

Paskay Memorial Luncheon and Keynote

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

Looking Back Over 15 Years

What I' ve Seen; What Saddens
Me; and What Encourages Me

Changes Over 15 Years

- The changes in business bankruptcy practice
- The emergence of distressed debt investing
- The Myth of Debtors v Creditors
- The damage to mid-market professionals

What Saddens Me

- Damage to the Bankruptcy Code
- The effect of lobbying
 - Landlords
 - Utilities
 - Safe Harbors
 - Exclusivity
- The inability to reorganize a retailer
- The Safe Harbors
- Obsession with Plain Meaning Analysis
- The growth of *in pari delicto* and knee-jerk imputation.

More Things That Sadden Me

- Failure of Code to Deal with Changes
 - Lesser Debtor Liquidity
 - Lesser Influence of Unsecured Creditors
 - Multi-Debtor Cases
 - 363 Sales
 - Need for Business Assistance by Means Less Draconian than a Trustee
- Increased Litigiousness

What Encourages Me

- The professionalism of the bankruptcy community
- Regional strengths
- Young talent
- Quality of new bankruptcy judges
- ABI's chapter 11 reform effort

General Motors Under the Surface

An Insider's View

Case Management Challenges

- How different from ordinary litigation?
- Managing a controversy with hundreds of objectors
 - Balancing ability to be heard with avoidance of repetition
 - Should Court indulge those wishing to go it alone?
- Establishing mechanisms for addressing key issues
- Dealing with discovery
- Speed v. attention to detail
- Coordinating with another court

More Case Management Challenges

- Keeping abreast of ongoing proceedings elsewhere
- Communicating to the Outside World
- Controlling lawyers who like to litigate in the press
- Writing in plain English or with legal precision?
- How broad an opinion?

Particular Concerns

- How will it affect the next 363 sale?
- How do we deal with unknown claims?
- Time constraints in providing notice
- Avoiding creating damaging precedents
- Recognizing practical realities
- What must management do next time?

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

DECISION ON MOTION TO ENFORCE SALE
ORDER

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ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE:

Introduction

In this contested matter in the chapter 11 case of Debtor Motors Liquidation Company, previously known as General Motors Corporation (“**Old GM**”), General Motors LLC (“**New GM**”)—the acquirer of most of Old GM’s assets in a section 363 sale back in July 2009—moves for an order enforcing provisions of the July 5, 2009 order (the “**Sale Order**”) by which this Court approved New GM’s purchase of Old GM’s assets.¹

The Sale Order, filed in proposed form on the first day of Old GM’s chapter 11 case with Old GM’s motion for the sale’s approval, was entered, in a slightly modified form, within a few hours after this Court issued its opinion approving the sale.² There were approximately 850 objections to the 363 Sale, the proposed Sale Order, or both. But the most serious were those relating to elements of the Sale Order (“**Free and Clear Provisions**”), discussed in more detail below, that provided that New GM would purchase Old GM’s assets “free and clear” of successor liability claims. After lengthy analysis,³ the Court overruled those objections.

In March 2014, New GM announced to the public, for the first time, serious defects in ignition switches that had been installed in Chevy Cobalts and HHRs, Pontiac

¹ ECF No. 12620. New GM’s motion has been referred to by New GM, the other parties, and the Court as the “**Motion to Enforce**.”

² See *In re General Motors Corp.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009) (Gerber, J.) (the “**Sale Opinion**”), stay pending appeal denied, 2009 WL 2033079 (S.D.N.Y. Jul. 9, 2009) (Kaplan, J.) (the “**Stay Opinion**”), appeal dismissed and *aff’d sub nom Campbell v. General Motors Corp.*, 428 B.R. 43 (S.D.N.Y. 2010) (Buchwald, J.) (“**Affirmance Opinion #1**”) and *Parker v. General Motors Corp.*, 430 B.R. 65 (S.D.N.Y. 2010) (Sweet, J.) (“**Affirmance Opinion #2**”), appeal dismissed, No. 10–4882–bk (2d Cir. July 28, 2011) (*per curiam*, Jacobs, CJ, and Hall and Carney, JJ.), *cert. denied*, 132 S.Ct. 1023 (2012).

³ See *Sale Opinion*, 407 B.R. at 499–506.

G5s and Solstices, and Saturn Ions and Skys (the “**Ignition Switch Defect**”), going back to the 2005 model year. In the Spring of 2014 (though many have queried why Old GM and/or New GM failed to do so much sooner), New GM then issued a recall of the affected vehicles, under which New GM would replace the defective switches, and bear the costs for doing so.

New GM previously had agreed to assume responsibility for any accident claims involving post-sale deaths, personal injury, and property damage—which would include any that might have resulted from the Ignition Switch Defect. But New GM’s announcement was almost immediately followed by the filing of about 60 class actions in courts around the United States, seeking compensatory damages, punitive damages, RICO damages and attorneys fees for *other* kinds of losses to consumers—“**Economic Loss**”—alleged to have resulted from the Ignition Switch Defect. The claims for Economic Loss include claims for alleged reduction in the resale value of affected cars, other economic loss (such as unpaid time off from work when getting an ignition switch replaced), and inconvenience. The Court has been informed that the number of class actions now pending against New GM—the great bulk of which were brought by or on behalf of individuals claiming Economic Loss (“**Economic Loss Plaintiffs**”)—now exceeds 140. Though the amount sought by Economic Loss Plaintiffs is for the most part unliquidated, it has been described as from \$7 to \$10 billion. Most of those actions (“**Ignition Switch Actions**”) are now being jointly administered, for pretrial purposes, in a multi-district proceeding before the Hon. Jesse Furman, U.S.D.J., in the Southern District of New York (the “**MDL Court**”).

New GM here seeks to enforce the Sale Order's provisions, quoted below, blocking economic loss lawsuits against New GM on claims involving vehicles and parts manufactured by Old GM.⁴ New GM argues that while it had voluntarily undertaken, under the Sale Order, to take on an array of Old GM liabilities (for the post-sale accidents involving both Old GM and New GM vehicles just described; under the express warranty on the sale of any Old GM or New GM vehicle (the "**Glove Box Warranty**"); to satisfy statutory recall obligations with respect to Old GM and New GM vehicles alike; and under Lemon Laws, again with respect to Old GM and New GM vehicles alike), the Sale Order blocked any others—including those in these suits for Economic Loss.

The Sale Order, as discussed below, plainly so provides. But as to 70 million Old GM cars whose owners had not been in accidents of which they'd advised Old GM, the Sale Order was entered with notice only by publication. And those owning cars with Ignition Switch Defects (again, those who had not been in accidents known to Old GM)—an estimated 27 million in number—were given neither individual mailed notice of the 363 Sale, nor mailed notice of the opportunity to file claims for any losses they allegedly suffered. And more importantly, from the perspective of these car owners, they were not given *recall notices* which (in addition to facilitating switch replacement before accidents took place), they contend were essential to enabling them to respond to the published notices to object to the 363 Sale or to file claims.

⁴ There may be misunderstandings as to the matters now before the Court. New GM has already undertaken to satisfy claims for death, personal injury, and property damage in accidents occurring after the 363 Sale—involving vehicles manufactured by New GM and Old GM alike. Except for the *pre*-Sale accidents that are the subject of the Pre-Closing Accident Plaintiffs' contentions, addressed below (where those plaintiffs wish to sue New GM in lieu of Old GM), this controversy does not involve death, personal injury, or property damage arising in accidents. Instead it involves only *economic losses* allegedly sustained with respect to Old GM vehicles or parts.

Then, after New GM filed the Motion to Enforce, two other categories of Plaintiffs came into the picture. One was another group of Ignition Switch Defect plaintiffs (the “**Pre-Closing Accident Plaintiffs**”) who (unlike the Economic Loss Plaintiffs) are suing with respect to actual accidents. But because those accidents involved Old GM and took place *before* the 363 Sale Closing—and taking on pre-closing accident liability was not commercially necessary to New GM’s future success—they were not among the accidents involving Old GM vehicles for which New GM agreed to assume responsibility. The Pre-Closing Accident Plaintiffs have (or at least had) the right to assert claims against Old GM (the only entity that was in existence at the time their accidents took place), but they nevertheless wish to proceed against New GM. New GM brought a second motion to enforce the Sale Order⁵ with respect to the Pre-Closing Accident Plaintiffs, and issues with respect to this Plaintiff group were heard in tandem with the Motion to Enforce.

The other category of Plaintiffs later coming into the picture (“**Non-Ignition Switch Plaintiffs**”) brought actions asserting Economic Loss claims as to GM branded cars that *did not have* Ignition Switch Defects, including cars made by New GM and Old GM alike. In fact, most of their cars did not have defects, and/or were not the subject of recalls, at all. But they contend, in substance, that the Ignition Switch Defect caused damage to “the brand,”⁶ resulting in Economic Loss to them. New GM brought still

⁵ ECF No. 12807.

⁶ See Day 1 Arg. Tr. at 137:4-138:16, Feb. 17, 2015 (“[PL. COUNSEL]: The revelation of New GM’s extensive deceptions tarnished the brand further . . . They allege that new GM concealed and suppressed material facts about the quality of its vehicle and the GM brand.”); Day 2 Arg. Tr. at 61:16-62:5, Feb. 18, 2015 (“THE COURT: I thought I heard arguments from either you or Mr. Esserman or both, that the contention being made on the Plaintiffs’ side is that the failure to deal with the ignition switches damaged the GM brand, and is some Court of competent jurisdiction then going to hear an argument that there are 70 million vehicles that lost value and not just the 27 million that are the subject of the recalls, or the lesser 13 million to which you just made

another motion⁷ to enforce the Sale Order with respect to them, though this third motion has been deferred pending the determination of the issues here.

In this Court, the first two groups of Plaintiffs, whose issues the Court could consider on a common set of stipulated facts and is in major respects considering together,⁸ contend that by reason of Old GM's failure to send out recall notices, they never learned of the Ignition Switch Defect, and that the Sale Order is unenforceable against them.

Summary of Conclusions

New GM is right when it says that most of the claims now asserted against it are proscribed under the Sale Order. But that is only the start, and not the end, of the relevant inquiry. And assuming, as the Plaintiffs argue, that Old GM's and then New GM's delay in announcing the Ignition Switch Defect to the driving public was unforgivable, that too is only the start, and not the end of the relevant inquiry.

The real issues before the Court involve questions of procedural due process, and what to do about it if due process is denied: (1) what notice was sufficient; (2) to what extent an assertedly aggrieved individual's lack of prejudice from insufficient notice

reference? [PL. COUNSEL]: I'm not counsel of record there, but I guess I would be surprised if the Plaintiffs in those actions aren't likewise looking for recompense for the people without ignition switch defects in their car, on the theory, which may or may not be upheld by Judge Furman . . . as giving rise to cognizable claims and causes of action.") Though not mentioned by Plaintiffs' counsel then, those claims were made with respect to cars made by Old GM, *see, e.g.*, Consolidated Amended Complaint for Post-Sale Vehicles ¶¶ 820-825, and thus were violative of the Sale Order, to the extent it remains enforceable.

⁷ ECF No. 12808.

⁸ When they can be referred to together, they are collectively referred to as the "**Plaintiffs**." Their bankruptcy counsel, retained and then designated to act for the large number of plaintiffs whose counsel at least generally litigate tort matters, rather than bankruptcy issues, have been referred to as "**Designated Counsel**." As the two groups of Plaintiffs' circumstances overlap in part and diverge in part, one brief was filed by Designated Counsel for Economic Loss Plaintiffs, and another by Designated Counsel for Pre-Closing Accident Plaintiffs—with the latter relying on the former's brief with respect to overlapping themes. References to "Pl. Br." are thus to the main brief filed by the Economic Loss Plaintiffs' Designated Counsel.

matters; (3) what remedies are appropriate for any due process denial; and (4) to what extent sale orders can be modified after the fact at the expense of those who purchased assets from an estate on the expectation that the sale orders would be enforced in accordance with their terms. They also involve the needs and concerns of Old GM creditors whose claims are pending, and of holders of units of the Old GM General Unsecured Creditors Trust (“**GUC Trust**”), formed for the benefit of unsecured creditors when Old GM confirmed its liquidating plan of reorganization (the “**Plan**”)—all of whom would be prejudiced if Old GM’s remaining assets were tapped to satisfy an additional \$7 to \$10 billion in claims.

