient knowledge to take steps to file a claim against the GUC Trust (the successor to the Old GM bankruptcy estate by virtue of Old GM's confirmed bankruptcy plan) or prevent the GUC Trust from distributing Sale proceeds because they knew that the GUC Trust was making distributions to its beneficiaries in 2014. A-11246–11248. They strategically chose not to take any action. *Id.* Their strategic decisions do not create a basis to pursue New GM.

CONCLUSION

For these reasons, this Court should hold that the notice procedure for Old GM's 363 sale did not violate Appellants' due process rights and that the Sale Order cannot be modified six years after it was issued to allow for purportedly "Independent Claims" against New GM. At a minimum, the Court should confirm that New GM cannot be liable for claims that in any way are based on acts or conduct by Old GM.

January 11, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, as modified by the Order of this Court, dated November 2, 2015 [Doc. No. 176], because it contains 19,717 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century School 14-point font.

Dated: January 11, 2016

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15-2844(L)

Nos. 15-2847-bk (XAP) and 15-2848-bk (XAP)

United States Court of Appeals
for the Second Circuit

IN RE: MOTORS LIQUIDATION COMPANY, *Debtor*

CELESTINE ELLIOTT, LAWRENCE ELLIOTT, BERENICE SUMMERVILLE,

Creditors – Appellants – Cross Appellees,

SESAY AND BLEDSOE PLAINTIFFS, IGNITION SWITCH PLAINTIFFS,
IGNITION SWITCH PRE-CLOSING ACCIDENT PLAINTIFFS, DORIS POWLEDGE PHILLIPS,

Appellants – Cross Appellees,

GROMAN PLAINTIFFS,

Appellants,

V.

GENERAL MOTORS LLC,

Appellee – Cross Appellant,

WILMINGTON TRUST COMPANY,

Trustee – Appellee – Cross Appellant,

PARTICIPATING UNITHOLDERS,

Creditor – Appellee – Cross Appellant.

ON DIRECT APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR IGNITION SWITCH PRE-CLOSING ACCIDENT PLAINTIFFS

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February 1, 2016

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INTRODUCTION AND SUMMARY OF ARGUMENT[1]

New GM tries to distract from the manifest due process failure and prejudice that resulted from concealment of the Ignition Switch Defect by focusing instead on peripheral matters. New GM:

(i) seeks refuge in the so-called emergency nature of the Sale, even though no emergency excuses the denial of due process;

(ii) invokes the Bankruptcy Court's approval of the form of Sale Notice as palliative, even though the Bankruptcy Court was not apprised of the existence of the Ignition Switch Defect at the time it approved that notice;

(iii) repeatedly refers to the expense of notifying owners of 70 million vehicles as if that is the correct number of parties entitled to actual notice, even though New GM knows full well that the Ignition Switch Defect afflicted approximately 2 million vehicles;

(iv) pronounces that people who were injured or killed by a known safety defect that was hidden from the public for twelve years by both Old GM and New GM and who were later deprived of a remedy against Old GM on the grounds of equitable mootness, are "belatedly" seeking a "windfall" from New GM; and

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Ignition Switch Pre-Closing Accident Plaintiffs' opening brief filed on November 16, 2015 (the "Opening Brief"). In addition, cases cited and defined in the Opening Brief are referred to by short citation and defined name herein. New GM's and the GUC Trust's opening briefs filed on January 11, 2015, shall be referred to herein as the "New GM Brief" and the "GUC Trust Brief." The Ignition Switch Pre-Closing Accident Plaintiffs adopt and incorporate by reference the Counter Statement of the Facts and Case contained in the Ignition Switch Plaintiffs' reply brief.

(v) mischaracterizes the record below, the Bankruptcy Court's Opinion, and the holdings of several important cases in an effort to avoid the consequences of the due process violations that occurred here.

New GM incorrectly argues that the Sale Order's bar against successor liability claims was properly imposed against the Ignition Switch Pre-Closing Accident Plaintiffs in 2009 because other parties making other objections about different issues somehow "covered" the same arguments that the Ignition Switch Pre-Closing Accident Plaintiffs are making now. Nothing could be further from the truth. No party raised the existence of the Ignition Switch Defect in 2009 for the simple reason that Old GM concealed its existence before the closing of the Sale on July 10, 2009, and New GM did not disclose its existence until 2014.

To ask whether the Ignition Switch Pre-Closing Accident Plaintiffs would have lost their objections at the Sale Hearing is to ask the wrong question. No one can say with certainty what would have occurred at the Sale Hearing had the Ignition Switch Pre-Closing Accident Plaintiffs been given the opportunity to raise the offsetting factors of non-disclosure, concealment, inequitable conduct, and unclean hands in connection with the joint request of Old GM and New GM to cut off successor liability claims without ever mentioning the existence of the Ignition Switch Defect. Old GM's employees had every incentive to keep the lid on Pandora's box at the time of the Sale by not disclosing the massive number of defective vehicles infected with the faulty Ignition Switch; they knew that with the

stroke of a pen, Old GM was about to transform into New GM and be rid of the claims of the Ignition Switch Pre-Closing Accident Plaintiffs.

The record of the Sale Hearing shows that other objectors were able to change the outcome for those not yet injured by an Old GM vehicle (the so-called "future claims"), yet the Bankruptcy Court mistakenly holds years after the Sale Hearing that it knows it would have overruled the objections of the Ignition Switch Pre-Closing Accident Plaintiffs if made in 2009. However, nowhere in its Opinion does the Bankruptcy Court acknowledge the differences between the equity-based arguments the Ignition Switch Pre-Closing Accident Plaintiffs made in 2015 and the arguments made in 2009 by other parties about such matters as subject matter jurisdiction, the scope of section 363(f), and the due process rights of future claimants not yet injured. The Bankruptcy Court treated the non-disclosure as if it did not exist, even though the Bankruptcy Court correctly found that the Plaintiffs were known creditors and the Subject Vehicles should have been recalled before the Sale Hearing. Due process rights cannot be so easily dispensed with a judicial shrug when the persons entitled to notice were deprived of the right to litigate their own issues, in their own voice, in real time, and to pursue timely appeals if unsuccessful in the first instance.

The battle over successor liability for personal injury and wrongful death claims relating to the defective Ignition Switch should have been fought by the real

parties in interest in July of 2009 with proper disclosure and on proper record rather than by false proxies retroactively mischaracterized by New GM and the Bankruptcy Court as having carried the water for the Ignition Switch Pre-Closing Accident Plaintiffs in July of 2009. The Supreme Court held in *Mullane* that notice cannot be a "mere gesture" and that notice must be "appropriate to the nature of the case," yet Old GM's insufficient notice ensured that the battle over successor liability to persons harmed by the Ignition Switch Defect before the Sale would be won by Old GM and New GM without either of them having to fire a shot.

Substantive rights of the Ignition Switch Pre-Closing Accident Plaintiffs to seek recovery from New GM as a successor for personal injury and wrongful death claims attributable to the Ignition Switch Defect were at risk at the time of the Sale Hearing. Rulings made at the Sale Hearing divested the Plaintiffs of those rights without them ever being told of the existence of the Ignition Switch Defect or what was at risk at the Sale Hearing. The loss of these substantive rights is the obvious prejudice the Ignition Switch Pre-Closing Accident Plaintiffs suffered.

The remedy for this due process violation rights is similarly obvious. While New GM attempts to block the Ignition Switch Pre-Closing Accident Plaintiffs from obtaining relief by mischaracterizing this Court's precedent, *Manville IV*, *Manville V*, and other decisions of this Court instruct that a party is not bound by

an order that purports to impair its rights if that order was entered in violation of that party's due process rights. That is exactly what should happen here.

In an effort to escape this result, New GM points to inapplicable sections of the Bankruptcy Code and the Federal Rules of Civil Procedure. These efforts should fail.

New GM strains to portray the relief the Plaintiffs seek as falling under Rule 60(b). This not a Rule 60(b) case and no one made a Rule 60(b) motion. In this Circuit, a party deprived of due process in connection with the entry of a bankruptcy court order is not confined to Rule 60(b) to remedy the due process violation.

Nor does Bankruptcy Code section 363(m) apply to this dispute. This proceeding is not an appeal from a sale order. This Court has explicitly recognized in *Gucci* and *Westpoint Stevens* that, while section 363(m) limits what an appellate court can do on an appeal from a sale order, a party entitled to another form of relief from that order can pursue that relief in the bankruptcy court. This is precisely what the Plaintiffs have done to remedy the due process violations that occurred here. Nothing in section 363(m) prohibits the Plaintiffs from seeking relief from the Sale Order from the Bankruptcy Court or prevents this Court from overturning the Bankruptcy Court's denial of such relief.

ARGUMENT

I. THE IGNITION SWITCH PRE-CLOSING ACCIDENT PLAINTIFFS WERE DENIED DUE PROCESS

Based on the stipulated record before it, the Bankruptcy Court concluded that a "critical mass" of Old GM engineers, senior managers, attorneys, and other employees "were informed or otherwise aware of the Ignition Switch Defect prior to the Sale Motion, as early as 2003." *Opinion*, 529 B.R. at 538, 558 n.154. Thus, all owners and lessees of vehicles containing the Ignition Switch Defect were "known" creditors of Old GM in June 2009 and were entitled to actual (not constructive) notice of the Sale Hearing at which their rights to bring successor liability claims were to be taken away from them. *Id.* at 557-59. These findings were not clearly erroneous.

To evade the Bankruptcy Court's "known creditor" finding, New GM mischaracterizes the evidentiary record and the nature of the Ignition Switch Pre-Closing Accident Plaintiffs' claims and instead focuses on inapplicable and factually distinguishable cases. This Court should reject New GM's arguments and uphold the Bankruptcy Court's correct determination that the Plaintiffs were known creditors and that the notice provided to them did not meet the requirements of due process.

A. The Ignition Switch Pre-Closing Accident Plaintiffs' Claims Were Not Contingent As Of The Sale; Those Claims Were Ripe And Known To Old GM (But Not To The Claimants Themselves)

Throughout its brief, New GM lumps all of the Appellants together as an undifferentiated group and continually refers to their claims as being "contingent." Both mischaracterizations are incorrect. First, the personal injury and wrongful death claims of the Ignition Switch Pre-Closing Accident Plaintiffs are distinct from the economic damage claims being asserted by the Ignition Switch Plaintiffs and certain of the other Appellants. Second, New GM uses the word "contingent" thirty times in its brief to support its tautological contention that only those tort victims who had already sued or threatened to sue Old GM were entitled to actual notice of the Sale. *See, e.g.*, New GM Brief at 39. Saying it thirty times does not make it true.

As this Court has explained, "[i]t is generally agreed that a debt is contingent if it does not become an obligation until the occurrence of a future event, but is noncontingent when all of the events giving rise to liability for the debt occurred prior to the debtor's filing for bankruptcy." *In re Mazzeo*, 131 F.3d 295, 303 (2d Cir. 1997). A debt does not become contingent merely because the debtor disputes the claim or because the claim has not yet been reduced to judgment. *Id.*

The Ignition Switch Pre-Closing Accident Plaintiffs were not contingent creditors under this (or any other) definition. Their crashes had already occurred. Additionally, regardless of whether lawsuits had been brought against Old GM for these crashes, there was nothing contingent about the existence of the defect – which was embedded identically into the DNA of every Subject Vehicle[2] – and there was nothing contingent about the repair claim that every vehicle owner had. It is true, however, that the Ignition Switch Pre-Closing Accident Plaintiffs' noncontingent claims were unliquidated at the time of the Sale (and remain so today). The reason for that, of course, is that the cause of their crashes was hidden from them by Old GM prior to the Sale and remained hidden by New GM until 2014. Old GM's and New GM's concealment of the Ignition Switch Defect, however, does not render the Ignition Switch Pre-Closing Accident Plaintiffs' claims contingent.

The burden is on the debtor to make a careful examination of its own books and records to identify those parties who hold claims against it. *Opinion*, 529 B.R. at 548-49. The facts and circumstances of each case determine whether a claim is

[2] New GM refers to the Ignition Switch Defect as a "possible" defect. New GM Brief at 70. The defect was and is an "actual" defect. The recalls that finally began in February 2014 were not based on possibilities; they concerned the exact same switch that was manufactured with below specification torque and with embedded electronics that disengaged the airbags if the switch inadvertently shifted into the "auxiliary" or "off" position.

"reasonably ascertainable" following an appropriately diligent review of the debtor's books and records. *Id.* at 550.

After a careful review of the facts and circumstances of this case, the Bankruptcy Court correctly determined that all owners of Subject Vehicles were known and identifiable creditors of Old GM and that the publication notice of the Sale did not afford them due process under *Mullane* and its progeny. Specifically, the Bankruptcy Court found that:

> [t]he known safety hazard that engendered the unsatisfied recall obligations gave rise to claims associated with the repair (and assertedly, though this is yet to be decided, decreases in value) of the cars and would give rise to more claims if car occupants were killed or injured as a result. Old GM knew—even if it knew the particular identities of only some cars that had been in Ignition Switch Defect accidents—that the defect had caused accidents; that is exactly why this particular recall was required. And Old GM also knew, from the same facts that caused it to be on notice of the need for the recall, that others, in the future, would be in accidents as well.

Opinion, 529 B.R. at 525. Thus, the Bankruptcy Court recognized that the Ignition Switch Pre-Closing Accident Plaintiffs did not have to overtly threaten litigation to be known creditors. Each had a repair claim due to the known defect regardless of whether Old GM was aware a crash had already occurred. Moreover, because the Sale was to be free and clear of successor liability claims, Old GM knew that any owner that had already had an accident resulting from the Ignition Switch Defect

(whether or not Old GM knew of the accident) would be adversely impacted by the proposed Sale Order. It is not speculation that there might have been accidents relating to the Ignition Switch Defect that had not yet been reported.

Assuming arguendo that unreported crash victims were unknown creditors, to bind these people to a sale free and clear of their successor liability claims, disclosure of the existence of the Ignition Switch Defect would have to have been part of the publication notice. Otherwise the notice does not tell affected parties what is at stake for them. However, as the Bankruptcy Court determined, all Ignition Switch Pre-Closing Accident Plaintiffs were known creditors because each of them had a repair claim. Because the Ignition Switch Pre-Closing Accident Plaintiffs were known creditors, the burden was on Old GM to provide constitutionally sufficient notice. Old GM failed to meet this burden and, as a result, the Ignition Switch Pre-Closing Accident Plaintiffs should not be bound by the free and clear provisions of the Sale Order. A rule that requires the party with the inferior knowledge to notify the party with superior knowledge would turn due process on its head.

B. New GM Mischaracterizes The Record Below

Displeased by the Bankruptcy Court's known creditor determination, New GM reacts by misstating the factual record. Specifically, New GM misstates in its brief that "the Bankruptcy Court concluded in 2009 that all Old GM vehicle

owners who had not made a demand or filed a lawsuit against Old GM–like Appellants–were unknown creditors. A-7765-7797." New GM Brief at 5. Of course, if Judge Gerber had made such a conclusion in 2009, it would have been completely at odds with his 2015 determination in the Opinion that the Plaintiffs were known creditors entitled to actual notice of the Sale. However, he never made this conclusion.

As support for this inaccurate statement, New GM points to the transcript of a June 2010 hearing concerning certain successor liability claims brought against New GM following the closing of the Sale. At that hearing, the Bankruptcy Court held that the Sale Order barred the claimants from bringing successor liability claims and ruled that their arguments against the enforceability of the free and clear provision failed on *res judicata* and *stare decisis* grounds. (A-7797). In so ruling, the Bankruptcy Court also addressed a due process argument made by Shane Robley, a personal injury claimant who was injured pre-bankruptcy in an Old GM vehicle but sued New GM after the Sale closed. (A-7795-7796). In rejecting Mr. Robley's due process argument, the Bankruptcy Court held that even though he did not receive actual notice of the Sale by mail, he was afforded due process as a result of the publication notice the Bankruptcy Court authorized in 2009. *Id.* Significantly, however, the Bankruptcy Court also made it 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. (A-7764) ("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.").

At no point during that hearing (or any other time) did Judge Gerber say that all Old GM vehicle owners who had not made a demand or filed a lawsuit against Old GM were unknown creditors only entitled to publication notice of the Sale. Instead, what the Bankruptcy Court concluded at that hearing was that the evidentiary record showed that Mr. Robley was an unknown creditor only entitled to publication notice of the Sale, but that particular knowledge by Old GM might require a different result.

Unlike in Mr. Robley's case, the evidentiary record below demonstrates that that at the time Old GM sought approval of the Sale Notice, it knew that all Subject Vehicles were defective, in need of repair, and that the owners of these vehicles had potential successor liability claims that were going to be extinguished through the Sale. Under these circumstances, the publication notice given deprived all Plaintiffs of due process.

New GM also tries to rely on the fact that the Bankruptcy Court approved the content and delivery mechanism of the Sale Notice in 2009. *See, e.g.*, New

GM Brief at 4. Such reliance is misplaced. The Bankruptcy Court approved the Sale Notice years before New GM finally disclosed the existence of the Ignition Switch Defect in 2014. Under the circumstances known to the Bankruptcy Court in 2009 – not having been told that millions of Subject Vehicles were known by Old GM to be hazardously defective and to have already have caused numerous serious injuries and deaths – it is unsurprising that the Bankruptcy Court approved a generic Sale Notice and permitted that notice to be served by publication on owners of Subject Vehicles. In 2015, after this same court learned – along with the rest of the world – that the Ignition Switch Defect had not been disclosed in connection with the 2009 Sale Hearing, it held that:

> [b]ecause owners of cars with Ignition Switch Defects received neither the notice required under the Safety Act nor any reasonable substitute (either of which, if given before Old GM's chapter 11 filing, could have been followed by the otherwise satisfactory post-filing notice by publication), they were denied the notice that due process requires.

Opinion, 529 B.R at 525.

New GM also states that the "Appellants" concede that if they were unknown creditors, publication notice alone would suffice and "that ends the appeal." New GM Brief at 50. This is incorrect. The Ignition Switch Pre-Closing Accident Plaintiffs have steadfastly contended that *Mullane* makes clear that there are two critical elements to notice: (1) the delivery system (which means first class

mail for known creditors and publication for unknown creditors), and (2) content (which applies to both methods of delivery). *Mullane*, 339 U.S. at 314 ("The notice must be of such nature as reasonably to convey the required information"). Content matters. For example, if the notice sent to creditors of the deadline to submit proofs of claim did not contain the correct date, the form of notice would be insufficient whether delivered by first class mail to known creditors or published in a newspaper for unknown creditors. The point for the Ignition Switch Pre-Closing Accident Plaintiffs is that regardless of whether first class mail or publication was the proper the method for giving them notice of the Sale and its impact upon their successor liability claims, the Sale Notice was deficient because it did not disclose the existence of the Ignition Switch Defect. In the parlance of *Mullane*, it was "not appropriate to the nature of the case." *Id.* at 313.

The generic Sale Notice used here was the merest of gestures. At the time of the Sale, the Ignition Switch Pre-Closing Accident Plaintiffs were unware that a dangerous defect likely caused their crashes and exacerbated their injuries. Unaware of causation and fault, they were similarly unaware that they would have highly-credible successor liability claims against New GM but for the successor liability bar that would be part of the Sale Order. Unaware of the non-disclosure, they were unaware that they had objections to the proposed injunction that were unique to them: concealment, inequitable conduct, unclean hands, disincentive for

the party in charge of giving notice to be candid, and prospective windfalls to both Old GM and New GM by sidestepping a huge and embarrassing fight in the Bankruptcy Court if the long-hidden Ignition Switch Defect suddenly came to light on the eve of the Sale.[3]

New GM also resorts to hyperbole by arguing that it would have been overly burdensome and costly to mail Sale Notices to every one of the 70 million owners of GM vehicles. *See* New GM Brief at 15, 26, 34, 78. To be clear, there were only 2,190,934 Subject Vehicles recalled. (A-9971). The Ignition Switch Pre-Closing Accident Plaintiffs are not arguing that Old GM had to provide actual notice of the Sale to the owners of all 70 million Old GM vehicles. They are arguing that Old GM was required to mail constitutionally sufficient notice the roughly 2 million owners of vehicles that Old GM knew contained the hazardous Ignition Switch Defect.

C. The Bankruptcy Court Did Not Err In Finding That Ignition Switch Pre-Closing Accident Plaintiffs Were Known Creditors As of Old GM's Bankruptcy Filing

New GM tries to obfuscate the facts surrounding Old GM's knowledge of the existence of the Ignition Switch Defect by suggesting that the standard set by the Bankruptcy Court would require debtors to "scour" their files for every

[3] According to the Opinion, the existence of the Ignition Switch Defect was known to Old GM as early as 2003, six years preceding the Sale. *Opinion*, 529 B.R. at 538.

possible contingent claim. New GM Brief at 27. The flaw in this argument is that the Plaintiffs' claims were not contingent – the recall was overdue, the repairs were already required, and the crashes had already happened – and knowledge was widespread among the constituencies within Old GM that were supposed to know about such matters.[4]

New GM tries to narrow the evidentiary record that was before the Bankruptcy Court by arguing that New GM did not stipulate that Old GM personnel knew enough about the Ignition Switch Defect in June 2009 to have been obligated under the Safety Act to conduct a recall of all Subject Vehicles. New GM Brief at 46-48. New GM then questions how Judge Gerber could have come to that conclusion based on the citations he included in his Opinion at footnotes 60 and 61. This attempt to manufacture an error on the part of the Bankruptcy Court fails on many levels.

First, at no point did Judge Gerber state that he was limiting his factual conclusions on the "known creditor" issue to the few portions of the record he chose to cite in footnotes 60 and 61 of his Opinion using "*see*" and "*see also*" references. To the contrary, the Bankruptcy Court expressly stated that:

[4] This argument also ignores the elaborate apparatus within Old GM that was established to comply with the Safety Act and the TREAD Act. (A-9925-57). This apparatus did in fact know about the existence of the Ignition Switch Defect.

> [t]he Court asked the parties to agree on stipulated facts, and they did so. By analogy to motions for summary judgment, the Court has relied only on undisputed facts. To avoid lengthening this Decision further, the Court has limited its citations to quotations and the most important matters.

Opinion, 529 B.R. at 529 n.17 (emphasis added). This quote makes clear that the factual findings contained in the Opinion were based on the entire record, not just those portions cited. Accordingly, New GM is wrong to assert that the Ignition Switch Pre-Closing Accident Plaintiffs are asking this Court to undertake its own fact finding by citing to portions of the record not referenced in footnotes 60 and 61. The Bankruptcy Court already reviewed the entire record – including those portions cited in the Opening Brief – and used those facts to reach its "known creditor" finding.

Second, New GM also ignores the fact that the Valukas Report was included in the evidentiary record below without any objection by New GM. (A-10829, A-11228-30). New GM ignores the Valukas Report altogether, never mentioning this voluminous report prepared by its own counsel at the request of New GM's board of directors. The Valukas Report makes damning conclusions as to why GM (both "Old" and "New") took so long to recall the Subject Vehicles in the face of the substantial knowledge within the organization "from the outset" of the Ignition

Switch being installed in GM vehicles. (A-9653). This report further buttresses the Bankruptcy Court's factual conclusion that the Plaintiffs were known creditors.

Third, the factual record before the Bankruptcy Court included at least two Technical Service Bulletins that Old GM sent to all of its dealers prior to 2009 warning of the possibility of an unexpected moving stall in Subject Vehicles. (A-5979-81). Ignoring this fact, New GM continues to assert that merely "some Old GM employees were aware of unresolved airbag non-deployment and stall issues with certain Old GM vehicles." New GM Brief at 8-9. This statement is directly contradicted by the fact that these Technical Service Bulletins were formal authorized communications by Old GM as a corporation (not by random employees) to dealers acknowledging the existence of the Ignition Switch Defect. A corporation like Old GM does not formally communicate in writing with its dealers – all of whom are third-party outsiders, not Old GM employees – in a haphazard manner.

Fourth, New GM tries to minimize the importance of paragraph 14 of Exhibit B to the Stipulated Facts in an effort to undermine Judge Gerber's factual conclusion that a "critical mass" of Old GM employees were aware of the need to conduct a recall of the Subject Vehicles prior to July 2009. *See* New GM Brief at 46. To be clear, that "paragraph" of the Stipulated Facts is not simply a list of names. Instead, paragraph 14 goes on for 25 pages, has numerous subparts, and is

heavily cross-referenced to the Valukas Report. (A-5981-6005). Paragraph 14 chronicles how numerous senior members of Old GM's legal, engineering, warranty, products investigations, and communications staff were well aware of serious and fatal crashes involving Subject Vehicles experiencing loss of power and airbag non-deployment. This portion of the Stipulated Facts, in conjunction with the rest of the evidentiary record, supports the Bankruptcy Court's conclusion that:

> the Plaintiffs were known creditors here [based] on the fact that at least 24 Old GM engineers, senior managers, and attorneys knew of the Ignition Switch Defect—a group large in size and relatively senior in position. The Court has drawn this conclusion based not (as the Plaintiffs argue) on any kind of automatic or mechanical imputation drawn from agency doctrine (which the Court would find to be of doubtful wisdom), but rather on its view that a group of this size is sufficient for the Court to conclude that a "critical mass" of Old GM personnel had the requisite knowledge—*i.e.*, were in a position to influence the noticing process.

Opinion, 529 B.R. at 558 n.154.

The number, seniority, and job functions of these the 24 Old GM employees referenced in the Stipulated Facts support the Bankruptcy Court's factual findings. These were not random unconnected employees scattered throughout a vast corporate enterprise who might have anecdotally overhead idle water cooler conversations. These were the people whose job it was to (i) investigate problems

with the Ignition Switches, (ii) draft the Technical Service Bulletins warning Old GM dealers of the problem with the Ignition Switches, (iii) perform the PRTS inquiries aimed at resolving the problem, and (iv) handle litigation claims relating to crashes involving Subject Vehicles. In other words, these were the Old GM employees whose jobs it was to know about safety defects, and it is clear they knew about this one. Their actions and levels of knowledge appropriately formed the basis of Judge Gerber's known creditor conclusion.

Fifth, New GM takes the position that the Bankruptcy Court could not have found that the Plaintiffs were known creditors absent an admission by New GM that Old GM knew of the Ignition Switch Defect and the need to conduct a recall prior to July 2009. New GM Brief at 27. This position is illogical and would place complete control of the Bankruptcy Court's factual findings in the hands of a self-interested litigant seeking to escape liability. Courts make factual findings based on the evidence before them and can determine that such evidence demonstrates that a party knew something even if that party (or its successor) denies it. If ultimate findings cannot be made by the trier of fact based upon constituent facts, then no court would ever be able to decide anything other than in a few confined unique circumstances where a party makes an outright admission or blurts out an ultimate fact.

The evidence before the Bankruptcy Court in the proceedings below amply demonstrated that the Plaintiffs were known creditors of Old GM at the time the Sale Notice was provided. The Bankruptcy Court committed no error in this regard.

Sixth, New GM complains that it should not be forced to "bear the ultimate burden for Old GM's alleged Sale notice transgressions." New GM Brief at 6. But that is exactly what should happen here. Setting aside for a moment the fact that New GM was created as a shell into which Old GM's assets and employees transferred upon the closing of the Sale, New GM was the party that required Old GM to sell its assets free and clear of successor liability claims. (A-128, A-537). Having forced Old GM to seek the extraordinary and controversial relief of selling assets free and clear of successor liability claims pursuant to section 363(f), New GM was fully incentivized to ensure that such relief was obtained in a constitutional manner. It is well known that in every bankruptcy sale the form and scope of notice is of paramount interest to the buyer for precisely the reasons that are at issue here: the buyer's desire to bind as many creditors and other parties as possible. If New GM did not conduct due diligence or ask obvious questions of Old GM – perhaps preferring not to know about any skeletons in the closet – then it must live with the consequences of failing to ensure that its seller provided due process to its known creditors.

D. Rather Than Confronting The Evidentiary Record, New GM Relies On Factually Distinguishable Cases

Unable to change the facts showing Old GM's knowledge of the Ignition Switch Defect, New GM tries pointing to a litany of cases that have no application here.

For example, New GM relies heavily on the Bankruptcy Court's decision in *Morgenstein v. Motors Liquidation Co., (In re Motors Liquidation Co.)*, 462 B.R. 494 (Bankr. S.D.N.Y. 2012) ("*Morgenstein*"), which was not a successor liability case. 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 to allow them the ability to file an untimely class proof of claim against the GUC Trust. *Morgenstein*, 462 B.R. at 496-97. In concluding that the heightened pleading standard for fraud under Rule 9(b) had not been met, the Bankruptcy 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; *see also id.* at 506 ("No facts are set forth establishing that Old GM actually knew the defect was more widespread.").

Here, by contrast, the very same court reviewed this evidentiary record and concluded that Old GM had knowledge of the undisclosed Ignition Switch Defect and the Plaintiffs' resulting claims. The Court's dismissal of the fraud on the court claim in *Morgenstein* based on the absence of evidence that Old GM had knowledge of the alleged defect in no way advances New GM's argument that Plaintiffs were unknown creditors.

New GM's reliance on *Burton v. Chrysler Grp., LLC, (In re Old Carco LLC)*, 492 B.R. 392 (Bankr. S.D.N.Y. 2013) ("*Burton*"), is similarly misplaced. In *Burton*, purchasers of defective used vehicles manufactured by the debtor sued the bankruptcy purchaser ("New Chrysler") for economic damages for devaluation of their vehicles, not for personal injuries. *Id.* at 399, 405. The claims fell into two categories: (i) assertions that New Chrysler assumed the debtor's warranty and duty to warn obligations under the sale agreement or had separate independent duties to compensate them, and (ii) assertions by plaintiffs harmed post-sale that the sale order could not cut off their rights as "future" claimants under *Grumman*. *Id.* at 401.

For the first set of claims, the court analyzed the question of liability as a matter of contract interpretation and determined New GM did not assume these obligations under the terms of the sale agreement. *Id.* at 403-04. Significantly, the court did not address or determine whether these plaintiffs were known creditors or

whether notice of the sale was constitutionally adequate. More importantly, the plaintiffs did not challenge whether the successor liability bar applied to these claims.

For the second set of claims, the court held that, even though these plaintiffs were allegedly harmed after the sale, the debtor had issued several recall notices for the same type of defect before the sale. Therefore, each such plaintiff (or the previous owner of that vehicle) had a prepetition relationship with the debtor and should have anticipated future repairs prior to the sale. *Id*. at 403.[5] Those plaintiffs were found not to be "future" claimants protected by *Grumman*. *Id.*

Unlike in *Burton*, where multiple fuel spit back recalls predated the sale, here, there were no Old GM recalls before the Sale similar to the eventual Ignition Switch Defect recalls that began in 2014.[6] Unlike in *Burton*, the Ignition Switch

[5] Whether buyers of used cars should 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 anyone should reasonably "expect" that when a new car rolls off the assembly line, purchasers will instantly have claims against the manufacturer for defects the manufacturer incorporated into the vehicle but failed to disclose notwithstanding widespread corporate knowledge of the defect and the dangers it posed.

[6] New GM argues that a recall notice would not have mentioned the Sale. *See* New GM Brief at 42. This is irrelevant. Whether notification of the existence of the Ignition Switch Defect should have been contained in a few sentences in the Sale Notice or given separately through a recall that predated the Sale is beside the point. Either approach would have sufficed to impart the necessary information about the Sale and its effect on the Plaintiffs. Instead of either, Old GM did neither, and that is the notice failure. The point that the Bankruptcy Court made below (which New GM ignores) is

(footnote continued on following page…)

Pre-Closing Accident Plaintiffs never sought status as future claimants to "get around" the successor liability bar for the obvious reason that they were all injured or killed before the Sale. Unlike in *Burton*, which was analyzed as a contract case and not a due process case, the Bankruptcy Court here found there was constitutionally insufficient notice to owners of Subject Vehicles. Thus, the Bankruptcy Court correctly concluded that *Burton* was distinguishable and did not support a conclusion that the Plaintiffs were unknown creditors at the time of the Sale. *See Opinion*, 529 B.R. at 559-60.

New GM also relies on *In re New Century TRS Holdings, Inc.*, No. 07-10416 (BLS), 2014 WL 842637 (Bankr. D. Del. Mar. 4, 2014) ("*New Century*"), to support its argument that Plaintiffs were not known creditors. 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. *Id.* at *3. In rejecting this argument, the court concluded that the claimant was an unknown creditor because: (i) she did not put the debtors on notice of her claims until after the bar date, (ii) her status as a customer of the

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that the failure of notice in this case is the failure to inform the Plaintiffs of the existence of the Ignition Switch Defect. *Opinion*, 529 B.R. at 525.

debtors, without more, did not make her a creditor (whether known or unknown), and (iii) the circumstances of each loan were different, and therefore, the existence of similar claims by other customers did not put the debtors on notice of her particular claims. *Id.* at *3-*5. 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. The differences between *New Century* and this case are obvious. Unlike in *New Century*, where each loan file had its own facts and, indeed, some loan files would have actionable irregularities and others would not, the Ignition Switch was identically manufactured and identically defective in every Subject Vehicle (and Old GM knew it).[7]

[7] For similar reasons the following cases New GM cites are also distinguishable: *In re Enron Corp.*, No. 01-16034 (ALG), 2006 WL 898031, at *5 (Bankr. S.D.N.Y. Mar. 20, 2006) (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 an investigation by the debtors of their records would not have indicated the state held a claim); *In re Spiegel, Inc.*, 354 B.R. 51, 56-57 (Bankr. S.D.N.Y. 2006) (plaintiffs accusing party released under confirmed chapter 11 plan of unlicensed pre-bankruptcy use of copyrighted materials were unknown creditors where plaintiffs' complaint contained "several key conclusory statements" and "Plaintiffs [did] not allege that a proper examination of the books and records would have uncovered their claim") (emphasis added); *In re Agway, Inc.*, 313 B.R. 31, 39 (Bankr. N.D.N.Y. 2004) (claimant asserting contribution claim was not a known creditor; such claim was "uncertain and speculative" from the debtor's perspective because the debtor had not been named in the already pending lawsuit and the claimants had not tried to bring the debtor into the lawsuit); *In re Envirodyne Indus., Inc.*, 206 B.R. 468, 473-74 (Bankr. N.D. Ill. 1997) (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

(footnote continued on following page…)

II. THE IGNITION SWITCH PRE-CLOSING ACCIDENT PLAINTIFFS WERE PREJUDICED BY THE DUE PROCESS VIOLATIONS INFLICTED ON THEM

Although this Court did not treat prejudice as being a necessary element of a due process violation in *Manville IV*, *Koepp*, or *DPWN Holdings II*, New GM and the Bankruptcy Court seek to read this requirement into those cases by asserting the prejudice was "obvious" and unworthy of discussion. *Opinion*, 529 B.R. at 560 n.161; New GM Brief at 55 n.21. Assuming arguendo that this Court implicitly held that prejudice is a necessary to find a due process violation, it is equally "obvious" that the Ignition Switch Pre-Closing Accident Plaintiffs suffered prejudice as a result of being denied constitutionally sufficient notice of the Sale.

A. No Party Made The Arguments To The Bankruptcy Court In 2009 That The Ignition Switch Pre-Closing Accident Plaintiffs Would Have Made Had They Been Given Constitutionally Sufficient Notice

New GM and the Bankruptcy Court assert that other parties in interest who received actual notice of the Sale made the same arguments in 2009 that the Ignition Switch Pre-Closing Accident Plaintiffs made in the proceedings below. That is not true. As the Ignition Switch Pre-Closing Accident Plaintiffs argued in

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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).

their Opening Brief and in the proceedings below, they have several arguments they would have raised if they had been given sufficient notice in 2009 of the Sale Hearing and the existence of their Ignition Switch Defect-related claims. The arguments they would have asserted in 2009 had proper disclosure been made would have included:

(i) the unclean hands of the seller;

(ii) the unfairness of selling free and clear of known claims that had been concealed for years;

(iii) the inequity and perverse incentives that result from permitting a party that concealed a deadly defect to sell its assets to a shell entity that its management and employees would imminently inhabit and later claim protection against successor liability claims; and

(iv) the impropriety of allowing Old GM to morph into New GM, launder its assets of unwanted liabilities, and then point back at its old self as the party to be blamed for the lack of candor about the Ignition Switch Defect.

The Bankruptcy Court completely ignored the concealment and equity-based arguments the Ignition Switch Pre-Closing Accident Plaintiffs made in their briefing and at oral argument.[8] None of these arguments were made in 2009 by parties that did get notice and objected at the Sale Hearing for the obvious reason that the basis for these arguments (the hidden defect) was concealed at the time.

[8] These arguments were detailed at pages 34 to 35 of the Ignition Switch Pre-Closing Accident Plaintiffs' opening brief, with citations to the record below.

Because the lack of notice prevented the Ignition Switch Pre-Closing Accident Plaintiffs from making these arguments in real time in 2009, they were unquestionably prejudiced by the due process violations inflicted upon them.

New GM also distorts what other objecting parties argued in 2009. A review of the briefs filed in 2009 by certain parties opposing the Sale shows that the objectors focused on the following three issues:

(i) assets cannot be sold free and clear of successor liability claims under section 363(f) because that section only authorizes sales free and clear of interests in a debtor's property, not claims;

(ii) the Bankruptcy Court lacked subject matter jurisdiction to enjoin post-closing disputes between a non-debtor plaintiff and a non-debtor defendant (New GM); and

(iii) due process prohibits the Bankruptcy Court from approving a sale free and clear of future claimants who had not yet suffered an injury as of the date of the sale.

See generally (A-7814, 7826, 7866, 7883, 7900, 7989). These are not the arguments the Ignition Switch Pre Closing Accident Plaintiffs made below or are making now. None of these briefs raised equitable arguments concerning the concealment of the Ignition Switch Defect because none of the parties objecting in 2009 knew about that defect.

Recognizing this problem, New GM mischaracterizes the arguments of the "Vehicle Owner Objectors" and states that "just like the Appellants" these parties argued in 2009 that "the free and clear provisions violated due process because

vehicle owners who might have claims did not receive meaningful notice that the sale would affect their rights as against the purchaser." New GM Brief at 20. When you look at the brief New GM cites, however, it is clear that this due process argument about "meaningful notice" was being made with respect to future tort and personal injury claimants "who have not yet suffered injury from defects in GM vehicles [and] do not know that they will be injured in the future…." (A-7824). This is a completely different issue because the Ignition Switch Pre-Closing Accident Plaintiffs were not future claimants; they had already been injured or killed prior to the Sale Hearing as a result of a known safety defect.

In fact, due process arguments about future claimants were successful in causing New GM to assume responsibility for personal injury and property damage claims arising from post-Sale accidents and incidents involving Old GM vehicles. New GM Brief at 65 n.27. What this demonstrates is that advocacy groups and state attorneys general who were given a fair opportunity to impact the outcome of the Sale proceedings and to protect the rights of their constituency (future crash victims) were able to do so. Because of the due process violations, the Ignition Switch Pre-Closing Accident Plaintiffs never received that same opportunity and, as a result, were prejudiced by being deprived of the opportunity to make their Ignition Switch Defect-related arguments in 2009.

New GM also asserts that the Ignition Switch Pre-Closing Accident Plaintiffs were not prejudiced because their objections would have been overruled in 2009. New GM Brief at 28-29. It is not that simple. A party seeking to escape the consequences of a due process notice violation cannot just return to the same bankruptcy judge that entered the order years after the due process violation occurred and ask "would you have overruled this objection years ago?" Even if the bankruptcy court says "yes," the bankruptcy court was not the final arbiter. The party deprived of notice could have appealed. The Bankruptcy Court cannot presume to speak for the district court, this Court, or the Supreme Court and say that the Ignition Switch Pre-Closing Accident Plaintiffs were not prejudiced because they would have lost in 2009.[9]

B. Ignition Switch Pre-Closing Accident Plaintiffs Are Being Treated Worse Than All Other Unsecured Creditors; They Are Not Seeking A "Windfall"

Ignoring the tragedies that the Ignition Switch Pre-Closing Accident Plaintiffs suffered as a result of the Ignition Switch Defect (for which they have

[9] The Ignition Switch Pre-Closing Accident Plaintiffs also contend they were prejudiced by being denied the opportunity to make their best arguments at the time when making those arguments would have mattered the most – in the context, fluidity, and uncertainty of the Sale Hearing. The strong public and Congressional reaction in 2014 and 2015 to the revelations about the Ignition Switch Defect are an indication of what might have happened at the Sale Hearing had the curtain been lifted on the Ignition Switch Defect in July 2009.

not received a penny), New GM attempts to tarnish the Ignition Switch Pre-Closing Accident Plaintiffs by characterizing them as opportunistic litigants who "sat on the sidelines" and now want to disrupt the Sale years after the closing and obtain a "windfall" and better treatment than other creditors. New GM Brief at 5, 85, 93. New GM argues this even though the Ignition Switch Pre-Closing Accident Plaintiffs are currently barred on mootness grounds from recovering anything from Old GM on account of their claims while holders of allowed general unsecured claims that received due process recovered on their claims long ago.

As the GUC Trust stated in its brief, in the spring of 2011 "more than 75% of the New GM Securities and nearly 30 million GUC Trust Units" were distributed to holders of allowed general unsecured claims and by September 2014, "more than 89% of GUC Trust Assets" had already been distributed.[10] GUC Trust Brief at 10. The vast majority of the contents of the GUC Trust was distributed to creditors before New GM admitted that it violated the Safety Act by concealing the existence of the Ignition Switch Defect from federal regulators and the public.[11] During that period New GM kept the Ignition Switch Pre-Closing Accident

[10] Following a November 2015 distribution, the GUC Trust claims it has distributed "nearly 93 percent of the GUC Trust Assets." GUC Trust Brief at 18.

[11] *See In re TQ14-001 NHTSA Recall No. 14V-047*, Consent Order dated May 16, 2014. (A-9969).

Plaintiffs in the dark about their claims while the Sale proceeds held in the GUC Trust were continuously distributed to other creditors.

Unless the Bankruptcy Court's equitable mootness ruling is overturned as part of this appeal,[12] there is nothing for the Plaintiffs to recover from Old GM's estate. It is unmitigated chutzpah for New GM to suggest that the Ignition Switch Pre-Closing Accident Plaintiffs are seeking a windfall and a leg up on other creditors when the current state of affairs (a zero recovery due to mootness) is a direct consequence of New GM's own admitted illegal post-Sale concealment of the Ignition Switch Defect. This is yet another example of the prejudice the Ignition Switch Pre-Closing Accident Plaintiffs suffered.[13] Far from being treated better than other creditors, the Ignition Switch Pre-Closing Accident Plaintiffs were injured or killed by the Ignition Switch Defect and have been denied any recovery at all.

New GM also accuses the Ignition Switch Pre-Closing Accident Plaintiffs of taking "belated" action with respect to the Sale Order. New GM Brief at 32, 61,

[12] Consistent with its opening brief, the Ignition Switch Pre-Closing Accident Plaintiffs adopt and incorporate by reference the arguments on equitable mootness contained in the Ignition Switch Plaintiffs' opening and reply briefs.

[13] Regardless of whether the equitable mootness ruling is overturned and the Ignition Switch Pre-Closing Accident Plaintiffs are granted allowed claims against the GUC Trust, they were nonetheless prejudiced for the other reasons discussed in this brief and the Opening Brief.

76, 79, 82. There is nothing belated about anything the Ignition Switch Pre-Closing Accident Plaintiffs did. They commenced suit promptly after New GM revealed the existence of the Ignition Switch Defect in 2014. The truly belated action here is the delayed recall by New GM that occurred after many more people were severely injured and killed as a result of this known safety defect.

New GM and the GUC Trust are also disingenuous when they assert that the Ignition Switch Pre-Closing Accident Plaintiffs have strategically chosen to pursue successor liability claims against New GM rather than seeking to file late proofs of claim against the GUC Trust. New GM Brief at 93-94; GUC Trust Brief at 42-43. On February 8, 2012, well before the 2014 recalls of the Subject Vehicles, the Bankruptcy Court entered an order preemptively disallowing all claims filed after entry of that order, unless such late claims were expressly authorized by the GUC Trust or allowed by the Bankruptcy Court following notice and a hearing. (A-4809). There was no point in the Plaintiffs filing and seeking allowance of proofs of claim that would be clearly time barred until the Bankruptcy Court ruled on the Four Threshold Issues. Later, when the Bankruptcy Court issued its equitable mootness ruling, there was again no point in Plaintiffs seeking permission to file

late proofs of claim for which any recovery was barred by mootness until this appeal was resolved.[14]

C. The "Prejudice" Cases Upon Which New GM Relies Are Readily Distinguishable

In support of its argument that a showing of prejudice is required to establish a due process violation, New GM points to out-of-circuit, lower court, and unpublished decisions. While those courts reference lack of prejudice in determining whether a due process violation occurred, each case is easily distinguished because the party complaining about lack of notice received an opportunity to be heard before relief was granted against it. *See* New GM Brief at 51-53, 60 (citing *Perry v. Blum*, 629 F.3d 1, 17 (1st Cir. 2010) (party joined as defendant after trial was not prejudiced because he was present and testified at the trial and could supplement the record with additional evidence on remand); *Rapp v. U.S. Dep't of Treasury, Office of Thrift Supervision*, 52 F.3d 1510, 1520 (10th Cir. 1995) (petitioners seeking review of adverse determination by the Office of the Thrift Supervision claimed a due process violation because the original notice of assessment stated the penalty would be assessed under the under the Change in Bank Control Act of 1978 without explicit reference to the similar Savings and

[14] The Ignition Switch Pre-Closing Accident Plaintiffs are not electing a remedy or seeking a claim against the GUC Trust to the exclusion of their successor liability claims against New GM.

Loan Holding Company Act; court found no due process violation or prejudice because there was no question both statutes applied and petitioners could not show how their case would have been presented differently had the notice referenced both statutes); *In re Parcel Consultants, Inc.*, 58 F. App'x 946, 951 (3d Cir. 2003) (unpublished) (district court adjudicated merits of appeal on appellant's motion for leave to appeal without allowing full merits briefing; Third Circuit found no due process violation because appellant was given full briefing and opportunity to be heard on the merits at the court of appeals); *Cedar Bluff Broad., Inc. v. Rasnake*, 940 F.2d 651 (Table), 1991 WL 141035, at *2 (4th Cir. 1991) (debtor's due process rights not violated where certain creditors were not given notice of another creditor's motion to convert a chapter 11 case to chapter 7; court held that the debtor received proper notice and did not suffer any prejudice from the alleged notice defect to creditors); *In re Caldor, Inc.*, 240 B.R. 180, 188 (Bankr. S.D.N.Y. 1999), *aff'd Pearl-Phil GMT (Far East) Ltd. v. Caldor Corp.*, 266 B.R. 575 (S.D.N.Y. 2001) (administrative creditor not given notice of proceedings that determined priority between "operational administrative creditors" and "wind-down administrative creditors" was not prejudiced because the order was not imposed against the creditor until after another hearing was held at which the creditor was given the opportunity to oppose the relief and present evidence; creditor did not produce any evidence); *In re Gen. Dev. Corp.*, 165 B.R. 685, 688

(S.D. Fla. 1994) (surety that was not given notice of settlement that impacted its rights was not prejudiced because when the notice violation was raised, the court vacated the settlement and only reinstated it after surety had multiple opportunities to appear and be heard in opposition); *In re Vanguard Oil & Serv. Co.*, 88 B.R. 576, 580 (E.D.N.Y. 1988) (creditor failed to show prejudice resulting from alleged notice defects relating to a 363 sale where complaining creditor had actual notice of the sale, appeared at the sale hearing, and failed to object); *In re City Equities Anaheim, Ltd.*, 22 F.3d 954, 959 (9th Cir. 1994) (no due process violation or prejudice found where court adjudicated a dispute adversely to the debtor prior to granting pending retention application for debtor's proposed counsel; proposed counsel filed opposition briefs, presented evidence, and argued at the hearing even though the court had not yet approved his retention); *Secs. Investor Prot. Corp. v. Blinder, Robinson & Co.*, 962 F.2d 960, 967 (10th Cir. 1992) (appointment of a SIPA trustee following debtor's chapter 11 filing did not violate due process or prejudice the debtor; debtor had notice of the proceedings and appeared at the hearing); *In re U.S. Kids, Inc.*, 178 F.3d 1297 (Table), 1999 WL 196509, at *4-5 (6th Cir. 1999) (unpublished) (creditor not denied due process or prejudiced when bankruptcy court ruled on validity of creditor's lien without a full-scale adversary proceeding; creditor had notice of the proceedings, had appeared, and waived its rights to an adversary proceeding); *In re Rosson*, 545 F.3d 764, 776-77 (9th Cir.

2008) (chapter 13 debtor was not given ample notice of hearing to convert his case to chapter 7; court of appeals held that no due process violation or prejudice occurred because bankruptcy court conducted a reconsideration hearing prior to converting the case at which debtor appeared and was heard in opposition)).[15] None of these cases is on point.

Lastly, in support of its "no prejudice" argument, New GM also relies on the out-of-circuit district court decision in *In re Paris Industries Corp.*, 132 B.R. 504, 509-10 (D. Me. 1991). In *Paris Industries*, the court held that future tort victims who suffered their injuries after a bankruptcy sale closed were not prejudiced by the lack of notice and inability to oppose entry of a sale order barring successor liability claims against the purchaser. That twenty-five year old case, however, is directly contrary to the more recent and better-reasoned *Grumman* decisions of the Southern District of New York district and bankruptcy courts, which held that due

[15] *In re New Concept Housing, Inc.*, 951 F.2d 932 (8th Cir. 1991), is also distinguishable. The majority in that case found no due process violation occurred when a chapter 7 debtor was not notified of its trustee's settlement of a claim against the estate. The majority held that the notice failure was a harmless error because the trustee had authority to settle the claim without the debtor's approval and the record demonstrated that the settlement was reasonable. *Id.* at 938-39. The majority also noted that the debtor had no economic interest in the settlement because there was no evidence of the possibility of a surplus in excess of claims and that "the Debtor has not even raised a due process claim." *Id.* at 938 n.7. There was also a strong dissent, which argued that "Due process affording procedural notice and hearing is not such a trivial device that can or should be obviated by hindsight rationalizations." *Id.* at 942.

process concerns prohibit a free and clear sale order from being enforced against so-called "future creditors" whose injuries occurred after the sale closed and could never have received constitutionally sufficient notice of the sale proceedings. *Grumman*, 467 B.R. at 706-07.[16]

D. There Is No Bankruptcy Sale Exception To Due Process

New GM also argues that the Ignition Switch Pre-Closing Accident Plaintiffs are somehow entitled to a lesser standard of due process in a bankruptcy sale context, due to "urgency," "extreme time deadlines/cost constraints," and "the dire nature of Old GM's financial condition." New GM Brief at 57. This is wrong. Known creditors are entitled to actual notice of any bankruptcy proceeding that will impair their rights, regardless of whether it is a sale, plan confirmation, or a deadline to file proofs of claim. As known creditors whose rights were going to be taken from them in connection with an injunction appurtenant to the Sale, the Ignition Switch Pre-Closing Accident Plaintiffs were entitled to actual notice reasonably calculated to apprise them of the nature of the free and clear Sale and give them an opportunity to present their objections. *Mullane*, 339 U.S. at 314.

[16] As anticipated, New GM also relies on *In re Edwards*, 962 F.2d 641 (7th Cir. 1992), *Molla v. Adamar of N.J., Inc.*, No. 11-6470 (JBS/KMW), 2014 WL 2114848 (D.N.J. May 21, 2014), and *In re BFW Liquidation, LLC*, 471 B.R. 652 (Bankr. N.D. Ala. 2012). The Ignition Switch Pre-Closing Accident Plaintiffs refer the Court to pages 52 to 53 of the Opening Brief for the reasons why these decisions are distinguishable and should not be followed here.

What they were given instead was a "mere gesture." *Id.* at 315. There is no sliding scale of due process depending upon the nature of the proceeding or the dollar amount at issue.

This Court and the Bankruptcy Court below have correctly held that the important policies of finality, maximizing value, and preserving jobs associated with bankruptcy sales do not trump the due process rights of those affected by the sale. *See Koepp*, 593 F. App'x at 23 (quoting *Manville IV*, 600 F.3d at 153-54); *Opinion*, 529 B.R. at 555 n.143, 579 (quoting *In re Polycel Liquidation, Inc.*, 2006 WL 4452982, at *9, 11-12 (Bankr. D.N.J. Apr. 18, 2006)). Other courts within this Circuit agree.

As a prime example, in *Grumman* the district court explained that "[c]ourts have rejected the premise that maximizing the value of the estate outweighs the due process rights of potential claimants." *Grumman*, 467 B.R. at 711. To support that conclusion, the district court in *Grumman* relied upon a Seventh Circuit decision that rejected the argument that "the price received in a bankruptcy sale will be lower if a court is free to disregard a condition in the sale agreement enjoining claims against the purchaser based on the sellers' misconduct," because it "proves too much." Specifically, in response to that argument the Seventh Circuit wrote:

> It implies, what no one believes, that by virtue of the arising-under jurisdiction a bankruptcy court enjoys a blanket power to enjoin all future lawsuits against a buyer at a bankruptcy sale in order to maximize the sale price: more, that the court could in effect immunize such buyers from all state and federal laws that might reduce the value of the assets bought from the bankrupt; in effect, that it could discharge the debts of nondebtors ... as well as of debtors even if the creditors did not consent; that it could allow the parties to bankruptcy sales to extinguish the rights of third parties, here future tort claimants, without notice to them or (as notice might well be infeasible) any consideration of their interests. If the court could do all these nice things the result would indeed be to make the property of bankrupts more valuable than other property-more valuable to the creditors, of course, but also to the debtor's shareholders and managers to the extent that the strategic position of the debtor in possession in a reorganization enables the debtor's owners and managers to benefit from bankruptcy. But the result would not only be harm to third parties, such as the [claimants], but also a further incentive to enter bankruptcy for reasons that have nothing to do with the purposes of bankruptcy law.

Id. (quoting *Zerand-Bernal Grp., Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir.1994)).

As the Bankruptcy Court correctly observed below, the constitutional violations here must "trump" the policy concerns surrounding section 363 sales. *Opinion*, 529 B.R. at 527.

E. The Ignition Switch Pre-Closing Accident Plaintiffs Had A Property Interest In Their Successor Liability Claims That Could Not Be "Preempted" Or Barred Without Providing Them With Due Process

New GM makes the untenable argument that the Plaintiffs did not have vested property rights in their successor liability claims. New GM Brief at 57-58 n.23. This is not only incorrect as a matter of law, but it is belied by the Sale Motion that New GM required Old GM to file. That motion relied upon Bankruptcy Code section 363(f) to sell Old GM's assets to New GM free and clear of the *in personam* successor liability claims of Old GM's creditors. (A-140-142). In addition, the Bankruptcy Court's published opinion concerning the Sale, relying on the bankruptcy court's and this Court's decisions approving the sale in *Chrysler*, found successor liability claims of creditors to be interests in the debtor's property that could be scraped away using Bankruptcy Code section 363(f). (A-1581-82). Not only did no court treat the successor liability claims in the *General Motors* or *Chrysler* cases as "belonging to the debtor," but the Sale Motion itself never sought to compromise or settle those claims against the buyer through a proceeding under Bankruptcy Rule 9019 (as was the case in the *Emoral* decision upon which New GM relies).

Having convinced the Bankruptcy Court to utilize section 363(f) to sell free and clear of the Plaintiffs' successor liability claims, New GM cannot now claim

that the Plaintiffs never had rights to those claims to begin with. This argument is simply an opportunistic and counter-historical argument that relies upon a questionable (and factually distinguishable) Third Circuit decision that itself was subject to a strong dissent.[17]

New GM also takes the position that even if the successor liability claims belonged to the Plaintiffs, successor liability state law is preempted by the Bankruptcy Code and "there can be no due process violation based on preempted state law." New GM Brief at 58 n.23. Neither of the cases New GM cites for this proposition hold that section 363(f) can be used to preempt a successor liability claim irrespective of the aggrieved party's due process rights.[18] In addition, New

[17] The *Emoral* and *Keene* cases cited in footnote 23 of the New GM Brief both involved pre-bankruptcy transactions. Neither involved a post-bankruptcy 363 sale or considered the rights of tort plaintiffs to be heard before a free and clear order was entered. The linchpin of those cases was that the claims at issue (in *Emoral*, successor liability claims, and in *Keene*, claims for looting corporate assets) were causes of action that (i) arose pre-bankruptcy, (ii) any creditor had standing to bring before the bankruptcy, and (iii) became "property of the estate" upon the bankruptcy filing to be pursued by the debtor for the benefit of all creditors. Here, by contrast, the Sale occurred post-bankruptcy and the Plaintiffs' successor liability claims were unique to them and first came into existence after the chapter 11 filing. Therefore, the Plaintiffs' successor liability claims were not property of Old GM's bankruptcy estate. For these and other reasons, the Bankruptcy Court correctly rejected this argument by New GM and noted that these exact cases "are at best irrelevant to New GM's position and at worst harmful to it." *Opinion*, 529 B.R. at 552-55.

[18] Indeed, in *White Motor*, the court explicitly found that a post-sale accident plaintiff was an unknown creditor whose due process rights in connection with the 363 sale were satisfied through publication notice. *In re White Motor Credit Corp.*, 75 B.R. 944, 949-50 (Bankr. N.D. Ohio 1987). Unlike in *White Motor*, here the Bankruptcy

(footnote continued on following page…)

GM ignores case law that holds "there is no federal preemption of state law successor liability merely because the sale of assets occurred in a bankruptcy proceeding" and that "[t]his is particularly true when the plaintiff does not receive notice of the bankruptcy and accordingly fails to pursue possible remedies in that proceeding." *R.C.M. Exec. Gallery Corp. v. Rols Capital Co.*, 901 F. Supp. 630, 637 (S.D.N.Y. 1995). *See also Chicago Truck Drivers, Helpers and Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 50-51 (7th Cir. 1995) (no blanket preemption of successor liability claims as a result of intervening bankruptcy); *In re Savage Indus., Inc.*, 43 F.3d 714, 721 (1st Cir. 1994) ("there can be no question that [successor liability] claim could not be extinguished absent a showing that Western Auto was afforded appropriate notice in the particular circumstances.").

New GM describes the end result of a regularly conducted sale free and clear of interests as barring all manner of claims. New GM Brief at 69. True enough. However, New GM puts the cart before the horse by assuming that a free and clear order under section 363(f) can be entered and preempt a plaintiff's successor liability claims even if that plaintiff is deprived of due process in connection with

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Court found that the Plaintiffs were known creditors whose due process rights were violated as a result of only receiving publication notice. Moreover, like *Paris Industries*, *White Motor* is also contrary to the more recent and persuasive *Grumman* decisions.

the sale. To the contrary, a free and clear order cannot be enforced against a party absent due process. *Koepp*, 593 F. App'x at 23 ("Bankruptcy courts cannot extinguish the interests of parties who lacked notice of or did not participate in the proceedings.") (citing *Manville IV*, 600 F.3d at 153-54)).

New GM also argues that a 363 sale does not extinguish claims, but instead transfers the claims to the sale proceeds. New GM Brief at 58 n.23. This argument ignores that the successor liability claims at issue here are claims against a solvent third party and that, if those claims are to be stripped away as interests in property using section 363(f), those claims must be given adequate protection pursuant to Section 363(e) of the Bankruptcy Code.[19] *See Ill. Dept. of Revenue v. Elk Grove Vill. Petroleum, LLC*, 541 B.R. 673, 681 (N.D. Ill. 2015) (where assets were to be sold free and clear under section 363(f), party with statutory successor liability claims against solvent purchaser was entitled to adequate protection under section 363(e) to protect it from diminution in value of such claims). *See also* Eamonn O'Hagan, *Can Existing Tort Claimants' Successor Liability Claims Get Completely 363(f)'d in Chapter 11?*, 23 NORTON J. OF BANKR. L. & PRACTICE 327,

[19] Section 363(e) of the Bankruptcy Code provides: "Notwithstanding any other provision of this section [including section 363(f)], at any time, on request of an entity that has an interest in property used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use sale, or lease as is necessary to provide adequate protection of such interest."). 11 U.S.C. § 363(e) (emphasis added).

333-34 n. 9 (June 2014). Because New GM and Old GM convinced the Bankruptcy Court to treat the Plaintiffs' successor liability claims as "interests" subject to Bankruptcy Code section 363(f), they were required to give those Plaintiffs the opportunity to seek adequate protection. Such protection had to provide the affected creditor with value equivalent to what it lost: a claim against the solvent New GM. A claim against the insolvent Old GM, even if given, would not be adequate protection. Rather than following the requirements of sections 363(e) and (f), Old GM deprived the Plaintiffs of constitutionally sufficient notice of the Sale and stripped their claims for no consideration.

III. THE REMEDY FOR THE DUE PROCESS VIOLATIONS HERE IS THAT THE FREE AND CLEAR PROVISION OF THE SALE ORDER BE DEEMED NOT ENFORCEABLE AGAINST THE PLAINTIFFS; MODIFICATION OR PARTIAL REVOCATION OF THE SALE ORDER IS NOT REQUIRED

As explained on pages 40 to 47 of the Opening Brief, *Manville IV* is directly on point and dictates that the free and clear provisions of the Sale Order cannot apply to parties deprived of due process. Those arguments are not repeated here.

A. New GM Mischaracterizes *Manville IV* In An Attempt To Evade Its Impact

In an effort to evade this Court's precedent, New GM argues that "*Manville IV* is not a due process case; it is a jurisdiction case that limits the bankruptcy court's ability to adjust rights that two non-debtors had *inter se*." New GM Brief

at 76. That is an absurd reading of *Manville IV*, which was unquestionably a due process case. The Supreme Court in *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, 155 (2009), reversed this Court's prior ruling that the bankruptcy court lacked jurisdiction to enjoin Chubb's claims against Travelers on "narrow" *res judicata* grounds. In doing so, the Supreme Court explicitly did not reach Chubb's due process arguments and instead remanded the case to this Court to address that issue. Specifically, the Supreme Court wrote:

> Nor do we decide whether any particular respondent is bound by the 1986 Orders. We have assumed that respondents are bound, but the Court of Appeals did not consider this question. Chubb, in fact… has maintained that it was not given constitutionally sufficient notice of the 1986 Orders, so that due process absolves it from following them, whatever their scope. The District Court rejected this argument, but the Court of Appeals did not reach it. On remand, the Court of Appeals can take up this objection and any others that respondents have preserved.

Id. (internal citations omitted). *Manville IV* is the remanded case in which this Court addressed and sustained Chubb's due process arguments. *See Manville IV*, 600 F.3d at 147.[20]

New GM also misrepresents what this Court did in *Manville IV* when it states that "this Court held that Chubb was, therefore, not bound by the settlement

[20] Indeed, *Manville IV* only exists because Chubb was denied due process in connection with the bankruptcy court's issuance of the 1986 Orders.

agreement." New GM Brief at 76 (citing *Manville IV*, 600 F.3d at 158). Chubb was never a party to the settlement agreement at issue in *Manville IV*; its rights were impaired by the bankruptcy court's 1986 Orders. What this Court actually did in *Manville IV* was hold that, because Chubb "did not receive adequate notice of the 1986 Orders," it was "not bound by the terms of the 1986 Orders." *Manville IV*, 600 F.3d at 158 (emphasis added). Of course, that holding is exactly what New GM is trying to avoid in this case (*i.e.*, that the Plaintiffs are not bound by the Sale Order due to the constitutionally inadequate notice provided).

New GM should not be allowed to recast this Court's seminal *Manville IV* decision to suit its needs and avoid the consequence of its holding. That case is Second Circuit due process precedent that dictates the result here. It holds that an order cannot be enforced against a party that was deprived of constitutionally sufficient notice of the proceedings that resulted in the entry of that order. *Id*.

B. New GM Incorrectly Asserts That The Sale Order Must Be Modified To Give The Plaintiffs Relief For Due Process Violations

New GM argues that Rule 60(b) of the Federal Rules of Civil Procedure "provides the *only* possible ground for modifying or amending the Sale Order to permit them to pursue successor liability claims against New GM." New GM Brief at 90. As the Bankruptcy Court correctly recognized, however, this Court has ruled that is not the case. Indeed, this Court in *Manville IV* and *Koepp* (as well

as the bankruptcy and district courts in *Grumman*) ruled without reference to Rule 60(b) that an order entered without giving constitutional notice to affected parties could not be enforced against those parties. *See Opinion*, 529 B.R. at 580-81. Therefore, it is clear that in this Circuit, a party deprived of due process in connection with the entry of a bankruptcy court order is not confined to the jurisprudence developed under Rule 60(b) to remedy the due process violation.[21]

Manville V makes clear that in this Circuit a due process violation may be remedied by not enforcing the order against the party deprived of notice and that such remedy does not require the order to be modified, rewritten, or vacated under Rule 60(b). New GM again distorts this Court's precedent when it argues that *Manville V* is not applicable here because that case "dealt with whether certain conditions to the funding of a settlement occurred." New GM Brief at 88 n.34. As explained on pages 48 to 51 of the Opening Brief, *Manville V* was more than a contract interpretation case. *Manville V* is directly on point and holds that limiting

[21] Even if the Rule 60(b) standard applied here (which it does not), that standard is met and the Sale Order may be partially voided to the limited extent needed to allow the Ignition Switch Pre-Closing Accident Plaintiffs to pursue their successor liability claims. *Opinion* 529 B.R. at 582 ("New GM's point that the Sale Order provided that it was a unitary document, and that the Free and Clear Provisions could not be carved out of it, cannot be found to be controlling once a court finds that there has been a due process violation. If a court applies Rule 60(b) analysis, and determines, as in *Metzger* and *Polycel-Bankruptcy*, that a sale order can be declared void to a "limited extent," the provisions providing for the sale order's unitary nature fall along with any other objectionable provisions.").

the reach of an injunction to those with notice does not modify the injunction. *Manville V*, 759 F.3d at 215-17. *Manville V* also holds that a party cannot conflate "(i) a party's ability to collaterally attack an order for lack of constitutional notice" with "(ii) the integrity of that order and the breadth of the claims it bars." *Id*. at 215. This is exactly what this Court prevented Travelers from doing in *Manville V* and exactly what it should prevent New GM from doing here.

C. Bankruptcy Code Section 363(m) Does Not Insulate New GM From The Impact Of The Due Process Violations Here

New GM is incorrect when it argues that Bankruptcy Code section 363(m) insulates it. New GM Brief at 82. Section 363(m) addresses appeals from orders approving sales. This proceeding is not an appeal from the Sale Order. Section 363(m) has nothing to do with due process issues that are raised after a sale has been approved or with injunctions barring the assertion of *in personam* claims that are included within a sale order that was entered on insufficient notice. It should be obvious that a party deprived of constitutionally sufficient notice of a sale will often not be aware of its due process claim until after the time to appeal from the sale order has lapsed. Therefore, the finality of a sale order cannot prevent a party deprived of proper notice from raising due process issues after the sale notwithstanding such finality. *See Manville IV*, 600 F.3d at 158.

Moreover, New GM omits from its brief that this Court has recognized on more than one occasion that, even though section 363(m) limits what an appellate court can do on an appeal of an unstayed section 363 sale order, any party entitled to another form of relief from that order can pursue their rights in the bankruptcy court. *In re Westpoint Stevens, Inc.*, 600 F.3d 231, 248 (2d Cir. 2010) (quoting *Licensing By Paolo, Inc. v. Sinatra (In re Gucci)*, 105 F.3d 837, 840 n.1 (2d Cir. 1997)) ("whatever other relief might be available could presumably be pursued in the bankruptcy court by those entitled to such relief."). That is exactly what is happening here because this is not an appeal from the 2009 Sale Order. The Ignition Switch Pre-Closing Accident Plaintiffs sought relief from the Bankruptcy Court to remedy the due process violation that occurred in connection with entry of the Sale Order in 2009 and was hidden until 2014. Having been denied relief in the Bankruptcy Court's Opinion and Judgment, the Ignition Switch Pre-Closing Accident Plaintiffs have appealed to this Court. Overruling the Bankruptcy Court and granting the Ignition Switch Pre-Closing Accident Plaintiffs the relief they request (*i.e.*, the same relief granted to Chubb in *Manville IV*) is consistent with the Bankruptcy Code and completely within this Court's appellate authority.

New GM cites to *Campbell v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 428 B.R. 43 (S.D.N.Y. 2010) ("*Campbell*"), to bolster its section 363(m) argument. *Campbell* was decided against the appellant on mootness

grounds primarily because of the appellant's lackadaisical approach in not seeking a stay of the Sale Order pending appeal and not attempting to expedite the appeal. *Id.* at 51, 54. Instead, the appellant assumed (apparently at its peril) that its academic argument that the Bankruptcy Court lacked subject matter jurisdiction to sell free and clear of successor liability claims would be timely so long as the Sale Order was not a final order. *Id.* at 54.

The reasons that *Campbell* does not help New GM are (i) it is not a due process decision, (ii) it does not address the consequence of the concealment of the Ignition Switch Defect from the Plaintiffs and the Bankruptcy Court at the time of the Sale, (iii) unlike the appellants in *Campbell*, the Ignition Switch Pre-Closing Accident Plaintiffs do not seek to set aside the Sale, and (iv) the Ignition Switch Pre-Closing Accident Plaintiffs do not challenge the subject matter jurisdiction of the Bankruptcy Court to sell free and clear of successor liability claims. Instead, the Ignition Switch Pre-Closing Accident Plaintiffs challenge the enforceability of the Sale Order as to them because the constitutional predicates to bind them have not been met. *Campbell* actually helps the Plaintiffs because the district court highlighted that, unlike *Manville IV*, *Campbell* did not involve a due process violation. *Id.* at 58 n.18 (citing *Manville IV*, 600 F.3d at 158) ("in contrast to the instant case, the appellant-insurer in *Manville IV* lacked adequate notice of the

underlying channeling and settlement orders such that due process concerns rendered mootness and res judicata doctrines inapplicable").

New GM also cites *Douglas v. Stamco*, 363 F. App'x 100 (2d Cir. 2010), for the proposition that a good faith purchaser for value has the right to take assets free and clear of successor liability claims. New GM Brief at 30, 89. What New GM omits is that issues of notice and due process were never mentioned in *Douglas*. In that case, following a sale, the appellant sued the buyer to recover on its pre-bankruptcy claim against the seller. The trial court dismissed the lawsuit because the claimant failed to articulate any theory that would permit it to recover against the seller. *Douglas*, 363 F. App'x at 101. In dismissing the complaint, the trial court assumed that the only possible theory the claimant might have was a claim based on successor liability, a theory that had not been pled. The trial court dismissed the complaint without leave to amend when it determined that, based upon the complaint's allegations, the plaintiff could not articulate a basis for holding the buyer to be a successor under non-bankruptcy law. *Id.* at 101-02. Thus, the case was decided on its "merits" and not on the basis of the free and clear aspect of the sale. This Court affirmed in an unpublished opinion. Viewed in this context, it is clear that this Court's commentary about free and clear sales in general and the chilling effect of permitting tort claims to be asserted against a buyer were not part of the ruling.

In re Fernwood Markets, 73 B.R. 616 (Bankr. E.D. Pa. 1987) ("*Fernwood*"), is also not on point. That case involved a sale of real property subject to the judgment lien of a known creditor who was not given notice of the sale. The lienholder did not dispute the price and his share of the sale proceeds was being held in escrow.[22] *Id.* at 618. The court viewed the options resulting from the due process violation as binary and gave the lienholder the choice of accepting its share of the sale proceeds or setting aside the sale and forcing a do-over. *Id.* at 621. Properly viewed, *Fernwood* is nothing more than a remedies case.

That case is also distinguishable because the lienholder had no expectation of a greater recovery than the value of its lien. This situation is not analogous to a tort claimant with a successor liability claim against a solvent purchaser. The tort claimant has two sources of recovery while the lien holder only has its lien. *See Opinion*, 529 B.R. at 554 ("theories of successor liability, when permissible, permit a claimant to assert claims not just against the transferor of the assets, but also against the transferee; they provide a second target for recovery").[23]

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[22] This is the same context as *In re Edwards*, 962 F.2d 641 (7th Cir. 1992), which is addressed on page 52 of the Opening Brief.

[23] The second source of recovery through a successor liability claim is what makes tort claimants different from other unsecured creditors. Tort claimants are analogous to creditors with a third party guaranty. That guaranty cannot be stripped without proper notice and preserving that guaranty is not a windfall.

Lastly, a notable aspect of *Fernwood* that New GM fails to mention is that court's express recognition that "§ 363(m) will not, however, protect a party buying from the trustee in a sale free and clear of liens where no notice is given to the lienholder. Such a purchaser will be held to have purchased subject to the lien." *Fernwood*, 73 B.R. at 620 (quoting COLLIER ON BANKRUPTCY, ¶ 363.13, at 363-40 (15th ed. 1987)).

CONCLUSION

The Judgment should be reversed and the Ignition Switch Pre-Closing Accident Plaintiffs should be permitted to pursue their successor liability-based claims against New GM.

Respectfully submitted,

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February 1, 2016

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, TYPE STYLE REQUIREMENTS, AND VIRUS PROTECTION

1. This response and reply brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(A)(i) because this brief contains 13,995 words (excluding the cover page, the Table of Contents, the Table of Authorities, the signature block, this Certificate of Compliance, and the Certificate of Service).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14-point type.

3. The PDF version of this brief sent by E-mail to the Court has been scanned for viruses and no virus has been found.

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February 1, 2016

CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of this Brief for Ignition Switch Pre-Closing Accident Plaintiffs were served electronically on the parties at the addresses indicated on the attached Service List on this 1st day of February, 2016.

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15-2844bk(L)

Nos. 15-2847-bk (con) and 15-2848-bk (con)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: MOTORS LIQUIDATION COMPANY, *Debtor*

CELESTINE ELLIOTT, LAWRENCE ELLIOTT, BERENICE SUMMERVILLE,

Creditors – Appellants – Cross Appellees,

SESAY AND BLEDSOE PLAINTIFFS,

Appellants – Cross Appellees,

IGNITION SWITCH PLAINTIFFS, IGNITION SWITCH PRE-CLOSING ACCIDENT PLAINTIFFS, THE STATE OF ARIZONA, PEOPLE OF THE STATE OF CALIFORNIA, GROMAN PLAINTIFFS,

Appellants,

V.

GENERAL MOTORS LLC,

Appellee – Cross Appellant,

WILMINGTON TRUST COMPANY,

Trustee – Appellee – Cross Appellant,

PARTICIPATING UNITHOLDERS,

Creditor – Appellee – Cross Appellant.

ON DIRECT APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR IGNITION SWITCH PRE-CLOSING ACCIDENT PLAINTIFFS

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November 16, 2015

CORPORATE DISCLOSURE STATEMENT

Each of the Ignition Switch Pre-Closing Accident Plaintiffs are individuals. Accordingly, no disclosure pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure is required.

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GLOSSARY

The following frequently-used terms have the meanings indicated. Other terms are defined in the text.[1]

TERM	DEFINITION
Bankruptcy Code	11 U.S.C. §§ 101, *et seq.*
Bankruptcy Court	United States Bankruptcy Court for the Southern District of New York
Bankruptcy Rules	Federal Rules of Bankruptcy Procedure
Chapter 11 Case	*In re Motors Liquidation Co.*, No. 09-50026 (REG) (Bankr. S.D.N.Y.)
Ignition Switch	Ignition switches containing the Ignition Switch Defect installed in Subject Vehicles
Ignition Switch Defect	Defective ignition switches installed in Subject Vehicles with below-specification torque that resulted in unexpected moving stalls and associated loss of power that would disengage power steering, power breaks, and the sensor that deploys airbags upon a collision
Ignition Switch Plaintiffs	Plaintiffs asserting economic loss damage claims against New GM arising from the Ignition Switch Defect
Ignition Switch Pre-Closing Accident Plaintiffs	Plaintiffs asserting personal injury and wrongful death claims against New GM for accidents related to the Ignition Switch Defect that occurred prior to the closing of the Sale
Judgment	*Judgment*, entered in the Chapter 11 Case on June 1, 2015 [Bk. Dkt. No. 13177] (SPA-253)
New GM	General Motors LLC
Old GM	Motors Liquidation Company (f/k/a General Motors Corporation)

[1] Citations to the record are to "(A-_)" for documents in the Joint Appendix and "(SPA-_)" for the Special Appendix.

TERM	DEFINITION
Opinion	*Decision on Motion to Enforce Sale Order*, entered in the Chapter 11 Case on April 15, 2015 (SPA-78)
Plaintiffs	Ignition Switch Plaintiffs and Ignition Switch Pre-Closing Accident Plaintiffs
Safety Act	National Traffic and Motor Vehicle Safety Act, 49 U.S.C. §§ 30101, *et seq.*
Sale	Sale under section 363 of the Bankruptcy Code of substantially all of Old GM's assets to an acquisition vehicle that later became New GM pursuant to the Sale Agreement and the Sale Order
Sale Agreement	Amended and Restated Master Sale and Purchase Agreement By and Among General Motors Corporation, Saturn LLC, Saturn Distribution Corporation and Chevrolet-Saturn of Harlem, Inc., *as Sellers* and NGMCO, Inc., *as Purchaser*, dated as of June 26, 2009 (as amended), attached as Exhibit A to the Sale Order [Bk. Dkt. No. 2968] (A-1660)
Sale Hearing	The hearing in July 2009 at which the Bankruptcy Court considered and approved the Sale
Sale Notice	The Bankruptcy Court-approved notice of the Sale Hearing that was mailed to certain creditors and published in certain newspapers (A-311-318)
Sale Order	*Order (i) Authorizing Sale of Assets Pursuant to Amended and Restated Master Sale and Purchase Agreement with NGMCO, Inc., a U.S. Treasury-Sponsored Purchaser; (ii) Authorizing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with the Sale; and (iii) Granting Related Relief*, entered in the Chapter 11 Case on July 5, 2009 [Bk. Dkt. No. 2968] (A-1609)

TERM	DEFINITION
Stipulated Facts	*Agreed and Disputed Stipulations of Fact Pursuant to the Court's Supplemental Scheduling Order* and Exhibits A-D thereto filed in the Chapter 11 Case on July 11, 2014 (A-5927, 5933, 5975, 6013, 6022)
Subject Vehicles	2005-2007 Chevrolet Cobalt and Pontiac G5, 2003-2007 Saturn Ion, 2006-2007 Chevrolet HHR, 2005-2006 Pontiac Pursuit (Canada), 2006-2007 Pontiac Solstice, and 2007 Saturn Sky vehicles (as well as certain later model vehicles that may have been repaired using a defective ignition switch that had been sold to dealers or aftermarket wholesalers)
Valukas Report	Anton R. Valukas, *Report to Board of Directors of General Motors Company Regarding Ignition Switch Recalls*, dated May 29, 2014 (A-9638)

JURISDICTIONAL STATEMENT

The Ignition Switch Pre-Closing Accident Plaintiffs are individuals and representatives of individuals who were injured or killed in car crashes occurring before July 10, 2009 involving motor vehicles manufactured by Old GM that contained the Ignition Switch Defect. The Ignition Switch Pre-Closing Accident Plaintiffs appeal from the April 15, 2015 Opinion (SPA-78) and June 1, 2015 Judgment (SPA-253) of the United States Bankruptcy Court for the Southern District of New York (Gerber, *Bankruptcy Judge*). The Bankruptcy Court's Opinion is reported at 529 B.R. 510. The Bankruptcy Court had subject matter jurisdiction to issue the Judgment pursuant to 28 U.S.C. §§ 157(a), (b), and 1334. The Judgment is a final order that disposes of the Ignition Switch Pre-Closing Accident Plaintiffs' successor liability claims against New GM. The Ignition Switch Pre-Closing Accident Plaintiffs filed a timely notice of appeal from the Judgment on June 10, 2015 (A-10991).

By order entered June 1, 2015, the Bankruptcy Court certified the Judgment for direct appeal to this Court pursuant to 28 U.S.C. § 158(d) and Bankruptcy Rule 8006(e) (SPA-274). As required under Bankruptcy Rule 8006(g), on June 18, 2015, certain parties to this litigation filed a petition for permission to appeal in this Court. This Court granted the petition on September 9, 2015 (SPA-456). By order entered on October 8, 2015, this Court designated the Ignition Switch Pre-

Closing Accident Plaintiffs as appellants and directed the Bankruptcy Court to transfer their appeal to this Court to be docketed and considered as part of these consolidated appeals. *See In re Motors Liquidation Co.*, Case No. 15-2844 (2d Cir.) [ECF No. 125]. This Court has jurisdiction over this appeal under 28 U.S.C. § 158(d)(1).

STATEMENT OF ISSUES

1. Did the Bankruptcy Court err by entering the Judgment barring the assertion of successor liability claims by the Ignition Switch Pre-Closing Accident Plaintiffs against New GM?

2. Having found that the notice given to the Ignition Switch Pre-Closing Accident Plaintiffs of the Sale was constitutionally insufficient for purposes of due process, did the Bankruptcy Court err in holding that the Ignition Switch Pre-Closing Accident Plaintiffs must demonstrate prejudice in order to (i) establish a denial of due process in connection with the entry or enforcement of the Sale Order, or (ii) obtain relief from the enforcement of the "free and clear" provisions of the Sale Order?

3. Assuming that the Ignition Switch Pre-Closing Accident Plaintiffs must demonstrate prejudice resulting from constitutionally insufficient notice to establish a due process violation, did the Bankruptcy Court err in holding that the Ignition Switch Pre-Closing Accident Plaintiffs were not prejudiced?

4. Did the Bankruptcy Court err by not providing the Ignition Switch Pre-Closing Accident Plaintiffs with the opportunity for further development of the factual record with respect to the impact of such matters as non-disclosure, fraud, concealment, lack of good faith, and inequitable conduct?

5. Did the Bankruptcy Court err in failing to consider the allegations of New GM's concealment of the Ignition Switch Defect in connection with the entry or enforcement of the Sale Order?

6. Did the Bankruptcy Court err in applying the judicially created doctrine of equitable mootness to this dispute?

7. Assuming the judicially created doctrine of equitable mootness is applicable to this dispute, whether the doctrine was appropriately applied in this case to deny any meaningful relief to the Ignition Switch Pre-Closing Accident Plaintiffs on account of their claims against Old GM?

STATEMENT OF THE CASE

As permitted under Federal Rule of Appellate Procedure 28(i) and to avoid burdening the Court with a duplicative recitation of the factual and procedural background of these appeals, the Ignition Switch Pre-Closing Accident Plaintiffs adopt and incorporate by reference the Statement of the Case contained in the opening brief submitted by the Ignition Switch Plaintiffs. The relevant factual

background is also set forth in the Stipulated Facts filed in the proceedings below and the exhibits thereto (A-5927, 5933, 5975, 6013, 6022).

The Ignition Pre-Closing Accident Plaintiffs also adopt and incorporate by reference the arguments on the application of the equitable mootness doctrine contained in Section VI.G of the Ignition Switch Plaintiffs' opening brief.

SUMMARY OF ARGUMENT

Old GM knowingly sold defective automobiles to unsuspecting customers. The defect was embedded in every one of the millions of Subject Vehicles. The Bankruptcy Court found that, by reason of the "critical mass" of engineers, product investigators, quality managers, and in-house lawyers that were aware of the Ignition Switch Defect, at the time Old GM filed for bankruptcy it knew that the Ignition Switch Defect presented a significant safety issue. Specifically, the Bankruptcy Court determined that all Subject Vehicles should have been recalled by Old GM prior to the Sale Hearing. Accordingly, owners and lessees of the Subject Vehicles were "known" creditors at the time of the Sale who were entitled to notice of the existence of the defect in connection with the Sale Hearing and the "free and clear" relief being sought against them.

However, when Old GM sought authority to sell its assets to New GM free and clear of successor liability claims, Old GM kept this serious safety defect

hidden from federal regulators, owners and lessees of the Subject Vehicles, creditors, and the public at large. None of the Sale Notices that were published in newspapers or mailed to car crash victims who had already commenced litigation against Old GM gave any hint of the existence of the Ignition Switch Defect or the claims against New GM that would be barred by the free and clear nature of the Sale.

As a result of this constitutionally insufficient notice, the Ignition Switch Pre-Closing Accident Plaintiffs were unaware that their Subject Vehicles contained a known safety defect that had been manufactured into the DNA of their vehicles and that likely caused and amplified the consequences of their accidents. Had the Ignition Switch 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) consequences that the Sale would have on their successor liability claims.

Lacking this crucial information, the Ignition Switch Pre-Closing Accident Plaintiffs were denied due process because they were deprived of the opportunity to file meaningful objections to the free and clear aspect of the proposed Sale at the

time of the Sale Hearing.[2] Matters such as concealment, bad faith, inequitable conduct, and unclean hands – *matters that no other parties raised at the Sale Hearing in 2009* – were not raised because Old GM had concealed from everyone the predicate facts of (i) its knowledge of the existence of the Ignition Switch Defect and (ii) its failure to warn anyone about the defect, repair the defect, or recall the Subject Vehicles.

Notwithstanding its findings that the Plaintiffs were denied the notice of the Sale that due process requires, the Bankruptcy Court incorrectly concluded that none of the Plaintiffs were prejudiced by the violation of their due process rights. The Ignition Switch Pre-Closing Accident Plaintiffs do not believe they have to demonstrate that they would have been successful in opposing the successor liability shield granted to New GM in 2009. What would have happened if Old GM had made proper disclosure about the Ignition Switch Defect and the Plaintiffs were given the opportunity to be heard at the 2009 Sale Hearing is speculative and unknowable. However, what is not speculative is that the Ignition Switch Pre-

[2] As the Bankruptcy Court correctly held, every Plaintiff had claims against Old GM at the time of the Sale. *Opinion*, 529 B.R. 510, 525 (Bankr. S.D.N.Y. 2015) ("The known safety hazard that engendered the unsatisfied recall obligations gave rise to claims associated with the repair (and assertedly, though this is yet to be decided, decreases in value) of the cars and would give rise to more claims if car occupants were killed or injured as a result.").

Closing Accident Plaintiffs were prevented from making arguments against the free and clear aspect of the Sale because material information was omitted from the Sale Notice and otherwise withheld from them. The Ignition Switch Pre-Closing Accident Plaintiffs cannot go back in time and make the arguments about concealment, unclean hands, and inequitable conduct that they could have made but for the lack of proper notice. The context, tension, and fluidity of the Sale Hearing that occurred in July 2009 cannot be recreated in 2015, hypothetically or otherwise. The firestorm reaction of the American public, federal and state governments, and the press to New GM's 2014 revelation of the Ignition Switch Defect gives every indication that a similar or greater maelstrom would have occurred in July 2009 had Old GM made proper disclosure before the Sale.

Irrespective of how the Sale Hearing might have played out had the Ignition Switch Defect been revealed in some spectacular manner prior to that hearing (such as through a whistleblower), three undeniable facts remain:

> (1) the Ignition Switch Pre-Closing Accident Plaintiffs were not given the opportunity at the Sale Hearing to raise important issues regarding the existence of the Ignition Switch Defect and Old GM's concealment of that defect at the time when doing so mattered;
>
> (2) contrary to what the Bankruptcy Court held below, no other party raised the same or similar issues on behalf of the Ignition Switch Pre-Closing Accident Plaintiffs at the time of the Sale Hearing for the obvious reason that the

> information about the existence of the Ignition Switch Defect was hidden by Old GM; and
>
> (3) in the context established by facts (1) and (2), the Ignition Switch Pre-Closing Accident Plaintiffs' successor liability claims were barred by the Sale Order.

As a result of Old GM's 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 with the same employees, books, records, and knowledge of the Ignition Switch Defect. These violations of due process can (and under this Court's precedent, should) be remedied by insulating the Ignition Switch Pre-Closing Accident Plaintiffs from the free and clear aspects and injunctive provisions of the Sale Order and permitting their claims to be asserted against New GM under theories of successor liability.

STANDARD OF REVIEW

In reviewing the Bankruptcy Court's rulings, "this Court undertakes an independent examination of the factual findings and legal conclusions of the bankruptcy court. The Bankruptcy Court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo." *In re Duplan Corp.*, 212 F.3d 144, 151 (2d Cir. 2000).

The Bankruptcy Court's determination that the Ignition Switch Pre-Closing Accident Plaintiffs were "known" creditors is a factual finding that can only be overturned if this Court finds such finding to have been clearly erroneous. The Bankruptcy Court's determination that prejudice is an element of a due process violation is a pure question of law subject to *de novo* review. The Bankruptcy Court's conclusion that the Ignition Switch Plaintiffs were not prejudiced as a result of the constitutionally insufficient notice of the Sale is a mixed question of law and fact based on stipulated facts. Because the ultimate question of whether the Ignition Switch Pre-Closing Accident Plaintiffs were prejudiced are not "basic, primary, or historical facts," such conclusions are also subject to *de novo* review. *Chhabra v. United States*, 720 F.3d 395, 407 (2d Cir. 2013) (prejudice component of a trial court's ineffective assistance of counsel analysis is a mixed question of law and fact reviewed *de novo* on appeal); *Bennett v. United States*, 663 F.3d 71, 85 (2d Cir. 2011) (same). Regardless, as will be demonstrated below, the Bankruptcy Court's conclusion that the Ignition Switch Pre-Closing Accident Plaintiffs were not prejudiced would not withstand a "clearly erroneous" standard of review.

ARGUMENT

I. THE BANKRUPTCY COURT CORRECTLY FOUND THAT THE IGNITION SWITCH PRE-CLOSING ACCIDENT PLAINTIFFS WERE "KNOWN" CREDITORS WHO WERE DENIED CONSTITUTIONALLY SUFFICIENT NOTICE OF THE SALE OF OLD GM'S ASSETS TO NEW GM "FREE AND CLEAR" OF SUCCESSOR LIABILITY CLAIMS

It is now widely known that – prior to filing for bankruptcy in 2009 – Old GM sold dangerously defective vehicles to millions of unsuspecting customers. The Ignition Switch Defect was part of the architecture of the Subject Vehicles and its presence resulted in scores of deaths and serious injuries, including those suffered by the Ignition Switch Pre-Closing Accident Plaintiffs.

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. 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) (A-5983).

However, the Ignition Switch Defect was deadly serious. Every car containing this defect was prone to spontaneous and unexpected moving stalls if

the key was inadvertently jostled or bumped 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, Old GM improperly treated the possibility of an unexpected moving stall as merely an issue of "customer convenience." Valukas Report at 2, 33, 133 (A-9650, 9681, 9781). 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) (A-5996-98); Valukas Report at 83, 93 (A-9731, 9741).

In the proceedings below, the Plaintiffs did not have the benefit of discovery with respect to Old GM's pre-Sale knowledge of the Ignition Switch Defect. Instead, the Plaintiffs were required to rely solely on stipulated facts derived primarily from the Valukas Report – the report of an investigation into the delayed recall of the Subject Vehicles conducted by New GM's own counsel. Nevertheless, the Plaintiffs established in the Bankruptcy Court that knowledge of the Ignition Switch Defect was widespread within Old GM and, thus, all owners and lessees of vehicles containing the Ignition Switch Defect were "known" creditors of Old GM at the time of the Sale. *Opinion*, 529 B.R. at 557.

Because the Bankruptcy Court found that the Ignition Switch Pre-Closing Accident Plaintiffs were "known" creditors at the time of the commencement of

Old GM's Chapter 11 Case, the Bankruptcy Court held that owners of these defective vehicles were entitled to actual notice of the Sale rather than the constructive notice that was provided. *Id.* at 560. The Bankruptcy Court was correct in this regard.

A. Old GM Was Constitutionally Required To Provide Known Creditors With Actual (Not Constructive) Notice Of Proceedings That Would Eliminate Those Creditors' Successor Liability Claims Against the Purchaser

The Fifth Amendment to the Constitution mandates that "[n]o person shall … be deprived of … property, without due process of law." U.S. Const. amend. V. In seeking Bankruptcy Court approval of the Sale free and clear of successor liability claims, Old GM sought a court order that would deprive the Ignition Switch Pre-Closing Accident Plaintiffs of a valuable property right: the right to sue New GM as a successor entity for the injuries and fatalities suffered as a result of the Ignition Switch Defect. *See Opinion*, 529 B.R. at 552 ("New GM's contention sidesteps the basic fact that a prepetition right that the Plaintiffs had to at least try to sue a successor was taken away from them, without giving them a chance to be heard as to whether or not this was proper.").

When a debtor seeks to impair the rights of creditors in this way, 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). 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, N.H. & H.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."); *Arch Wireless, Inc. v. Nationwide Paging, Inc. (In re Arch Wireless, Inc.)*, 534 F.3d 76, 83 (1st Cir. 2008) (same).

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.") (emphasis in original); *Tulsa Prof'l*

Collection Servs., Inc. v. Pope, 485 U.S. 478, 489-90 (1988) (executor required to provide actual notice by mail of probate proceedings to creditors whose identities were "reasonably ascertainable"). "Direct 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." *In re Drexel Burnham Lambert Grp., Inc.*, 151 B.R. 674, 681 (Bankr. S.D.N.Y. 1993). 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. (In re Crystal Oil Co.)*, 158 F.3d 291, 297 (5th Cir. 1998)). *See also In re Thomson McKinnon Sec., Inc.*, 130 B.R. 717, 720 (Bankr. S.D.N.Y. 1991) ("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).

To identify its known creditors, a debtor must undertake a diligent examination of its books and records. *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."); *Drexel Burnham*, 151 B.R. at 681; *Thomson McKinnon*, 130 B.R. at 720. As the Bankruptcy Court correctly observed,

> the "books and records" standard does not rest on whether the notice-giver has booked a liability or created a reserve on its balance sheet; on the treatment of the loss contingency under FASB 5 standards; or on whether the debtor has acknowledged its responsibility for the claim; it merely requires having the requisite knowledge in one way or another that can be relatively easily ascertained and thereafter used incident to the noticing process.

Opinion, 529 B.R. at 558.

B. As Of The Date Of The Commencement Of Old GM's Chapter 11 Case, The Existence Of The Plaintiffs' Claims Related To The Ignition Switch Defect Was Reasonably Ascertainable By Old GM

Relying only on the report from New GM's internal investigation of the Ignition Switch Defect and those other facts to which New GM was willing to stipulate, the Plaintiffs established that knowledge of the Ignition Switch Defect was pervasive within Old GM prior to its bankruptcy. The factual record below showed that millions of defective Subject Vehicles were in circulation among unsuspecting owners and lessees (and by extension, the rest of the driving and pedestrian public) from the Ignition Switch's earliest commercial use in 2002

through the commencement of Old GM's Chapter 11 Case in 2009. *See, e.g.*, Stipulated Facts, Exh. B ¶ 14(B)(vi) (A-5983) (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."). During the seven year period from 2002 and 2009, 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). Valukas Report at 63 (A-9711). These internal probes followed as a 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 about the high rate of airbag non-deployments in Cobalts and Ions, and (v) crashes 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) (A-5988); Valukas Report at 133 (A-9781). This inadequate 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) (A-5997). In fact, the key modification had been recommended four years earlier in May of 2005, but was delayed without explanation while crashes and deaths in Subject Vehicles

continued to occur. Stipulated Facts, Exh. B ¶ 14(T)(ii) (A-5999); Valukas Report at 78, 80, 88 (A-9726, 9728, 9736). 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 these vehicles.

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 Subject Vehicles. Stipulated Facts, Exh. B ¶¶ 10, 11, 14(R)(ii) (A-5979-81, 5997). The Technical Service Bulletins prepared for dissemination to Old 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. 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 this defect.[3]

[3] Neither of the Technical Service Bulletins actually used the word "stall" because "stall" was considered to be a hot button word that would alert the federal regulators to a safety issue and a possible recall. Valukas Report 8, 92 (A-9656, 9742). This 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. Valukas Report at 93 (A-9741).

Likewise, beginning in 2005, the Product Investigations group within Old GM initiated the first of several investigations into the Ignition Switch Defect to try to diagnose and correct the stalling problem. Valukas Report at 74, 86, 102 (A-9722, 9734, 9750). 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 these Ignition Switches.

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

- 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." Valukas Report at 89 (A-9737).
- 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." Valukas Report at 89 n.378 (A-9737).
- 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) (A-5988-89).

Old GM was aware of and possessed these and similar 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.

The record also demonstrated that numerous senior members of Old GM's legal, engineering, warranty, products investigations, and communications staff were well aware of serious and fatal crashes involving Subject Vehicles experiencing loss of power and airbag non-deployment.[4] *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 Old and New 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) (Aclyn Palmer, in-house product liability attorney); (U) (Manuel Peace, Field

[4] Notwithstanding the proven connection between the unexpected moving stalls and the failure of the airbags to deploy, airbag non-deployment did not cause the crashes that killed and injured the Ignition Switch 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.

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) (A-5981-6004). These employees were not isolated individuals randomly scattered throughout a vast corporation. Rather, they were part of an elaborate apparatus set up within Old GM – in compliance with federal law – to investigate mechanical problems and potential safety defects, and initiate recalls. In other words, these were precisely the people within Old GM who were supposed to assure Old GM's compliance with the Safety Act and protect drivers of Old GM vehicles from safety defects.

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

New GM tried to evade the conclusion that the Plaintiffs were known creditors by arguing that only a limited number of Old GM personnel were aware of problems with the Ignition Switch. This argument is contrary to the gravamen of the Stipulated Facts and is misleading because it ignores the job functions of the 24 employees cited by the Bankruptcy Court and their role within Old GM to investigate potential safety defects and initiate recalls. It also ignores the well-established tenet of agency law that the knowledge of a corporation's employees

acting within the scope of their employment is imputed to the company. *N.J. Steamboat Co. v. Brockett*, 121 U.S. 637, 645 (1887) ("misconduct or negligence while transacting the company's business, and when acting within the general scope of their employment, is of necessity to be imputed to the corporation"); *Breeden v. Kirkpatrick & Lockhart LLP (In re Bennett Funding Grp., Inc.)*, 336 F.3d 94, 100 (2d Cir. 2003); *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 152 n.19 (S.D.N.Y. 2009); *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). To have knowledge or actions imputed, the employee need not be high-ranking. *United States v. Koppers Co.*, 652 F.2d 290, 298 (2d Cir. 1981) (imputation is not limited to "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"). Nor does a corporation's large size or complex internal structure immunize it from imputation. *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)). While the Bankruptcy Court cautioned that it was not ruling on the basis of "automatic or mechanical imputation," it correctly concluded that the knowledge of this "critical mass" of employees resulted in Old

GM "knowing" about these claims for purposes of the known/unknown creditor analysis. *Opinion*, 529 B.R. at 558 n.154.

D. The Bankruptcy Court Correctly Found That The Plaintiffs Were Known Creditors Of Old GM At The Time Notice of The Sale Was Given

Based on the stipulated factual record before it, the Bankruptcy Court found that the level of knowledge within Old GM of the Ignition Switch Defect was sufficient such that all Plaintiffs were known creditors as of Old GM's bankruptcy filing. Specifically, the Bankruptcy Court found that:

- "At least 24 Old GM engineers, senior manager and attorneys knew of the Ignition Switch Defect – a group large in size and relatively senior in position.";
- "a group of this size is sufficient for the Court to conclude that a 'critical mass' of Old GM had the requisite knowledge – *i.e.*, were in a position to influence the noticing process.";
- "Old GM had enough knowledge of the Ignition Switch Defect to be Required under the Safety Act, to send out mailed recall notices to owners of affected Old GM vehicles….";
- "by reason of the *known safety risk* that required the recall – that here there was known death or injury in the making to someone (or many)…."; and
- Because of the obligation under the Safety Act to maintain records of vehicle owners' names and addresses, "Old GM knew exactly to whom, and where, it had to send the statutorily required notice."

Id. at 557, 558 n.154. These factual conclusions are correct and withstand scrutiny under the "clearly erroneous" standard of review.

Based on the foregoing, the Bankruptcy Court concluded that "the owners of cars with Ignition Switch Defects had 'known' claims, from Old GM's perspective, as that expression is used in the due process jurisprudence." *Id.* at 557. Accordingly, under *Mullane* and its progeny, before the Plaintiffs' successor liability claims could be extinguished as part of the Sale, each of them was entitled to actual notice of the Sale "reasonably calculated, under all the circumstances, to apprise [them] of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. None of the Plaintiffs received such constitutionally required notice.

E. The Bankruptcy Court Correctly Held That The Sale Notice Provided By Old GM To The Plaintiffs Was Constitutionally Insufficient For Due Process Purposes

The Bankruptcy Court held that the notice of the Sale that Old GM published in newspapers and mailed to those Ignition Switch Pre-Closing Accident Plaintiffs that had already commenced litigation was constitutionally deficient. *See Opinion*, 529 B.R. at 531, 560.[5]

> The publication notice here given, which otherwise would have been perfectly satisfactory (especially given the time exigencies), was insufficient, because from Old

[5] The form of Sale Notice that was published in newspapers and mailed to certain parties was identical in its failure to disclose the existence of the Ignition Switch Defect. *See* Sale Notice (A-311-318).

> GM's perspective, owners of cars with Ignition Switch Defects had "known" claims. Because Old GM failed to provide the notice required under the Safety Act (which, if given before Old GM's chapter 11 filing, could have been followed by the otherwise satisfactory post-filing notice by publication), the Plaintiffs were denied the notice due process requires.

Id. at 560. Because Old GM withheld from the Plaintiffs and the public at large information that would have been contained in a recall notice, the Sale Notice did not properly apprise affected parties that important rights were about to be lost in connection with the Sale. *See Opinion*, 529 B.R. at 559. Specifically, the Bankruptcy Court stated:

> here we have the unique fact that Old GM knew enough to send out recall notices (to meet a statutory obligation to car owners, and, more importantly, to forestall the injury or death which, without corrective action, would result), whose mailing, coupled with the publication notice it could appropriately send, would have been more than sufficient. But Old GM did not do so.

Id. The Ignition Switch Pre-Closing Accident Plaintiffs did not know that their vehicles contained a safety defect that could supply important elements of causation and fault, which could establish Old GM's liability for their injuries and, in turn, could establish New GM's liability as a successor. Nor did the Ignition Switch Pre-Closing Accident Plaintiffs have the information necessary to understand that the Sale Order was about to bar viable successor liability claims that they did not know they possessed.

While Old GM knew of the Ignition Switch Pre-Closing Accident Plaintiffs' claims, it was uncontested that none of the Plaintiffs "knew of the Ignition Switch Defect, or had the means to ascertain it." *Opinion*, 529 B.R. at 545 n.98. Even though the Ignition Switch Pre-Closing Accident Plaintiffs experienced car crashes prior to the Sale closing, New GM presented no evidence that this subset of Plaintiffs were aware of the existence of the Ignition Switch Defect or that this defect may have caused their cars to crash. Nor could it, inasmuch as the defect was concealed by Old GM from 2002 through 2009 and by New GM from 2009 through 2014. Accordingly, there is no basis for New GM to argue that the Ignition Switch Pre-Closing Accident Plaintiffs were on notice that they had claims based on the Ignition Switch Defect or that they should have objected to the free and clear nature of the Sale (on equitable grounds or otherwise) if they wanted to preserve the ability to assert *in personam* successor liability claims against New GM. Moreover, because the existence of the defect was concealed, the Ignition Switch Pre-Closing Accident Plaintiffs were also prevented from raising Old GM's concealment as a basis for disapproval of the requested bar against successor liability claims.[6]

[6] This latter point goes to the issue of prejudice, which is discussed in Section II below.

1. To Satisfy Due Process, The Notice-Giver Must Provide Sufficient Information Necessary For Affected Parties To Attempt To Protect Their Rights

The Supreme Court has recognized 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 proper notice is not just a matter of execution and delivery; 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."). If the notice in *Mullane* had been sent by first class mail to known creditors as dictated by the Supreme Court's holding, but had not advised the recipient that the purpose of the hearing was the approval of the accounting and exoneration of the trustee, the content of the notice surely would not have been "appropriate to the nature of the case."

When a debtor can reasonably ascertain the existence of a creditor's claim and her identity but the creditor herself is unaware of the claim, due process requires the debtor to take measures reasonably calculated to apprise that creditor of the facts necessary to protect her rights and property interests from being extinguished through the bankruptcy. That is exactly what this Court held in its 2010 decision in the *Johns-Manville* case. *Travelers Cas. & Sur. Co. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.)*, 600 F.3d 135, 157 (2d Cir. 2010) ("*Manville IV*"). In *Manville IV*, this Court found a due process violation where a party that was 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 direct third-party *in personam* claims against the insurer. *Id.* Indeed, other courts within this circuit have similarly recognized that "due process should also 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 Mach. Co.*, 68 B.R. 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).

Thus, a debtor that has 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 corporation 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 bankruptcy 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 subset of Ignition Switch Pre-Closing Accident Plaintiffs who may have received actual notice of the impending Sale via mail because they had already commenced litigation against Old GM, were nonetheless denied due process because that notice (and the notice-giver, Old GM) failed to apprise them of vital information necessary to understand the consequences to them of the free and clear nature of the proposed Sale. In particular, these victims were unaware that they had substantial equitable grounds to oppose the successor liability injunction and bar requested by Old GM for New GM as part of the Sale. They were also unaware that there was a credible causal connection between the existence of a known but undisclosed defect in their vehicle and their car crash, which enhanced their ability to successfully recover damages from Old GM's successor absent a bar on such claims. 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 Ignition Switch Pre-Closing Accident Plaintiffs were denied due process.

The *DPWN Holdings* case is particularly on point with respect to those Ignition Switch Pre-Closing Accident Plaintiffs who received the Sale Notice by

mail. In that case, United Air Lines ("United") allegedly participated in illegal price-fixing prior to filing for bankruptcy that resulted in overcharges to its customers, including DPWN Holdings (USA), Inc. ("DHL"). Although DHL, in its capacity as an ordinary trade creditor, received actual notice by mail 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 (which assumed for purposes of the motion 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 F. Supp. 2d at 159 (emphasis added). On appeal, this Court did not upset the district court's holding, however, it found that 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. Accordingly, this Court remanded the case to the district court to determine what aspects of United's alleged price-fixing conduct were known or reasonably

ascertainable by DHL prior to plan confirmation. *DPWN Holdings II*, 747 F.3d at 152-53.[7]

The Bankruptcy Court recognized that *DPWN Holdings II* was especially instructive because the case suggested that the content of the notice (as opposed to the delivery method) is particularly relevant where the creditor's claim is known to the debtor but not to the creditor. *Opinion*, 529 B.R. at 545. Because New GM failed to contend or present any evidence that "any of the Plaintiffs knew of the Ignition Switch Defect, or had the means to ascertain it" the Bankruptcy Court correctly concluded that the generic notice provided did not satisfy the any of the Plaintiffs' due process rights. *Id.* at 545 n.98.

II. ASSUMING ARGUENDO THAT PREJUDICE IS REQUIRED TO ESTABLISH A DUE PROCESS VIOLATION, THE BANKRUPTCY COURT ERRED IN HOLDING THAT THE IGNITION SWITCH PRE-CLOSING ACCIDENT PLAINTIFFS WERE NOT PREJUDICED AS A RESULT OF BEING DEPRIVED OF CONSTITUTIONALLY SUFFICIENT NOTICE OF THE SALE

New GM argued below that, because certain personal injury claimants with different arguments and different claims, state attorneys general, and consumer

[7] On remand, the district court again rejected a motion to dismiss by United and ordered that the parties undergo discovery so that the court may resolve "what DHL knew 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, at *6 (E.D.N.Y. Sept. 16, 2014).

advocates were unsuccessful in opposing the Sale and forcing New GM to assume all liabilities for claims arising from vehicles manufactured by Old GM, the Plaintiffs' participation in the process would not have made a difference in the result. The essence of New GM's argument was that the outcome of the Sale Hearing would have been no different had the Bankruptcy Court, the owners of GM vehicles, the federal government, state attorneys general, consumer advocacy groups, and government actors all known:

(i) that millions of GM vehicles were dangerously defective;

(ii) that Old GM had known about the existence of the Ignition Switch Defect for seven years;

(iii) that the Subject Vehicles should have been recalled under the Safety Act but were not; and

(iv) that this vital information would remain hidden by New GM for another five years.

Apart from being self-serving speculation, the hypothetical notion that nothing would have changed had the affected parties been able to appear at the Sale Hearing in "real time" (rather than years later) and be heard in a meaningful way about the long-concealed defect cannot be the basis to justify the due process violations that occurred here.

The Bankruptcy Court, however, sided with New GM and held that for a due process notice violation to be worthy of redress, the party that was not properly

notified must show resulting prejudice. *Opinion* at 529 B.R. at 568, 572-73. The Bankruptcy Court erred on this important point.

Plaintiffs dispute that a finding of "prejudice" is a necessary element of determining whether a due process violation has occurred. Indeed, in three recent cases analyzing due process in bankruptcy cases, this Court did not include demonstrating prejudice as a predicate to relief or discuss that showing prejudice is part of the calculus of whether due process has been denied. *DPWN Holdings II*, 747 F.3d 145; *Manville IV*, 600 F.3d 135; *Koepp v. Holland*, 593 F. App'x 20 (2d Cir. 2014). Recognizing that this Circuit has never ruled that prejudice is an element that must be proven to establish a due process violation, the Bankruptcy Court relied instead on lower court and out-of-circuit decisions for that conclusion. *See Opinion*, 529 B.R. at 561 n.161-65. Many of those cases, which are obviously not binding on this Court, generally stand for the proposition that if the due process violation is cured prior to an adverse consequence to the aggrieved party, no relief is warranted. That is not the case here because the Ignition Switch Pre-Closing Accident Plaintiffs never received constitutionally proper notice and suffered an adverse consequence in 2009 when the Sale Order was entered and their successor liability claims were extinguished. The denial of a timely and meaningful opportunity to be heard is, in and of itself, prejudice. The Plaintiffs were denied their "day in court" at the Sale Hearing. In the parlance of *Mullane*, because the

notice provided did not "convey the required information," the Plaintiffs were not given the "opportunity to present their objections." *Mullane*, 339 U.S. at 314.

More importantly, without question, the Ignition Switch Pre-Closing Accident Plaintiffs suffered prejudice when they were denied constitutionally sufficient notice of the Sale and the impact of the requested injunction and bar on their successor liability claims arising from the concealed Ignition Switch Defect. As a result of Old GM's failure to disclose the existence of the Ignition Switch Defect, the Ignition Switch Pre-Closing Accident Plaintiffs were denied the ability to attempt to affect the outcome of the Sale Hearing by making an informed objection to the free and clear aspect of the Sale. These arguments would have included such equitable considerations as (i) the unfairness of selling free and clear of known but concealed claims, (ii) the unclean hands of the seller, and (iii) the consequences of incentivizing non-disclosure in bankruptcy sales. As to this last point, the Ignition Switch Pre-Closing Accident Plaintiffs would have argued that rewarding the same people at "Oldco" who failed to disclose the Ignition Switch Defect with a successor liability shield that would benefit them at "Newco" would create perverse incentives for debtors to keep important information hidden in sale cases.

These are arguments that the Ignition Switch Pre-Closing Accident Plaintiffs made to the Bankruptcy Court in the proceedings below, however, the Bankruptcy

Court ignored them. *See* Tr. 2/17/15 at 125:10-25 (A-11260) ("What kind of arguments would people have made against successor liability? Clearly, unclean hands would have been an issue. Clearly, whether or not it would be equitable to sell free and clear of successor liability claims in circumstances like this one, where the buyer had -- I'm sorry, the seller had withheld the information for seven years before the sale. This would have been a maelstrom of a hearing, even much more contentious than the hearing that we actually had."); *Id.* at 126:9-127:7 (A-11261-62). *See also 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, In re Motors Liquidation Co.*, No. 09-50026 (REG) (Bankr. S.D.N.Y.) [Bk. Dkt. No. 13021], at 46 n.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.").

The arguments made by other objectors at the Sale Hearing in July of 2009 against the successor liability shield had nothing to do with the Ignition Switch

Defect and were made without any knowledge of the existence of the Ignition Switch Defect or its concealment by Old GM. Instead, the objections made by these other parties in July 2009 were abstract legal and policy arguments about contingent future claims or the limits of the bankruptcy court's subject matter jurisdiction to sell free and clear of *in personam* claims. These are not the arguments the Ignition Switch Pre-Closing Accident Plaintiffs would have made. No one made (or could have made) arguments in July 2009 about the Ignition Switch Defect because the existence of the defect was hidden back then by Old GM and remained hidden by New GM until 2014.

In reaching its conclusion that the Ignition Switch Pre-Closing Accidents did not raise any arguments against the free and clear nature of the Sale that were not raised by other objectors in 2009, the Bankruptcy Court mistakenly focused on the following language from *Mullane*:

> The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all.

Opinion, 529 B.R. at 543 (quoting *Mullane*, 339 U.S. at 319). Focusing on this language, the Bankruptcy Court stated that "*Mullane* recognizes that where notice is imperfect, the ability of others to argue the point would preclude the prejudice

that might result if *none* could." *Opinion*, 529 B.R. at 566. This conclusion, even if correct in some circumstances,[8] is entirely misplaced in the context of this case. The referenced language from *Mullane* assumes a situation where "most of those interested in objecting" have the same or substantially similar claims and arguments and are given constitutionally sufficient notice and opportunity to object. That never happened here. As the Bankruptcy Court recognized, none of the Plaintiffs were given constitutionally sufficient notice of the Sale Hearing. Accordingly, at the time of the Sale Hearing, there was no representative mass of objectors aware of the Ignition Switch Defect who were making or could have made the arguments against the bar on successor liability claims that the Ignition Switch Pre-Closing Accident Plaintiffs are making now.

Put simply, the Bankruptcy Court implicitly held that the Pre-Closing Accident Plaintiffs were not prejudiced because they were merely denied the opportunity to lose in real time. This is incorrect. The prejudice the Ignition Switch Pre-Closing Accident Plaintiffs suffered was that they were deprived of a

[8] What the Bankruptcy Court overlooks is that *Mullane* also implies that each claimant's right to be heard is unique to it and a due process violation cannot be cured by proxy. *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).

meaningful day in court to argue the true state of affairs, which included knowledge that (i) they were injured by defective vehicles as opposed to an act of God, (ii) they had viable claims against Old GM due to its fault in manufacturing a defective and unsafe vehicle, (iii) the cause of their crash and resulting injuries was known to Old GM but had been withheld from them and the Bankruptcy Court, and (iv) Old GM's request to sell its assets free and clear of successor liability claims would have a direct and personal effect on their viable successor liability claims against New GM. This due process violation cannot be fixed by assuming that arguments that were never made due to the concealment of the predicate facts would have been overruled.[9] The denial of a meaningful opportunity to be heard is itself prejudice, regardless of whether the result would have been different. But here, the prejudice to the Plaintiffs was that in July 2009 they were barred from bringing successor liability claims that were hidden from them until the recalls of the Subject Vehicles began in 2014.

Any suggestion that the outcome of the Sale Hearing and resulting Sale Order would have been no different if objectors and the Bankruptcy Court had the Valukas Report in hand on July 9, 2009, is unknowable speculation. No court can

[9] The Bankruptcy Court also erred by not allowing the Plaintiffs to take discovery with respect to whether the Plaintiffs were prejudiced.

truly know what it would have done if it had known that Old GM had known about this dangerous defect for years. But what is not speculation is that the Ignition Switch Pre-Closing Accident Plaintiffs were never given the opportunity to make arguments at the time when those arguments might have mattered. Deprivation of the opportunity to win or lose on a proper record and denial of the opportunity to raise the issues of concealment, bad faith, inequitable conduct, and unclean hands at the Sale Hearing is prejudice. The resulting injunction barring the Plaintiffs' successor liability claims is the proof of that prejudice. The point is not that the Ignition Switch Pre-Closing Accident Plaintiffs would have prevailed in 2009; the point is that they were never given a fair opportunity to try.[10]

[10] It hardly suffices for the Bankruptcy Court or New GM to suggest that the Sale was necessary to avert a liquidation that would have been harmful to creditors and the American economy. If that is the standard, there is no need for providing due process in bankruptcy sales so long as the buyer and seller lock arms and affirm to the court that there is a compelling emergency. This Court held as much in *Manville IV* when it stated that there is no special bankruptcy exception to due process. *See Koepp*, 593 F. App'x at 23 (quoting *Manville IV*, 600 F.3d at 153-54). *See also Opinion*, 529 B.R. at 528 ("remedying a constitutional violation must trump" bankruptcy policy concerns regarding the finality and enforceability of section 363 sale orders).

III. THE PROPER REMEDY FOR THE DUE PROCESS VIOLATION IN THIS CASE IS TO PERMIT IGNITION SWITCH PRE-CLOSING ACCIDENT PLAINTIFFS TO PURSUE ALL RIGHTS AVAILABLE TO THEM WITHOUT IMPEDIMENT FROM THE INJUNCTIVE PROVISIONS OF THE SALE ORDER

For the reasons discussed above, the Ignition Switch Pre-Closing Accident Plaintiffs were denied procedural due process in connection with the Sale and suffered prejudice as a result (assuming prejudice is even an element of a due process violation). The proper remedy for the due process violation is clear: the Plaintiffs cannot be bound by the Sale Order to the extent it purported to enjoin the Plaintiffs from asserting their *in personam* successor liability claims against New GM. This result is dictated by governing precedent in this Circuit and does not have the effect of "setting aside" the Sale or "rewriting" the Sale Order, notwithstanding New GM's attempts to characterize it as such. 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. The Second Circuit's Decision In *Manville IV* Dictates The Appropriate Remedy

In 2010, this Court in *Manville IV* 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 by non-debtors against certain settling insurers, including Travelers Indemnity Company ("Travelers"). *Id.* at 141-42. The 1986 injunction was part of a settlement through which Travelers agreed to contribute hundreds of millions of dollars to the debtor's estate.[11] Years after entry of the 1986 orders, when Travelers sought entry of the "clarifying order," 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 *in personam* 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 this Court's decision in *Manville IV*. *Id.* at 149 ("With respect to due process . . . . the issue is therefore

[11] Travelers and others argued that "direct claims" by plaintiffs against non-debtor insurance carriers for their independent wrongdoing (as opposed to claims derivative of the debtor's conduct and arising from its rights as an insured) were settled as part of the 1986 orders. The 2004 "clarifying order" was intended to confirm that the 1986 orders resolved and barred these direct claims. *Id.* at 142-44.

whether Chubb may be bound at all by the 1986 Orders, whatever their meaning." (emphasis added)).[12]

According to this Court, 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. As a result, Chubb was free to pursue its *in personam* claims against Travelers notwithstanding the 1986 orders' purported injunction of those claims.[13] The Court did not predicate this ruling on a showing by Chubb of the prejudice it suffered; the word prejudice does not even appear in *Manville IV*.

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[12] Although the Bankruptcy Court incorrectly held that the Ignition Switch Pre-Closing Accident Plaintiffs were not prejudiced by the insufficient notice of the Sale and thus were not entitled to a remedy, it did recognize in a different part of the Opinion that Second Circuit precedent instructs that when a party's due process rights are violated in connection with the entry of an order, declining to enforce that order against such party is the appropriate remedy. *See Opinion*, 529 B.R. at 578 n.227 (citing *Manville IV*, 600 F.3d at 153-54; *Koepp*, 593 F. App'x at 20).

[13] The remedy imposed in *Manville IV* was anything but novel. 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 (mortgagee could not be bound by tax sale of property where mortgagee was not provided constitutionally sufficient notice); *New York, N.H. & H.R. Co.*,

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Manville IV is directly on point and mandates that the Ignition Switch Pre-Closing Accident Plaintiffs be granted relief from the free and clear aspects of the Sale Order. In *Manville IV*, the denial of due process prevented Chubb from timely challenging the subject matter jurisdiction of the bankruptcy court to bar its contribution claims against Travelers. *Manville IV*, 600 F.3d at 148-49. In this case, the denial of due process prevented the Ignition Switch Pre-Closing Accident Plaintiffs from timely raising serious questions about Old GM's lack of candor concerning the Ignition Switch Defect and its failure to disclose the nature and scope of the relief sought against persons unaware that the Ignition Switch Defect was the cause of their injuries or deaths. The due process violations in Old GM's case also prevented the Plaintiffs from challenging – in real time – the propriety and basic inequity of using the Bankruptcy Code to impose an injunction barring *in personam* successor liability claims against a new company that was populated by the same people who had withheld information about the existence of a defect that had injured and killed so many people. Just as no one was capable of raising

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344 U.S. at 296 (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 (party could not be bound by judicial settlement of trust because notice was constitutionally deficient).

Chubb's issues on its behalf during the proceedings that led to entry of the 1986 orders at issue in *Manville IV*, no one was capable of raising the concealment of the Ignition Switch Defect at the Sale Hearing in July of 2009. These were serious issues about lack of good faith, unclean hands, and inequitable conduct; issues that clearly would have been worthy of consideration at the Sale Hearing. Under any reasonable analysis, these issues could have influenced the outcome of Old GM's request to bar assertion of the concealed claims against its new incarnation.[14]

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[14] *Manville IV* also supports the contention that the quality and content of notice (in addition to the method of delivery) is critical for determining whether due process was given. In *Manville IV*, when evaluating the quality of the notice that was given in the proceedings leading up to entry of the 1986 orders, this Court looked to "settlement-only" class action cases. In this Court's view, the quality of notice required in "settlement-only" class actions to bar *in personam* claims was similar to the quality of notice that should be given in a bankruptcy case when *in personam* claims are being barred (such as the direct claims at issue in *Manville IV* and the successor liability claims here). *See Manville IV*, 600 F.3d at 154 (analyzing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001)). The Court focused on whether the intended recipients of the notice were made aware of how their interests might be affected by the proceedings and concluded that the notice given to Chubb was constitutionally defective because (1) the notice did not tell Chubb how its contribution rights were going to be affected, and (2) no one at the 1986 proceedings had rights similar to Chubb or raised issues similar those affecting Chubb. *Id.* at 156-57. Likewise, the notice given of the Sale and the Sale Hearing in this case did not notify victims of the Ignition Switch Defect that the defect existed, that the defect likely caused their cars to crash, that they likely would have viable *in personam* claims against New GM based on successor liability, or that the "free and clear" aspect of the Sale would bar their ability to assert *in personam* successor claims against New GM. Moreover, no one could have raised those

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In sum, in *Manville IV*, Chubb was prevented from raising subject matter jurisdiction in 1986, at a time when the objection could have made a difference in the proceedings. Here, the Ignition Switch Pre-Closing Accident Plaintiffs were prevented from raising the Ignition Switch Defect and Old GM's concealment of its existence at a time when the objection could have made a difference in the proceedings. Even though subsequent jurisprudence proved that Chubb would have prevailed in 1986 had it been able to raise subject matter jurisdiction objections,[15] the Ignition Switch Pre-Closing Accident Plaintiffs do not have to prove they would have prevailed in July 2009 had they been armed with the missing and concealed information. If that were the test, every denial of due process could be armchair quarterbacked years later, and denials of due process could be rationalized away with the conceit that the aggrieved party "would have lost anyway." Yet, that is exactly the consequence of the result below, which is another reason why the Bankruptcy Court's Judgment should be reversed.

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issues for the Ignition Switch Pre-Closing Accident Plaintiffs because the root information was concealed from all creditors and all objectors.

[15] *See Travelers Cas. & Sur. Co. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.)*, 517 F.3d 52, 68 (2d Cir. 2008), *rev'd and remanded sub nom. Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (U.S. 2009).

B. New GM's Attempts To Distinguish *Manville IV* Fail

Any attempt by New GM to argue that *Manville IV* is somehow distinguishable because it addressed injunctions contained in confirmation and settlement orders (rather than an order approving a sale) does not withstand scrutiny. Indeed, this Court's 1998 decision in *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988), explains that a bankruptcy court's order approving a settlement is 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.

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

Even if the 1986 orders in *Manville* were not analogous to a sale order, this Court's due process remedy analysis would still apply with full force here. In both the *Manville* case and here, 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 bringing 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*, 593 F. App'x at 23 (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); *W. Auto Supply Co. v. Savage Arms, Inc. (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 "free and clear" nature of the sale because plaintiffs were denied adequate notice in connection with sale); *Schwinn Cycling & Fitness Inc. 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).

C. Authorities Cited By New GM To The Bankruptcy Court Were Inapposite

In addressing available remedies in its briefs to the Bankruptcy Court, New GM erroneously conflated 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. In collapsing these two distinct concepts into one, New GM cited case law that is inapposite. *See Opening Brief By General Motors LLC On Threshold Issues Concerning Its Motions To Enforce The Sale Order And Injunction, In re Motors Liquidation Co.*, No. 09-50026 (REG) (Bankr. S.D.N.Y.) [Bk. Dkt. No. 12981], at 52-56. As this Court 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. *Common Law Settlement Counsel v. Travelers Indem. Co. (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 this Court'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 this Court,

> [t]he 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 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 Court 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*, in the proceedings below New GM incorrectly conflated a revocation or rewriting of the Sale Order with a determination that certain parties are simply not bound by its terms. 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 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 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, which will remain a final order as entered by the Court in 2009.[16]

D. Potential Availability Of Remedies Against Old GM's Estate Is Immaterial

To support its argument that no remedy can be had against it, New GM argued to the Bankruptcy Court that the Plaintiffs now have a "viable remedy" against Old GM's estate. As an initial matter, New GM incorrectly framed the issue of appropriate remedy as requiring the Bankruptcy Court to choose between allowing either a remedy against Old GM's estate or against New GM. As explained above, the proper remedy for the due process violation is simply a ruling that the Plaintiffs are not bound by the injunctive provisions of the Sale Order, thereby freeing them to pursue any and all available remedies, including the assertion of successor liability claims against New GM.[17] This Court need go no

[16] It is also worth noting that the relief the Ignition Switch Pre-Closing Accident Plaintiffs seek does not affect the title to any of the assets sold to New GM in 2009. The Sale itself would remain intact.

[17] The proceedings below and this appeal do not implicate the merits of the Plaintiffs' successor liability claims against New GM, just the right to assert those claims. The merits of successor liability claims would need to be tried under state

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further. Such a remedy does not require the Court to determine whether "viable" remedies also exist against Old GM's estate.[18]

To the extent New GM argues that the exclusive remedy for the due process violation is a claim against Old GM's estate, it is mistaken. In support of its position, in the Bankruptcy Court proceedings New GM primarily relied on cases where no due process violation was found or that are otherwise readily distinguishable. New GM cited to in *In re Edwards*, 962 F.2d 641, 643-45 (7th

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law applicable to each Plaintiff's action against New GM. That said, if the Bankruptcy Court is reversed and the Sale Order's bar on successor liability claims is held not to apply to the Plaintiffs, there are several theories under which the Plaintiffs could assert such claims against New GM. These theories include "continuity of enterprise," "products line," and "fraudulent purpose." *See Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 875 (Mich. 1976) (establishing standard for "continuity of enterprise" theory of successor liability); *Ray v. Alad Corp.*, 560 P.2d 3, 11 (Cal. 1977) (analyzing "products line" theory of successor liability; "a party which acquires a manufacturing business and continues the output of its line of products under the circumstances here presented assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired"); *Schmoll v. ACandS, Inc.*, 703 F. Supp. 868, 874 (D. Or. 1988) (imposing successor liability on purchaser of corporation's assets because transaction was done for improper purpose of escaping asbestos liability).

[18] Indeed, the Bankruptcy Court effectively held that the Plaintiffs have no viable remedy against Old GM because any effort to seek allowance and payment of "late" claims against the GUC Trust is now equitably moot (that is, barred). As noted above, The Ignition Switch Pre-Closing Accident Plaintiffs adopt by reference the arguments the Ignition Switch Plaintiffs make in their brief in opposition to the Bankruptcy Court's equitable mootness ruling.

Cir. 1992) (holding that entire sale transaction (including transfer of title) could not be completely unwound based on deficient notice to lien holder where lien holder failed to monitor the case for two years, took no action for months after learning of notice deficiency complained of, did not dispute the adequacy of the sale price, and the lien holder's share of the sale proceeds was still available to it for distribution); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d at 94 (addressing bankruptcy court order approving settlement that enjoined claims against settling insurers and holding: (i) injunction was not "unfair" because objector retained claim against debtor's estate (including a $770 million settlement fund) and (ii) objector's due process rights were not violated because objector was provided with adequate notice of the settlement order and injunction and specifically objected); *Conway v. White Trucks, A Div. of White Motor Corp.*, 885 F.2d 90, 96 (3d Cir. 1989) (affirming dismissal of successor liability claims where plaintiff "did not attempt to assert his inadequate notice argument" in bankruptcy court or district court); *Molla v. Admar of N.J., Inc.*, No. 11-6470 (JBS/KMW), 2014 WL 2114848, at *3, *5 (D.N.J. May 21, 2014) (granting defendant's motion to dismiss successor liability claim, in case where no due process violation was found and defendant acquired assets "free and clear of all claims and interests."); *Austin v. BFW Liquidation, LLC (In re BFW Liquidation, LLC)*, 471 B.R. 652 (Bankr. N.D. Ala. 2012) (holding that "free and clear" sale of substantially all of the debtor's assets barred

claims against purchaser and that plaintiff could assert its claims against the debtor where no due process violation had occurred).

Even if the out-of-circuit cases upon which New GM relied could somehow support its argument that Plaintiffs' remedy is limited to asserting a claim against Old GM's estate – which they do not – that argument would remain at odds with governing Second Circuit precedent holding that a party cannot be bound by the injunctive terms of a bankruptcy court order for which insufficient notice was provided. *Manville IV*, 600 F.3d at 137 ("[T]he primary current contention is the argument of Chubb . . . that 'it was not given constitutionally sufficient notice of the 1986 Orders, so that due process absolves it from following them, whatever their scope.' In our view, Chubb is correct.") (internal citation omitted); *Grumman*, 467 B.R. at 711. More fundamentally, New GM's proposed remedy would not provide redress for the due process violation actually at issue. As New GM is no doubt aware, the operative language of the Due Process Clause provides that "[n]o person shall . . . deprived of . . . property, without due process of law." U.S. Const. amend. V. Here, the property of which the Plaintiffs were deprived through the Sale Order is their right to assert claims against New GM.[19] By

[19] Stated differently, Plaintiffs are not asserting a due process challenge to a bar date order or a discharge injunction issued in favor of a debtor. Rather, the due

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suggesting the assertion of a claim against Old GM's estate, New GM proposes a remedy that is disconnected from the constitutional injury. This incongruity further highlights the incorrectness of New GM's argument and the soundness of this Court's conclusion in *Manville IV*.

Based on the foregoing, the appropriate remedy for the due process violation at issue is for this Court to determine that Plaintiffs are not bound by the injunctive provisions of the Sale Order.

CONCLUSION

For the reasons set forth above, the Judgment should be reversed and the Ignition Switch Pre-Closing Accident Plaintiffs should be permitted to pursue their successor liability-based claims against New GM notwithstanding the "free and clear" provisions of the Sale Order.

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process violation occurred through an order that curtailed their rights vis-à-vis a non-debtor (New GM).

Respectfully submitted,

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November 16, 2015

CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of this Brief for Ignition Switch Pre-Closing Accident Plaintiffs were served electronically on the parties at the addresses indicated on the attached Service List on this 16th day of November, 2015.

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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]

C. Potential Availability Of Remedies Against Old GM's Estate Is Immaterial

To support its argument that no remedy can be had against it, New GM suggests that Plaintiffs have a "viable remedy" against Old GM's estate. New GM Opening Brief at 56. As an initial matter, New GM incorrectly frames the Remedies Threshold Issue as requiring this Court to specifically choose between allowing either a remedy against Old GM's estate or against New GM. As explained above, the proper remedy for the due process violation is simply

[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.

for the Court to rule that the Plaintiffs are not bound by the injunctive provisions of the Sale Order and Injunction, thereby freeing Plaintiffs to pursue any and all available remedies, including successor liability claims against New GM. The Court need go no further. Such a remedy does not require the Court to determine whether "viable" remedies also exist against Old GM's estate.

To the extent New GM argues that the exclusive remedy for the due process violation is a claim against Old GM's estate, it is mistaken. In support of its position, New GM primarily relies on cases where no due process violation was found or that are otherwise readily distinguishable. New GM Opening Brief at 56-57 (citing in *In re Edwards*, 962 F.2d 641, 643-45 (7th Cir. 1992) (holding that entire sale transaction (including transfer of title) could not be completely unwound based on deficient notice to lien holder where lien holder failed to monitor the case for two years, took no action for months after learning of notice deficiency complained of, did not dispute the adequacy of the sale price, and the lien holder's share of the sale proceeds was still available to pay it); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 94 (2d Cir. 1988) (addressing bankruptcy court order approving settlement that enjoined claims against settling insurers and holding: (i) injunction was not "unfair" because objector retained claim against debtor's estate and (ii) objector's due process rights were not violated because objector was provided with adequate notice of the settlement order and injunction and specifically objected); *Conway v. White Trucks, A Div. of White Motor Corp.*, 885 F.2d 90, 96 (3d Cir. 1989) (affirming dismissal of successor liability claims where plaintiff "did not attempt to assert his inadequate notice argument" in bankruptcy court or district court); *Molla v. Admar of New Jersey, Inc.*, No. 11-6470 (JBS/KMW), 2014 WL 2114848, at *3, *5 (D.N.J. May 21, 2014) (granting defendant's motion to dismiss successor liability claim, in case where no due process

violation was found and defendant acquired assets "free and clear of all claims and interests."); *BFW Liquidation,* 471 B.R. 652 (holding that "free and clear" sale of substantially all of the debtor's assets barred claims against purchaser and that plaintiff could assert its claims against the debtor where no due process violation had occurred)).

Even if the out-of-circuit cases relied by New GM could somehow support its argument that Plaintiffs' remedy is limited to asserting a claim against Old GM's estate – which they do not – that argument would remain at odds with governing Second Circuit precedent holding that a party cannot be bound by the injunctive terms of a bankruptcy court order for which insufficient notice was provided. *Manville IV*, 600 F.3d at 153 ("[T]he primary current contention is the argument of Chubb . . . that 'it was not given constitutionally sufficient notice of the 1986 Orders, so that due process absolves it from following them, whatever their scope.' In our view, Chubb is correct."); *Grumman*, 467 B.R. at 711. More fundamentally, New GM's proposed remedy would not provide redress for the due process violation actually at issue. As New GM is no doubt aware, the operative language of the Due Process Clause provides that "[n]o person shall . . . deprived of . . . property, without due process of law." U.S. Const. amend. V. Here, the property Plaintiffs were deprived of through the Sale Order and Injunction is their right to assert claims against New GM.[26] By suggesting the assertion of a claim against Old GM's estate, New GM proposes a remedy that is disconnected from the constitutional injury. This incongruity further highlights the incorrectness of New GM's argument and the soundness of the Second Circuit's conclusion in *Manville IV*.

[26] Stated differently, Plaintiffs are not asserting a due process challenge to a bar date order or a discharge injunction issued in favor of a debtor. Rather, the due process violation occurred through an order that curtailed their rights vis-à-vis a non-debtor (New GM).

Based on the foregoing, the appropriate remedy for the due process violation at issue is for this Court to determine that Plaintiffs are not bound by the injunctive provisions of the Sale Order and Injunction.

III. CONCLUSION

For the reasons set forth above, the Pre-Closing Accident Plaintiffs respectfully request that the Court deny New GM's Motion to Enforce Sale Order re: Pre-Closing Accident Lawsuits and grant such other and further relief as it deems just and proper.

Dated: December 16, 2014

Respectfully submitted,

/s/ William P. Weintraub

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CERTIFICATE OF SERVICE

I, William P. Weintraub, hereby certify that a copy of the foregoing *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*, filed through the CM/ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on December 16, 2014.

/s/ *William P. Weintraub*
William P. Weintraub

Exhibit A

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-11233 (REG)

- -x

In the Matter of:

CHEMTURA CORPORATION

Debtors.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York 10004

January 31, 2013

9:53 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

ECRO: EMMANUEL

HEARING re: Doc #5769 Motion to Approve/Reorganized Debtors Motion for an Order Enforcing the Discharge Injunction Under the Debtors Chapter 11 Plan of Reorganization

Transcribed by: Theresa Pullan

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P R O C E E D I N G S

THE COURT: We have a busy day today. We have major matters in both Chemtura and Bearing Point. I want to get appearances on Chemtura, and then I have some preliminary remarks.

I know that our friends from Missouri had some challenges in getting these issues heard -- I do need quiet on the phone please. But certainly I'll hear the same arguments over the phone that I would have heard in person. First, for the Chemtura estate.

MS. LABOVITZ: Your Honor, Natasha Labovitz from Debevoise & Plimpton representing Chemtura.

THE COURT: Okay, Ms. Labovitz. Thank you. Anybody in the courtroom on behalf of the litigants, the Fermenich litigants? No. Okay. On the phone?

MR. MCCLAIN: On behalf of the Fermenich litigants, Your Honor, Kenneth McClain.

THE COURT: Okay, Mr. McClain.

MS. TOBIN: Yes, and as local counsel for the Fermenich litigants, Your Honor, Rita Tobin. I'm actually downstairs and I will be off Courtcall and in the courtroom in about five m minutes. I had traffic problems getting in.

THE COURT: Ms. Tobin, are you going to be the principal arguer for your side?

MS. TOBIN: No, no, no, Mr. McClain is, but I am

going to be in the courtroom.

THE COURT: Okay. Do you want us to wait until you can get upstairs?

MS. TOBIN: I can get up -- I'm right downstairs, so I should be upstairs shortly. Yes, that would be great.

THE COURT: All right. We'll stand by.

MS. TOBIN: Okay.

(Pause)

THE COURT: Mr. McClain, you're hearing quiet on the courtroom side of the phone because we're waiting for Ms. Tobin.

MR. MCCLAIN: And thank you, Your Honor. Yes, I understood that. And you're not hearing any noise from my end, are you?

THE COURT: I can't tell where it came from, but I, but after I made the comments, the noise stopped which I guess was a good sign.

MS. TOBIN: Your Honor, I apologize. I came from West Chester, and they had some problems up there this morning.

THE COURT: Okay. Ms. Tobin is now here. All right. Ms. Labovitz, Mr. McClain, make your arguments as you see fit, but keep them relatively brief because I've read the papers. Mr. McClain, when it's your turn to argue, I need you to focus on the U.S. Supreme Court of Mullane, decision in Mullane, which to my surprise you didn't cite much less substantively

address. And with it the decisions in Best Products, Chateaugay and Placid Oil.

You know, we have the U.S. Supreme Court decision that's talked about what's necessary here, and in particularly notice that's reasonably calculated to reach its recipient. And which, unless I read it wrong, and I think I'm pretty good at reading cases at this point in my career, the subjective understanding of the claimant is not relevant. The -- whether or not the claimant read the notice in the newspaper or other means of providing published notice is not relevant, and I have some difficulty seeing how or why you made the arguments you did while failing to address the Supreme Court decision that's directly on point.

And, you know, I read your brief, I read your table of authorities which is why my case management order require tables of authorities to find your discussion of Best Products, Chateaugay and Placid Oil -- couldn't find anything. So I need help from you on that.

On the class action points, your opponent says at least seemingly correctly that this isn't a class action, so why do we have all this discussion about class actions, and I have some difficulty seeing why your opponent isn't right on that as well. And while I recognize that the inclusion of these folks or the failure to include them in the earlier settlement is a second string to their bow, and it may be

depending on when they, you know, contacted your firm might not be regarded within that group of additional people who are covered by the earlier settlement as having been deemed to have been retained by your firm back when the settlement was entered into. I don't see how that goes to their more fundamental point, and I need help on that.

Ms. Labovitz, I do not recall you actually asking me for discovery style relief to get a more fulsome disclosure beyond those redacted retention agreements with respect to when the folks here, I think there are nine of them, first contacted Humphrey, the Humphrey Firm. But you help me understand whether you want to pursue your second ground for relief or whether you're content to rely on the Mullane issues and the like. We'll go in the traditional order. Ms. Labovitz, I'll hear from you first.

MS. LABOVITZ: Thank you, Your Honor. For the record, this is Natasha Labovitz from Debevoise and Plimpton representing Chemtura.

Your Honor, particularly in light of the Court's busy calendar today, I'm going to try to be very brief in my initial remarks. I would request the opportunity to respond to any points that Mr. McClain makes.

THE COURT: Sure. And if you say anything in reply, I'll give Mr. McClain a comparable opportunity to sur-reply, but in each case the second round has to be limited to new

stuff that was raised here and not to address things that could have been said the first time.

MS. LABOVITZ: I understand, Your Honor. What I'd like to do is cover what I think are the three main points that are before the Court today, and in doing that, I will answer the question about whether we're asking for discovery style relief or whether we think this could be decided on the pleadings.

Your Honor, there are some tangents in the pleadings, but I think this really comes down to three big points, the first two of which are related, and the third of which is separate.

The related points are, as you characterize them, the Mullane factors, although I have looked at them as the Mullane and Waterman factors. The questions are -- was the bar date noticing scheme reasonably calculated to provide notice to unknown creditors? I think it's undisputed that these Fermenich plaintiffs were unknown creditors.

THE COURT: Ms. Labovitz, don't necessarily raise your voice, but come a little closer to the microphone.

MS. LABOVITZ: Of course, Your Honor. So the first question that I think arises under the bar date noticing and discharge portion of our argument is whether the bar date noticing scheme was reasonably calculated to provide notice to unknown creditors. And as I said, I think that it's undisputed

that he Fermenich claimants were unknown creditors from the perspective of Chemtura during the chapter 11 case.

The second question that is related to this is whether these plaintiffs' claims fall within the scope of the definition of claim such that they're susceptible to discharge. In other words, the Debtors have recognized throughout these chapter 11 cases that there is a category of potential future claim that is so remote, so I don't even want to say contingent, it's so incipient that it simply cannot be characterized as a claim and discharged under a plan of reorganization. The classic example of those kinds of claims is a manufacturing defect that does not come into contact with a party and cause injury until after the chapter 11 case is concluded. So, for example, a manufacturing defect in an airplane that causes a plane crash after the confirmation of a chapter 11 plan cannot give rise to a claim that would be discharged in bankruptcy I think under applicable precedent. Because the exposure, the injury that causes the harm has not occurred until after the case. We've always conceded that point.

I think that in this case and throughout the chapter 11 cases, we view diacetyl claims as being different, because in all such instances, almost based on the very nature of diacetyl and how it was used in the food industry. Every claimant that may have a diacetyl claim came into contact with

diacetyl and therefore was exposed and incurred injury within the meaning of the Bankruptcy Code many years before Chemtura filed for chapter 11 because the food industry ceased using nonorganic diacetyl before the chapter 11 case. So all instances of exposure should have occurred before the chapter 11 case.

So looking at those two points, Your Honor, the Debtors' position is that the bar date noticing scheme was comprehensive, the company took great pains to provide not only constructive notice, but in all instances possible, actual notice to unknown claimants. We think our bar date noticing scheme was good, and we think that's evidenced by the fact that we started the case with 50 diacetyl claims that were known to the company, we ended with 375 including five new claimants from the very Fermenich facility that is at issue here. From our perspective our bar date noticing scheme was not only reasonably calculated to provide notice, it worked, it did provide notice to the extent possible. And from our perspective that is the conduct that was required under Mullane. You can't be held to the standard to provide actual notice to every possible unknown creditor.

I addressed the point of whether the plaintiffs' claims fall within the scope of the Bankruptcy Code definition of claim. We think in this case they clearly do.

From our perspective we think that's the end of the

story, we think that the Court could rule today based on the pleadings, on the adequacy of the notice and the scope of the discharge, and that there's no need to get to the third argument that we've raised, but as a backup we've raised it.

And the third argument is the one that you identified, Your Honor, as the independent question of whether the claims fall within the scope of Chemtura as diacetyl settlement with the Humphrey Farrington firm. As is clearly covered in the pleadings, that settlement was intended to cover not only all of the claimants that Chemtura knew about at the time of the chapter 11 case, but just as added protection, anyone else that Mr. McClain or his law firm knew about at that time. We don't know whether or not these nine claimants fall within the scope of that settlement or not, that's information that Mr. McClain has and we don't have. To the extent that Your Honor either you thought that there was reason -- I'm going to back up on that. To the extent that, Your Honor, you don't believe you can rule on the law on the Mullane and Waterman question, then we would think there is an open factual question both as to whether these are claims that are dischargeable and as to whether these claimants were known to Mr. McClain at the time of the settlement.

THE COURT: Ms. Labovitz, I can see a scenario under which a potential claimant might have consulted the Humphrey Farrington firm with a phone call or a meeting with a view to

representation with a level of finality sufficient to allow the attorney-client privilege to attach, but might have delayed in having signed one of the retention agreements that was provided to me in redacted form. Did you have any discussions with the Humphrey Farrington firm about some method of getting the information that might be relevant to your last point without impinging on their attorney client privilege such as getting the dates of first contact, the dates of any communications or anything of that sort?

MS. LABOVITZ: Your Honor, we had a letter exchange with the Humphrey Farrington firm in which Chemtura asked for information of that kind. We haven't had follow-up discussions about that. I do think that there may be ways to get at that information, but again, Your Honor, respectfully we think this can be discharged as a matter of law without having to get to that point. If we do have to get to that point, I'm sure we could explore ways of getting the information we need.

THE COURT: Okay. Anything else before I give Mr. McClain a chance to be heard?

MS. LABOVITZ: No, thank you, Your Honor.

THE COURT: Okay. Thank you. Mr. McClain?

MR. MCCLAIN: Your Honor, you, in your initial questions you talked about Mullane and adequacy of notice issues, and I will address those points. We put that information in our brief simply to illustrate the point that

these people in fact were unaware. Whether or not that has any impact on the noticing scheme was not the focus of why we pointed that out. We had long discussions as the Court will recall about the noticing scheme and the difficulties of it before the notice was approved by the Court in which we talked about important issues that impinge on the second point that I really want to focus on, which is a point that this Court previously made in the context of the GM bankruptcy, where you pointed out, Judge, in that case in the opinion at 407 Br. 463 (2009) that the notice given on this motion was not fully effective since without knowledge of an ailment that had not yet manifested itself, any recipient would be in no position to file a present claim. That's really the focus of our issue and complaint here.

And I just want to back up to a point that we made at the time that the bar date was set and the noticing scheme was discussed. This is a new disease process. In 2002, the New England Journal of Medicine published the first article about diacetyl and its ability to cause disease. So the issues involved in regard to the medical community, workers and lawyers becoming aware of this disease process is really relatively speaking asbestos and these other things that have consumed the courts in the opinions that we cited to in the arguments that have been previously made are quite different in that it is a new disease process. But the Waterman Steamship

case that the Court asked us to address in regard to the Mullane scheme has some important language that we did discuss in our brief. The defendants pointed to this any detectible signs language that the Court I'm sure is aware of without reference to able to perceive the significance and implications language contained in the opinion which you clearly were aware of when recognizing the complexity of this issue in a latent disease situation such as was existed in the General Motors case. In fact, Judge, on this issue, in the Chemtura bankruptcy itself in a related but separate situation, on September 8th of 2010 --

THE COURT: Pause please Mr. McClain. GM didn't involve latent diseases, it involved people who were hurt in car wrecks. When your car goes off the road and gets into a crash, that's not so latent. I mean you know about it. And what had bothered me was the scenario under which GM made cars before the sale and they didn't crash until years later. That is not a situation where somebody was injured much earlier but had not brought the lawsuit until a later time. 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 from the instant that the car wreck takes place.