For the reasons discussed at length below, the Court concludes:

1. Due Process

Notice must be provided in bankruptcy cases, as in plenary litigation, that is “reasonably calculated, under all the circumstances” to apprise people of the pendency of any proceeding that may result in their being deprived of any property, and to “afford them an opportunity to present their objections.”⁹ The Second Circuit, like many other courts, has held that “the Due Process Clause requires the best notice practical under the circumstances.”¹⁰ But “actual” (*i.e.*, personalized) notice is required for “known” creditors—those whose names and addresses are “reasonably ascertainable.”¹¹ “Constructive” notice (typically provided by publication) can be used when it is the best

⁹ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“**Mullane**”) (citations omitted).

¹⁰ *In re Drexel Burnham Lambert Grp.*, 995 F.2d 1138, 1144 (2d Cir. 1993) (“**Drexel Burnham**”). The *Drexel Burnham* chapter 11 case generated several opinions relevant to this controversy. The Court has given another of them a different shorthand name to help tell it apart. See n.105 below.

¹¹ *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) (“**Mennonite Board**”).

notice practical under the circumstances. But publication notice, as a substitute for actual notice, at least normally is insufficient for “known” creditors.

In the bankruptcy context, those general principles apply to both the notice required incident to sale approval motions, on the one hand, and to claims allowance, on the other. And in this case, the Court ultimately reaches largely the same conclusions with respect to each. But the different circumstances applicable to the sale process (to be completed before a grievously bleeding Old GM ran out of money) and the claims process (which lacked comparable urgency) cause the Court to reach those conclusions in different ways.

(a) Notice Before Entry of Sale Order

The Court disagrees with New GM’s contention that imposing free and clear provisions doesn’t result in a potential deprivation of property, and thus concludes that due process requirements apply. But the caselaw—in plenary litigation and in bankruptcy cases alike—permits, and indeed requires, consideration of practicality.

There was extraordinary urgency in connection with the 363 Sale. In June 2009, Old GM was bleeding cash at an extraordinary rate. And U.S. and Canadian governmental authorities, who had agreed to provide cash to keep Old GM alive until the closing of a 363 sale, had conditioned their willingness to continue the necessary funding on the approval of the 363 Sale by July 10, 2009, only 40 days after the chapter 11 filing.

Given that urgency, with the sale hearing to commence 29 days after the Petition Date; objections due 18 days after the Petition Date; and 70 million Old GM vehicles on the road, notice by publication to vehicle owners was obviously proper. Indeed, it was essential. It would be wholly unreasonable to expect actual notice of the 363 Sale hearing then to have been mailed to the owners of the 70 million GM cars on the road at

the time, or even the 27 million whose cars were then (or later became) the subject of pending recalls. Though notice by publication would at least normally also be acceptable in instances involving considerably smaller bodies of creditors, this is exactly the kind of situation for which notice by publication is the norm. Under normal circumstances, notice by publication would easily be sufficient under *Mullane*, *Drexel Burnham*, and their respective progeny.

But the Court must also determine whether the knowledge of many Old GM personnel of the Ignition Switch Defect removes this case from the general rule. While there is no indication on this record, if there ever will be, that Old GM's bankruptcy counsel knew of the need to focus on notice to owners of cars with Ignition Switch Defects, at least 24 business and in-house legal personnel at Old GM were aware of the problem. As of June 2009, when entry of the Sale Order was sought, Old GM had enough knowledge of the Ignition Switch Defect to be required, under the National Traffic and Motor Vehicle Safety Act (the "**Safety Act**"), to send out mailed recall notices to owners of affected Old GM vehicles. And Old GM knew to whom it had to mail the recall notices, and had addresses for them.

The adequacy of notice issue is nevertheless close, however, because while Old GM had a known recall obligation, and knew the names and addresses of those owning the vehicles that were affected, Old GM gave *actual* notice of the 363 Sale to anyone who had previously asserted a claim against it for injury or death—by reason of Ignition Switch Defects or otherwise. And only a subset (and, possibly a small subset) of the others who were entitled to Ignition Switch Defect recall notices would later turn out to have been injured, killed, or economically damaged as a result of the circumstances that

led to the recall, or want to object to the 363 Sale or any of its terms. That *some* of them would be killed or injured was known; *who they would be* was not.

But on balance the Court believes that the distinction is insufficient to be meaningful. 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. 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.

The publication notice here given, which otherwise would have been perfectly satisfactory (especially given the time exigencies), was not by itself enough for those whose cars had Ignition Switch Defects—because from Old GM’s perspective, the facts that gave rise to its recall obligation resulted in “known” claims, as that expression is used in due process jurisprudence. Because 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.

(b) Notice Before Expungement of Claims

By contrast to the 363 Sale, there was no particular urgency with respect to the allowance of claims. Claims could be (and ultimately were) considered in a less hurried fashion. And while notice only by publication to 70 million (or even 27 million) vehicle

owners not known by Old GM to have been in accidents would be the norm for the claims process as well (and notice by publication, applicable in this respect and others, is what this Court then approved), the fact is that even at the later times set as deadlines for the filing of claims, Old GM still had not sent out notice of the recall, and Old GM car owners were still unaware of any resulting potential claims.

In the claims allowance respect too, the Court concludes that Old GM's knowledge of facts sufficient to justify notice of a recall, and its failure to provide the recall notice, effectively resulted in a denial of the notice due process requires.

(c) Requirement for Prejudice

Though the Court has found failures, insofar as the Plaintiffs are concerned, to provide the notice that due process requires, that does not by itself mean that they have established a due process violation. The Court categorically rejects the Plaintiffs' contention that prejudice is irrelevant. Rather, in order to establish a due process violation, they must demonstrate that they have sustained prejudice as a result of the allegedly insufficient notice.¹²

In some instances, a lack of notice plainly results in prejudice, as in instances in which the earlier judicial action cannot be undone. In others, it does not—and it can be cured by providing the opportunity to be heard at a later time, and, where the law permits and requires, vacating or modifying the earlier order, or exempting parties from the order's effect. In every case, however, a denial of notice need not result in an automatic win for the party that failed to get appropriate notice the first time around. Instead that party should get the full and fair hearing it was initially denied, with the Court then

¹² *Perry v. Blum*, 629 F.3d 1, 17 (1st Cir. 2010); accord all of the other cases cited in nn.162 through 164 *infra*.

focusing on the extent to which prejudice actually resulted—and, of course, on achieving the right outcome on the merits, which in a perfect world would have been reached the first time.¹³

Both groups of Plaintiffs were plainly prejudiced with respect to the bar date for filing claims. But the Pre-Closing Accident Plaintiffs were not prejudiced at all, and the Economic Loss Plaintiffs were prejudiced only in part, by the failure to give them the requisite notice in connection with the 363 Sale. Neither the Economic Loss Plaintiffs nor the Pre-Closing Sale Plaintiffs were prejudiced with respect to the Sale Order's Free and Clear Provisions. Back in 2009, the Court heard many others make the same arguments, and rejected them. The Court now has heard from both the Economic Loss Plaintiffs and Pre-Closing Accident Plaintiffs with respect to the Free and Clear Provisions and successor liability, with full and fair opportunity to be heard. And neither Plaintiff group has advanced any arguments on successor liability that were not previously made, and made exceedingly well before. Their principal contention—that they would have won by reason of public outrage, political pressure, or the U.S. Treasury's anger with Old GM, when they would not have won in the courtroom—is the very speculation that they rightfully criticize. Thus insofar as successor liability is concerned, while the Plaintiffs established a failure to provide them with the notice due

¹³ That was referred to in oral argument here, initially by the Court, as a “do-over.” In many, if not most, instances, that will be required, but in many, if not most, cases that will also be sufficient. What is critical, however it is accomplished, is that the Court gauge in a non-speculative fashion whether (and how) the outcome might have been different if the requisite notice had been provided.

process requires, they did not establish a due process violation. The Free and Clear Provisions stand.¹⁴

But the Economic Loss Plaintiffs were prejudiced in one respect. Nobody else had argued a point that they argue now: that the proposed Sale Order was overly broad, and that it should have allowed them to assert claims involving Old GM vehicles and parts so long as they were basing their claims *solely on New GM conduct*, and not based on any kind of successor liability or any other act by Old GM. If the Economic Loss Plaintiffs had made that argument back in 2009, the Court would have agreed with them. And by contrast to their predictions as to possible results of public outrage, this is not at all speculative, since the Court had ruled on closely similar issues before, seven years earlier, and, indeed, again in that very same *Sale Opinion*. Here, by contrast, the failure to provide the notice that due process requires was coupled with resulting prejudice. The Economic Loss Plaintiffs were not furnished the opportunity to make the overbreadth argument back in 2009, and in that respect they were prejudiced. The failure to be heard on this latter argument necessarily must be viewed as having affected the earlier result.

Thus, with respect to Sale Order overbreadth, the Economic Loss Plaintiffs suffered a denial of due process, requiring the Court to then turn to the appropriate remedy.

2. Remedies

As noted above, the Court has rejected the Plaintiffs' contention that prejudice is irrelevant to a claim for denial of due process. And it has likewise rejected the notion

¹⁴ They also stand with respect to a subset of Economic Loss Plaintiffs (the “**Used Car Purchasers**”) who acquired cars manufactured by Old GM in the aftermarket after the 363 Sale (*e.g.*, from their original owners, or used car dealers). They too were not prejudiced by the inability to make successor liability arguments that others made, and, in addition, they can have no greater rights than the original owners of their cars had.

that the denial of the notice that due process requires means that the Plaintiffs should automatically win. But to the extent they were prejudiced (and the Court has determined that the Economic Loss Plaintiffs *were* prejudiced with respect to Sale Order overbreadth), they deserve a remedy tailored to the prejudice they suffered, to the extent the law permits.

The Court rejects, for reasons discussed below, New GM's contention that the principles under which property is sold free and clear of liens, with the liens to attach instead to sale proceeds, apply universally to interests other than liens—as relevant here, interests permitting the assertion of successor liability. But New GM's next several points—that purchasers of assets acquire property rights too, and that taking away purchasers' contractually bargained-for rights strikes at the heart of understandings critically important to the bankruptcy system—have great merit. They have so much merit, in fact, that were it not for the fact that the Plaintiffs' claim is a constitutional one, the Court would not deny enforcement of the Sale Order, in whole or in part. There is no good reason to give creditors asserting successor liability claims recovery rights greater than those of other creditors. And as importantly or more so, the interests inherent in the enforceability of 363 orders (on which the buyers of assets should justifiably be able to rely, and on which the interests of creditors, keenly interested in the maximization of estate value, likewise rest) are hugely important.

But the Court concludes that remedying a constitutional violation must trump those concerns. Decisions of the Second Circuit and other courts hold, or suggest (with little in the way of countervailing authority), that with or without reliance on Fed.R.Civ.P. 60(b), lower courts may—and should—deny enforcement, against those

who were prejudiced thereby, of even cherry-picked components of sale orders that have been entered with denials of due process. Those cases make clear that it is not necessary for a court to invalidate the sale order in full. That is so whether or not the Court declares the order, or part of it, to be “void.” And if the order can be declared to be void (or if it can be selectively enforced, to avoid enforcing it against one denied due process), provisions in the order providing that it is nonseverable fall as well.

In the absence of a constitutional violation, the Court suspects that the power to deny full enforcement of a sale order (assuming that such is even permissible) will rarely, if ever, be invoked. The principles underlying the finality of 363 sale orders are much too important. But in cases where a sale order can be declared to be void (and orders entered without due process are subject to such a consequence), sale orders may be modified, or selectively enforced, as well.

3. Assumed Liabilities

In light of the Court’s conclusions, summarized above, New GM’s concerns as to the limited liabilities that New GM assumed are not as significant as they might otherwise have been. New GM is right that it expressly declined to assume any liabilities based on Old GM’s wrongful conduct, and that these were “retained liabilities” to be satisfied by Old GM. But the Court’s ruling that it will continue to enforce prohibitions against successor liability makes New GM’s concerns as to that academic. And to the extent, if any, that New GM might be liable on claims based solely on any wrongful conduct on its own part (and in no way relying on wrongful conduct by Old GM), New GM would have such liability not because it had assumed any Old GM liabilities, or was responsible for anything wrong that Old GM did, but only because it had engaged in independently wrongful, and otherwise actionable, conduct on its own.