MR. MCCLAIN: Judge, I'm talking about your opinion regarding the asbestos claim within the GM bankruptcy, and those people who had not yet had manifested asbestos claims who

were trying to assert them after the Debtor's asset sale. And it's at 407 Br. 463, the 2009 opinion.

THE COURT: All right. Go on.

MR. MCCLAIN: So that's one point, Judge, that caught my attention that it's similar to our problem which is that if someone doesn't know they have a disease or they don't have a disease yet, no noticing scheme will be effective as to them nor should it bar under due process Mullane and its progeny a claim that arises later. Particularly in this instance where there was no futures representative and no futures were anticipated, and in fact repeatedly this defendant claimed that no futures were intended to be covered by the settlement. In our view, these are futures. If they had filed a claim, Judge, I think we had some indication from you in regard to a similar chemical exposure against Chemtura in this very bankruptcy where you ruled, and the transcript that I have dated September 8th of 2010 where a Mr. Cogut (phonetic) came before the Court claiming that he had been exposed to chemicals at the Naugatuck Treatment Company plant owned by the Debtor. And in that very case, the proceeding, you struck that claim because he offered no evidence or allegations of any specific injury to himself or his family. In essence, his claim was that his exposure may cause injuries, that it becomes apparent now by which I mean or I assume he means shortly in the future or in the future which I understand to be more in the future. That's insufficient to

stay the claim much less for 20, or 10 or 20 million dollars. As a conclusion of law, I rule that while I wouldn't demand all of the claimant's evidentiary support at the proof of claim stage, the law requires that there be some showing of a an entitlement to relief of a legally cognizable injury.

Our point on these nine individuals is that there is no evidence since they had a legally cognizable injury as of the bar date and the settlement effective date. If they had, they would have been included in the settlement, but they were not even our clients at that point in time because there was no evidence that they were sick. That's the nature of why we believe that these claims are viable and not barred. And that's the focus of our argument in this case, Judge, and the rest of the arguments are within the pleadings. So unless the Court has questions, that's all I have.

THE COURT: Yeah, I do have one follow-up question. Were you saying by your last point that's why they weren't included in the settlement, that there were people who had consulted you before the date that they signed their retention agreement but they weren't included in the settlement because they didn't have legally cognizable injuries?

MR. MCCLAIN: Judge, I would have to look to see to be sure about that. But in general, if they didn't have legally cognizable injuries, we didn't file proofs of claims for them because of the principal that you announced and we

understood even before you announced it, that I think it's actually automatic what you announced on September 8th of 2010 that if you have no legally cognizable claim you don't have a bankruptcy claim either.

THE COURT: Um-hum. Continue please.

MR. MCCLAIN: So it was our intention not to file claims that were not legally cognizable, and I don't think that we knowingly did that. So I would have to look to be certain about that, but I think we tried to file all the claims that we had in our office that potentially involved Chemtura before the effective date and the bar date. And in fact we included some that we discovered along the way that were not filed, but we included them within the settlement with Chemtura even afterwards to be sure that we were being comprehensive and acting in good faith with them. But we don't think that it's possible to bar people who we subsequently came to represent with a settlement that was, that had occurred before the representation and say constitutionally at least or even contractually, you know, you didn't get any money, you didn't sign this agreement, but you're barred because the McClain firm represented some other people that we settled with. That doesn't seem to be fair and it's not certainly something that I've seen the Court previously address or sanction.

So we think that these are futures claims as properly understood and were not included within the settlement and

should not be barred from pursuing their claim against Chemtura in State Court since Chemtura did not want a future settlement. We proposed that at the beginning and they did not want a futures rep, and they said that futures were not included within the claims that we were currently settling. And that would be my understanding of what these are.

THE COURT: Okay. Anything else? Mr. McClain, anything else?

MR. MCCLAIN: No, Your Honor, that's all I have.

THE COURT: Okay. Ms. Labovitz, reply?

MS. LABOVITZ: Thank you, Your Honor. I'd like to start by once again drawing a distinction between the two distinct arguments that Chemtura is making because I think Mr. McClain continues to collapse them on each other. Chemtura's point is first that the nine Fermenich claimants have claims that are barred and discharged under the bar date in Chemtura's plan of reorganization. That has nothing to do with the settlement with the Humphrey Farrington firm. That settlement was embodied in one part of the plan, but it's not even the entire settlement that covers all diacetyl claimants. As the Court may recall and Mr. McClain doubtless does, there were other diacetyl claimants that were not represented by Mr. McClain's firm, they are still barred by the plan of reorganization and covered by that plan.

So there are two distinct points here. One is the

bar date and the discharge; the other is the contractual settlement with the McClain firm.

On the bar date and discharge point, I understand the points that Mr. McClain is raising, and the on a human level difficulty of wrestling with the idea that the Bankruptcy Code can and must act to bar claims of creditors who as a factual matter do not know or have the factual information to file a proof of claim. Your Honor, I acknowledge that's a tough concept. It's a concept, however, that courts have wrestled with and dealt with long before we stand in the Court today. The A.H. Robins court at the circuit level, not in this circuit, but a seminal case on this issue.

THE COURT: Fourth Circuit if I recall?

MS. LABOVITZ: I'm going to have to look it up now, Your Honor. You got it for me?

THE COURT: I am pretty sure of that.

MS. LABOVITZ: It -- what's that?

THE COURT: I'm pretty sure it was the Fourth Circuit Court of Appeals.

MS. LABOVITZ: I think it is the Fourth Circuit, Your Honor. In any event, it's cited in our pleadings and in our table of authorities. Your Honor, the A.H. Robins court says what matters is that when the acts constituting a tort or an injury occurred prepetition there was a claim. And it doesn't matter whether the plaintiff knew about the bar date and filed

the proof of claim. It's difficult, but it's the law. Mr. McClain says that he understood before anything was said in the Chemtura case that a claim doesn't need to be ripe in order for a proof of claim to be required by the bar date. But again, Your Honor, that's just not the law even in this district. Judge Bernstein said in Quigley and Judge Lifland said in Chateaugay that when an actual chemical exposure occurs prepetition, the resulting injuries are prepetition claims and a proof of claim is required. And in the Quigley case, Judge Bernstein expressly addressed the question of whether a claim needs to be ripe as a matter of law to allow a complaint to be filed. And Judge Bernstein said it doesn't matter if under state law you would file a complaint at the point of a bar date, you should submit a proof of claim anyway.

Judge Bernstein's theory in Quigley would suggest that Mr. Cogut, who is the claimant from September 2010 who Mr. McClain referenced, Mr. Cogut did exactly the right thing by filing a proof of claim that said I've been exposed to chemicals, I don't know if I have a claim or not. And applying the Bankruptcy Code, exactly the right thing happened, which is we said you may have a claim for chemical exposure, but you can't articulate a claim in this bankruptcy case for 10 or 20 million dollars when you have no injuries to point to. That's the way the law works. In some situations -- and I'm going to come to how I think the courts have addressed this challenge --

in some situations, especially in the asbestos cases where we know there is a large class of claims that has a long latency period, we know that there is some X-factor of tort obligations out there that is going, that it's incipient it's going to ultimately be an obligation of the debtor, we've said it's not sufficient for us just to rely on the bar date noticing scheme that is a standard noticing scheme or even an enhanced noticing scheme like the one we used in Chemtura. So for those long latency cases where you know there's going to be a category of claims out there, the asbestos trust, the 524G contract has arisen as the way to deal with those cases. But that doesn't mean you have to go through that process or impose it, that kind of a future claims trust in every case. And the case law that I can point to that helps us understand why that is, is the District Court Opinion in Waterman.

In Waterman you may recall Judge Conrad originally looked at the bar date noticing scheme and said it's a good enough noticing scheme, it's adequate, yes there were future claimants but it's a good enough noticing scheme, they published their notice, you know, in a major newspaper just the way you're supposed to, that's enough. And when Judge Conrad's decision in Waterman went up on appeal, the District Court said you can't quite do it that way. The adequacy of your noticing scheme has to be tailored to reflect the kinds of claims that you know you're going to have. And the District Court in

Waterman said you knew you had this future class of asbestos claimants and you needed to have an enhanced noticing scheme that reflected the scope of claims that you knew you were going to have. It needed to be appropriately tailored to the circumstances. And so the District Court referred that question back down to Judge Conrad and asked Judge Conrad to pass on the question of whether the noticing scheme the debtor had used in that case was reasonably tailored to the kinds of tort claims that they had. And in that case Judge Conrad found that the noticing scheme wasn't reasonably tailored.

But you can take that construct, that legal construct now and look at Judge Lifland's opinion in Chateaugay where Judge Lifland said there were asbestos claims, they didn't establish an asbestos trust, but they used enough of a good noticing scheme that it's okay, because in that case, this is important, Judge Lifland was saying Chateaugay is not primarily an asbestos case, there, you know, this is not the construct or the rationale for this case, and, therefore, Judge Lifland said they didn't need to go through the whole process of establishing an asbestos trust.

And, Your Honor, I think that's the line of cases that points the way through this Chemtura challenge. In Chemtura, as you know and as Mr. McClain knows, the noticing scheme was not your garden variety bar date noticing scheme, it was comprehensive, it was expensive, it took a long time to put

in place. We had more than one hearing before Your Honor to discuss whether it was adequate, the company ended up providing additional notice even over and above the enhanced scheme it was already proposing with the direct input of Mr. McClain and his fellow representatives of diacetyl claimants. It was comprehensive. And from our perspective it was reasonably tailored to with the class of plaintiffs that we knew that we had, particularly in light of the fact that diacetyl is a low latency kind of chemical exposure, it's not like asbestos. People do know that they have injuries. Mr. McClain's point is that they may not be immediately diagnosed with a diacetyl related injury that could be the basis for filing a complaint, I think that's Mr. McClain's point. But again I would come back to the Quigley case and the Holmes case coming out of the Eastern District and say that's just not the legal standard. The legal standard is whether there was exposure, whether the bar date noticing scheme was adequately tailored under Waterman to the kind of tort plaintiffs that we had. And ultimately I think the proof that it was is that Chemtura's knowledge of its diacetyl claimants increased by approximately 325. And since the chapter 11 case we have only these nine plaintiffs who came up. It's not that there was a huge class of claims that we didn't reach.

Your Honor, unless you have any questions, I think that's all I have.

THE COURT: No, thank you. Okay. Mr. McClain, sur-reply limited to new stuff you heard from Ms. Labovitz this last time.

MR. MCCLAIN: Yes, I fundamentally disagree with the factual matter that these are not long latency diseases and that people know that they're sick from diacetyl, and that these people were sick before 2009. I just don't think that there's any evidence of that, and I disagree with it fundamentally.

I have a number of clients, including these who do have long latencies and have no symptoms that are diagnosable before they are diagnosed. And in fact, in this case I would dispute the fact that they had a diagnosable disease by 2009. And I think that this falls right within the opinions that I previously pointed the Court to which say that it's not constitutional to bar people who do not have demonstrable disease before the bar date, it's just not, it does not give them due process in this circumstance. And so, Judge, I would ask the Court for these nine individuals not to, not to say that they are barred, they didn't have disease beforehand and they didn't know. That's all.

THE COURT: Okay. Thank you. All right. Everybody sit in place for a minute. Mr. McClain, you're going to hear a little quiet.

MR. MCCLAIN: That's fine.

(Pause)

THE COURT: All right. Ladies and gentlemen, in this contested matter in the chapter 11 cases of Chemtura and its affiliates the reorganized Debtors seek entry of an order pursuant to Sections 105(a), 524 and 1141 of the Code, and Bankruptcy Rule 3020(d) enforcing the discharge injunction as to the Firmenich claimants and their counsel, Humphrey Farrington and McClain, and seek orders first finding that the claims asserted in the diacetyl lawsuits now pending in State Court arose before the Chemtura petition date and were thus discharged pursuant to the plan of reorganization; second, directing the Firmenich claimants and their counsel to dismiss the Chemtura defendants from the diacetyl lawsuits; and third, declaring that the Firmenich claimants and their counsel are barred from attempting to seek monetary damages or other relief with respect to any of their diacetyl related claims.

The reorganized Debtors' motions in each of their three prongs are granted. I find that the claims asserted by the Fermenich claimants in the pending State Court diacetyl lawsuits are claims within the meaning of Federal Bankruptcy Law that arose before the petition date and that are thus subject to discharge under Chemtura's plan of reorganization; I find that they're enjoined from seeking any form of relief from the Chemtura defendants with respect to their diacetyl related claims, and I will direct the claimants to dismiss the Chemtura

defendants from the pending diacetyl lawsuit as quickly as that reasonably may be accomplished.

My findings of fact and conclusions of law underlying this decision follow.

Turning first to my findings of fact. I won't lay out every fact in this matter, but instead will address only those relevant to this decision. On March 18, 2009, Chemtura's domestic operations filed petition for relief under chapter 11. From 1982 to 2005, Chemtura Canada manufactured and sold diacetyl, a butter flavoring ingredient that was widely used in the food industry prior to 2005 to certain customers in the U.S. And Chemtura acted as Chemtura Canada's intermediary purchasing the diacetyl from Chemtura Canada and then selling it to customers in the U.S.

In 2001, food industry workers began alleging that exposure to diacetyl caused respiratory illnesses, and product liability actions were filed alleging that diacetyl was defectively designed or manufactured. As of the petition date, Chemtura and Chemtura Canada faced approximately 15 filed diacetyl lawsuits involving approximately fifty (50) plaintiffs. In the summer of 2009, the Debtors developed a bar date noticing program involving a combination of general and importantly site specific notices. The site specific notices were designed to provide notice to potential tort plaintiffs in known geographical locations. Putting it in another way, the

locations were known, but the people who might have claims in those locations were not. On August 4, 2009, the Debtors filed a motion before me seeking my approval of their bar date noticing program. The diacetyl claimants who were then represented by Humphrey Farrington filed a limited objection arguing in part that the noticing program for unknown creditors was not reasonably calculated to inform potential diacetyl claimants of the need to file a proof of claim.

The Debtors argued that the site specific diacetyl notices which Humphrey Farrington had overlooked in its objection were more than adequate to satisfy due process requirements. In addition, the Debtors pointed out that other diacetyl claimants had previously argued that it was unlikely that there would be future claims because of a stated short latency period for manifestation of injuries from diacetyl exposure. Though I note for the avoidance of doubt that this was other diacetyl claimants and not the Humphrey Farrington firm, and Mr. McClain has stated as recently in oral argument today that he differs with that statement.

After hearing argument from both sides, I approve the Debtors' bar date noticing program noting at that time that it was important to me that the Debtors had done or proposed more than a generalized national publication, which is why I welcomed the Debtors' proposal to provide site specific notice. I was then not called upon to decide and I do not decide today

whether notice the way it's often done in large bankruptcy cases by notice in publications like the New York Times and Wall Street Journal would, without the supplemental noticing undertaken by the Debtor, be enough to pass constitutional muster or not.

On August 21, 2009, an order approving the bar date noticing program was entered, and October 31, 2009, two months later was established as the bar date for filing proofs of claim.

At the request of the Humphrey Farrington firm, the Debtors added 83 additional manufacturing site locations for site specific notice, including of particular significance here, the Fermenich facility. The notices informed potential claimants that they might have a claim under various legal theories if they were exposed to diacetyl and such exposure "directly or indirectly caused injury that becomes apparent either now or in the future." The notices specifically informed potential claimants that they needed to file a proof of claim by the bar date in order to preserve any claim alleging diacetyl related injury. And in addition, and what I thought then and still do think, is the salutary practice, although I don't make any finding as to whether it's constitutionally required. There was even language in Spanish to lead the reader to help if he or she was a Spanish speaking recipient.

After the notice was given and by the time the bar date passed, the Debtors received 373 non-duplicative proofs of claim related to diacetyl, markedly more than the 50 that were on the table at the time that the chapter 11 case was filed. Of note, five of the 373 were filed by Humphrey Farrington on behalf of individuals who worked at the Fermenich facility. However, none of the claimants pursuing the State Court action to which the reorganized Debtors now object filed a proof of claim.

After the bar date passed, Humphrey Farrington and the Debtors reached a settlement which I approved on September 1st, 2010 resolving the 347 diacetyl claims filed by Humphrey Farringdon and all claims by anyone represented by Humphrey Farrington as of the effective date of the settlement in exchange for $50 million to be divided by Humphrey Farrington among its clients. The settlement became effective on November 11, 2010. This Court entered an order confirming the chapter 11 plan of Chemtura Corporation on November 3rd, 2010 with a plan effective date of November 10, 2010. The confirmation order contained language which I'll explore more fully below implementing discharge and injunctive provisions that were set forth in the plan.

On September 12th, 2011 the Fermenich claimants who were nine individuals represented by the Humphrey Farrington firm, filed diacetyl related lawsuits in the Superior Court in

Middlesex County, New Jersey against, among others, Chemtura and Chemtura Canada. For reasons that are not fully clear to me, they didn't serve the reorganized Debtors for a period of nine months after they filed the lawsuits until July 9, 2012. When the reorganized Debtors learned of the lawsuits in March of 2012, they then reached out to counsel for the Firmenich claimants to demand that the reorganized Debtors be dismissed from the diacetyl lawsuits contending that the lawsuits violated the discharge injunction entered by this Court. When the parties were unable to come to a consensual resolution, the reorganized Debtors filed this motion.

Turning now to my conclusions of law. Under Section 1141(d)(1) of the Code, confirmation of a plan of reorganization provides a discharge to a debtor that extinguishes and debts claims against the debtor that arose prior to the confirmation. Section 1141(d)(1) provides in relevant part, and I'm quoting.

"Except as otherwise provided in this subsection in the plan, or in the order confirming the plan, the confirmation of a plan:

(a) discharges the debtor from any debt that arose before the date of such confirmation ... whether or not

(i) a proof of claim based on such debt is filed or deemed filed under Section 501 of this title...

In line with that section of the Code, my order

confirming the debtors' plan of reorganization stated at paragraph 141 in relevant part and I'm quoting. "Pursuant to Section 1141(d) of the Bankruptcy Code and except as otherwise specifically provided in the plan, the distributions, rights, and treatment that are provided in the plan shall be in full and final satisfaction, settlement, release and discharge, effective as of the effective date of all claims interest and causes of action of any nature whatsoever including any interest accrued on claims or interest from and after the petition date whether known or unknown for periods, this order shall be a judicial determination of the discharge of all claims and interest subject to the effective date occurring except as otherwise expressly provided in the plan."

Then Section 524(a)(2) of the Code provides that the discharge afforded to a debtor "operates as an injunction against the commencement or continuation of an action, the employment process, or an act, to collect, recover, or offset such debt...."

And then the confirmation order contains language mirroring that of Section 524(a)(2) or implementing that. It states in part, again I'm quoting. "All entities who have held, hold or may hold claims or interest ... that have been discharged pursuant to Section 11.7 [of the plan] or are subject to exculpation pursuant to Section 11.6 [of the plan] ... are permanently enjoined, from and after the effective

date, from taking any of the following actions: (a) commending or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such claims or interest ... (d) commencing or continuing in any manner in the action or other proceeding of any kind on account of or in connection with or with respect to any such claims or interest ... discharge pursuant to the plan."

Section 11.6 of the plan "Discharge of Claims and Termination of Interest," and Section 11.7 "Injunction," contain virtually identical language to that in the confirmation order.

As a result of Sections 1141(d)(1) and 524(a)(2) of the Code and the related provisions in the plan and confirmation order, the reorganized Debtors argue that the Fermenich claimants are barred from asserting their claims against the reorganized Debtors in the State Court diacetyl lawsuits. I agree.

The first and most vigorously argued issue before me is whether these are claims at all, that is prepetition claims. At Section 1141(d)(1) only discharges claims that arose prior to the confirmation, it is necessary to first determine when the claimants' claims arose.

Section 1015(a) defines "claim" broadly to include "a right to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured,

unmatured, disputed, undisputed, legal, equitable, secured, or unsecured....” As the Ninth Circuit noted, this definition is “designed to ensure that ‘all legal obligations of the debtor no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.’” California Department of Health Services vs. Jensen (In re Jensen) 995 F.2d 925, 929 (9th Cir. 1993). I’ve left out its citations.

Importantly -- and this is why I have the problems with the arguments that are the principal arguments upon which the Fermenich claimants rely including those that I heard from Mr. McClain this morning -- Judges in this Court have consistently held that claims for injuries resulting from preparation exposure to products alleged to cause tort injuries are prepetition claims. The claim arises at the time of exposure regardless of when the injury manifests or when the claimant receives a formal diagnosis. See In re Chateaugay Corp, 2009 Westlaw 367490 at *6 (Bankr. S.D.N.Y. 2009) (Lifland J.) In re Quigley Company Inc., 383 Br. 19, 27 (Bankr. S.D.N.Y. 2008) (Bernstein J) both holding that if a plaintiff was exposed to asbestos before the petition date, he or she held a prepetition claim.

I must conclude that the claimants’ hold prepetition claims because any exposure of the claimants to diacetyl that was manufactured or sold by the Debtors occurred prepetition. Each of the nine claimants alleges that he or she was exposed

to diacetyl during the course of employment at the Fermenich facility during various time periods starting from 1984 to 2000 and continuing to 2011. The Debtors ceased manufacturing and/or selling diacetyl in 2005, four years prior to filing a chapter 11 petition in this Court. The claimants' claims as to injuries arising from alleged exposure to diacetyl that was manufactured or sold by the Debtors arose at the time of exposure, which under these facts would be 2005 at the latest. Thus, these are prepetition claims.

The rule that claims are discharged under those circumstances is, however, subject to an important qualification, one that's required under the U.S. Constitution. That's a requirement of due process. Though I was surprised and disappointed to see that the Fermenich claimants failed to mention the key case in this area, which is a Supreme Court decision, notwithstanding the language of Section 1141 the discharge of claims without notice violates the due process clause of the United States Constitution. As the Supreme Court held in Mullane vs. Central Hanover Bank and Trust Company, 339 U.S. 306, 314 (1950), "an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is noticed 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. The notice must be of such nature as

reasonably to convey the required information."

The Supreme Court in Mullane went on to note that actual notice is not required in all circumstances to satisfy due process. Rather "in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that ... [is required]." 339 U.S. at 317. See also Dippipo (phonetic) vs. Kmart Corp., 335 Br. 290, 296 (S.D.N.Y. 2005) (Connor J) "It is well settled that when a creditor is 'unknown' to the debtor, publication notice of the claims' bar date is adequate constructive notice sufficient to satisfy due process requirements...." An "unknown" creditor is one whose interests "are either conjectural or future or although they could be discovered upon investigation, do not in due course of business come to knowledge [of the debtor]." Mullane 339 U.S. at 317.

Courts have routinely held that publication notice is sufficient to satisfy due process standards for unknown creditors. See for example, In re Chateaugay Corp., 2009 WL 367490, at *5. That's not, however, to say that any means of publication notice is sufficient. The publication notice must be reasonably calculated to reach interested creditors. See Waterman Steamship Corp. vs. Aguilar, (In re Waterman Steamship corporation), 157 Br. 2290 (S.D.N.Y. 1993). That's why Bankruptcy Judges like me look at the proposed form of notice and we make a judgment as to whether we think that under all

the circumstances it will skin the cat that is whether it's reasonably calculated to achieve the notice that the Constitution and traditional concepts of fairness require. That's why, for example, we had the supplemental noticing scheme here, partly because the Debtors anticipated the need and partly because I wanted to be comfortable that it would do a better job of providing that kind of notice, the notice the way it's very often proposed in large chapter 11 cases.

Here I find that the claimants fall squarely within the definition of unknown creditors because although their interests likely were not conjectural or future at the time of notice, their interests were not discoverable by the debtors in the ordinary course of the Debtors' business. As unknown creditors, actual notice was not required to satisfy due process. Rather, the Debtors only needed to provide publication notice reasonably calculated to reach the claimants as dictated by Waterman and Mullane.

I find that the Debtors' extensive bar date noticing process including specific diacetyl related notices and local publications and postings at various sites, including the Fermenich facility, were sufficient to satisfy due process. As the reorganized Debtors point out in their motion, following that unusually thorough noticing procedure, five individuals employed at the Fermenich facility filed proofs of claim asserting injuries allegedly caused by exposure to diacetyl at

that facility. This lends further support to the finding that notice of the bar date for individuals who worked at the Fermenich facility was sufficient to satisfy the due process standards articulated under Mullane and Waterman.

The claimants make three main objections which I'll deal with now although one of them was largely addressed already. They argued that they could not have been provided with notice reasonably calculated to advise them of their future ability to assert a claim because it wasn't until after the bar date that they received the diagnosis from a doctor telling them that they had injuries caused by diacetyl. The reorganized Debtors respond persuasively that many hundreds of personal injury claimants, including diacetyl claimants, filed proofs of claim based on asserted physical injury without the formality of a doctor's diagnosis, and that these claimants should be held to the same standard. In fact, other individuals who worked at the Fermenich facility and who were represented by Humphrey Farrington did exactly that.

Next, the Fermenich claimants argue that they were denied due process because they didn't receive sufficient notice. They argue that none of the Fermenich claimants ever subscribed to, received or read the Home News Tribune, a newspaper in which supplemental notice was published, nor were they otherwise aware of the bar date or plan of reorganization. But again that runs contrary to what Mullane, which they failed

to address, requires. The standard doesn't turn on whether they actually read the notice, rather the question is whether the notice scheme was reasonably calculated to reach unknown creditors which as I noted previously I find to be the case here.

Further, the Fermenich claimants argue that they can't constitutionally be bound by the discharge injunction because they were denied due processes, there was no future claims representative appointed to represent their interest. A future claims representative was not required here. They correctly rely upon Manful (phonetic) 603 F.3d, 135 (2010) in which the Second Circuit held that Chubb (phonetic) wasn't adequately represented by the asbestos claimants in the proceedings that led the court to approve a nondebtor release of other liability insurers including Travelers, and thus that Chubbs' claims against Travelers for contribution and indemnity were not enjoined. But as the reorganized Debtors point out here Manful isn't on point -- it's a third party release case, not a discharge case, and it involves the Bankruptcy Court's exercise of in persona authority in relation to third party claims against a nondebtor rather than in rem authority dealing with the claims that are asserted against the debtor itself and the debtor's property itself. The motion here invokes this court's in rem jurisdiction.

The applicable authority here as the reorganized

Debtors correctly assert is the bundle of cases such as Chateaugay in which a debtor's discharge against unknown tort claimants was enforced based upon publication notice of the debtor's bar date.

Finally, the parties argue an issue that ultimately is not relevant, whether they were parties to the earlier Humphrey Farrington settlement or not. By reason of what I've held previously I don't need to deal with that issue. To be sure, I must conclude that when they sign their retainer agreements, which is the only evidence I have in the record, and where these agreements are heavily redacted, is not necessarily determinative without knowledge of the extent to which any of the nine folks who are the subject of the motion were represented by Humphrey Farrington or could be found to have done so before they signed those particular pieces of papers. But in light of the other conclusions that follow, I don't need to address what is effectively another string to the reorganized Debtors.

I'm well aware of the fact as argued by Mr. McClain today that when somebody has suffered an injury but doesn't yet know it, there are fairness issues associated with requiring an individual of that circumstance to file a claim even though as the record reflects here, many claimants did exactly that. But nevertheless, as cases like Chateaugay, Quigley, Holmes versus ALPA 745, F.Supp 2d, 176, 196(E.D.N.Y. 2000), Placid Oil,

claims of this character arise at times earlier than the plaintiff may be in a position to sue. I don't write on a clean slate and indeed it could be persuasively argued if Judges could act upon their notions of policy rather than on precedent and case law. It would be difficult for the bankruptcy system to effectively function if the law were any different. But as I've stated many times in writing the interest of predictability that is so important to the commercial community require me to follow the decisions of my colleague Bankruptcy Judges in this district, except at least in cases of manifest error and certainly the decisions by Chief Judges Lifland and Bernstein are hardly of that character. Consistent with their rulings, there were claims here that were capable of being subject to publication notice, it was good, indeed better than average publication notice, the Humphrey Farrington firm had further opportunities to make even greater suggestions and I effectively incorporated anything that I felt was practical to achieve the best notice we could, and the notice did its job.

Accordingly, the Fermenich claimants' claims were discharged and they can't proceed with their pending lawsuit.

Ms. Labovitz, you are to settle an order in accordance with the preceding ruling.

MS. LABOVITZ: Yes, Your Honor.

THE COURT: All right. We're going to take a five

minute recess, maybe ten, enough for me to get my voice back and then we'll continue with the next matter on the calendar. We're in recess.

MS. LABOVITZ: Thank you, Your Honor.

(Proceedings concluded at 11:14 AM)

I N D E X

RULINGS

CERTIFICATION

I, Theresa Pullan, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

AAERT Certified Electronic Transcriber CET**00650

Theresa Pullan

February 3, 2013

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF DEBTORS' MOTION PURSUANT TO 11 U.S.C. §§ 105, 363(b), (f), (k), (m) AND 365, AND FED. R. BANKR. P. 2002, 6004 AND 6006, TO (I) APPROVE (A) THE SALE PURSUANT TO THE MASTER SALE AND PURCHASE AGREEMENT WITH VEHICLE ACQUISITION HOLDINGS LLC, A U.S. TREASURY-SPONSORED PURCHASER, FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS; (B) THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (C) OTHER RELIEF; AND (II) SCHEDULE SALE APPROVAL HEARING

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Other Authorities

General Motors Corporation ("GM") and certain of its subsidiaries, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "Debtors" or the "Company"), submit this Memorandum of Law in Support of Debtors' Motion Pursuant to 11 U.S.C. §§ 105, 363(b), (f), (k), (m) and 365, and Fed. R. Bankr. P. 2002, 6004 and 6006, to (i) Approve (a) the Sale Pursuant to the Master Sale and Purchase Agreement with Vehicle Acquisition Holdings LLC, a U.S. Treasury-Sponsored Purchaser, Free and Clear of Liens, Claims, Encumbrances and Other Interests; (b) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (c) Other Relief; and (ii) Schedule Sale Approval Hearing (the "363 Motion").[1]

PRELIMINARY STATEMENT

There can be no doubt that the Company's decision to enter into the 363 Transaction represents an exercise of sound and prudent business judgment -- the overriding consideration under section 363(b) -- for that transaction represents the *only* available option to preserve and maximize the value of the assets to be sold; to save GM, a lynchpin of the domestic automotive industry; and to ensure its continued existence and viability. The well-documented financial crisis that has befallen the Company since 2008, and that has threatened not only the Company and its nearly quarter of a million workers, but also the jobs of hundreds of thousands of other United States workers and the viability of thousands of businesses that supply or are otherwise dependent upon the Company, has already necessitated billions of dollars of assistance by the U.S. Government. That assistance, however, which to date has sustained the Company's

[1] Capitalized terms not otherwise defined herein have the meanings ascribed thereto in the 363 Motion; the Affidavit of Frederick A. Henderson Pursuant to Local Bankruptcy Rule 1007-2, sworn to on June 1, 2009 (the "First Day Affidavit" or "Henderson Affidavit"), filed contemporaneously with the 363 Motion; or the proposed Master Sale and Purchase Agreement among the Debtors (the "Sellers") and Vehicle Acquisition Holdings LLC (the "Purchaser"), a purchaser sponsored by the U.S. Treasury, dated June 1, 2009 (the "MPA").

operations (and, thus, avoided both the Company's and an industry-wide failure), is *not* committed going forward: that is, there will be no additional Government assistance (either inside or outside of chapter 11) *unless* the 363 Transaction is expeditiously approved. And, absent such Governmental assistance, there is no viable alternative at all to preserve the Company's business.

Absent approval of the 363 Transaction, the Company will be forced to liquidate, yielding only a fraction of the value that the assets subject to the sale have as a going concern. A liquidation will result in virtually all of the proceeds going to satisfy, in part or fully, the billions of dollars of secured loans to GM. That scenario will not only result in significantly lesser recoveries by the Company's creditors, but also drastic consequences for its customers, current, and even former, employees, suppliers and dealers -- and, in turn, the overall United States automotive industry and the Midwest and national economies. Chapter 11 -- including section 363(b) -- is designed, and repeatedly has been applied, precisely to avoid this result. As noted in *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723 (Bankr. S.D.N.Y. 1992), the "'fundamental purpose of reorganization is to prevent [the] debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.'" *Id.* at 760 (quoting *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984)).

In short, the 363 Transaction -- and *only* the 363 Transaction -- avoids systemic failure and provides a genuine opportunity for the business to survive and thrive in an economically viable entity, and, in the process, to maximize value for all of its stakeholders and stabilize and foster both consumer and market confidence. There simply is *no* other alternative: there is no other purchaser to buy the business; no investor to capitalize the business; no other financing source for the long term; not even another source to provide financing for a chapter 11

case. The Debtors therefore request that the Court approve the 363 Transaction expeditiously and ensure, in the words of President Obama, that "the cars of the future are built where they've always been built -- in Detroit and across the Midwest -- to make America's auto industry in the 21st century what it was in the 20th century -- unsurpassed around the world." Barack H. Obama, U.S. President, Remarks on the American Automotive Industry, at 7 (Mar. 30, 2009).

STATEMENT OF FACTS

The Debtors refer the Court to, and expressly incorporate herein, the factual background set forth in the 363 Motion and the Henderson Affidavit, as well as the supporting declarations of J. Stephen Worth of Evercore Group LLC (the "Worth Declaration"), William C. Repko of Evercore Group LLC (the "Repko Declaration") and Albert A. Koch of AlixPartners, LLP (the "Koch Declaration"), each sworn to on May 31, 2009.

ARGUMENT

I. THE 363 TRANSACTION IS AN EXERCISE OF SOUND BUSINESS JUDGMENT AND SHOULD BE APPROVED UNDER SECTION 363(b)

It is axiomatic that going concern value exceeds liquidation value. Thus, it is in the best interests of all stakeholders that, whenever possible, avoidance of liquidation and preservation of going concern value, and the preservation of a business, jobs and correlated interests, should be the objectives of any bankruptcy case. *See In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723, 759-60 (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984)). *See also Reading Co. v. Brown*, 391 U.S. 471, 475 (1968) ("[T]he words 'preserving the estate' include the larger objective . . . of operating the debtor's business with a view to rehabilitating it"); *In re Global Serv. Group, LLC*, 316 B.R. 451, 460 (Bankr. S.D.N.Y. 2004) ("[C]hapter 11 is based on the accepted notion that a business is worth more to everyone alive than dead") (citations omitted); *In re WorldCom, Inc.*, 2003 WL 23861928, at *51 (Bankr.

S.D.N.Y. Oct. 31, 2003) (same); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989) ("[T]he paramount policy and goal of Chapter 11, to which all other bankruptcy policies are subordinated, is the rehabilitation of the debtor").

The 363 Transaction achieves the objectives of enhancing value and preserving a business that is a critically important part of the national economy, thereby avoiding liquidation and, thus, comporting with the essential purpose of chapter 11:

> The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. *The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap.* Often, the return on assets that a business can produce is inadequate to compensate those who have invested in the business. Cash flow problems may develop, and require creditors of the business, both trade creditors and long-term lenders, to wait for payment of their claims. If the business can extend or reduce its debts, it often can be returned to a viable state. *It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets.*

H.R. Rep. No. 95-595, at 220, *reprinted in*, 1978 U.S.C.C.A.N. 5963, 6179 (emphasis added); *see also* 7 Collier on Bankruptcy ¶ 1100.01 (15th ed. rev. 2008) ("Chapter 11 embodies a policy that it is generally preferable to enable a debtor to continue to operate and to reorganize its business rather than simply to liquidate a troubled business. Continued operation may enable the debtor to preserve any positive difference between the going concern value of the business and the liquidation value. Moreover, continued operation can save the jobs of employees, the tax base of communities, and generally reduce the upheaval that can result from termination of a business").

Against this backdrop, the authority for the 363 Transaction, which enables the Company to sell its major assets as a going concern, rather than simply liquidating them, is clear

in the Bankruptcy Code and under the cases. *See, e.g., Fla. Dep't of Revenue v. Piccadilly Cafeteria, Inc.*, 128 S. Ct. 2326, 2331 n.2 (2008) (recognizing that debtors often sell "substantially all of [their] assets as a going concern" and then "submit[] for confirmation a plan of liquidation . . . providing for the distribution of the proceeds resulting from the sale"). Specifically, section 363(b) authorizes a debtor to sell assets other than in the ordinary course of business by providing, in relevant part, that "[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1); *see also* 11 U.S.C. § 1107(a) (providing that debtors in possession have "all the rights . . . of a trustee"); Fed. R. Bankr. P. 6004(f)(1) (providing that "[a]ll sales not in the ordinary course of business may be by private sale or by public auction").

Although section 363(b) states the general principle that debtors in possession may sell property of the estate outside of the ordinary course of business, it does not set forth a standard for determining when it is appropriate for a court, in an exercise of its sound discretion, to authorize such a sale or other disposition of a debtor's assets. Courts in the Second Circuit (and elsewhere) have required that the decision to sell assets outside the ordinary course of business be based on the sound business judgment of the debtor. *See Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 466 (2d Cir. 2007) (holding that an asset sale under section 363(b) "is permissible if the 'judge determining the . . . application expressly find[s] from the evidence presented before [him or her] at the hearing [that there is] a good business reason to grant such an application'") (quoting *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983)); *Consumer News & Bus. Channel P'ship v. Fin. News Network Inc. (In re Fin. News Network Inc.)*, 980 F.2d 165, 169 (2d Cir. 1992) (same); *Official Comm. of Unsecured Creditors of LTV Aerospace &*

Defense Co. v. LTV Corp. (In re Chateaugay Corp.), 973 F.2d 141, 143 (2d Cir. 1992) (same); *In re Global Crossing Ltd.*, 295 B.R. 726, 743 (Bankr. S.D.N.Y. 2003) (same); *In re Ionosphere Clubs, Inc.*, 100 B.R. 670, 675 (Bankr. S.D.N.Y. 1989) (same); *see also In re Lionel*, 722 F.2d at 1069, 1071 (holding that, in considering a section 363(b) motion, "a bankruptcy judge must not be shackled with unnecessarily rigid rules when exercising the undoubtedly broad administrative power granted him under the Code," but must simply find a "good business reason" supporting the proposed transaction).

Nor will courts second-guess a reasonably founded business judgment in the context of section 363(b). As Judge Lifland stated in *Committee of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612 (Bankr. S.D.N.Y. 1986), "[w]here the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct." *Id.* at 616. When a valid business justification exists, the law vests the debtor's decision to sell or otherwise dispose of assets outside the ordinary course of business with a strong presumption that the debtor's management and directors, in approving the sale or other disposition, "'acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'" *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkum*, 488 A.2d 858, 872 (Del. 1985)), *appeal dismissed*, 3 F.3d 49 (2d Cir. 1993); *see also In re Integrated Res.*, 147 B.R. at 656 (holding that the Delaware business judgment rule has "vitality by analogy" in chapter 11, especially where the debtor is a Delaware corporation) (quotations omitted). The burden of rebutting this presumption falls to parties opposing the proposed exercise of a debtor's business judgment. *See In re Integrated*

Res., 147 B.R. at 656 (citing *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). And, that burden is heavy indeed, for the business judgment rule defers to a board decision that can be "attributed to any rational business purpose." *Williams v. Geier*, 671 A.2d 1368, 1378 & n.20 (Del. 1996). Here, under any analysis, it would be irrational *not* to enter into the 363 Transaction.

Just as the decision to engage in a sale or other disposition at all is, in the end, a business judgment, so, too, is the decision regarding the timing of that transaction. *See, e.g.*, *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 126 F.3d 380, 387 (2d Cir. 1997) (holding that an early sale is permissible "if a good business purpose exists to support it") (citation omitted). Indeed, circumstances often exist where, and the courts repeatedly have upheld debtors' business judgments that, such a transaction in the earliest days of a chapter 11 case is necessary (and especially, as here, critical) to the ultimate success of the reorganized business. For example, courts frequently approve sales, in a wide range of businesses, where the debtor's assets -- and future prospects -- are rapidly deteriorating. In fact, this Court, on a number of recent occasions, has approved the sale or transfer of all or substantially all of a debtor's assets in the very early stages of a chapter 11 case. *See, e.g.*, *In re Lehman Bros. Holdings, Inc.*, 2009 WL 667301, at *8 (S.D.N.Y. Mar. 13, 2009) (affirming bankruptcy court's approval of sale of debtors' investment banking business three days after the filing of sale motion); *see also In re Steve & Barry's Manhattan LLC*, Case. No. 08-12579 (Bankr. S.D.N.Y. Aug. 22, 2008) (order attached hereto as Exhibit A) (approving sale of debtors' entire retail business 45 days after filing); *In re Refco, Inc.*, Case No. 05-60006 (Bankr. S.D.N.Y. Nov. 14, 2005) (order attached hereto as Exhibit B) (approving sale of regulated commodities futures merchant bank 28 days after commencement of bankruptcy case).

Moreover, the Second Circuit has stressed that "perishability" of assets is not the *sine qua non* for approval. *See In re Lionel*, 722 F.2d at 1070 (specifically approving the decision in *In re Sire Plan, Inc.*, 332 F.2d 497, 499 (2d Cir. 1964)). In *In re Sire*, the debtors' sale of their principal asset -- a partially completed hotel -- was approved because, according to the Second Circuit in *Lionel*, "a good business opportunity was presently available, so long as the parties could act quickly." *In re Lionel*, 722 F.2d at 1069. *A fortiori*, approval is appropriate where perishability and timing *are* substantial factors, as the courts so hold. *See*, *e.g.*, *In re Andy Frain Servs., Inc.*, 798 F.2d 1113, 1128 (7th Cir. 1986) (affirming sale order with respect to substantially all of the debtor's assets where lower court, "under very difficult circumstances, showed great concern for salvaging [the debtor] and protecting the jobs of its numerous employees"); *Ready v. Rice*, 2006 WL 4550188, at *3 (D. Md. Sept. 26, 2006) (the "fast-deteriorating condition" of the debtor's property "called for a prompt sale"); *In re Trans World Airlines, Inc.*, 2001 WL 1820326, at *14 (Bankr. D. Del. Apr. 2, 2001) ("Given TWA's precarious financial history, . . . a rejection or denial of the Sale Motion would have resulted in an immediate and precipitous decline in the financial affairs of TWA with a very high probability, if not certainty, of liquidation"); *see also Piccadilly*, 128 S. Ct. at 2342 ("[O]ne major reason why a transfer may take place before rather than after a plan is confirmed is that the preconfirmation bankruptcy process takes time. . . . And a firm (or its assets) may have more value (say, as a going concern) where a sale takes place quickly. . . . Thus, an immediate sale can often make more revenue available to creditors or for reorganization of the remaining assets") (Breyer, J., dissenting).

The public (and not merely the debtor's) interest in avoiding the enormous impact of the failure of a major corporation -- even when far less dramatic in its systemic impact upon

an entire industry or the national economy than a failure of GM -- also has been appropriately taken into account not only by the boards of directors of chapter 11 debtors, but by courts considering whether to approve proposed sale transactions. As the court observed in *In re Trans World Airlines*:

> [T]here is a substantial public interest in preserving the value of TWA as a going concern and facilitating a smooth sale of substantially all of TWA's assets to American. This includes the preservation of jobs for TWA's 20,000 employees, the economic benefits the continued presence of a major air carrier brings to the St. Louis region, and preserving consumer confidence in purchased TWA tickets American will assume under the sale. I also believe the Sale Order implements the public interest that favors an organized rehabilitation . . . of a financially distressed corporation which lies at the core of chapter 11. I conclude that the alternative to the Sale Order in this case is a free-fall chapter 11 leading to a liquidation with the subsequent substantial disruption of diverse economic relationships and likelihood of material adverse harm to a very broad spectrum of creditor constituencies.

2001 WL 1820326, at *14. The billions of dollars that the Government has provided and the further billions that it is willing to provide to the Company if -- but *only* if -- the 363 Transaction is approved is eloquent and compelling proof of the Government's belief that the Company's business can be rehabilitated, and its recognition of the dire need for and national interest in this transaction.

A. The 363 Transaction Is The Only Alternative To Preserve Value And Obtain The U.S. Government Support Necessary For The Company To Finance Its Operations

As discussed above and at length in the 363 Motion and the Henderson Affidavit, nothing could be more exigent or precarious than the Debtors' current financial posture. Indeed, to say that the 363 Transaction at this time, to be followed by plan confirmation, is a "sound business judgment" would be the quintessential understatement. The Debtors have simply run out of money; they owe billions of dollars that they cannot repay; and, for obvious reasons, they

are therefore completely unable to continue operating their business absent the 363 Transaction. Indeed, since December 2008, the Debtors have relied exclusively on Government funding (more than $19 billion in the aggregate) to prevent the sudden termination of the Company's operations. *See* Henderson Aff. ¶¶ 102-05. But that funding, absent the 363 Transaction, is no longer committed.

In addition, the Company's efforts to find an alternative to the sale have confirmed what was already obvious: there are *no* other lenders or investors willing or able to invest in the Company, whether as debtor in possession financing or otherwise. This is not surprising, given that the U.S. Treasury possesses a first priority security interest in substantially all of GM's unencumbered assets and a junior lien on GM's encumbered assets. *See id.* at ¶ 103. Moreover, the Debtors' obligations to the Government, which were not scheduled to mature until December 30, 2011, have become almost immediately due and payable as a result of the Government's failure to certify the Debtors' restructuring (or "viability") plan by the June 1, 2009 deadline. *See id.* at ¶ 58. Specifically, pursuant to the terms of the loan facilities, GM agreed, on or before March 31, 2009 (which date was later extended to June 1, 2009), to submit to the Auto Task Force a written certification and report detailing the progress it had made in implementing its restructuring efforts and any deviations from its restructuring targets (together with an explanation as to why such deviations did not jeopardize the Company's long-term viability). *See id.* Upon reviewing that report, if the Auto Task Force was unable to conclude that the Company had taken all necessary steps to achieve and sustain its long-term viability, international competitiveness and energy efficiency, advances under the Government loan facilities would become due and payable on the 30th day thereafter. *See id.*

The 363 Transaction is the *only* alternative to a liquidation and, thus, is certainly a good alternative for the Company's stakeholders. And, it simultaneously provides a genuine opportunity to let the Company's business survive and thrive as a viable entity: it is designed to optimize New GM's ability to compete immediately and successfully on a global basis -- the prerequisite for additional billions of dollars of Government financing and related support, as well as the Government's forbearance with respect to the more than $19 billion already extended under (and secured by) the existing facilities. *See* Henderson Aff. ¶¶ 14-15, 74-76 (explaining that the U.S. Government is *not* willing to provide financing in any other scenario but the 363 Transaction). The 363 Transaction ensures continued financing (particularly given the Government's substantial interest in GM) and, thus, permits maximization of the value of the Debtors' assets, while, at the same time, enabling the business to be sold and continue operations without the current financial and operating distress and free of bankruptcy, as part of an immediately viable going concern.

B. The 363 Transaction Is Also Justified Because It Avoids The Dire Consequences Of A Liquidation

The 363 Transaction is critical to the Debtors' ability to curb the rapidly decreasing value of the Purchased Assets and maintain vital integrated relationships with existing and potential customers, current and former employees, suppliers, dealers and partners (the loss of any of which would significantly and likely permanently impair the Company's business and future prospects, even putting aside the impact of the rapid decline in global vehicle sales). *See generally* Henderson Aff. ¶¶ 82-96. For example, a protracted bankruptcy process, among other things, would:

- dramatically and irreversibly erode sales and GM's market share. It will substantially erode customers' confidence in GM's ability to stay in business, provide parts and service over the long-term, ensure the availability of warranty coverage or maintain

acceptable resale values, all of which will result in a significant, precipitous and irreversible decline in GM's sales, global revenues, profitability and cash flow;

- endanger the viability of GM's dealers and suppliers that depend on volume sales to GM, causing systemic failures;
- distract managerial and union employees from the performance of their duties or, worse yet, cause them to seek other job opportunities, while, at the same time, rendering it extremely difficult, if not impossible, to attract new employees;
- lead many of GM's suppliers, dealers and partners (including certain joint-venture partners) to terminate their relationships with GM, require financial assurances or enhanced performance, or refuse to provide trade credit on the same terms as the bankruptcy cases; and
- foreclose GM's ability to obtain debtor in possession financing sufficient to sustain operations during case administration, which likely would force the Debtors' liquidation.

See generally Henderson Aff. ¶¶ 82-96. The 363 Transaction, pursuant to which New GM would continue to operate the Debtors' business freed of any taint of bankruptcy (in exchange for consideration to the Company), is intended to address the foregoing concerns and, among other things, stabilize and foster the dealer and supplier networks that are crucial to the success and restoration of consumer and market confidence. At the same time, the 363 Transaction maximizes the value of the Company's business for the benefit of all of the Debtors' economic stakeholders.

The 363 Transaction makes not just good, but overwhelming business sense, as it: (i) saves one of the largest and most important global businesses from the almost certain risk of a near term liquidation, which would minimize (rather than maximize) the value of the assets -- and which would have extraordinary, if not incalculable, systemic economic and societal consequences not only to the Company's customers, employees, suppliers and dealers, but also to the entire automotive industry, the Midwest and the overall United States economy; (ii) saves countless smaller businesses and their tens (if not hundreds) of thousands of jobs in the process;

and (iii) creates a new entity with the operational and balance sheet flexibility to compete successfully (and, thus, generate substantial value) going forward (with the most fundamental benchmark, as indicated by the Government, being the near term generation of positive cash flow and an adequate return on capital). As Judge Peck observed this past September in approving the sale of Lehman Brothers' North American business within a week of the filing of Lehman Brothers' chapter 11 case:

> I am completely satisfied that I am fulfilling my duty as a United States bankruptcy judge in approving this transaction and in finding that there is no better alternative transaction for these assets, that the consequences of not approving a transaction could prove to be truly disastrous, and those adverse consequences are meaningful to me as I exercise this discretion. The harm to the debtor, its estates, the customers, creditors, generally, the national economy, and the global economy could prove incalculable.
>
> * * *
>
> And so, as to those objectors who say it would be establishing bad precedent to approve this transaction, I say no. This is not bad precedent. To the contrary. It's an extraordinary example of the flexibility that bankruptcy affords under circumstances such as this. It's an example that creative minds working diligently day and night even under the worst of circumstances can create remarkably complicated transactions that preserve value. I am proud to have been part of this process.

In re Lehman Bros. Holdings Inc., Case No. 08-13555 (Bankr. S.D.N.Y. Sept. 19, 2008), Transcript of Sale Approval Hearing, at 250, 252 (excerpts attached hereto as Exhibit C). The same can be said even more strongly here, which, like *Lehman Brothers*, is the extraordinary case where the outcome will have consequences extending far beyond the particular transaction at issue.

C. <u>The Debtors Have Satisfied All Of The Other Section 363(b) Factors</u>

Given the Debtors' sound business justification for the proposed sale, the inquiry turns to whether: (i) adequate and reasonable notice of the sale has been provided to interested

parties; (ii) the purchase price is fair and reasonable; and (iii) the sale has been proposed in good faith. *See Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983); *In re Betty Owens Sch., Inc.*, 1997 WL 188127, at *4 (S.D.N.Y. Apr. 17, 1997); *accord In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991); *In re Decora Indus., Inc.*, 2002 WL 32332749, at *3 (D. Del. May 20, 2002). *See also* 3 Collier on Bankruptcy ¶ 363.02[3] (15th ed. rev. 2008) ("It is now generally accepted that section 363 allows [sales of substantial assets] in chapter 11, as long as the sale proponent demonstrates a good, sound business justification for conducting the sale before confirmation (other than appeasement of the loudest creditor), that there has been adequate and reasonable notice of the sale, that the sale has been proposed in good faith, and that the purchase price is fair and reasonable. These factors are considered to assure that the interests of all parties in interest are protected and that the sale is not for an illegitimate purpose"). These factors are all satisfied here.

As to the adequacy of notice, the U.S. Supreme Court has repeatedly emphasized the flexibility of the due process requirement. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands"). An "elementary and fundamental requirement of due process . . . 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." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Baker v. Latham Sparrowbush Assocs.*, 72 F.3d 246, 254 (2d Cir. 1995) ("If a party receives actual notice that apprises it of the pendency of the action and affords an opportunity to respond, the due process clause is not

offended"); *In re Drexel Burnham Lambert Group Inc.*, 995 F.2d 1138, 1144 (2d Cir. 1993) ("[T]he Due Process Clause requires the best notice practical under the circumstances"). Constitutional requirements of due process will have been satisfied if notice was given with "due regard for the practicalities and peculiarities of the case." *Mullane*, 339 U.S. at 314-15.

Any suggestion that the notice that the Debtors intend to provide here is inadequate, in light of the exigencies of the situation and the well-publicized facts pre-dating the filing, would defy credulity.[2] No trustee, examiner or statutory creditors' committee has been appointed yet in these chapter 11 cases. Accordingly, pursuant to the Debtors' proposed notice procedures, the Debtors intend to serve notice of the 363 Motion, and an opportunity to be heard with respect to the same, on:

- the attorneys for the U.S. Treasury;
- the attorneys for Export Development Canada;
- the attorneys for the agent under the Debtors' prepetiton secured term loan agreement;
- the attorneys for the agent under the Debtors' prepetition amended and restated secured revolving credit agreement;
- the attorneys for the Creditors Committee (and, if no statutory committee of unsecured creditors has been appointed, the holders of the 50 largest unsecured claims against the Debtors on a consolidated basis);
- the attorneys for the UAW;

[2] For example, in April 2009, as part of its overall restructuring efforts, GM launched a public exchange offer for approximately $27 billion of its unsecured bonds ("Exchange Offer") -- conditioned on the receipt of tenders representing at least 90% of the aggregate principal amount of the outstanding notes -- which was intended to provide a means to support GM's future success, while enabling it to continue operating outside of chapter 11 (and thereby obviate the risk of a potentially precipitous decline in revenues that would result from a prolonged bankruptcy case). *See* Henderson Aff. ¶¶ 71-73. The terms of the Exchange Offer, GM's rationale for launching it and the likely consequences in the event of insufficient tenders (including the commencement of these chapter 11 cases) were set forth in detail in a registration statement on Form S-4 that was filed with the Securities and Exchange Commission (the "SEC") on April 27, 2009 -- and the likelihood of a chapter 11 filing and the 363 Transaction were then emphasized in the filing of an amended registration statement on Form S-4/A that was filed with the SEC on May 14, 2009.

- the attorneys for the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers—Communications Workers of America;
- the U.S. Department of Labor;
- the attorneys for the National Automobile Dealers Association;
- the attorneys for the ad hoc bondholders committee;
- any party who, in the past three years, expressed in writing to the Debtors an interest in the Purchased Assets and who the Debtors and their representatives reasonably and in good faith determine potentially have the financial wherewithal to effectuate the transaction contemplated in the MPA;
- non-Debtor parties to the Assumable Executory Contracts;
- all parties who are known to have asserted any lien, claim, encumbrance or interest in or on the Purchased Assets;
- the SEC;
- the Internal Revenue Service;
- all applicable state attorneys general, local environmental enforcement agencies and local regulatory authorities;
- all applicable state and local taxing authorities;
- the Federal Trade Commission;
- the U.S. Attorney General/Antitrust Division of the Department of Justice;
- the U.S. Environmental Protection Agency and similar state agencies;
- the United States Attorney's Office;
- all dealers with current agreements for the sale or leasing of GM brand vehicles;
- the Office of the United States Trustee for the Southern District of New York;
- all entities that requested notice in these chapter 11 cases under Bankruptcy Rule 2002; and
- all other known creditors and equity security holders of the Debtors.

In addition, the Debtors propose, pursuant to Bankruptcy Rules 2003(d) and 2002(l), that publication notice with respect to the 363 Motion be effected in the global edition of *The Wall Street Journal*, the national edition of *The New York Times*, the global edition of *The Financial Times*, the national edition of *USA Today*, the *Detroit Free Press/Detroit News*, *Le Journal de Montreal*, the *Montreal Gazette*, *The Globe and Mail* and *The National Post*, as well as on the website of the Debtors' claims and noticing agent, The Garden City Group, Inc., at <http://www.gmcourtdocs. com>.

The Debtors submit that no other or further notice need be given, particularly given the publicity that, for months, has surrounded, among other things, the deterioration of the Company's business and the Company's consideration, in conjunction with the U.S. Treasury and the Auto Task Force, among others, of its strategic options -- not to mention the publicity attendant to the commencement of the Debtors' chapter 11 cases.[3] In fact, given such publicity, it is an absolute certainty (irrespective of the additional notice that the Debtors intend to provide) that the Debtors' largest creditors have already retained counsel and, with the assistance of such counsel and other sophisticated advisors, have long been evaluating the Debtors' financial condition; addressing (and rejecting) their own role as purchasers, investors or financing sources; and evaluating the proposed sale -- all rendering additional notice (particularly in the present circumstances) unnecessary. For the very same reasons, the Debtors also submit that their proposed Sale Procedures to govern the submission of any competing offers based on the MPA are also appropriate and, under the circumstances, will enable the Debtors to realize the maximum value from the sale of the Purchased Assets.

[3] For proof of the same, the Court need only take judicial notice of the media coverage surrounding Chrysler's recent bankruptcy filing, which was preceded and then immediately followed by articles on the first page of virtually every major newspaper across the country, thousands upon thousands of business wires from every major outlet, and lead coverage on every major network and cable news broadcast.

Further, the Debtors have proposed a hearing date on the 363 Motion of June 30, 2009, with an objection deadline 11 days earlier, which affords all parties in interest a 19-day period to review the 363 Motion and the Debtors' related disclosures and evaluate, prepare and file any objections thereto. That notice period easily comports with recent precedent in this Court approving, for example, significantly shorter notice periods of two, three and 12 days. *See, e.g.*, *In re Lehman Bros.*, Case No. 08-13555 (Bankr. S.D.N.Y. Sept. 17, 2008) (order attached hereto as Exhibit D) (allowing two days for objections and permitting oral objections at September 19, 2008 sale approval hearing); *In re BearingPoint, Inc.*, Case No. 09-10691 (Bankr. S.D.N.Y. Apr. 7, 2009) (order attached hereto as Exhibit E) (allowing three days for objections and scheduling sale approval hearing for 10 days later (April 17, 2009)); *In re Chrysler LLC*, Case No. 09-50002 (Bankr. S.D.N.Y. May 7, 2009) (order attached hereto as Exhibit F) (allowing 12 days for objections and scheduling sale approval hearing for eight days later (May 27, 2009)).[4]

As to the sufficiency of the Purchaser's purchase price, there can be no debate that the 363 Transaction will enable the Debtors to realize the greatest value for the Purchased Assets. Simply put, not a single offer, request for information or expression of interest -- with respect to acquiring the Company or its business or providing all or part of the financing necessary for it to survive (either inside or outside of chapter 11) -- has been received from any

[4] *See also In re Haven Eldercare, LLC*, 390 B.R. 762, 769-70 (Bankr. D. Conn. 2008) (under "unique and extraordinary circumstances," cause existed for shortening to two days the 20-day notice period to approve sale to credit bidder where debtors were in "financial extremis," value of assets was deteriorating, debtors were unable to find cash purchaser to bring into auction process, and there was "no credible evidence to support a claim that additional notice might materially enhance the outcome for any . . . constituency"); *Apex Oil Co. v. Vanguard Oil & Serv. Co. (In re Vanguard Oil & Serv. Co.)*, 88 B.R. 576, 580 (E.D.N.Y. 1988) (holding that bankruptcy court acted within its discretion in approving sale despite objection to improper notice where delay risked decreasing value of all assets in estate and appellant failed to demonstrate how it was materially prejudiced by alleged due process violation).

other potential purchaser, equity investor or lender. *See* Worth Aff. ¶¶ 20-24, 30; *see also* Repko Aff. ¶¶ 24-29, 31-35.

Of course, the lack of such interest is not (and, even after the Debtors' requested notice period, cannot be) at all surprising, given the publicity surrounding the Company's (and the entire automotive industry's) poor and continually deteriorating sales and financial performance, its operational and structural challenges (on the labor, product brand, dealership and various other fronts), and the impact of the global recession on the Company and other domestic auto manufacturers -- and GM's outstanding obligation to repay to the U.S. Treasury more than $19 billion of secured loans. The failure of *any* other potential purchaser, investor or financier to come forward over the past several months is compelling support for the 363 Transaction and demonstrates that there is no alternative, as the Company cannot survive any delay in administration. *See*, *e.g.*, *In re Tempo Tech. Corp.*, 202 B.R. 363, 370 (D. Del. 1996) (dismissing appeal from bankruptcy court's approval of sale of substantially all of chapter 11 debtor's assets and holding that "[w]ithout a sizeable pool of potential buyers, with only one buyer willing to negotiate terms of a purchase, and the [d]ebtor's severe cash flow predicament, the bankruptcy court did not err when it approved the sale," which it agreed was negotiated in good faith; "combined with the [d]ebtor's cash crunch, the lack of other companies engaged in th[e] industry weighed heavily in justifying an expeditious sale . . . as a going concern").

Moreover, even putting aside the complete lack of third-party interest in either purchasing or investing in GM, the consideration being paid by the U.S. Treasury here provides value that dwarfs the value that would be expected to be received in a liquidation (*i.e.*, $6.5 billion to $9.7 billion, after accounting for liquidation costs of $2.0 billion to $2.7 billion (*see* Koch Decl. at 7)) -- which only underscores the fairness of the proposed sale terms. And, while

the Company's secured creditors would receive some distribution in a liquidation -- namely, recoveries ranging from 26.3% to 77.1% for GM's secured bank lenders and 12.7% to 23.7% for the U.S. Treasury -- the Company's unsecured creditors, in contrast to the 363 Transaction, would receive *nothing* in that scenario. *See id.*

In sum, the 363 Transaction is the result of arm's length, good faith negotiations by and between the Debtors and the U.S. Treasury, as sponsor. Moreover, the Company, despite significant efforts, has been unable to identify any viable alternative to the 363 Transaction, either inside or outside of chapter 11, and therefore made the reasonable business judgment to negotiate and sell the Purchased Assets. And, the MPA is the "product of an arm's length transaction," *In re WBQ P'ship*, 189 B.R. 97, 102, 103 (Bankr. E.D. Va. 1995), that encompassed negotiated concessions from the UAW and VEBA representatives to modify, and make significantly less onerous, the CBA and VEBA settlement. *See* Henderson Aff. ¶¶ 17-18, 76; *see also In re Gucci*, 126 F.3d at 390 (holding that good faith is destroyed by "'fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders'" -- but not by "hard bargaining" by the purchaser) (quoting *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978)); *Kabro Assocs. of W. Islip, LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.)*, 111 F.3d 269, 276 (2d Cir. 1997) (same).

II. THE 363 TRANSACTION SHOULD BE APPROVED FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS

Pursuant to section 363(f) of the Bankruptcy Code, a debtor may sell property of the estate under section 363(b) "free and clear of any interest in such property of an entity other than the estate" if any one of the following conditions is satisfied:

- applicable nonbankruptcy law permits the sale of such property free and clear of such interest;

- such entity consents;
- such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- such interest is in bona fide dispute; or
- such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). *See In re Smart World Tech. LLC*, 423 F.3d 166, 169 n.3 (2d Cir. 2005) ("Section 363 permits sales of assets free and clear of claims and interests. It thus allows purchasers . . . to acquire assets [from a debtor] without any accompanying liabilities"); *In re Dundee Equity Corp.*, 1992 WL 53743, at *4 (Bankr. S.D.N.Y. Mar. 6, 1992) ("Section 363(f) is in the disjunctive, such that the sale of the interest concerned may occur if any one of the conditions of § 363(f) have been met").[5]

Pursuant to the 363 Motion, and in order to permit a viable New GM, the Debtors request that the Court authorize the 363 Transaction free and clear of all liens, claims, encumbrances and other interests, other than the liabilities expressly assumed by the Purchaser, as set forth in the MPA. The 363 Transaction will satisfy section 363(f) because any entities holding an interest in the Purchased Assets will have received notice and have been afforded a sufficient opportunity to object to the requested relief. Any such entity that does not object should be deemed to have consented. As the Seventh Circuit aptly explained in *Futuresource LLC v. Reuters Ltd.*, 312 F.3d 281 (7th Cir. 2002):

> It is true that the Bankruptcy Code limits the conditions under which an interest can be extinguished by a bankruptcy sale, but one

[5] In addition, section 105(a) of the Bankruptcy Code authorizes bankruptcy courts to "issue any order . . . that is necessary or appropriate to carry out the provisions of this title," 11 U.S.C. § 105(a); and, that authority, separate and apart from section 363(f), extends to the approval of asset sales free and clear of all claims and liabilities. *See, e.g., In re White Motor Corp.*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) (holding that the court's power to approve a sale free and clear of tort claims originated from section 105(a), rather than section 363(f), subject only to the limits on the court's power to discharge claims under section 1141).

> of those conditions is the consent of the interest holder, and lack of objection (provided of course there is notice) counts as consent. It could not be otherwise; transaction costs would be prohibitive if everyone who *might* have an interest in the bankrupt's assets had to execute a formal consent before they could be sold.

Id. at 285-86 (internal citations omitted) (emphasis in original); *see also In re Enron Corp.*, 2003 WL 21755006, at *2 (Bankr. S.D.N.Y. July 28, 2003) (order deeming all parties who did not object to proposed sale to have consented under section 363(f)(2)); *Hargrave v. Township of Pemberton (In re Tabone, Inc.)*, 175 B.R. 855, 858 (Bankr. D.N.J. 1994) (failure to object to sale free and clear of liens, claims and encumbrances satisfies section 363(f)(2)); *Citicorp Homeowners Serv., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988) (same). As such, to the extent that no party holding a lien, claim, encumbrance or other interest objects to the relief requested in the Sale Order, the sale of the Purchased Assets free and clear of all such interests, except for any liabilities expressly assumed by the Purchaser, satisfies section 363(f)(2).

Moreover, to the extent a specific lien, claim, encumbrance or other interest does not satisfy the consent requirement of section 363(f)(2), such lien, claim, encumbrance or other interest satisfies one or more of the other conditions set forth in section 363(f) and will be adequately protected by attachment to the net proceeds of the sale, or interest will be adequately protected by attachment to the net proceeds of the sale, subject to any claims and defenses the Debtors may possess with respect thereto. For example, each of the parties holding liens on the Purchased Assets could be compelled to accept a monetary satisfaction of such interests, satisfying sections 363(f)(5).

In addition, the Purchased Assets may be sold free and clear of all successor liability claims. Notwithstanding reference to the conveyance free and clear of "any interest" in section 363(f), that section has been interpreted to allow the sale of a debtor's assets free and

clear of successor liability claims, as well. *See, e.g., In re Trans World Airlines, Inc.*, 322 F.3d 283, 288-90 (3d Cir. 2003) (sale of assets pursuant to section 363(f) barred successor liability claims for employment discrimination and rights under travel voucher program); *see also Am. Living Sys. v. Bonapfel (In re All Am. of Ashburn, Inc.)*, 56 B.R. 186, 189-90 (Bankr. N.D. Ga. 1986) (sale pursuant to section 363(f) barred successor liability for product defects claims), *aff'd*, 805 F.2d 1515 (11th Cir. 1986); *Rubinstein v. Alaska Pac. Consortium (In re New English Fish Co.)*, 19 B.R. 323, 328 (Bankr. W.D. Wash. 1982) (sale pursuant to section 363(f) was free and clear of successor liability claims for employment discrimination and civil rights violations).

Accordingly, the Purchased Assets should be transferred to the Purchaser free and clear of all liens, claims, encumbrances and other interests, including rights or claims based on any successor or transferee liability, and other than any liabilities expressly assumed by the Purchaser, with such interests to be transferred and to attach to the net sale proceeds from the Purchased Assets or satisfied as may be agreed upon by the parties.

III. THE 363 TRANSACTION IS NOT A *SUB ROSA* PLAN

The MPA does not dictate the terms of a plan of reorganization, as it does not attempt to dictate or restructure the rights of creditors. Indeed, the courts have made clear that a section 363(b) sale transaction is not objectionable as a *sub rosa* plan based on the fact that the purchaser is to assume some but not all of the debtor's liability, or because some creditors may benefit disproportionately compared with others whose claims are not being assumed by the purchaser. *See, e.g., In re Trans World Airlines, Inc.*, 2001 WL 1820326, at *11 (Bankr. D. Del. Apr. 2, 2001). As explained in *In re Trans World Airlines*:

> [N]othing in section 363 suggests that disparate treatment of creditors, such as is likely to occur here, disqualifies a transaction from court approval. The purpose of a section 363(b) sale is to transform assets . . . into cash in an effort to maximize value. *Distribution of the value generated in accordance with section*

> *1129 and other priority provisions occurs and is intended to occur subsequent to the sale*.
>
> * * *
>
> The treatment of creditors in a section 363(b) context is dictated by the fair market value of those assets of the debtor that the purchaser in its business judgment elects to purchase. A purchaser cannot be told to assume liabilities that do not benefit its purchase objective. *Thus, the disparate treatment of creditors occurs as a consequence of the sale transaction itself and is not an attempt by the debtor to circumvent the distribution scheme of the Code*.

Id. (emphasis added).

Notably, courts in this and other jurisdictions have long considered whether a preconfirmation sale transaction constitutes a *sub rosa* plan of reorganization, and have suggested various factors that aid in that determination -- but *none* of those factors exist here. *See, e.g., Abel v. Shugrue (In re Ionosphere Clubs, Inc.)*, 184 B.R. 648, 654 & n.6 (S.D.N.Y. 1995) (where aspects of transaction dictate terms of plan); *see also Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (In re Cajun Elec. Power Coop, Inc.)*, 119 F.3d 349, 354 (5th Cir. 1997) (settlement disposing of all claims; restriction upon creditors' right to vote; disposition of virtually all assets); *Official Unsecured Creditors' Comm. v. Stern (In a SPM Mfg. Corp.)*, 984 F.2d 1305, 1317 (1st Cir. 1993) (agreement to vote for particular plan); *In re Lehigh Valley Prof'l Sports Clubs, Inc.*, 2000 WL 567905, at *6 (Bankr. E.D. Pa. May 5, 2000) (transactions or agreements fixing terms of plan by securing court's imprimatur on pre-confirmation motions without protections afforded creditors through confirmation process); *In re Marvel Entm't Group, Inc.*, 222 B.R. 243, 251 (D. Del. 1998) (all parties must be given opportunity to litigate details of reorganization plan); *In re Condere Corp.*, 228 B.R. 615, 626-29 (Bankr. S.D. Miss. 1998) (term sheet dictating allocation of sale proceeds among secured and priority claimants; requirement of creditors to cast votes for or dictate terms of any plan; deal

contingent upon concessions by creditors; and requirement of waiver of claims by independent creditors).

Accordingly, while the Debtors recognize that a sale of assets may not be approved where such sale dictates the terms of a plan of reorganization, thereby denying creditors the procedural protections of the plan process, *see Int'l Creditors of Cont'l Air Lines v. Cont'l Air Lines, Inc. (In re Cont'l Air Lines, Inc.)*, 780 F.2d 1223, 1227-28 (5th Cir. 1986); *PBGC v. Braniff Airways Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935, 939 (5th Cir.), *reh'g denied*, 705 F.2d 450 (5th Cir. 1983), that is not what is proposed here. Rather, the MPA simply provides for a sale: the Debtors will sell and assign assets; and the Government, in exchange, will provide consideration consisting of forgiveness of debt, cash (including by financing only an expeditious chapter 11 sale process), assumption of liabilities and stock in New GM. That consideration unquestionably is the highest and best available, and of far more value than the Debtors' refusing to sell and simply liquidating (again, their *only* other alternative). The foundation of the MPA is the creation of New GM, which the Government is willing to create and fund -- in a manner that the Debtors themselves cannot -- so that the nation can retain and strengthen a basic and necessary United States automotive industry. And, in that respect, any payments that are made to the Debtors' creditors in connection with the 363 Transaction (other than payments of Cure Amounts in connection with the assumption and assignment of the Assumable Executory Contracts) will be voluntarily made by New GM.

In addition, the 363 Transaction provides that the Purchaser will enter into new collective bargaining and VEBA agreements.[6] This is essential to the Company's transformation, and, despite extensive efforts, the Company has been unable to reach a

[6] The UAW has made clear that any amended collective bargaining agreement is contingent on the Purchaser providing retiree medical benefits, as contemplated by the new VEBA agreement.

comparable agreement with the UAW. In the event that the 363 Transaction is not approved, it is unclear whether the Debtors (if they even were to survive in chapter 11) would be able to reach an agreement with the UAW that would enable them to emerge from these chapter 11 cases as a viable entity pursuant to a standalone plan -- which, among other things, would be contingent on obtaining (notwithstanding the complete lack of available, non-Governmental sources) several billion dollars in exit financing to refinance the Debtors' secured debt, pay administrative expense claims and fund operations (including substantial capital expenditures). Of course, the biggest risk associated with a standalone plan, as discussed above, is that the Debtors simply would not survive for an extended period of time, with their assets becoming essentially worthless.

Finally, the 363 Transaction, if approved, will facilitate the ultimate development and formulation of a chapter 11 plan for the Debtors and the distribution of the sale consideration and the Debtors' remaining assets, while the Debtors' creditors will be afforded their full protections under the Bankruptcy Code to assert their claims and participate in the plan process. *See In re Naron & Wagner, Chartered*, 88 B.R. 85, 88 (Bankr. D. Md. 1988) (holding that the "sale proposed here is not a *sub rosa* plan because it seeks only to liquidate assets, and the sale will not restructure [the] rights of creditors"); *cf. In re Lion Capital Group,* 49 B.R. 163, 177 (Bankr. S.D.N.Y. 1985) (settlement agreement did not dictate terms of plan of reorganization where it "frees up assets for an estate and permits formulation of a plan"). *See also In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992) (emphasizing the discretion vested in the court in approving a transaction outside of, but that paves the way for, a plan of reorganization and, thus, "is unquestionably an essential element of [the] ultimate reorganization"); *In re Lionel*, 722 F.2d at 1071 (holding that a debtor may take significant

action, despite an allegation that the action deprives a party in interest of essential protections under chapter 11 (*i.e.*, the safeguards of disclosure, voting, acceptance and confirmation), if there is an articulated business justification); *accord In re Trans World Airlines*, 2001 WL 1820326, at *12 ("It is true, of course, that TWA is converting a group of volatile assets into cash. It may also be true that the value generated is not enough for a dividend to certain groups of unsecured creditors. It does not follow, however, that the sale itself dictates the terms of TWA's future chapter 11 plan. The value generated through the Court approved auction process reflects the market value of TWA's assets and the conversion of the assets into cash is the contemplated result under § 363(b)").

IV. THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES IS NECESSARY TO EFFECTUATE THE 363 TRANSACTION

As stated above, to facilitate and effect the sale of the Purchased Assets, the Debtors also seek authority to assume and assign certain contracts and unexpired leases to the Purchaser. Section 365 of the Bankruptcy Code allows the debtor to maximize the value of the its estate by assuming and assigning executory contracts and unexpired leases that benefit the estate and by rejecting those that do not. 11 U.S.C. § 365(a); *see COR Route 5 Co., LLC v. The Penn Traffic Co. (In re The Penn Traffic Co.)*, 524 F.3d 373, 382 (2d Cir. 2008). Section 365 authorizes the proposed assumptions and assignments, provided that any defaults under such contracts and leases are cured and adequate assurance of future performance is provided. *See* 11 U.S.C. § 365(f)(2).

The "business judgment" test is the standard applied by courts in determining whether an executory contract or unexpired lease should be assumed. *See Nostas Assocs. v. Costich (In re Klein Sleep Prods., Inc.)*, 78 F.3d 18, 25 (2d Cir. 1996); *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures)*, 4 F.3d 1095, 1099 (2d Cir. 1993); *see also*

Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1311 (5th Cir. 1985) ("More exacting scrutiny would slow the administration of the debtor's estate and increase its cost, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially"). Thus, the assumption of a contract under section 365 should be approved if the court finds that the debtor has exercised its sound business judgment in determining that such assumption is in the best interests of its estate. *See Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp. (In re Sharon Steel Corp.)*, 872 F.2d 36, 40 (3d Cir. 1989); *In re Child World, Inc.*, 142 B.R. 87, 89 (Bankr. S.D.N.Y. 1992); *In re Ionosphere Clubs, Inc.*, 100 B.R. 670, 673 (Bankr. S.D.N.Y. 1989).

Section 365(b) requires that a debtor in possession meet certain requirements to assume an executory contract or unexpired lease:

> If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—
>
> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default . . . ;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b).[7] The Contract Website sets forth the cure amounts GM believes are required to be paid -- and that New GM will pay -- pursuant to section 365 in connection with the

[7] This section does not apply to a default that is a breach of a provision relating to:

> (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
>
> (B) the commencement of a case under this title;

assumption and cure of the Assumable Executory Contracts ("Cure Amounts"), which the parties to such contracts will have ample opportunity to contest.

Moreover, pursuant to section 365(f)(2), a debtor in possession may assign an executory contract or unexpired lease of nonresidential property if:

> (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
>
> (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2). The words "adequate assurance of future performance" must be given a "practical, pragmatic construction" based on "the facts of the proposed assumption." *In re Fleming Cos.*, 499 F.3d 300, 307 (3d Cir. 2007); *Carlisle Homes, Inc. v. Arrari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1989); *see also In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (adequate assurance of future performance does not mean absolute assurance that debtor will thrive and pay rent); *In re Bon Ton Rest. & Pastry Shop, Inc.*, 53 B.R. 789, 803 (Bankr. N.D. Ill. 1985) ("Although no single solution will satisfy every case, the required assurance will fall considerably short of an absolute guarantee of performance").

Adequate assurance may be given by demonstrating, among other things, the assignee's financial health and experience in managing the type of enterprise or property assigned. *See In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (adequate assurance of future performance present when prospective assignee of a lease from debtor has

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> (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or
>
> (D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

Id. at § 365(b)(2).

financial resources and has expressed a willingness to devote sufficient funding to business in order to give it strong likelihood of succeeding; chief determinant of adequate assurance is whether rent will be paid); *see also In re Vitanza*, 1998 WL 808629, *26 (Bankr. E.D. Pa. 1998) ("The test is not one of guaranty but simply whether it appears that the rent will be paid and other lease obligations met").

The Debtors will present facts at the Sale Hearing to demonstrate the financial credibility, willingness and ability of the Purchaser or any successful bidder to perform under the Assumable Executory Contracts. Indeed, the Purchaser is a new entity, free of the enormous debt the Debtors have been forced to operate under, and, thus, with a much stronger balance sheet than the entity with whom the Debtors' counterparties originally contracted. The Sale Hearing thus will provide the Court and other interested parties the opportunity to evaluate the ability of the Purchaser or any other successful bidder to provide adequate assurance of future performance under the Assumable Executory Contracts, as required by section 365(b)(1)(C).[8]

V. THE COURT SHOULD WAIVE OR REDUCE THE PERIODS REQUIRED BY BANKRUPTCY RULES 6004(g) AND 6006(d)

Pursuant to Bankruptcy Rule 6004(g), unless the Court orders otherwise, all orders authorizing the sale of property pursuant to section 363 of the Bankruptcy Code are automatically stayed for 10 days after entry of the order. *See* Fed. R. Bankr. P. 6004(g). Along

[8] Pursuant to the 363 Motion, the Debtors also request that the Sale Order provide that anti-assignment provisions in certain of the Assumable Executory Contracts shall not restrict, limit or prohibit the assumption, assignment and sale of such contracts within the meaning of section 365(f). *See* 11 U.S.C. § 365(f)(1); *see also Coleman Oil Co., Inc. v. The Circle K Corp. (In re The Circle K. Corp.)*, 127 F.3d 904, 910-11 (9th Cir. 1997) ("[N]o principle of bankruptcy or contract law precludes us from permitting the Debtors here to extend their leases in a manner contrary to the leases' terms, when to do so will effectuate the purposes of section 365"). In addition, section 365(f)(3) further prohibits the enforcement of any clause creating a right to modify or terminate the contract or lease upon a proposed assumption or assignment thereof. *See In re Jamesway Corp.*, 201 B.R. 73, 78 (Bankr. S.D.N.Y. 1996); *see also In re Rickel Home Ctrs., Inc.*, 240 B.R. 826, 831 (D. Del. 1998) ("In interpreting Section 365(f), courts and commentators alike have construed the terms to not only render unenforceable lease provisions which prohibit assignment outright, but also lease provisions that are so restrictive that they constitute de facto anti-assignment provisions"), *aff'd*, 209 F.3d 291 (3d Cir.), *cert. denied*, 531 U.S. 873 (2000).

these same lines, Bankruptcy Rule 6006(d) stays all orders authorizing a debtor to assign an executory contract or unexpired lease pursuant to section 365(f) of the Bankruptcy Code for 10 days, unless the Court orders otherwise. *See* Fed. R. Bankr. P. 6006(d).

To preserve the value of the Debtors' estates and limit the costs of administering and preserving the Purchased Assets, it is critical that the Debtors consummate the 363 Transaction. Accordingly, the Debtors request that the Court waive the 10-day stay periods under Rules 6004(g) and 6006(d) or, in the alternative, if an objection to the sale of the Purchased Assets or to the assignment of any Purchased Contract was filed (and later denied), reduce the stay period to the minimum amount of time reasonably required by the objecting party to file any appeal.

CONCLUSION

For the foregoing reasons, as well as those set forth in the 363 Motion, the 363 Transaction should be approved.

Dated: June 1, 2009
New York, New York

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF THE LIMITED OBJECTION OF CALLAN CAMPBELL, KEVIN JUNSO, *ET AL.*, EDWIN AGOSTO, KEVIN CHADWICK, *ET. AL.*, JOSEPH BERLINGIERI, AND THE CENTER FOR AUTO SAFETY, *ET AL.*, TO THE DEBTORS' 363 MOTION FOR THE SALE OF THE "PURCHASED ASSETS" FREE AND CLEAR OF POTENTIAL SUCCESSOR LIABILITY CLAIMS

Dated: June 19, 2009
(as amended technically on June 22, 2009)

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Callan Campbell ("Campbell"), Kevin Junso, *et al.* ("Junso"), Edwin Agosto ("Agosto"), Kevin Chadwick, *et al.* ("Chadwick"), and Joseph Berlingieri ("Berlingieri," together with Campbell, Junso, Agosto, and Chadwick, the "Products Liability Claimants"), and the Center for Auto Safety, Consumer Action, Consumers for Auto Reliability and Safety, National Association of Consumer Advocates, and Public Citizen (collectively, the "Consumer Organizations," and together with the Product Liability Claimants, the "Products Liability Claimant Advocates"), by and through their respective attorneys, submit this Memorandum of Law in support of their limited objection to the motion (the "363 Motion") of General Motors and certain of its subsidiaries (collectively, "GM" or "Debtors") for an order authorizing the sale of certain assets, including its Continuing Brands, to Vehicle Acquisition Holdings LLC, a U.S. Treasury-sponsored purchaser (the "Purchaser").[1]

PRELIMINARY STATEMENT

More than 69 million GM passenger vehicles are on American roads today. In 2007, according to the National Highway Traffic Safety Administration's Fatal Analysis Reporting System, 9,985 occupants of GM vehicles were killed in fatal accidents; and a total of 14,828 people were killed that year as a result of motor vehicle crashes involving GM vehicles. Many thousands more are injured each year in GM vehicles. Many of these vehicles contain certain defects that have and will continue to be the subject of product liability lawsuits, including due to injuries and deaths from crushed roofs, exploding "side saddle" gas tanks, and collapsing seat backs.[2]

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[1] Capitalized terms used herein and not otherwise defined shall have the meaning set forth in the Product Liability Claimant Advocates' limited objection, the Debtors' 363 Motion, or the Master Purchase Agreement ("MPA") attached to the 363 Motion.

[2] Extensive background information on the nature of, and litigation associated with, design defects on these particular design defects can be found at http://www.autosafety.org/general-motors-roof-crush-

GM states in the 363 Motion that the sale "must be free and clear" of "rights or claims based on any successor or transferee liability." (363 Motion at 32-33). No business justification has been articulated, however, as to why the Purchaser is entitled to such relief, particularly when the "New GM" will look and operate much like the "Old GM" in the Continuing Brand businesses, and thus potentially satisfy the "mere continuation," "continuity of enterprise," or "product line exception" tests for successor liability under the laws of various states.

Although shedding potential successor liability claims provides expediency, it's not permitted under Bankruptcy Code section 363(f), which authorizes the sale of property free and clear only of "interests in" property to be sold, not *in personam* claims against the Purchaser under theories of successor liability. And while the *Chrysler* court authorized such relief in the sale of Chrysler's assets in the transaction with Fiat, if the Court undertakes its own independent analysis of *Chrysler's* reasoning, it will conclude that *Chrysler* was wrongly decided on this point of law and that the cases it relied upon were flawed.

The Court should not approve the sale free and clear of successor liability claims for two additional reasons. First, this Court lacks jurisdiction to enjoin actions between non-debtor product liability claimants and the Purchaser post-closing since resolution of these claims will not affect the Debtors' estates. Second, due process does not permit debtors and purchasers to use a Section 363 sale to extinguish future claims that have not yet accrued because the injuries on which they will be based have not yet occurred. People who will one day have such claims cannot have received meaningful notice that the bankruptcy proceeding was resolving their rights or a meaningful opportunity to protect those rights, which otherwise might allow a state law cause of action for their injuries.

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lawsuits (crushed roof cases), http://www.autosafety.org/general-motors-ck-fuel-fed-fire-litigation ("side saddle" gas tank cases), and http://www.autosafety.org/general-motors-seat-back-collapse-litigation-0 (seat back collapse cases).

Foreclosing the ability to hold the successor Purchaser liable under state successor liability laws will harm thousands of people who have been or will be injured in vehicles represented by the Continuing Brands. Victims of vehicle accidents attributable to defects are injured in often life-changing ways. They may have incurred staggering medical bills because of the physical injuries they have suffered, lost income because of the time they could not work, and/or suffered the loss of family members in devastating accidents. They should not be deprived of the opportunity, because of expediency, to have their day in court as to whether the Purchaser, under the laws of the several states, remains liable for the injuries, pain, and suffering they endure.

STATEMENT OF FACTS

The Product Liability Claimant Advocates refer the Court to, and incorporate herein, the background facts set forth in their limited objection to the 363 Motion, filed contemporaneously herewith.

ARGUMENT

I. Neither the language of § 363(f) nor the policy underlying it authorize a sale "free and clear" of a product liability claimant's potential successor liability claims.

A. § 363(f)'s plain meaning does not extend to successor liability choses in action.

Code section 363(f) provides, in relevant part, that "the trustee may sell property ... free and clear of any interests in such property." Analyzing whether § 363(f) authorizes a sale "free and clear" of a products liability claimant's state law successor liability claims "begins where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

The issue here turns on the phrase "*interests in such property*," the statutory language that describes what is released as part of a "free and clear" sale under § 363(f). In considering

the meaning of this phrase, the Court should presume that "equivalent words have equivalent meaning when repeated in the same statute." *Cohen v. de la Cruz*, 523 U.S. 213, 220 (1998) (*citing Ratzlaff v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.")). As set forth in the attached **Exhibit A**, the phrase "interest(s) in property" appears 40 times in the Code. Notably, not once can the phrase "interest in property" be substituted with the word "claim" and make any sense. In this regard, the Seventh Circuit's opinion in *Precision Indus., Inc. v. Qualitech Steel SBQ, LLC (In re Qualitech Steel Corp.)*, 327 F.3d 537 (7th Cir. 2003), is instructive. There, after citing to other times the phrase "interest in property" is used in the Code, the Court held that a leasehold was an "interest in property" because it was "not simply a right that is connected to or arising from the property, … but a (limited) right to the property itself." *Id.* at 545-46 (7th Cir. 2003) (disagreeing with the 3rd Circuit's holding in *In re TWA*, 322 F.3d 283 (3d Cir. 2003)).

Notably, § 363(f) does not mention the word "claim." In contrast, § 1141(c) of the Bankruptcy Code provides that "property dealt with by the plan is free and clear of all *claims and interests* ... *in* the debtor." (Emphasis added). Section 363 and 1141(c) are two mechanisms for transfer of estate property (one through a sale, the other through a plan). The difference between the words chosen by Congress in these two closely related sections shows that Congress did not intend a sale under § 363(f) to be free and clear of "*claims*," but only of "*interests in* such property" because "'it is generally presumed that Congress acts intentionally and purposely' when it 'includes particular language in one section of a statute but omits it in another.'" *City of Chicago v. Environmental Defense Fund,* 511 U.S. 328, 338 (1994) (*quoting Keene Corp. v. United States,* 508 U.S. 200, 208 (1993)); *see also N.L.R.B. v. Bildisco & Bildisco,* 465 U.S. 513, 523 (1984) (where language in one provision shows that Congress knows how to draft to effect a

particular outcome, its failure to use that language elsewhere indicates that Congress intended not to effect that outcome); *Greene v. United States*, 79 F.3d 1348, 1355 (2d Cir. 1996) ("The ancient maxim *expression unius est exclusio alterius* (mention of one impliedly excludes others) cautions us against engrafting an additional exception to what is an already complex [statutory scheme]."). Moreover, interpreting the term "interest" to include "claim" would render the term "claim" in § 1141(c) superfluous. "'It is a cardinal principle of statutory construction,' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant.'" *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

In addition, Congress had the opportunity to change the Code in considering the National Bankruptcy Review Commission's 1997 recommendation that the differences between § 363(f) and § 1141(c) be reconciled by expanding the "free and clear" language of § 363(f) to mirror the language of § 1141(c).[3] Yet, Congress chose not to do so. Notably, in making this recommendation, the Commission explained that "the difference in language between [the] two sections raises a concern that the scope of protection regarding transfers pursuant to asset sales is narrower than the protection afforded to transfers pursuant to a plan of reorganization."[4] Yet in 2005, when Congress enacted massive revisions to the Code, both technical and substantive, it did not amend § 363 to expand the "free and clear" language to encompass "claims" generally

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[3] *See* ABSTRACT OF SUBMISSIONS MADE TO NATIONAL BANKRUPTCY REVIEW COMM., National Bankruptcy Review Commission (Jan. 12, 1998), *at* http://www.abiworld.org/AM/Template.cfm?Section=Submission_Abstract&Template=/CM/ContentDisplay.cfm&ContentID=36636 (last visited, June 17, 2009).

[4] *Id.* (*see* ID NRBC-0189, recommendation of Marcia L. Goldstein on behalf of the NYC Bar Ass'n, Comm. on Bankr. and Corp. Reorg., *identifying* the "PROBLEM REFERENCED" ("Sections 1141(c) and 363(f) contain incompatible language with regard to asset sales…. The difference in language between [363(f) and 1141(c)] raises a concern that the scope of protection regarding transfers pursuant to asset sales is narrower than the protection afforded to transfers pursuant to a plan of reorganization.") *and* the "PROPOSED SOLUTION" ("Section 363(f) should be amended to provide that property can be sold under this section 'free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.'").

that might have some connection with the property sold. *See Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

The Court also should look to pre-Code practice for guidance in interpreting § 363(f)'s reference only to "interests in property" and not to "claims" generally. *Dewsnup v. Timm,* 502 U.S. 410, 419 (1992) ("When Congress amends the bankruptcy laws, it does not write 'on a clean slate.'"). As noted by the late Chief Judge Brozman in *Shearson Lehman Hutton, Inc. v. Schulman (In re Schulman),* 196 B.R. 688 (Bankr. S.D.N.Y. 1996):

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. *Midlantic Nat'l Bank v. New Jersey Dep't of Environ. Protection,* 474 U.S. 494, 501 (1986). This rule is followed with particular care in construing the Bankruptcy Code [which] should not be read to abandon past bankruptcy practice absent a clear indication that Congress intended to do so. *Pennsylvania Public Welfare Dep't v. Davenport,* 495 U.S. 552, 563 (1990). Thus, where the text of the Code does not unambiguously abrogate the pre-Code practice, court should presume Congress intended it to continue unless the legislative history dictates a contrary result. *Dewsnup v. Timm,* 502 U.S. 410, 418-20.

Schulman, 196 B.R at 697 n.10.

In *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville)*, 837 F.2d 89 (2d Cir. 1988), the Second Circuit expounded on the pre-Code authority of a bankruptcy court "to approve settlements and to channel claims arising under the [insurance] policies to the proceeds of the settlement." *Id.* at 93. Notably, in each of the four examples given, the property was transferred free of true interests or encumbrances, but not of *in personam* claims. *Id.* Moreover, in the only case cited in which assets were sold free and clear of simple claims (civil rights claims, in particular), the Second Circuit affirmed the lower court's ruling *not* on the basis that a bankruptcy trustee has authority to sell assets free and clear of claims, but rather because there

was in fact "no basis for plaintiff's claim" to hold the successor employer liable under the "substantial continuity of identity" test for successor liability. *Forde v. Kee-Lox Mfg. Co., Inc.*, 584 F.2d 4, 5-6 (2d Cir. 1978). In sum, therefore, nothing in pre-Code practice establishes the notion that bankruptcy sales can be effectuated free and clear of claims against the purchaser based on theories of successor liability.

The legislative history to § 363(f) is also instructive in two ways. First, it establishes, consistent with the judicial presumptions and pre-Code practice described above, that the new proposed Code section on "sales free of interests of third persons" "codifies case law insofar as it recognizes the right of the trustee to sell property of the estate free and clear of liens and other interests that can be reduced to dollars." H.R. Doc. No. 93-137, 93rd Cong., 1st Sess., § 5-203 (Sale of Property of the Estate), note 2 (*available at* Appx. Vol. B, COLLIER ON BANKRUPTCY, at App. Pt. 4-764 (15th ed. rev. 2008)). The legislative history makes no reference to such sales being washed free of *in personam* claims for successor liability. Second, the legislative history cannot sensibly be read to include the notion that a bankruptcy sale can be ordered free and clear of *in personam* claims. Both the final House and Senate Reports on Section 363 provide:

> At a sale free and clear of other interests, any holder of any interest in the property being sold will be permitted to bid. If that holder is the high bidder, he will be permitted to offset the value of his interest against the purchase price of the property.

H.R. 8200, 9th Cong., 1st Sess., § 363 (1977) (*available at* Appx. Vol. C, COLLIER ON BANKRUPTCY, at App. Pt. 4-1478 (15th ed. rev. 2008)); S. 2266, 95th Cong., 1st Sess., § 363 (1977) (*available at* Appx. Vol. D, COLLIER ON BANKRUPTCY, at App. Pt. 4-1996 (15th ed. rev. 2008)). One cannot substitute "claims against" for "interest in" and make any sense of the rights of such holder; it would be absurd to argue that a holder of a general unsecured claim has a right

to credit bid its claims in an auction and "offset the value of his [claims] against the purchase price of the property."

Further support that § 363(f)'s use of the term "interests in property" does not include *in personam* claims for successor liability is found in *Butner v. United* States, 440 U.S. 48 (1979), which is best known for the proposition that—except where Congress has specifically chosen to exercise its power to fashion applicable rules of bankruptcy law—"Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Butner* states:

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy."

Id. at 55 (citation omitted).

Barnhill v. Johnson, 503 U.S. 393 (1992), took *Butner* one step further. In holding that the "transfer" of an "interest in property" had occurred at the time the debtor's check was honored, not at the time the check was delivered, *Barnhill* establishes that a "nebulous right to bring suit" is not an "interest in property":

> There is thus some force in petitioner's claim that he did, in fact, gain something when he received the check. But at most, what petitioner gained was a chose in action against the debtor. Such a right, however, cannot fairly be characterized as a conditional right to "property ... or an interest in property," where the property in this case is the account maintained with the drawee bank. For as noted above, until the moment of honor the debtor retains full control over disposition of the account and the account remains subject to a variety of actions by third parties. **To treat petitioner's nebulous right to bring suit as a "conditional transfer" of the property would accomplish a near-limitless expansion of the term "conditional." In the absence of any right against the bank or the account, we think the fairer description is that petitioner had received no interest in debtor's property, not that his interest was "conditional."**

Id. at 400-401 (emphasis added). Also instructive is *United Savings Assn. of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988), which held that "the 'interest in property' protected by § 362(d)(1) does not include a secured party's right to immediate foreclosure." *Id.* at 371.

Reading "interest in property" as broadly as the Debtors request in their Motion, however, would contravene the holdings of *Barnhill* and *Timbers* each of those cases involved the same kind of "nebulous right" or "chose in action" that the Debtors here are seeking to enjoin through its proposed "free and clear" sale, yet in neither of those cases were those rights considered "interests in property."

B. The Court should decline to follow the *Chrysler* court's opinion authorizing a sale "free and clear" of successor liability choses in action.

In the recent decision in *In re Chrysler,* 405 B.R. 84 (Bankr. S.D.N.Y. May 31, 2009), the court held that tort claims are "interests in such property" under § 363(f). As explained below, that decision was incorrect for several reasons. First, a narrower reading that would exclude *in personam* choses in action from the coverage of "interests in property" under § 363(f) is amply supported by a long line of cases, including *In re White Motor Credit Corp.,* 75 B.R. 944 (Bankr. N.D. Ohio 1987), and *Rubinstein v. Alaska Pacific Consortium (In re New England Fish Co.),* 19 B.R. 323 (Bankr. W.D. Wash. 1982). The *Chrysler* decision cited these cases as authority for extending § 363(f)'s coverage to *in personam* choses in action, but in fact, these cases support the *opposite* conclusion. *See White Motor,* 75 B.R. 948 ("General unsecured claimants, including tort claimants, have no specific interest in a debtor's property. Therefore, section 363 is inapplicable for sales free and clear of such claims."); *Rubinstein*, 19 B.R. at 326 (Title VII claimants are general unsecured creditors who lack "an interest in the specific property of the estate being sold" under § 363(f)).

American Living Sys. v. Bonapfel (In re All Am. Of Ashburn, Inc.), 56 B.R. 186 (Bankr. N.D. Ga. 1986), upon which the *Chrysler* court also relied, did not conclude that *in personam* claims are "interests in property" for purposes of § 363(f). Rather, like *White Motor* and *Rubinstein*, that case was decided without a single reference to the section's "interest in property" language. *Id.* at 190.

In fact, almost every case that has closely examined the language, history, and policies of § 363(f) has concluded that the section does not authorize sales "free and clear" of *in personam* choses in action for successor liability.[5] *In re TWA*, 322 F.3d 283 (3d Cir. 2003), on which the *Chrysler* court relied, is one of the few exceptions. *See also United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal)*, 99 F.3d 573 (4th Cir. 1996) (upon which *TWA* relies).

For example, in the Seventh Circuit case of *Precision Indus., Inc. v. Qualitech Steel SBQ, LLC (In re Qualitech Steel Corp.)*, 327 F.3d 537 (7th Cir. 2003), Judge Posner, writing for a unanimous panel, held that § 363(f)'s reference to "any interest" was "sufficiently broad to

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[5] Federal cases include *Michigan Empl. Sec. Comm. v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1147 n. 23 (6th Cir. 1991) (relying upon *White Motor* to "reject Wolverine's argument that general unsecured interests fall within the scope of those interests that can be discharged pursuant to section 363(f)"); *Kattula v. Republic Bank (In re LWD, Inc.)*, No. 5:08-CV-121-R, 2009 WL 367738 at *4 (W.D. Ky. Feb. 12, 2009) (free and clear language of § 363 sale order enjoining successor liability claims "applies only to estate property … and does not contemplate protection against personal liability claims"); *Miller v. Level 3 Comms., LLC*, No. 03-4451, 2005 WL 1529419 at *9 (D.N.J. June 29, 2005) ("the Bankruptcy Court [free and clear sale] Order may not defeat application of the eight factors set forth by the Secretary of Labor [for evaluating whether an employer qualifies as a successor in interest for purposes of the Act"); In *re Eveleth Mines, LLC*, 312 B.R. 634 , 654 (Bankr. D. Minn. 2004) ("In the last instance, the reasoning of the [*TWA* and *Leckie*] opinions fails on an alternate basis: they do not take the inquiry back to where it belongs, the governance of state law in the defining of "interest."); *Fairchild Aircraft Corp. v. Cambell (In re Fairchild Aircraft Corp.)*, 184 B.R. 910, 918 (Bankr. W.D. Tex. 1995), *vacated as moot on equitable grounds*, 220 B.R. 909 (W.D. Tex. 1998) ("Were we to allow 'any interests' to sweep up *in personam* claims … we would render the words 'in such property' a nullity. No one can seriously argue that *in personam* claims have, of themselves, an *interest in property.*").

State cases include: *Kattula v. Republic Bank*, 2008 WL 4606076 (Mich. App. Oct. 7, 2008) ("Section 363(f) is not intended to extinguish *in personam* liabilities."); *Lefever v. K.P. Hovnanian Enters., Inc.* 160 N.J. 307, 320 (N.J. 1999) (products liability claimant had no "interest" in the sense of a lien or encumbrance on the property); *Gross v. Trustees of Columbia Univ.*, 816 N.Y.S. 2d 695 (N.Y. Sup. Ct. 2006) (follows *Lefever* in case applying NJ law).

include Precision's possessory interest as lessee." In rejecting *TWA*'s more expansive definition of "any interest" as meaning "a right that is connected to or arising from the property," he stated:

> The Bankruptcy Code does not define "any interest," and in the course of applying section 363(f) to a wide variety of rights and obligations related to estate property, courts have been unable to formulate a precise definition. *Folger Adam Security, Inc. v. DeMatteis/MacGregor, JV,* 209 F.3d 252, 258 (3d Cir. 2000).... [We] conclude that the term "any interest" as used in section 363(f) is sufficiently broad to include Precision's possessory interest as a lessee. BLACK'S defines "interest" to mean "[a] legal share in something; all or part of a legal or equitable claim to or right in property." BLACK'S LAW DICTIONARY, 816 (7th ed. 1999). The right that a leasehold confers upon the lessee is one to possess property for the term of the lease. **It is, therefore, not simply a right that is connected to or arising from the property**, *see In re Trans World Airlines, Inc.,* 322 F.3d 283, 289-90 (3d Cir.2003), **but a (limited) right to the property itself**. That right readily may be understood as an "interest" in the property. This inclusive interpretation of the phrase "any interest" is consistent with the expansive use of that same phrase in other provisions of the Code. *See, e.g.,* 11. U.S.C. § 541(a)(3), (4), (5), and (7) (identifying various interests comprising property of the estate).

Qualitech Steel., 327 F.3d at 545-46 (emphasis added); *see also Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994) (in holding that bankruptcy court had no jurisdiction over post-confirmation products liability claim, stating: "It is true that [the debtor's] assets were sold to [the purchaser] free from all liens and other encumbrances. And such a cleansing of the assets in the bankruptcy sale is a valid power of a bankruptcy court, 11 U.S.C. §§ 363(f), 1141(c). But the [claimants] are not attempting to enforce a lien.").

Thus, the *Chrysler* court erred in following *TWA* and authorizing the sale of Chrysler's assets free and clear of potential *in personam* or successor liability claims against New Chrysler. In *TWA*, the Third Circuit affirmed a bankruptcy court's order that a 363 sale to American Airlines of TWA's operating assets would be "free and clear" of both pending employment discrimination claims and rights under a travel voucher program established in settlement of a sex discrimination action initiated by TWA's flight attendants. However, not only did *TWA*

misinterpret the phrase "interests in property" in § 363, but it —and *Leckie Smokeless Coal*,[6] the case upon which it primarily relies—failed to articulate coherent policy grounds authorizing such sales "free and clear" of all such claims.

As explained in *In Eveleth Mines, LLC*, 312 B.R. 634 (Bankr. D. Minn. 2004), the problem with both *TWA* and *Leckie* is that they "are built on an amorphously inclusive rationalization [that] posits a loose sort of 'but-for' causality that is thrown up to identify the straw-built 'interest' that then is vanquished." *Id.* at 654.

TWA and *Leckie* adopt tortured reasoning to shoehorn the claim at issue into an "interest in property" that can be wiped out in a "free and clear" sale under § 363(f). They both reason that the successor liability claims at issue were an "interest in" the property transferred because had the debtor not deployed the assets sold in the particular manner that subjected it to the particular claim at issue, then the claimants would have had no claim upon which the successor could be liable. *See TWA,* 322 F.3d at 290 ("Had TWA not invested in airline assets, which required the employment of the EEOC claimants, those successor liability claims would not have arisen. Further, TWA's investment in commercial aviation is inextricably linked to its employment of the … claimants … and its ability to distribute travel vouchers as part of the settlement agreement."); *Leckie Smokeless Coal*, 99 F.3d 573, 582 ("[I]f Appellees had never elected to put their assets to use in the coal-mining industry, and had taken up business in an altogether different area, the Plan and Fund would have no right to seek premium payments from them.").

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[6] *United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal)*, 99 F.3d 573 (4th Cir. 1996) (debtor's assets could be sold "free and clear" of obligations under the Coal Industry Retiree Health Benefit Act of 1992, which imposed joint and several liability on any "successor in interest" to a covered coal producer).

This interpretation of "interest in such property," however, would render the phrase meaningless as it would be all-encompassing. After all, hardly any claim arises other than as a result of the debtor's particular use of the assets. And as Justice Scalia warned in writing for the majority in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), a court should not "torture [the text] into meaning" for "such word-gaming would deprive the criterion of all meaning." *Id.* at 538 n.4.

Moreover, the *Eveleth Mines* court rightly stated, the reasoning of *TWA* and *Leckie Smokeless Coal* fails because "they do not take the inquiry back to where it belongs, the governance of state law in the defining of 'interest'." *Eveleth Mines*, 312 B.R. at 654. "As recognized in *Butner*," the *Eveleth Mines* court concluded, "this is a matter of federalism." *Id.* (*citing Butner*, 440 U.S. at 52-56).

Equally flawed are the policy considerations relied upon by *TWA* and *Chrysler* in permitting sales free and clear of successor liability claims against the purchaser. According to *TWA*, "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.'" *TWA*, 322 F.3d at 292 (*quoting New England Fish Co.*, 19 B.R. at 329). Such a *per se* rule, however, was rejected by the Seventh Circuit in *Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund v. Tasemkim,* 59 F.3d 48 (7th Cir. 1995), which stated:

> What imposition of successor liability would accomplish, and what the district court objected to, would be a second opportunity for a creditor to recover on liabilities after coming away from the bankruptcy proceeding empty-handed. But a second chance is precisely the point of successor liability, and it is not clear why an intervening bankruptcy proceeding, in particular, should have a *per se* preclusive effect on the creditor's chances.... Instead of being dispositive, however, the availability of relief

> from the predecessor is a factor to be considered along with other facts in a particular case. Here, those facts include the apparent nature of the acquisition of Old Tasemkin by New Tasemkin-which clearly had the effect, intended or not, of frustrating unsecured creditors while resurrecting virtually the identical enterprise.

Id. at 51. *Cf. Anderson v. J.A. Interior Applications, Inc.,* No. 97-4552, 1998 WL 708851 (N.D. Ill. 1998) (rejecting concerns that successor claimants will elevate their priority rights by noting that "[c]reditors ahead of plaintiffs in the bankruptcy proceedings are thus entitled to the same distribution of assets regardless of whether plaintiffs recover anything from [the debtor's] successor").

TWA and *Chrysler* also rely on the notion that "the policy underlying section 363(f) is to allow a purchaser to assume only the liabilities that promote its commercial interests." *Chrysler,* 405 B.R. at 111 (citing *New England Fish Co.* and *White Motor Credit*); *TWA,* 322 F.3d at 292-93 ("Absent entry of the Bankruptcy Court's order providing for a sale of TWA's assets free and clear of the successor liability claims at issue, American may have offered a discounted bid."). But here, the proposed sale is being effected primarily through a credit bid by GM's senior secured lender of its debt, and no less consideration would flow to the estate if product liability claims were allowed to go forward in states that allow such actions to be pursued against successor purchasers of the assets. Regardless, it is inappropriate to release claims against a non-debtor just because of its contributions to the debtor's estate. *See Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.)*, 517 F.3d 52, 65 (2d Cir. 2008) (*citing In re Karta Corp.,* 342 B.R. 45, 55 (S.D.N.Y. 2006) ("[C]onditioning of financial participation by non-debtors on releases … is subject to … abuse.")), *rev'd on other grounds, Travelers Indemnity Co. v. Bailey*, No. 08–295, 2009 WL 1685625 (June 18, 2009).[7] *cf., Tasemkim,* 59

[7] On June 18, 2009, the Supreme Court reversed the Second Circuit's 2008 decision in *Johns-Manville*, but only based on the "narrow" grounds that once the bankruptcy court's orders of 1986 became final on direct review, they became *res judicata* as to the parties. *Bailey*, 2009 WL 1685675, at *11. The narrowness of the holding, coupled

F.3d at 50-51 ("[T]he potential for chilling does not vary as a function of a company's precise degree of distress, and there is no reason to accord the purchasers of formally bankrupt entities some special measure of insulation from liability that is unavailable to ailing but not yet defunct entities."); *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1992) (extinguishing state law rights in order to increase the value of the debtors' property "would not only [] harm [] third parties…, but [would provide an] incentive to enter bankruptcy for reasons that have nothing to do with bankruptcy").

In sum, the Code's plain meaning does not support the result sought by GM here. Although the proposed sale is presented as a needed step to preserve a company important to the U.S. economy, "it was and is for the legislature to pass on [these] policy choice[s] … [for] the job of the courts is limited to ascertaining what policy choice Congress *did* make, not what policy choice Congress *should have* made."[8] *Fairchild Aircraft*, 184 B.R. at 919 (emphasis in original); *see also Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 24-25 (2000) ("Bankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of creditors' entitlements, but are limited to what the Bankruptcy Code itself provides.").

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with the absence of any disagreement by the majority with the categorical statement in Justice Stevens' dissent that "the bankruptcy court has no authority … to adjudicate, settle, or enjoin claims against nondebtors that do not affect the debtor's estate," strongly suggests that were the issue on the bankruptcy court's authority to enjoin actions between—and release claims against—non-debtors again presented to the Second Circuit, its holding and rationale on this issue would not change. *See Bailey,* 2009 WL 1685675, at *14 (Stevens, J., *dissenting*).

[8] As noted by the *Ad Hoc* Committee of Tort Claimants, however, "New GM's viability is not dependent on New GM avoiding its liability for tort claims. If it was, GM and the U.S. Treasury would not have consented to an out-of-court reorganization under which tort claims would have survived." (Docket No. 1997, ¶ 35). The Debtors agree, noting that these cases are not "asbestos-driven" (or, presumably, "tort claim-driven") cases. (Docket No. 1915, ¶ 27).

II. The Court lacks subject matter jurisdiction over post-closing disputes between products liability claimants and the successor Purchaser.

Bankruptcy courts are courts of limited jurisdiction. Under § 1334(b), district courts have original jurisdiction over civil proceedings "arising under" title 11 or "arising in" or "related to" a case under title 11. The district courts may in turn refer such cases to the bankruptcy judges for that district. 28 U.S.C. § 157(a).

GM is asking the Court to exercise jurisdiction to enjoin product liability claimants from bringing successor liability claims against the Purchaser after the § 363 sale closes. This Court, however, does not have the subject-matter jurisdiction under 28 U.S.C. § 1334 to enjoin such suits because the outcomes of such actions are unrelated to this bankruptcy proceeding. "Related to" jurisdiction exists when:

> [T]he *outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy* . . . . An action is related to the bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts the handling and administration of the bankrupt estate.

Celotex Corp. v. Edwards, 514 U.S. 300, 308 n.6 (1995) (emphasis in original) (*quoting Pacor v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). Although "any effect" may appear to sanction a broad grant of authority, the *Celotex* Court warned that "a bankruptcy court's 'related to' jurisdiction cannot be limitless." *Id.* at 308.

Generally, courts find "related to" jurisdiction exists over a third-party action when "the subject of the third-party dispute is property of the estate" or "the dispute over the asset would have an effect on the estate." *Johns-Manville,* 517 F.3d at 65 (*quoting Feld v. Zale Corp.* (*In re Zale Corp.*), 62 F.3d 746, 753-54 (5th Cir. 1995)), *rev'd on other grounds, Bailey*, *supra,* note 7. Conversely, courts will not find "related to" jurisdiction exists over third-party actions "when the asset in question is not property of the estate and the dispute has no effect on the estate." *Johns-*

Manville Corp., 517 F.3d at 65. Additionally, that an action between non-debtor third-parties shares facts or other similarities with the debtor-creditor relationship is insufficient to establish "related to" jurisdiction over the third-party action. *Id.*

Here, the product liability claimants' successor liability claims—to the extent they exist under applicable state law—will be asserted solely against the non-debtor Purchaser and thus will not diminish the Debtors' estates. *See Zerand-Bernal Group*, 23 F.3d at 162 (in holding that product liability claim brought under state law theory of successor was not "related to" and did not "arise under" the Bankruptcy Code, explaining that the claimants' action was "neither by nor against the Debtor"). Further, such suits will not affect the Purchaser's offered acquisition price because the Purchaser is obtaining the assets largely through a credit bid. Therefore, the Court does not have "related to" jurisdiction over such claims, and cannot enjoin them.

Moreover, "[s]ubject matter jurisdiction cannot be 'conferred by consent' of the parties." *Binder v. Price Waterhouse & Co., LLP* (*In re Resorts Int'l, Inc.*), 372 F.3d 154, 161 (3d Cir. 2004) (*quoting Coffin v. Malvern Fed. Sav. Bank*, 90 F.3d 851, 854 (3d Cir. 1996)); *Cable Television Ass'n of New York v. Finneran*, 954 F.2d 91, 94 (2d Cir. 1992) ("[T]he parties may not confer subject matter jurisdiction on the court by consent.") (*citing Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)). As such, the fact that the 363 sale is contingent upon entry of an order that enjoins successor liability claims is insufficient to establish "related to" jurisdiction, for "a debtor [cannot] create subject matter jurisdiction over any non-debtor third party by structuring a plan in such a way that it depend[s] upon thirty-party contributions." *In re Combustion Engineering, Inc.*, 391 F.3d 190, 228-29 (3d Cir. 2004); *cf., Johns-Manville*, 517 F.3d at 66 (it is "inappropriate for the bankruptcy court to enjoin claims brought against a third-party non-debtor solely on the basis of that third-party's financial

contribution to a debtor's estate."), *rev'd on other grounds, Bailey, supra*, note 7. The Debtors' desire to facilitate a 363 sale "may not be used as a jurisdictional bootstrap when no jurisdiction otherwise exists." *Id.* at 68.

Even the outside chance that allowing these claims to proceed after the sale might, if successful, give rise to a claim by the Purchaser against the Debtors for breach of the MPA is not in itself sufficient to establish "related to" jurisdiction. *Cf.*, *Pacor*, 743 F.2d at 995 (holding that a potential indemnity claim against the debtor did not give rise to "related to" jurisdiction over a third-party action because "[t]he fact remains that any judgment received by the [non-debtor plaintiff] could not itself result in even a contingent claim against [the debtor], since [the third-party defendant] would still be obligated to bring an entirely separate proceeding to receive indemnification.").

Finally, the Court lacks jurisdiction to enter the proposed Sale Order because a bankruptcy court does not have stand-alone powers to make determinations on common or state law questions. *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982). After *Marathon*, Congress amended the law in 28 U.S.C. § 157(c)(1) to provide that bankruptcy judges may hear a non-core proceeding grounded in state law that is "*related to*" the bankruptcy case. The determination of whether the Purchaser is a successor (*e.g.*, under theories of "mere continuation," "continuity of enterprise," or "product line exception") is a question of state law. *See generally* Michael H. Reed, *Successor Liability and Bankruptcy Sales Revisited—A New Paradigm*, 61 BUS. LAW. 179, 184 (2005) ("The rights of common law successor liability claimants … usually are 'created and defined' by state law and clearly appear to be substantive rights"). Such traditional state law questions qualify under any measure as "non-core" matters as to which this Court may only submit proposed findings of fact and conclusions of law to the

district court (*see* 28 U.S.C. § 157(c)(1)), assuming it can even hear the matter at all (*see* 28 U.S.C. § 157(b)(5) ("personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claims arose"). *See Marshall v. Marshall*, 547 U.S. 293, 303 (2006) ("A bankruptcy court may exercise plenary power only over core proceedings. In noncore matters, a bankruptcy court may not enter final judgment; it has authority to issue only proposed findings of fact and conclusions of law, which are reviewed *de novo* by the district court").

Regardless, consideration of such issues is premature and not ripe for adjudication since the facts needed to establish the purchaser's post-sale order conduct cannot possibly be considered before the sale has even been consummated.. *See e.g., Bes Enterprises, Inc. v. Natanzon*, No. 06-870, 2006 WL 3498419, at *5 (D. Md. Dec. 4. 2006) (motion to dismiss denied because more facts were needed to establish the purchaser's post-sale order conduct).

III. The Purchased Assets cannot be sold "free and clear" of successor liability for future tort and product liability claims.

The Master Purchase Agreement and Proposed Sale Order contain language that purports to release the purchaser from successor liability for future product liability and tort claims. *See, e.g.*, MPA at 94 (stating that Purchaser will not have any successor liability "whether now existing or hereafter arising"). For two reasons, GM cannot be sold free and clear of claims that have not yet arisen. First, such future claims are not within the statutory language of § 363(f). Second, due 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 had no opportunity to seek to preserve those rights.

To begin with, as discussed above, product liability claims in general are not "*interests in such property*" within the meaning of § 363(f). But even if such claims could be considered

"interests in such property" under that section, future claims cannot. 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.

Moreover, even if § 363(f) applied to "claims" (as opposed to just "interests in such property"), the future causes of actions of people who have not yet suffered a loss or injury due to the defect in their vehicles would not be covered. "The term 'claim' means . . . right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A). A person who has not yet suffered a loss or injury has no right to payment of any kind from the debtor. As the Seventh Circuit stated in *Fogel v. Zell*, 221 F.3d 955 (7th Cir. 2000), addressing a hypothetical remarkably similar to the case at hand:

> Suppose a manufacturer goes bankrupt . . . . And suppose that ten million people own automobiles manufactured by it that may have the same defect that gave rise to [product liability] suits but, so far, only a thousand have had an accident caused by the defect. Would it make any sense to hold that all ten million are tort creditors of the manufacturer and are therefore required, on pain of having their claims subordinated to early filer, to file a claim in the bankruptcy proceeding? Does a pedestrian have a contingent claim against the driver of every automobile that might hit him? We are not alone in thinking that the answer to these questions is "no."

Id. at 960. *See also Epstein v. Official Comm. Of Unsecured Creditors of Estate of Piper Aircraft Corp. (In re Piper Aircraft Corp.)*, 58 F.3d 1573 (11th Cir. 1995) (holding that prepetition manufacture, design, sale, and distribution of airplanes was insufficient to establish a "claim" for future victims in the bankruptcy proceeding because "there [was] no preconfirmation exposure to a specific identifiable defective product or any other preconfirmation relationship between [the manufacturer] and the broadly defined class of Future Claimants"); *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1274 (5th Cir. 1994) (refusing to extend term "claimants" to

include people "whom the record indicates were completely unknown and unidentified at the time [the company] filed its petition and whose rights depended entirely on the fortuity of future occurrences"); *In re Chateaugay Corp.*, 944 F.2d at 1003-04 ("Accepting as claimants those future tort victims whose injuries are caused by pre-petition conduct but do not become manifest until after confirmation, arguably puts considerable strain not only on the Code's definition of 'claim,' but also on the definition of 'creditor.'"); *cf., Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 944 (3d Cir. 1985) (claims for personal injuries that developed after a bankruptcy not dischargeable "claims" or "interests" under prior version of Bankruptcy Act).

Furthermore, even if future claims were "interests in property" under § 363(f), GM's assets cannot be sold free and clear of them unless one of the five conditions set forth in § 363(f) is met. Here, GM is relying on § 363(f)(5), which allows sale free and clear of claims that can be "compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." Future claims—causes of action that have not yet even accrued—do not and cannot be made to fit within this section. People with no current claim do not have an interest that can be reduced to a monetary value; they have not yet been injured, so they cannot know the nature or extent of an injury yet to occur. It would be impossible for GM to bring a proceeding against any future claimant to compel him or her to accept money in exchange for a claim that has not yet arisen. The plain meaning of the statute thus forecloses GM's effort to make the sale free and clear of these future claims.

The sale of GM "free and clear" of tort and product liability claims that have yet to arise also violates due process. Because people who will, but have not yet, suffered injury from defects in GM vehicles do not know that they will be injured in the future, they cannot be given either meaningful notice that their rights are being adjudicated or a meaningful opportunity to be

heard. As the Third Circuit stated in *Schweitzer*, it would be "absurd" to expect a "person who had no inkling" that he would be injured by the debtor's product years in the future to file a claim in the debtor's bankruptcy proceedings to preserve his rights. *Schweitzer,* 758 F.2d at 943; *see also In re Pettibone Corp.*, 151 B.R. 166, 172 (Bankr. N.D. Ill. 1993) ("[T]he argument implies that *uninjured* persons who wish to protect themselves in event of future injuries have the burden of monitoring national financial papers . . . to read notices about businesses they have no claims against because they are on notice of claim bar dates affecting any future injuries caused by such companies. Franz Kafka would have been able to accept such a legal principle in one of his stories; the Bankruptcy Code and the Fifth Amendment to the United States Constitution cannot.") (emphasis in original).

In its motion to approve the sale, GM requests that publication notice be deemed sufficient notice to those whose identities are unknown to the debtor. But the problem here is not just that GM has been unable to provide individualized notice to people with future claims; the problem is that people with future claims do not *themselves* know that they will be injured by defects in GM's products. Even if they saw a notice in a newspaper, people who have not yet been injured—some of whom may not even own a GM vehicle—would not know that the sale would affect them. These individuals have neither claims against nor knowledge that they will ever have a cause of action against GM. *See Schwinn Cycling & Fitness, Inc. v. Benonis (In re Schwinn Bicycle Co.)*, 210 B.R. 747, 760 (Bankr. N.D. Ill. 1997), *aff'd,* 217 B.R. 790 (N.D. Ill. 1997) (holding that it would violate due process to bind future victims to terms of sale order because "without knowing today who will be injured tomorrow, notice to particular individuals who may be injured in the future cannot be given" and "it is "doubtful that any general warning would have motivated future victims to participate actively in the bankruptcy proceeding");

Kewanee Boiler Corp. v. Smith (In re Kewanee Boiler Corp.), 198 B.R. 519, 538 ("Identifying persons who might come in close proximity to any of Kewanee's boilers that were manufactured imperfectly would have been impossible … [and] [w]hile a list could have been compiled of those who had purchased all the boilers, it is doubtful that notice to such parties and their employees could have reached all future victims of malfunctioning boilers or that anyone would have known what to do with notice of a bankruptcy as to which they then had no claim of injury.). And although some courts have sought to address the inability of people with future claims to be heard in court on those claims by providing for those people in the bankruptcy proceeding, GM has not done so here. *Cf., Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001) (holding that post-1994 asbestos claimants were not bound by settlement that purported to settle future claims but did not provide for recovery for injuries discovered after 1994).

Many courts have recognized the constitutional problem caused by attempting to discharge or foreclose future claims in a bankruptcy proceeding. *See In re Chateaugay*, 944 F.2d 997, 1003 (2d Cir. 1991) (recognizing the "enormous practical and perhaps constitutional problems" that would arise from considering future claims to be "claims" under the Bankruptcy Code); *Schweitzer*, 758 F.2d at 944 ("[A]n interpretation of 'interests' that included plaintiffs' future tort actions would raise constitutional questions."); *Mooney Aircraft Corp. v. Foster (In re Mooney Aircraft, Inc.)*, 730 F.2d 367, 375 (5th Cir. 1984) ("[L]ack of notice might well require us to find that the bankruptcy court's prior judgment was ineffective as to the [future claimants'] claims."); *In re UNR Indus., Inc.*, 725 F.2d 1111, 1119 (7th Cir. 1984) (stating that the difficulties of giving constitutionally adequate notice to the thousands of people exposed to asbestos sold by UNR but who had not yet developed asbestosis were "possibly insurmountable"). 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.

CONCLUSION

The limits of the Bankruptcy Court's power will be on display in this case as never before. Through this objection, the Product Liability Claimant Advocates ask the Court to respect the jurisdictional boundaries of the Court, the statutory directives of Congress, and the due process requirements of the Constitution and deny the Debtors' request to bar present and future product liability claimants from pursing claims against the Purchaser post-closing under applicable state law theories of successor liability.

Dated: June 19, 2009 (as amended technically on June 22, 2009)

Respectfully submitted,

CALLAN CAMPBELL, KEVIN JUNSO, ET AL., EDWIN AGOSTO, KEVIN CHADWICK, ET AL., AND JOSEPH BERLINGIERI

By: /s/ Steve Jakubowski
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

STATEMENT OF THE DEBTORS ON SUCCESSOR LIABILITY

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

Pursuant to the direction of the Court, General Motors Corporation ("**GM**") and its affiliated debtors (collectively, the "**Debtors**"), submit this Statement on successor liability issues:

- It is the position of the Debtors and the Purchaser[1] that the 363 Transaction and the transfer of the Purchased Assets should be free and clear of liens, claims, encumbrances, and other interests, including any successor or transferee liability pursuant to 11 U.S.C. §§ 363(f) and 105, as set forth in the MPA as filed on June 1, 2009, annexed to the Motion as Exhibit "A." Since the filing of the Motion, further negotiations ensued that resulted in modifications to the MPA with respect to certain of these matters (the "**Modifications**").
- Future Products Liability Claims. The Modifications provide the Purchaser will expressly assume all products liability claims arising from accidents or other discrete incidents arising from the operation of GM vehicles occurring subsequent to the Closing of the 363 Transaction, regardless of when the product was purchased. In addition, the Modifications provide that the Purchaser shall be responsible for the payment of all liabilities arising under Lemon Laws.
- Asbestos Current and Future Claims. There has been no modification or change of position as to current and future asbestos claims. The Debtors and the Purchaser propose that the Sale Order provide that the Purchased Assets will be free and clear of all current and future asbestos claims, including any successor or transferee liability.
- Environmental Claims. Although the Purchaser is not assuming any existing environmental claims, the Sale Order has been modified to provide that nothing in the Order shall in any way (i) diminish the obligation of the Purchaser to comply with Environmental Laws, or (ii) diminish the obligations of the Debtors to comply with Environmental Laws consistent with their rights and obligations as debtors in possession under the Bankruptcy Code.

[1] Capitalized terms not defined herein have the meaning ascribed thereto in the Debtors' motion requesting, inter alia, an order pursuant to 11 U.S.C. §§ 105, 363(b), (f), and (m), and 365 authorizing and approving the sale of substantially all the Debtors' assets pursuant to a proposed Master Sale and Purchase Agreement and related agreements, dated June 1, 2009 (the "**Motion**") or the MPA.

Dated: June 30, 2009
New York, New York

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HEARING DATE AND TIME: June 30, 2009 at 9:45 a.m. (Eastern Time)
OBJECTION DEADLINE: June 19, 2009 at 5:00 p.m. (Eastern Time)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

OMNIBUS REPLY OF THE DEBTORS TO OBJECTIONS TO DEBTORS' MOTION PURSUANT TO 11 U.S.C. §§ 105, 363(b), (f), (k), AND (m), AND 365 AND FED. R. BANKR. P. 2002, 6004, AND 6006, TO APPROVE (A) THE SALE PURSUANT TO THE MASTER SALE AND PURCHASE AGREEMENT WITH VEHICLE ACQUISITION HOLDINGS LLC, A U.S. TREASURY-SPONSORED PURCHASER, FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND OTHER INTERESTS; (B) THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (C) OTHER RELIEF

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

General Motors Corporation ("**GM**") and its affiliated debtors (collectively, the "**Debtors**"), respectfully represent:

Introduction

1. On June 1, 2009, the Debtors filed the motion (the "**Motion**"), requesting, *inter alia*, an order (the "**Sale Order**"), pursuant to 11 U.S.C. §§ 105, 363(b), (f), and (m), and 365 and Fed. R. Bankr. P. 6004 and 6006, authorizing and approving (i) the sale of substantially all of the Debtors' assets pursuant to a proposed Master Sale and Purchase Agreement and related agreements (the "**MPA**") among the Debtors (the "**Sellers**") and Vehicle Acquisition Holdings LLC (the "**Purchaser**"), a purchaser sponsored by the United States Department of the Treasury (the "**U.S. Treasury**"), free and clear of liens, claims, encumbrances, and other interests, including any successor liabilities (the "**363 Transaction**"), (ii) the assumption and assignment of certain executory contracts and unexpired leases of personal property and of nonresidential real property (collectively, the "**Leases")**, and (iii) the approval of the UAW Retiree Settlement Agreement, subject to higher or better offers.

2. These chapter 11 cases and the Motion were initiated because there was no viable alternative to preserve and maximize the going concern value of the GM business and also preserve the largest part of the domestic automotive industry and the hundreds of thousands of jobs and countless suppliers and other businesses that depend on an ongoing viable GM business.

3. Although several hundred responsive pleadings to the Motion have been filed, there is a consistent and overwhelming theme -- not one party seriously suggests (much less points to a single fact suggesting) that the 363 Transaction not be consummated or that there

is any viable alternative transaction, purchaser, or financing source outside of the 363 Transaction:

- No party has questioned that the alternative to the 363 Transaction is liquidation – or presented any facts to controvert the Debtors' showing that in liquidation -- the unsecured creditors would receive no recovery;
- No party has questioned the draconian consequences to employees, suppliers, dealers, communities, and the overall U.S. economy if the 363 Transaction is not consummated;
- Virtually no dealers have objected and, in fact, in excess of 95% of all dealers have agreed to new ongoing participation or wind-down agreements to be assumed by the Purchaser;
- No party or person has expressed an interest or proposed a higher or better offer or any other financing proposal.

4. Indeed, the responsive pleading filed by the Official Committee of Unsecured Creditors (the "**Creditors' Committee**") (Docket No. 2362), speaking for a broad cross-section of the unsecured creditor body, including unionized employees, suppliers, dealers, tort claimants, and bondholders, the claimant group most affected by the chapter 11 cases appropriately stated that: it is "satisfied that no viable alternative [to the 363 Transaction] exists to prevent the far worse harm that would flow from the liquidation of GM;" the "current transaction is the only option on the table"; and the 363 Transaction "serves the core purposes of the Bankruptcy Code and constitutes a strong business justification under section 363 of the Code to sell the debtors' assets outside of a plan process."

5. Moreover, as demonstrated by both the initial and the Supplemental Affidavit of Frederick A. Henderson Pursuant to Local Bankruptcy Rule 1007-2 (Docket Nos. 21 and 2479), time is of the essence and, in fact, the need for speed has intensified. The emergence of a New GM is a significant part of the effort to persuade and encourage consumers to purchase

GM products, and consummation of the 363 Transaction is essential to alleviate the stress on GM's supplier and dealer network and the obvious systemic risks attendant thereto.

6. The objections to the Motion may be placed into four principal categories (exclusive of cure objections) and, as stated, they do not challenge the necessity to consummate the 363 Transaction but rather, simply seek to extract more money from the Purchaser. These four categories are:

- Dealer contract issues;
- Claims of successor liability issues;
- Demands for additional and increased retiree benefits for retired hourly employees to be paid by the Purchaser; and
- Whether the 363 Transaction constitutes a *sub rosa* plan.

7. The objections lack merit and should be overruled. First, the agreements with the dealers are in full compliance with applicable law, and neither the Debtors nor the Purchaser seek to strip the states of any cognizable rights they have with respect to such agreements.

8. Second, under well-settled authority, and as recently acknowledged by Judge Gonzalez in the *Chrysler* case, the provisions in the MPA and the proposed order approving the 363 Transaction relating to successor liability are appropriate in the circumstances and entirely consistent with section 363 of title 11, United States Code (the "**Bankruptcy Code**"). In addition, the Purchaser has agreed to assume all express warranty claims and all products liability claims arising subsequent to the closing of the 363 Transaction.

9. Third, the retired hourly employees cannot compel the Purchaser to either assume their existing benefits or to offer them more than the Purchaser is willing to pay for the assets. Notably, the Purchaser is not relegating the retirees to an unsecured claim against the

estates: rather, it has offered them the same benefit proposal that is being made and will be implemented for GM's salaried retirees -- and four separate collective bargaining agents representing hourly retirees similar to those other hourly retirees who have filed objections to the 363 Transaction have accepted such proposal.

10. Finally, the 363 Transaction is not a *sub rosa* plan. In the *Chrysler* case, where precisely the same issue was raised under the same circumstances, it was soundly and clearly rejected. The same conclusion is warranted here because the 363 Transaction simply does not allocate or distribute any of the sale proceeds, nor does it otherwise dictate the terms of a plan. The 363 Transaction simply sells assets for consideration (including assumption of liabilities).

11. Manifestly, the 363 Transaction is not a plan disposition. Rather, it follows what has become the standardized structure for the many section 363 sales that have occurred and been approved.

12. The undisputed facts are clear. Prompt approval of the 363 Transaction is the only means to preserve and maximize enterprise value and provide a real and genuine opportunity for GM's business to survive and thrive as an economically viable entity. The only other alternative is prompt liquidation and the systemic failure and dire consequences that will inevitably unfold. The objecting parties, which seek to promote their own parochial economic interests in contrast to the interests of the greatest number of impaired stakeholders, should not be permitted to stop the necessary approval and consummation of the 363 Transaction.

The Objections

13. To date, approximately 750 written objections to the Motion or related aspects of the 363 Transaction (the "**Objections**"), have been filed with the Court or received by

the Debtors.[1] These Objections fall into eleven general categories and are set forth in summaries annexed hereto as Exhibits "A" through "K":

(i) Objections filed by bondholders ("**Bondholder Objections**"), a summary of which is annexed hereto as Exhibit "A";

(ii) Objections relating to state franchise law issues or objections by dealers ("**Dealer-Related Objections**"), a summary of which is annexed hereto as Exhibit "B";

(iii) Objections relating to successor liability, tort, asbestos, environmental, and other products liability claims, including consumer protection issues ("**Successor Liability and Consumer Objections**"), a summary of which is annexed hereto as Exhibit "C";

(iv) Objections filed by governmental agencies opposing specific plant closures ("**Plant Closure Objections**"), a summary of which is annexed hereto as Exhibit "D";

(v) Objections filed by retirees or "splinter" union representatives of retirees ("**Retiree/Splinter Union Objections**"), a summary of which is annexed hereto as Exhibit "E";

(vi) Objections relating to workers' compensation issues ("**Workers' Compensation Objections**"), a summary of which is annexed hereto as Exhibit "F";

(vii) Objections relating to tax issues ("**Tax Objections**"), a summary of which is annexed hereto as Exhibit "G";

(viii) Objections filed by holders of liens, including construction or mechanic's liens ("**Lien Creditor Objections**"), a summary of which is annexed hereto as Exhibit "H";

(ix) Objections filed by Stockholders ("**Stockholder Objections**"), a summary of which is annexed hereto as Exhibit "I";

(x) Objections relating to assumption and assignment of contracts, including cure amounts ("**Cure Objections**"), a summary of which is annexed hereto as Exhibit "J" and

[1] The Debtors intend to file an amended reply to address additional Objections that have been filed or received after the deadline to file objections to the Motion.

(xi) Miscellaneous objections ("**Miscellaneous Objections**"), a summary of which is annexed hereto as Exhibit "K."

14. The Debtors are continuing to review the Objections and are discussing specific issues with a number of entities who have filed Objections. In addition, in order to resolve certain Objections, the proposed order approving the Motion (the "**Sale Order**") will be modified and supplemented (the "**Modified Sale Order**"), which also should have the effect of resolving the number of outstanding Objections. The Modified Sale Order as well as a marked copy of the Sale Order showing the revisions will be submitted to the Court prior to the hearing to consider the Motion (the "**Sale Hearing**").

15. For the reasons set forth below and in the Motion and the Debtors' Memorandum of Law in Support of the Motion (the "**Memorandum of Law**" or "**Debtors' Mem.**"), any Objections that may not be resolved by the beginning of the Sale Hearing should be overruled, the Motion should be granted, and the Modified Sale Order granted.

Specific Objections

Bondholder Objections

16. Most of the Objections filed by the Debtors' bondholders are nothing more than emotional reactions to the reality that unsecured creditors of the Debtors will experience an economic loss as a result of the 363 Transaction. Although the Debtors are sympathetic to the economic circumstances facing bondholders, the Bondholder Objections present no legitimate challenge to the Motion.

17. The Unofficial Committee of Family & Dissident GM Bondholders (the "**F&D Bondholders**")[2] (Docket No. 1969), Oliver Addison Parker ("**Parker**") (Docket Nos.

[2] Note that as reflected by the Rule 2019 statements filed by the F&D Bondholders, many of such bondholders are speculators who purchased their respective bonds in the days preceding the Commencement Date for a price sometimes as low as $1.20 per $100 of face value.

2193 and 2194), and Radha R.M. Narumanchi (Docket No. 2357) ("**Narumanchi,**" and collectively with the F&D Bondholders and Parker, the "**Minority Bondholder Objectors**"),[3] challenge the 363 Transaction on the unsupportable grounds that, among other things, the 363 Transaction should have been implemented in the context of a chapter 11 plan of reorganization and is a disguised *sub rosa* plan of reorganization. These objections are without merit. The well-settled law is to the contrary, including, most recently Judge Arthur J. Gonzalez's May 31, 2009 decision, *In re Chrysler LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009), which was subsequently affirmed by the United States Court of Appeals for the Second Circuit on June 5, 2009, "for substantially the reasons stated in the opinions of Bankruptcy Judge Gonzalez," *In re Chrysler, LLC*, No. 09-2311-bk, 2009 U.S. App. LEXIS 12351, at *1 (2d Cir. June 5, 2009), approving the section 363 asset sale in Chrysler's chapter 11 cases. The *Chrysler* decision addressed, and squarely rejected, the precise arguments the Minority Bondholder Objectors now proffer. Notably, the Minority Bondholder Objectors simply ignore the unassailable legal analysis and substantive findings in *Chrysler*. Such Objections also conspicuously ignore both the reality and consequences of the liquidation alternative.

18. An Expedited Asset Sale Outside of a Chapter 11 Plan of Reorganization Is Appropriate Under These Exigent Circumstances. As discussed in the Motion and the Debtors' Memorandum of Law, the overriding objective of a business reorganization is to preserve the value of a debtor's assets as a going concern. *See NLRB v. Bildisco & Bildisco*, 465

[3] The F&D Bondholders purport to represent the interests of over 1,500 bondholders with bond holdings purportedly in excess of $400 million at face value. F&D Obj. at 1. On June 23, 2009, the Court denied the F&D Bondholders' motion seeking appointment as an official committee, pursuant to 11 U.S.C. § 1102(a)(2), finding that the F&D Bondholders did not establish a lack of adequate representation by the statutory committee appointed in these chapter 11 cases (the "**Creditors' Committee**"). Parker purports to hold 200,000 "shares" of GM bonds with a face value of $5 million. Parker Obj. at 2. Narumanchi purports to own $400,000 worth of GM bonds (at par value). Narumanchi Obj. at 1. Other bondholders also challenge the 363 Transaction for substantially the same reasons, including, for example, Ronald and Sandra Davis (Docket No. 2137) and Lloyd A. Good (Docket No. 2025).

U.S. 513, 528 (1984); Debtors' Mem. at 3-4 (citing cases). Debtors in bankruptcy often have been permitted to sell substantially all their assets prior to the process of confirming a plan (including at the very early stages of a chapter 11 case), particularly where sufficient exigent circumstances (such as the erosion in value of assets over time) exist. *See, e.g., Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2331 n.2 (2008); *In re Brookfield Clothes, Inc.*, 31 B.R. 978, 986 (1983); Debtors' Mem. at 5. These cases are no different. Here, in the absence of *any* other financing, equity investment, strategic alliance, or other alternative to liquidation, the Debtors entered into the 363 Transaction and filed the Motion to preserve the going concern value of GM's business and maximize value to all economic stakeholders. Thus, the issue is whether, in the context of these chapter 11 cases involving a fragile business, there is a "business justification" or a "good business reason" for the sale of substantially all the Debtors' assets at this early stage. *See In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983); *Chrysler*, 405 B.R. at 96; *In re Trans World Airlines, Inc.*, 2001 Bankr. LEXIS 980 (Bankr. D. Del. Apr. 2, 2001). As demonstrated in the Debtors' Motion, Memorandum of Law, and supporting affidavits and declarations, and in the submission made by the Creditors' Committee, the answer is a resounding "yes."

19. The *undisputed* record before the Court demonstrates that the 363 Transaction is the *only* viable means of preserving the value of GM's business enterprise and maximizing its going concern value. *See, e.g.*, Affidavit of Frederick A. Henderson Pursuant to Local Bankruptcy Rule 1007-2 ¶¶ 5, 14, 16, 19, dated June 1, 2009 (the "**Henderson Affidavit**" or "**Henderson Aff**."). There simply is no other option: The only alternative is liquidation. *Id.* All prior efforts by GM's management and financial advisors did not yield a single purchaser or strategic partner for GM's assets -- or even an entity willing to provide critical debtor in

possession financing, except for the U.S. and Canadian Governments. *Id.* ¶ 14; Repko Decl. ¶¶ 24-29. But these entities have made it abundantly clear that they are willing to purchase substantially all of the Debtors' assets *only in the context of an expedited 363 Transaction.* The Minority Bondholder Objectors' *ipse dixit*, that the 363 Transaction is not necessary and that a traditional chapter 11 process should proceed, is totally without support. They set forth no facts -- nor can they -- to indicate that the Purchaser or any other entity is willing to proceed with either a transaction, debtor in possession financing, or any other element of the transaction outside of an expedited 363 asset sale, or that any other purchaser or financing source even exists.

20. Faced with a choice between (a) implementing the 363 Transaction within the parameters negotiated with the Purchaser -- thereby (i) preserving and maximizing the value of GM's business, (ii) saving hundreds of thousands of automotive-related jobs, and (iii) facilitating a distribution of the purchase price (including stock with an estimated value of $3.8 to $4.8 billion (*see* Declaration of J. Stephen Worth, dated May 31, 2009, at Ex. F., pg. 14 (Docket No. 425) (the "**Worth Declaration**" or "**Worth Dec.**")) and other assets to bondholders and other creditors through an eventual chapter 11 plan of liquidation, or (b) liquidating the Debtors' assets, which would provide no distribution to bondholders (*see, e.g.*, Declaration of Albert Koch, dated May 31, 2009, at 7 (Docket No. 435) ("**Koch Declaration**" or "**Koch Dec.**") -- the Debtors' Board of Directors patently exercised sound business judgment in proceeding with the 363 Transaction.

21. In the face of these factual realities and significant legal authority, the Minority Bondholder Objectors complain that the 363 Transaction should have been implemented in the context of a plan of reorganization. *See, e.g.*, F&D Obj. ¶18. But this contention ignores the law and facts. As a matter of law, a 363 Transaction *is* permissible

(Debtors' Mem. at 3-4; *Chrysler*, 405 B.R. at 94), and the Minority Bondholder Objectors neither controvert the Debtors' authorities nor cite any contrary rule of law. As a matter of fact, the record demonstrates that the Purchaser – the only potential purchaser -- will walk away if the sale is not pursued in the context of an expedited 363 sale proceeding and approved by July 10, 2009. As discussed in detail in the Henderson Affidavit (Henderson Aff. ¶¶ 82-96) and the Supplemental Affidavit of Frederick A. Henderson Pursuant to Local Bankruptcy Rule 1007-2, dated June 25, 2009 (the "**Supplemental Henderson Affidavit**" or "**Supp. Henderson Aff.**") (Supp. Henderson Aff. ¶¶ 5-11), with each passing day, the economic viability of GM's suppliers and dealers becomes increasingly uncertain; indeed, many have already commenced bankruptcy cases, and many more will likely do the same in the near future unless the 363 Transaction is promptly consummated and New GM[4] begins operations. As such, notwithstanding the Minority Bondholder Objectors' conclusory assertions to the contrary, the Debtors simply do not have the luxury of waiting around for a *nonexistent* white knight to both finance a chapter 11 case and await the outcome of a prolonged chapter 11 case. The Minority Bondholder Objectors certainly identify no such financier or purchaser.

22. The 363 Transaction Is a Sale of Assets, Not a *Sub Rosa* Plan of Reorganization. While it is true that obstacles exist in obtaining Bankruptcy Court approval of a transaction that would amount to a *sub rosa* plan of reorganization -- i.e., a transaction that effectively dictates a distribution scheme and other terms only found in a plan of reorganization -- it is equally true that if an asset sale transaction contemplated by a debtor "has a proper business justification which has potential to lead toward confirmation of a plan and is not to evade the plan confirmation process, the transaction may be authorized." *Chrysler*, 405 B.R. at

[4] Capitalized terms not defined herein have the meaning ascribed thereto in the Motion or the Debtors' Memorandum of Law.

96 (citations omitted). In particular, a "debtor may sell substantially all of its assets as a going concern and later submit a plan of liquidation providing for the distribution of proceeds of the sale." *Id.* That is precisely the situation here: The 363 Transaction is a value-preserving and value-maximizing transaction; the Debtors are receiving fair value for the assets being sold; and the sale in no way effects any distribution of the *Debtors'* property to creditors, nor does it in any way impinge upon any chapter 11 plan that necessarily will follow.

23. Specifically, as set forth in the Motion, the 363 Transaction, as contemplated by the MPA, meets all the traditional elements of a sale of assets under section 363(b), including arm's-length negotiations between the buyer and seller for the assets that the Purchaser is willing to acquire and the Debtors are willing to sell (as well as liabilities and obligations that the Purchaser is willing to assume) so that the Purchaser could effectively continue GM's business as a going concern. *See, e.g.*, Debtors' Mem. at 20. In exchange, the Debtors received consideration consisting of (i) cancellation of billions of dollars of secured debt, (ii) assumption by New GM of a portion of the Debtors' businesses' obligations and liabilities that must be satisfied to preserve the ongoing value of the business, and (iii) no less than 10% of the stock of the Purchaser (and warrants, as well) which the Debtors' financial expert values between $3.8 and $4.8 billion. *See* Worth Decl. at Ex. F, pg. 14. As the unrebutted evidence of the Debtors' valuation and liquidation experts make clear, that consideration is unquestionably the highest and best available, and the Debtors' receipt of such consideration should allow for a distribution to the Debtors' unsecured creditors, including the Minority Bondholder Objectors, in the context of a chapter 11 plan of liquidation. It is easily understood when considering the liquidation alternative why the ad hoc bondholder committee that appeared at the June 1, 2009 hearing strenuously supports the Motion.