But it is plain that to the extent the Plaintiffs seek to impose successor liability, or to rely, in suits against New GM, on any wrongful conduct by Old GM, these are actually claims against Old GM, and not New GM. It also is plain that any court analyzing claims that are supposedly against New GM only must be extraordinarily careful to ensure that they are not in substance successor liability claims, “dressed up to look like something else.”¹⁵ Claims premised in any way on Old GM conduct are properly proscribed under the Sale Agreement and the Sale Order, and by reason of the Court’s other rulings, the prohibitions against the assertion of such claims stand.

4. *Equitable Mootness*

Because the successor liability claims start by being claims against Old GM, the Court also must consider the GUC Trust’s concerns as to Equitable Mootness. The Court recognizes that mootness concerns will materially, if not entirely, impair the Plaintiffs’ ability to collect on any allowed claims against Old GM (or more precisely, the GUC Trust) that they otherwise might have. But nevertheless, the Court concludes, contrary to its original instincts at the outset of this controversy, that the GUC Trust is right in its mootness contentions, and that the rights of GUC Trust beneficiaries cannot be impaired at this late time.

Mootness doctrine already made a return of past distributions from all of Old GM’s many thousands of creditors unthinkable. But the Court, being mindful of the Second Circuit’s holdings that mootness doctrine does not foreclose relief where *some* meaningful relief can be fashioned, originally thought that mootness concerns would not foreclose at least some relief—such as permitting the late filing of claims, and thereby

¹⁵ *Burton v. Chrysler Grp., LLC (In re Old Carco)*, 492 B.R. 392, 405 (Bankr. S.D.N.Y. 2013) (Bernstein, C.J.) (“*Old Carco*”).

permitting Economic Loss Plaintiffs to share in assets remaining in the GUC Trust. In the course of subsequent briefing, however, the GUC Trust and its unit holders (the “Unitholders”) pointed out (along with other reasons for denial of relief) that granting relief now to the Plaintiffs would require not just the allowance of late claims (which by itself would be acceptable), but also *the modification of the confirmation order*—and with it, impairment of the rights of the Unitholders, especially those who acquired those units in post-confirmation trading. Though late claims filed by the Plaintiffs might still be allowed, assets transferred to the GUC Trust under the Plan could not now be tapped to pay them. Under the mootness standards laid down by the Second Circuit in its leading decisions in the area,¹⁶ GUC Trust Unitholders must be protected from a modification of the Plan.

5. *Fraud on the Court*

Believing that rulings now might expedite or moot further litigation down the road, the Court also undertook to rule on the legal standards applicable to litigation over whether, in connection with the entry of the Sale Order, there might have been a fraud on the Court. Though they become less important for reasons discussed below, the Court provides them in Section V.

Of the standards for establishing fraud on the Court, discussed below, three are particularly relevant here. One is that fraud on the court requires action that does or attempts to defile the *court itself*. Another, related to the first, is that establishing a fraud on the Court requires defrauding the *court*, as contrasted to a non-judicial victim (such as

¹⁶ See *Official Comm. of Unsecured Creditors of LTV Aerospace & Defense Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.)*, 988 F.2d 322 (2d Cir. 1993) (“*Chateaugay I*”); *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944 (2d Cir. 1993) (“*Chateaugay II*”); *Beeman v. BGI Creditors’ Liquidating Trust (In re BGI, Inc.)*, 772 F.3d 102 (2d Cir. 2014) (“*BGI*”).

a vehicle owner). A third is because it involves an effect on the Court (as contrasted to any injured third parties), it turns on the knowledge and intent of *those actually interfacing with the Court*. In each of those respects, and its application otherwise, establishing a fraud on the Court requires a knowing and purposeful effort to subvert the judicial process.

6. *Certification to the Circuit*

The issues here are important, difficult, and involve the application of often conflicting authority. Their prompt determination will affect further proceedings not just in this Court, but also the MDL Court. The Court believes that it should certify its judgment for direct review by the Circuit.

Facts¹⁷

1. *Background*

In late 2008 and the first half of 2009, Old GM—then the only “GM”—was in extremis. As the Court found in the *Sale Opinion*, Old GM had suffered a steep erosion in revenues, significant operating losses, and a dramatic loss of liquidity, putting its future in grave jeopardy. It was bleeding cash at an extraordinary rate.

Old GM was assisted in December 2008 by an emergency infusion of cash by the Bush administration, and then again, in January and February 2009, by two more emergency infusions of cash by the Obama administration. But the latter declared that its financial support would last for only a limited period of time, and that Old GM would have to address its problems as a matter of great urgency.

¹⁷ The 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.

In March 2009, the U.S. Treasury (“**Treasury**”), whose Presidential Task Force on the Auto Industry (“**Auto Task Force**”) was quarterbacking the rescue effort, gave Old GM 60 days to submit a viable restructuring plan. Failure to accomplish that would force Old GM to liquidate. But Old GM was unable to achieve an out-of-court restructuring. It quickly became obvious that Old GM’s only viable option was to file a chapter 11 case and to sell its assets through a 363 Sale, shed of the great bulk of its prepetition liabilities. The acquirer ultimately became New GM.

The urgency at the time is apparent. The cash bleeding was brutal; Old GM suffered negative cash flow of \$9.4 billion in the first quarter of 2009 alone.¹⁸ Without a very quick end to the bleeding, Old GM would plunge into liquidation. Apart from the loss to Old GM’s creditors, Old GM’s liquidation would result in the loss of over 200,000 jobs at Old GM alone, and grievous loss to the approximately 11,500 vendors, with more than 500,000 workers, in the Supplier Chain.¹⁹ Liquidation would also result in virtually no recovery for any of Old GM’s prepetition creditors—including Pre-Closing Accident Plaintiffs and Economic Loss Plaintiffs before the Court now.

2. Chapter 11 Filing

On June 1, 2009 (the “**Petition Date**”)—40 days prior to the deadline imposed under the critical DIP Financing—Old GM and three affiliates commenced these now jointly administered chapter 11 cases before this Court. That same day, Old GM filed the motion (the “**Sale Motion**”) for authority to engage in the required 363 Sale.

¹⁸ *Sale Opinion*, 407 B.R. at 476, 479.

¹⁹ *Id.* at 476, 477 n.6. The Supplier Chain is the body of vendors that supply parts and subassemblies that go into the vehicles that are manufactured by the U.S. Big Three—GM, Chrysler, and Ford—and many of their foreign counterparts, at least those that manufacture vehicles in the U.S. The Court learned, in connection with the 363 Sale Hearing back in 2009, that the majority of the value that would go into a GM vehicle would in fact have come from the Supplier Chain.

3. *The Sale Motion and Notice Order*

In its Sale Motion, GM asked the Court to authorize the 363 Sale “free and clear of all other ‘liens, claims, encumbrances and other interests,’ including, specifically, ‘all successor liability claims.’”

Specifically, GM submitted a proposed order to the Court (the “**Proposed Sale Order**”) containing provisions directed at cutting off successor liability except in the respects where successor liability was contractually assumed. As the Court noted in 2009, the Proposed Sale Order would effectuate a free and clear sale through a double-barreled approach:

First, the Proposed Sale Order contains a finding—and a decretal provision to similar effect—that the Debtors may sell the Purchased Assets free and clear of all liens, claims, encumbrances, and other interests, including rights or claims based on any successor or transferee liability.

Second, the Proposed Sale Order would enjoin all persons (including “litigation claimants”) holding liens, claims, encumbrances, and other interests, including rights or claims based on any successor or transferee liability, from asserting them against New GM or the Purchased Assets.²⁰

Along with its submission of the Proposed Sale Order, GM moved for court approval of the sale procedures, and for an order fixing and approving the form and manner of notice. After hearing argument on the motion, the Court approved the sale procedures, and the next day entered an order laying out the procedures for the upcoming 363 Sale (the “**Sale Procedures Order**”).

²⁰ *Sale Opinion*, 407 B.R. at 483 (internal citations omitted).

4. *Notice of the Sale*

As relevant here, the Sale Procedures Order provided for *actual* notice to 25 categories of persons and entities, including, among many others, all parties who were known to have asserted any lien, claim, encumbrance, or interest in or on the Purchased Assets; all vehicle owners involved in actual litigation with Old GM (or, who though not yet involved in actual litigation, had asserted claims or otherwise threatened to sue); and all other known creditors.²¹

And the Sale Procedures Order additionally provided for constructive notice, by publication, in the *Wall Street Journal* (global edition); *New York Times* (national edition); *Financial Times* (global edition); *USA Today* (national edition); *Detroit Free Press*; *Detroit News*; in the Canadian *Le Journal de Montreal*, *Montreal Gazette*, *The Globe and Mail*, and *The National Post*; and on the website of Old GM's noticing agent, The Garden City Group.²²

The notice of hearing on the proposed 363 Sale ("**Sale Notice**") provided the general terms of the sale, including the date and location at which the sale was to occur, and instructions for those wishing to object or otherwise respond. The Sale Notice did not, however, attempt to describe the claims any recipient might have against Old GM, or any bases for objections to the sale or Proposed Sale Order that any notice recipient might wish to assert.

5. *Objections to Free and Clear Provisions*

Many of the 850 parties objecting to the Sale Motion made limited objections—not opposing the 363 Sale or its timing as such, but objecting instead to provisions in the

²¹ See Sale Procedures Order ¶¶ 9(a)(i) through (xxv), 9(b)(i) through (ii) (ECF No. 274).

²² See *id.* ¶ 9(e); see also New GM Stipulations of Fact ¶¶ 22-23 (ECF No. 12826-2).

Proposed Sale Order. They argued that New GM should assume certain kinds of claims; that the Free and Clear Provisions limiting successor liability were improper; or both.

More specifically:

(a) Many of the states' Attorneys General ("**AGs**"), assisted in significant part by an attorney with the National Association of Attorneys' General well known for her expertise in the interplay between bankruptcy law and states' regulatory needs and concerns, argued that New GM should assume consumer claims for implied, express, and statutory warranties.²³

(b) Old GM's Official Committee of Unsecured Creditors (the "**Creditors' Committee**"), representing unsecured creditors of all types (including tort plaintiffs and other vehicle owners), objected to the Proposed Sale Order because (as the Creditors' Committee well understood) it would cut off state law successor liability and limit any current or future claimants to recovery from the assets "left behind in the old company."²⁴

(c) The Ad Hoc Committee of Consumer Victims (the "**Consumer Victims Committee**"); attorneys for individual accident litigants (the "**Individual Accident Litigants**"); attorneys for asbestos victim litigants (the "**Asbestos Litigants**"); 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**

²³ See AGs Objections, ECF Nos. 1926 and 2043.

²⁴ Creditors' Committee Objection at 3 (ECF No. 2362).

Organizations,” and, together with the others, the “**Successor Liability Objectors**”) likewise argued that Old GM could not sell its assets free and clear of any rights or claims based on successor or transferee liability.²⁵

The Successor Liability Objectors argued that shedding potential successor liability was not permitted under Bankruptcy Code section 363(f). They further argued that section 363(f) “authorize[d] 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.”²⁶ They further argued that the Court “lack[ed] jurisdiction to enjoin actions between non-debtor product liability claimants and the Purchaser post-closing since resolution of these claims [would] not affect the Debtors’ estates.”²⁷ And they argued that the Free and Clear Provisions would violate due process—asserting that individuals who might have future claims for injuries “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.”²⁸

In the *Sale Opinion*, the Court considered, but ultimately rejected, those contentions and similar ones. Relying on, among other things, the then recent opinions by the Bankruptcy Court in *Chrysler*²⁹ (which had recently issued its own sale order with

²⁵ See Successor Liability Objectors’ Limited Obj. (ECF No. 2041).

²⁶ Successor Liability Objectors’ Mem. of Law at 2 (ECF No. 2050).