24. The Minority Bondholder Objectors erroneously contend that the 363 Transaction constitutes an impermissible *sub rosa* plan because the "*distributions to constituencies* that would be *approved* in the section 363 sale would either not be part of any later plan, or would be *predetermined* such that they could not be distributed in a later plan process." F&D Obj. at 12 (emphasis added). The Minority Bondholder Objectors further assert that "the Debtors specifically seek to obtain the benefits of the section 1129 confirmation process, through an accelerated section 363 transaction, while flatly ignoring the requirements and creditor protection of section 1129 of the Bankruptcy Code." Parker Obj. at 20. They point to no provision of the MPA that would support their tortured interpretation of the 363 Transaction as dictating subsequent distributions of the Debtors' assets. It is clear on the face of the 363 Transaction documents that there will be *no distribution or allocation of estate assets or sale proceeds to any creditors* under the 363 Transaction. The sale proceeds and remaining assets will be allocated and distributed only at a future date pursuant to a chapter 11 plan of liquidation.[5]

25. Specifically, the Minority Bondholder Objectors' characterization that the ownership interests in New GM that the Purchaser has assigned to certain of the Debtors' creditors upon consummation of the 363 Transaction reflect a distribution or allocation of estate

[5] Accordingly, the Minority Bondholder Objectors' reliance on *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1993) for the proposition that the 363 Transaction is an attempt to dictate the terms of reorganization because the 363 Transaction provides for the "distributions in respect of both the UAW claims and the general unsecured claims" (F&D Obj. at 9-10) is inapposite. *See also* Parker Obj. at 16. There is no distribution of estate assets in connection with the 363 Transaction. Equally unavailing is Parker's reliance on *In re Westpoint Stevens Inc.*, 333 B.R. 30 (S.D.N.Y. 2005), for the proposition that the Debtors "cannot use Section 363 to force the bondholders and other unsecured non-trade creditors to take a distribution in satisfaction of their claims that is disproportionately less then . . . claims that are of equal rank . . ." Parker Obj. at 20. As Judge Gonzalez recognized, the *Westpoint Stevens* case involved a situation where "the terms of the sale order allocated the sales proceeds between the first and second lien lenders, and directed that the distribution fully satisfied the underlying claims by terminating the lenders' security interest in those claims, thereby usurping the role of the confirmation process." *Chrysler*, 405 B.R. at 98. That simply is not the case here – and, contrary to Parker's contention, there certainly is no distribution in connection with the 363 Transaction that "impairs the rights of a class of unsecured creditors in favor of another class of unsecured creditors of equal rank." Parker Obj. at 18.

assets in violation of the absolute priority rule is simply false. The Purchaser -- *not* the Debtors -- has determined New GM's ownership composition and capital structure *outside of the bankruptcy context*. The Minority Bondholder Objectors concede as much. *See, e.g.*, F&D Obj. at 7 ("The *Government* will thereafter allocate the ownership of New GM . . . .") (emphasis added); Parker Obj. at 15 ("The Debtors did not play any role in negotiating the capital structure of the Purchaser and did not decide what any of its stakeholders would receive as part of the transaction."). As part of that decision, New GM will assign ownership interests to certain of the Debtors' creditors in the belief that such transfer is necessary to conduct the acquired business. These obligations will be satisfied through allocation of New GM equity or assumption, including the UAW collective bargaining obligations and workers' compensation claims that must be satisfied to obtain beneficial self-insured status. In sum, the assignment of ownership interests is neither a distribution of estate assets nor an allocation of proceeds from the sale of the Debtors' assets. As Judge Gonzalez made clear, the "allocation of ownership interests in the new enterprise is irrelevant to the estates' economic interests." *Chrysler*, 405 B.R. at 99.

26. For example, the fact that the Purchaser has decided to allocate 17.5% of New GM's equity to the VEBA as consideration for entering into a new collective bargaining agreement with the UAW, in no way reflects any distribution or allocation of assets of the Debtors, let alone discrimination by the Debtors on account of prepetition claims. Rather, it is the product of a separately-negotiated agreement between New GM and the UAW. The consideration provided by New GM "in that exchange is not value that would otherwise inure to the benefit of the Debtors' estates." *Id.* at 100. Likewise, the value that the Debtors will receive if the 363 Transaction is approved (i.e., 10% of equity plus warrants), is the product of arm's-length negotiations between the Debtors and the Purchaser. Ultimately, the confirmation of a

plan of liquidation will provide for the manner in which the distribution of the Debtors' assets, in accordance with the priority scheme of the Bankruptcy Code.[6]

27. Parker's Challenge to the Appropriateness of the U.S. Treasury Expending TARP Funds Lacks Any Legal Basis. In late 2008, Congress promulgated the Emergency Economic Stabilization Act of 2008 ("**EESA**"), Pub. L. No. 110-343, 122 Stat. 3765 (Oct. 3, 2008) (codified at 12 U.S.C. §§ 5201, *et seq*.), which established the Troubled Asset Relief Program ("**TARP**"). "TARP authorizes the Secretary of the Treasury to purchase troubled assets to restore confidence in the economy and stimulate the flow of credit." *Chrysler*, 405 B.R. at 82. As set forth in the Henderson Affidavit, beginning in December 2008, pursuant to a Loan and Security Agreement, dated December 31, 2009, GM borrowed approximately $13.4 billion under the TARP program to finance its operations. Thereafter, GM borrowed an additional $6 billion.

28. Parker further objects to the Motion on the ground that the "TARP funds are not available to fund the Debtors' reorganization" because Congress limited the scope of EESA to permit the Secretary to purchase troubled assets only from "financial institution[s]." Parker Obj. at 22, 24 (citing 12 U.S.C. § 5211(a)(1)). As a threshold matter, Parker lacks standing to raise the TARP issue, as he has suffered no injury as a result of the alleged violation. To the contrary, Parker will benefit directly from the alleged violation by likely receiving a distribution to which he would otherwise not be entitled.

29. Specifically, the issue of standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). There are three elements to constitutional standing: (1) the plaintiff must have suffered an "injury in fact," which is actual or imminent, and that is a concrete and

[6] For these reasons, the similar Objection set forth by Narumanchi equally fails.

particularized invasion of a legally protected right; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, not merely speculative, that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). These elements must be shown to satisfy the "case or controversy" requirement of Article III. *See Chrysler*, 405 B.R. at 82. In addition, there are judicially-proscribed prudential limitations to standing, one of which is "the plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett*, 520 U.S. at 162 (internal citations omitted).

30. Here, Parker lacks constitutional standing. Because "all unsecured claims are receiving no less than they would receive under a liquidation," the Minority Bondholder Objectors have no injury in fact. *Chrysler*, 405 B.R. at 83. Moreover, even if Parker could demonstrate an injury in fact, the injury is not "causally connected" to the U.S. Government's use of TARP funds. Specifically, "[i]f a non-governmental entity were providing the funding in this case, [Parker] would be alleging the same injury . . . . In this light, it is not the actions of the lender that [Parker is] challenging but rather the transaction itself. Specifically, [Parker's] alleged injury is not fairly traceable to the U.S. Treasury's actions because [Parker] would suffer the same injury regardless of the identity of the lender. " *Id.*

31. Parker's Miscellaneous Objections Equally Lack Merit. Parker asserts additional objections to the Motion, all of which should be summarily rejected.

32. First, Parker contends that "[w]hile the Debtors claim that liquidation would be disastrous for GM's stakeholders . . . they offer no evidence that would support this claim." Parker Obj. at 13. Not so. Parker completely ignores the liquidation analysis attached

to the Koch Declaration, which sets forth in detail the recoveries to be expected by each class of creditor under a hypothetical liquidation scenario of the Debtors' assets.

33. Second, Parker claims that the Debtors "do not (and apparently cannot) state the expected value of the Purchaser after the completion of the proposed 363 'sale', the amount of debt the Purchaser can safely support, the expected value of the Purchaser's common stock being distributed under the 'sale' transaction . . ." Parker Obj. at 15. This argument is misguided for several reasons. First, issues such as the amount of debt that the Purchaser can safely support are wholly irrelevant. More importantly, Parker's claim that the Debtors do not state the expected value of the Purchaser's common stock to be paid to the Debtors under the 363 Transaction simply ignores the Worth Declaration and the fairness opinion and presentation to the GM Board of Directors annexed thereto as Exhibits A and F, respectively.

34. Third, Parker purports to undertake his own liquidation analysis of the Debtors' assets and liabilities and proclaims that, in a liquidation, "unsecured creditors could reasonably expect to receive 25 cents on the dollar while secured creditors are paid in full." Parker Obj. at 7. Putting aside the absence of any showing that he has any expertise in this area, his own analysis actually supports the Debtors. Specifically, central to his analysis, Parker repeatedly contends that the Debtors have approximately $30 billion of value in net operating losses that are available as a tax loss carry forward -- but he acknowledges that this loss carry forward only has value "to an acquiring corporation" that obtains at least 50% of the Debtors. *Id.* at 6. In the hands of the Debtors -- including in a liquidation -- it has *no* value to creditors. Moreover, Parker cannot identify any entity that has come forward to be that "acquiring corporation," even with the supposedly valuable tax loss as the prize. No such individual or entity exists.

35. Finally, in his amended Objection (Docket No. 2193), Parker contends that "[u]nder the limitations on liens provisions of the senior bondholders' bonds, GM could not grant the Government a lien on virtually everything it owned without concurrently granting to its bondholders (like Parker) an identical lien on the same property securing the bond debt equally and ratably together with the debt of the Government . . . ." Parker Obj. at 9. Parker's contention is flatly wrong.

36. There is no such sweeping restriction on liens in the indentures governing the bonds. Rather, the only restriction on liens is contained in Section 4.06 of such indentures. Section 4.06 provides only that

> [GM] will not, nor will it permit any Manufacturing Subsidiary to, issue or assume any Debt secured by a Mortgage upon any Principal Domestic Manufacturing Property of [GM] or any Manufacturing Subsidiary or upon any shares of stock or indebtedness of any Manufacturing Subsidiary . . . without in any such case effectively providing concurrently with the issuance or assumption of any such Debt that the Securities . . . shall be secured equally and ratably with such debt. . . .

Indentures Section 4.06.

37. The debt under the U.S. Treasury Loan Agreement is *not* secured by liens on any such assets. Of course, these assets became subject to the postpetition liens of the lenders under the debtor in possession financing facility.

38. Based on the foregoing, the Bondholder Objections, including those filed by the Minority Bondholder Objectors, should be overruled in their entirety.

Dealer-Related Objections

39. GM Must Restructure Its Uncompetitive, Legacy Dealer Network. Through the 363 Transaction and related efforts, GM is in the process of restructuring all facets of its business. Central to these efforts are the changes currently underway with respect to GM's

uncompetitive, legacy dealer network, the cost of which is simply staggering: Because of insufficient throughput (or sales per dealership) and only marginal network-wide profitability, the Company spends more than $2 billion annually (for, among other things, wholesale floor plan support, standards for excellence programs, new vehicle inspection payments, free fuel fills, and other incentives paid directly to dealers). Although the proposed network reductions will not immediately save these costs in full, it will allow New GM to begin significant systematic cost reduction, as the retained dealers become stronger due to increased market opportunity and, thus, require decreased levels of support over time.[7]

40. Nevertheless, GM has addressed transition issues in a manner that is much more dealer-friendly than simply rejecting dealership agreements. That is, *every* GM dealer, whether it is being retained or not, has received an offer of very substantial consideration in the form of a Wind-Down or Participation Agreement, including: (i) in the case of non-retained dealers, a substantial monetary payment and the continuation of GM's indemnity obligations regarding future product liability; and (ii) in the case of retained dealers, the opportunity to continue in business pursuant to an agreement that will provide New GM with necessary flexibility going forward and the commitment of retained dealers to invest appropriately in their facilities in light of increased market opportunity -- while, importantly, otherwise changing very little of the contractual arrangements under which these dealers will continue to operate.[8]

[7] In specific terms, the dealer restructuring plan will reduce overall GM dealerships from slightly under 6,000 today to about 3,600 to 3,800 by the end of 2010, providing eventual structural cost savings of approximately $415 million per year, including reduced local advertising assistance, channel network alignment payments, sales and service consultant fees, dealer website funding, dealer support system costs, and dealer training programs.

[8] In addition, the Company established an appeal mechanism to reconsider dealer wind-downs, which, to date, has resulted in decisions to retain 64 of such dealers going forward.

41. Overview of the Dealer-Related Objections. The thrust of the Dealer-Related Objections, which were not filed by the dealers themselves but, rather, by governmental agencies, is that the Wind-Down and Participation Agreements signed by the Debtors' dealers conflict with, and effect an improper waiver of, such dealers' state franchise law protections. As explained below, however, because the Debtors -- as confirmed by Judge Gonzalez's recent *Chrysler* decision -- would have been well within their rights to simply *reject* their dealership agreements, there is nothing improper about the far less draconian alternatives presented by the Wind-Down and Participation Agreements (which, not surprisingly, have been all but unanimously accepted). *See* Henderson Supp. Aff. ¶¶ 10-11 (noting that nearly 100 percent of the dealers offered Wind-Down and Participation Agreements have accepted); *see also* Objection of the State of Texas, on behalf of the Texas Department of Transportation ("**Texas Obj.**"), Exhibit B (Participation Agreement) at ¶ 9(f) (providing that the "[d]ealer acknowledges that its decisions and actions are entirely voluntary and free from any duress").

42. Outright Rejection of the Company's Dealership Agreements, While Far More Severe, Would Have Been Entirely Permissible Under Section 365 of the Bankruptcy Code. The Supreme Court explained in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), that "the authority to reject an executory contract [under section 365] is vital to the basic purpose to a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization." *Id.* at 528. Thus, as Judge Gonzalez recently held in *Chrysler*, absent a showing of bad faith or abuse of discretion, the decision to reject is subject only to the debtor's business judgment -- regardless of whether that decision is the best (or even a good) one. *In re Old Carco LLC*, No. 09-50002, 2009 WL 1708813, at *1 (Bankr. S.D.N.Y. June 19, 2009); *see also In re Penn Traffic Co.*, 524 F.3d 373, 383 (2d Cir.

2008) ("That the debtor's interests are paramount in the balance of control is underscored by the business judgment standard employed" under section 365); *In re G Survivor Corp.*, 171 B.R. 755, 757 (Bankr. S.D.N.Y. 1994) ("Generally, absent a showing of bad faith, or an abuse of discretion, the debtor's business judgment will not be altered") (citations omitted), *aff'd sub nom. John Forsyth Co. v. G. Licensing, Inc.*, 187 B.R. 111 (S.D.N.Y. 1995); *In re Chipwich, Inc.*, 54 B.R. 427, 430-31 (Bankr. S.D.N.Y. 1985) (similar); *see also In re Trans World Airlines, Inc.*, 261 B.R. 103, 121-22 (Bankr. D. Del. 2001) ("[W]hether the debtor is making the best or even a good business decision is not a material issue of fact under the business judgment test") (internal quotation omitted).

43. In recently approving Chrysler's rejection of hundreds of dealership agreements, Judge Gonzalez confirmed that the traditional business judgment standard -- and *not* some heightened "public interest standard" or "balancing of the equities" test urged by various objectors -- applies to an OEM-debtor's rejection of dealership agreements under section 365. *Old Carco* at *1-6. Judge Gonzalez explained that state franchise laws, by their express terms, do not justify imposition of a higher standard of section 365 review:

> [W]hile the policies designed to protect the public interest may, in part, underlie the Dealer Statutes, those statutes have been enacted by *state legislatures*, not Congress, and by their very terms protect the public interest of their respective states rather than the national public interest. Further, the fundamental interests sought to be protected by these state legislatures are the economic interests of local businesses and customer convenience and costs. Although some Dealer Statutes articulate a public safety concern in such enactments, the public safety issues raised by the closing of dealerships do not create an imminent threat to health or safety.

Id. at *3 (citation omitted) (emphasis in original); *see also id.* at *4 n.8 ("[T]he Dealer Statutes have a limited connection to public safety. The vast majority of Dealer Statutes concern solely

commercial issues affecting the dealers and their customers and communities. . . . Thus, the health and safety of the public are not threatened by rejection") (citation omitted).

44. Moreover, after concluding that Chrysler's rejection of dealership agreements constituted a valid exercise of business judgment, Judge Gonzalez found that the state franchise laws at issue, like those at issue here, frustrated the purposes of (and, thus, were preempted by) section 365. *See generally id.* at *11-17; *see also id.* at *16 ("'Where a state law 'unduly impede[s] the operation of federal bankruptcy policy, the state law [will] have to yield'") (quoting *In re City of Vallejo*, 403 B.R. 72, 77 (Bankr. E.D. Cal. 2009)). As Judge Gonzalez explained:

> Specifically and by no means exclusively, statutory notice periods of, *e.g.*, 60 or 90 days before termination clearly frustrate § 365's purpose to allow a debtor to reject a contract as soon as the debtor has the court's permission (and there is no waiting period under the Bankruptcy Rules). Buy-back requirements also frustrate § 365's purpose to free a debtor of obligations once the debtor has rejected the contract. Good cause hearings frustrate § 365's purpose of giving a bankruptcy court the authority to determine whether a contract may be assumed or rejected. Strict limitations on grounds for nonperformance frustrate § 365's purpose of allowing a debtor to exercise its business judgment and reject contracts when the debtor determines rejection benefits the estate. So-called "blocking rights," which impose limitations on the power of automobile manufacturers to relocate dealers or establish new dealerships or modify existing dealerships over a dealer's objection, frustrate § 365's purpose of giving a debtor the power to decide which contracts it will assume and assign or reject by allowing other dealers to restrict that power.

Id. at *16; *see also Vallejo*, 403 B.R. at 77 (holding that "Congress enacted section 365 to provide debtors the authority to reject executory contracts. This authority preempts state law by virtue of the Supremacy Clause [and] the Bankruptcy Clause") (internal citation omitted). Judge Gonzalez also made clear that 28 U.S.C. § 959(b), on which the Dealer-Related Objections largely rely, did not alter the Court's "preemption analysis," because that provision "does not de-

limit the precise conditions on contract rejection" -- particularly where, as here, the pertinent state laws concern "consumer convenience and costs and the protection of local businesses, rather than a concern over public safety." 2009 WL 1708813, at *14-15.[9]

45. Providing Dealers with More than Would Be Realizable from Rejection Claims Should Obviate the Objections Interposed by State Regulators. Based on the reasoning in *Chrysler*, and given that the Debtors, in the exercise of their business judgment, could have followed the rejection process, the proposed result here, i.e., the approval of agreements that offer the Company's affected dealers significant consideration that would otherwise not be available, should be approved and authorized.

46. For example, through the Wind-Down Agreements, dealers will receive financial remuneration, including incentive payments, that will enable them to stay in business through the end of their current contracts (approximately 17 months) and to continue to sell existing new vehicle inventory in the ordinary course (rather than in a "fire sale") and provide service and parts availability to their customers. In exchange, and instead of simply being put out of business immediately, these dealers will agree not to order additional inventory or protest future network modifications, to release certain claims (not including claims related to future normal course payment for business activities) and to waive termination assistance rights under their current contracts. In addition, under the Wind-Down Agreements, the indemnification provisions of article 17.4 of the dealership agreements will be assumed and assigned to New GM -- a further obligation that, in a rejection scenario, would fall squarely on the dealers' shoulders.

[9] *See also* 2009 WL 1708813, at *15 ("In sum, the Dealer Statutes . . . are concerned with protecting economic or commercial interests and are thus preempted by the Bankruptcy Code notwithstanding 28 U.S.C. § 959(b)) (citing *In re Baker & Drake, Inc.*, 35 F.3d 1348, 1353 (9th Cir. 1994)); *id.* at *16 n.32 (stating that "state law protections cannot be used to negate the Debtors' rejection powers under § 365. . . . 'The requirement that the debtor in possession continue to operate *according to* state law requirements imposed on the debtor in possession (i.e., § 959(b)) does not imply that its powers under the Code are *subject to* the state law protections'") (quoting *In re PSA, Inc.*, 335 B.R. 580, 587 (Bankr. D. Del. 2005) (emphasis in original)).

The Wind-Down Agreements therefore represent classic settlement agreements (routinely approved and enforced) to resolve any issue or dispute that otherwise would arise upon termination and that, while critical to the restructuring of GM's dealer network, are also intended and designed to avoid the harsh consequences of rejection.[10]

47. The same can be said even more strongly about the Participation Agreements -- through which *retained* dealers are offered a *long-term* alternative to rejection, although on slightly modified (but, nevertheless, relatively common) terms. In fact, those terms have only improved from the dealers' perspective since originally being offered, as the Debtors have worked closely with the National Automobile Dealers Association ("**NADA**") to further refine the retained dealers' arrangements through a letter amendment to the Participation Agreements. *See* Texas Obj., Exhibit C. This amendment provides additional clarity that (i) sales and inventory requirements will not be imposed unilaterally by GM; (ii) brand and model exclusivity requirements only will apply to the retained dealers' showrooms; (iii) retained dealers will continue to have the notice and procedural protections under their current contracts or state law with respect to claimed breaches; (iv) the waiver of protest rights will not apply to

[10] *See, e.g., Edwards v. Kia Motors of Am., Inc.*, 554 F.3d 943, 945-49 (11 Cir. 2009) (holding that retrospective release by dealer of existing claims against manufacturer for alleged violation of the Alabama Motor Vehicle Franchise Act, in exchange for manufacturer's consent to dealership sale, was enforceable under Alabama law, as it was executed in good faith and for valid consideration). In fact, a number of States -- including Alaska, Colorado, Louisiana, New York, and Virginia -- expressly carve out claim settlements from the universe of non-waivable provisions. *See, e.g.*, Alaska Stat. § 45.25.130(b) ("This section does not prohibit a voluntary agreement between a manufacturer and a new motor vehicle dealer . . . to settle legitimate disputes"); Colo. Rev. Stat. § 12-6-120(1)(o) (a manufacturer cannot coerce a dealer's prospective assent to waiver "that would relieve any person of a duty or liability imposed under this article *except in settlement of a bona fide dispute*") (emphasis added); La. Rev. Stat. § 32.1261(1)(a)(iv) (manufacturer cannot coerce dealer to assent to a release or waiver "unless done in connection with a settlement agreement to resolve a matter pending a commission hearing or litigation. . . ."); N.Y. Veh. & Traf. Law § 463(2)(*l*) (prohibition on coercing dealer to assent to release or waiver "shall not be construed to prevent a franchised motor vehicle dealer from entering into a valid release or settlement agreement with a franchisor"); Va. Code Ann. § 46.2-1572.3 (non-waiver provision "shall not apply to good faith settlement of disputes, *including disputes pertaining to contract negotiations*, in which a waiver is granted in exchange for fair consideration in the form of a benefit conferred upon the dealer. . . .") (emphasis added).

circumstances in which GM seeks to increase the number of dealers in a given market;[11] and (v) matters outside the Participation Agreements will not be subject to this Court's exclusive jurisdiction.[12]

48. Indeed, the rationale behind these provisions (particularly the exclusivity and "no protest" provisions, which are the primary focus of the Dealer-Related Objections) is clear -- and entirely consistent with the purposes of the Bankruptcy Code. First, there can be no debate that New GM will benefit, both from a sales and brand focus/recognition perspective, from a dealer network comprised of showrooms of exclusively GM cars and trucks. Second, the retained dealers' limited waiver of their protest rights provides New GM with some flexibility to optimally construct and alter its dealer network in the future in the interests of enhancing the value of the Purchaser that will benefit the Sellers' creditors. But the Participation Agreements, as amended, preserve the retained dealers' right to protest franchise modifications within six miles and limit any protest right waivers to a period of only two years, provisions which are neither arbitrary nor unreasonable and have been voluntarily agreed to by the Company's dealers.

49. The bottom line is that these restructuring efforts make sense for all involved. Retained dealers will, again, enjoy enhanced market opportunities because of the smaller number of dealers, while the attendant reduction in GM's production and legacy costs will make GM products more competitive in the retail market. It is thus reasonable for GM to

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[11] *See, e.g., DaimlerChrysler Motors Co. v. Lew Williams, Inc.*, 48 Cal. Rptr. 3d 233, 239 (Cal. Ct. App. 2006) (finding dealer's prospective waiver of protest rights valid and enforceable, as it "was the result of an arm's length voluntary transaction . . . for valuable consideration").

[12] Annexed hereto as Exhibit "L" is a statement by NADA confirming that it "has reviewed and supports GM's amendments to the Participation Letter Agreement" and stating its belief that "the revised document addresses the majority of dealer concerns." Per NADA chairman John McEleney: "'I especially commend GM for its flexibility and its willingness to make substantive clarifications and modifications to address dealer concerns. We believe GM has made a very good faith effort, given the unprecedented circumstances facing GM and the industry.'"

require that these dealers invest in exclusive and attractive facilities and temporarily forego certain protest rights so that a new dealer network can be appropriately configured at the outset. Indeed, it is an overall benefit to the dealers that GM be able to do so, including because dealer relocations may be necessary to leave out-of-date facilities behind or to re-establish operations in auto malls or similarly concentrated areas. Finally, it is no stretch for GM to require retained dealers (or, for that matter, winding down dealers) to execute a release in exchange for the substantial consideration being offered. After all, if GM could simply reject its dealership agreements (thus leaving dealers holding their unsecured claims) and then offer new agreements only to those dealers chosen by GM, then it surely is reasonable for GM to require a release in these circumstances.

Successor Liability and Consumer Objections

50. Various of the Objections relate to tort, asbestos, environmental, and other products liability claims and assert that the Debtors' assets may not be sold to the Purchaser free and clear of such claims, including, in particular, shielding the Purchaser from successor liability. Notably, in presenting these arguments, the objectors cite no controlling authority which supports their position and, instead, ask this Court to completely disregard applicable precedent and Judge Gonzalez's decision in *In re Chrysler LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2008), *aff'd*, No. 09-2311-bk, 2009 U.S. App. LEXIS 12351 (2d Cir. June 5, 2009). In *Chrysler*, Judge Gonzalez categorically rejected the precise contentions posited by the Successor Liability and Consumer Objections. Indeed, the attorneys for the Creditors' Committee, who served in a similar capacity in Chrysler's chapter 11 case, conspicuously fail to mention, much less confront, Judge Gonzalez's decision and the stated principle of this Court to assure consistency in the decisions and rulings made by Bankruptcy Judges in the Southern District of New York.

51. Section 363(f) of the Bankruptcy Code provides that a debtor in possession may sell property

> free and clear of any interest in such property … only if
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

52. The reference in section 363(f) to the sale being free and clear of "any interest" has been interpreted to permit the sale of a debtor's assets free and clear of claims, including successor liability claims. *In re Trans World Airlines, Inc.*, 322 F.3d 283, 288-90 (3d Cir. 2003) ("***TWA***"); *Am. Living Sys. v. Bonapfel (In re All Am. of Ashburn, Inc.)*, 56 B.R. 186, 189-90 (Bankr. N.D. Ga. 1986) (sale pursuant to section 363(f) barred successor liability for product defects claim), *aff'd*, 805 F.2d 1515 (11th Cir. 1986); *Rubinstein v. Alaska Pac. Consortium (In re New England Fish Co.)*, 19 B.R. 323, 328 (Bankr. W.D. Wash. 1982) (sale pursuant to section 363(f) was free and clear of successor liability claims for even statutorily protected rights against employment discrimination and civil rights violations). The leading treatise on bankruptcy supports this conclusion:

> Section 363(f) permits the bankruptcy court to authorize a sale free of "any interest" that an entity has in property of the estate. Yet the Code does not define the concept of "interest," of which the property may be sold free. Certainly a lien is a type of "interest"

> of which the property may be sold free and clear. This becomes apparent in reviewing section 363(f)(3), which provides for particular treatment when "such interest is a lien." Obviously there must be situations in which the interest is something other than a lien; otherwise, section 363(f)(3) would not need to deal explicitly with the case in which the interest is a lien.

3 *Collier on Bankruptcy* ¶ 363.06[1] (15th rev. ed. 2008).

53. In *TWA*, the Third Circuit addressed the issue of whether the Bankruptcy Court properly extinguished the liability of a purchaser of a debtors' business operations as a successor under section 363(f) as it related to, *inter alia*, employment discrimination claims. In affirming the ruling of the Bankruptcy Court, the Third Circuit expressly rejected the arguments made by the objectors here – that "interests" in property should be narrowly interpreted to mean in rem interests in property such as liens. This principle has been consistently followed as a standard provision in the numerous section 363 sales that have occurred since *TWA* without objection or judicial attacks, e.g., in the following chapter 11 cases, among others: *In re Bearing Point, Inc.*, Ch. 11 Case No. 09-10691 (Bankr. S.D.N.Y. 2009); *In re Steve & Barry's Manhattan LLC*, Ch. 11 Case No. 08-12579 (Bankr. S.D.N.Y. 2008); *In re Lenox Sales, Inc.*, Ch. 11 Case No. 08-14679 (Bankr. S.D.N.Y. 2008); *In re Pilgrim's Pride Corp.*, Ch. 11 Case No. 08-45664 (Bankr. N.D. Tex. 2008); *In re Lehman Brothers Holdings Inc.*, Ch. 11 Case No. 08-13555 (Bankr. S.D.N.Y. 2008); and *In re The Sharper Image Corp.*, Ch. 11 Case No. 08-10322 (Bankr. D. Del. 2007).

54. Judge Gonzalez, in *Chrysler*, concurred with the principle expressed in *TWA*. The very same assertions that are argued here as to successor liability and the scope of section 363(f) in the context of tort and other claims were raised in opposition to Chrysler's section 363 motion. In overruling those objections, Judge Gonzalez, relying on *TWA*, stated:

> Some of these objectors argue that their claims are not "interests in property" such that the purchased assets can be sold free and clear

> of them. However, the leading case on this issue, *In re Trans World Airlines, Inc.*, 322 F.3d 283 (3d Cir 2003) ("***TWA***"), makes clear that such tort claims are interests in property such that they are extinguished by a free and clear sale under section 363(f)(5) and are therefore extinguished by the Sale Transaction. *See id.* at 289, 293. The Court follows *TWA* and overrules the objections premised on this argument. Even so, *in personam* claims, including any potential state successor or transferee liability claims against New Chrysler, as well as *in rem* interests, are encompassed by section 363(f) and are therefore extinguished by the Sale Transaction. *See, e.g., In re White Motor Credit Corp.*, 75 B.R. 944, 949 (Bankr. N.D. Ohio 1987); *In re All Am. Of Ashburn, Inc.*, 56 B.R. 186, 190 (Bankr. N.D. Ga. 1986). The Court also overrules the objections premised on this argument.

55. Notably, the fact that so-called "future" tort claims may have been impacted by this ruling in *Chrysler*, did not warrant a different result:

> 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 ascertain." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 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.

The objectors have provided no basis to overrule Judge Gonzalez's careful analysis of the issue that must be deemed to have been reviewed and accepted by the United States Court of Appeals for the Second Circuit. *In re Chrysler, LLC*, No. 09-2311-bk, 2009 U.S. App. LEXIS 12351 (2d Cir. June 5, 2009). Accordingly, the Successor Liability and Consumer Objections should be overruled.[13]

[13] With respect to objections raised as to environmental liabilities or obligations, a purchaser under section 363 has no obligation to assume environmental liabilities and, as set forth above, can purchase assets free and clear of such

56. Reliance by any objector on *In re White Motor Credit Corp.*, 75 B.R. 944 (Bankr. N.D. Ohio 1987), to support the proposition that a Bankruptcy Court lacks the authority to order the sale of a debtor's assets free and clear of tort claims and successor liability is misplaced. Although the *White Motor* court did not find that tort claims were interests within the purview of section 363(f), the court nevertheless held that a "sale conducted through the court's equitable powers can provide the debtor the same degree of relief effected by a sale in a plan of reorganization and, therefore, can affect claims arising prior to confirmation." *Id.* at 949. Accordingly, the court found "the sale was free and clear of all Defendants' claims." *Id.*

57. Moreover, relying on the Supreme Court's decision in *Perez v. Campbell*, 402 U.S. 637 (1971), the *White Motor* Court indicated that, in the context of asset sales in bankruptcy, state successor liability statutes, rules, etc. are subject to federal preemption pursuant to the Supremacy Clause of the United States Constitution, as applicable to the implementation of the provisions and objectives of the Bankruptcy Code. As a result, state successor liability laws must defer to achievement of the objectives and policies of the Bankruptcy Code.

58. The Objections interposed as to present and future asbestos claims, and the erroneous assertion that section 524(g) of the Bankruptcy Code is somehow applicable to a sale under section 363, do not compel a different result. As Judge Gonzalez again recognized in *Chrysler*, "section 524(g) is inapplicable to a free and clear sale under section 363(f) and the Sale Transaction does not contain releases of third parties." 405 B.R. at 112.

59. Additionally, this Court, in connection with its ruling on the Motion of the Ad Hoc Committee of Asbestos Personal Injury Claimants for an order directing the United

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liabilities, including successor liability. Of course, to the extent the Purchaser becomes the owner and operator of any purchased property, it will be responsible for environmental claims in respect of such property, and the 363 Transaction in no way seeks to shield the Purchaser from such liability.

States Trustee to appoint a committee of asbestos claimants and an order appointing a future asbestos claimants representative (the "**Motion to Appoint Asbestos Committee and Future Claims Representative**") (Docket No. 478), clearly noted that section 524(g) was not applicable to these chapter 11 cases as there is no intent to seek a section 524(g) channeling injunction and no discharge will be granted in the context of a liquidating plan. Notably, the Creditors' Committee opposed the Motion to Appoint Asbestos Committee and Future Claims Representative on the basis of, among other things, that "section 524(g) is not applicable to these chapter 11 cases . . . ." Objection of the Official Committee of Unsecured Creditors to the Motion of the Ad Hoc Committee of Asbestos Personal Injury Claimants for an Order (I) Appointing a Legal Representative for Future Asbestos and Personal Injury Claimants and (II) Directing the United States Trustee to Appoint an Official Committee of Asbestos Personal Injury Claimants at 3 (Docket No. 2266).

60. As the Creditors' Committee appropriately notes in its Objection to the 363 Transaction, section 524(g) relates to discharge of asbestos claims, which plainly is not being sought or even contemplated by the 363 Transaction. To state, as the Creditors' Committee does, that section 363 sales are "impliedly circumscribed by the existence of section 524(g)," lacks any authoritative support. Indeed, it would require this Court, by implication, to write statutory language that Congress conspicuously did not include in the Bankruptcy Code. The argument serves to highlight the futility of the Committee's position.

61. Whatever rights present and future asbestos claimants have can be properly addressed in the Debtors' chapter 11 cases subsequent to the Closing of the 363 Transaction, if approved. Again, it must be noted that these chapter 11 cases are not asbestos-driven, as noted by the Court on June 25, 2009, in connection with the Motion to Appoint

Asbestos Committee and Future Claims Representative. The Debtors' projected liabilities for asbestos claims constitute a minute fraction of the total claims to be administered, and the parochial interests of holders of contested asbestos claims should not be permitted to frustrate or otherwise impede a transaction that all parties recognize will maximize value for all economic stakeholders.

62. Notwithstanding the foregoing, to alleviate certain concerns that have been raised on behalf of consumers as to future products liability claims, the MPA has been amended to provide that the Purchaser will expressly assume all products liability claims arising from accidents or other discrete incidents arising from the operation of GM vehicles occurring subsequent to the Closing of the 363 Transaction, regardless of when the product was purchased. Additionally, the Purchaser has confirmed and, to the extent necessary, the MPA will be clarified to reflect, that the Purchaser is assuming all liability under Lemon Laws for additional repairs, refunds, partial refunds, or replacement of a defective vehicle, and for regulatory obligations under such laws, but not punitive, exemplary, special, consequential, or multiple damages or penalties, all as shall be more particularly addressed in any order approving the 363 Transaction. In connection with the foregoing, the Purchaser has agreed to continue addressing Lemon Law claims (to the extent they are assumed) using the same or substantially similar procedural mechanisms previously utilized by the Debtors.

63. In sum, objections asserting that the Purchaser is not entitled to the benefit of successor liability are without merit. *Chrysler* is directly on point. Its *ratio decidendi* should be applied. Moreover, and despite having no obligation therefor, the Purchaser has voluntarily agreed to assume certain products liability claims. Such assumptions should significantly alleviate the concern of most objectors.

Plant Closure Objections

64. A result of any sale is that the purchaser may elect to purchase less than all of the assets of the seller. The 363 Transaction is no different. The Debtors have received two informal Objections and one formal Objection by governmental units that challenge the decision by the Purchaser to exclude certain plants from the Purchased Assets. These Objections are summarized on the schedule annexed hereto as Exhibit "D."

65. These Objections challenge the business judgment of the Debtors in shutting down facilities. Yet it is the decision of the Purchaser which is at issue, not the Debtors. The incontrovertible evidence clearly supports the Debtors' business judgment in pursuing the 363 Transaction, notwithstanding the exclusion of certain assets from the sale.

66. The Objection by the County of Wayne, Michigan with respect to the exclusion of the Debtors' Willow Run facility asserts that the 363 Transaction should be reviewed under a heightened scrutiny standard based on the allegation that the Purchaser is an insider. As is clear in the Henderson Affidavit, the Purchaser is not an insider but rather, the entity designated by an arm's-length lender and negotiator that engaged in good faith negotiations with the Debtors regarding the terms of the 363 Transaction. Moreover, the Debtors have submitted substantial support that the 363 Transaction, even under a heightened scrutiny standard, inextricably leads to one conclusion -- the 363 Transaction must be approved in the interest of economic stakeholders.

Retiree/Splinter Union Objections

67. Like all other objectors to the 363 Transaction, the unions that have filed Objections (the "**Objecting Unions**")[14] do not dispute that (i) the 363 Transaction is in the

[14] The Objecting Unions include the IUE-CWA (the "**IUE**"), the United Steelworkers, and the International Union of Operating Engineers Locals 18S, 101S and 832S. Numerous similar objections have been submitted by other GM

Debtors' best interests; (ii) the 363 Transaction represents the best (and, indeed, the only) available alternative to a liquidation (which, there can be no debate, would offer a far lesser (or even no) recovery for any of the Debtors' general unsecured creditors, including the retirees represented by the Objecting Unions); or (iii) that the 363 Transaction will result in an immediately viable and competitive New GM (saving hundreds of thousands of jobs and the businesses of countless suppliers in the process). Rather, the Objecting Unions' challenge is principally limited to the contention that the treatment of their retirees in the 363 Transaction, as compared to the treatment of the UAW's retirees, is contrary to the requirements of section 1114 of the Bankruptcy Code and otherwise unfair and inequitable.

68. The Debtors are not unsympathetic to the Objecting Unions' concerns and do not seek to minimize the impact of the 363 Transaction and these chapter 11 cases upon the retirees represented by the Objecting Unions (and many others). But the Objection is meritless as a matter of law and fact.

69. The transaction at issue is a *sale* of assets, not a distribution of proceeds by or from the assets of the Debtors to *any* creditor or creditor group. No modification of any benefit plans of the Objecting Unions or the retirees they represent are being proposed or effected; and, as a matter of law (including under the Bankruptcy Code), satisfying section 1114 is simply *not* a precondition to an asset disposition under section 363. Indeed, a section 1114 process in this context would effectively preclude the very expedition that section 363 so clearly permits, and that is an express condition of the MPA. (*See*, *e.g.*, Debtors Mem. at 7-9 (citing cases)). Moreover, while the Objecting Unions try to pin the blame for their retirees' supposed

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retirees and representatives thereof (collectively, the "**Other Retiree Objections**"), as reflected in Exhibit "E." For ease of reference, the Debtors refer herein solely to the Objecting Unions' Objection, but note that their response is equally applicable to (and, thus, also requires the rejection of) the Other Retiree Objections.

disparate treatment (i.e., vis-à-vis the UAW) on the Debtors, the treatment of the UAW's retirees is the result of an agreement entered into between New GM and the UAW. That agreement reflects a business judgment by New GM, which needed the support of the UAW, whereby New GM will provide consideration to the New UAW VEBA (i.e., preferred and common equity in New GM) that does not include *any* Debtor assets. Such business decisions by the Purchaser do not implicate any rights of the Objecting Unions or their retirees, or contravene any obligation of the Debtors under the Bankruptcy Code. As Judge Gonzalez stated in *Chrysler*: "In negotiating with those groups essential to its viability, New Chrysler made certain agreements and provided ownership interests in the new entity, which was neither a diversion of value from the Debtors' assets nor an allocation of the proceeds from the sale of the Debtors' assets."[15] *In re Chrysler LLC*, 405 B.R. 84, 99 (Bankr. S.D.N.Y. 2009), *aff'd*, No. 09-2311-bk, 2009 U.S. App. LEXIS 12351 (2d Cir. June 5, 2009).

70. The consideration from the Purchaser to the New UAW VEBA further flows from (i) contractual obligations that are plainly not applicable to the Objecting Unions;[16] and (ii) negotiations principally between the UAW and the U.S. Treasury (as the Purchaser's

[15] See also *Chrysler*, in which the Court explained:

> the UAW, VEBA, and the Treasury are not receiving distributions on account of their prepetition claims. Rather, consideration to these entities is being provided under separately-negotiated agreements with New Chrysler. . . . As part of those negotiations, New Chrysler and the workers have reached agreement on terms of collective bargaining agreements with the UAW. . . . That New Chrysler and the UAW have agreed to fund the VEBA with equity and a note is part of a bargained-for exchange between New Chrysler and the UAW. . . . *The consideration provided by New Chrysler in that exchange is not value which would otherwise inure to the benefit of the Debtors' estates.*

405 B.R. at 99-100 (emphasis added).

[16] Specifically, by letter agreement dated September 26, 2007 (annexed hereto as Exhibit "M"), GM agreed that "any sale of an operation as an ongoing business would require the buyer to assume the 2007 GM-UAW Collective Bargaining Agreement." No similar obligation applies to the Objecting Unions.

sponsor), which is not a chapter 11 debtor and which is under no obligation to comply with section 1114. The U.S. Treasury's objective is to give New GM the best chance for future success to enable the recovery of its loans and investments as well as enhance the value of the equity interests in the Purchaser. In order to accomplish that goal, it is necessary to obtain the support and to preserve jobs of the UAW and its members (including those who someday will be retirees), who are critical to ongoing operations. In contrast, none of those jobs, by the Objecting Unions' own admission, are held by *any* of their existing members. The section 1114 rights of the Objecting Unions' retirees, if any, can and should be addressed in connection with the administration of the Debtors' chapter 11 cases subsequent to the Closing of the 363 Transaction. *See Chrysler*, 405 B.R. at 110 ("[T]he Court finds that if the Sale Motion were not approved, which would likely result in the Debtors' liquidation, there would likely be no value to distribute [to] any retirees, all of whom would be unsecured creditors").[17]

71. As for the Objecting Unions' more general claim of "grossly unfair and inequitable" treatment, none of their benefit plan terms are being modified; and the claims of their retirees are not being compromised, settled or changed in any way by the 363 Transaction. Ironically, however, these retirees have an alternative to simply filing a claim in these chapter 11 cases -- an alternative offered by New GM. Such alternative -- which already has been accepted by several other unions (including the International Brotherhood of Electrical Workers, the

[17] Several of the Other Retiree Objections challenge the Motion insofar as it seeks approval of the New UAW VEBA, which, they contend, does not provide them with commensurate benefits going forward. But the law is clear that such approval, even though the VEBA benefits are not uniformly applicable to *all* retirees, permissibly avoids the potential loss of *all* benefits by *all* retirees. *See, e.g.*, *UAW v. Gen. Motors Corp.*, 2008 WL 2968408, at *24 (E.D. Mich. 2008) (approving settlement because "risk of loss, even if unlikely, would produce consequences too grave that they are worth avoiding through a settlement") (citations omitted); *see also UAW v. Chrysler LLC*, 2008 U.S. Dist. LEXIS 92591, at *68 (E.D. Mich. July 31, 2008) (approving settlement, which reduced certain retiree benefits as a result of Chrysler's financial difficulties, because the potential loss of all benefits due to "Chrysler's financial collapse" would be "far more harsh" for all retirees); *IUE-CWA v. Gen. Motors Corp.*, 238 F.R.D. 583, 595 (E.D. Mich. 2006) (similar). Accordingly, the 363 Transaction should be approved because the alternative is a near certain elimination of all UAW and other retiree benefits.

International Association of Machinists, Carpenters Local 687, Interior Systems Local 1045, and the International Brotherhood of Painters and Allied Trades of the United States and Canada, Sign and Display Union Local 591) (*see* Henderson Supp. Aff. ¶ 12) -- includes the provision by New GM of healthcare benefits commensurate with the benefits that have been and will be provided to GM's *salaried* retirees. The Objecting Unions may be unhappy with this offer and are free to reject it, but such unhappiness simply does not give rise to a cognizable objection to the 363 Transaction. One thing is abundantly clear, however -- denying the Motion on these or any other grounds would force the Debtors' immediate liquidation, resulting in limited recovery for even the Debtors' secured creditors and likely no recovery by any of the Company's unsecured creditors, including the retirees whom the Objecting Unions represent.

Workers' Compensation Objections

72. The Debtors have received Objections from two states (Michigan and Ohio) regarding the Purchaser's proposed treatment of workers' compensation claims under the MPA. The Debtors have been engaged in discussions with representatives from these states and believe that the issues set forth in their Objections have been resolved.

Tax Objections

73. The Debtors have received Objections from taxing authorities in various states. The Debtors' reply to these Tax Objections are set forth in the schedule annexed hereto as Exhibit "G."

Lien Creditor Objections

74. Several entities identified in Exhibit "H" (the "**Lien Creditor Objectors**") claim to hold liens on the Purchased Assets and have filed Objections asserting that the Sale Order improperly seeks to extinguish or otherwise impair their rights with respect to any valid statutory or possessory liens, such as mechanics', carriers', workers', repairers', shippers',

marine cargo, construction, toolers', molders', or similar liens (the "**Statutory Liens**"). The Debtors are not seeking to sell the Purchased Assets free and clear of Statutory Liens under section 363(f) of the Bankruptcy Code

75. After consulting with the Purchaser, the Debtors have agreed to add a provision to the Sale Order to clarify the issue and resolve the Lien Creditor Objections. This provision is as follows:

> Notwithstanding anything to the contrary in this Order or the MPA, (a) any Purchased Asset that is subject to any mechanics', carriers', workers', repairers', shippers', marine cargo, construction, toolers', molders', or similar lien or any statutory lien on real and personal property for property taxes not yet due shall continue to be subject to such lien after the Closing Date if and to the extent that such lien (i) is valid, perfected and enforceable as of the Commencement Date (or becomes valid, perfected and enforceable after the Commencement Date as permitted by section 546(b) or 362(b)(18) of the Bankruptcy Code), (ii) could not be avoided by any Debtor under sections 544 to 549, inclusive, of the Bankruptcy Code or otherwise, were the Closing not to occur; and (iii) the Purchased Asset subject to such lien could not be sold free and clear of such lien under applicable non-bankruptcy law, and (b) any Liability as of the Closing Date that is secured by a lien described in clause (a) above (such lien, a "**Continuing Lien**") that is not otherwise an Assumed Liability shall constitute an Assumed Liability with respect to which there shall be no recourse to the Purchaser or any property of the Purchaser other than recourse to the property subject to such Continuing Lien. The Purchased Assets are sold free and clear of any reclamation rights, *provided, however,* that nothing, in this Order or the MPA shall in any way impair the right of any claimant against the Debtors with respect to any alleged reclamation right to the extent such reclamation right is not subject to the prior rights of a holder of a security interest in the goods or proceeds with respect to which such reclamation right is alleged, or impair the ability of a claimant to seek adequate protection against the Debtors with respect to any such alleged reclamation right. Further, nothing in this Order or the MPA shall prejudice any rights, defenses, objections or counterclaims that the Debtors, the Purchaser, the U.S. Treasury, EDC, the Creditors' Committee or any other party in interest may have with respect to the validity or priority of such asserted liens or rights, or the type (or amount), if any, of required adequate protection.

76. The Debtors have reached out to the attorneys for the Lien Creditor Objectors to propose the foregoing language in an effort to resolve the Lien Creditor Objections. As of the date hereof, the Lien Creditor Objectors that have responded have indicated that their respective Objections will be resolved if the foregoing language is included in the Sale Order. In any event, the Debtors submit that this language fully addresses the issues raised in the Lien Creditor Objections. As a result, the Debtors request that the Court overrule the Lien Creditor Objections to the extent they are not withdrawn.

Stockholder Objections

77. Much like a vast majority of the Bondholder Objections, the approximately 18 Objections interposed by GM's equity interest holders largely are not substantive.

78. The objecting equity interest holders claim that they are being treated unfairly compared with other stakeholders. There is no basis for such argument. The purpose of a sale of substantially all of a debtor's assets pursuant to section 363(b) of the Bankruptcy Code is to "transform assets . . . into cash in an effort to maximize value." *In re Trans World Airlines, Inc.*, 2001 Bankr. LEXIS 980, at *31-32 (Bankr. D. Del. Apr. 2, 2001). The value generated by a sale pursuant to section 363(b) will be distributed in accordance with the absolute priority distribution scheme set forth in section 1129(b)(2)(B)(ii) of the Bankruptcy Code, in which creditors must be paid in full before equity interest holders receive any recovery. *See In re Iridium Operating LLC*, 478 F.3d 452, 463 (2d Cir. 2007) (quoting *N. Pac. R.R. Co. v. Boyd*, 228 U.S. 482, 504 (1913)). Therefore, the inability to receive a recovery on account of their shares absent full payment to the unsecured creditors, including the bondholders, cannot be the basis of a sustainable objection to the 363 Transaction.

Cure Objections

79. At the outset of the 363 Transaction process, the Debtors established detailed procedures to address proactively the issues that are bound to arise in connection with the assumption and assignment of over 700,000 executory contracts and unexpired leases of personal and nonresidential real property (the "**Contracts**") in an organization as large and complex as GM. At the center of these efforts is a call center in Warren, Michigan (the "**Call Center**"), which is staffed by purchasing personnel employed by the Debtors, representatives from Alix Partners, in-house counsel, and outside counsel. The Call Center operates and responds to inquiries 24 hours a day.

80. In addition, the Debtors established for the benefit of Contract counterparties an interactive website (the "**Website**") that provides current information regarding the status of assumption and assignment of Contracts, detailed information on cure amounts, and other pertinent information. The Website is updated as cure disputes, whether in the form of informal inquiries or formal objections, are resolved.

81. The approximately 550 Cure Objections, including reservations of rights filed by Contract counterparties in connection with the 363 Transaction, actually represents a very small percentage of the Contracts being assumed and assigned to the Purchaser. This is a tribute to the efforts and resources expended by the Debtors to ensure a smooth 363 Transaction.

82. The Debtors have continued to address the Cure Objections and are confident that virtually all of these Objections either will be resolved or relegated to simple cure reconciliation issues by the Sale Hearing. A schedule identifying the Cure Objections is annexed hereto as Exhibit "J." Prior to the Sale Hearing, the Debtors intend to file with the Court an updated schedule setting forth the then-current status of the Cure Objections.

83. Many of the Cure Objections raise concerns regarding the treatment of claims for amounts that have or will become due after the Commencement Date but prior to the Closing of the 363 Transaction. For the avoidance of doubt, the Debtors intend to modify the proposed Sale Order to clarify that the Purchaser will assume, and pay in the ordinary course of business and as they come due, all amounts for postpetition goods delivered and services provided to the Debtors under each Purchased Contract to the extent due and payable and not otherwise paid by the Debtors.

84. In short, a significant number of Cure Objections already have been resolved, and the remainder do not constitute impediments to approval of the 363 Transaction. The Sale Procedures provide that Contracts may be assumed and assigned notwithstanding ongoing cure disputes with Contract counterparties, with such disputes being resolved post-Closing. If the Cure Objections cannot be resolved on a business level, the disputes will be resolved either in this Court or pursuant to binding arbitration as agreed to between the Debtors and such Contract counterparty under a Court-approved Trade Agreement. Accordingly, to the extent a Cure Objection is styled as an Objection to the Motion, it is improper and should be overruled.

Miscellaneous Objections

85. The Creditors' Committee. The Creditors' Committee's assertion that the Purchaser must make adequate provision for the payment of all costs and expenses associated with administering the chapter 11 cases subsequent to the Closing of the 363 Transaction is completely unsupportable. Notably, the Creditors' Committee cites no applicable legal authority for its novel position, because none exists. Neither section 363 nor section 506(c) of the Bankruptcy Code requires either a secured creditor or a purchaser to fund such expenses in connection with a sale under section 363 of the Bankruptcy Code. Moreover, the Creditors'

Committee's assertion that a "recovery [was] promised to them under the terms of the Sale" (Creditors' Committee Obj. at 24) is patently untrue.

86. What is true, however, is that consummation of the 363 Transaction will avoid the draconian consequences to unsecured creditors and other stakeholders that the Creditors' Committee recognizes will ensue if the 363 Transaction is not pursued. What also is true is that the Purchaser has voluntarily agreed to fund not less than $950,000,000 to the Debtors' estates post-Closing, which currently is believed to be adequate to fund the projected costs and expenses attendant to the confirmation of a liquidating chapter 11 plan for the Debtors.

87. White Marsh and Memphis Facilities. Among the assets to be sold in the 363 Transaction are the Debtors' interest in two commercial facilities -- located in White Marsh, Maryland and Memphis, Tennessee -- the acquisition of which was financed by a group of secured lenders (the "**White Marsh/Memphis Lenders**"). In their Objection to the Motion, these lenders do not dispute that the Debtors own and are entitled to sell these facilities (WM/M Obj. ¶¶ 1, 5-6). Rather, they argue that section 363(f)(3) of the Bankruptcy Code prevents the Debtors from selling the two facilities free and clear of the lenders' first priority liens unless the lenders are paid the face amount of their liens in full, in cash, at closing, regardless of the value of the facilities that constitute their collateral (*Id.* ¶¶ 12-14).[18] They also argue that their interest is not adequately protected. However, they will have more than adequate protection through a replacement lien on a portion of the consideration being provided by the Purchaser consisting of shares in New GM valued at $3.8-4.8 billion (or some 40 to 160 times the value of the interest the White Marsh/Memphis Lenders assert). Their argument is unsound and based on a

[18] Section 363(f)(3) provides that "[t]he trustee may sell property… free and clear of any interest in such property of an entity other than the estate, only if… such interest is a lien and the price at which such property is to be sold is greater than *the aggregate value* of all liens on such property" (emphasis added).

misreading of section 363(f)(3) – but in any event, it provides no basis to frustrate the 363 Transaction. The Court can hold a post-sale hearing to determine the value of the objectors' lien and the assets of the Debtors' estates to which that lien should attach.

88. The White Marsh/Memphis Lenders argue that the two facilities cannot be sold "free and clear" of the existing liens unless the lenders receive a replacement lien equal to the face amount of such liens. That is not the case. On its face, section 363(f)(3) refers to "the aggregate *value* of all liens," 11 U.S.C. § 363(f)(3)(emphasis added), – not the "aggregate *amount* of all liens." If Congress had intended the latter, it would have used such term. It did not.

89. Consistent with this reading, this Court has repeatedly held that the "aggregate value of all liens" contained in section 363(f)(3) does not refer to the *face amount* of the liens, but rather to the *actual value* of the related collateral.[19] *See, e.g., In re Beker Indus. Corp.*, 63 B.R. 474, 475-76 (Bankr. S.D.N.Y. 1986) (holding that the Bankruptcy Code "plainly indicate[s] that the term 'value' [as used in sections 506(a) and 363(f)(3)] means its actual value as determined by the Court, as distinguished from the amount of the lien");[20] *In re Bygaph, Inc.*, 56 B.R. 596, 606 (Bankr. S.D.N.Y. 1986) (authorizing sale of property subject to a lien after reviewing the "sharply disputed" value of the collateral); *cf. In re Chrysler LLC*, 405 B.R. at 98 (authorizing section 363 sale because, among other reasons, the *liquidation value* of the

[19] This reading of section 363(f)(3) is consistent with the Supreme Court's holdings that: (i) the "value" of a "creditor's interest" under section 506(a) means "the value of the collateral" (*United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 372 (1988); *see also LNC Invs., Inc. v. First Fidelity Bank*, 247 B.R. 38, 44 (S.D.N.Y. 2000)); and (ii) "the 'proposed disposition or use' of the collateral is of paramount importance to the valuation question" (*Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 962 (1997) (internal citations omitted)).

[20] Ironically, the White Marsh/Memphis Lenders rely on *Beker* for their section 363(f)(5) arguments (WM/M Obj. ¶ 17), but utterly ignore *Beker*'s primary holding that section 363(f)(3) "is to be interpreted to mean what it says: the price must be equal to or greater than the aggregate *value* of the liens asserted against it, *not their amount*." 63 B.R. at 476 (emphasis added).

collateral was lower than the sale price and "[t]he full *value* of the collateral will be distributed to the [secured lenders]") (emphasis added).

90. Numerous other courts have followed *Beker*, recognizing that the objectors' proposed "face amount of the lien" interpretation of § 363(f)(3) "ignores the [Bankruptcy] Code's focus on protecting the *value* of collateral" and impermissibly allows an "undersecured creditor to obstinately block an otherwise sensible sale." *In re Terrace Gardens Park P'ship*, 96 B.R. 707, 712 (Bankr. W.D. Tex. 1989); *see also In re Oneida Lake Dev., Inc.*, 114 B.R. 352, 356-57 (Bankr. N.D.N.Y. 1990) (holding that section 363(f)(3) requires "that the secured creditor receives only the value of its secured claim in debtor's property, *even though that may be significantly less than the face amount of the claim*") (emphasis added); *In re WPRV-TV, Inc.*, 143 B.R. 315, 319, 320 n.14 (D.P.R. 1991) (the "face amount" approach has been "highly criticized" and is "unduly strict," and citing *Beker* as the "better reasoned view"), *vacated on other grounds*, 165 B.R. 1 (D.P.R. 1992), *aff'd in part, rev'd in part on other grounds*, 983 F.2d 336 (1st Cir. 1993).[21]

91. Moreover, the White Marsh/Memphis Lenders' interpretation of section 363(f)(3) would enable vastly undersecured creditors to hold up asset sales that provide enormous value to a debtor's estate unless they are paid in full – even on the *unsecured* portion

[21] Although there are cases – which the White Marsh/Memphis Lenders cite – that support the "face amount of the lien" interpretation, the weight of authority, particularly of courts that have analyzed the issue in detail, supports the Debtors' "actual value" interpretation. For example, the court in *In re Collins*, 180 B.R. 447, 450 (Bankr. E.D. Va. 1995), undertook an in-depth analysis of the two viewpoints and concluded that the Debtors' interpretation "provides a better reasoned solution to this dilemma." In contrast, the sole case in this district to which the White Marsh/Memphis Lenders cite, *In re General Bearing Corp.*, is not persuasive. 136 B.R. 361 (Bankr. S.D.N.Y. 1992). The parties there did not even raise the issue of section 363(f)(3). *Id.* at 366. Thus, the Court there, lacking proper briefing on this issue, did not acknowledge that other courts had interpreted section 363(f)(3) in a contrary manner. Indeed, the Debtors respectfully note that the *General Bearing* Court inexplicably cited *Beker* and *Oneida* – cases that explicitly *reject* the "face amount" interpretation – as *supporting* such interpretation (*id.*), thus confirming that *General Bearing* should not be followed.

of their claim.[22] An interpretation that results in secured creditors insisting on and receiving such a windfall is illogical and runs counter to the entire framework of the Bankruptcy Code, which compensates secured creditors for the value of their collateral. *See, e.g.*, 11 U.S.C. §§ 506(a)(1), 1129(b)(2)(A) – as well as § 363(f)(3) itself.[23] In short, the Debtors clearly have met their burden of proving that section 363(f)(3) permits a "free and clear" sale of the White Marsh and Memphis facilities.[24] Moreover, the dispute over the amount of the liens to which the White Marsh/Memphis Lenders should be entitled as adequate protection should in no way interfere with the 363 Transaction. The amount, timing and form of protection can be readily established in a subsequent valuation proceeding and order, if necessary. The Debtors are not attempting to deny the White Marsh/Memphis Lenders the value to which their collateral entitles them.

92. The White Marsh/Memphis Lenders are More than Adequately Protected Under Sections 361 and 363 of the Bankruptcy Code. The White Marsh/Memphis Lenders' further assertions that the replacement lien in sale proceeds is inadequate to provide them adequate protection should be rejected. The case law is uniform that the adequate protection to which secured creditors are entitled when their collateral is sold "free and clear" of liens in a section 363 sale is a replacement lien on the "proceeds" of the sale. *See, e.g., In re Collins*, 180

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[22] Section 506(a)(1) of the Bankruptcy Code provides that "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the *value* of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the *value* of such creditor's interest . . . is less than the amount of such allowed claim" (emphasis added).

[23] *See also In re Broomall Printing Corp*., 131 B.R. 32, 37 (Bankr. D. Md. 1991) – a case cited by the White Marsh/Memphis Lenders (WM/M Obj. ¶ 23) – holding that "[t]he only collateral values a debtor possesses to pay a secured claim are the proceeds which may be realized from the sale of the collateral. If a debtor pays to a secured creditor more than the proceeds realized from the sale of the collateral, then of necessity the debtor will have made the payments from sources that otherwise would have been available for other creditors or for the debtor's rehabilitation. This result would not constitute equitable treatment of creditors…".

[24] Because the Debtors have demonstrated that section 363(f)(3) clearly supports a sale of the two properties free and clear of all existing liens, there is no need to address the lenders' arguments that section 363(f)(5) does not apply, notwithstanding that their claim plainly is one to be satisfied by a money judgment (*see* WM/M Obj. ¶¶ 15-17).

B.R. 447, 452 (Bankr. E.D. Va. 1995); *WPRV-TV*, 143 B.R. at 321 ("The legislative history makes clear that 'the most common form of adequate protection will be to have the interest attach to the proceeds of the sale'") (citation omitted); *In re Brileya*, 108 B.R. 444, 446 (Bankr. D. Vt. 1989) (citing H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 345-46 (1977), and S. Rep. No. 95-989, 95th Cong., 2d Sess. 55 (1978)) (adequate protection is achieved by attaching those interests which are "free and clear" to the proceeds of the sale). Thus, contrary to the Lenders' assertions, the Bankruptcy Code and case law do not require that proceeds of the sale must be *cash*, or that the replacement lien must be a lien on *cash* proceeds – and they also do not require that the proceeds to which the replacement lien attaches be distributed to the secured creditors prior to the effective date of a chapter 11 plan. WM/M Obj. ¶ 25.

93. First, a secured creditor's right to adequate protection "is limited to the lesser of the value of the collateral or the amount of the secured claim." *Bygaph*, 56 B.R. at 606. *See also In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 90-91 (2d Cir. 2003) (holding that the value of the replacement lien must be determined under section 506(a)); *In re Winthrop Old Farm Nurseries, Inc.*, 50 F.3d 72, 74 (1st Cir. 1995) ("[V]aluation for section 361 purposes necessarily looks to section 506(a) for a determination of the amount of a secured claim."). And it is the secured creditor that bears "the burden of proof under § 363(o)(2) to establish the extent of its interest, *i.e.*, the value of the collateral." *Bygaph*, 56 B.R. at 606.

94. Second, "adequate protection" entitles a secured creditor to realize the equivalent of its collateral, "only upon completion of the reorganization." *Timbers*, 484 U.S. at 377. *See also LNC*, 247 B.R. at 45.

95. Third, contrary to the White Marsh/Memphis Lenders' assertions, courts have found that security interests in equity (such as stock) indeed can constitute "adequate

protection" in the context of a section 363 sale and there is no proscription of such form of protection. The Bankruptcy Code "confers upon 'the parties and the courts flexibility'" and discretion in fashioning the adequate protection relief. *In re 495 Cent. Park Ave. Corp*., 136 B.R. 626, 631 (Bankr. S.D.N.Y 1992) (citation omitted); *Dairy Mart*, 351 F.3d at 90 (courts can grant adequate protection in the form of "cash payments, a lien, or ... 'other relief'") (citation omitted). *See also In re Westpoint Stevens, Inc*. 333 B.R. 30 (S.D.N.Y. 2005) (adequate protection provided in the form of securities, though prohibiting premature allocation and distribution of same); *Chrysler*, 405 B.R. at 98 ("The *Westpoint* court, however, recognized that, pursuant to section 363, a bankruptcy court had authority to authorize a sale of assets in exchange for stock and the granting of replacement liens.").

96. The only case cited by the White Marsh/Memphis Lenders on this issue does not support their assertion that, *per se*, "a security interest in equity does not constitute adequate protection" for a lienholder. WM/M Obj. ¶ 26. To the contrary, the court in *In re TM Monroe Manor Assocs*., 140 B.R. 298 (Bankr. N.D. Ga. 1991), extensively cited to *In re San Felipe @ Voss, Ltd.*, 115 B.R. 526, 529 (Bankr. S.D. Tex. 1990), and noted that in *San Felipe*,

> the debtor proposed to offer a secured creditor equity securities in a third-party purchaser as the indubitable equivalent of the creditor's claim. The court confirmed the plan, reasoning that while the use of *equity securities in the reorganized debtor* was not contemplated in the Bankruptcy Code, the use in cramdown of *equity securities in a third-party purchaser* was not prohibited as long as the securities at issue were stable and there was a substantial equity cushion in the offered stock.

TM Monroe, 140 B.R. at 300 (emphasis provided by the court). This is precisely what the Debtors have offered to the White Marsh/Memphis Lenders here.

97. The Debtors here have met their burden of proving that the proposed adequate protection is sufficient. Specifically, the Worth Declaration establishes the value of

New GM shares that the Debtors are receiving as proceeds at $3.8 billion to $4.8 billion, while the White Marsh/Memphis Lenders' asserted claim is $90 million. In contrast, the White Marsh/Memphis Lenders have provided *no evidence* that such valuation is inaccurate or inadequate and rely instead on baseless *ipse dixit* assertions that a replacement lien on "equity in a newly-formed non-public entity does not adequately protect" the lenders. WM/M Obj. ¶ 25. rs

98. In sum, the objecting Lenders' interests are more than adequately protected. The Court should authorize the sale of the properties free and clear of existing liens

99. The White Marsh/Memphis Lenders' argument that the proposed sale frustrates their right to credit bid their secured claims (WM/M Obj. ¶ 19) is unavailing. Bankruptcy courts have broad discretion to establish bidding procedures. *See In re Fin. News Network, Inc.*, 980 F.2d 165, 170 (2d Cir. 1992) (finding the bankruptcy bidding process was fair and noting that "[t]here are cases where the bankruptcy court's discretion must be sufficiently broad so that in making its decision it can compass [any] competing considerations as best as it can"); *In re Big Rivers Elec. Corp.*, 213 B.R. 962, 976-77 (Bankr. W.D. Ky. 1997) ("[h]ere the Court had broad discretion with regard to ordering the bidding process … . The Bankruptcy Court has a *duty* to maximize the value of the estate"). The Court here properly determined that to maximize value for the Debtors' estates, only bids for all or substantially all of the Debtors' assets would be qualified.

100. Toyota. The limited objection filed by Toyota Motor Corporation ("**Toyota**") is not an objection to the 363 Transaction, but rather an objection to the assumption and assignment of certain contracts between the Debtors and Toyota without Toyota's consent. The Debtors are willing to delay the assumption and assignment of any contracts with Toyota until a later date, and in the absence of a consensual resolution, will ask the Court to determine

the substance of this Objection as it relates to any contracts with Toyota the Debtors are seeking to assume and assign to the Purchaser. As such, the Court need not determine the merits of this Objection prior to approval of the 363 Transaction.

101. GMAC. GMAC LLC ('**GMAC**") supports the 363 Transaction, but has filed a reservation of rights. On June 1, 2009, the Court entered an Order authorizing the Debtors to enter into and approving that certain ratification agreement (the "**Ratification Agreement**") between the Debtors and GMAC. The Ratification Agreement authorized the Debtors to continue their prepetition financial and operating agreements and arrangements (the "**Operating Documents**") with GMAC, pending the assumption and assignment to the Purchaser of the Operative Documents pursuant to the Motion. The Ratification Agreement further provides that the Purchaser is to assume and perform the Debtors' obligations under the Operative Documents in accordance with the terms thereof. GMAC consents to and supports the 363 Transaction, but has reserved its rights to object to the 363 Transaction to the extent that

certain undisclosed schedules to the MPA do not comply with the requirements of the Ratification Agreement.

WHEREFORE the Objections should be overruled and the Debtors' request for approval of the 363 Transaction be granted, together with such other and further relief as is just.

Dated: New York, New York
June 26, 2009

/s/ Harvey R. Miller
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Exhibit A

Bondholder Objections

Bondholder Objections

Docket No.	Name of Objector	Summary of Objection	Response
545	Douglas M. Chapman	The Debtors are circumventing the chapter 11 process.	*See* below response (to Docket No. 1969).
1260	Paul D. Schrader	The 363 Transaction does not provide an equitable result to bondholders in comparison to other GM stakeholders.	*See* below response (to Docket No. 1969).
1277	Peter Petra	The 363 Transaction does not provide an equitable result to bondholders in comparison to other GM stakeholders.	*See* below response (to Docket No. 1969).
1290	Marcel Cicic	The 363 Transaction does not provide an equitable result to bondholders in comparison to other GM stakeholders.	*See* below response (to Docket No. 1969).
1755	Ralph A. Henderson and Jean L. Henderson	Bondholders' rights are senior to the rights of shareholders, and the Bankruptcy Court should decide whether the U.S. Treasury is a creditor or shareholder.	*See* below response (to Docket No. 1969).
1758	Radha R.M. Narumanchi	The 363 Transaction is a fraud on various creditors, and bondholders were given insufficient time to object thereto.	*See* below response (to Docket No. 1969).

Docket No.	Name of Objector	Summary of Objection	Response
1759	Radha R.M. Narumanchi	The Debtors did not provide adequate notice of the 363 Motion to its stakeholders. The 363 Motion should not be decided in an expedited manner.	*See* below response (to Docket No. 1969).
1891	Francis H. Caterina, et al	The MPA violates the U.C.C. and unfairly denies objectors the right to a trial by jury.	The 363 Transaction, as contemplated by the MPA, is allowed under the Bankruptcy Code. *See* below response (to Docket No. 1969). There is no right to a trial by jury in the context of an asset sale pursuant to section 363 of the Bankruptcy Code.
1893	Sandra Stevens Goodale	The 363 Transaction does not provide an equitable result to bondholders as compared to other GM stakeholders.	*See* below response (to Docket No. 1969).
1897	Charles and Mary Reckard	The 363 Transaction does not provide an equitable result to bondholders as compared to other GM stakeholders.	*See* below response (to Docket No. 1969).
1924	Lucile E. Cochran	The 363 Transaction does not provide an equitable result to bondholders as compared to other GM stakeholders.	*See* below response (to Docket No. 1969).

Docket No.	Name of Objector	Summary of Objection	Response
1969	Unofficial Committee of Family & Dissident GM Bondholders	The 363 Transaction should be pursued in the context of a chapter 11 plan of reorganization. The Debtors are not exercising sound business judgment in pursuing the 363 Transaction. The 363 Transaction constitutes a *sub rosa* plan that cannot be approved under section 363(b) of the Bankruptcy Code.	In the context of these chapter 11 cases involving the fragile business at issue, there *is* a business justification for the sale of substantially all the Debtors' assets at this early stage. The 363 Transaction is the *only* viable means of preserving GM's business and maximizing its going concern value. It cannot be disputed that the only purchaser who has come forward to purchase substantially all of the Debtors' assets is only willing to do so *in the context of an expedited 363 Transaction.* Faced with a choice between implementing the 363 Transaction -- and thereby preserving and maximizing the value of GM's business and saving hundreds of thousands of automotive-related jobs -- versus liquidating the Debtors' assets, the Debtors' Board of Directors undoubtedly exercised sound business judgment in proceeding with the 363 Transaction.

Docket No.	Name of Objector	Summary of Objection	Response
(con't)	(con't)	(con't)	(con't)
1969	Unofficial Committee of Family & Dissident GM Bondholders	The 363 Transaction should be pursued in the context of a chapter 11 plan of reorganization. The Debtors are not exercising sound business judgment in pursuing the 363 Transaction. The 363 Transaction constitutes a *sub rosa* plan that cannot be approved under section 363(b) of the Bankruptcy Code.	The 363 Transaction is a value-preserving and value-maximizing transaction that is the product of arm's-length, good-faith negotiations. The consideration the Debtors are receiving in connection with the 363 Transaction is fair value for the assets being sold. The sale in no way effects any distribution of the *Debtors'* property to creditors, nor does it in any way impinge on any plan that necessarily will follow. Indeed, there is no distribution of estate assets or proceeds from the 363 Transaction (if approved) to any creditors. The Purchaser -- *not* the Debtors -- has determined the New GM's ownership composition and capital structure *outside of the bankruptcy context*. The allocation of ownership interests by Purchaser in New GM is neither a distribution of estate assets nor an allocation of proceeds from the sale of the Debtors' assets.

Docket No.	Name of Objector	Summary of Objection	Response
1985	Maurice F. Curran	The 363 Transaction does not provide an equitable result to bondholders as compared to other GM stakeholders. The Debtors are circumventing and abusing the chapter 11 process and Due Process Clause.	*See* above response (to Docket No. 1969).
1989	Angela Urquhart and Glen Urquhart, and Glen Urquhart as Trustee	Joins and adopts the Objection of the Unofficial Committee of Family and Dissident Bondholders. See Docket No. 1969.	*See* above response (to Docket No. 1969).
1993	Angela Urquhart and Glen Urquhart, and Glen Urquahart as Trustee	The Debtors are circumventing and abusing the chapter 11 process and Due Process Clause by involving the United States government so heavily in the 363 sale. Debtors' treatment of non-institutional bondholders violates the Due Process Clause.	*See* above response (to Docket No. 1969).
2004	Nettie McClinton	The 363 Transaction does not provide an equitable result to bondholders as compared to other GM stakeholders.	*See* above response (to Docket No. 1969).
2016	Louis F Schad	The 363 Transaction does not provide an equitable result to bondholders as compared to other GM stakeholders.	*See* above response (to Docket No. 1969).

Docket No.	Name of Objector	Summary of Objection	Response
2025	Lloyd. A. Good, Jr.	Joins and adopts the Objection of the Unofficial Committee of Family and Dissident Bondholders. *See* Docket No. 1969. The 363 Transaction is a disguised *sub rosa* plan of reorganization.	*See* above response (to Docket No. 1969).
2137	Ronald and Sandra Davis	The 363 Transaction does not provide an equitable result to bondholders as compared to other GM stakeholders. The 363 Transaction is an illegal *sub rosa* plan of reorganization. The 363 Transaction is not proposed in good faith.	*See* above response (to Docket No. 1969).

Docket No.	Name of Objector	Summary of Objection	Response
2193	Oliver Addison Parker	Joins and adopts the Objection of the Unofficial Committee of Family and Dissident Bondholders. *See* Docket No. 1969. Under the limitations on liens provisions of the senior bondholders' bonds, GM could not grant the Government a lien on virtually everything it owned without concurrently granting to its bondholders (like Parker) an identical lien on the same property securing the bond debt equally and ratably together with the debt of the Government.	*See* above response (to Docket No. 1969). There is no such sweeping restriction on liens in the indentures governing the bonds. The assets in which the U.S. Treasury has been granted liens prepetition pursuant to the U.S. Treasury Loan Agreement (and the related security documents) include various assets, including certain equity interests domestic and foreign subsidiaries, intellectual property, real estate, and certain inventory. But such agreements *specifically exclude* from the property in which the U.S. Treasury has been granted a lien any property that would give rise to bondholder liens.

Docket No.	Name of Objector	Summary of Objection	Response
2194	Oliver Addison Parker	The 363 Transaction, as contemplated by the MPA, constitutes a *sub rosa* plan that cannot be approved under section 363(b) of the Bankruptcy Code. In addition, the 363 Transaction does not provide equal payouts to creditors of equal rank The DIP financing provided by the U.S. Treasury exceeds the statutory authority provided by TARP and the Bankruptcy Code.	*See* above response (to Docket No. 1969). Parker lacks standing to raise the TARP issue, as he has suffered no injury as a result of the alleged violation.
2357	Radha R.M. Narumanchi	The 363 Transaction does not provide an equitable result to bondholders.	*See* above response (to Docket No. 1969).

Docket No.	Name of Objector	Summary of Objection	Response
2367	Wilmington Trust Company	Joins in Limited Objection of The Official Committee of Unsecured Creditors to Debtors' Motion Pursuant to 11 U.S.C. §§ 105, 363(b), (f), (k), and (m), and 365 and Fed. R. Bankr. P. 2002, 6004, and 6006, to (I) Approve (A) The Sale Pursuant to The Master Sale and Purchase Agreement With Vehicle Acquisition Holdings LLC, a U.S. Treasury-Sponsored Purchaser, Free and Clear of Liens, Claims, Encumbrances, and Other Interests; (B) The Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (C) Other Relief; and (II) Schedule Sale Approval Hearing. *See* Docket No. 2362.	*See* response re: Successor Liability Objections.

Docket No.	Name of Objector	Summary of Objection	Response
2368	Law Debenture Trust Company of New York	Joins in Limited Objection of The Official Committee of Unsecured Creditors to Debtors' Motion Pursuant to 11 U.S.C. §§ 105, 363(b), (f), (k), and (m), and 365 and Fed. R. Bankr. P. 2002, 6004, and 6006, to (I) Approve (A) The Sale Pursuant to The Master Sale and Purchase Agreement With Vehicle Acquisition Holdings LLC, a U.S. Treasury-Sponsored Purchaser, Free and Clear of Liens, Claims, Encumbrances, and Other Interests; (B) The Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (C) Other Relief; and (II) Schedule Sale Approval Hearing. *See* Docket No. 2362.	*See* response re: Successor Liability Objections.
Un Docketed	O.B. Hutchinson	The 363 Transaction does not provide an equitable result to bondholders, and bondholders were given insufficient time to object thereto.	*See* above response (to Docket No. 1969).
1931	Dorothy Tam	The 363 Transaction does not provide an equitable result to bondholders as compared to other GM stakeholders.	*See* above response (to Docket No. 1969).
2111	Sherri Barkan	The 363 Transaction does not provide an equitable result to her as a bondholder.	*See* above response (to Docket No. 1969).

Docket No.	Name of Objector	Summary of Objection	Response
Un Docketed	Frank Schuster	General objection to 363 Transaction (no grounds provided).	*See* above response (to Docket No. 1969).
Un Docketed	Joella Schuster	General objection to 363 Transaction (no grounds provided).	*See* above response (to Docket No. 1969).
Un Docketed	Kurt J. Schneider & Barbara L. Schneider	The 363 Transaction does not provide an equitable result to bondholders as compared to other GM stakeholders.	*See* above response (to Docket No. 1969).
Un Docketed	Richard D. Clark & Alice W. Clark	General objection to 363 Transaction (no grounds provided).	*See* above response (to Docket No. 1969).
2233	Roland E. King	The 363 Transaction does not provide an equitable result to bondholders as compared to other GM stakeholders.	*See* above response (to Docket No. 1969).
2350	Richard W. Lenderman, Jr.	The 363 Transaction does not provide an equitable result to bondholders as compared to other GM stakeholders.	*See* above response (to Docket No. 1969).
2351	Darlene E. Jewett	General objection to 363 Transaction (no grounds provided).	*See* above response (to Docket No. 1969).

Docket No.	Name of Objector	Summary of Objection	Response
2245	John E. Green III	The 363 Transaction does not provide an equitable result to bondholders as compared to other GM stakeholders.	*See* above response (to Docket No. 1969).
Un Docketed	Harry Werland	The 363 Transaction does not provide an equitable result to bondholders as compared to other GM stakeholders.	*See* above response (to Docket No. 1969).
2354	Blaise Morton	The 363 Transaction does not provide an equitable result to bondholders as compared to other GM stakeholders.	*See* above response (to Docket No. 1969).

Exhibit B

Dealer-Related Objections

Dealer-Related Objections

Docket No.	Name of Objector	Summary of Objection	Response
712	The State of Texas, on behalf of the Texas Department of Transportation, Motor Vehicle Division	The Debtors have violated 28 U.S.C. § 959(b) by conditioning their assumption and assignment of dealer agreements upon the dealers' waiver of certain state law franchise protections. The Participation Agreements signed by the Debtors' retained dealers violate various provisions of Texas law, including by: (i) vesting the Court with exclusive jurisdiction over disputes thereunder; (ii) modifying the retained dealers' protest rights with respect to franchise modification and termination; (iii) requiring the acceptance of inventory sufficient to meet increased sales expectations; (iv) requiring the retained dealers to carry exclusively GM cars and trucks; (v) requiring the waiver of certain warranty and other claims; and (vi) requiring the waiver of certain protest rights.	Because the Debtors -- as confirmed by Judge Gonzalez's recent decision in *Chrysler*, from which the result here follows *a fortiori* -- would have been well within their rights to simply *reject* their dealership agreements, there is nothing improper about the far less draconian alternatives presented by the Wind-Down and Participation Agreements. *See also* Omnibus Reply to Dealer-Related Objections.
1272	Tranum Buick Inc.	The Debtors should be held accountable under Texas state law and abide by the terms of GM's dealer sales and service agreements, including with respect to Article 15 thereof (requiring GM to purchase personal property from the dealer).	*See* above response (to Docket No. 712).

Docket No.	Name of Objector	Summary of Objection	Response
1880	Texas Automobile Dealers Association	The Participation Agreements signed by the Debtors' retained dealers violate various provisions of Texas law, including by: (i) vesting the Court with exclusive jurisdiction over disputes thereunder; (ii) modifying the retained dealers' protest rights with respect to franchise modification and termination; (iii) requiring the acceptance of inventory sufficient to meet increased sales expectations; (iv) requiring the retained dealers to carry exclusively GM cars and trucks; and (v) requiring the waiver of certain warranty and other claims.	*See* above response (to Docket No. 712).
1900	Greater New York Automobile Dealers Association	The Debtors have violated 28 U.S.C. § 959(b) by conditioning their assumption and assignment of dealer agreements upon the dealers' waiver of certain state law franchise protections. The Debtors fail to sufficiently compensate terminated dealers for recent expenditures required by GM.	*See* above response (to Docket No. 712).

Docket No.	Name of Objector	Summary of Objection	Response
1947	State of West Virginia ex rel. Darrell V. McGraw, Jr., Attorney General	The MPA is a *sub rosa* plan of reorganization.	*See* response re: Bondholder Objections. See Response to Objection of Unofficial Committee of Family and Dissident Bondholders, Exhibit A, Docket No. 1969.
		The Debtors have violated 28 U.S.C. § 959(b) by conditioning their assumption and assignment of dealer agreements upon the dealers' waiver of certain state law franchise protections, which are not preempted by sections 363 and 365 of the Bankruptcy Code.	*See* above response (to Docket No. 712).

Docket No.	Name of Objector	Summary of Objection	Response
1966	The State of Ohio, Department of Public Safety, Bureau of Motor Vehicles	The Debtors have violated 28 U.S.C. § 959(b) by conditioning their assumption and assignment of dealer agreements upon the dealers' waiver of certain state law franchise protections. The Participation Agreements signed by the Debtors' retained dealers violate various provisions of Ohio law, including by: (i) vesting the Court with exclusive jurisdiction over disputes thereunder; (ii) modifying the retained dealers' protest rights with respect to franchise modification and termination; (iii) requiring the acceptance of inventory sufficient to meet increased sales expectations; (iv) requiring the retained dealers to carry exclusively GM cars and trucks; and (v) requiring the waiver of certain warranty and other claims. The Debtors coerced retained dealers to sign the Participation Agreements in violation of the "good faith" obligation of O.R.C. § 4517.59.	*See* above response (to Docket No. 712).

Docket No.	Name of Objector	Summary of Objection	Response
2043, 2425	The States of Arkansas, Arizona, California, Connecticut, Colorado, Delaware, Georgia, Hawaii, Idaho, Iowa, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Maryland, Maine, Michigan, Minnesota, Missouri, Mississippi, Montana, Nebraska, North Carolina, North Dakota, New Hampshire, New Jersey, New Mexico, Nevada, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Vermont, Washington, West Virginia and Wisconsin	Section 363(f)(5) of the Bankruptcy Code does not provide for sales "free and clear" of all "claims." The Debtors must litigate the issue of whether the Purchaser is their successor. Even if section 363(f)(5) of the Bankruptcy Code can be read to provide for sales "free and clear" of all "claims," the proposed Order nevertheless sweeps to broadly (by including defenses and statutory obligations and inchoate rights for future enforcement, such as for post-confirmation injuries). The Debtors' request for an order with respect to section 525 of the Bankruptcy Code is unclear and improper. Paragraphs 21-24, 28, 33(a), 38 and 44 of the proposed Order are otherwise objectionable. The Debtors have violated 28 U.S.C. § 959(b) by conditioning their assumption and assignment of dealer agreements upon the dealers' waiver of certain state law franchise protections, which are not preempted by sections 363 and 365 of the Bankruptcy Code. The MPA is ambiguous and it is impossible to determine whether its provisions are objectionable.	*See* response re: Tort, Product Liability, Asbestos, Successor Liability Objections. The Debtors are reviewing the proposed Order, including in light of these and other objections, and will make any modifications that they ultimately determine to be necessary. *See* above response (to Docket No. 712). No response is required to this general, unspecific reservation of rights.

Docket No.	Name of Objector	Summary of Objection	Response
2076	The Florida Attorney General	The Debtors have violated 28 U.S.C. § 959(b) by conditioning their assumption and assignment of dealer agreements upon the dealers' waiver of certain state law franchise protections. The Wind-Down and Participation Agreements signed by the Debtors' terminated and retained dealers, respectively, violate various provisions of Florida law, including by: (i) vesting the Court with exclusive jurisdiction over disputes thereunder; (ii) requiring the retained dealers' acceptance of inventory sufficient to meet increased sales expectations; (iii) requiring retained dealers to increase floor plan capability to accommodate increased sales expectations; (iv) requiring the retained dealers to carry exclusively GM cars and trucks; (v) requiring the waiver of certain warranty and other claims; and (vi) requiring the waiver of certain protest rights. The Debtors have failed to preserve consumer lemon law rights.	*See* above response (to Docket No. 712). *See* response re: Tort, Product Liability, Asbestos, Successor Liability Objections.

Docket No.	Name of Objector	Summary of Objection	Response
2165	Unofficial GM Dealers Committee	The Debtors have not followed their detailed procedures for notifying the holders of executory contracts whether their contracts are to be assumed or rejected with respect to dealer agreements. The proposed Order eliminates the rights of non-debtors parties (including dealers) to Assumable Executory Contracts to pursue claims against the Purchaser based upon Assumed Liabilities. The proposed Order extends beyond the relief permitted by sections 363 and 365 of the Bankruptcy Code.	The Debtors believe they have followed the procedures set forth in the Motion. The proposed Order is consistent with other sale orders approved in this District and is consistent with the Bankruptcy Code and specifically sections 363 and 365.

Docket No.	Name of Objector	Summary of Objection	Response
2353	Colorado Motor Vehicle Dealer Board	The Debtors assumption and assignment of modified dealer agreements is outside the scope of section 365 of the Bankruptcy Code and contrary to state franchise law, which is not preempted by the Bankruptcy Code. The Debtors have violated 28 U.S.C. § 959(b) by conditioning their assumption and assignment of dealer agreements upon the dealers' waiver of certain state law franchise protections. The Participation Agreements signed by the Debtors' retained dealers violate various provisions of Colorado law, including by: (i) vesting the Court (as opposed to the Colorado Motor Vehicle Dealer Board) with exclusive jurisdiction over disputes thereunder; (ii) requiring retained dealers to meet increased sales expectations; and (iii) requiring retained dealers to increase floor plan capability to accommodate increased sales expectations. Paragraphs 8, 20 and 28 of the proposed Order are otherwise objectionable.	*See* above response (to Docket No. 712). The Debtors are reviewing the proposed Order, including in light of these and other objections, and will make any modifications that they ultimately determine to be necessary.

Exhibit C

Successor Liability and Consumer Objections

Successor Liability and Consumer Objections

Docket No.	Name of Objector	Summary of Objection	Response
1749	Sophia Bennet	Objects to 363 Transaction on basis that she is owed amounts for loss/damage due to a recall/fire to GM vehicle.	See response to Docket No. 1811.
1811	Burton Taft, Administrator of the Estate of Brian Taft	Sale free and clear would deprive the objector of the ability to pursue and recover damages from GM for wrongful death. The 363 Transaction is contrary to Pennsylvania Law providing for successor liability.	Case law supports the sale of a debtor's assets free and clear of claims, including successor liability claims. *In re Trans World Airlines, Inc.*, 322 F.3d 283 (3d Cir. 2003). In *In re Chrysler*, Judge Gonzalez also found that successor liability claims with respect to tort and product liability are "interests in property" and therefore subject to section 363(f).

Docket No.	Name of Objector	Summary of Objection	Response
1926	The States of Connecticut, Kentucky, Maryland, Minnesota, Missouri, Nebraska, North Dakota and Vermont	Sale free and clear will divest consumers of legal rights, without regard for state laws concerning successor liability. Future claims should not be treated as claims subject to discharge in bankruptcy as doing so is contrary to public policy.	See response to Docket No. 1811. MPA has been amended to provide that the Purchaser will expressly assume all products liability claims arising from accidents or other discrete incidents arising from operation of GM vehicles occurring subsequent to the closing of the 363 Transaction, regardless of when the product was purchased. The Debtors are not seeking a discharge as part of this transaction.
1956	The Schaefer Group	Object on basis that they were unable to determine what property is "Excluded Real Property" pursuant to the MSPA.	On June 12, 2009, the Debtors filed Exhibit F to the Master Sale and Purchase Agreement which includes a schedule of certain Excluded Owned Real Property.

Docket No.	Name of Objector	Summary of Objection	Response
1971	The Ad Hoc Committee of the Asbestos Personal Injury Claimants	363 Transaction is a *sub rosa* plan. The Motion seeks to preclude asbestos claimants from asserting claims against New GM; section 524(g) cannot be circumvented. Asbestos related claims are *in personam* claims, which cannot be sold free and clear of successor liability. Debtors have not satisfied the requirements of section 363(f).	See Response to Objection of Unofficial Committee of Family and Dissident Bondholders, Exhibit A, Docket No. 1969. Section 524(g) is inapplicable to a sale free and clear under section 363(f). 363 Transaction is not seeking to discharge asbestos liability claims See response to Docket No. 1811
1987	Gabriel Yzarra	363 Transaction is a *sub rosa* plan. Debtors are shifting healthcare costs to various states. Section 363 does not permit debtors to sell free and clear of claims, only interests.	See Response to Objection of Unofficial Committee of Family and Dissident Bondholders, Exhibit A, Docket No. 1969. See response to Docket No. 1811

Docket No.	Name of Objector	Summary of Objection	Response
1997	The Ad Hoc Committee of Consumer Victims of General Motors	363 Transaction is a *sub rosa* plan GM's refusal to assume responsibility for tort claims is in bad faith. Tort claimants have *in personam* claims which cannot be transferred free and clear.	See Response to Objection of Unofficial Committee of Family and Dissident Bondholders, Exhibit A, Docket No. 1969. See response to Docket No. 1811
2041 (2976) 2050 (2977) (amended)	Callan Cambell, Kevin Junso, Edwin Agosto, Kevin Chadwick, Joseph Berlingieri and the Center for Auto Safety, Consumer Action, Consumers for Auto Reliability and Safety, National Association of Consumer Advocates, and Public Citizen	Debtors cannot transfer property free and clear of *in personam* claims or future product liability and tort claims. Enjoining successor liability claims against the Purchaser violates applicable law, notice requirements, and due process. The Court lacks subject matter jurisdiction over post-closing disputes between products liability claimants and the successor Purchaser.	See response to Docket Nos. 1811 and 1926.
2065	The States of Illinois, California, and Kansas	Joinder to objection of Kentucky, Maryland, Minnesota, Missouri, Nebraska, North Dakota and Vermont [Docket No. 1926]	See response to Docket No. 1926.

Docket No.	Name of Objector	Summary of Objection	Response
2148	Mark Buttita	Joins in the Objection of Ad Hoc Committee of the Asbestos Personal Injury Claimants Further objects on basis that the 363 Transaction affects rights of present and future asbestos claimants because it exceeds the scope of section 363 and provides for an illegal injunction against future liability.	See response to Docket No. 1971
2362	Official Committee of Unsecured Creditors	Proposed order purports to cut off all state law successor liability for the Purchaser which is poor business and bad policy judgment, illegal under section 363(f), and, with respect to future claims, is a violation of due process. Debtors must make adequate showing that enough assets will remain in the estates after the 363 Transaction to pay all administrative expenses and priority claims against the estate.	See response to Docket Nos. 1811 and 1926.
Undocketed	John G. Cronin	Wants an adequate pool of funds set aside to indemnify personal injury claimants.	See response to Docket No. 1811.

Exhibit D

Plant Closure Objections

Plant Closure Objections

Docket No.	Name of Objector	Summary of Objection	Response
1041	City of Ontario, Ohio	The City of Ontario, Ohio does not request any specific relief. The objection: (i) focuses on the high benchmark rankings of the GM Stamping Plant in Ontario, Ohio, (ii) asserts that U.S. taxpayers "expect the best facilities will be kept open," (iii) expresses concern that presses and dies will be removed from the stamping plant prior to the completion of the bankruptcy, (iv) concludes that the removal of equipment will speed up the plant closing, and (v) expresses confidence that GM assets will be judged on their merits and that the "restructure plan" will be judged on what is best and most viable to insure the success of GM.	The City of Ontario does not present any objection to the Motion, or entry of the Sale Order. The City of Ontario does not have standing to represent the interests of U.S. taxpayers. The use of equipment and other estate assets, including the relocation of equipment, is properly within the business judgment of the Debtors.

Docket No.	Name of Objector	Summary of Objection	Response
1698	Richland County, Ohio	Seeks a modification to the Sale Order that would require the Debtors to continue operating the General Motors Stamping Plant in Ontario, Ohio through December 2010. Raises "an issue of equity," essentially claiming that a history of tax abatements and other concessions or contributions by local county and municipal authorities justify the request for a delay in the closing of the stamping plant.	Richland County's objection does not constitute a proper objection to the Motion, as it relates to issues not before the Court. To the extent Richland County is seeking to compel the Purchaser to purchase the stamping plant, the Purchaser's business judgment is not at issue and there is no precedent in case law or otherwise permitting the Court to mandate the Purchaser to purchase particular assets from the estate. To the extent Richland County is seeking to compel Old GM to continue operating the stamping plant, the request is not related to the Motion, and entry of the Sale Order will not impair any right Richland County may have to seek such relief. In any event, the business judgment standard protects the Debtors' determination as to whether to continue operating an estate asset.

Docket No.	Name of Objector	Summary of Objection	Response
1889	County of Wayne, Michigan	The County of Wayne, Michigan asserts (i) that the U.S. Treasury is an insider (see objection at ¶ 38), (ii) that transactions that benefit insiders must withstand heightened scrutiny, and (iii) that the failure to include the six speed transmission manufacturing facility at Ypsilanti, Michigan as a Purchased Asset under the Motion is not a reasonable or prudent exercise of business judgment.	The County of Wayne, Michigan does not present a proper objection to the Motion, as its objection relates to issues not before the Court. To the extent Wayne County is seeking to compel the Purchaser to purchase the Ypsilanti plant, the Purchaser's business judgment is not at issue and there is no precedent in case law or otherwise permitting the Court to mandate the Purchaser to purchase particular assets from the estate. To the extent Wayne County is seeking to compel Old GM to continue operating the Ypsilanti plant, the request is not related to the Motion, and entry of the Sale Order will not impair any right objector may have to seek such relief. In any event, the business judgment standard protects the Debtors' determination as to whether to continue operating an estate asset. Moreover, heightened scrutiny of the Debtors' business judgment is not warranted because the U.S. Treasury is not an insider. Regardless, the proposed transaction would easily withstand any standard applied.
1899	Washtenaw County, A Michigan Municipal Corporation	Washtenaw County, a Michigan Municipal Corporation, joins in the objection of Wayne County, Michigan.	See responses to Docket No. 1889 above.
1990	Charter Township of Ypsilanti, Michigan	Charter Township of Ypsilanti, Michigan, joins in the objection of Wayne County, Michigan.	See responses to Docket No. 1889 above.

Exhibit E

Retiree/Splinter Union Objections

Retiree/Splinter Union Objections

Docket No.	Name of Objector	Summary of Objection	Response
1020	Mr. and Mrs. Bruce Linhart	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	The law is clear that the New UAW VEBA, even though the benefits thereunder are not uniformly applicable to *all* GM retirees, permissibly avoids the potential loss of *all* benefits for *all* retirees. *See, e.g., UAW v. Gen. Motors Corp.*, 2008 WL 2968408, at *24 (E.D. Mich. 2008). The Motion thus should be approved because the alternative is a near certain elimination of all UAW and other retiree benefits. Moreover, the objection does not provide a basis for finding that the modifications negotiated in good faith by New GM and the UAW are not valid and binding upon all union member-retirees. Specifically, section 1114(c)(1) of the Bankruptcy Code authorizes the UAW, as the authorized representative of its retirees, to negotiate any modification of benefits conferred under its collective bargaining agreement. *See also* below response (to Docket No. 1941) and Debtors' (i) Objections to Application and (ii) Rebuttal to Reply of General Motors Retirees Association for the Appointment of a Retirees Committee Pursuant to 11 U.S.C. § 1114(d) [Docket Nos. 1901 and 2457].
1074	Stanley D. Smith	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).

Docket No.	Name of Objector	Summary of Objection	Response
1078	Leo St. Amour	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).
1085	Melvin Hays	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).
1254	Chris Messina	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).
1256	Robert Fain	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).
1257	John A. Dwyer	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably and retirees were not afforded the opportunity to vote thereon.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).
1293	Marilyn Powell	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).

Docket No.	Name of Objector	Summary of Objection	Response
1519	John J. Patros	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).
1546	Glen Schrader	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).
1547	Stanley Janusz	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably and retirees were not afforded the opportunity to vote thereon.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).
1550	Clifton R. Arrington	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).
1559	Edward J. Glanti	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).
1560	Marilyn A. Wassenaar	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably and retirees were given insufficient to time to object thereto.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941). *See also* Motion at ¶¶ 8-10, 29, 34-45, 50-51, 54-57 (regarding the sufficiency of notice in light of current exigencies).

Docket No.	Name of Objector	Summary of Objection	Response
1562	Robert A. McKenzie	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).
1828	Ellis Hollingsworth	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably and retirees were not afforded the opportunity to vote thereon.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).
1890	Ernestine Jordan	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).
1894	Kenneth M. Wood	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably and retirees were not afforded the opportunity to vote thereon.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).
1898	Luis Escalona	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).
1901	Donna M. Neal	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).

Docket No.	Name of Objector	Summary of Objection	Response
1912	Michael Toth	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).
1922	Ron Tanner	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above response (to Docket No. 1020) and below response (to Docket No. 1941).

Docket No.	Name of Objector	Summary of Objection	Response
1941	IUE-CWA, United Steelworkers and International Union of Operating Engineers Locals 18S, 101S and 832S	The Debtors have violated section 1114 of the Bankruptcy Code by affording retirees covered by the New UAW VEBA certain benefits and protections that allegedly have been denied to the retirees represented by these objecting unions. The 363 Transaction otherwise treats the retirees represented by these objecting unions unfairly and inequitably, particularly vis-à-vis the retirees represented by the UAW.	The transaction at issue is a *sale* of assets, not the distribution of proceeds by or from the assets of the Debtors to *any* creditor or creditor group; no modifications of any benefits plans of the Objecting Unions or their retirees are being proposed or effected; and, as a matter of law (including under the Bankruptcy Code), satisfying section 1114 is simply *not* a pre-condition to an asset disposition under section 363. Moreover, the treatment of the UAW's retirees is the result of an agreement entered into between New GM (*not* the Debtors) and the UAW. That agreement reflects a business judgment by New GM, whereby New GM will provide consideration to the New UAW VEBA that does not include *any* Debtor assets. Such business decisions by the Purchaser, which is not a chapter 11 debtor and which is under no obligation to comply with section 1114, do not implicate any rights of the objecting unions or their retirees or contravene any obligation of the Debtors. *See also* Omnibus Reply relating to Retiree/Splinter Union Objection and above response (to Docket No. 1020).
1981	General Motors Retirees Association	The 363 Transaction ignores Bankruptcy Code requirements to specify which retiree benefits will be cut and what protections there will be for what remains.	*See* above responses (to Docket Nos. 1020 and 1941).

Docket No.	Name of Objector	Summary of Objection	Response
1986	Richard H. Meeker	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
1992	James S. Zischke	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably and retirees were not afforded the opportunity to vote thereon.	*See* above responses (to Docket Nos. 1020 and 1941).
2011	Thomas H. Perros	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2101	Ted Tatro	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably and retirees were given insufficient to time to object and no alternatives thereto.	*See* above responses (to Docket Nos. 1020 and 1941). *See also* Motion at ¶¶ 8-10, 29, 34-45, 50-51, 54-57 (regarding the sufficiency of notice in light of current exigencies).
2117	David and Karen Hobson	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2119	John R. Brantingham	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).

Docket No.	Name of Objector	Summary of Objection	Response
2133	James Miller	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2196	Marcia Hopewell	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2197	Ronald F. Albright	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2198	Betty Gordon	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2199	Wesley Frazier	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2200	Len Reichel	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2202	Edmund R. Hillegas, Jr.	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).

Docket No.	Name of Objector	Summary of Objection	Response
2203	Geo Edwards	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2204	Patrick L. Wilson	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2206	Bobbie Jean S. Arrington	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2209	Dennise A. Beechraft	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2218	Thomas H. Perros	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably and retirees were not afforded the opportunity to vote thereon.	*See* above responses (to Docket Nos. 1020 and 1941).
2230	Gerald S. Sarka	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).

Docket No.	Name of Objector	Summary of Objection	Response
2234	Junius L. Johnson	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2235	Delmar L. Taylor	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2236	Theopolis Williams	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2243	Raymond W. Sargent	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2246	Arnold and Shirley Starks	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably and retirees were given insufficient time to object thereto.	*See* above responses (to Docket Nos. 1020 and 1941). *See also* Motion at ¶¶ 8-10, 29, 34-45, 50-51, 54-57 (regarding the sufficiency of notice in light of current exigencies).
2256	George Chavez	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).

Docket No.	Name of Objector	Summary of Objection	Response
2264	Albert Burdick	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2290	Arthur Woodke	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2348	Larry J. Hays	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2349	Robert S. Gordon	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2351	Darlene E. Jewett	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2373	Kathryn Griffin	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2377	Susan Muffley	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).

Docket No.	Name of Objector	Summary of Objection	Response
2381	David W. Muffley	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2383	Russ Detterich	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2386	Carolyn R. Wells	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2389	Charles F. Presser	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2393	Dean Woodard	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2395	Rodney Klein	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably and retirees were given insufficient time to object thereto.	*See* above responses (to Docket Nos. 1020 and 1941). *See also* Motion at ¶¶ 8-10, 29, 34-45, 50-51, 54-57 (regarding the sufficiency of notice in light of current exigencies).

Docket No.	Name of Objector	Summary of Objection	Response
2403	Patrick J. Straney	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2417	Eileen J. McIntyre	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2420	Joan K. Walls	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
2495	Robert Henderson	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
Un-docketed	Michael O. Gifford	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
Un-docketed	Clarence Davis	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
Un-docketed	Jennie Novak	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).

Docket No.	Name of Objector	Summary of Objection	Response
Un-docketed	Albert G. Sipka	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
Un-docketed	Josephine Peterson	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably.	*See* above responses (to Docket Nos. 1020 and 1941).
Un-docketed	Merlin Lanaville	The 363 Transaction and UAW retiree settlement do not treat all retirees equitably and retirees were given insufficient time to object thereto.	*See* above responses (to Docket Nos. 1020 and 1941). *See also* Motion at ¶¶ 8-10, 29, 34-45, 50-51, 54-57 (regarding the sufficiency of notice in light of current exigencies).
Un Docketed	David Solis	Objects to the UAW Retiree Settlement Agreement.	*See* responses relating to Retiree Objections.

Exhibit F

Workers' Compensation Objections

Workers' Compensation Objections

Docket No.	Name of Objector	Summary of Objection	Response
1851	The State of Michigan Workers' Compensation Agency Funds Administration	No intention to delay sale. The MPA does not create a sufficient commitment on behalf of the Purchaser to assume Debtors' workers' compensation obligations in Michigan because, pursuant to § 6.5 of the MPA, the Debtors could decide to move their workers' compensation obligations (including those arising from the Delphi operations) to the "Retained Liabilities" category. Debtors' have failed to adequately define or even discuss the effect of its pending transaction with Delphi.	Debtors believe that an agreement has been reached between the Debtors and objector that would resolve the Objection.
1929	The Ohio Bureau of Workers' Compensation	Reserves its rights to oppose any sale requiring New GM to qualify for self-insured status for Ohio workers' compensation because Ohio's workers' compensation issues are governed and controlled by Ohio laws. Also reserves rights to object to any sale that might not adequately provide for full compliance with Ohio's workers' compensation laws.	See response to Docket No. 1851.

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Exhibit G

Tax Objections

Tax Objections

Docket No.	Name of Objector	Summary of Objection	Response
1052	Texas Comptroller	Taxes at Issue: sales taxes, franchise taxes, and sales and use taxes. Tax Periods: not specified. (1) The MPA Section 1.2 currently defines Permitted Encumbrances to include, in part, liens for Taxes, (i) the validity or amount of which is being contested in good faith and (ii) for which appropriate reserves have been established. Since the Texas Comptroller is unaware what reserves have been established or whether such reserves are "adequate," the Texas Comptroller requests to confirm whether its tax liens will be treated as Permitted Encumbrances under the MPA. (2) To the extent not treated as Permitted Encumbrances, other adequate protection shall be provided under sections 363(c) and (e) of the Bankruptcy Code. (3) The MPA Section 2.3(a)(v) provides that the Assumed Liabilities include all prepetition Liabilities of Sellers to the extent approved by the Bankruptcy Court for payment by Sellers pursuant to a Final Order. The Texas Comptroller requests to clarify (i) whether the secured tax claims at issue are assumed by the	(1) The definition of Permitted Encumbrances will be amended to include only statutory liens for current taxes not yet due, payable or delinquent (or which may be paid without interest or penalties). Therefore, to the extent that the taxes at issue are not yet due, payable or delinquent, the liens for such taxes will remain intact as Permitted Encumbrances. (2) The tax liens will be retained as attached either to the Excluded Assets or to the sales proceeds of the collateral. (3) If further clarification is necessary, the Sale Order will be supplemented to clarify that, pursuant to Section 2.3(a)(v) of the MPA, the Purchaser will assume (i) all prepetition real and personal property taxes (whether related to Purchased Assets or Excluded Assets), (ii) all prepetition franchise and income taxes and (iii) all

Docket No.	Name of Objector	Summary of Objection	Response
		Purchaser under the MPA §2.3(a)(v) and (ii) if not, whether other identified source of payment is provided to ensure the Debtors' ability to pay those taxes in "cash."	prepetition excise, gross receipt, sales and use taxes.
		(4) Paragraphs 8 and 28 of the proposed Sale Order prohibits any person taking any action against the Purchaser asserting any "setoff" for any obligation of the Debtors as against any obligation due the Purchaser. Since the Purchaser will acquire all tax refund claims of the Debtors under the MPA, the Sale Order may be interpreted as preventing a tax authority from offsetting any prepetition tax liabilities against any tax refund to be assigned to the Purchaser. The Texas Comptroller requests that the relief requests under the Motion be denied to the extent that such requests would abrogate tax creditors' setoff rights.	(4) The Sale Order will be revised to provide that a relevant taxing authority's ability to exercise its right to setoff shall be preserved to the extent allowed under section 553 of the Bankruptcy Code.
		(5) Paragraph 39 of the Sale Order contains a provision that "no law of any state or other jurisdiction … shall apply in any way to the transactions contemplated by the 363 Transaction, the MPA, the Motion and this Order." This Paragraph may render relevant state tax laws inapplicable with respect to the 363 Transaction. The Texas Comptroller requests that this Paragraph be revised so as not to repeal or abrogate state tax laws with respect to the 363 Transaction.	(5) The Sale Order will be revised to add a proviso to Paragraph 39 that: provided however, the Debtors shall comply with their tax payment obligations under 28 U.S.C. § 960 except to the extent that the Purchaser, pursuant to the MPA, assumes the applicable liabilities.

Docket No.	Name of Objector	Summary of Objection	Response
1833	Department of the Treasury of the State of Michigan	Taxes at Issue: Use taxes, Michigan Single Business Taxes and Michigan Business Taxes. Tax Periods: 2002 to 2009. (1) The Michigan Treasury requests written confirmation from the Debtors regarding (i) who will be paying Sellers' taxes (including priority taxes) due now or determined to be due in the future to the Michigan Treasury, (ii) what arrangements are being made to ensure that funds will be available to pay the taxes, and (iii) such payment will be made in cash. (2) The Michigan Treasury requests that the party or parties responsible for the above-mentioned taxes shall escrow sufficient money to cover the taxes, interest and penalties as may be determined to be due and unpaid following the completion of the audits (pending or anticipated) until the Debtors produce a receipt that the taxes due are paid or a certificate that taxes are not due. (3) The Michigan Treasury requests that the tax creditor's setoff rights be preserved. *See* "Texas Comptroller—Summary of Objections— (4)" above. (4) The Michigan Treasury requests that state tax laws not be repealed or abrogated with	(1) *See* "Texas Comptroller—Response— (3)" above. Pursuant to Section 2.3(a)(v) of the MPA, the Purchaser will also assume all prepetition Michigan Single Business Taxes and Michigan Business Taxes. (2) No escrow is necessary since the Purchaser will assume the Debtors' tax liabilities with respect to those taxes at issue. (3) *See* "Texas Comptroller—Response— (4)" above. (4) *See* "Texas Comptroller—Response— (5)" above.

Docket No.	Name of Objector	Summary of Objection	Response
		respect to the 363 Transaction. *See* "Texas Comptroller—Summary of Objections— (5)" above.	
1837	County of Bastrop Texas, et al.	Taxes at Issue: property taxes. Tax Periods: 2009. (1) The Texas Ad Valorem Tax Authorities request to confirm whether their tax liens will be treated as Permitted Encumbrances under the MPA without regard to the adequacy of the established tax reserves. *See* "Texas Comptroller—Summary of Objections— (1)" above. (2) The Texas Ad Valorem Tax Authorities request to clarify whether the definition of Assumed Liabilities under the Purchaser under the MPA Section 2.3(a)(v) (i) includes those tax liabilities authorized by the Bankruptcy Court to be paid in the Order Authorizing the Debtors to Pay Prepetition Taxes and Assessments, and (ii) is intended to provide for the assumption by the Purchaser of unpaid pre-petition property taxes on assets being conveyed by the sale. (3) The Sale Order shall be revised to the extent it refers to the sale as being "free and clear of all liens, claims and encumbrances" without specifying that property being conveyed will be subject to Permitted Encumbrances.	(1) To the extent that the taxes at issue are not yet due, payable or delinquent, the liens for such taxes will remain intact as Permitted Encumbrances. *See* "Texas Comptroller—Response— (1)" above. (2) *See* "Texas Comptroller—Response— (3)" above. (3) No clarification is necessary.

Docket No.	Name of Objector	Summary of Objection	Response
1841	California Franchise Tax Board	Taxes at Issue: California franchise taxes. Tax Periods: not specified. (1) The California Franchise Tax Board (the "FTB") requests to clarify whether the California franchise taxes are Assumed Liabilities. (2) If prepetition claims of the FTB are not intended to be assumed by the Purchaser, the approval of the Agreement shall be conditioned on the Debtors demonstrating that any priority claims of the FTB will be paid in full. (3) The FTB requests that the setoff and recoupment rights of taxing authorities be preserved. *See* "Texas Comptroller—Summary of Objections— (4)" above. (4) The FTB requests that state tax laws not be repealed or abrogated with respect to the 363 Transaction. *See* "Texas Comptroller—Summary of Objections— (5)" above.	(1) *See* "Texas Comptroller—Response— (3)" above. (2) Not applicable. (3) *See* "Texas Comptroller—Response— (4)" above. (4) *See* "Texas Comptroller—Response— (5)" above.

Docket No.	Name of Objector	Summary of Objection	Response
1888	Arlington ISD, et al.	Taxes at Issue: ad valorem property taxes. Tax Period: 2009. (1) Arlington ISD, et al., request that either their tax liens be paid at the time of sale or, in the alternative, a separate escrow be created at closing from the proceeds of any sale to cover the estimated 2009 taxes.	(1) *See* "Texas Comptroller—Response— (3)" above.
1914	Commonwealth of Pennsylvania, Department of Revenue	Taxes at Issue: corporate (franchise) taxes, sales taxes, and employer withholding taxes. Tax Period: not specified. (1) The Commonwealth requests to (i) confirm whether its tax liens will be treated as Permitted Encumbrances under the MPA, (ii) confirm the adequacy of the reserves for the Permitted Encumbrances as well as disclose the amounts in said reserves, and (iii) provide adequate protection if its liens not to be retained to its collateral. (2) The Commonwealth requests to clarify whether (i) the Commonwealth's tax claims are Assumed Liabilities under the MPA §2.3(a)(v), (ii) whether the Debtors intend to pay the Commonwealth their prepetition taxes or whether Commonwealth have to look to the Purchaser for payment of said taxes, and (iii) either in (i) or (ii), whether certain arrangement	(1) To the extent that the taxes at issue are not yet due, payable or delinquent, the liens for such taxes will remain intact as Permitted Encumbrances. *See* "Texas Comptroller—Response— (1)" above. (2) *See* "Texas Comptroller—Response— (3)" above. If further clarification is necessary, the Order will be supplemented to clarify that, pursuant to Section 2.3(a)(v) of the MPA, all prepetition employer withholding taxes will be assumed by the Purchaser.

Docket No.	Name of Objector	Summary of Objection	Response
		is being made to ensure that funds will be available to pay the Commonwealth's claims in full. (3) The Commonwealth requests that the setoff rights of taxing authorities be preserved. *See* "Texas Comptroller—Summary of Objections— (4)" above. (4) The Commonwealth requests that state tax laws not be repealed or abrogated with respect to the 363 Transaction. *See* "Texas Comptroller—Summary of Objections— (5)" above.	(3) *See* "Texas Comptroller—Response— (4)" above. (4) *See* "Texas Comptroller—Response— (5)" above.
1937	Ohio Department of Taxation	Taxes at Issue: not specified Tax Period: not specified (1) The Ohio Department of Taxation (the "Taxation") requests that the setoff rights of taxing authorities be preserved. *See* "Texas Comptroller—Summary of Objections— (4)" above. (2) The Taxation requests that the applicability of state tax laws be preserved with respect to the 363 Transaction. *See* "Texas Comptroller—Summary of Objections— (5)" above.	(1) *See* "Texas Comptroller—Response— (4)" above. (2) *See* "Texas Comptroller—Response— (5)" above.

Docket No.	Name of Objector	Summary of Objection	Response
1939	County of Santa Clara	Taxes at Issue: personal property taxes Tax Period: not specified. (1) The County of Santa Clara (the "**County**") requests that the Court either deny the proposed sale of assets free and clear of liens, claim or encumbrances or, in the alternative, order that sufficient proceeds to be set aside to satisfy the County's tax claims.	(1) *See* "Texas Comptroller—Response— (3)" above.
1944	Angelina County , et al.	Taxes at Issue: ad valorem property taxes Tax Period: 2009. (1) The Tax Authorities request to clarify whether the Debtors or the Purchaser will pay current taxes that are not yet due or payable to which the statutory liens are attached. (2) The Tax Authorities (i) request that a segregated cash collateral be established for their tax claims from the sale proceeds, (ii) object to the use of the cash collateral unless their claims are paid in full, and (iii) request that the approval of the Order be denied if a segregated cash collateral is not established and other adequate protection cannot be provided. (3) The Tax Authorities request to clarify whether the Assumed Liabilities under the MPA (i) includes those tax liabilities to be paid	(1) *See* "Texas Comptroller—Response— (3)" above. (2) Because statutory liens for property taxes that are not yet due or payable are Permitted Encumbrances, there is no basis for the relief requested. (3) *See* "Texas Comptroller—Response— (3)" above.

Docket No.	Name of Objector	Summary of Objection	Response
		pursuant to the Order Authorizing the Debtors to Pay Prepetition Taxes and Assessments and (ii) is intended to provide for the assumption by the Purchaser of unpaid pre-petition property taxes on assets being conveyed by the sale.	
2000	Wayne County Treasurer, Oakland County Treasurer and the City of Detroit	Taxes at Issue: property taxes and income and withholding taxes. Also at Issue: sewer and water bills. Tax Period: 1999, 2003, 2007 and 2008 (in the case of income and withholding taxes, from 1983 to May 2007). (1) The Treasurers' request to clarify whether the Treasurers' tax claims are Assumed Liabilities under the MPA. (2) The Treasurers' request to clarify that the Treasurers' statutory lien for property taxes that are payable or to be payable are Permitted Encumbrances under the MPA. (3) If taxes owed to the Treasurers are neither Assumed Liabilities or Permitted Encumbrances, the Treasurers' request that an adequate protection be provided with respect to their secured claims. (4) The Treasurers' request to clarify whether	(1) *See* "Texas Comptroller—Response— (3)" and "Commonwealth of Pennsylvania, Department of Revenue —Response— (2)" above. (2) To the extent that the property taxes at issue are not yet due, payable or delinquent, they will be considered Permitted Encumbrances. *See* "Texas Comptroller—Response— (1)" above. (3) Not applicable. (4) Pursuant to Section 2.3(a)(v) of the MPA, the

Docket No.	Name of Objector	Summary of Objection	Response
		the outstanding sewer and water bills due and owing on the Purchased Assets are Assumed Liabilities. (5) The Treasurers' request to clarify whether the outstanding sewer and water bills due and owing on the Purchased Assets are Permitted Encumbrances. (6) If the sewer and water bills are neither Assumed Liabilities or Permitted Encumbrances, the Treasurers' request that adequate protection be provided with respect to such claims. (7) The Treasurers' request that state tax laws not be repealed or abrogated with respect to the 363 Transaction. *See* "Texas Comptroller—Summary of Objections— (5)" above.	Purchaser assumes sewer and water bills only to extent that such liabilities arise in the ordinary course of business during the Bankruptcy Case through and including the Closing Date. (5) To the extent that the sewer and water bills at issue are not yet due, payable or delinquent, the liens for such bills will be considered Permitted Encumbrances. *See* "Texas Comptroller—Response— (1)" above. (6) The tax liens will be retained as attached either to the Excluded Assets or to the sales proceeds of the collateral with respect to their secured claims. (7) *See* "Texas Comptroller—Response— (5)" above.
2044	NYS Tax Department	Taxes at Issue: sales, withholding and corporate (franchise) taxes. Tax Period: not specified. (1) The NYS Tax Department requests to clarify whether its prepetition tax claims are Assumed Liabilities under the MPA Section 2.3(a)(v).	(1) *See* "Texas Comptroller—Response— (3)" above.

Docket No.	Name of Objector	Summary of Objection	Response
		(2) If that is not the intent of the parties to the MPA, another source of payment should be identified to ensure payment of claims in cash. (3) The NYS Tax Department requests that the setoff rights of taxing authorities be preserved. *See* "Texas Comptroller—Summary of Objections— (4)" above. (4) The NYS Tax Department requests that state tax laws not be repealed or abrogated with respect to the 363 Transaction. *See* "Texas Comptroller—Summary of Objections— (5)" above.	(2) Not applicable. (3) *See* "Texas Comptroller—Response— (4)" above. (4) *See* "Texas Comptroller—Response— (5)" above.
	Mississippi State Tax Commission	Taxes at Issue: income, franchise and sales taxes Tax Period: not specified (1) The Mississippi State Tax Commission (the "MSTC") requests that the setoff rights of taxing authorities be preserved. *See* "Texas Comptroller—Summary of Objections— (4)" above. (2) The MSTC requests that state tax laws not be repealed or abrogated with respect to the 363 Transaction. *See* "Texas Comptroller—Summary of Objections— (5)" above.	(1) *See* "Texas Comptroller—Response— (4)" above. (2) *See* "Texas Comptroller—Response— (5)" above.

Exhibit H

Lien Creditor Objections

Lien Creditor Objections

Docket No.	Name of Objector	Summary of Objection	Response
1470	Demaria Building Company	Pursuant to the Michigan Construction Lien Act, construction corporation obtained a secured interest in the real property upon which it performed construction improvements. Therefore, in order to transfer free and clear title to the real property, the Debtors must either fully compensate the construction corporation prior to the asset sale or agree that the liens will pass with the real property against the Purchaser.	The Debtors will be adding language to the proposed Sale Order that they believe address the concerns set forth in this objection. See Omnibus Reply to Creditor Lien Objections.
1695	Usher Tool & Die, Inc.	Pursuant to the Michigan Special Tools Lien Act and/or the Michigan Mold Lien Act, special tooling supplier obtained a statutory lien on its delivered special tooling supplies to secure full payment of all sums due by the Debtors. With regard to this lien, the Debtors have not satisfied any of the requirements set forth in 11 U.S.C. § 363(f) for the sale of assets free and clear of liens. Therefore, any order authorizing the asset sale should contain a clause making it clear that the order does not adjudicate any lien rights held by the special tooling supplier.	The Debtors will be adding language to the proposed Sale Order that they believe address the concerns set forth in this objection. See Omnibus Reply to Creditor Lien Objections.

Docket No.	Name of Objector	Summary of Objection	Response
1697	Proper Tooling, Inc.	Pursuant to the Michigan Special Tools Lien Act and/or the Michigan Mold Lien Act, special tooling supplier obtained a statutory lien on its delivered special tooling supplies to secure full payment of all sums due by the Debtors. With regard to this lien, the Debtors have not satisfied any of the requirements set forth in 11 U.S.C. § 363(f) for the sale of assets free and clear of liens. Therefore, any order authorizing the asset sale should contain a clause making it clear that the order does not adjudicate any lien rights held by the special tooling supplier.	The Debtors will be adding language to the proposed Sale Approval Order that they believe address the concerns set forth in this objection. See Reply.
1700	Pinnacle Tool, Incorporated	Pursuant to the Michigan Special Tools Lien Act and/or the Michigan Mold Lien Act, special tooling supplier obtained a statutory lien on its delivered special tooling supplies to secure full payment of all sums due by the Debtors. With regard to this lien, the Debtors have not satisfied any of the requirements set forth in 11 U.S.C. § 363(f) for the sale of assets free and clear of liens. Therefore, any order authorizing the asset sale should contain a clause making it clear that the order does not adjudicate any lien rights held by the special tooling supplier.	The Debtors will be adding language to the proposed Sale Approval Order that they believe address the concerns set forth in this objection. See Reply.

Docket No.	Name of Objector	Summary of Objection	Response
1704	ACEMCO, Incorporated	Pursuant to the Michigan Special Tools Lien Act and/or the Michigan Mold Lien Act, special tooling supplier obtained a statutory lien on its delivered special tooling supplies to secure full payment of all sums due by the Debtors. With regard to this lien, the Debtors have not satisfied any of the requirements set forth in 11 U.S.C. § 363(f) for the sale of assets free and clear of liens. Therefore, any order authorizing the asset sale should contain a clause making it clear that the order does not adjudicate any lien rights held by the special tooling supplier.	The Debtors will be adding language to the proposed Sale Approval Order that they believe address the concerns set forth in this objection. See Reply.
1707	Grand Die Engravers, Inc.	Pursuant to the Michigan Special Tools Lien Act and/or the Michigan Mold Lien Act, special tooling supplier obtained a statutory lien on its delivered special tooling supplies to secure full payment of all sums due by the Debtors. With regard to this lien, the Debtors have not satisfied any of the requirements set forth in 11 U.S.C. § 363(f) for the sale of assets free and clear of liens. Therefore, any order authorizing the asset sale should contain a clause making it clear that the order does not adjudicate any lien rights held by the special tooling supplier.	The Debtors will be adding language to the proposed Sale Approval Order that they believe address the concerns set forth in this objection. See Reply.

Docket No.	Name of Objector	Summary of Objection	Response
1710	Plastic Mold Technology, Inc.	Pursuant to the Michigan Special Tools Lien Act and/or the Michigan Mold Lien Act, special tooling supplier obtained a statutory lien on its delivered special tooling supplies to secure full payment of all sums due by the Debtors. With regard to this lien, the Debtors have not satisfied any of the requirements set forth in 11 U.S.C. § 363(f) for the sale of assets free and clear of liens. Therefore, any order authorizing the asset sale should contain a clause making it clear that the order does not adjudicate any lien rights held by the special tooling supplier.	The Debtors will be adding language to the proposed Sale Approval Order that they believe address the concerns set forth in this objection. See Reply.
1718	Paramount Tool & Die, Inc.	Pursuant to the Michigan Special Tools Lien Act and/or the Michigan Mold Lien Act, special tooling supplier obtained a statutory lien on its delivered special tooling supplies to secure full payment of all sums due by the Debtors. With regard to this lien, the Debtors have not satisfied any of the requirements set forth in 11 U.S.C. § 363(f) for the sale of assets free and clear of liens. Therefore, any order authorizing the asset sale should contain a clause making it clear that the order does not adjudicate any lien rights held by the special tooling supplier.	The Debtors will be adding language to the proposed Sale Approval Order that they believe address the concerns set forth in this objection. See Reply.

Docket No.	Name of Objector	Summary of Objection	Response
1762	Wolverine Tool & Engineering Co.	Pursuant to the Michigan Special Tools Lien Act and/or the Michigan Mold Lien Act, special tooling supplier obtained a statutory lien on its delivered special tooling supplies to secure full payment of all sums due by the Debtors. With regard to this lien, the Debtors have not satisfied any of the requirements set forth in 11 U.S.C. § 363(f) for the sale of assets free and clear of liens. Therefore, any order authorizing the asset sale should contain a clause making it clear that the order does not adjudicate any lien rights held by the special tooling supplier.	The Debtors will be adding language to the proposed Sale Approval Order that they believe address the concerns set forth in this objection. See Reply.
1767	Eclipse Tool & Die, Inc.	Pursuant to the Michigan Special Tools Lien Act and/or the Michigan Mold Lien Act, special tooling supplier obtained a statutory lien on its delivered special tooling supplies to secure full payment of all sums due by the Debtors. With regard to this lien, the Debtors have not satisfied any of the requirements set forth in 11 U.S.C. § 363(f) for the sale of assets free and clear of liens. Therefore, any order authorizing the asset sale should contain a clause making it clear that the order does not adjudicate any lien rights held by the special tooling supplier.	The Debtors will be adding language to the proposed Sale Approval Order that they believe address the concerns set forth in this objection. See Reply.

Docket No.	Name of Objector	Summary of Objection	Response
1780	Dietool Engineering Company, Inc.	Pursuant to the Michigan Special Tools Lien Act and/or the Michigan Mold Lien Act, special tooling supplier obtained a statutory lien on its delivered special tooling supplies to secure full payment of all sums due by the Debtors. With regard to this lien, the Debtors have not satisfied any of the requirements set forth in 11 U.S.C. § 363(f) for the sale of assets free and clear of liens. Therefore, any order authorizing the asset sale should contain a clause making it clear that the order does not adjudicate any lien rights held by the special tooling supplier.	The Debtors will be adding language to the proposed Sale Approval Order that they believe address the concerns set forth in this objection. See Reply.
1783	Standard Tool & Die, Inc.	Pursuant to the Michigan Special Tools Lien Act and/or the Michigan Mold Lien Act, special tooling supplier obtained a statutory lien on its delivered special tooling supplies to secure full payment of all sums due by the Debtors. With regard to this lien, the Debtors have not satisfied any of the requirements set forth in 11 U.S.C. § 363(f) for the sale of assets free and clear of liens. Therefore, any order authorizing the asset sale should contain a clause making it clear that the order does not adjudicate any lien rights held by the special tooling supplier.	The Debtors will be adding language to the proposed Sale Approval Order that they believe address the concerns set forth in this objection. See Reply.

Docket No.	Name of Objector	Summary of Objection	Response
1787	STM Mfg., Inc.	Pursuant to the Michigan Special Tools Lien Act and/or the Michigan Mold Lien Act, special tooling supplier obtained a statutory lien on its delivered special tooling supplies to secure full payment of all sums due by the Debtors. With regard to this lien, the Debtors have not satisfied any of the requirements set forth in 11 U.S.C. § 363(f) for the sale of assets free and clear of liens. Therefore, any order authorizing the asset sale should contain a clause making it clear that the order does not adjudicate any lien rights held by the special tooling supplier.	The Debtors will be adding language to the proposed Sale Approval Order that they believe address the concerns set forth in this objection. See Reply.
1790	Advance Tooling Systems, Inc., Dynamic Tooling Systems and Engineered Tooling Systems, Inc.	Pursuant to the Michigan Special Tools Lien Act and/or the Michigan Mold Lien Act, special tooling supplier obtained a statutory lien on its delivered special tooling supplies to secure full payment of all sums due by the Debtors. With regard to this lien, the Debtors have not satisfied any of the requirements set forth in 11 U.S.C. § 363(f) for the sale of assets free and clear of liens. Therefore, any order authorizing the asset sale should contain a clause making it clear that the order does not adjudicate any lien rights held by the special tooling supplier.	The Debtors will be adding language to the proposed Sale Approval Order that they believe address the concerns set forth in this objection. See Reply.

Docket No.	Name of Objector	Summary of Objection	Response
1797	Competition Engineering, Inc., Datum Industries, LLC, Monroe, LLC, J.R. Automation Technologies, LLC and Dane Systems, LLC	Pursuant to the Michigan Special Tools Lien Act and/or the Michigan Mold Lien Act, special tooling supplier obtained a statutory lien on its delivered special tooling supplies to secure full payment of all sums due by the Debtors. With regard to this lien, the Debtors have not satisfied any of the requirements set forth in 11 U.S.C. § 363(f) for the sale of assets free and clear of liens. Therefore, any order authorizing the asset sale should contain a clause making it clear that the order does not adjudicate any lien rights held by the special tooling supplier.	The Debtors will be adding language to the proposed Sale Approval Order that they believe address the concerns set forth in this objection. See Reply.
1813	Lansing Tool & Engineering, Inc.	Pursuant to the Michigan Special Tools Lien Act and/or the Michigan Mold Lien Act, special tooling supplier obtained a statutory lien on its delivered special tooling supplies to secure full payment of all sums due by the Debtors. With regard to this lien, the Debtors have not satisfied any of the requirements set forth in 11 U.S.C. § 363(f) for the sale of assets free and clear of liens. Therefore, any order authorizing the asset sale should contain a clause making it clear that the order does not adjudicate any lien rights held by the special tooling supplier.	The Debtors will be adding language to the proposed Sale Approval Order that they believe address the concerns set forth in this objection. See Reply.

Docket No.	Name of Objector	Summary of Objection	Response
1816	Commercial Tool & Die Company	Pursuant to the Michigan Special Tools Lien Act and/or the Michigan Mold Lien Act, special tooling supplier obtained a statutory lien on its delivered special tooling supplies to secure full payment of all sums due by the Debtors. With regard to this lien, the Debtors have not satisfied any of the requirements set forth in 11 U.S.C. § 363(f) for the sale of assets free and clear of liens. Therefore, any order authorizing the asset sale should contain a clause making it clear that the order does not adjudicate any lien rights held by the special tooling supplier.	The Debtors will be adding language to the proposed Sale Approval Order that they believe address the concerns set forth in this objection. See Reply.
1876	Cinetic Automation Corp.	Pursuant to the Michigan Ownership Rights in Dies, Molds and Forms Act, tooling supplier obtained a statutory lien on its delivered tooling supplies to secure full payment of all sums due by the Debtors. With regard to this lien, the Debtors have not satisfied any of the requirement set forth in 11 U.S.C. § 363(f) for the sale of assets free and clear of liens. Therefore, the Debtors must either fully compensate the tooling supplier prior to the asset sale or agree that the lien will pass with the tooling supplies against the Purchaser.	The Debtors will be adding language to the proposed Sale Approval Order that they believe address the concerns set forth in this objection. See Reply.

Docket No.	Name of Objector	Summary of Objection	Response
1983	Active Burgess Mould & Design, Ltd and Automotive Gauge & Fixture, Ltd.	Pursuant to the Mold Builders Lien Acts, mold manufacturers obtained statutory liens on certain molds to secure full payment of all sums due for their fabrication, repair, and modification. With regard to these liens, the Debtors have not satisfied any of the requirements set forth in 11 U.S.C. § 363(f) for the sale of assets free and clear of liens. Furthermore, the mold manufacturers' interests in the molds are not adequately protected under 11 U.S.C. § 363(e). Therefore, the Court should deny the Motion to the extent that it affects the mold manufacturers' secured status.	The Debtors will be adding language to the proposed Sale Approval Order that they believe address the concerns set forth in this objection. See Reply.
2021	L.K. Machinery, Inc.	Die casting machine manufacturer is in the process of filing and perfecting mechanics liens on certain equipment sold and delivered to the Debtors. The Court should enter an order providing that the manufacturer's liens transfer to the proceeds of the asset sale.	The Debtors will be adding language to the proposed Sale Approval Order that they believe address the concerns set forth in this objection. See Reply.

Exhibit I

Stockholder Objections

Stockholder Objections

Docket No.	Name of Objector	Summary of Objection	Response
1073	William H. Chambers	Shareholders are losing value and will receive no vested interest. Seeks same treatment as new stakeholders.	Objection cites no better alternative to Sale. No legal basis exists to elevate priority of equity holders.
1067	Peter Backus	Seeks consideration for loss of shares and contends that GM is in breach of contract for failure to offer such consideration.	See response to Docket No. 1073.
1269	Robert Daniel Howell and Sharlene Howell	Seeks consideration for stock loss.	See response to Docket No. 1073.
1284	Jonathan Lee Riches	Objection seeks more time to analyze 363 Transaction; claims current timeline is violation of due process.	Additional time not available to preserve going concern value. No alternative is available even with more time.

Docket No.	Name of Objector	Summary of Objection	Response
1692	Charles Benninghoff	Argues that government has unlawfully interfered in private enterprise by requiring GM to receive cash infusions rather than filing for bankruptcy. Alleges that UAW's equity stake in New GM is an illegal kickback for political contributions and lawyers representing GM have conflicts of interest. Argues that government's tactics are unlawful uses of executive and legislative power.	No factual or legal basis for objection. No response necessary.
1760	Carole R. Maddux	Claims equity is being unfairly transferred from current shareholders to UAW without adequate compensation. Argues that priority in preferred and common stock should go to current stockholders.	See response to Docket No. 1073.
1904	Lewis S. Weingarten	Objects to distribution of common stock. Requests same treatment as bondholders. Alternatively wants preferred stock.	See response to Docket No. 1073.

Docket No.	Name of Objector	Summary of Objection	Response
1910	John W. Williams	Claims that UAW is receiving kickbacks as a result of providing financial support to the current government.	See response to Docket No. 1692.
1936	Charlotte Kirk	President Obama has his own agenda with respect to the GM bankruptcy.	See response to Docket No. 1692.
1988	Robert Mathi	Wants stockholders to receive "portion of New GM."	See response to Docket No. 1073.
1804	Gerald Haynor	Claims to have obtained a pension-related judgment against GM in the Eastern District of Michigan in March 2009 that will not be honored.	See response to Docket No. 1073.
2146	Jack M. Wilhelm	Objects to notice period. Claims that the government is engaging in self-dealing with respect to the 363 Transaction. No stakeholder should receive "special place" in the claims process.	See responses to Docket Nos. 1692 and 1073.

Docket No.	Name of Objector	Summary of Objection	Response
2131	Robert W. Hartnagel	Seeks to incorporate objections filed in a Michigan class action. Says shareholders have lost everything while high level executives have safeguarded their financial well-being.	See responses to Docket Nos. 1692 and 1073.
2260	Warren R. Bolton	Objects to issuance of preferred stock when GM was insolvent. Preferred stock holders should be exempt from the sale.	See response to Docket No. 1073.
2284	Peter G. Polmen	Objects to loss of shares and wants consideration from proceeds of the sale.	See response to Docket No. 1073.
2126	John Lauve	Claims that 363 Transaction it is a scheme for cutting recovery to stakeholders. Stockholders were not given an opportunity to vote on new directors or to purchase additional stock. Stockholders were consulted with respect to the sale of assets as required by Delaware Law, section 8-271.	See responses to Docket Nos. 1284, 1692, and 1073.

Docket No.	Name of Objector	Summary of Objection	Response
Un-Docketed	Ransom Ford, Jr.	Objection states that attorneys are only parties to gain. Stockholder interests are not represented.	See response to Docket No. 1073.
2478	Tristam T. Buckley	Objects to notice period. Common stockholders' are being unfairly eliminated. GM should engage in a public bidding process. The disposition of GM's assets should be reviewed by the Court and other agencies (such as the FBI and CIA) for the purpose of protecting national security. The current board members of GM should not be maintained.	See responses to Docket Nos. 1284 and 1073.