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *In re Chrysler LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009) (“*Chrysler*”), (Gonzalez, CJ.), *aff’d for substantially the reasons stated in the opinions below*, No. 09–2311–bk (2d Cir. Jun. 5, 2009) (“*Chrysler Circuit Order*”), *temporary stay vacated and further stay denied*, 556 U.S. 960 (June 9, 2009), *Circuit written opinion issued*, 576 F.3d 108 (2d Cir. Aug. 5, 2009) (“*Chrysler Circuit*

free and clear provisions); of the Second Circuit (which, three weeks before the Old GM 363 Sale hearing, affirmed the *Chrysler* decision for “substantially the same reasons articulated by the bankruptcy court”³⁰); and earlier authority,³¹ this Court overruled the objections to the Free and Clear Provisions—determining, after lengthy analysis, that New GM should be protected against successor liability claims.³²

6. *Sale Agreement—Relevant Provisions*

The agreement under which the 363 Sale would take place, which had the formal name of “Amended and Restated Master Sale and Purchase Agreement,” dated June 26, 2009 (often referred to by the parties as the “ARMSPA” but by this Court as the “**Sale Agreement**”), was originally filed with the Sale Motion on June 1, 2009. It was thereafter amended—in respects relevant here (1) to incorporate an agreement with the AGs under which New GM would assume liabilities under state Lemon Laws, and (2) to provide that New GM would assume responsibility for any and all accidents or incidents

Opinion”), judgment vacated and case remanded with instructions to dismiss appeal as moot, 558 U.S. 1087 (Dec. 14, 2009).

³⁰ See *Chrysler Circuit Order*. The Circuit first issued a short written order, affirming for “substantially the reasons articulated by the Bankruptcy Court,” *id.*, and advising that its order would be followed by a written order more fully explaining the Circuit’s ruling. The Circuit thereafter issued a lengthy opinion explaining its earlier ruling in great detail. See *Chrysler Circuit Opinion*. But about four months later, the Circuit’s “judgment” was vacated by the United States Supreme Court with directions to dismiss the appeal as moot. What the Supreme Court meant by “judgment” in that context was not explained, but one can infer (though the Supreme Court did not explain this either) that the appeal was moot at the time the Circuit’s written opinion was issued, since Chrysler’s 363 sale had already closed. But even assuming that the controversy was moot by the time the Circuit issued the *Chrysler Circuit* written opinion, the controversy was not moot when the Circuit issued its initial affirmance order—the *Chrysler Circuit Order*—preceding the Chrysler 363 sale closing, upon which this Court also relied. And assuming, *arguendo*, that, by reason of these matters of timing, the Circuit’s written *Chrysler Circuit Opinion* can no longer be regarded as binding on the lower courts in the Second Circuit (a matter this Court has no need to decide), the Court thinks the Circuit’s written thinking on the subject should continue to be respected.

³¹ See *In re Trans World Airlines, Inc.*, 322 F.3d 283, 288–90 (3d Cir. 2003); *United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573, 581–82 (4th Cir.1996).

³² See *Sale Opinion*, 407 B.R. at 499-506.

giving rise to death, personal injury, or property damage after the date of closing of the 363 Sale, irrespective of whether the vehicle was manufactured by Old GM or New GM.

The Sale Agreement, in its Section 2.3, listed liabilities that New GM would assume (“**Assumed Liabilities**”), on the one hand, and that Old GM would retain (“**Retained Liabilities**”), on the other. Those that would be assumed by agreement were listed in subsection (a); those that would be retained (which would cover everything else) were listed in subsection (b). As provided in subsection (a), Assumed Liabilities included:

(a) Claims for “**Product Liabilities**” (a term defined in the Sale Agreement), with respect to which New GM would assume (but assume only) those that arose out of “accidents or incidents”³³ occurring on or after the Closing Date;³⁴

³³ The Court addressed the meaning of “incidents” in its decisions in *In re Motors Liquidation Co.*, 447 B.R. 142, 149 (Bankr. S.D.N.Y. 2011) (Gerber, J.) (“**GM-Deutsch**”), and *In re Motors Liquidation Co.*, 513 B.R. 467 (Bankr. S.D.N.Y. 2014) (Gerber, J.) (“**GM-Phaneuf**”). In *GM-Deutsch*, the Court accepted the explanation proffered by New GM counsel in which he stated that the language was drafted to cover situations similar to accidents that might not be said to be accidents, such as a car catching on fire, blowing up, or running off the road—in each case where it could cause a physical injury to someone. 447 B.R. at 148 n.20. In *GM-Phaneuf*, the Court made reference to its earlier *GM-Deutsch* ruling, describing it, in a parenthetical following the citation, as “construing the ‘incidents’ portion of the “accidents or incidents’ language (in the context of claims against New GM by the estate of a consumer who had been in an accident before the 363 Sale, but died thereafter) as covering more than just “accidents,” but covering things that were similar, such as fires, explosions, or other definite events that caused injuries and resulted in the right to sue”). 513 B.R. at 472 n.17.

³⁴ Sale Agreement § 2.3(a)(ix) (as amended) (ECF No. 2968-2). As a practical matter the great bulk of covered occurrences would be accidents. For brevity, except where quoting language that did not do likewise, the Court uses “**Accidents**” to cover anything within that category.

The “**Closing Date**”—the date the 363 Sale closed, under the authority of the Sale Order—turned out to be July 10, 2009.

(b) Repairs or the replacement of parts provided for under the
Glove Box Warranty;³⁵ and

(c) Lemon Law claims.³⁶

And as noted in the Sale Decision, “an important change [] was made in the [Sale Agreement] after the filing of the motion” which broadened the Assumed Liabilities to include “*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.*”³⁷

But by contrast, the liabilities retained by Old GM—and not assumed by New GM—expressly included: (a) Product Liabilities arising in whole or in part from any Accidents, that happened *prior to* the Closing Date;³⁸ and (b) Liabilities to third parties for prepetition claims based on contract, tort, or any other basis.³⁹

The Sale Agreement also required New GM to comply with recall obligations imposed by federal and state law, even for cars or parts manufactured by Old GM.⁴⁰

³⁵ Sale Agreement § 2.3(a)(vii). This is a duty to make, or cause to be made, the necessary repairs. It is not a monetary obligation. *See Trusky v. General Motors Co. (In re Motors Liquidation Co.)*, 2013 Bankr. LEXIS 620, at *26, 2013 WL 620281, at *9 (Bankr. S.D.N.Y. Feb. 19, 2013) (Gerber, J.) (“*GM-Trusky*”) (“Performance of repairs and needed adjustments is the exclusive remedy under this written warranty. What is recoverable, in substance, is specific performance of the repair or replacement obligation for otherwise qualifying defects.”).

³⁶ *See* Sale Agreement § 2.3(a)(vii). Lemon Law claims were added as an assumed liability during the course of the 363 Sale hearing after negotiation with the AGs. Additionally, and importantly here, New GM undertook to comply with its statutory recall obligations, even with respect to Old GM manufactured vehicles. Though to the extent these related to Old GM manufactured vehicles, these might be thought of as Old GM liabilities to be assumed, they were not characterized as such. But the characterization doesn’t matter; what is clear is that New GM agreed that it would be responsible for them.

³⁷ 407 B.R. at 481–82 (emphasis in original).

³⁸ Sale Agreement § 2.3(b)(ix). The Pre-Closing Accident Plaintiffs’ claims are in this category.

³⁹ Sale Agreement § 2.3(b)(xi). The Economic Loss Plaintiffs’ Claims are in this category.

⁴⁰ *See* Sale Agreement § 6.15(a) (“From and after the Closing, Purchaser shall comply with the certification, reporting and recall requirements of the National Traffic and Motor Vehicle Safety

7. *The Sale Order*

As previously discussed, the Court overruled objections to Free and Clear Provisions, and the Sale Order thus had five (somewhat duplicative) provisions, including injunctive provisions, protecting New GM from successor liability.

One provided, for example, that except for Assumed Liabilities, Old GM's assets were acquired "free and clear of all liens, claims, encumbrances, and other interests of any kind or nature whatsoever [other than permitted liens], *including rights or claims based on any successor or transferee liability*," with "all such liens, claims, encumbrances, and other interests, *including rights or claims based on any successor or transferee liability*, [to] attach to the net proceeds" of the Sale.⁴¹

Three others provided that "*no claims, other than Assumed Liabilities, will be assertable against the Purchaser [New GM]*";⁴² that New GM would have no liability "*for any claim that arose prior to the Closing Date, relates to the production of vehicles prior to the Closing Date, or otherwise is assertable against the Debtors or is related to the Purchased Assets prior to the Closing Date*";⁴³ and that "*the Purchaser shall have no successor, transferee, or vicarious liabilities of any kind or character*."⁴⁴ And another included injunctive provisions barring assertion of successor liability claims.⁴⁵

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.").

⁴¹ Sale Order ¶ 7 (ECF No. 2968) (emphasis added).

⁴² *Id.* at ¶ 9(a) (reformatted for readability, emphasis added).

⁴³ *Id.* at ¶ 46 (reformatted for readability, emphasis added).

⁴⁴ *Id.* at ¶ 48 (reformatted for readability, emphasis added).

⁴⁵ *Id.* at ¶ 8 (the "**Injunctive Provision**").

But tracking the language of the Sale Agreement, almost verbatim, the Sale Order imposed certain recall and other obligations on New GM in accordance with federal and state law, even with respect to parts and vehicles manufactured by Old GM:

From and after the Closing, the Purchaser shall comply with the certification, reporting, and recall requirements of the National Traffic and Motor Vehicle Safety Act, as amended and recodified, including by 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 motor vehicles, vehicles, motor vehicle equipment, and vehicle parts manufactured or distributed by the Sellers prior to the Closing.⁴⁶

And the Sale Order also addressed severability: “The provisions of this Order are nonseverable and mutually dependent on each other.”⁴⁷

8. *Matters After the Sale*

Upon the closing of the 363 Sale, New GM provided Old GM, as provided in the Sale Agreement, shares of New GM common stock and warrants (the “**New GM Securities**”), to be later distributed to Old GM creditors pursuant to a future plan.

In September 2009, about two months after the Sale was completed, the Court entered an order (the “**Bar Date Order**”) establishing November 30, 2009, as the deadline (the “**Bar Date**”) for proofs of claim to be filed against Old GM, and approved the form and manner of notice of the Bar Date. The Bar Date Order allowed for publication notice to holders of unknown claims. The Plaintiffs here are among those who received publication notice only as to any claims they might have against Old GM.

⁴⁶ *Id.* at ¶ 17.

⁴⁷ *Id.* at ¶ 69.

In March 2011, Old GM filed the Plan, and without opposition anything like the opposition that the 363 Sale had engendered (though the opposition was sufficient to warrant a written opinion),⁴⁸ the Plan was confirmed. On March 29, 2011, the Court entered an order (the “**Confirmation Order**”) confirming the Plan.

The Plan became effective on March 31, 2011 (the “**Effective Date**”), and the Plan provided that it would be deemed substantially consummated as of the Effective Date. The parties have stipulated that the Plan has been substantially consummated.⁴⁹

9. *The GUC Trust and its Operation*

Among many other things, the Confirmation Order authorized the creation of the GUC Trust. Under the agreement by which the GUC Trust was formed (the “**GUC Trust Agreement**”), only certain categories of persons or entities were made beneficiaries. The GUC Trust Agreements limited GUC Trust Beneficiaries to:

- (i) the holders of *allowed* general unsecured claims against Old GM that existed as of the Effective Date;
- (ii) the holders of claims asserted against Old GM that *were disputed* as of the Effective Date (“**Disputed Claims**”) and *subsequently allowed* (collectively with claims that were allowed as of the Effective Date, “**Allowed Claims**”),
- (iii) the holders of potential general unsecured claims (“**JPMorgan Claims**”) that might arise in connection with the GUC Trust’s lien

⁴⁸ See *In re Motors Liquidation Co.*, 447 B.R. 198 (Bankr. S.D.N.Y. 2011) (Gerber, J.) (the “**Confirmation Decision**”).

⁴⁹ Equitable Mootness Stipulated Facts ¶ 18 (ECF No. 12826-4); see also *Morgenstein v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 462 B.R. 494, 501 n. 36 (Bankr. S.D.N.Y. 2012) (Gerber, J.) (“**Morgenstein**”) (“[T]he Plan already has been substantially consummated.”), *aff’d* 12-cv-01746-AJN, ECF No. 21 (S.D.N.Y. Aug. 9, 2012) (Nathan, J.).

avoidance action relating to a mistakenly released financing statement;⁵⁰

and

(iv) the holders of units of beneficial interest (each, a “**GUC Trust Unit**”)⁵¹ in the GUC Trust.

The GUC Trust Agreement also set forth provisions governing the GUC Trust’s ability to distribute the New GM Securities and their proceeds (collectively, the “**GUC Trust Assets**”), which were intended to ensure that the Unitholders would receive, as promptly as practicable, any GUC Trust Assets that were not necessary to fund the Allowed Claims (or potential Allowed Claims); any additional JPMorgan Claims; or projected liquidation and administrative costs of the GUC Trust (collectively, the “**GUC**

⁵⁰ Before Old GM’s Plan was confirmed, the Creditors’ Committee brought an adversary proceeding seeking a determination that the principal lien securing a syndicated \$1.5 billion term loan (the “**Term Loan**”) that had been made to GM in November 2006 was terminated in October 2008, before the filing of GM’s chapter 11 case—thereby making most of the \$1.5 billion in indebtedness under the Term Loan unsecured. The defendants were the syndicate members who together made the Term Loan and JPMorgan Chase Bank, N.A. (“**JPMorgan**”), the agent under the facility. On cross-motions for summary judgment in that adversary proceeding, this Court ruled in favor of JPMorgan, but that decision, after an intermediate certification to the Delaware Supreme Court, was thereafter reversed by the Second Circuit and remanded to this Court. *See Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JP Morgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 486 B.R. 596 (Bankr. S.D.N.Y. 2013) (“**GM-UCC-3 Opinion**”), *question certified for determination by Delaware Supreme Court*, 755 F.3d 78 (2d Cir. 2014), *question answered*, 103 A.3d 1010 (Del. 2014), *rev’d and remanded*, 777 F.3d 100 (2d Cir. 2015), *rehearing en banc denied*, No.13-2187 ECF No. 179 (2d Cir. Apr. 13, 2015).

When Old GM’s Plan was confirmed, after that adversary proceeding was commenced, the Creditors’ Committee’s right to pursue that litigation devolved to another trust created under the Plan—the “Avoidance Action Trust.” Depending on the outcome of further litigation in this Court, it is possible that a portion (and perhaps a major portion) of the Term Loan Debt would have to be paid to the Avoidance Action Trust and then result in additional unsecured claims against the GUC Trust. *See* 486 B.R. at 615 n.54 (“To the extent that the Committee might be successful in this adversary proceeding, the amount paid to JPMorgan and the Lenders would be subject to recapture, as provided in the final DIP Financing Order when the payoff of the Term Loan was authorized. In that event, after the return of the amount previously paid on what was thought to be a duly secured claim, the Lenders would still have a claim for the Term Loan debt, but would have only an unsecured claim, sharing *pari passu* with the many billions of dollars of other unsecured claims in GM’s chapter 11 case.”).

⁵¹ The GUC Trust Units are freely tradable. As reported by Bloomberg Finance, as of October 21, 2014, approximately 100 million GUC Trust Units had been bought and sold since June 14, 2012, and the aggregate value of those GUC Trust Units (based on daily closing prices) totaled approximately \$2.1 billion.

Trust Liabilities”), and that the GUC Trust would retain sufficient assets to fund those liabilities.

By January 2012, more than two years after the original Bar Date, many claims continued to be filed against Old GM. On January 1, 2012 (nearly a year after the Effective Date), the GUC Trust filed a motion (the “**Late Filed Claims Motion**”) seeking an order disallowing late filed claims.⁵² Under the requested order, any future late filed claims would be disallowed unless, among other things, the claimant filed a motion with the Court seeking permission to file a late proof of claim.

The Court granted the GUC Trust’s Late Filed Claims Motion, and in February 2012, entered its order (the “**Late Filed Claims Order**”) implementing that ruling.

The Late Filed Claims Order explicitly stated that “nothing in [the Late Filed Claims Order] shall prevent any claimant submitting a Late Claim from filing a motion with the Court seeking to have its Late Claim deemed timely filed.”⁵³ Likewise, none of the Plan, Confirmation Order, and GUC Trust Agreement prohibited late filed claims. In two known instances, late filed claims have been allowed in the Old GM bankruptcy case both before and after the Effective Date. Under the Plan, a late filed proof of claim may be subsequently adjudicated as an Allowed General Unsecured Claim.

In April and May 2011, initial distributions—consisting of 75% of the New GM Securities, along with nearly 30 million GUC Trust Units—were made to those who had Allowed Claims as of the Effective Date. The only New GM Securities that were not distributed were those that could be necessary to fund GUC Trust Liabilities⁵⁴—

⁵² ECF No. 11351.

⁵³ Late Filed Claims Order at 2 (ECF No. 11394).

⁵⁴ Equitable Mootness Stipulated Facts ¶ 35 (ECF No. 12826-4).

principally claims that as of that time had been neither allowed or disallowed, and administrative costs.

Between May 2011 and the end of September 2014, the GUC Trust made distributions on formerly Disputed Claims that had thereafter been resolved. Similarly, in July and October 2011, and December 2013, the GUC Trust made additional distributions of New GM Securities—to the end that by September 30, 2014, the GUC Trust had distributed more than 89% of the New GM Securities and nearly 32 million GUC Trust Units.

On October 24, 2014, the GUC Trust Administrator disclosed that it was planning on making still another distribution, scheduled for November 12, 2014. Shortly thereafter, certain Plaintiffs' counsel wrote the GUC Trust's counsel advising that Plaintiffs were "known potential contingent beneficiaries of the GUC Trust and the GUC Trust should not make any further distributions unless and until it demonstrates that adequate reserves ha[d] been established with respect to Plaintiffs' potential claims against Old GM and/or the GUC Trust that could be in the multiple billions of dollars."⁵⁵ The next day, counsel for the GUC Trust Administrator replied that it would *not* establish reserves for the Plaintiffs' claims, and that it was going forward with the planned November 2014 GUC Trust Distribution. Plaintiffs chose, for admitted strategic reasons,⁵⁶ not to seek a stay of the GUC Trust's distributions.

The GUC Trust Administrator then made that distribution, without establishing any reserves for the Plaintiffs' claims.

⁵⁵ See ECF No. 13029, Exhibit A, at 3.

⁵⁶ See Day 1 Arg. Tr. at 112:13-16 ("yes, there was a strategic element to the decision that was taken on our side").

As of December 16, 2014, the GUC Trust had total assets of approximately \$773.7 million, comprised principally of New GM Securities, though with approximately \$64 million in commercial paper, demand notes, and cash equivalents.⁵⁷

The GUC Trust Assets stand to be augmented upon allowance of any Plaintiffs' claims against Old GM and/or the GUC Trust through an "accordion feature"⁵⁸ in the Sale Agreement and any order by the Court requiring New GM to contribute more money or New GM Common Stock to the GUC Trust.⁵⁹

10. Knowledge of the Ignition Switch Defect

In February and March of 2014, New GM informed the Safety Administration of the Ignition Switch Defect, and that a recall would be conducted to address it. New GM does not contend, and there is no evidence in the record from which the Court now could find, that any Plaintiff knew of the Ignition Switch Defect before New GM's announcement in the Spring of 2014. But more than a few at Old GM knew of it as of the time of Old GM's chapter 11 filing. 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 2003.⁶⁰

⁵⁷ See GUC Trust Q3 2014 Form 10-Q at 1, 12.

⁵⁸ Under the Sale Agreement, New GM agreed to provide additional consideration to Old GM if the aggregate amount of Allowed General Unsecured Claims against Old GM exceeded \$35 billion. See Equitable Mootness Stipulated Facts ¶ 5. In such case, New GM is required to issue additional shares of New GM Common Stock to the GUC Trust. *Id.*

⁵⁹ See *id.* ¶ 32.

⁶⁰ See Pl. Stipulated Facts ¶ 14 (ECF No. 12826-2).

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 then to have been obligated, under the Safety Act, to conduct a recall of the affected vehicles.⁶¹

11. The Motion to Enforce

Very nearly immediately after New GM's Spring 2014 announcement, a large number of class actions—the earliest Ignition Switch Actions—were commenced against New GM, asserting, among other things, successor liability. In April 2014, New GM filed the Motion to Enforce, contending that most of the claims in the Ignition Switch Actions related to vehicles or parts manufactured and sold by Old GM, and that the Sale Order's Free and Clear Provisions, and injunctions against successor liability, proscribed such claims. In August 2014, New GM filed similar motions to enforce the Sale Order against the Pre-Closing Accident Plaintiffs and the Non-Ignition Switch Plaintiffs, though the latter is on hold pending the rulings here.

In June 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 Judge Furman to oversee coordinated proceedings for the actions assigned to the MDL. New GM has stated in its Reply that “[t]here are over 140 class action lawsuits currently pending against [it], with more being filed.”⁶² The Court understands the great bulk of these to involve economic loss claims.

At an August 11, 2014 case management conference in MDL 2543, it was determined that certain plaintiffs' counsel who had been designated to take the lead in MDL 2543 (“**Lead Counsel**”) would file a consolidated master complaint for all

⁶¹ See *id.*; see also Pl. Br. at 47; Day 1 Arg. Tr. at 91:1-18; Day 2 Arg. Tr. at 7:11-19, 13:5-10.

⁶² New GM Reply at 45.

economic loss actions. This Court then adjusted the briefing and argument of the issues here to take into consideration any claims added or dropped in MDL 2543. In October 2014, Lead Counsel filed two Consolidated Complaints, each seeking class action treatment. The first—referred to by many as the “Pre-Sale Consolidated Complaint”—seeks damages from New GM on behalf of class members who purchased vehicles with an Ignition Switch Defect (which necessarily would have been manufactured by Old GM) *before* the closing of the 363 Sale.⁶³

The second—referred to by some as the “Post-Sale Consolidated Complaint”—seeks relief on behalf of class members who had purchased vehicles *after* the closing of the 363 Sale.⁶⁴

12. The Threshold Issues

After this Court held conferences with the parties to establish means to most efficiently litigate the issues here, the parties identified, at the Court’s request, four threshold issues for judicial determination. They were:

Whether Plaintiffs’ procedural due process rights were violated in connection with the Sale Motion and the Sale Order and Injunction, or alternatively, whether Plaintiffs’ procedural due process rights would be violated if the Sale Order and Injunction is enforced against them (the “**Due Process Threshold Issue**”);

If procedural due process was violated as described in (a) above, whether a remedy can or should be fashioned as a result of such violation and, if so, against whom (the “**Remedies Threshold Issue**”);

⁶³ These would all be barred under the Sale Order, to the extent it is enforceable.

⁶⁴ Some of these would be barred under the Sale Order and some would not, depending on whether the vehicle acquired after the 363 Sale had been previously manufactured by Old GM, or had Old GM parts.

Whether any or all of the claims asserted in the Ignition Switch Actions are claims against the Old GM bankruptcy estate (and/or the GUC Trust) (the “**Old GM Claim Threshold Issue**”);⁶⁵ and

If any or all of the claims asserted in the Ignition Switch Actions are or could be claims against the Old GM bankruptcy estate (and/or the GUC Trust), should such claims or the actions asserting such claims nevertheless be disallowed/dismissed on grounds of equitable mootness (the “**Equitable Mootness Threshold Issue**”).⁶⁶

The Court also asked for briefing on the legal standards that would apply to any claims asserting Fraud on the Court, and announced that it would rule on those as well.⁶⁷

The Court addresses those issues, in some instances breaking them down further and restating them slightly to conform to a more appropriate framework, in the discussion to follow.

Discussion

I.

Due Process

The Due Process Threshold Issue requires the Court to decide, with respect to the Sale Order, whether

(1) as New GM contends and the Plaintiffs dispute, insufficient notice of the 363 Sale hearing could not result in a deprivation of due process (principally because any successor liability claims would belong

⁶⁵ They agreed, however, that the issue of whether a claim asserted in the Ignition Switch Actions would be timely and/or meritorious against the Old GM bankruptcy estate (and/or the GUC Trust) is not a Threshold Issue.