Exhibit J

Cure Objections

Exhibit: Logged Supplier Objections

Supplier Objections (Ordered by Counterparty Name ascending)

Counterparty Name	Docket ID	Date	Contact
AT&T	**906**	6/12/2009	Name: **David A. Rosenzweig** Law Firm: **Fulbright & Jaworski, LLP** Title: eMail: 666 Fifth Avenue, New York NY 10128 (USA) **212-318-3000**
A Raymond, Inc.	**1441**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long** Title: eMail: fishere@butzel.com 380 Madison Avenue, 22nd Floor, New York NY 10017 (USA) **212-818-1110**
A.W. Farrell & Sons, Inc.	**696**	6/12/2009	Name: **Angela Z. Miller** Law Firm: **Phillips Lytle LLP** Title: eMail: 437 Madison Ave., 34th Floor, New York NY 10022 (USA) **212-759-4888**
ABC Group, Inc.	**1244**	6/15/2009	Name: **Ann Marie Uetz** Law Firm: **Foley& Lardner, LLP** Title: eMail: One Detroit Center, 500 Woodward Avenue, Suite 2700, Detroit MI 48226-3489 (USA) **313-234-7100**
Accuride Corp	**1434**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long** Title: eMail: 380 Madison Avenue, New York NY 10017 **212.818.1110**
Acument Global Technologies	**1359**	6/15/2009	Name: **Salvatore A. Barbatano** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center, 500 Woodward Avenue, Suite 2700, Detroit MI 48226-3489 (USA) **313.234.7100**
ADAC - Strattec	**1344**	6/15/2009	Name: **Jennifer A. Christian** Law Firm: **Kelley Drye & Warren LLP** Title: eMail: 101 Park Avenue, New York NY 10178 (USA) **212.808.7800**
ADAC Plastics, Inc.	**1102**	6/15/2009	Name: **Mary Kay Shaver** Law Firm: **Varnum LLP** Title: eMail: mkshaver@varnumlaw.com Bridgewater Place, P.O. Box 352, Grand Rapids MI 49501-0352 (USA) **616-336-6000**
Advancement LLC, d/b/a Contract Professionals of Ohio LLC	**1769**	6/16/2009	Name: **Dave Beveridge** Law Firm: Title: Chief Financial Officer eMail: 32200 Solon Road, Solon OH 44139 (USA) **440-248-8550**
Advics North America, Inc.	**1129**	6/15/2009	Name: **Michael C. Hammer** Law Firm: **Dickinson Wright PLLC** Title: eMail: jplemmons@dickinsonwright.com 500 Woodward Ave., Suite 4000, Detroit MI 48226 (USA) **313-223-3500**
Affiliated Commputer Systems of Spain SL, et. al	**1270**	6/15/2009	Name: **Larry A. Levick** Law Firm: **Singer Levick, P.C.** Title: eMail: 16200 Addison Road, Suite 140, Addison TX 75001 (USA) **972.380.5533**
Affinia Group, Inc. and certain of its affiliates	**1421**	6/15/2009	Name: **W. David Arnold** Law Firm: **Robison, Curphey & O'Connell** Title: eMail: darnold@rcolaw.com Four Seagate, Nineth Floor, Toledo OH 43604 (USA) **419-249-7900**

Affinion Loyalty Group, Inc. dba Apollo Management LP	**837**	6/15/2009	Name: **Shawn R. Fox** Law Firm: **McGuirewoods LLP** Title: eMail: 1345 Avenue of the Americas, New York NY 10105 **212.548.2100**
Air International (U.S.), Inc. and Air International Thermal (Austrialia) Pty Ltd.	**1415**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**
Airgas, Inc. and its subsidiaries and related entities	**1809**	6/18/2009	Name: **Jonathan Hook** Law Firm: **Haynes and Boone, LLP** Title: eMail: 1221 Avenue of the Americas 26th Floor, New York NY 10020 (USA) **212-659-7300**
Airtex Products, L.P.	**1365**	6/15/2009	Name: **Mitchell Seider** Law Firm: **Latham & Watkins LLP** Title: eMail: mitchell.seider@lw.com 885 Third Ave., New York NY 10022-4802 (USA) **212-906-1200**
Ai-Shreveport LLC	**1626**	6/16/2009	Name: **Salvatore A. Barbatano** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center; 500 Woodward Ave.Suite 2700, Detroit MI 48226-3489 (USA) **313-234-7100**
Aisin AW Co., Ltd.	**1207**	6/15/2009	Name: **Yoshihiro Saito** Law Firm: **Manelli Denison & Selter PLLC** Title: Counsel to Aisin AWCo., Ltd. eMail: ysaito@mdslaw.com 2000 M Street, NW 7th Floor, Washington DC 20036-3307 (USA) **202-261-1000**
Aisin AW Co., Ltd.	**1109**	6/12/2009	Name: **Yoshihiro Saito** Law Firm: Title: Cousel to AW Engineering USA, Inc. eMail: ysaito@mdslaw.com not provided
Aisin World Corp. of America	**1413**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**
Aisin World Corporation of America	**1413**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long** Title: eMail: sidorsky@butzel.com 380 Madison Avenue , New York NY 10017 (USA) **212-818-1110**
Albar Industires, Inc.	**1040**	6/12/2009	Name: **Barry E. Lichtenberg** Law Firm: **Schwartz, Lichtenberg, LLP** Title: eMail: barryster@att.net 420 Lexington Ave. Suite 2040, New York NY 10170 (USA) **212-389-7818**
Alcoa, Inc.	**714**	6/12/2009	Name: **Shawn R. Fox** Law Firm: **McQuire Woods, LLP** Title: eMail: 1345 Avenue of the Americas, 7th Floor, New York NY 10105-0106 (USA) **212.548.2165**
Allison Transmission, Inc., f/k/a Clutch Operating Company, Inc.	**984**	6/15/2009	Name: **Robert J. Rosenberg** Law Firm: **Latham & Watkins LLP** Title: eMail: 885 Third Avenue, New York NY 10022 (USA) **212-906-1200**
ALPS Automotive, Inc.	**1448**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long** Title: eMail: sidorsky@butzel.com 380 Madison Avenue, 22nd Floor, New York NY 10017 (USA) **212-818-1110**

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AMPORTS, Inc.	**1278**	6/15/2009	Name: **Sean A. O'Neal** Law Firm: **Cleary Gottlieb Steen & Hamilton LLP** Title: eMail: One Liberty Plaza, New York NY 10006 **212.225.2000**
Analysts International Corporation	**741**	6/12/2009	Name: **Gerard DiConza** Law Firm: **Diconza Law, P.C.** Title: eMail: 630 Third Avenue, 7th Floor, New York NY 10017 (USA) **212.682.4940**
Android Industries LLC	**1449**	6/15/2009	Name: **Salvatore A. Barbatano** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center; 500 Woodward Avenue Suite 2700, Detroit MI 48226-3489 (USA) **313-234-7100**
Android Industries-Delta Township, LLC	**1446**	6/15/2009	Name: **Salvatore A. Barbatano** Law Firm: **Foley & Lardner LLP** Title: eMail: 500 Woodward Ave. Suite 2700, Detroit MI 48226-3489 (USA) **313-234-7100**
Android Industries-Shreveport LLC	**1452**	6/15/2009	Name: **Salvatore A. Barbatano** Law Firm: **Foley & Lardner LLP** Title: eMail: 500 Woodward Ave. Suite 2700, Detroit MI 48226-3489 (USA) **313-234-7100**
AP Moller Maersk	**829**	6/12/2009	Name: **Wendy S. Walker** Law Firm: **Morgan, Lewis & Bockus, LLP** Title: eMail: wwalker@morganlewis.com 101 Park Avenue, New York NY 10178 (USA) **2121.309.6000**
APL Co. Pte. Ltd. and American President Lines, Ltd.	**1339**	6/15/2009	Name: **Alyssa d. Englund** Law Firm: **Orrick, Herringotn & Sutcliffe LLP** Title: eMail: 666 Fifth Ave., New York NY 10103-0002 (USA) **212-509-5000**
Applied Handling, Inc.	**1374**	6/15/2009	Name: **Marie T. Racine** Law Firm: **Racine & Associates** Title: eMail: mracine@racinelaw.us 211 W. Fort St. Ste. 500, Detroit MI 48226 (USA) **313-961-8930**
Applied Manufacturing Technologies	**700**	6/12/2009	Name: **Frederick A. Berg** Law Firm: **Kotz, Sangster, Wysocki and Berg, PC** Title: eMail: fberg@kotzsangster.com 400 Renaissance Center, Suite 3400, Detroit MI 48243 (USA) **313-259-8300**
Aquent LLC	**1150**	6/12/2009	Name: **John Pustell** Law Firm: Title: VP and Controller North America eMail: jpustell@aquent.com 711 Boylston Street, Boston MA 02116 (USA) **617-535-5102**
Aramark Holdings Corporation	**DDN0003**	6/12/2009	Name: **Michael A. Bloom** Law Firm: **Morgan, Lewis & Bockius LLP** Title: eMail: 1701 Market Street, Philadelphia PA 19103-2921 (USA) **215-963-5000**
Aramark Holdings Corporation	**813**	6/12/2009	Name: **Michael A. Bloom** Law Firm: **Morgan, Lewis & Bockius LLP** Title: eMail: Morgan, Lewis & Bockius LLP, 1701 Market Street, Philadelphia PA 19103-2921 (USA) **215.963.5000**
ArvinMeritor, Inc.	**2001**	6/18/2009	Name: **Robert Sidsorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Avenue 22nd Floor, New York NY 10017 (USA) **212-818-1110**

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ArvinMeritor, Inc., its subsidiaries and affiliates, and all other legal entities associated with ul	**1440**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**
Aspen Marketing Services, Inc.	**804**	6/12/2009	Name: **Carey D. Schreiber** Law Firm: **Butzel Long, a professional corporation** Title: eMail: cschreiber@winston.com WINSTON & STRAWN LLP, 200 Park Avenue, New York NY 10166 (USA) **212-294-6700**
Assurant Inc. dba SSDC Services Corp.	**891**	6/15/2009	Name: **Michael E. Norton** Law Firm: **Norton & Associates, LLC** Title: eMail: 317 Madison Avenue, Suite 415, New York NY 10017 **212.297.0100**
ATC Drivetrain, Inc.	**1134**	6/15/2009	Name: **Brian L. Shaw** Law Firm: **Shaw Gussis Fishman Glantz Wolfson & Towbin LLC** Title: eMail: 321 N. Clark Street, Suite 800, Chicago IL 60654 (USA) **312-541-0151**
ATC Logistics & Electronics, Inc.	**1163**	6/15/2009	Name: **Brian L Shaw** Law Firm: **Shaw Gussis Fishman Glantz Wolfson & Towbin LLC** Title: eMail: 321 N. Clark Street, Suite 800, Chicago IL 60654 (USA) **312-541-0151**
ATS Automation Tooling Systems, Inc.	**777**	6/12/2009	Name: **Robert D. Gordon** Law Firm: **Clark Hill PLC** Title: eMail: rgordon@clarkhill.com 151 S. Old Woodward Avenue, Suite 200, Birmingham MI 48009 (USA) **313-965-8572**
ATS Ohio, Inc.	**709**	6/12/2009	Name: **Robert D. Gordon** Law Firm: **Clark Hill PLC** Title: eMail: rgordon@clarkhill.com 151 S. Old Woodward Ave. Suite 200, Birmingham MI 48009 (USA) **313-965-8572**
Auma, S.A. de C.V.	**805**	6/12/2009	Name: **Michael G. Cruse** Law Firm: **Clark Hill PLC** Title: eMail: mcruse@wnj.com WARNER NORCROSS & JUDD LLP, 2000 Town Center, Suite 2700, Southfield MI 48075 (USA) **248-784-5131**
Auto Craft Tool & Die Co., Inc.	**1214**	6/15/2009	Name: **Michael J. DuVernay** Law Firm: Title: President eMail: info@auto-craft.com 1800 Fruit Street, Algonac MI 48001 (USA) **810-794-4929**
Auto-Craft Tool & Die Co., Inc.	**1214**	6/15/2009	Name: **Michael J. DuVernay** Law Firm: Title: President eMail: info@auto-craft.com 1800 Fruit Street, Algonac MI 48001 (USA) **810-794-4929**
Autodata Solutions, Inc.	**1433**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long** Title: eMail: 380 Madison Avenue, New York NY 10017 **212.818.1110**
Autoliv ASP, Inc.	**862**	6/12/2009	Name: **Dennis J. Connolly** Law Firm: **Butzel Long** Title: eMail: ALSTON & BIRD LLP; One Atlantic Center; 1201 West Peachtree Street, Atlanta GA 30309-3424 (USA) **404-881-7000**
Automatic Data Processing , Inc.	**918**	6/2/2009	Name: **Michael C. Hammer** Law Firm: **Butzel Long** Title: eMail: mhammer@dickinsonwright.com DICKINSON WRIGHT PLLC; 500 Woodward Ave., Suite 4000, Detroit MI 48226 (USA) **313-223-3500**

Exhibit: Logged Supplier Objections

Autoport Limited	**846**	6/12/2009	Name: **J. Eric Charlton** Law Firm: **Hiscock & Barclay, LLP** Title: eMail: One Park Place, 300 South State Street, Syracuse NY 13202-2078 **315.425.2716**
Avery Dennison Corporation	**778**	6/12/2009	Name: **Paul Traub** Law Firm: **Epstein Becker Green P.C.** Title: eMail: PTaub@ebglaw.com 250 Park Avenue, New York NY 10177-1211 (USA) **212.351.4500**
AVL Americas, Inc. formerly known as AVL Michigan Holding Corp.	**1735**	6/17/2009	Name: **P. Warren Hunt** Law Firm: **Kerr, Russell and Weber, PLC** Title: eMail: 500 Woodward Ave. Suite 2500, Detroit MI 48226 (USA) **313-961-0200**
AVL Instrumentation & Test Systems, Inc. fka AVL N.A., Inc.	**856**	6/12/2009	Name: **P. Warren Hunt** Law Firm: **Kerr, Russell and Weber, PLC** Title: eMail: Kerr, Russell and Weber, PLC, 500 Woodward Ave., Suite 2500, Detroit MI 48226 (USA) **313-961-0200**
AVL Powertrain Engineering, Inc.	**1738**	6/17/2009	Name: **P. Warren Hunt** Law Firm: **Kerr, Russell and Weber, PLC** Title: eMail: 500 Woodward Ave., Suite 2500, Detroit MI 48226 (USA) **313-961-0200**
Ballard Materials Products, Inc.	**1295**	6/15/2009	Name: **Michael Foreman** Law Firm: **Dorsey & Whitney LLP** Title: eMail: 250 Park Avenue, New York NY 10177 **212.415.9200**
BASF Corporation	**640**	6/11/2009	Name: **Ryan D. Heilman** Law Firm: **Dorsey & Whitney LLP** Title: eMail: rheilman@Schaferandweiner.com Schafer and Weiner, PLLC, 40950 Woodward Ave., Ste. 100, Bloomfield Hills MI 48304 (USA) **248-540-3340**
Bay Logistics, Inc.	**1212**	6/15/2009	Name: **Terry L. Zabel** Law Firm: **Rhoades McKee** Title: eMail: tlzabel@rhoadesmckee.com 161 Ottawa Ave., NW, Ste 600, Grand Rapids MI 49503 (USA) **616-235-3500**
BBi Enterprises Group, Inc.	**2038**	6/19/2009	Name: **Ann Marie Uetz** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center; 500 Woodward Avenue, Suite 2700, Detroit MI 48826-3489 (USA) **313-234-7100**
Behr America, Inc.	**916**	6/12/2009	Name: **Patrick J. Kukla** Law Firm: **Foley & Lardner LLP** Title: eMail: Carson Fischer, PLC; 4111 Andover Road, West 2nd Floor, Bloomfield Hills MI 48302 (USA) **248-644-4840**
Behr GmbH & Co. KG	**919**	6/12/2009	Name: **Patrick J. Kukla** Law Firm: **Foley & Lardner LLP** Title: eMail: CARSON FISCHER, PLC; 4111 Andover Road, West 2nd Floor, Bloomfield Hills MI 48302 (USA) **248-644-4840**
Behr-Hella Thermocontrol GmbH Co.	**1405**	6/15/2009	Name: **Richard H. Wyron** Law Firm: **Orrick, Herrington & Sutcliffe LLP** Title: eMail: Columbia Center 1152 15th Street, N.W., Washington DC 20005-1706 (USA) **202-339-8400**

Bendix Commercial Vehicle Systems, LLC and its affiliated entities	**1416**	6/15/2009	Name: **Wendy J. Gibson** Law Firm: **Baker & Hostetler LLP** Title: eMail: wgibson@bakerlaw.com 3200 National City Center; 1900 E. 9th St., Cleveland OH 44114 (USA) **216-621-0200**
Benteler Automotive Corporation	**1045**	6/15/2009	Name: **Thomas P. Sarb** Law Firm: **Miller Johnson Attorneys for Benteler Automotive Corporation** Title: eMail: 250 Monroe Avenue, Suite 800; PO Box 306, Grand Rapids MI 49501-0306 (USA) **616-831-1700**
BHM Technologies Holdings, Inc., The Brown Company of Waverly, LLC, The Brown Company of Moberly, LL	**1023**	6/15/2009	Name: **Mary Kay Shaver** Law Firm: **Varnum LLP** Title: eMail: mkshaver@varnumlaw.com Bridgewater Place, P.O. Box 352, Grand Rapids MI 49501-0352 (USA) **616-336-6000**
Bing Metals Group, Inc.	**912**	6/12/2009	Name: **PatrickJ. Kukla** Law Firm: **Carson Fischer, PLC** Title: eMail: 4111 Andover Road, West 2nd Floor, Bloomfield Hills MI 48302 (USA) **248-644-4840**
BNSF Railway Company	**1701**	6/17/2009	Name: **Pepper Hamilton LLP** Law Firm: **Linda J. Casey** Title: eMail: 3000 Two Logan Square; 18th and Arch Streets, Philadelphia PA 19103-2799 (USA) **215-981-4000**
Bocar, S.A. de C.V.	**825**	6/12/2009	Name: **Michael G. Cruse** Law Firm: **Warner, Norcross & Judd LLP** Title: eMail: mcruse@wnj.com 2000 Town Center, Suite 2700, Southfield MI 48075 (USA) **248.784.5131**
Borgwarner, Inc.	**841**	6/15/2009	Name: **Michael G. Cruse** Law Firm: **Warner, Norcross & Judd** Title: eMail: 2000 Town Center, Suite 2700, Southfield MI 48075
BP Products North America Inc. and BP Corporation North America Inc.	**679**	6/11/2009	Name: **James S. Carr** Law Firm: **Kelley, Drye & Warren LLP** Title: eMail: 101 Park Avenue, New York NY 10178 (USA) **212-808-7800**
Brandenburg Industrial Service Co.	**936**	6/12/2009	Name: **Christopher Battaglia** Law Firm: **Halperin Battaglia Raicht, LLP** Title: eMail: cbattaglia@halperinlaw.net 555 Madison Avenue - 9th Floor, New York NY 10022 (USA) **212-765-9100**
Brencal Contractors, Inc.	**1838**	6/12/2009	Name: **Mark L. McAlpine** Law Firm: **McAlpine & Associates, P.C.** Title: eMail: mdnovello@mcalpinelawfirm.com 3201 University Dr. Suite 100, Auburn Hills MI 48326 (USA) **248-373-3700**
Buehler Motor GMBH	**2075**	6/19/2009	Name: **J. William Boone** Law Firm: **Alston & Bird LLP** Title: eMail: 1201 West Peachtree Street, Atlanta GA 30309-3424 (USA) **404-881-7000**
Burns International Industrial Contracting Co.	**1296**	6/15/2009	Name: **John A. Ruemenapp** Law Firm: **Weisman, Young & Ruemenapp, P.C.** Title: eMail: 30100 Telegraph Road, Suite 428, Bingham Farms MI 48025 **248.258.2700**
Cadillac Products Automotive Company	**1060**	6/15/2009	Name: **Salvatore B. Barbatano** Law Firm: **Foley & Lardner, LLP** Title: eMail: 500 Woodward Avenue, Suite 2700, Detroit MI 48226-3489 **313.234.7100**

Exhibit: Logged Supplier Objections

Canadian National Railway Company	**682**	6/17/2009	Name: **J. Eric Charlton** Law Firm: **Canadian National Railway Company** Title: eMail: One Park Place, 300 South State Street, Syracuse NY 13202-2078 **315.425.2716**
Canadian Pacific Railway Company	**2008**	6/19/2009	Name: **Jacob B. Sellers** Law Firm: **Leonard, Street and Deinard** Title: eMail: 150 South Fifth Street, Suite 2300, Minneapolis MN 55402 (USA) **612-335-1500**
Canon USA, Inc.	**1308**	6/15/2009	Name: **Paul Rubin** Law Firm: **Herrick, Feinstein LLP** Title: eMail: Two Park Avenue, New York NY 10016 (USA) **212.592.1400**
Capgemini America, Inc.	**1077**	6/15/2009	Name: **Steven M. Schwartz** Law Firm: **Winston & Strawn, LLC** Title: eMail: sschwartz@winston.com 200 Park Avenue, New York NY 10166 (USA) **212.294.6761**
Carlisle & Company, Inc.	**1279**	6/11/2009	Name: **Kathleen M. Breault** Law Firm: **Carlisle & Company, Inc.** Title: Finane Manager eMail: 30 Monument Sq., Concord MA 01742 (USA)
Cassens Transport Company	**827**	6/12/2009	Name: **Karin F. Avery** Law Firm: **Silverman & Morris, P.L.L.C** Title: eMail: avery@silvermanmorris.com 7115 Orchard Lake Road, Suite 500, West Bloomfield MI 48322 (USA) **248.539.1330**
Castrol Industrial North America and Castrol North America Automotive	**1561**	6/16/2009	Name: **James S. Carr** Law Firm: **Kelley Drye & Warren LLP** Title: eMail: 101 Park Ave., New York NY 10178 (USA) **212-808-7800**
CDI Corporation	**1142**	6/15/2009	Name: **James O. Moore** Law Firm: **Dechert LLP** Title: eMail: james.moore@dechert.com 1095 Avenue of the Americas , New York NY 10036-6797 (USA) **212-698-3500**
Cellco Partnership dba Verizon Wireless	**1054**	6/15/2009	Name: **Stanley B. Tarr** Law Firm: **Blank Rome, LLP** Title: eMail: The Chrysler Building, 405 Lexington Avenue, New York NY 10174-5001 **212.885.5000**
Cellco Partnership dba Verizon Wireless	**1054**	6/15/2009	Name: **Stanley B. Tarr** Law Firm: **Blank Rome, LLP** Title: eMail: The Chrysler Building, 405 Lexington Avenue, New York NY 10174-5001 **212.885.5000**
CenterPoint Energy Gas Transmission Company and CenterPoint Energy Arkla	**980**	6/12/2009	Name: **Jil Mazer-Marino** Law Firm: **Meyer, Suozzi, English & Klein, PC** Title: eMail: 990 Stewart Avenue, Suite 300; PO Box 9194, Garden City NY 11530-9194 (USA) **516-741-6565**
CenterPoint Energy Services, Inc.	**900**	6/12/2009	Name: **Thomas R. Slome, Esq.** Law Firm: **Meyer, Suozzi, English & Klein, P.C.** Title: eMail: 990 Stewart Avenue, Suite 300; P.O. Box 9194, Garden City NY 11530-9194 (USA)
Central Conveyor Inc.	**1360**	6/15/2009	Name: **Cliff A. Katz** Law Firm: **Platzer, Swergold, Karlin Levine, Goldberg & Jaslow, LLP** Title: eMail: ckatz@platzerlaw.com 1065 Avenue of the Americas, New York NY 10018 (USA) **212.593.3000**

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CEVA	**698**	6/12/2009	Name: **Judith Elkin** Law Firm: **Haynes and Boone, LLP** Title: eMail: 1221 Avenue of the Americas, 26th Floor, New York NY 10020 (USA) **212-659-6300**
Champion Laboratories, Inc.	**1363**	6/15/2009	Name: **Mitchell Seider** Law Firm: **Latham & Watkins LLP** Title: eMail: mitchell.seider@lw.com 885 Third Ave., New York NY 10022-4802 (USA) **212-906-1200**
ChannelVantage, Inc.	**762**	6/12/2009	Name: **Deborah Kovsky-Apap** Law Firm: **PEPPER HAMILTON LLP** Title: eMail: kovskyd@pepperlaw.com 100 Renaissance Center Suite 3600, Detroit MI 48243 (USA) **313-259-7110**
Chemico Mays, LLC	**1250**	6/15/2009	Name: **Thomas K. Lindahl** Law Firm: **McDonald Hopkins PLC** Title: eMail: tlindahl@mcdonaldhopkins.com 39533 Woodward Ave., Suite 318, Bloomfield Hills MI 48304 (USA) **248-646-5070**
Chemico Mays, LLC	**1211**	6/15/2009	Name: **Thomas K. Lindahl** Law Firm: **McDonald Hopkins PLC** Title: eMail: tlindahl@mcdonaldhopkins.com 39533 Woodward Ave., Suite 318, Bloomfield Hills MI 48304 (USA) **248-646-5070**
Chemico Systems, Inc.	**1208**	6/15/2009	Name: **Thomas K. Lindahl** Law Firm: **McDonald Hopkins PLC** Title: eMail: tlindahl@mcdonaldhopkins.com 39533 Woodward Ave., Suite 318, Bloomfield Hills MI 48304 (USA) **248-646-5070**
Chrysler Group LLC, on behalf of itself and as agent for Old Carco LLC and Chrysler Motors LLC	**1640**	6/16/2009	Name: **James A. Plemmons** Law Firm: **Dickinson Wright PLLC** Title: eMail: jplemmons@dickinsonwright.com 500 Woodward Ave. Suite 4000, Detroit MI 48226 (USA) **734-623-7075**
Chrysler Group LLC, on behalf of itself and as agent for Old Carco LLC and Chrysler Motors LLC	**1908**	6/19/2009	Name: **James A. Plemmons** Law Firm: **Dickinson Wright PLLC** Title: eMail: jplemmons@dickinsonwright.com 500 Woodward Ave., Suite 4000, Detroit MI 48226 (USA) **734-623-7075**
Cinetic Automation Corp., Cinetic DyAG Corporation, and Cinetic Landis Corp.	**1034**	6/15/2009	Name: **Mary Kay Shaver** Law Firm: **Varnum LLP** Title: eMail: Bridgewater Place, P.O. Box 352, Grand Rapids MI 49501-0352 (USA) **616-336-6000**
Cintas Corporation	**932**	6/12/2009	Name: **Jason V. Stitt** Law Firm: **Keating Muething & Klekamp PLL** Title: eMail: jstitt@kmklaw.com One East Fourth Street, Suite 1400, Cincinnati OH 45202 (USA) **513-639-3964**
Cisco Systems Capital Corporation	**1141**	6/12/2009	Name: **Karel S. Karpe** Law Firm: **White and Williams, LLP** Title: eMail: One Penn Plaza, Suite 4110, New York NY 10119 (USA) **212-631-4421**
Cisco Systems, Inc.	**1183**	6/12/2009	Name: **Karel S. Karpe** Law Firm: **White and Williams, LLP** Title: eMail: One Penn Plaza, Suite 4110, New York NY 10119 (USA) **212-631-4421**
Citation Corporation	**704**	6/12/2009	Name: **Colin T. Drake** Law Firm: **BODMAN LLP** Title: eMail: cdrake@bodmanllp.com 6th Fllor Ford Field; 1901 St. Antoine Street, Detroit MI 48026 (USA) **313-393-7585**

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Clarcor, Inc. and Total Filtration Services, Inc.	**1372**	6/15/2009	Name: **David H. Hartheimer** Law Firm: **Mazzeo Song & Bradham LLP** Title: eMail: 708 Third Ave. 19th Floor, New York NY 10017 (USA) **212-599-0700**
Cloyes Gear & Products, Inc.	**1347**	6/15/2009	Name: **Richard J. Bernard** Law Firm: **Baker & Hostetler, LLP** Title: eMail: rbernard@bakerlaw.com 45 Rockefeller Plaza, New York NY 10111 (USA) **212.589.4200**
CNI Enterprises, Inc.	**1459**	6/15/2009	Name: **Robert T. Smith** Law Firm: **CNI Inc Attorney for CNI Enterprises, Inc.** Title: eMail: rsmith@cniinc.cc 1451 East Lincoln Ave., Madison Heights MI 48071 (USA) **248-586-3320**
Coastal Container Corporation and Vericorr Packaging of Coastal, LLC	**1243**	6/15/2009	Name: **Mary Kay Shaver** Law Firm: **Varnum LLP** Title: eMail: mkshaver@varnumlaw.com Bridewater Place, P.O. Box 352, Grand Rapids MI 49501-0352 (USA) **616-336-6000**
Coastal Container Corporation_Vericorr Packaging	**1336**	6/15/2009	Name: **Mary Kay Shaver** Law Firm: **Varnum LLP** Title: eMail: Bridgewater Place, P.O. Box 352, Grand Rapids MI 49501-0352 (USA) **616.336.6000**
Cobasys LLC	**2190**	6/22/2009	Name: **Patrick J. Kukla** Law Firm: **Carson Fischer, P.L.C.** Title: eMail: 4111 Andover Road, West-2nd Flr., Bloomfield Hills MI 48302 (USA) **248-644-4840**
Columbia Gas of Ohio, Inc. and Columbia Gas of Virginia, Inc.	**764**	6/12/2009	Name: **Jason M. Torf** Law Firm: **Schiff Hardin LLP** Title: eMail: egeekie@schiffhardin.com 6600 Sears Tower , Chicago IL 60606-6473 (USA) **312-258-5500**
Comau, Inc.	**981**	6/15/2009	Name: **Thomas K. Lindahl** Law Firm: **McDonald Hopkins PLC** Title: eMail: tlindahl@mcdonaldhopkins.com 39533 Woodward Ave., Ste 318, Bloomfield Hills MI 48304 (USA) **248-646-5070**
Comau, Inc.	**653**	6/10/2009	Name: **Thomas K. Lindahl** Law Firm: **MCDONALD HOPKINS PLC** Title: eMail: tlindahl@mcdonaldhopkins.com 39533 Woodward Ave., Suite 318, Bloomfield Hills MI 48304 (USA) **248-646-50701**
Commercial Contracting Corporation	**1126**	6/15/2009	Name: **Mark S. Frankel** Law Firm: **Couzens, Lansky, Fealk, Ellis, Roeder & Lazar, P.C.** Title: eMail: mark.frankel@couzens.com 39395 W. Twelve Mile Road, Suite 200, Farmington Hills MI 48331 (USA) **248-489-8600**
Compagnie de Saint-Gobain	**1152**	6/15/2009	Name: **Elizabeth A. Haas** Law Firm: **The Haas Law Firm** Title: eMail: ehaas@thehaaslawfirm.com 254 S. Main Street, Suite 210, New City NY 10956-3363 (USA) **845-708-0340**
Compania Sud Americana de Vapores S.A.	**1128**	6/15/2009	Name: **Michael C. Lambert** Law Firm: **Gilmartin, Poster & Shafto LLP Attorneys for Compania Sud Americana de Vapores SA** Title: eMail: mclambert@lawpost-nyc.com 845 Third Ave. 18th Floor, New York NY 10022 (USA) **212-425-3220**
Comprehensive Logistics Co., Inc.	**1645**	6/12/2009	Name: **Michael A. Gallo** Law Firm: **Nadler Nadler & Burdman Co., L.P.A.** Title: eMail: tmreardon@nnblaw.com 20 Federal Plaza West, Suite 600, Youngstown OH 44503-1423 (USA) **330-744-0247**

Compuware Corporation	**792**	6/12/2009	Name: **MIchael G. Cruse** Law Firm: **Nadler Nadler & Burdman Co., L.P.A.** Title: eMail: mcruse@wnj.com Warner Norcross & Judd, 2000 Town Center, Suite 2700, Southfield MI 48075 (USA) **248-784-5131**
Concept Industries, Inc.	**1273**	6/12/2009	Name: **Ellen McClain** Law Firm: **Concept Industries, Inc.** Title: Controller eMail: 4950 Kraft S.E. , Grand Rapids MI 49512-9707 (USA) **616-554-9000**
Connecticut General Life Insurane Company and related CIGNA entities	**1402**	6/15/2009	Name: **Jeffrey C. Wisler** Law Firm: **Connolly Bove Lodge & Hutz LLP** Title: eMail: The Nemours Building 1007 North Orange St.; PO Box 2207 (19899), Wilmington DE 19801 (USA) **302-658-9141**
Continental AG and its affiliates	**1824**	6/18/2009	Name: **John T. Gregg** Law Firm: **Barnes & Thornburg LLP** Title: eMail: jgregg@btlaw.com 171 Monroe Ave, NW Suite 1000, Grand Rapids MI 49503 (USA) **616-742-3930**
Continental Plastics Co.	**1343**	6/15/2009	Name: **Salvatore A. Barbatano** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center, 500 Woodward Avenue, Suite 2700, Detroit MI 48226-3489 (USA) **313.234.7100**
Continental Structural Plastics, Inc.	**1978**	6/19/2009	Name: **Ann Marie Uetz** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center; 500 Woodward Avenue, Suite 2700, Detroit MI 48226-3489 (USA) **313-234-7100**
Convention & Show Services, Inc.	**1135**	6/12/2009	Name: **David J. Selwocki** Law Firm: **Sullivan, Ward, Asher & Patton, P.C.** Title: eMail: dselwocki@swappc.com 1000 Maccabees Center; 25800 Northwestern Highway, Southfield MI 48075-1000 (USA) **248-746-0700**
Convergys Corporation	**902**	6/12/2009	Name: **Kim Martin Lewis** Law Firm: **Dinsmore & Shohl LLP** Title: eMail: kim.lewis@dinslaw.com 225 E. 5th Street, Cincinnati OH 45202 (USA) **513.977.8200**
Cooper-Standard Automotive	**1294**	6/15/2009	Name: **Steven H. Hilfinger** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center, 500 Woodward Avenue, Suite 2700, Detroit MI 48226-3489 **313.234.7100**
Creative Foam Corporation	**769**	6/12/2009	Name: **Michael G. Cruse** Law Firm: **Warner Norcross & Judd LLP** Title: eMail: 2000 Town Center, Suite 2700, Southfield MI 48075 (USA) **248-784-5131**
CSX Transportation, Inc.	**688**	6/11/2009	Name: **Shawn R. Fox** Law Firm: **McGuireWoods LLP** Title: eMail: 1345 Avenue of the Americas, 7th Floor, New York NY 10105 (USA) **804-775-1000**
Cummins Inc.	**1743**	6/17/2009	Name: **Jill L. Murch** Law Firm: **Foley & Lardner LLP** Title: eMail: 321 North Clark St. Suite 2800, Chicago IL 60654 (USA) **312-832-4500**

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Custom Automotive Services, Inc.	**687**	6/11/2009	Name: **Gloria M. Chon** Law Firm: **Kemp Klien Law Firm** Title: eMail: gloria.chon@kkue.com 201 W. Big Beaver, Suite 600, Troy MI 48084 (USA) **248-740-5689**
CVS Pharmacy, Inc.	**1249**	6/15/2009	Name: **Mark Minuti** Law Firm: **Saul Ewing LLP** Title: eMail: 222 Delaware Avenue, Suite 1200; P.O. Box 1266, Wilmington DE 19899 (USA) **302-421-6840**
D.W. Griffith, Inc.	**1089**	6/11/2009	Name: **D.W. Griffith** Law Firm: Title: President eMail: wilmardon@aol.com 100 Phila Pike, Suite B, Wilmington DE 19809 (USA) **302-762-1241**
Dakkota Integrated Systems, LLC	**1219**	6/15/2009	Name: **Mary Kay Shaver** Law Firm: **Varnum LLP** Title: eMail: mkshaver@varnumlaw.com Bridgewater Place, P.O. Box 352, Grand Rapids MI 49501-0352 (USA) **616-336-6000**
Danaher Corporation	**1752**	6/16/2009	Name: **Robert S. Lutz** Law Firm: Title: eMail: 2099 Pennsylvania Avenue, NW, 12th Floor, Washington DC 20006 (USA) **202-828-0850**
Dell Financial Services LLC	**867**	6/12/2009	Name: **Stephen H. Gross** Law Firm: **Hodgson Russ LLP** Title: eMail: sgross@hodgsonruss.com 60 East 42nd Street, 37th Floor, New York NY 10165-0150 (USA) **212-661-3535**
Delta Tooling Co., and certain of its affiliates and subsidiaries, including without limitation, Del	**1638**	6/16/2009	Name: **P. Warren Hunt** Law Firm: **Kerr, Russell and Weber, PLC** Title: eMail: 500 Woodward Ave., Suite 2500, Detroit MI 48226 (USA) **313-961-0200**
Delta Township Utilities II, LLC	**1024**	6/15/2009	Name: **Jil Mazer-Marino** Law Firm: **Meyer, Suozzi, English & Klein, PC** Title: eMail: 990 Stewart Avenue, Suite 300; PO Box 9194, Garden City NY 11530-9194 (USA) **516-741-6565**
Delta Township Utilities, LLC	**1013**	6/15/2009	Name: **Jil Mazer-Marino** Law Firm: **Meyer, Suozzi, English & Klein, PC** Title: eMail: 990 Stewart Avenue, Suite 300; PO Box 9194, Garden City NY 11530-9194 (USA) **516-741-6565**
DENSO International America, Inc.	**758**	6/12/2009	Name: **Marc E. Richards** Law Firm: **Blank Rome LLP** Title: eMail: mrichards@blankrome.com The Chrysler Building; 405 Lexington Avenue, New York NY 10174 (USA) **212-885-5000**
Det Norske Veritas (USA), Inc.	**693**	6/11/2009	Name: **Michael Farquhar** Law Firm: **Winstead PC** Title: eMail: 1100 JPMorgan Chase Tower; 600 Travis Street, Houston TX 77002-5895 (USA) **713-650-8400**
Detroit Technologies	**1325**	6/15/2009	Name: **Ann Marie Uetz** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center, 500 Woodward Avenue, Suite 2700, Detroit MI 48226-3489 (USA) **313.234.7100**
Discovery Communications, LLC	**1132**	6/15/2009	Name: **James M. Sullivan** Law Firm: **Arent Fox LLP Attorneys for Discovery Communications, LLC** Title: eMail: 1675 Broadway, New York NY 10019 (USA) **212-484-3900**

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Dominion Retail, Inc.	**1268**	6/15/2009	Name: **Dion W. Hayes** Law Firm: **McGuirewoods, LLP** Title: eMail: 1345 Avenue of the Americas, Seventh Floor, New York NY 10105 **212.548.2100**
Dominion Retail, Inc.	**1669**	6/17/2009	Name: **Shawn R. Fox** Law Firm: **McGuirewoods LLP** Title: eMail: 1345 Aveune of Americas, 17th Floor, New York NY 10105 (USA) **212-548-2100**
Dow Chemical Co.	**852**	6/12/2009	Name: **Anne M. Aaronson** Law Firm: **Dilworth Paxson LLP** Title: eMail: 1500 Market Street, Suite 3500E, Philadelphia PA 19102-2101 (USA) **215.575.7000**
dSpace, Inc. and dSpace GmbH	**692**	6/11/2009	Name: **Donald J. Hutchinson** Law Firm: **Miller Canfield Paddock and Stone, PLC** Title: eMail: hutchinson@millercanfield.com 150 West Jefferson Avenue, Suite 2500, Detroit MI 48226 (USA) **313-963-6420**
DTE Lordstown, LLC	**1231**	6/15/2009	Name: **Thomas L. Kent** Law Firm: **Paul, Hastings, Janofsky & Walker LLP** Title: eMail: thomaskent@paulhastings.com Park Avenue Tower; 75 East 55th Street, New York NY 10022 (USA) **212-318-6000**
DTE Northwind Operations, LLC	**1216**	6/15/2009	Name: **Thomas L. Kent** Law Firm: **Paul, Hastings, Janofsky & Walker LLP** Title: eMail: thomaskent@paulhastings.com Park Avenue Tower, 75 East 55th Street, New York NY 10022 (USA) **212-318-6000**
DTE Tonawanda, LLC	**1225**	6/15/2009	Name: **Thomas L. Kent** Law Firm: **Paul, Hastings, Janofsky & Walker LLP** Title: eMail: thomaskent@paulhastings.com Park Avenue Tower; 75 East 55th Street, New York NY 10022 (USA) **212-318-6000**
Duerr AG	**910**	6/12/2009	Name: **William M. Barron** Law Firm: **Smith, Gambrell & Russell, LLP** Title: eMail: 250 Park Avenue, New York NY 10177 (USA) **212-907-9700**
Duerr AG, Duerr Systems Inc., and Duerr Ecolcelan, Inc.	**911**	6/12/2009	Name: **William M. Barron** Law Firm: **Smith, Gambrell & Russell, LLP** Title: eMail: 250 Park Avenue, New York NY 10177 (USA) **212-907-9700**
Duerr AG, Duerr Systems Inc., and Duerr Ecolcelan, Inc.	**913**	6/12/2009	Name: **William M. Barron** Law Firm: **Smith, Gambrell & Russell, LLP** Title: eMail: 250 Park Avenue, New York NY 10177 (USA) **212-907-9700**
Dura Automotive Systems, Inc. and certain of its affiliates	**1381**	6/15/2009	Name: **Ann Marie Uetz** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center; 500 Woodward Ave. Suite 2700, Detroit MI 48226-3489 (USA) **313-34-7100**
E & L Construction Group, Inc. aka Erickson and Lindstrom Construction	**809**	6/12/2009	Name: **Robert D. Gordon** Law Firm: **Foley & Lardner LLP** Title: eMail: rgordon@clarkhill.com CLARK HILL PLC, 151 S. Old Woodward Avenue, Suite 200, Birmingham MI 48009 (USA) **313-965-8572**
E.I. du Pont de Nemours and Compnay	**2337**	6/23/2009	Name: **Allan L. Hill** Law Firm: **Phillips Lytle LLP** Title: eMail: 437 Madison Avenue, 34th Floor, New York NY 10022 (USA) **212-759-4888**

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E.I. DuPont de Nemours and Company	**868**	6/12/2009	Name: **William J. Brown** Law Firm: **Phillips Lytle LLP** Title: eMail: PHILLIPS LYTE, LLP; 437 Madison Ave, 34th Floor, New York NY 10022 (USA) **212-759-4888**
Eaton Corporation	**1224**	6/15/2009	Name: **G. Christopher Meyer** Law Firm: **Squire, Sanders & Dempsey LLP** Title: eMail: cmeyer@ssd.com 4900 Key Tower; 127 Public Square, Cleveland OH 4414-1304 (USA) **216-479-8500**
Eberspaecher (ENA)	**889**	6/12/2009	Name: **Robert N. Bassel** Law Firm: Title: eMail: bbassel@gmail.com P.O. Box T, Clinton MI 49326 (USA) **248-835-7683**
EMC Corporation	**935**	6/12/2009	Name: **Christopher J. Battaglia** Law Firm: **Halperin Battaglia Raicht, LLP** Title: eMail: 555 Madison Avenue - 9th Floor, New York NY 10022 (USA) **212-765-9100**
EMCON Technologies	**1299**	6/15/2009	Name: **John A. Simon** Law Firm: **Foley & Lardner LLP** Title: eMail: 500 Woodward Ave., Suite 2700, Detroit MI 48226-3489 (USA) **313-234-7100**
Emerson Electric Company	**859**	6/12/2009	Name: **Andrew C. Gold** Law Firm: **Foley & Lardner LLP** Title: eMail: Herrick, Feinstein LLP; 2 Park Avenue, New York NY 10016 (USA) **212-592-1400**
Emigrant Business Credit Group corp. (Sun Microsystems)	**904**	6/15/2009	Name: **John F. Carberry** Law Firm: **Cummings & Lockwood LLC** Title: eMail: Six Landmark Square, Stamford CT 06901 **203.351.4280**
EnovaPremier of Michigan LLC	**1653**	6/16/2009	Name: **Richard L. Ferrell** Law Firm: **Taft Stettinius & Hollister LLP** Title: eMail: ferrell@taftlaw.com 425 Walnut Street Ste. 1800, Cincinnati OH 45240 (USA) **513-381-2838**
Enprotech Mechanical Services, Inc.	**2298**	6/23/2009	Name: **Michael P. Shuster** Law Firm: **Porter Wright Morris & Arthur LLP** Title: eMail: mshuster@porterwright.com 925 Euclid Avenue, Suite 1700, Cleveland OH 44115-1483 (USA) **216-443-2510**
Enprotech Mechanical Services, Inc.	**1083**	6/15/2009	Name: **Michael P. Shuster** Law Firm: **Porter Wright Morris & Arthur LLP** Title: eMail: mshuster@porterwright.com 925 Euclid Avenue, Suite 1700, Cleveland OH 44115-1483 (USA) **216-443-2510**
Enshu Ltd and Enshu (USA) Corporation	**2027**	6/19/2009	Name: **Rein F. Krammer** Law Firm: **Masuda, Funai, Eifert & Mitchell, Ltd.** Title: eMail: rkrammer@masudafunai.com 203 N. LaSalle Street, Suite 2500, Chicago IL 60601-1262 (USA) **312-245-7500**
Enshu Ltd and Enshu Corporation	**1670**	6/17/2009	Name: **Amy Evans** Law Firm: **Cross & Simon, LLC** Title: eMail: aevans@crosslaw.com 913 North Market Street, 11th Floor; PO Box 1380, Wilmington DE 19899-1380 **302-777-4200**
Environmental Systems Research Institute Incorporated	**DDN0002**	6/15/2009	Name: **Krista M. Moreno** Law Firm: **Environmental Systems Research Institute Incorporated** Title: Manager, Contracts & Legal Services eMail: 380 New York Street, Redlands CA 92373 (USA)

Ernie Green Industries, Inc.	**1650**	6/16/2009	Name: **Daniel J. Flanigan** Law Firm: **Polsinelli Shughart PC** Title: eMail: dflanigan@polsinelli.com 7 Penn Plaza, Suite 600, New York NY 10001 (USA) **212-684-0199**
Etkin Management Services, Inc.	**1479**	6/16/2009	Name: **Earle I. Erman** Law Firm: **Attorneys for Etkin Management Services, Inc.** Title: eMail: eerman@ermanteicher.com 400 Galleria Officentre, Suite 444, Southfield MI 48034 (USA) **248-827-4100**
Exedy America Corp. and Dynax America Corp.	**1431**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**
Exel Inc. ("Exel"), Exel Transportation Services, Inc. ("Exel Transportation") and Air Express Inter	**2094**	6/19/2009	Name: **Blanka K. Wolfe** Law Firm: **Sheppard Mullin Richter & Hampton LLP** Title: eMail: 30 Rockefeller Plaza, 24th Floor, New York NY 10012 (USA) **212-332-3800**
Fabtronic, Inc.	**806**	6/12/2009	Name: **Robert D. Gordon** Law Firm: **Sheppard Mullin Richter & Hampton LLP** Title: eMail: rgordon@clarkhill.com CLARK HILL PLC, 151 S. Old Woodward Avenue, Suite 200, Birmingham MI 48009 (USA) **313-965-8572**
Falcon Transport Co.	**1643**	6/12/2009	Name: **Michael A. Gallo** Law Firm: **Nadler Nadler & Burdman Co., L.P.A.** Title: eMail: tmreardon@nnblaw.com 20 Federal Plaza West, Suite 600, Youngston OH 44503-1423 (USA) **330-744-0247**
FANUC Robotics America, Inc.	**1391**	6/15/2009	Name: **Ann Marie Uetz** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center; 500 Woodward Ave. Suite 2700, Detroit MI 48226-3489 (USA) **313-234-7100**
FATA Automation, Inc.	**1196**	6/15/2009	Name: **Charles D. Bullock** Law Firm: **Stevenson & Bullock, PLC** Title: eMail: cbullock@sbplclaw.com 29200 Southfield Rd., Suite 210, Southdield MI 48076 (USA) **248-423-8200 ext 224**
Faurecia USA Holdings, Inc., Faurecia Interior Systems, Inc., Faurecia Automotive Seating, Inc., and	**1429**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**
Federal Broach & Machine Company, LLC	**1012**	6/15/2009	Name: **Scott A. Wolfson** Law Firm: **Bush Seyferth & Paige PLLC** Title: eMail: wolfson@bsplaw.com 3001 W. Big Beaver Rd., Suite 600, Troy MI 48084 (USA) **248-822-7803**
Federal Express Corporation	**888**	6/15/2009	Name: **Robert R. Ross** Law Firm: **Federal Express Corporation** Title: eMail: 3620 Hacks Cross Road, Building B-2nd Floor, Memphis TN 38125 **901.434.8369**
Ferndale Electric Company, Inc.	**1871**	6/19/2009	Name: **P. Warren Hunt** Law Firm: **Kerr, Russell and Weber, PLC** Title: eMail: 500 Woodward Ave., Suite 2500, Detroit MI 48226 (USA) **313-961-0200**
Ferndale Electric Company, Inc.	**2338**	6/23/2009	Name: **P. Warren Hunt** Law Firm: **Kerr, Russell and Weber, PLC** Title: eMail: 500 Woodward Ave, Suite 2500, Detroit MI 48226 (USA) **313-961-0200**

Exhibit: Logged Supplier Objections

Feuer Powertrain GmbH & Co. KG	**1584**	6/16/2009	Name: **Karin F. Avery** Law Firm: **Silverman & Morris, P.L.L.C.** Title: eMail: avery@silvermanmorris.com 7115 Orchard Lake Road, Suite 500, West Bloomfield MI 48322 (USA) **248-539-1330**
Fiat S.p.A.	**1037**	6/12/2009	Name: **William L. Farris** Law Firm: **Sullivan & Cromwell LLP** Title: eMail: 125 Broad Street , New York NY 10004 (USA) **212-558-4000**
Ficosa North America Corporation	**1399**	6/15/2009	Name: **Thomas B. Spillane** Law Firm: **Foley & Lardner, LLP** Title: eMail: One Detroit Center, 500 Woodward Avenue, Suite 2700, Detroit MI 48226-3489 **313.234.7100**
Fleet-Car Lease, Inc. d/b/a Fleet Car Carriers	**945**	6/12/2009	Name: **P. Warren Hunt** Law Firm: **Kerr, Russell and Weber, PLC** Title: eMail: 500 Woodward Avenue, Suite 2500, Detroit MI 48226 (USA) **313-961-0200**
Flex-N-Gate Corporation	**572**	6/10/2009	Name: **Deborah Kovsky-Apap** Law Firm: **Kerr, Russell and Weber, PLC** Title: eMail: kovskyd@pepperlaw.com Pepper Hamilton LLP, 100 Renaissance Center Suite 3600, Detroit MI 48243 (USA) **313-259-7110**
Flextronics International Ltd., et al.	**1079**	6/12/2009	Name: **Lawrence M. Schwab** Law Firm: **Bialson, Bergen & Schwab** Title: Esquire eMail: 2600 El Camino Real, Suite 300, Palo Alto CA 94306 (USA) **650-657-9500**
Fluid Routing Solutions, Inc.	**1281**	6/15/2009	Name: **Melissa Detrick** Law Firm: **Marshall Melhorn, LLC** Title: eMail: detrick@marshall-melhorn.com Four SeaGate, Eighth Floor, Toledo OH 43604-2638 (USA) **419-249-7100**
Ford, Comverca, and ACH	**2335**	6/23/2009	Name: **Timothy A. Fusco** Law Firm: **Miller, Canfield, Paddlock and Stone, P.L.C.** Title: eMail: fusco@millercanfield.com 150 West Jefferson Aveune Suite 2500, Detroit MI 48226 (USA) **313-496-8435**
Foster Electric Co. Ltd.	**775**	6/12/2009	Name: **Amy E. Evans, Esq.** Law Firm: **Cross & Simon, LLC** Title: eMail: aevans@crosslaw.com 913 North Market Street, 11th Floor, Wilmington DE 19801 (USA) **302.777.4200**
Foster Electric, Inc.	**775**	6/12/2009	Name: **Amy E. Evans** Law Firm: **Cross & Simon, LLC** Title: eMail: 913 North Market Street, 11th Floor, Wilmington DE 19801 (USA) **302.777.4200**
Freudenberg - NOK General Partnership, et. al	**1287**	6/15/2009	Name: **Ralph E. McDowell** Law Firm: **Bodman LLP** Title: eMail: 1901 St. Antoine, 6th Floor at Ford Field, Detroit MI 48226 **313.393.7585**
Freudenberg-NOK General Partnership; Freudenberg-NOK, Inc; Freudenberg-NOK de Mexico, S.A. de C.V.;	**1853**	6/18/2009	Name: **Colin T. Drake** Law Firm: **Bodman LLP** Title: eMail: cdarke@bodmanllp.com 1901 St. Antoine Street 6th Floor at Ford Field, Detroit MI 48026 (USA)
FTM Service Corp.	**1297**	6/15/2009	Name: **Howard S. Beltzer** Law Firm: **Morgan, Lewis & Bockius LLP** Title: eMail: 101 Park Avenue, New York NY 10178 (USA) **212.309.6000**

Fujiwa Machinery Industry (Kunshan)	**858**	6/15/2009	Name: **Marc E. Edwards** Law Firm: **Blank Rome LLP** Title: eMail: The Chrysler Building, 405 Lexington Avenue, New York NY 10174 **212.885.5000**
Fuzhou Lioho Machinery Co., LTD	**842**	6/12/2009	Name: **Marc E. Richards** Law Firm: **Blank Rome, LLP** Title: eMail: mrichards@blankrome.com 405 Lexington Avenue, New York NY 10174 (USA) **212.885.5000**
Gail & Rice, Inc.	**839**	6/12/2009	Name: **Robert D. Gordon** Law Firm: **Clark Hill PLC** Title: eMail: rgordon@clarkhill.com 151 S. Old Woodward Avenue, Suite 200, Birmingham MI 48009 (USA) **313.965.8572**
Gates Corporation	**1412**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long** Title: eMail: sidorsky@butzel.com 380 Madison Avenue , New York NY 10017 (USA) **212-818-1110**
GE Capital Corporation	**1143**	6/15/2009	Name: **George Royle** Law Firm: **Latham & Watkins LLP** Title: eMail: 885 Third Avenue, Suite 1000, New York NY 10022 (USA) **212-906-1200**
Gensler Architecture, Design & Planning, PC	**1165**	6/15/2009	Name: **Mark A Waite** Law Firm: Title: Regional Counsel eMail: mark_waite@gensler.com One Woodward Avenue, Suite 601, Detroit MI 48226 (USA) **313-965-1600**
Georg Fischer Automotive AG	**756**	6/12/2009	Name: **Renee M. Dailey** Law Firm: **Bracewell & Giuliani LLP** Title: eMail: 225 Asylum Street, Suite 2600, Hartford CT 06103 (USA) **860-256-8531**
Getrag Transmission Corporation	**1437**	6/15/2009	Name: **Frank W. DiCastri** Law Firm: **Foley & Lardner LLP** Title: eMail: 777 East Wisconsin Ave., Milwaukee WI 53202 (USA) **414-271-2400**
GHSP, Inc. and JSJ Corporation	**865**	6/15/2009	Name: **Steven B. Grow** Law Firm: **Warner Norcross & Judd LLP** Title: eMail: 900 Fifth Third Center, 111 Lyon Street, NW, Grand Rapids MI 49503 **616.752.2158**
Gill Industries	**1386**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**
GKN Driveline, GKN Sinter Metals, GKN Polsk Sp Z.O.O., and GKN Deutschland	**1427**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**
Gonzalez Design Engineering, Gonzalez Production Systems, and Gonzalez Manufacturing Technologies	**1566**	6/16/2009	Name: **Stephen M. Gross** Law Firm: **McDonald Hopkins PLC** Title: eMail: sgross@mcdonaldhopkins.com 39533 Woodward Ave. Ste 318, Bloomfield Hills MI 48304 (USA) **248-646-5070**
Gonzalez-Group	**1428**	6/15/2009	Name: **Stephen M. Gross** Law Firm: **McDonald Hopkins PLC** Title: eMail: sgross@mcdonaldhopkins.com 39533 Woodward Ave. Ste 318, Bloomfield Hills MI 48304 (USA) **248-646-5070**

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GP Strategies Corporation, General Physics Corporation, and Sandy Corporation	**794**	6/12/2009	Name: **Mark J. Friedman** Law Firm: **McDonald Hopkins PLC** Title: eMail: DLA PIPER LLP, 1251 Avenue of the Americas, New York NY 10020-1104 (USA) **212-335-4500**
Granger Electric Company	**706**	6/12/2009	Name: **Robert D. Gordon** Law Firm: **Clark Hill PLC** Title: eMail: 151 S. Old Woodward Avenue, Suite 200, Birmingham MI 48009 (USA) **313.965.8572**
Grubb & Ellis Management Services, Inc.	**878**	6/12/2009	Name: **Brian M. Graham** Law Firm: **Smith Amundsen, LLC** Title: eMail: 150 North Michigan Avenue, Suite 3300, Chicago IL 60601 (USA) **312.894.3200**
Grupo Antolin North America	**1321**	6/15/2009	Name: **John A. Simon** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center, 500 Woodward Avenue, Suite 2700, Detoit MI 48226-3489 (USA) **313.234.7100**
Grupo Industrial Bocar SA de CV dba Fugra, SA de CV	**920**	6/15/2009	Name: **Nichael G. Cruse** Law Firm: **Warner, Norcross & Judd LLP** Title: eMail: 2000 Town Center, Suite 2700, Southfield M 48075 **248.784.5131**
Guardian Parties	**995**	6/15/2009	Name: **Scott A. Wolfson** Law Firm: **Bush Seyferth & Paige PLLC** Title: eMail: wolfson@bsplaw.com 3001 W. Big Beaver Rd., Suite 600, Troy MI 48084 (USA) **248-822-7803**
Hagemeyer, N.A. America and certain of its affiliates	**2173**	6/22/2009	Name: **David Wander** Law Firm: **Davidoff Maltio & Hutcher LLP** Title: eMail: dhw@dmlegal.com 605 Third Avenue, 34th Floor, New York NY 10158 (USA) **212-557-7200**
Harry Major Machine & Tool Company	**1962**	6/19/2009	Name: **Karin F. Avery** Law Firm: **Silverman & Morris, P.L.L.C.** Title: eMail: avery@silvermanmorris.com 7115 Orchard Lake Road Suite 500, West Bloomfield MI 48322 (USA) **248-539-1330**
Hayman Management Co.	**814**	6/12/2009	Name: **Kathleen H. Klaus** Law Firm: **Silverman & Morris, P.L.L.C.** Title: eMail: khk@maddinhauser.com Maddin, Hauser, Wartell, Roth & Heller, P.C. - 28400 Northwestern Hwy., 3rd Floor, Southfield MI 48034 (USA) **248.359.7520**
HCA, Inc.	**1221**	6/15/2009	Name: **Diane Carlisle** Law Firm: Title: President eMail: 5300 Plains Rd, Eaton Rapids MI 48827 (USA)
Healthtrax international, Inc.	**1264**	6/15/2009	Name: **Lisa M. Liegeot** Law Firm: **Healthtrax International, Inc.** Title: General Counsel eMail: 2345 Main Street, Glastonbury CT 06033 **860.633.5572 x256**
Hella KGaA Hueck & Co., Hella Corporate Center USA, Inc., and certain affiliated entities	**1409**	6/15/2009	Name: **Richard H. Wyron** Law Firm: **Orrick, Herrington & Sutcliffe LLP** Title: eMail: Columbia Center 1152 15th Street, N.W., Washington DC 20005-1706 (USA) **202-339-8400**
Henkel Corporation	**893**	6/12/2009	Name: **Gordon J. Toering** Law Firm: **Warner Norcross & Judd LLP** Title: eMail: gtoering@wnj.com 900 Fifth Third Center, 111 Lyon Street, NW, Grand Rapids MI 49503 (USA) **616.752.2185**

Henniges Automotive Holding, Inc. and certain of its affiliates and subsidiaries	**1426**	6/15/2009	Name: **Ann Marie Uetz** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center; 500 Woodward Ave. Suite 2700, Detroit MI 48226-3489 (USA) **313-234-7100**
Hertz Corporation	**975**	6/15/2009	Name: **Richard F. Hahn** Law Firm: **Debevoise & Plimpton LLP** Title: eMail: 919 Third Avenue, New York NY 10022 (USA) **212-909-6000**
Hewlett-Packard Company and Electronic Data Systems, LLC	**1112**	6/15/2009	Name: **Jennifer L. Nassiri** Law Firm: **DLA Piper LLP** Title: eMail: karol.denniston@dlapiper.com 550 South Hope Street, Suite 2300, Los Angeles CA 90071-2678 (USA) **213-330-7700**
Hewlett-Packard Company, Electronic Data Systems, LLC, and Hewlett-Packard Financial Services Compan	**2378**	6/24/2009	Name: **Jennifer L. Nassiri** Law Firm: **DLA Piper LLP** Title: eMail: jennifer.nassiri@dlapiper.com 550 South Hope Street, Suite 2300, Los Angeles CA 90071-2678 (USA) **213-330-7700**
Hewlett-Packard Financial Services Company and certain HPFS affiliates	**1115**	6/15/2009	Name: **Jennifer L. Nassiri** Law Firm: **DLA Piper LLP** Title: eMail: karol.denniston@dlapiper.com 550 South Hope Street, Suite 2300, Los Angeles CA 90071-2678 (USA) **213-330-7700**
Hilite Industries, Inc.	**854**	6/15/2009	Name: **Stuart A. Laven, Jr.** Law Firm: **Benesh Friedlander Coplan & Aronoff LLP** Title: eMail: 200 Public Square, Suite 2300, Cleveland OH OH 44114 **216.363.4500**
Hirata Corporation of America	**2371**	6/24/2009	Name: **Mark R. Owens** Law Firm: **Barnes & Thornburg LLP** Title: eMail: mowens@btlaw.com 11 South Meridian Street, Indianapolis IN 46204 (USA) **317-236-1313**
Hirata Corporation of America	**941**	6/12/2009	Name: **Mark R. Owens** Law Firm: **Barnes & Thornburg LLP** Title: eMail: mowens@btlaw.com 11 South Meridian Street, Indianapolis IN 46204 (USA) **317-236-1313**
Hirotec America, Inc.	**1326**	6/15/2009	Name: **Ryan D. Heilman** Law Firm: **Schafer and Weiner, PLLC** Title: eMail: rheilman@schaferandweiner.com 40950 Woodward Ave. Ste. 100, Bloomfield Hills MI 48304 (USA) **248-540-3340**
Hitachi Automotive Products (USA)	**1156**	6/15/2009	Name: **Paul J. Ricotta** Law Firm: **Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC** Title: eMail: One Financial Center, Boston MA 02111 (USA) **617-542-6000**
Hitachi Cable Indiana, Inc.	**1151**	6/15/2009	Name: **Paul J. Ricotta** Law Firm: **Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC** Title: eMail: One Financial Center, Boston MA 02111 (USA) **617-542-6000**
Hitachi, Ltd.	**1149**	6/15/2009	Name: **Paul J. Ricotta** Law Firm: **Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC** Title: eMail: One Financial Center, Boston MA 02111 (USA) **617-542-6000**
Honeywell International Inc.	**1087**	6/15/2009	Name: **Michael E. Hastings** Law Firm: **LeClairRyan, a Professional Corporation** Title: Esquire eMail: 830 Third Avenue, Fifth Floor, New York NY 10022 (USA) **212-446-5075**

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Horiba Instruments Inc. and Horiba Ltd.	**883**	6/12/2009	Name: **Donald J. Hutchinson** Law Firm: **Miller Canfield Paddock and Stone, PLC** Title: eMail: hutchinson@millercanfield.com 150 West Jefferson Avenue, Suite 2500, Detroit MI 48226 (USA) **313-963-6420**
Hutchinson and related entities	**1447**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long** Title: eMail: sidorsky@butzel.com 380 Madison Avenue, 22nd Floor, New York NY 10017 (USA) **212-818-1110**
ICM Systems, LLC and Ingersoll Prodction	**1047**	6/15/2009	Name: **Mark H. Shapiro** Law Firm: **Steinberg Shapiro & Clark** Title: eMail: shapiro@steinbergshapiro.com 24901 Northwestern Hwy. Suite 611, Southfield MI 48075 (USA) **248-352-4700**
Ideal Contracting, LLC	**799**	6/12/2009	Name: **Paul R. Hage** Law Firm: **Steinberg Shapiro & Clark** Title: eMail: phage@jaffelaw.com JAFFE RAITT HEUER & WEISS, PC, 27777 Franklin Road, Suite 2500, Southfield MI 48034 (USA) **248-351-3000**
Ideal Setech Share The Space, LLC	**791**	6/12/2009	Name: **Paul R. Hage** Law Firm: **Steinberg Shapiro & Clark** Title: eMail: phage@jaffelaw.com Jaffe Raitt Heuer & Weiss, P.C., 27777 Franklin Road, Ste 2500, Southfield MI 48034 (USA) **248-351-3000**
Ideal Setech, LLC	**811**	6/12/2009	Name: **Paul R. Hage** Law Firm: **Steinberg Shapiro & Clark** Title: eMail: phage@jaffelaw.com Jaffe Raitt Heuer, 27777 Franklin Road, Suite 2500, Southfield MI 48034 (USA) **248.351.3000**
Illinois Tool Works, Inc.	**2022**	6/19/2009	Name: **Mark L. Radtke** Law Firm: **Shaw Gussis Fishman Glantz Wolfson & Towbin LLC** Title: eMail: 321 N. Clark St., Suite 800, Chicago IL 60654 (USA) **312-541-0151**
Industrial Transport Inc.	**2240**	6/15/2009	Name: **Ted E. Crawford** Law Firm: **Industrial Transport Inc.** Title: Chief Financial Officer eMail: tcrawford@industrialtransport.com 2330 East 79th Street, Cleveland OH 44104 (USA) **216-881-5052 Ext. 100**
Inergy Automotive Systems	**1310**	6/15/2009	Name: **Mark A. Aiello** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center, 500 Woodward Avenue, Suite 2700, Detroit MI 48226-3489 (USA) **313.234.7100**
Infineon Technologies North America Corp.	**2156**	6/22/2009	Name: **Debra S. Turetsky** Law Firm: **Reed Smith LLP** Title: eMail: dturetsky@reedsmith.com 599 Lexington Avenue, 28th Floor, New York NY 10022 (USA) **212-521-5400**
Inland Waters Pollution Control	**1200**	6/15/2009	Name: **Paul R. Hage** Law Firm: **Jaffe Raitt Heuer & Weiss, PC** Title: eMail: phage@jaffelaw.com 27777 Franklin Road, Suite 2500, Southfield MI 48034 (USA) **248-351-3000**
International Automotive Components Group North America Inc.	**1176**	6/15/2009	Name: **Carey D. Schreiber** Law Firm: **Winston & Strawn, LLP** Title: eMail: cshreiber@winston.com 200 Park Avenue, New York NY 10166-4193 (USA) **212-294-6700**
International Business Machines Corporation	**1092**	6/15/2009	Name: **James L. Bromley** Law Firm: **Cleary Gottlieb Steen & Hamilton LLP** Title: eMail: One Liberty Plaza, New York NY 10006 (USA) **212-225-2000**

International Business Machines Corporation	**1092**	6/15/2009	Name: **James L. Bromley** Law Firm: **Cleary Gottlieb Steen & Hamilton LLP** Title: eMail: One Liberty Plaza, New York NY 10006 (USA) **212-225-2000**
international Industrial Contracting Co.	**1306**	6/15/2009	Name: **John Ruemenapp** Law Firm: **Weisman, Young & Ruemenapp** Title: eMail: 30100 Telegraph Road, Suite 428, Bingham Farms MI 48025 (USA) **248.258.2700**
Internet Brands, Inc.	**1380**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**
Inteva Products, LLC	**1400**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave., New York NY 10017 (USA) **212-818-1110**
Intra Corporation	**1300**	6/15/2009	Name: **Steven H. Hilfinger** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center, 500 woodward Avenue, Suite 2700, Detroit MI 48226-3489 (USA) **313.234.7100**
Isuzu Motors Limited	**1463**	6/15/2009	Name: **Eric Lopez Schnabel** Law Firm: **Dorsey & Whitney LLP** Title: eMail: 250 Park Avenue, New York NY 10177 (USA) **212.415.9368**
J.B. Hunt Transport Services, Inc.	**1080**	6/15/2009	Name: **Steven Montgomery** Law Firm: Title: eMail: 14 Wall street, 27th Floor, New York NY 10005 (USA) **212.323.7070**
J.L. French Automotive Casting, Inc.	**1043**	6/15/2009	Name: **Mary Kay Shaver** Law Firm: **Varnum LLP** Title: eMail: mkshaver@varnumlaw.com PO Box 352, Grand Rapids MI 49501-0352 (USA) **616-336-6000**
J.L. French Automotive Castings, Inc, and Nelson Metal Products LLC	**1043**	6/15/2009	Name: **Mary Kay Shaver** Law Firm: **Varnum LLP** Title: eMail: mkshaver@varnumlaw.com Bridgewater Place; P.O. Box 352 , Grand Rapids MI 49501-0352 (USA) **616-336-6000**
J2 Management Corp.	**894**	6/12/2009	Name: **Patrick J. Kukla** Law Firm: **Carson Fischer, PLC** Title: eMail: 4111 Andover Road, West 2nd Floor, Bloomfield Hills MI 48302 (USA) **248.644.4840**
JAC Products, Inc.	**1259**	6/15/2009	Name: **Jeffrey C. Hampton** Law Firm: **Saul Ewing LLP** Title: eMail: Central Square West, 1500 Market Street, 38th Floor, Philadelphia PA 9102 **215.972.7118/8662**
Jackson-Dawson Communications, Inc.	**908**	6/12/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long** Title: eMail: sidorsky@butzel.com 380 Madison Avenue , New York NY 10017 (USA) **212-818-1110**
JASCO international, LLC	**1261**	6/15/2009	Name: **James A. Plemmons** Law Firm: **Dickinson Wright PLLC** Title: eMail: 500 Woodward Ave., Suite 4000, Detroit MI 48226 **313.223.3500**

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Jason Incorporation dba Janesville Acoustics	**1334**	6/15/2009	Name: **James S. Carr** Law Firm: **Kelley Drye & Warren LLP** Title: eMail: 101 Park Avenue, New York NY 10178 (USA) **212.808.7800**
JD Power and Associates	**785**	6/12/2009	Name: **David N. Crapo, Esq.** Law Firm: **Gibbons P.C.** Title: eMail: dcrapo@gibbonslaw.com One Gateway Center, Newark NJ 07102-5310 (USA) **973.596.4523**
Jefferson Wells International, Inc.	**1683**	6/17/2009	Name: **Tonya A. Trumm** Law Firm: **Michael Best & Friedrich LLP** Title: eMail: tatrumm@michaelbest.com 100 East Wisconsin Avenue, Suite 3300, Milwaukee WI 53202-4108 (USA) **414-271-6560**
Jernberg Industries, Inc.	**1454**	6/15/2009	Name: **Ann Marie Uetz** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center; 500 Woodward Avenue, Suite 2700, Detroit MI 48226-3489 (USA) **313-234-7100**
John E. Green Company	**767**	6/12/2009	Name: **William L. Rosin** Law Firm: **Dawda, Mann, Mulcahy & Sadler, PLC** Title: eMail: 39533 Woodward Avenue, Suite 200, Bloomfield Hills MI 48304 (USA) **248.642.3700**
Johnson Controls, Inc., Intertec Systems, LLC, JCIM, LLC	**1105**	6/15/2009	Name: **James A. Plemmons** Law Firm: **Dickinson Wright PLLC** Title: eMail: jplemmons@dickinsonwright.com 500 Woodward Ave., Suite 4000, Detroit MI 48226 (USA) **313-223-3500**
Johnson Matthey Vehicle Testing & Development, LLC, Johnson Matthey Inc.	**1198**	6/15/2009	Name: **Teresa K.D. Currier** Law Firm: **Saul Ewing LLP** Title: eMail: TCurrier@saul.com Suite 1200, 222 Delaware Avenue, Wilmington DE 19899 (USA) **302-421-6826**
Joseph Cargenlli and Hydrogenics Corporation	**1802**	6/18/2009	Name: **William F. Gray Jr.** Law Firm: **Troys LLP** Title: eMail: 237 Park Ave., New York NY 10017 (USA) **212-880-6000**
Joseph Cargenlli and Hydrogenics Corporation	**1802**	6/18/2009	Name: **William F. Gray Jr.** Law Firm: **Troys LLP** Title: eMail: 237 Park Ave., New York NY 10017 (USA) **212-880-6000**
JTEKT Automotive Tennessee-Vonore, Co., JTEKT Automotive Tennessee-Morristown, Inc., Toyoda Machiner	**1384**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**
Kayaba Industry, Co. Ltd.	**2006**	6/19/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Avenue 22nd Floor, New York NY 10017 (USA) **212-818-1110**
Keifer GmbH (MP Beteiligungs)	**898**	6/15/2009	Name: **Gordon J. Toering** Law Firm: **Warner Norcross & Judd LLP** Title: eMail: 900 Fifth Third Center, 111 Lyon Street, NW, Grand Rapids MI 49503 **616.752.2185**
Kelly Services, Inc.	**2324**	6/23/2009	Name: **Garvan F. McDaniel** Law Firm: **Bifferato Gentilotti LLC** Title: eMail: 800 N. King Street, Plaza Level, Wilmington DE 19801 (USA) **302-429-1900**

Key Plastics	**1351**	6/15/2009	Name: **Colin T. Darke** Law Firm: **Bodman LLP** Title: eMail: 1901 St. Antoine, 6th Floor at Ford Field, Detroit MI 48226 **313.393.7585**
Knight Facilities Management, Inc. and Caravan/Knight Facilities Management, LLC	**964**	6/13/2009	Name: **Susan M. Cook** Law Firm: **Lambert, Leser, Isackson, Cook & Giunta, P.C.** Title: eMail: 309 Davidosn Building; 916 Washington Avenue, Bay City MI 48708 (USA) **989-893-3518**
Koch Enterprises, Inc.	**694**	6/11/2009	Name: **Mark R. Owens** Law Firm: **Barnes & Thornburg LLP** Title: eMail: mowens@btlaw.com 11 South Meridian Street, Indianapolis IN 46204 (USA) **317-236-1313**
Kohlberg & Co LLC dba PGW, LLC	**1396**	6/15/2009	Name: **Aaron L. Hammer** Law Firm: **Freeborn & Peters, LLP** Title: eMail: 311 South Wacker Drive, Suite 3000, Chicago IL 60606-6677 **312.360.6000**
Kolbenschmidt-Pierburg AG	**2003**	6/19/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Avenue 22nd Floor, New York NY 10017 (USA) **212-818-1110**
Kolbenschmidt-Pierburg AG	**1439**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**
KONE, Inc.	**742**	6/12/2009	Name: **J. Alex Kress** Law Firm: **Riker, Danzig, Scherer, Hyland, Perretti LLP** Title: eMail: Headquarters Plaza, One Speedwell Avenue, Morristown NJ 07962 (USA) **973.538.0800**
Kongsberg Automotive, Inc., Kongsberg Driveline Systems I, Inc., Kongsberg Driveline Systems S de RL	**753**	6/12/2009	Name: **Marc N. Swanson** Law Firm: **MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.** Title: eMail: swansonm@millercanfield.com 150 West Jefferson Avenue, Suite 2500, Detroit MI 48226 (USA) **313-496-7591**
Kuka Systems Corp. North America F/K/A Kuka Flexible Production Systems Corp.	**1123**	6/15/2009	Name: **Marc M. Bakst** Law Firm: **Bodman LLP** Title: eMail: mbakst@bodmanllp.com 6th Floor at Ford Field; 1091 St. Antoine Street, Detroit MI 48226 (USA) **313-393-7530**
Kyklos Bearing International	**1403**	6/15/2009	Name: **Ann Marie Uetz** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center; 500 Woodward Ave. Suite 2700, Detroit MI 48226-3489 (USA) **313-234-7100**
L & A Architects, Inc.	**907**	6/12/2009	Name: **Steven R. Pohl** Law Firm: **Cheli & Lyshak, PLC** Title: eMail: 26154 Woodward Avenue; P.O. Box 1257, Royal Oak MI 48068-1257 (USA) **248-545-1700**
L.K. Machinery, Inc.	**766**	6/12/2009	Name: **Gordon J. Toering** Law Firm: **WARNER NORCROSS & JUDD LLP** Title: eMail: gtoering@wnj.com 900 Fifth Third Center; 111 Lyon Street, NW, Grand Rapids MI 49503 (USA) **616-752-2185**
Laclede Gas Company	**2153**	6/12/2009	Name: **Rick E. Zucker** Law Firm: **Laclede Gas Company** Title: Assistance General Counsel eMail: rzucker@lacledegas.com 720 Olive Street Room 1520, St. Louis MO 63101 (USA) **314-342-0532**

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Lansing Board of Water & Light	**871**	6/12/2009	Name: **Donald J. Hutchinson** Law Firm: **Miller, Canfield, Paddock and Stone, P.L.C.** Title: eMail: hutchinson@millercanfield.com 150 West Jefferson Avenue, Suite 2500, Detroit MI 48226 (USA) **313.963.6420**
Lapeer Metal Stamping Co., Inc.	**890**	6/12/2009	Name: **Patrick J. Kukla** Law Firm: **Carson Fischer, PLC** Title: eMail: 4111 Andover Road, West - 2nd Floor, Bloomfield Hills MI 48302 (USA) **248.644.4840**
Lapeer Metal Stamping Companies, Inc.	**1664**	6/17/2009	Name: **Patrick J. Kukla** Law Firm: **Carson Fischer, P.L.C.** Title: eMail: 4111 Andover Rd., West-2nd Floor, Bloomfield Hills MI 48302 (USA) **248-644-4840**
LBA Realty Fund III-Company IX, LLC	**1432**	6/15/2009	Name: **Ivan M. Gold** Law Firm: **Allen Matkins Leck Gamble Mallory & Natsis LLP** Title: eMail: igold@allenmatkins.com Three Embarcadero Center 12th Floor, San Francisco CA 94111-4074 (USA) **415-837-1515**
Lear Corporation	**1100**	6/15/2009	Name: **Marc M. Bakst** Law Firm: **BODMAN LLP** Title: eMail: mbakst@bodmanllp.com 6th Fllor Ford Field; 1901 St. Antoine Street, Detroit MI 48026 (USA) **313-393-7530**
Leggett and Platt, Incorporated	**2168**	6/22/2009	Name: **John E. Jureller, Jr.** Law Firm: **Klestadt & Winters LLP** Title: eMail: jjureller@Klestadt.com 292 Madison Avenue, 17th Floor, New York NY 10017 (USA) **212-972-3000**
LEM USA, Inc.	**1317**	6/15/2009	Name: **James S. Carr** Law Firm: **Kelley Drye & Warren LLP** Title: eMail: 101 Park Avenue, New York NY 10178 (USA) **212.808.7800**
Len Industries, Inc.	**987**	6/15/2009	Name: **Scott A. Wolfson** Law Firm: **Bush Seyferth & Paige PLLC** Title: eMail: wolfson@bsplaw.com 3001 W. Big Beaver Rd., Suite 600, Troy MI 48084 (USA) **248-822-7803**
LG Electronics USA, Inc.	**1036**	6/15/2009	Name: **Carey D. Schreiber** Law Firm: **Winston & Strawn, LLP** Title: eMail: cschreiber@winston.com 200 Park Avenue , New York NY 10166-4193 (USA) **212-294-6700**
Lioho Light Metal (Kunshan) Co., Ltd.	**851**	6/15/2009	Name: **Marc E. Richards** Law Firm: **Blank Rome LLP** Title: eMail: The Chrysler Building, 405 Lexington Avenue, New York NY 10174 **212.885.5000**
Liufeng Machinery Industry Co., Ltd.	**848**	6/15/2009	Name: **Marc E. Richards** Law Firm: **Blank Rome, LLP** Title: eMail: The Chrysler Building, 405 Lexington Avenue, New York NY 10174 **212.885.5000**
LMC Phase II, L.L.C.	**2214**	6/23/2009	Name: **Richard Epling** Law Firm: **Pillsbury Winthrop Shaw Pttman LLP** Title: eMail: 1540 Broadway, New York NY 10036-4039 (USA) **212-858-1000**
LMC Phase II, LLC	**198**	6/15/2009	Name: **Richard Epling** Law Firm: **Pillsbury Winthrop Shaw Pittman LLP** Title: eMail: 1540 Broadway , New York NY 10036-4039 (USA) **212-858-1000**

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LMC Phase II, LLC and PSEG Resources LLC	**1098**	6/15/2009	Name: **Richard L. Epling** Law Firm: **Pillsbury Winthrop Shaw Pittman LLP** Title: eMail: 1540 Broadway, New York NY 10036-4039 **212.858.1000**
LMC Resources Capital Limited Partnership	**956**	6/12/2009	Name: **Richard Epling** Law Firm: **Pillsbury Winthrop Shaw Pittman LLP** Title: eMail: 1540 Broadway , New York NY 10036-4039 (USA) **212-858-1000**
Logistics Insight Corp.	**750**	6/12/2009	Name: **Michael A. Nedelman** Law Firm: **Nedelman Gloetzner, PLLC** Title: eMail: mnedelman@nglegal.com 28580 Orchard Lake Road, Suite 140, Farmington Hills MI 48334 (USA) **248.855.8888**
Louis Padnos Iron & Metal Company	**2132**	6/18/2009	Name: **Scott Wolters** Law Firm: **Louis Padnos Iron & Metal Company** Title: eMail: 185 West 8th Street, Holland MI 49423 (USA) **616-796-7164**
Lowe's Companies, Inc.	**1419**	6/15/2009	Name: **Eric R. Markus** Law Firm: **Wilmer Cutler Pickering Hale and Dorr LLP** Title: eMail: eric.markus@wilmerhale.com 1875 Pennsylvania Ave., NW, Washington DC 20006 (USA) **202-663-6000**
Macquarie Equipment Finance, LLC	**1348**	6/15/2009	Name: **Christopher J. Battaglia** Law Firm: **Halperin, Battaglia Raicht, LLP** Title: eMail: 555 Madison Avenue, 9th Floor, New York NY 10022 (USA) **212.765.9100**
Magneti Marelli Powertrain USA, LLC, Magnetti Marelli North America, Automotive Lightning LLC, et. a	**731**	6/12/2009	Name: **William L. Rosin** Law Firm: **Dawda, Mann, Mulcahy & Sadler, PLC** Title: eMail: 39533 Woodward Avenue, Suite 200, Bloomfield Hills MI 48304 (USA)
Mahar Tool Supply Company, Inc.	**963**	6/12/2009	Name: **Susan M. Cook** Law Firm: **Lambert, Leser, Isackson, Cook & Giunta, P.C.** Title: eMail: 309 Davidson Building; 916 Washington Avenue, Bay City MI 48708 (USA) **989-893-3518**
Mahle Industries, Inc.	**903**	6/12/2009	Name: **Gordon J. Toering** Law Firm: **Warner Norcross & Judd LLP** Title: eMail: gtoering@wnj.com 900 Fifth Third Center; 111 Lyon Street, NW, Grand Rapids MI 49503 (USA) **616.752.2185**
Mando Corporation	**1170**	6/15/2009	Name: **Mary Kay Shaver** Law Firm: **Varnum LLP** Title: eMail: mkshaver@vernumlaw.com Bridgewater Place; P.O. Box 352, Grand Rapids MI 49501-0352 (USA) **616-336-6000**
Mann+Hummel USA, Inc., Mann+Hummel GMBH, Mann+Hummel Advanced Filtration Concepts, Inc., Mann+Hummel	**1450**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**
Market Insight Corporation	**1050**	6/11/2009	Name: **Rich Falcone** Law Firm: **Market Insight Corporation** Title: eMail: 2479 East Bayshore Rd., Suite 809, Palo Alto CA 94303 (USA) **650.320.8222**
Martin Transportation Systems, Inc.	**884**	6/12/2009	Name: **Terry L. Zabel** Law Firm: **Rhoades McKee** Title: eMail: tlzabel@rhoadesmckee.com 161 Ottawa Ave., NW, Ste 600, Grand Rapids MI 49503 (USA) **616-235-3500**