⁶⁶ See Supplemental Scheduling Order, dated Jul. 11, 2014, ECF No. 12770. Though the Threshold Issues were first identified before the Consolidated Complaints were filed, nobody has suggested that what has been pleaded in the Consolidated Complaint requires any change in the Threshold Issues.

⁶⁷ *Id.*

to the Old GM estate, and not to the Plaintiffs, and because the Plaintiffs' rights would attach to the sale proceeds), as there would not be the requisite potential deprivation of property;

(2) as the Plaintiffs contend and New GM disputes, the Plaintiffs failed to get the notice due process requires (and related to that, whether the Plaintiffs had "known claims" as that expression is used in the due process jurisprudence); and

(3) as New GM contends and the Plaintiffs dispute, prejudice is an essential element of any claim for a denial of due process, and the Plaintiffs failed to show the requisite prejudice here, with respect to all or some of their claims.

After the Court does so, it then must decide the extent to which the Sale Order remains subject to attack, and any areas as to which the Plaintiffs, or some of them, may potentially qualify for a remedy. The Court also believes that it should address these same issues with respect to the allowance of Plaintiff claims against Old GM, from which their successor liability contentions emanate, and which cannot appropriately be divorced from any due process analysis. Discussion of these matters follows.

A.

Underlying Principles

1. Mullane

All parties, appropriately, begin with the Supreme Court's decision in *Mullane*—which Plaintiffs describe as "the seminal Supreme Court case establishing due process

requirements for creditors in a bankruptcy proceeding.”⁶⁸ They are right to start with *Mullane*; it is the seminal Supreme Court opinion clarifying what due process requires in litigation. But it was not a bankruptcy case.⁶⁹ In *Mullane*, the Supreme Court held that a statute authorizing notice by publication of a proposed judicial settlement of a “common trust,” holding the assets of 113 smaller trusts, failed to satisfy due process requirements for the trust’s known beneficiaries.⁷⁰ The common trust had “many” beneficiaries.⁷¹ But

⁶⁸ Pl. Br. at 27.

⁶⁹ Nevertheless, considerable authority, by the Second Circuit and other circuit courts, holds, not surprisingly, that due process requirements apply in bankruptcy cases, just as they do in plenary litigation. See, e.g., *DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 747 F.3d 145, 150 (2d Cir. 2014) (Newman, Pooler, and Livingston, JJ) (“*DPWN*”) (“[A] claim cannot be discharged if the claimant is denied due process because of lack of adequate notice.”); *In re Johns–Manville Corp.*, 600 F.3d 135, 153–54 (2d Cir. 2010) (*per curiam*) (“*Manville-2010*,” sometimes also referred to as “*Manville IV*”) (Calabrese and Wesley, JJ) (ruling that due process was denied in dispute over whether an earlier bankruptcy court order in a chapter 11 case properly enjoined not only claims directed at Travelers insurance policies in the *res* of the Manville estate, but also non-derivative claims by Chubb that sought to impose liability on Travelers separately); *Koepp v. Holland*, 593 Fed. Appx. 20 (2d Cir. 2014) (Summary Order, Katzmman, CJ, and Hall and Livingston, JJ) (“*Koepp*”) (ruling that due process was denied in dispute over easements on land previously owned by a debtor reorganized under § 77 of the now-superseded Bankruptcy Act); *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 n.1 (3d Cir. 1995) (“*Chemetron*”) (“Although *Mullane* involved the notice due beneficiaries on judicial settlement of accounts by the trustee of a common trust fund, subsequent courts have interpreted the case to set the standard for notice required under the Due Process Clause in Chapter 11 bar date cases.”); *In re Edwards*, 962 F.2d 641 (7th Cir. 1992) (“*Edwards*”) (considering due process contentions by a secured creditor whose interest was extinguished in a free and clear section 363 sale without notice, though ultimately ruling in favor of a bona fide purchaser).

⁷⁰ See *Mullane*, 339 U.S. at 320 (“We hold the notice of judicial settlement of accounts required by the New York Banking Law § 100-c(12) is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights.”).

⁷¹ *Id.* at 309. But the Plaintiffs exaggerate, however, when they assert that the *Mullane* court ruled as it did notwithstanding the “very large” number of beneficiaries involved. Pl. Br. at 27. Actually, the *Mullane* court said that “the record [did] not show the number or residence of the beneficiaries,” 339 U.S. at 309, though it also said that there were 113 contributing trusts, with aggregate assets of about \$3 million. *Id.* A \$3 million trust corpus was a bigger number in 1950 than it is now, but the likely number of individuals having interests in the 113 contributing trusts whose collective assets led to that \$3 million corpus would at least seemingly be many orders of magnitude smaller than the huge number of vehicle owners here—of 27 million cars with Ignition Switch Defects and of 70 million on the road. That and the fact later mentioned by the *Mullane* court that mailed notices had been sent to ascertainable beneficiaries in the past, which was “persuasive” as to the Trust Company’s ability to mail notice there, see 339 U.S. at 319, suggests that the number to be given mailed notice there, while relatively large, was much less than huge, most likely in the thousands (and perhaps low thousands), rather than tens of millions.

despite that (and even though the statute authorized service by publication), the Court found that because the trustee, Central Hanover Bank & Trust Company (the “**Trust Company**”), seeking the judicial settlement of the trust for which it was responsible, could with due diligence ascertain their names and addresses, they were entitled to mailed notice of the settlement.

In reaching that result, the *Mullane* court started with the recognition that while “[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified,” the Court would have to “balance” against that interest an individual’s right to be heard.⁷² It continued by observing that while it “ha[d] not committed itself to any formula” in achieving that balance, “a few general principles stand out in the books.”⁷³ One was that:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.⁷⁴

Others were that “[t]he notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance.”⁷⁵

The *Mullane* court qualified its statement of those general requirements, however, by including an element of practicality:

But if with due regard for the practicalities and peculiarities of the case these conditions are

⁷² *Id.* at 313-14.

⁷³ *Id.* at 314.

⁷⁴ *Id.*

⁷⁵ *Id.*

reasonably met the constitutional requirements are satisfied. The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.⁷⁶

And once again recognizing the need for practicality, it stated that

[t]he reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, *where conditions do not reasonably permit such notice*, that the form chosen is not substantially less likely to bring home notice than other of the *feasible* and customary substitutes.⁷⁷

The *Mullane* court expressly endorsed the use of publication when it would not be practical to provide better notice:

This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.

Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained come clearly within this category. As to them the statutory notice [*i.e.*, notice by publication] is sufficient. However great the odds that publication will never reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable.⁷⁸

⁷⁶ *Id.* at 314-15 (internal quotation marks deleted).

⁷⁷ *Id.* at 315 (emphasis added) (citations omitted).

⁷⁸ *Id.* at 317 (citations omitted).

In a later post-*Mullane* decision,⁷⁹ the Supreme Court reiterated this.

In the years since *Mullane* the Court has adhered to these principles, balancing the “interest of the State” and “the individual interest sought to be protected by the Fourteenth Amendment.” The focus is on the reasonableness of the balance, and, as *Mullane* itself made clear, whether a particular method of notice is reasonable depends on the particular circumstances.⁸⁰

Thus it is hardly surprising that the Supreme Court has also stated, albeit in a different context (there, deciding the extent of the hearing required before a revocation of a former inmate’s parole), that “[i]t 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.”⁸¹

Finally, the *Mullane* court made one other point—one which is frequently overlooked—of considerable relevance here. It recognized that notice to *others* with an interest in objecting could ameliorate prejudice (and impliedly, if not expressly, even the existence of constitutionally deficient notice in the first place) to those who did not get notice. It observed:

This type of trust presupposes a large number of small interests. *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.* We think that under such circumstances reasonable risks that notice might not actually reach

⁷⁹ *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988) (“*Tulsa Collection Services*”).

⁸⁰ *Id.* at 484.

⁸¹ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“*Morrissey*”).

every beneficiary are justifiable. ‘Now and then an extraordinary case may turn up, but constitutional law, like other mortal contrivances, has to take some chances, and in the great majority of instances, no doubt, justice will be done.’⁸²

2. *Second Circuit Guidance*

The Second Circuit has given the lower courts in this Circuit more specific guidance, in several key cases. In its 1989 decision in *Weigner v. City of New York*,⁸³ the Circuit held that “[t]he proper inquiry [on a due process contention] is whether the [noticing party] *acted reasonably in selecting means likely to inform persons affected*, not whether each property owner actually received notice.”⁸⁴

Then, in its 1993 decision in *Drexel Burnham*, first mentioned above,⁸⁵ the Circuit put forward its understanding of *Mullane*’s principles by stating that “no person may be deprived of life, liberty or property by an adjudicatory process without first being afforded notice and a full opportunity to appear and be heard, *appropriate to the nature of a given case*.”⁸⁶

There, the “given case,” a proceeding in the *Drexel Burnham* chapter 11 case, involved the approval of a settlement under which, among other things, Drexel Burnham and a sub-class of its securities claimants pooled their recoveries from lawsuits Drexel Burnham had brought against its former officers and directors, and the settling parties granted a release to former officer Michael Milken. As here, the *Drexel Burnham* objectors were apparently troubled that the settlement would impair their recoveries

⁸² *Mullane*, 339 U.S. at 319 (emphasis added).

⁸³ 852 F.2d 646 (2d Cir. 1988) (“*Weigner*”), *cert. denied*, 488 U.S. 1005 (1989).

⁸⁴ *Id.* at 649 (emphasis added).

⁸⁵ See n.10 *supra*.

⁸⁶ 995 F.2d at 1144 (emphasis added).

against parties other than the debtor itself. The objectors raised both due process and substantive objections to the settlement—contending, in the due process prong of their objection, that the notice of the proposed settlement that had been mailed to 7,700 Drexel bankruptcy claimants was insufficiently descriptive of the proposed settlement.

In that context, as part of its due process analysis, the Circuit observed in *Drexel Burnham* that “[n]o rigid constitutionally mandated standard governs the contents of notice in a case like the one before us. Rather, the Due Process Clause requires *the best notice practical under the circumstances*.”⁸⁷ And once again citing *Mullane*, the Circuit continued that “the Supreme Court has warned against interpreting this notice requirement so inflexibly as to make it an ‘impractical or impossible obstacle[.]’”⁸⁸

Similarly, in its 2014 decision in *DPWN*,⁸⁹ the Second Circuit reiterated that “whether notice comports with due process requirements turns on the *reasonableness* of the notice, a *flexible* standard that often turns on what the debtor or the claimant knew about the claim or, with reasonable diligence, should have known.”⁹⁰

Like *Weigner* before it (where the notice had also been mailed), *Drexel Burnham* was a *quality* of notice case, rather than a *means* of notice case.⁹¹ Nevertheless, its

⁸⁷ *Drexel Burnham*, 995 F.2d at 1144 (citing *Mullane*) (emphasis added).

⁸⁸ *Id.* (once again citing *Mullane*). With a *cf.*, the Circuit also cited, and quoted, a considerably older Supreme Court decision, *Grannis v. Ordean*, 234 U.S. 385, 395 (1914), quoting the earlier opinion’s observation that the Due Process Clause “does not impose an unattainable standard of accuracy.”

⁸⁹ 747 F.3d 145.

⁹⁰ *Id.* at 150 (citing *Mullane* and *Chemetron*) (emphasis added).

⁹¹ It considered whether the duly mailed notice was still insufficient, because it didn’t tell creditors enough. In that respect, *Drexel Burnham* considered a contention like the Pre-Closing Accident Plaintiffs’ assertions here that “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” (Pre-Closing Accident Pl. Br. at 9) and “[t]he notice that Old GM provided with respect to the 363 Sale was constitutionally deficient . . . regardless of whether the notice was mailed directly to the Plaintiff or published in the newspaper.” (*Id.* at 26; accord *id.* at 29).

direction that notice must be “*appropriate to the nature of a given case*”⁹² was not limited to cases of the first type. And *Mullane*, the opinion on which the *Drexel Burnham* court relied, was a case of the second type. For each of those reasons, along with common sense, the Court reads the Circuit’s *Drexel Burnham* directions that “the Due Process Clause requires the best notice practical under the circumstances,”⁹³ and that the notice requirement should not be interpreted “so inflexibly as to make it an ‘impractical or impossible obstacle’”⁹⁴—each of which was derived by citing *Mullane*—as applicable to cases involving either the *means* or the *quality* of any notice whose adequacy is questioned.

Then, though it involves a materially different factual situation, the Circuit’s decision in *DPWN* is nevertheless significant in several respects. *DPWN* was an antitrust case, but with a bankruptcy discharge defense. The plaintiff there, the well-known courier DHL, which used United Airlines for cargo delivery services, sued United under the Sherman Act, alleging price-fixing. United had been reorganized in a chapter 11 case in Chicago, at the conclusion of which it received a discharge of its debts, and moved to dismiss the antitrust action under Rule 12(b)(6), relying on its earlier discharge.⁹⁵

DHL (which had earlier received mailed notice in the bankruptcy of the opportunity to file claims, but without particularized mention of United’s susceptibility to antitrust claims) had anticipated the discharge defense, and proactively pleaded a potential basis for avoiding it—that it lacked sufficient notice of the availability of its

⁹² 995 F.2d at 1144.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *See* 747 F.3d at 147.

antitrust claim to satisfy due process requirements for rendering that claim discharged. The District Court, taking that allegation as true, declined to dismiss at that state of the proceedings. But the Circuit remanded, considering the allegation to be too conclusory to pass *Iqbal*⁹⁶ scrutiny, and directed the District Court to conduct further inquiry as to whether it was supportable. More specifically, the Circuit remanded for District Court inquiry as to *DHL*'s knowledge of its potential antitrust claim during United's chapter 11 case, and *United's* knowledge with respect to a DHL claim.⁹⁷

DPWN also suggests two other concerns that turn out not to be determinative in this case, but that may well be important in others. First, it suggests (if it does not also require) a two-step methodology that should be used, to the extent applicable, in examining contentions that the notice that due process requires was denied. The first step calls for inquiry as to whether the *claimant* knew of the claim it might assert.⁹⁸ The second step calls for the lower court to determine whether the claim was, from the perspective of the *notice-giver* (often a debtor in a bankruptcy case), a "known" claim, obligating the notice-giver to provide actual, and possibly more detailed, notice.⁹⁹

The second is a hint that in some cases, it may be the *quality*—as contrasted to the *means*—of notice that matters. That might suggest that even if the means of notice were entirely satisfactory (as it obviously was when DHL received *mailed* notice of the bankruptcy and of the deadline to file claims), notice lacking the requisite quality might

⁹⁶ See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁹⁷ See 747 F.3d at 153.

⁹⁸ This Court said "to the extent applicable," however, because here New GM does not contend that any of the Plaintiffs knew of the Ignition Switch Defect, or had the means to ascertain it. Thus all parties here, and the Court, go straight to the second step.

⁹⁹ That "known claim" second step, of course, is one of the most important elements of this Court's inquiry here.

nevertheless warrant relief. And this suggests that *notice of the bankruptcy* is not enough, or even the *deadline for the filing of claims*—and that assuming that the debtor has knowledge of the existence of the claim (which debtors will typically have in the case of contractual obligations but typically won’t have with respect to non-contractual ones), something more detailed in the way of notice might have to be provided.¹⁰⁰

3. *Guidance from Lower Courts*

Courts below the Circuit level likewise have been sensitive to the need for practicality and flexibility in due process analysis. In *Affirmance Opinion #2*, referred to by several parties in their briefs as “*Parker*,” on one of the appeals from the *Sale Decision*, Judge Sweet considered a number of objections by appellant Oliver Parker, a bondholder, claiming that the 363 Sale violated his due process rights. Before rejecting Parker’s contentions, Judge Sweet synthesized the underlying law, making reference to *Mullane* and *Morrissey* in the Supreme Court, and *Drexel Burnham* in the Circuit:

The U.S. Supreme Court has repeatedly emphasized the flexibility of the due process requirement, which simply “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

¹⁰⁰ Importantly, however, the *DPWN* court did not do away with the “known” claim requirement. And that is understandable. Unless the debtor knew of the claim or could reasonably ascertain its existence (a task that is particularly challenging for noncontractual obligations), the debtor could not provide sufficiently detailed notice, and the bankruptcy system could not operate. Debtors (with resulting prejudice to their genuinely known creditors) would be subject to extraordinary expense and uncertainty in trying to think up, and explain in sufficient detail, claims that potential creditors might assert. They would be uncertain whether all of their claims could actually be discharged. And the process would be particularly fraught with peril under the rushed circumstances that typify section 363 sales. Though the *DPWN* court did not lay it down as a legal principle, it made another very important observation as to claims that are known and those that are not. It observed that “a debtor will normally be less likely to be charged with knowledge that it has violated the law than that it owes money unrelated to a law violation.” 747 F.3d at 151. That is equally true with respect to many types of tort liabilities, especially product liability claims. Both violations of law and tort liabilities present challenges in knowing of the existence of the claim that are quite different from those in knowing of contractual obligations or transactions (such as the granting of liens or easements) involving earlier grants of property interests.

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” In short, the constitutional requirements of due process are satisfied if notice is given with “due regard for the practicalities and peculiarities of the case.”¹⁰¹

Thus New GM is right when, quoting *Mullane* and *Affirmance Opinion #2*, it argues that “[d]ue process is a flexible standard.” In fact, New GM’s point that due process is “flexible” comes verbatim from the Supreme Court’s opinion in *Morrissey*,¹⁰² and also appears in so many words in *DPWN*.¹⁰³ But as *Morrissey* also at least implies, the caselaw does not support a wholly standardless flexibility.¹⁰⁴ Other authority—especially authority addressing the “known”-“unknown” claim distinction discussed in the subsection that follows—rather suggests a standard requiring a fairly thoughtful, and sometimes nuanced, consideration of the circumstances, to ascertain whether any failure to provide better notice (either more direct or more detailed) can appropriately be excused.

4. The “Known”-“Unknown” Creditor Distinction

Apart from focusing on the practicality of requiring notice by one means or another, and of one argued level of detail or another, a court also has to focus on whether providing notice to one particular person or entity, or group of such, is required in the first place. As an abstract matter, that latter issue turns on whether those to be noticed

¹⁰¹ *Affirmance Opinion #2*, 430 B.R. at 97 (citations omitted).

¹⁰² See 408 U.S. at 481 (“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.”).

¹⁰³ See 747 F.3d at 150.

¹⁰⁴ See 408 U.S. at 481 (“To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.”).

(which in bankruptcy most commonly are creditors and those with ownership or security interests in estate property) are “known,” on the one hand, or “unknown,” on the other.¹⁰⁵ Stating the distinction is easy; applying it is much more difficult.

In many cases, whether the notice recipient would want the right to file a claim or to be heard—and hence is “known”—is obvious. In others, as here, it is much less so. Caselaw, at the Supreme Court and, especially, in the lower courts, has provided some guidance in this area. But it has been less than totally helpful.

Mullane, which was decided 65 years ago, did not yet make a “known”-“unknown” distinction, nor did it yet use the expression “reasonably ascertainable,” which later became the standard, as discussed below. But *Mullane* did say—apart from saying that actual notice wasn’t required for those whose interests were “conjectural”¹⁰⁶—that actual notice was not required for those who, “although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee.”¹⁰⁷ That is plainly a rejection of a duty of investigation. But it is

¹⁰⁵ See, e.g., *Chemetron*, 72 F.3d at 347 (“As characterized by the Supreme Court, a ‘known’ creditor is one whose identity is either known or ‘reasonably ascertainable by the debtor.’ 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].’”) (citations omitted); *In re Drexel Burnham Lambert Grp.*, 151 B.R. 674, 680 (Bankr. S.D.N.Y. 1993) (Conrad, J) (“*Drexel Burnham-Bankruptcy*”) (“For purposes of determining constitutionally acceptable notice of an impending bar date, bankruptcy law divides creditors into two groups: known and unknown. According to well-established case law, due process requires that a debtor’s known creditors be afforded actual notice of the bar date . . . For obvious reasons, debtors need not provide actual notice to unknown creditors. It is widely held that unknown creditors are entitled to no more than constructive notice (i.e., notice by publication) of the bar date.”) (citations omitted).

¹⁰⁶ 339 U.S. at 317. “Conjectural” has since been joined by “conceivable” and “speculative.” See *In re Thomson McKinnon Sec., Inc.*, 130 B.R. 717, 720 (Bankr. S.D.N.Y. 1991) (Schwartzberg, J.) (“*Thomson McKinnon*”); *In re XO Commc’ns, Inc.*, 301 B.R. 782, 793 (Bankr. S.D.N.Y. 2003) (Gonzalez, C.J.) (“*XO Communications*”) (quoting *Thomson McKinnon*). With each of those three words, the idea is the same; many claims are *possible*, but to be known they must be much more than that.

¹⁰⁷ 339 U.S. at 317.

less helpful when the notice-giver has considerable knowledge, but lacks knowledge of every detail.

The standard was clarified somewhat thereafter. In its 1983 decision in *Menonite Board*, a post-*Mullane* opinion (though once again in a non-bankruptcy context), the Supreme Court held that notice by mail or by other means “as certain to ensure actual notice” was required if the name and address of the entity to be notified was “reasonably ascertainable.”¹⁰⁸ But the *Menonite Board* court did not flesh out the standards in determining what the “reasonably ascertainable” standard required—concluding only that when the name of the mortgagee and its county in Ohio were shown on the underlying mortgage, but the mortgagee’s full mailing address was not,¹⁰⁹ the “reasonably ascertainable” requirement was satisfied, and actual notice was required.¹¹⁰

Likewise, in *Tulsa Collection Services*,¹¹¹ another nonbankruptcy post-*Mullane* decision about five years after *Menonite Board*, the Supreme Court repeated that if a claimant’s identity was “known or reasonably ascertainable,” actual notice was required.¹¹² But once again, the Court did not flesh out the standards for “reasonably

¹⁰⁸ 462 U.S. at 800. In a dissent in which Justices Powell and Rehnquist joined, Justice O’Connor argued for a more flexible standard (and hence a greater willingness to accept notice by publication), considering it a departure from the “balancing required by *Mullane*.” *Id.* at 806. But this view secured only three votes.

¹⁰⁹ *See id.* at 798 n.4; *id.* at 805 (dissent).

¹¹⁰ Without stating in so many words that it would embody the standard, the *Menonite Board* court said in a footnote that “[w]e assume that the mortgagee’s address could have been ascertained by reasonably diligent efforts.” 462 U.S. at 798 n.4. But it did not say whether, in determining whether a claimant’s interest or address was “reasonably ascertainable,” how much in the way of “diligent efforts” was required, or what would happen if efforts were insufficiently diligent.

¹¹¹ *See* n.79 *supra*.

¹¹² 485 U.S. at 490. Conversely, the Court made clear that actual notice need not be provided to claimants who are *not* actually known or “reasonably ascertainable.” In fact, speaking of the other extreme, it stated:

Nor is everyone who may conceivably have a claim properly considered a creditor entitled to actual notice. Here, as in

ascertainable,” and on the record there presented, simply remanded for a factual determination as to that issue.¹¹³

However lower courts have addressed the applicable standards more extensively than the Supreme Court did. In its 1995 decision in *Chemetron*, the Third Circuit provided more guidance, focusing in particular on the opposite extreme. After reading the language in the *Mennonite Board* footnote quoted above to say that a creditor’s identity is “reasonably ascertainable” if that creditor can be identified through “reasonably diligent efforts,” the *Chemetron* court went on to say that “[r]easonable diligence does not require ‘impracticable and extended searches . . . in the name of due process.’”¹¹⁴ And it stated further that:

The requisite search instead focuses on the debtor’s own books and records. Efforts beyond a careful examination of these documents are generally not required. Only those claimants who are identifiable through a diligent search are “reasonably ascertainable” and hence “known” creditors.¹¹⁵

Importantly, the *Chemetron* court declined to apply a “reasonably foreseeable” standard that had appeared in dictum in an earlier case in this District¹¹⁶—finding

Mullane, it is reasonable to dispense with actual notice to those with mere “conjectural” claims. *Id.*

¹¹³ *Id.* at 491 (“Appellee of course was aware that her husband endured a long stay at St. John Medical Center, but it is not clear that this awareness translates into a knowledge of appellant’s claim. We therefore must remand the case for further proceedings to determine whether “reasonably diligent efforts,” would have identified appellant and uncovered its claim.”) (citation omitted).