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Martin Transportation Systems, Inc.	**DDN0004**	6/12/2009	Name: **Terry L. Zabel** Law Firm: **Rhoades McKee** Title: eMail: tlzable@rhoadesmckee.com 161 Ottawa Ave., NW Suite 600, Grand Rapids MI 49503 (USA) **616-235-3500**
Martinrea International, Inc. and its subsidiaries	**1425**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Fllor, New York NY 10017 (USA) **212-818-1110**
Material Management Services, Inc.	**667**	6/11/2009	Name: **Marc B. Merklin** Law Firm: **Brouse McDowell** Title: eMail: mmerklin@brouse.com 388 S. Main Street, Suite 500, Akron OH 44311 (USA) **330-535-5711**
Maxxis International - USA	**1081**	6/12/2009	Name: **Brad Barrett** Law Firm: Title: eMail: bbarrett@maxxis.com 545 Old Peachtree Road, Suwanee GA 30024-2944 (USA) **678-407-6700**
McGraw-Hill Companies, Inc.	**788**	6/12/2009	Name: **David N. Crapo** Law Firm: Title: eMail: dcrapo@gibbonslaw.com Gibbons P.C., One Gateway Center, Newark NY 07102-5310 (USA) **973-596-4523**
MCM Management Corp., Inc.	**1832**	6/12/2009	Name: **Don W. Belvins** Law Firm: **McAlpine & Associates, P.C.** Title: eMail: dwblevins@mcalpinelawfirm.com 3201 University Dr. Suite 100, Auburn Hills MI 48326 (USA) **248-373-3700**
Meadville Forging Company and Carolina Forge Company	**1737**	6/17/2009	Name: **James M. Lawniczak** Law Firm: **Calfee, Halter & Griswold LLP** Title: eMail: jlawniczak@calfee.com 800 Superior Avenue Suite 1400, Cleveland OH 44114 (USA) **216-622-8200**
Medco Health Solutions, Inc.	**2012**	6/19/2009	Name: **Martin J. Weis** Law Firm: **Dilworth Paxson LLP** Title: eMail: mweis@dilworthlaw.com 1500 Market Street Suite 3500E, Philadelphia PA 19102-2101 (USA) **215-575-7000**
Medialink Worldwide	**1394**	6/15/2009	Name: **Miles Baum** Law Firm: **Davis & Gilbert LLP** Title: eMail: mbaum@dglaw.com 1740 Broadway, New York NY 10017 (USA) **212-468-4800**
Menlo Logistics, Inc.	**798**	6/12/2009	Name: **Robert D. Gordon** Law Firm: **Davis & Gilbert LLP** Title: eMail: rgordon@clarkhill.com CLARK HILL PLC, 151 S. Old Woodward Avenue, Suite 200, Birmingham MI 48009 (USA) **313-965-8572**
Midway Products Group, Inc.	**957**	6/12/2009	Name: **Mark S. Frankel** Law Firm: **Couzens, Lansky, Fealk, Ellis, Roeder & Lazar, P.C.** Title: eMail: mark.frankel@couzens.com 39395 W. Twelve Mile Road, Suite 200, Farmington Hills MI 48331 (USA) **248-489-8600**
MIS Environmental Services, Inc.	**1086**	6/15/2009	Name: **Susan M. Cook** Law Firm: **Lambert, Leser, Isackson, Cook & Giunta, PC** Title: eMail: 309 Davidson Building; 916 Washington Avenue, Bay City MI 48708 (USA) **989-893-3518**
Mitsuba Corp.	**1379**	6/15/2009	Name: **Stephen M. Gross** Law Firm: **McDonald Hopkins PLC** Title: eMail: sgross@mcdonaldhopkins.com 39533 Woodward Ave. Ste 318, Bloomfield Hills MI 48304 (USA) **248-646-5070**

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Mitsubishi Heavy Industries	**1322**	6/15/2009	Name: **David M. Bennett** Law Firm: **Thompson & Knight LLP** Title: eMail: david.bennett@tklaw.com 1722 Routh Street, Suite 1500, Dallas TX 75201 (USA) **214.969.1700**
Mitsuboshi Belting, LTD.	**864**	6/15/2009	Name: **Amy E. Evans** Law Firm: **Cross & Simon, LLC** Title: eMail: 913 North Market Street, 11th Floor, Wilmington DE 19801 **302.777.4200**
Modine Manufacturing Company	**1417**	6/15/2009	Name: **Christopher Combest** Law Firm: **Quarles & Brady LLP** Title: eMail: christopher.combest@quarles.com 300 North LaSalle Street Suite 4000, Chicago IL 60654 (USA) **312-715-5000**
Modineer Co.	**1039**	6/15/2009	Name: **Mary Kay Shaver** Law Firm: **Varnum LLP** Title: eMail: mkshaver@varnumlaw.com PO Box 352, Grand Rapids MI 49501-0352 (USA) **616-336-6000**
Mold Masters Co.	**1649**	6/16/2009	Name: **P. Warren Hunt** Law Firm: **Kerr, Russell and Weber, PLC** Title: eMail: 500 Woodward Ave. Suite 2500, Detroit MI 48226 (USA) **313-961-0200**
Mold Masters Co.,	**2342**	6/23/2009	Name: **P. Warren Hunt** Law Firm: **Kerr, Russell and Weber, PLC** Title: eMail: 500 Woodward Ave, Suite 2500, Detroit MI 48226 (USA) **313-961-0200**
Molded Fiber Glass Co.	**1309**	6/15/2009	Name: **Jeffrey L. Coxon** Law Firm: **Warren and Young PLL** Title: eMail: 134 west 46th Street, Ashtabula OH 44050-2300 (USA) **440.997.6275**
Monster Worldwide, Inc. d/b/a Monster MediaWorks	**1312**	6/15/2009	Name: **Jeffrey R. Waxman** Law Firm: **Morris James LLP** Title: eMail: jwaxman@morrisjames.com 500 Delaware Avenue, Suite 1500, Wilmington DE 19899-2306 (USA) **302-888-6800**
Morgan Adhesives Company Inc. d/b/a MACtac and Bemis Company Inc.	**1814**	6/18/2009	Name: **Leslie S. Barr** Law Firm: **Windels, Marx, Lane & Mittendorf, LLP** Title: eMail: 156 West 56th Street, New York NY 10019 (USA) **212-237-1000**
MPS Group, Inc.	**744**	6/12/2009	Name: **Paul R. Hage** Law Firm: **Jaffe Raitt Heuer & Weiss, PC** Title: eMail: phage@jaffelaw.com 27777 Franklin Road, Suite 2500, Southfield MI 48034 (USA) **248-351-3000**
Mubea, Inc.	**773**	6/12/2009	Name: **Gordon J. Toering** Law Firm: **WARNER NORCROSS & JUDD LLP** Title: eMail: gtoering@wnj.com 900 Fifth Third Center, 111 Lyon Street, NW, Grand Rapids MI 49503 (USA) **616-752-2185**
Nagel Precision, Inc.	**1064**	6/13/2009	Name: **Christopher A. Merritt** Law Firm: **RJ Landau Partners, PLLC** Title: eMail: cmerritt@rjlps.com 5340 Plymouth Rd., Suite 200, Ann Arbor MI 48105 (USA) **734.865.1580**
National Auto Radiator Mfg. Co. Ltd.	**1361**	6/15/2009	Name: **James E. DeLine** Law Firm: **Kerr, Russell and Weber, PLC** Title: eMail: 500 Woodward Ave., Suite 2500, Detroit MI 48226 (USA) **313.961.0200**

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National Fuel Gas Distribution Corporation	**866**	6/12/2009	Name: **Angela Z. Miller** Law Firm: **Kerr, Russell and Weber, PLC** Title: eMail: PHILLIPS LYTE, LLP; One HSBC Center, Suite 3400, Buffalo NY 14203-2887 (USA) **716-847-8400**
National Fuel Resources, Inc.	**1827**	6/18/2009	Name: **Angela Z. Miller** Law Firm: **Phillips Lytle LLP** Title: eMail: One HSBC Center Suite 3400, Buffalo NY 14203-2887 (USA) **716-847-8400**
National Logistics Management Co.	**790**	6/12/2009	Name: **Robert Gordon** Law Firm: **Phillips Lytle LLP** Title: eMail: rgordon@clarkhill.com Clark Hill PLC, 151 S. Old Woodward Avenue, Suite 200, Birmingham MI 48009 (USA) **313-965-8572**
National Logistics Management Co. (successor by merger to Artisan Container Services, LLC)	**796**	6/12/2009	Name: **Robert D. Gordon** Law Firm: **Phillips Lytle LLP** Title: eMail: rgordon@clarkhill.com Clark Hill PLC, 151 S. Old Woodward Avenue, Suite 200, Birmingham MI 48009 (USA) **313-965-8572**
NBC Universal	**1275**	6/15/2009	Name: **George Royle** Law Firm: **Latham & Watkins LLP** Title: eMail: 885 Third Avenue Suite 1000, New York NY 10022 (USA) **212-906-1200**
Neptune Orient Lines, Ltd. dba APL Logistics Transport, et. al	**1330**	6/15/2009	Name: **Alyssa D. Englund** Law Firm: **Orrick, Herrington & Sutcliffe, LLP** Title: eMail: 666 Fifth Avenue, New York NY 10103-0002 **212.509.5000**
New Mather Metals, Inc.	**1740**	6/17/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**
New United Motor Manufacturing	**1118**	6/15/2009	Name: **Benjamin P. Deutsch** Law Firm: **Schnader Harrison Segal & Lewis LLP** Title: eMail: bdeutsch@Schnader.com 140 Broadway, Suite 3100, New York NY 10005 (USA) **212-973-8000**
Newkirk Electric & Associates	**1138**	6/15/2009	Name: **Gordon J. Toering** Law Firm: **Warner Norcross & Judd LLP** Title: eMail: gtoering@wnj.com 900 Fifth Third Center; 111 Lyon Street NW, Grand Rapids MI 49503 (USA) **616-752-2185**
Newport Television	**1458**	6/15/2009	Name: **Marshall Turner** Law Firm: **Husch Blackwell Sanders LLP** Title: eMail: marshall.turner@huschblackwell.com 190 Carondelet Plaza Suite 600, St. Louis MO 63105 (USA) **314-480-1500**
NGK Spark Plugs (U.S.A.), Inc,	**1423**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**
Niles America Wintech, Inc.	**1133**	6/15/2009	Name: **Michael C. Hammer** Law Firm: **Dickinson Wright PLLC** Title: eMail: jplemmons@dickinsonwright.com 500 Woodward Ave., Suite 4000, Detroit MI 48226 (USA) **313-223-3500**
Nisshinbo Automotive Corp.	**1368**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**

Norfolk Southern Corporation, Norfolk Southern Railway, and Triple Crown Services Company	**1235**	6/15/2009	Name: **David J. Baldwin** Law Firm: **Potter Anderson & Corroon, LLP** Title: eMail: Hercules Plaza, 6th Floor; 1313 North Market Street; P.O. Box 951, Wilmington DE 19801 (USA) **302-984-6000**
Norfolk Southern Corporation, Norfolk Southern Railway, and Triple Crown Services Company	**1235**	6/15/2009	Name: **David J. Baldwin** Law Firm: **Potter Anderson & Corroon LLP** Title: eMail: Hercules Plaza, 6th Floor; 1313 North Market Street; P.O. Box 951, Wilmington DE 19801 (USA) **302-984-6000**
North American Acquisition Corporation d/b/a AMTEC Percision Products	**1139**	6/15/2009	Name: **Diconza Law, P.C.** Law Firm: **Gerard DiConza** Title: eMail: 630 Third Ave. 7th Floor, New York NY 10017 (USA) **212-682-4940**
Northern Engraving Corporation	**749**	6/12/2009	Name: **Paul R. Hage** Law Firm: **Jaffe Raitt Heuer & Weiss, PC** Title: eMail: phage@jaffelaw.com 27777 Franklin Road, Suite 2500, Southfield MI 48034 (USA) **248-351-3000**
Novodynamics, Inc.	**763**	6/12/2009	Name: **Deborah Kovsky-Apap** Law Firm: **Pepper Hamilton LLP** Title: eMail: kovskyd@pepperkaw.com 100 Renaissance Center, Suite 3600, Detroit MI 48243 (USA) **313-259-7110**
NYX, Inc. and Bates Acquisition, LLC	**2072**	6/19/2009	Name: **Scott A. Wolfson** Law Firm: **Bush Seyferth & Paige PLLC** Title: eMail: wolfson@bsplaw.com 3001 W. Big Beaver Rd. Suite 600, Troy MI 48084 (USA) **248-822-7803**
Oakland University	**1337**	6/15/2009	Name: **Richardo I. Kirkpatrick** Law Firm: **Kilpatrick & Associates, P.C.** Title: eMail: ecf@kaalaw.com 903 N. Opdyke Road, Suite C, Auburn Hills MI 48326 (USA) **248.377.0700**
Ogihara America Corporation	**855**	6/12/2009	Name: **Michael G. Cruse** Law Firm: **Kilpatrick & Associates, P.C.** Title: eMail: mcruse@wnj.com WARNER NORCROSS & JUDD LLP, 2000 Town Center, Suite 2700, Southfield MI 48075 (USA) **248-784-5131**
Omron Automotive Electronics, Inc.	**1292**	6/15/2009	Name: **Steven H. Hilfinger** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center, 500 Woodward Avenue, Suite 2700, Detroit MI 48226-3489 **313.234.7100**
Oracle USA, Inc., successor in interest to Oracle Corporation and to Siebel Systems, Inc.	**1233**	6/15/2009	Name: **Amish R. Doshi** Law Firm: **Day Pitney LLP** Title: eMail: adoshi@daypitney.com 7 Times Square , New York NY 10036 (USA) **212-297-5800**
Ottaway Motor Express	**2005**	6/12/2009	Name: **Shawn McMahon** Law Firm: **Ottaway Motor Express Ltd.** Title: V.P. of Operations and Finance eMail: 714880 County Road 4, Woodstock, Ontario N4S 7W3 (Canada) **519-539-8434**
Overhead Conveyor Company	**887**	6/12/2009	Name: **Deborah L. Fish** Law Firm: **Allard & Fish, P.C.** Title: eMail: 2600 Buhl Building, 535 Griswold, Detroit MI 48226 (USA) **313.961.6141**
Oxbow Carbon & Minerals, LLC	**929**	6/12/2009	Name: **Elizabeth K. Flaagan** Law Firm: **Allard & Fish, P.C.** Title: eMail: eflaagan@faegre.com Faegre & Benson LLP; 3200 Wells Fargo Center; 1700Lincoln Center, Denver CO 80203 (USA) **303-607-3694**

Panasonic Automotive Systems Company f/k/a Matsushita Electric Corporation of America	**1179**	6/15/2009	Name: **Jonathan L. Flaxer** Law Firm: **Golenbock Eiseman Assor Bell & Peskoe LLP** Title: eMail: 437 Madison Avenue, New York NY 10022 (USA) **212-907-7300**
Paragon Metals, Inc.	**772**	6/12/2009	Name: **Michael G. Cruse** Law Firm: **Warner, Norcross & Judd LLP** Title: eMail: 2000 Town Center, Suite 2700, Southfield MI 48075 (USA) **248.784.5131**
Park-Ohio Industries, Inc.	**1329**	6/15/2009	Name: **James M. Lawniczak** Law Firm: **Calfee, Halter & Griswold LLP** Title: eMail: Key Bank Center, Suite 1400; 800 Superior Avenue, Cleveland OH 44114 **216.622.8200**
Penske Auto Group	**1460**	6/15/2009	Name: **Carollynn H.G. Callari** Law Firm: **Venable LLP** Title: eMail: Rockefeller Center 1270 Avenue of the Americas, New York NY 10020 (USA) **212-983-3850**
Penske Logistics LLC and Automotive Component Carriers LLC	**869**	6/12/2009	Name: **Andrew C. Kassner** Law Firm: **DRINKER BIDDLE & REATH LLP** Title: eMail: One Logan Square; 18th and Cherry Streets, Philadelphia PA 19103 (USA) **215-988-2700**
Penske Logistics LLC and Automotive Component Carriers LLC	**869**	6/12/2009	Name: **Andrew C. Kassner** Law Firm: **DRINKER BIDDLE & REATH LLP** Title: eMail: One Logan Square; 18th and Cherry Streets, Philadelphia PA 19103 (USA) **215-988-2700**
Peterson American Corporation	**1106**	6/15/2009	Name: **Steven H. Hilfinger** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center; 500 Woodward Avenue, Suite 2700, Detroit MI 48226-3489 (USA) **313-234-7100**
Peugeot Japy Industries, SA	**1304**	6/15/2009	Name: **Judy A. O'Neill** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center, 500 Woodward Avenue, Suite 2700, Detroit MI 48226-3489 (USA) **313.234.7100**
Phillips Lytle LLP	**715**	6/12/2009	Name: **Angela Z. Miller** Law Firm: **Phillips Lytle LLP** Title: eMail: Suite 3400, One HSBC Center, Buffalo NY 14203-2887 (USA) **716-847-8400**
Pilkington North America, Inc. and certain of its affiliates and subsidiaries	**701**	6/12/2009	Name: **Deborah Kovsky-Apap** Law Firm: **PEPPER HAMILTON LLP** Title: eMail: kovskyd@pepperlaw.com 100 Renaissance Center Suite 3600, Detroit MI 48243 (USA) **313-259-7110**
Pintura, Estampado y Montaje, S.A. de C.V., Pintura y Ensambles de Mexico, S.A. de C.V., Nugar S.A.	**628**	6/10/2009	Name: **Michael R. Wernette** Law Firm: **SCHAFER AND WEINER, PLLC** Title: eMail: mwernette@schaferandweiner.com 40950 Woodward Ave., Ste. 100, Bloomfield Hills MI 48304 (USA) **248-540-3340**
Pioneer Steel Corporation	**717**	6/11/2009	Name: **Donald Sazama** Law Firm: Title: President eMail: 7447 Intervale , Detroit MI 48238-2488 **313.933.9400**
Pioneer Steel Corporation	**711**	6/12/2009	Name: **Lynn M. Brimer** Law Firm: **Strobal & Sharp, P.C.** Title: eMail: lbrimer@stroblpc.com 300 E. Long Lake Rd., Ste. 200, Bloomfield Hills MI 48304 (USA) **248-540-2300**

Pirelli Tires, LLC	**1385**	6/15/2009	Name: **Salvatore A. Barbatano** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center; 500 Woodward Ave. Suite 2700, Detroit MI 48226-3489 (USA) **313-234-7100**
Pitney Bowes Inc., Pitney Bowes Management Services, Inc. ("PBMS"), Pitney Bowes	**2051**	6/19/2009	Name: **Edward J. LoBello** Law Firm: **Meyer, Suozzi, English & Klein, P.C.** Title: eMail: 1350 Broadway, Suite 501; P.O. Box 822, New York NY 10018-0822 (USA) **212-763-7030**
PJAX, Inc.	**1205**	6/15/2009	Name: **Mark T. Vuono** Law Firm: **Vuono & Gray, LLC** Title: eMail: mvuono@vuonogray.com 310 Grant St., Suite 2310 , Pittsburgh PA 15219 (USA) **412-471-1800**
Plasan USA, Inc. and Plasan USA, Ltd.	**875**	6/12/2009	Name: **Robert D. Gordon** Law Firm: **Clark Hill PLC** Title: eMail: rgordon@clarkhill.com 151 S. Old Woodward Avenue, Suite 200, Birmingham MI 48009 (USA) **313.965.8572**
Plastic Omnium Auto Exteriors, L.L.C., Plastic Omnium Auto Exteriores, S.A. de C.V., Burelle, S.A.,	**2029**	6/19/2009	Name: **Leslie S. Barr** Law Firm: **Windels Marx Lane & Mittendorf, LLP** Title: eMail: 156 West 56th Street, New York NY 10019 (USA) **212-237-1000**
Power Information Network, LLC	**783**	6/12/2009	Name: **David N. Crapo** Law Firm: **Gibbons P.C.** Title: Esquire eMail: dcrapo@gibbonslaw.com One Gateway Center, Newark NJ 07102-5310 (USA) **973-596-4523**
Pratt & Miller Engineering & Fabrication, Inc.	**1303**	6/15/2009	Name: **Tristan Manthey** Law Firm: **Heller, Draper, Hayden, Patrick & Horn, LLC** Title: eMail: 650 Poydras Street, Suite 2500, New Orleans LA 70130 (USA) **504.299.3300**
Praxair, Inc. and Praxair Distribution, Inc.	**1001**	6/15/2009	Name: **Sarah M. Chen** Law Firm: **Locke Lord Bissell & Liddell, LLP** Title: eMail: 885 Third Avenue, Twenty-Sixth Floor, New York NY 10022 (USA) **212-812-8303**
Praxair, Inc. as Agent for Niject Services Company	**1164**	6/15/2000	Name: **Sarah M. Chen** Law Firm: **Locke Lord Bissell & Liddell LLP** Title: eMail: 885 Third Avenue, Twenty-Sixth Floor, New York NY 10022 (USA) **212-812-8303**
Praxair, Inc. as agent for Niject Services Company	**1164**	6/15/2009	Name: **Sarah M. Chen** Law Firm: **Locke Lord Bissell and Liddell LLP** Title: eMail: 885 Third Avenue, Twenty-Sixth Floor, New York NY 10022 (USA) **212-812-8303**
Production Modeling Corporation	**521**	6/9/2009	Name: **Colin T. Drake** Law Firm: **Locke Lord Bissell and Liddell LLP** Title: eMail: cdrake@bodmanllp.com BODMAN LLP, 6th Floor at Ford Field, 1901 St. Antoine, Detroit MI 48226 (USA) **313-393-7585**
Production Services Management, Inc.	**870**	6/12/2009	Name: **Paul R. Hage** Law Firm: **Jaffw Raitt Heuer & Weiss, P.C.** Title: eMail: phage@jaffelaw.com 27777 Franklin Road, Southfield MI 48034 (USA) **248.351.3000**
Progressive Stamping Company, Inc.	**1673**	6/16/2009	Name: **Leslie S. Barr** Law Firm: **Windels Marx Lane & Mittendorf, LLP** Title: eMail: 156 West 56th Street, New York NY 10019 (USA) **212-237-1000**

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Project Management Services, Inc.	**1178**	6/15/2009	Name: **Paul R. Hage** Law Firm: **Jaffe Raitt Heuer & Weiss, PC** Title: eMail: phage@jaffelaw.com 27777 Franklin Road, Suite 2500, Southfield MI 48034 (USA) **248-351-3000**
PTI Quality Containment solutions, LLC	**1316**	6/15/2009	Name: **Tony F. Di Ponio** Law Firm: **Calhoun & Di Ponio, PLC** Title: eMail: 31000 Telegraph Road, Suite 280, Bingham Farms MI 48025 (USA) **248.594.1500**
Pyeong HWA Automotive Co., Ltd.	**1422**	6/15/2009	Name: **Lynn M. Brimer** Law Firm: **Strobl & Sharp, P.C.** Title: eMail: lbrimer@stroblpc.com 300 E. Long Lake Rd. Ste 200, Bloomfield Hills MI 48304 (USA) **248-540-2300**
QEK Global Solutions (US) LP	**1189**	6/15/2009	Name: **David B. Aaronson** Law Firm: **Drinker Biddle & Reath LLP** Title: eMail: One Logan Square, 18th and Cherry Streets, Philadelphia PA 19103 (USA) **215-988-2700**
Quadion Corp.	**1906**	6/19/2009	Name: **Matthew A. Swanson** Law Firm: **Leonard, Street and Deinard** Title: eMail: 150 South Fifth Street, Suite 2300, Minneapolis MN 55402 (USA) **612-335-1500**
Quaker Chemical Corporation	**1160**	6/15/2009	Name: **David B. Aaronson** Law Firm: **Drinker Biddle & Reath LLP** Title: eMail: One Logan Square; 18th and Cherry Streets, Philadelphia PA 19103 (USA) **215-988-2700**
R.L. Polk & Co.	**834**	6/12/2009	Name: **Marc E. Richards** Law Firm: **Blank Rome, LLP** Title: eMail: mrichard@blankrome.com The Chrysler Building, 405 Lexington Avenue, New York NY 10174 (USA) **212.885.5000**
Rapids Tumble Finish, Inc.	**1771**	6/11/2009	Name: **LouAnn Loomis** Law Firm: **Rapids Tumble Finish, Inc.** Title: Office Manager eMail: louann.loomis@rapidstumblefinish.com 1607 Hults Dr., Eaton Rapids MI 48827 (USA) **517-663-8606**
Raycom Media, Inc.	**665**	6/11/2009	Name: **Wanda Borges** Law Firm: **Borges & Associates, LLC** Title: eMail: borgeslawfirm@aol.com 575 Underhill Blvd., Suite 118, Syosset NY 11791 (USA) **516-677-8200**
Raytheon	**1461**	6/15/2009	Name: **Lawrence Katz** Law Firm: **Venable LLP** Title: eMail: 8010 Towers Crescent Drive, Suite 300, Vienna VA 22182-2707 (USA) **703.760.1600**
Raytheon Professional Services, LLC	**1461**	6/15/2009	Name: **Carollynn H.G. Callari** Law Firm: **Venable LLP** Title: eMail: 1270 Avenue of the Americas, New York NY 10020 (USA) **212-983-3850**
RCO Engineering, Inc.	**797**	6/12/2009	Name: **Deborah L. Fish** Law Firm: **Venable LLP** Title: eMail: Allard & Fish, P.C., 2600 Buhl Building, 535 Griswold, Detroit MI 48226 (USA) **313-961-6141**
RCR Enterprises, LLC	**938**	6/12/2009	Name: **Christopher J. Battaglia** Law Firm: **Halperin Battaglia Raicht, LLP** Title: eMail: cbattaglia@halperinlaw.net 555 Madison Avenue - 9th Floor, New York NY 10022 (USA) **212-765-9100**

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RECARO North America, Inc.	**787**	6/12/2009	Name: **Gordon J. Toering** Law Firm: **WARNER NORCROSS & JUDD LLP** Title: eMail: gtoering@wnj.com 900 Fifth Third Center; 111 Lyon Street, NW, Grand Rapids MI 49503 (USA) **616-752-2185**
Relational, LLC, f/k/a Relational Funding Corporation, and d/b/a Relational Technology Solutions	**1340**	6/15/2009	Name: **Mark G. Ledwin** Law Firm: **Wilson, Fisher, Moskowitz, Edelman & Dicker LLP** Title: eMail: mark.ledwin@wilsonelser.com 3 Gannett Drive, White Plains NY 10604 (USA) **914-872-7148**
Reliable Carriers, Inc.	**944**	6/12/2009	Name: **James E. DeLine/P. Warren Hunt** Law Firm: **Kerr, Russell and Weber, PLC** Title: eMail: 500 Woodward Avenue, Suite 2500, Detroit MI 48226 (USA) **313-961-0200**
Remy International, Inc., Remy Inc., and Remy Power Products, LLC	**831**	6/12/2009	Name: **Todd A. Burgess** Law Firm: **Greenberg Traurig, LLP** Title: eMail: burgesst@gtlaw.com 2375 E. Camelback Rd., Suite 700, Phoenix AZ 85016 (USA) **602-445-8563**
Rhythm North America Corporation and THK Manufacturing of America, Inc.	**1153**	6/15/2009	Name: **Michael C. Hammer** Law Firm: **Dickinson Wright PLLC** Title: eMail: jplemmons@dickinsonwright.com 500 Woodward Ave., Suite 4000, Detroit MI 48226 (USA) **313-223-3500**
Ridgeview Industries, Inc.	**1849**	6/18/2009	Name: **Thomas W. Schouten** Law Firm: **Dunn, Schouten & Snoap, P.C.** Title: eMail: tschouten@dunnsslaw.com 2745 DeHoop Ave. SW, Wyoming MI 49509 (USA) **616-538-6380**
Rima Manufacturing Company	**897**	6/12/2009	Name: **Patrick J. Kukla** Law Firm: **Carson Fischer, P.L.C.** Title: eMail: 4111 Andover Road, West - 2nd Floor, Bloomfield Hills MI 48302 (USA) **248.644.4840**
RMT Acquisition Company, LLC	**1305**	6/15/2009	Name: **James E. DeLine** Law Firm: **kerr, Russell and Weber, PLC** Title: eMail: 500 Woodward Ave., Suite 2500, Detroit MI 48226 (USA) **313.961.0200**
Rubber Enterprises, Inc.	**892**	6/12/2009	Name: **Joel D. Applebaum** Law Firm: **Clark Hill, PLC** Title: eMail: japplebaum@clarkhill.com 151 S. Old Woodward Avenue, Suite 200, Birmingham MI 48009 (USA) **313.965.8579**
Rush Trucking Corporation	**931**	6/12/2009	Name: **Patrick J. Kukla** Law Firm: **Clark Hill, PLC** Title: eMail: CARSON FISCHER, PLC; 4111 Andover Road, West 2nd Floor, Bloomfield Hills MI 48302 (USA) **248-644-4840**
Ryder Integrated Logistics Inc.	**1140**	6/15/2009	Name: **Stephen J. Shimshak** Law Firm: **Paul, Weiss, Rifkind, Wharton & Garrison LLP** Title: eMail: 1285 Avenue of the Americas, New York NY 10019-6064 (USA) **212-373-3000**
Sabo Industria e Comercio de Autopecas Ltda	**1238**	6/15/2009	Name: **Michael C. Hammer** Law Firm: **Dickinson Wright PLLC** Title: eMail: jplemmons@dickinsonwright.com 500 Woodward Ave., Suite 4000, Detroit MI 48226 (USA) **313-223-3500**
Sabo USA, Inc.	**1223**	6/15/2009	Name: **Michael C. Hammer** Law Firm: **Dickinson Wright PLLC** Title: eMail: jplemmons@dickinsonwright.com 500 Woodward Ave., Suite 4000, Detroit MI 48226 (USA) **313-223-3500**

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Saginaw LLc and Brazing Concepts LLC	**1313**	6/15/2009	Name: **James N. Lawlor** Law Firm: **Wollmuth Maher & Deutsch LLP** Title: eMail: jlawlor@wmd-law.com One Gateway Center, Ninth Floor, Newark NJ 07102 (USA) **973.733.9200**
Sanden International (USA), Inc.	**1255**	6/15/2009	Name: **Philip C. Dublin** Law Firm: **Akin Gump Strauss Hauer & Feld LLP** Title: eMail: One Bryant Park, New York NY 10036 (USA) **212-872-1000**
Sandler & Travis Trade Advisory Services, Inc.	**857**	6/12/2009	Name: **Paul R. Hage** Law Firm: **Akin Gump Strauss Hauer & Feld LLP** Title: eMail: phage@jaffelaw.com JAFFE RAITT HEUER & WEISS, P.C., 27777 Franklin Road, Suite 2500, Southfield MI 48034 (USA) **248-351-3000**
Sankyo Oilless Industry (USA) Corp.	**1826**	6/18/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**
SAP America, Inc.	**2333**	6/23/2009	Name: **Kenneth J. Schweiker, Jr.** Law Firm: **Brown & Connery, LLP** Title: eMail: kschweiker@brownconnery.com 6 North Broad St. Suite 100, Woodbury NJ 08096 (USA) **856-812-8900**
SAS Institute Inc.	**927**	6/12/2009	Name: **Eric T. Moser** Law Firm: **K&L Gates LLP** Title: eMail: 599 Lexington Avenue, New York NY 10022 (USA) **212-536-3900**
SCG Capital Corporation	**739**	6/12/2009	Name: **Gerard DiConza** Law Firm: **DiConza Law, PC** Title: eMail: gdiconza@dlawpc.com 630 Third Avenue, 7th Floor, New York NY 10017 (USA) **212-682-4940**
Schaeffler Group Entities	**881**	6/15/2009	Name: **John Bicks** Law Firm: **Sonnenschein Nath Rosenthal LLP** Title: eMail: 1221 Avenue of the Americas, New York NY 10020 **212.768.6700**
Schenck Rotec Corporation	**810**	6/12/2009	Name: **Smith, Gambrell & Russell, LLP - William M. Barron** Law Firm: **Sonnenschein Nath Rosenthal LLP** Title: eMail: 250 Park Avenue, New York NY 10177 (USA) **212.907.9700**
Schneider National, Inc, Schneider National Carriers, Inc., and Schneider Logistics, Inc.	**1237**	6/15/2009	Name: **Mark Minuti** Law Firm: **Saul Ewing LLP** Title: eMail: 222 Delaware Avenue, Suite1200; P.O. Box 1266, Wilmington DE 19899 (USA) **302-421-6840**
Screenvision Cinema Network LLC	**1369**	6/15/2009	Name: **Salvatore A. Barbatano** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center; 500 Woodward Ave. Suite 2700, Detroit MI 48226-3489 (USA) **313-234-7100**
Scripps Networks, LLC	**1388**	6/15/2009	Name: **Wendy J. Gibson** Law Firm: **Baker & Hostetler LLP** Title: eMail: wgibson@bakerlaw.com 3200 National City Center; 1900 E. 9th St., Cleveland OH 44114 (USA) **216-621-0200**
Security Packaging, Inc.	**1387**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**

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Severn Trent Del Inc.	**1007**	6/11/2009	Name: **Dan Elias** Law Firm: **Elias Group, LLP** Title: eMail: delias@eliasgroup.com 411 Theodore Fremd Avenue, Suite 102, Rye NY 10580 (USA) **914-925-0000**
Severstal North America, Inc.	**899**	6/12/2009	Name: **Deborah L. Fish** Law Firm: **Allard & Fish, P.C.** Title: eMail: 2600 Buhl Building, 535 Griswold, Detroit MI 48226 (USA) **313.961.6141**
Shambaugh & Son, L.P.	**1404**	6/15/2009	Name: **John R. Burns** Law Firm: **Baker & Daniels LLP** Title: eMail: john.burns@bakerd.com 111 East Wayne St. Suite 800, Fort Wayne IN 46802 (USA) **260-424-8000**
Shanghai Automotive Industry Corporation (Group)	**879**	6/12/2009	Name: **Shmuel Vasser** Law Firm: **Dechert LLP** Title: eMail: shmuel.vasser@dechert.com 1095 Avenue of the Americas , New York NY 10036-6797 (USA) **212-698-3500**
Shiloh Industries, Inc.	**1349**	6/15/2009	Name: **Richard J. Bernard** Law Firm: **Baker & Hostetler LLP** Title: eMail: rbernard@bakerlaw.com 45 Rockefeller Plaza, New York NY 10111 (USA) **212.589.4200**
Shreveport Red River Utilities, LLC	**1051**	6/15/2009	Name: **Thomas R. Slome** Law Firm: **Meyer, Suozzi, English & Klein, P.C.** Title: eMail: 990 Stewart Avenue, Suite 300, Garden City NY 11530-9194 (USA) **516.741.6565**
Siemens Enterprise Communications, Inc.	**1124**	6/15/2009	Name: **Karel S. Karpe** Law Firm: **White and Williams, LLP** Title: Esquire eMail: One Penn Plaza, Suite 4110, New York NY 10119 (USA) **212-631-4421**
Siemens Product Lifecycle Management Software, Inc.	**1068**	6/15/2009	Name: **Karel S. Karpe** Law Firm: **White and Williams, LLP** Title: eMail: karpek@whiteandwilliams.com One Penn Plaza, Suite 4110, New York NY 10119 (USA) **212.631.4421**
Sika Corporation	**1088**	6/15/2009	Name: **Sam Della Fera, Jr.** Law Firm: **Trenk, DiPasquale, Webster, Della Fera & Sodono, PC** Title: eMail: 347 Mt. Pleasant Avenue, Suite 300, West Orange NJ 07052 (USA) **973-243-8600**
SKF USA, Inc.	**965**	6/12/2009	Name: **James C. Carignan** Law Firm: **Pepper Hamilton LLP** Title: eMail: Hercules Plaza, Suite 5100; 1313 N. Market Street; P.O. Box 1709, Wilmington DE 19899-1709 (USA) **302-777-6500**
SKF USA, Inc.	**965**	6/15/2009	Name: **Nina M. Varughese** Law Firm: **Pepper Hamilton LLP** Title: eMail: 3000 Two Logan Square, 18th and Arch Streets, Philadelphia PA 19103-2799 **215.981.4000**
Soroc Acquisiton Corp.	**708**	6/12/2009	Name: **Robert D. Gordon** Law Firm: **Clark Hill PLC** Title: eMail: 151 S. Old Woodward Avenue, Suite 200, Birmingham MI 48009 (USA) **313.965.8572**
Spartan Light Metal Products, Inc.	**1301**	6/15/2009	Name: **Richard M. Meth** Law Firm: **Day Pitney** Title: eMail: 7 Times Square, New York NY 10036-7311 (USA) **973.966.6300**

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Sprint Nextel Corporation	**1354**	6/15/2009	Name: **Shawn R. Fox** Law Firm: **McGuirewoods, LLP** Title: eMail: 1345 Avenue of the Americas, Seventh Floor, New York NY 10105 (USA) **212.548.2100**
SPS Technologies, LLC, SPS Technologies Waterford Company, NSS Technologies, Inc., and AVK Division	**757**	6/12/2009	Name: **Gordon J. Toering** Law Firm: **Warner Norcross & Judd LLP** Title: eMail: gtoering@wnj.com 900 Fifth Third Center; 111 Lyon Street, NW, Grand Rapids MI 49503 (USA) **616-752-2185**
SPX Corporation	**901**	6/12/2009	Name: **Joel D. Applebaum** Law Firm: **Clark Hill PLC** Title: eMail: japplebaum@clarkhill.com 151 S. Old Woodward Avenue, Suite 200, Birmingham MI 48009 (USA) **313.965.8579**
SPX Filtran LLC, formerly known as Filtran Division of SPX Corporation	**905**	6/12/2009	Name: **Joel D. Applebaum** Law Firm: **Clark Hill PLC** Title: eMail: japplebaum@clarkhill.com 151 S. Old Woodward Avenue, Suite 200, Birmingham MI 48009 (USA) **313-965-8579**
Standard Electric Company	**1011**	6/15/2009	Name: **John Wisniewski** Law Firm: Title: General Sales Manager eMail: 2650 Trautner Drive; P.O. Box 5289, Saginaw MI 48603-0289 (USA) **989-497-2100**
StarSource Management Services	**748**	6/12/2009	Name: **Fred Stevens** Law Firm: **Fox Rothschild LLP** Title: eMail: 100 Park Avenue, 15th Floor10017, New York NY 10017 (USA) **212.878.7900**
Stoneridge, Inc._Stoneridge Pollak, Ltd._Hi-Stat Mfg.	**1355**	6/15/2009	Name: **Richard J. Bernard** Law Firm: **Baker & Hostetler LLP** Title: eMail: 45 Rockefeller Plaza, New York NY 10111 (USA) **212.589.4200**
Strattec Power Access LLC	**1338**	6/15/2009	Name: **Jennifer A. Christian** Law Firm: **Kelley Drye & Warren** Title: eMail: 101 Park Avenue, New York NY 10178 (USA) **212.808.7800**
Strattec Security Corporation	**1341**	6/15/2009	Name: **Jennifer A. Christian** Law Firm: **Kelley Drye & Warren LLP** Title: eMail: 101 Park Avenue, New York NY 10178 (USA) **212-808-7800**
Suez/VWNA/DEGS of Lansing, LLC	**1044**	6/15/2009	Name: **Jil Mazer-Marino** Law Firm: **Meyer, Suozzi, English & Klein, PC** Title: eMail: 990 Stewart Avenue, Suite 300; P.O. Box 9194, Garden City NY 11530-9194 (USA) **516-741-6565**
Sumitomo Electric Wiring Systems, Inc.	**1168**	6/15/2009	Name: **Michael C. Hammer** Law Firm: **Dickinson Wright PLLC** Title: eMail: jplemmons@dickinsonwright.com 500 Woodward Ave., Suite 4000, Detroit MI 48226 (USA) **313-223-3500**
Summit Polymers, Inc.	**1324**	6/15/2009	Name: **Mary Kay Shaver** Law Firm: **Varnum LLP** Title: eMail: Bridgewater Place, Grand Rapids MI 49501-0352 (USA) **616.336.6000**
Summit Polymers, Inc.	**1327**	6/15/2009	Name: **Mary Kay Shavers** Law Firm: **Varnum LLP** Title: eMail: Bridgewater Place, Grand Rapids MI 49501-0352 **616.336.6000**

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Sun Microsystems, Inc. and Sun Microsystems Global Financial Services, LLC	**1107**	6/12/2009	Name: **Karel S. Karpe** Law Firm: **White and Williams, LLP** Title: Esquire eMail: One Penn Plaza, Suite 4110, New York NY 10119 (USA) **212-631-4421**
Superior Acquistion, Inc.	**697**	6/12/2009	Name: **David T. Lin** Law Firm: **Seyburn, Kahn, Ginn, Bess, & Serlin, P.C.** Title: eMail: 2000 Town Center, Suite 1500, Southfield MI 48075-1195 (USA) **248-353-7620**
Superior Industries International, Inc.	**909**	6/12/2009	Name: **James M. Sullivan** Law Firm: **Arent Fox LLP** Title: eMail: 1675 Broadway , New York NY 10019 (USA) **212-484-3900**
Superior Industries International, Inc.	**1111**	6/15/2009	Name: **James M. Sullivan** Law Firm: **Arent Fox, LLP** Title: Esquire eMail: 1675 Broadway, New York NY 10019 (USA) **212-484-3900**
SUPERVALU Inc.	**1857**	6/18/2009	Name: **Eric G. Waxmann III** Law Firm: **Westerman Ball Ederer Miller & Sharfstein, LLP** Title: eMail: 170 Old Country Road, Suite 400, Mineola NY 11501 (USA) **516-622-9200**
Supina Machine Company, Inc.	**1748**	6/15/2009	Name: **Andrew M. Corsini** Law Firm: **Supina Machine Company, Inc.** Title: President and CEO eMail: andrew.corsini@supfina.com 181 Circuit Dr., North Kingstown RI 02852 (USA) **401-294-1702**
Swagelok Company	**699**	6/12/2009	Name: **Stephen M. Gross** Law Firm: **Supina Machine Company, Inc.** Title: eMail: sgross@mcdonaldhopkins.com McDonald Hopkins PLC, 39533 Woodward Ave., Ste. 318, Bloomfield Hills MI 48304 (USA) **248-646-5070**
Tata America International Corporation	**1148**	6/15/2009	Name: **Benjamin D. Feder** Law Firm: **Kelley Drye & Warren LLP** Title: eMail: 101 Park Avenue, New York NY 10178 (USA) **212-808-7800**
Techform Products Limited	**1821**	6/18/2009	Name: **Marc M. Bakst** Law Firm: **Bodman LLP** Title: eMail: mbakst@bodmanllp.com 1901 St. Antoine St. 6th Floor at Ford Field, Detroit MI 48026 (USA) **313-393-7530**
Technology Investment Partners, LLC	**1960**	6/19/2009	Name: **John A. Simon** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center; 500 Woodward Avenue Suite 2700, Detroit MI 48226-3489 (USA) **313-234-7100**
Tecta America Corp.	**1097**	6/15/2009	Name: **Christopher Combest** Law Firm: **Quarles & Brady LLP** Title: eMail: Christopher.Combest@quarles.com 300 North LaSalle Street, Suite 4000, Chicago IL 60654 (USA) **312-715-5000**
Tenneco Inc. and certain of its affiliates	**1094**	6/15/2009	Name: **Michael T. Conway** Law Firm: **LeClair Ryan** Title: eMail: 830 Third Avenue, Fifth Floor, New York NY 10022 (USA) **212-430-8063**
Textron	**1457**	6/15/2009	Name: **Scott T. Seabolt** Law Firm: **Foley & Lardner, LLP** Title: eMail: One Detroit Center, 500 Woodward Avenue, Suite 2700, Detroit MI 48226 (USA) **313.234.7100**

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Textron Inc.	**1457**	6/15/2009	Name: **Frank W. DiCastri** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center, 500 Woodward Ave. Suite 2700, Detroit MI 48226 (USA) **313-234-7100**
TGI Direct, Inc.	**1210**	6/15/2009	Name: **Michael C. Hammer** Law Firm: **Dickinson Wright PLLC** Title: eMail: jplemmons@dickinsonwright.com 500 Woodward Ave., Suite 4000, Detroit MI 48226 (USA) **313-223-3500**
The Bank of New York Mellon	**2070**	6/19/2009	Name: **Edward P. Zujkowski** Law Firm: **Emmet, Marvin & Martin, LLP** Title: eMail: ezujkowski@emmetmarvin.com 120 Broadway, New York NY 10271 (USA) **212-238-3000**
The Barnes Group Inc.	**2358**	6/24/2009	Name: **Carol A. Felicetta** Law Firm: **Barnes Group Inc.** Title: eMail: cfelicetta@reidandriege.com 195 Church Street, New Haven CT 061510 (USA) **203-777-8008**
The Barnes Group, Inc. and Seeger-Orbis GmbH & Co. OHG	**1096**	6/15/2009	Name: **Carol A. Felicetta** Law Firm: **Reid and Riege, PC** Title: eMail: cfelicetta@reidandriege.com 195 Church Street, New Haven CT 06510 (USA) **203-777-8008**
The Barnes Group, Inc. and Seeger-Orbis GmbH & Co. OHG	**1096**	6/15/2009	Name: **Carol A. Felicetta** Law Firm: **Reid and Riege, PC** Title: eMail: cfelicetta@reidandriege.com 195 Church Street, New Haven CT 06510 (USA) **203-777-8008**
The Cobalt Group, Inc.	**1307**	6/15/2009	Name: **David B. Levant** Law Firm: **Stoel Rives LLP** Title: eMail: 600 University Street, Suite 3600, Seattle WA 98101 (USA) **206.624.0900**
The Detroit Edison Company and Michigan Consolidated Gas Company	**1185**	6/15/2009	Name: **Jil Mazer-Marino** Law Firm: **Meyer, Suozzi, English & Klein, PC** Title: eMail: 900 Stewart Avenue, Suite 300; P.O. Box 9194, Garden City NY 11530-9194 (USA) **516-741-6565**
The Environmental Quality Co.	**817**	6/12/2009	Name: **Robert D. Gordon** Law Firm: **Meyer, Suozzi, English & Klein, PC** Title: eMail: rgordon@clarkhill.com Clark Hill, PLC - 151 S. Old Woodward Avenue, Suite 200, Birmingham MI 48009 (USA) **313.965.8572**
The Goodyear Tire & Rubber Company	**1410**	6/15/2009	Name: **Peter A. Zisser** Law Firm: **Squire, Sanders & Dempsey L.L.P.** Title: eMail: 1095 Avenue of the Americas, 31st Floor, New York NY 10036 (USA) **212-872-9800**
The Interpublic Group of Companies, Inc.	**1167**	6/15/2009	Name: **Sean A. O'Neal** Law Firm: **Cleary Gottlieb Steen & Hamilton LLP** Title: eMail: One Liberty Plaza, New York NY 10006 (USA) **212-225-2000**
The Lansing Board of Water & Light	**874**	6/12/2009	Name: **Donald J. Hutchinson** Law Firm: **Miller, Canfield, Paddlock and Stone, P.L.C.** Title: eMail: hutchinson@millercanfield.com 150 West Jefferson Aveune Suite 2500, Detroit MI 48226 (USA) **313-963-6420**
The MathWorks, Inc.	**1091**	6/12/2009	Name: **Thomas M. Serpa** Law Firm: Title: Vice President and General Counsel eMail: tserpa@mathworks.com 3 Apple Hill Drive, Natick MA 01760 (USA)

The Regents of the University of Michigan	**1628**	6/15/2009	Name: **Donald J. Hutchinson** Law Firm: **Miller, Canfield, Paddock and Stone, P.L.C.** Title: eMail: hutchinson@millercanfield.com 150 West Jefferson Avenue, Suite 2500, Detroit MI 48226 (USA) **313-963-6420**
The Reynolds and Reynolds Company	**1027**	6/15/2009	Name: **Martin Eisenberg** Law Firm: **Law Offices of Martin Eisenberg** Title: eMail: me@martineisenberglaw.com Suite 1000, 50 Main Street, White Plains NY 10606 (USA) **914-682-2044**
The Royal Bank of Scotland plc, ABN AMRO Bank N.V. and RBS Citizens N.A.	**1302**	6/15/2009	Name: **Andrew Brozman** Law Firm: **Clifford Chance US LLP** Title: eMail: andrew.brozman@cliffordchance.com 31 W. 52nd Street, New York NY 10019-6131 (USA) **212-878-8000**
The Scharine Group, Inc.	**1220**	6/15/2009	Name: **Phillip M. Wacker** Law Firm: Title: General Manager eMail: N4213 Scharine Road, Whitewater WI 53190 (USA) **608-883-2880**
The Timken Company	**1104**	6/15/2009	Name: **James M. Sullivan** Law Firm: **Arent Fox, LLP** Title: Esquire eMail: 1675 Broadway, New York NY 10019 (USA) **212-484-3900**
The Timken Company	**1389**	6/15/2009	Name: **James M. Sullivan** Law Firm: **Arent Fox LLP** Title: eMail: 1675 Broadway, New York NY 10019 (USA) **212-484-3900**
The Wayne County Treasurer, The Oakland County Treasurer, and The City of Detroit	**971**	6/15/2009	Name: **Richardo I. Kilpatrick** Law Firm: **Kilpatrick and Associates, PC** Title: eMail: ecf@kaalaw.com 903 N. Opdyke Road, Suite C, Auburn Hills MI 48326 (USA) **248-377-0700**
The Wayne County Treasurer, The Oakland County Treasurer, and the City of Detroit	**971**	6/15/2009	Name: **Richardo I. Kilpatrick** Law Firm: **Kilpatrick and Associates, P.C.** Title: eMail: ecf@kaalaw.com 903 N. Opdyke Road, Suite C, Auburn Hills MI 48326 (USA) **248-377-0700**
The Wayne County Treasurer, The Oakland County Treasurer, and the City of Detroit	**971**	6/15/2009	Name: **Richardo I. Kilpatrick** Law Firm: **Kilpatrick and Associates, PC** Title: eMail: ecf@kaalaw.com 903 N. Opdyke Road, Suite C, Auburn Hills MI 48326 (USA) **248-377-0700**
Thread Information Design, Inc.	**1021**	6/12/2009	Name: **Gerald L. Mills** Law Firm: Title: eMail: no information provided
ThyssenKrupp Steel North America, Inc., TWB Company LLC, ThyssenKrupp Crankshaft Co., LLC, ThyssenKr	**1442**	6/15/2009	Name: **Robert Sidorsky, a professional corporation** Law Firm: **Butzel Long** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**
Timco, LLC	**967**	6/12/2009	Name: **Sheldon S. Toll** Law Firm: **Sheldon S. Toll PLLC** Title: eMail: lawtoll@comcast.net 2000 Town Center, Suite 2100, Southfield MI 48075 (USA) **248-351-5480**
TitanX Engine Cooling, Inc.	**860**	6/12/2009	Name: **Anglea Z. Miller** Law Firm: **Sheldon S. Toll PLLC** Title: eMail: PHILLIPS LYTLE LLP; One HSBC Center, Suite 3400, Buffalo NY 14203-2887 (USA) **716-847-8400**

Exhibit: Logged Supplier Objections

TK Holdings, Inc. and all other legal entities associated with ultimate DUNS number 690545165	**1438**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**
TMI Custom Air Systems, Inc. and certain of its affiliates and subsidiaries	**1465**	6/15/2009	Name: **Jennifer L. Saffer** Law Firm: **J.L. Saffer, P.C.** Title: eMail: 20 Vesey Street, 7th Floor, New York NY 10007 (USA) **212-608-6968**
Toledo Molding & Die, Inc.	**2369**	6/24/2009	Name: **Mark H. Shapiro** Law Firm: **Steinberg Shapiro & Clark** Title: eMail: shapiro@steinbergshapiro.com 24901 Northwestern Hwy. Suite 611, Southfield MI 48075 (USA) **248-352-4700**
Toledo Molding & Die, Inc.	**2326**	6/23/2009	Name: **Mark H. Shapiro** Law Firm: **Steinberg Shapiro & Clark** Title: eMail: shapiro@steinbergshapiro.com 24901 Northwestern Highway, Suite 611, Southfield MI 48075 (USA) **248-352-4700**
Toro Energy of Indiana, LLC ("Toro Indiana") and Toro Energy of Michigan, LLC ("Toro Michigan")	**2160**	6/22/2009	Name: **Angela Z. Miller** Law Firm: **Phillips Lytle LLP** Title: eMail: One HSBC Center Suite 3400, Buffalo NY 14203-2887 (USA) **716-847-8400**
Toyoda Gosei North America Corporation	**1418**	6/15/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Ave. 22nd Floor, New York NY 10017 (USA) **212-818-1110**
Toyota Motor Corporation	**2045**	6/19/2009	Name: **John A. Simon** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center; 500 Woodward Ave. Suite 2700, Detroit MI 48226-3489 (USA) **313-234-7100**
Toyota Motor Sales, USA	**863**	6/12/2009	Name: **Wendy S. Walker** Law Firm: **Morgan Lewis & Bockius LLP** Title: eMail: wwalker@morganlewis.com 101 Park Avenue, New York NY 10178 (USA) **212-309-6000**
TPI Incorporated and certain of its subsidiaries	**1632**	6/16/2009	Name: **Kenneth S. Ziman** Law Firm: **Simpson Thacher & Bartlett LLP** Title: eMail: kziman@stblaw.com 425 Lexington Avenue, New York NY 10017 (USA) **212-455-2000**
Traffice Marketplaces,Inc.	**1995**	6/18/2009	Name: **Robert Sidorsky** Law Firm: **Butzel Long, a professional corporation** Title: eMail: sidorsky@butzel.com 380 Madison Avenue 22nd Floor, New York NY 10017 (USA) **212-818-1110**
Trico Products Corporation	**1392**	6/15/2009	Name: **Thomas R. Fawkes** Law Firm: **Freeborn & Peters LLP** Title: eMail: 311 South Wacker Dr. Suite 3000, Chicago IL 60606 (USA) **312-360-6000**
TRW Automotive U.S., LLC	**1006**	6/15/2009	Name: **G. Christopher Meyer** Law Firm: **Squire, Sanders & Dempsey LLP** Title: eMail: cmeyer@ssd.com 4900 Key Tower, 127 Public Square, Cleveland OH 44114-1304 (USA) **216-479-8500**
TT electronics plc, on behalf of subsidiaries AB Automotive Electronics Ltd., AB Electronic Products	**1930**	6/19/2009	Name: **Louis A. Curcio** Law Firm: **Sonnenschein Nath & Rosenthal LLP** Title: eMail: 1221 Avenue of the Americas, New York NY 10020-1089 (USA) **212-768-6700**

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Turchan Technologies Group, Inc	**DDN0001**	6/12/2009	Name: **Jahr Turchan** Law Firm: **Turchan Technologies Group, Inc** Title: Vice President eMail: jahr@turchan.com 12825 Ford Road, Dearborn MI 48126 (USA) **313-581-0043**
TV Minority Company Inc.	**1122**	6/11/2009	Name: **Stephen B. Foley** Law Firm: **Stephen B. Foley, P.C.** Title: eMail: sfoley@sbfpc.com 9900 Pelham Road, Taylor MI 48180 (USA) **31-295-2590**
Ultralife Corporation	**1019**	6/12/2009	Name: **Ingrid Schumann Palermo** Law Firm: **Harter Secrest & Emery LLP** Title: eMail: 1600 Bausch & Lomb Place , Rochester NY 14604 (USA) **585-232-6500**
Unico Inc.	**1331**	6/15/2009	Name: **James S. Carr** Law Firm: **Kelley Drye & Warren LLP** Title: eMail: 101 Park Avenue, New York NY 10178 (USA) **212.808.7800**
Union Pacific Railroad Company	**1014**	6/15/2009	Name: **Michael St. Patrick Baxter** Law Firm: **Covington & Burling LLP** Title: eMail: mbaxter@cov.com 1201 Pennsylvania Avenue, NW, Washington DC 20004-2401 (USA) **202-662-6000**
Union Pacific Railroad Company	**1062**	6/15/2009	Name: **Michael St. Patrick Baxter** Law Firm: **Covington & Burling LLP** Title: eMail: 1201 Pennsylvania Avenue, N.W., Washington D.C. 20004-2401 **202.662.6000**
Unique Fabricating, Inc.	**1687**	6/12/2009	Name: **Daniel J. Bernard** Law Firm: **Vercruysee Murray & Calzone PC** Title: eMail: dbernard@vmclaw.com 31780 Telegraph Road, Suite 200, Bingham Farms MI 48028 (USA) **248-540-8019**
Unisia Mexicana S.A. DE C.V.	**1147**	6/15/2009	Name: **Paul J. Ricotta** Law Firm: **Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC** Title: eMail: One Financial Center, Boston MA 02111 (USA) **617-542-6000**
United Parcel Service, Inc.	**2007**	6/19/2009	Name: **Faye B. Feinstein** Law Firm: **Quarles & Brady LLP** Title: eMail: 300 N. LaSalle Street Suite 4000, Chicago IL 60654 (USA)
United REMC	**774**	6/12/2009	Name: **James P. Moloy** Law Firm: **Dann Pecar Newman & Kleiman, P.C.** Title: eMail: One American Square, Suite 2300, Indianapolis IN 46282 (USA) **317-632-3232**
United States Steel Corporation	**838**	6/12/2009	Name: **Mark D. Silverschotz** Law Firm: **Reed Smith LLP** Title: eMail: 599 Lexington Avenue, 22nd Floor, New York NY 10022 **212.521.5400**
University of Michigan	**710**	6/12/2009	Name: **Donald J. Hutchinson** Law Firm: **Miller, Canfield, Paddock and Stone, PLC** Title: eMail: hutchinson@millercanfield.com 150 West Jefferson Avenue, Suite 2500, Detroit MI 48226 (USA) **313.963.6420**
US Farathane Corporation	**994**	6/15/2009	Name: **Stephen M. Gross** Law Firm: **McDonald Hopkins PLC** Title: eMail: sgross@mcdonaldhopkins.com 39533 Woodward Ave., Ste 318, Bloomfield Hills MI 48304 (USA) **248-646-5070**

Exhibit: Logged Supplier Objections

USF Holland, Inc.	**789**	6/12/2009	Name: **Paul Traub** Law Firm: **McDonald Hopkins PLC** Title: eMail: PTraub@ebglaw.com Epstein Becker Green P.C., 250 Park Avenue, New York NY 10177-1211 (USA) **212-351-4500**
UTi United States, Inc.	**2359**	6/24/2009	Name: **Walter Benzija** Law Firm: **Halperin Battaglia Raicht, LLP** Title: eMail: wbenzjia@halperinlaw.net 555 Madison Avenue-9th Floor, New York NY 10022 (USA) **212-765-9100**
V2Soft Inc.	**735**	6/12/2009	Name: **Joel D. Applebaum** Law Firm: **CLARK HILL PLC** Title: eMail: japplebaum@clarkhill.com 151 S. Old Woodward Avenue, Suite 200, Birmingham MI 48009 (USA) **313-965-8579**
Valeo sylvania LLC	**1675**	6/17/2009	Name: **Deborah Kovsky-Apap** Law Firm: **Pepper Hamilton LLP** Title: eMail: kovskyd@pepperlaw.com 100 Renaissance Center Suite 360, Detroit MI 48243 (USA) **313-259-7110**
Valeo, Inc.	**1262**	6/15/2009	Name: **Sean A. O'Neal** Law Firm: Title: eMail: One Liberty Plaza, New York NY 10006 **212.225.2000**
Vector CANtech, Inc. and Vector Informatik GmbH	**720**	6/12/2009	Name: **Donald J. Hutchinson** Law Firm: **Miller, Canfield, Paddock and Stone, PLC** Title: eMail: 150 West Jefferson Avenue, Suite 2500, Detroit MI 48226 (USA) **313.496.7536**
Veolia Water Partners	**1061**	6/15/2009	Name: **Jil Mazer-Marino** Law Firm: **Meyer, Suozzi, English & Klein, P.C.** Title: eMail: 990 Stewart Avenue, Suite 300, Garden City NY 11530-9194 (USA) **516.741.6565**
Verizon Communications Inc.	**985**	6/15/2009	Name: **Darryl S. Laddin** Law Firm: **Arnall Golden Gregory LLP** Title: eMail: 171 17th Street NW, Suite 2100, Atlanta GA 30363-1031 (USA) **404-837-8120**
Verizon Communications Inc.	**2009**	6/19/2009	Name: **Darryl S. Laddin** Law Firm: **Arnall Golden Gregory LLP** Title: eMail: 171 17th Street NW, Suite 2100, Atlanta GA 30363-1031 (USA) **404-873-8120**
Veyance Technologies, Inc.	**1358**	6/15/2009	Name: **Richard J. Bernard** Law Firm: **Baker & Hostetler LLP** Title: eMail: 45 Rockefeller Plaza, New York NY 10111 (USA) **212.589.4200**
Visiocorp USA, Inc., Visiocorp Mexico, S.A. de C.V., and Visiocorp P.L.C.	**1741**	6/17/2009	Name: **Salvatore A. Barbatano** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center; 500 Woodward Avenue Suite 2700, Detroit MI 48226-3489 (USA) **313-234-7100**
Visiocorp USA, Inc._Visiocorp Mexico S.A. de C.V._Visiocorp PLC	**1342**	6/15/2009	Name: **Salvatore A. Barbatano** Law Firm: **Foley & Lardner LLP** Title: eMail: One Detroit Center, 500 Woodward Avenue, Suite 2700, Detroit MI 48226-3489 (USA) **313.234.7100**
Visteon Corporation	**1174**	6/15/2009	Name: **Michael C. Hammer** Law Firm: **Dickinson Wright PLLC** Title: eMail: mhammer@dickinsonwright.com 500 Woodward Ave., Suite 4000, Detroit MI 48226 (USA) **734-623-7075**

Voith AG and Premier Manufacturing Support Services, Inc.	**743**	6/12/2009	Name: **Martin Eisenberg** Law Firm: **Law Offices of Martin Eisenberg** Title: eMail: me@martineisenberglaw.com Suite 1000, 50 Main Street, White Plains NY 10606 (USA) **914-682-2044**
Voith AG and Premier Manufacturing Support Services, Inc.	**743**	6/12/2009	Name: **Martin Eisenberg** Law Firm: **Law Offices of Martin Eisenberg** Title: eMail: me@martineisenberglaw.com Suite 1000, 50 Main Street, White Plains NY 10606 (USA) **914-682-2044**
WABCO Holdings, Inc.	**1180**	6/15/2009	Name: **Ann Marie Uetz** Law Firm: **Foley & Lardner LLP** Title: eMail: 500 Woodward Avenue, suite 2700, Detroit MI 48226-3489 (USA) **313-234-7100**
Wahler Automotive Systems, Inc., Whaler Metalurgica Ltda, and Gustav Wahler GmbH	**1155**	6/15/2009	Name: **Colin T. Drake** Law Firm: **Bodman LLP** Title: eMail: cdrake@bodmanllp.com 6th Floor at Ford Field, 1901 St. Antoine Street, Detroit MI 48026 (USA) **313-393-7585**
Webasto Roof Systems, Inc.	**1127**	6/15/2009	Name: **Frank W. DiCastri** Law Firm: **Foley & Lardner LLP** Title: eMail: 777 East Wisconsin Avenue, Milwaukee WI 53202 (USA) **414-271-2400**
Western Flyer Express, Inc.	**1282**	6/15/2009	Name: **Leslie S. Barr** Law Firm: **Windels, Marx, Lane & Mittendorf, LLP** Title: eMail: lbarr@windelsmarx.com 156 West 56th Street, New York NY 10019 (USA) **212-232-1000**
WhereNet Corp.	**2155**	6/22/2009	Name: **Merritt A. Pardini** Law Firm: **Katten Muchin Rosenman LLP** Title: eMail: 575 Madison Avenue, New York NY 10022-2585 (USA) **212-940-8800**
Willette aka Allied Digital Technologies	**1328**	6/15/2009	Name: **Pillip Bohl** Law Firm: **Gray Plant Mooty Mooty & Bennett P.A.** Title: eMail: phillip.bohl@gpmlaw.com 500 IDS Center, 80 South 8th Street, Minneapolis MN 55402 (USA) **612.632.3019**
Windsor Mold, Inc. and Windsor Mold USA Inc.	**946**	6/12/2009	Name: **P. Warren Hunt** Law Firm: **Kerr, Russell and Weber, PLC** Title: eMail: 500 Woodward Avenue, Suite 2500, Detroit MI 48226 (USA) **313-961-0200**
WITTE-Velbert GmbH & Co. KG	**1186**	6/15/2009	Name: **Mary Kay Shaver** Law Firm: **Varnum LLP** Title: eMail: mkshaver@varnumlaw.com Bridgewater Place, P.O. Box 352, Grand Rapids MI 49501-0352 (USA) **616-336-6000**
Worthington Industries, Inc.	**999**	6/12/2009	Name: **Andrea Fischer** Law Firm: **Olshan Grundman Frome Rosenzweig & Wolosky LLP** Title: eMail: Park Avenue Tower, 65 East 55th Street, New York NY 10022 (USA) **212-451-2300**
Xerox Capital Services, LLC as servicing agent for Xerox Corporation	**691**	6/11/2009	Name: **Stephen H. Gross** Law Firm: **Hodgson Russ LLP** Title: eMail: sgross@hodgsonruss.com 60 East 42nd Street, 37th Floor, New York NY 10165-0150 (USA) **212-661-3535**
Yahoo! Inc.	**1056**	6/12/2009	Name: **Karel S. Karpe** Law Firm: **White and Williams, LLP** Title: Esquire eMail: One Penn Plaza, Suite 4110, New York NY 10119 (USA) **212-631-4421**

Exhibit: Logged Supplier Objections

Yarema Die & Engineering Co.	**1774**	6/17/2009	Name: **Kenneth A. Nathan** Law Firm: **Nathan Zousmer, P.C.** Title: eMail: knathan@nathanzousmer.com 29100 Northwestern Highway Suite 260, Southfield MI 48034 (USA) **248-351-0099**
Yazaki North America, Inc.	**1195**	6/12/2009	Name: **Michael C. Hammer** Law Firm: **Dickinson Wright PLLC** Title: eMail: mhammer@dickinsonwright.com 500 Woodward Ave., Suite 4000, Detroit MI 48226 (USA) **313-223-3500**
Yeaton Research, Inc.	**940**	6/12/2009	Name: **G. Scott Yeaton** Law Firm: Title: President eMail: syeaton@rdscypress.com 5552 Cerritos Avenue, Suite K, Cypress CA 90630 (USA) **714-527-0606**
Yorozu North America, Inc. (a/k/a/ Yorozu America Corporation)	**1116**	6/15/2009	Name: **Michael C. Hammer** Law Firm: **Dickinson Wright PLLC** Title: eMail: mhammer@dickinsonwright.com 500 Woodward Ave., Suite 4000, Detroit MI 48226 (USA) **313-223-3500**
YRC Logistics Services, Inc.	**781**	6/12/2009	Name: **Paul Traub** Law Firm: **Epstein Becker Green P.C.** Title: eMail: 250 Park Avenue, New York NY 10177-1211 (USA) **212.351.4500**
YRC Worldwide, Inc.	**793**	6/12/2009	Name: **Paul Traub** Law Firm: **Epstein Becker Green P.C.** Title: eMail: PTraub@ebglaw.com Epstein Becker Green P.C., 250 Park Avenue, New York NY 10177-1211 (USA) **212-351-4500**
YRC, Inc., formely known as Roadway Express, Inc.	**785**	6/12/2009	Name: **Paul Traub** Law Firm: **Epstein Becker Green P.C.** Title: eMail: PTraub@ebglaw.com Epstein Becker Green P.C., 250 Park Avenue, New York NY 10177-1211 (USA) **212-351-4500**
Zeppelin-Stiftung and ZF Friedrichshafen AG	**683**	6/11/2009	Name: **John J. Hunter, Jr.** Law Firm: **Hunter & Schank Co. LPA** Title: eMail: jhunter@hunterschank.com One Canton Square; 1700 Canton Avenue, Toledo OH 43624 (USA) **419-255-4300**
Zeppelin-Stiftung and ZF Friedrichshafen AG	**683**	6/11/2009	Name: **John J. Hunter, Jr.** Law Firm: **Hunter & Schank Co. LPA** Title: eMail: jhunter@hunterschank.com One Canton Square; 1700 Canton Avenue, Toledo OH 43624 (USA) **419-255-4300**
ZF Lenksysteme GmbH	**684**	6/11/2009	Name: **John J. Hunter, Jr.** Law Firm: **Hunter & Schank Co. LPA** Title: eMail: jhunter@hunterschank.com One Canton Square; 1700 Canton Avenue, Toledo OH 43624 (USA) **419-255-4300**

Exhibit K

Miscellaneous Objections

Miscellaneous Objections

Docket No.	Name of Objector	Summary of Objection	Response
2018	White Marsh/ Memphis Lenders	The White Marsh/Memphis Lenders, creditors with a security interests certain facilities, do not oppose the sale, but argue that (i) the Debtors cannot sell the facilities to the Purchaser free and clear of the lenders' security interests without fully satisfying the claims of those lenders under section 363(f)(3), (ii) the lenders must be provided an opportunity to credit bid, and (iii) a replacement lien in the proceeds of the sale, equity interests in the Purchaser, does not adequately protect the lenders' interests.	The Debtors' response to this objection is set forth at length in the Reply.
2052	Toyota Motor Corporation	Toyota Motor Corporation ("**Toyota**") asserts that the Debtors cannot assign certain contracts between the Debtors and Toyota to the Purchaser without Toyota's consent.	Toyota is not objecting to the sale, but is objecting to the assumption and assignment of certain contracts between the Debtors and Toyota without Toyota's consent. The Debtors are willing to delay the assumption and assignment of any contracts with Toyota until a later date. In the meantime, the Debtors will negotiate with Toyota in an attempt to reach a consensual resolution as to the assumption and assignment of the Toyota contracts. In the absence of a consensual resolution, the Debtors will ask the Court to determine the substance of the Toyota Objection as it relates to any contracts the Debtors are seeking to assume and assign to the Purchaser. As such, the Court need not determine the merits of the Toyota Objection prior to entering the Sale Approval Order.

Docket No.	Name of Objector	Summary of Objection	Response
2056	GMAC LLC	On June 1, 2009, the Court entered an Order authorizing the Debtors to enter into and approving that certain ratification agreement (the "**Ratification Agreement**") between the Debtors and GMAC LLC ("**GMAC**"). The Ratification Agreement authorized the Debtors to continue their prepetition financial and operating agreements and arrangements (the "**Operative Documents**") with GMAC, pending the assumption and assignment to the Purchaser of the Operative Documents pursuant to the Sale Motion. The Ratification Agreement further provides that the Purchaser is to assume and perform the Debtors' obligations under the Operative Documents in accordance with the terms thereunder. GMAC consents to and supports the Sale but has reserved its rights to object to the Sale to the extent that certain undisclosed schedules to the MPA do not comply with the requirements of the Ratification Agreement.	The Debtors are in the process of resolving GMAC's reservation of rights and do not anticipate GMAC objecting to the Sale.

Exhibit L

NADA Statement on GM's Revised Participation Agreement

McLean, Va. (June 8, 2009) -- The National Automobile Dealers Association (NADA) has reviewed and supports GM's amendments to the Participation Letter Agreement. We're especially pleased that GM moved so quickly to meet with NADA and the GM National Dealer Council on such short notice to review and to discuss the serious concerns that dealers had with the original agreement.

"I especially commend GM for its flexibility and its willingness to make substantive clarifications and modifications to address dealer concerns. We believe GM has made a very good faith effort, given the unprecedented circumstances facing GM and the industry," said NADA chairman John McEleney.

While NADA is not in a position to formally endorse the Participation Agreement, we believe the revised document addresses the majority of dealer concerns.

Contacts:

David Hyatt
Vice President
NADA Public Affairs
(703) 821-7120
dhyatt@nada.org

Charles Cyrill
Director of Public Relations
NADA Public Affairs
(703) 821-7121
ccyrill@nada.org

Exhibit M

Doc. No. 91
SALE OF BUSINESS

GENERAL MOTORS CORPORATION

September 26, 2007

Mr. Cal Rapson
Vice President and Director
General Motors Department
International Union, UAW
8000 East Jefferson Avenue
Detroit, Michigan 48214

Dear Mr. Rapson:

During these negotiations, the Union requested the Corporation to agree that any sale of an operation as an ongoing business would require the buyer to assume the 2007 GM-UAW Collective Bargaining Agreement. The Corporation agreed to do so in the case of any such sale during the term of the 2007 Agreement.

Very truly yours,

Diana D. Tremblay
GMNA Vice President
Labor Relations

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CBA-2007-004716