¹¹⁴ 72 F.3d at 346.

¹¹⁵ *Id.* at 347. The *Chemetron* court emphasized, however, that while some courts had held, regardless of the circumstances, that the “reasonably ascertainable” standard would require only an examination of the debtor’s books and records, without an analysis of the specific facts of each case, it did not construe the standard that narrowly. It pointed out that situations could arise when creditors are “reasonably ascertainable” although not identifiable through the debtor’s books and records. *Id.* at n.2.

¹¹⁶ See *In re Brooks Fashion Stores, Inc.*, 124 B.R. 436 (Bankr. S.D.N.Y. 1991) (Blackshear, J.) (“*Brooks Fashion Stores*”)

insufficient a contention that “Chemetron knew or should have known that it was reasonably foreseeable” that it could suffer claims from individuals living near the debtor’s waste dump.¹¹⁷ The *Chemetron* court explained:

In the instant case, the bankruptcy court failed to apply the “reasonably ascertainable” standard. It instead crafted a “reasonably foreseeable” test from dictum in *In re Brooks Fashion Stores, Inc.*, 124 B.R. 436 (Bankr. S.D.N.Y. 1991). In applying this test, the bankruptcy court found that “Chemetron knew or should have known that it was reasonably foreseeable that it could suffer claims from individuals living near the Bert Avenue Dump....” It therefore found that claimants were known creditors.

We hold that in substituting a broad “reasonably foreseeable” test for the “reasonably ascertainable” standard, the bankruptcy court applied an incorrect rule of law. This constitutes clear error. The bankruptcy court’s expansive test departed from established rules of law and produced a result in conflict with other decisions. Even if we were writing on a blank slate, we would reject the bankruptcy court’s expansive standard. Put simply, such a test would place an impossible burden on debtors.¹¹⁸

To the contrary, the *Chemetron* court held that “[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,’ and that what is required ‘is not a vast, open-ended investigation.’”¹¹⁹ Applying these standards, the Third Circuit rejected the contention that though the debtor could reasonably *foresee* that parties present in the immediate vicinity of its toxic waste

¹¹⁷ 72 F.3d at 347.

¹¹⁸ *Id.* (citations omitted).

¹¹⁹ *Id.* at 346.

dump would have toxic tort claims against it, their claims would thereby become

“known.” As a result, it ruled, publication notice was sufficient.

Since then, *Chemetron*, rather than *Brooks Fashion Stores*, has been followed in this District¹²⁰ and elsewhere.¹²¹ In his 2003 decision in *XO Communications*, Chief Judge Gonzalez cited *Brooks Fashion Stores* for a different proposition, but relied on *Chemetron* for the latter’s rejection of the “reasonably foreseeable” standard. And fleshing out the standards further, Judge Gonzalez quoted another decision in the *Drexel Burnham* chapter 11 case:

Reasonable 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. Applying *Mullane’s* “reasonable under the circumstances” standard, due process requires a reasonable search for contingent or unmatured claims so that ascertainable creditors can receive adequate notice of the bar date. What is reasonable depends on the particular facts of each case. A debtor need not be omnipotent or clairvoyant. A debtor is obligated, however, to

¹²⁰ See *XO Communications*, 301 B.R. at 793 (citing *Chemetron* as “emphasizing that claimants must be reasonably ascertainable, not reasonably foreseeable”).

¹²¹ See *Louisiana Dep’t of Env’tl. Quality v. Crystal Oil Co. (In re Crystal Oil Co.)*, 158 F.3d 291, 297 (5th Cir. 1998) (“*Crystal Oil*”). In *Crystal Oil*, the Fifth Circuit affirmed a bankruptcy court’s order declining to allow an environmental agency’s late filing of a claim, even though the environmental agency had received notice only by publication. Though the “evidence could go either way,” see *id.* at 298, the bankruptcy court’s determination that the environmental claim was not “reasonably ascertainable” was held not to be clearly erroneous. Though *Crystal Oil* had dealt with environmental agencies in the past, including this one, the Fifth Circuit held that there could be “no basis for concluding that a debtor is required to send notices to any government agency that possibly may have a claim against it.” *Id.* at 297. And it further held that even though the Louisiana Department of Environmental Quality had a telephone call with an individual at *Crystal Oil* discussing the particular polluted site with which it later would assert a claim, and *Crystal Oil* looked up its records and erroneously concluded that it had no relationship with the property (because the records that would confirm ownership were “ancient ones in long-term storage”), the environmental agency was not a “reasonably ascertainable,” and hence “known,” creditor. See *id.* at 297-98. In articulating the standard, the Fifth Circuit stated that “[a]s we read these cases, in order for a claim to be reasonably ascertainable, the debtor must have in his possession, at the very least, 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.” *Id.* at 297.

undertake more than a cursory review of its records
and files to ascertain its known creditors.¹²²

The takeaway from the cases discussing the general principles helping courts decide what are “known” and “unknown” claims is that the debtor must make effective use of the information already available, but the fact that additional claims may be “foreseeable” does not make them “known.” Then, in each case, the Court must determine on which side of the line the facts before it fall.

B.

The Particular Issues Here

1. Do Due Process Requirements Apply?

New GM argues preliminarily that due process requirements did not apply to the 363 Sale at all, because this Court’s earlier bar to successor liability did not result in a deprivation of property. The Court cannot agree.

New GM premises that argument on five separate contentions:

(1) that in most 363 sales (including this one), claims or interests would attach to the sale proceeds, and thus that there is no extinguishment of a property right;

(2) that there was no extinguishment of a property right, because any successor liability claims really belonged to the Old GM estate;

(3) that section 363(f) of the Bankruptcy Code preempts—*i.e.*, trumps—state laws imposing successor liability;

¹²² 301 B.R. at 793-94 (quoting *Drexel Burnham-Bankruptcy*, 151 B.R. at 681).

(4) that the Court already ruled that there was no continuity of ownership between purchaser and seller, and thus no basis for successor liability; and

(5) that there could be no successor liability anyway for Economic Loss Plaintiffs, because, unlike accident victims, they would not get the benefit of the “product line exception.”

The Court finds these preliminary contentions unpersuasive.

New GM is right when it says that in bankruptcy sales—either from the start or by agreement to resolve objections—creditors with *security interests or other liens* regularly get substitute liens on sale proceeds when estate property subject to their liens is sold to a third party, and that the bankruptcy community regularly regards that as a fair substitute. But comparable protection often cannot be provided for claims or interests other than liens. And here that comparable protection could not effectively be obtained.¹²³ Neither

¹²³ Thus Judge Posner, speaking for the Seventh Circuit in *Edwards*, see n.69 *supra*, was correct when he observed that the failure to give a lien creditor notice of a section 363 sale resulted in no more than a *de minimis* deprivation of property, since the value of the secured creditor’s interest in the property (*i.e.*, the value of its lien) was no more than the value of the property, and the sale proceeds were the best measure of that. See 962 F.2d at 645 (“[secured creditor] Guernsey does not suggest that the property was worth more than the \$85,000 that the bankrupt estate received for selling it—and if it was worth no more Guernsey suffered only a trivial loss of interest (the interest on \$7,000 during the period it was in the hands of the trustee) as a result of the failure to notify it of the sale.”). But as this Court explained in the *Sale Opinion*, see 407 B.R. at 501, “we know that ‘interest’ includes more than just a lien.” Because estate property can be sold free and clear of many types of claims and interests apart from liens, it would at least generally be inappropriate to apply *Edwards*-style analysis to claims and interests other than liens whose value is capped at the value of the property sold (and hence the available sale proceeds).

For that reason, although the Court agrees with nearly all of the analysis in *In re Paris Indus. Corp.*, 132 B.R. 504 (D. Me. 1991) (Hornby, J.) (“*Paris Industries*”) (a non-lien case in which plaintiffs were enjoined from asserting successor liability in a tort action against an estate’s assets’ purchaser, and where the court concluded that “the liquidation of the assets and their replacement with cash (which was then apparently distributed to a secured creditor) has not affected [the plaintiffs’] ability to recover on their claim,” *id.* at 510), the Court agrees with the portion it has just quoted only in part. The *Paris Industries* plaintiffs might have recovered more from the purchaser if their successor liability theory survived and prevailed. But this Court agrees with the next observation made by the *Paris Industries* court, pointing to a different kind of lack of prejudice—“[t]he irony of [the plaintiffs’] argument is that they would not even be able to make

back in 2009, nor in 2011 when Old GM's plan was confirmed, did anyone suggest that Old GM's product liability creditors became secured creditors—the natural corollary of New GM's position. They were ordinary members of the unsecured creditor class, sharing in the proceeds of the 363 Sale in accordance with the usual bankruptcy priorities waterfall.¹²⁴ That would not, of course, make a sale free and clear of successor liability claims improper. But it likewise does not make it true that the Economic Loss Plaintiffs asserting successor liability claims would have “no property interest that was extinguished,” as argued by New GM,¹²⁵ and thus no interests at stake and no interest in being heard. Rather, the Economic Loss Plaintiffs would have the same interest in being heard as the accident victims who likewise wanted to (and did) oppose successor liability. The Court ultimately overruled the latter's objections on the merits, but there never was any doubt that they had a right to be heard.

The Court also cannot agree with New GM's second contention in this regard—that successor liability claims did not really belong to the Economic Loss Plaintiffs and Pre-Closing Accident Plaintiffs who might wish to assert them, but were actually claims owned by Old GM. Though New GM offers caselaw support that at first blush supports its position, 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 that was proper.

their claim against [the purchaser] were it not for the sale, for it is only by the sale of assets and the doctrine of successor liability that they can even assert such a claim.” *Id.* There, as here, the plaintiffs would have received no more in a liquidation.

¹²⁴ See Plan at §§ 1.79, 4.3 (ECF No. 9941-1).

¹²⁵ See New GM Reply at 36.

New GM relies on three cases in support of its contention: *In re Keene Corp.*,¹²⁶ *In re Emoral, Inc.*,¹²⁷ (which heavily relied on *Keene*), and *In re Alper Holdings USA*.¹²⁸ Each of *Keene* and *Alper Holdings*, in this Court's view, was properly decided; *Emoral*, a 2-1 decision with a cogently articulated dissent by Judge Cowen, probably was not. But whether or not all were properly decided, none supports the conclusion, which New GM asks the Court to reach, that tort litigants' interest in pursuing successor liability was so minimal that they didn't even have a right to be heard.

Keene, the first of the three, involved approximately 1,600 lawsuits by asbestos plaintiffs who at least arguably had claims against the debtor *Keene*. But their rights to recover against the debtor were impaired when *Keene* transferred over \$200 million of its assets to its then affiliates during the 1980s and then spun off the affiliates.¹²⁹ Not surprisingly, the transfer and spin-off triggered fraudulent conveyance claims, initially brought prepetition. In those same prepetition actions, asbestos plaintiffs also brought claims against the transferees, asserting successor liability and tort liability based on piercing the corporate veil.¹³⁰

Thereafter, *Keene* filed a chapter 11 case. Judge Bernstein granted the *Keene* estate's motion for an injunction blocking the continued prosecution of those actions, concluding that they were violative of section 362(a)(1) of the Code, which bars, among other things, the continuation of suits to recover on claims against the debtor that arose

¹²⁶ *Keene Corp. v. Coleman (In re Keene Corp.)*, 164 B.R. 844 (Bankr. S.D.N.Y. 1994) (Bernstein, C.J.) ("**Keene**").

¹²⁷ 740 F.3d 875 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 436 (2014) ("**Emoral**").

¹²⁸ 386 B.R. 441 (Bankr. S.D.N.Y. 2008) (Lifland, C.J.) ("**Alper Holdings**").

¹²⁹ *See* 164 B.R. at 846.

¹³⁰ *See id.* at 847-48.

before the filing of the bankruptcy case.¹³¹ He noted that the fraudulent conveyance claims became the estate's claims to prosecute under section 544 of the Code, and reasoned, properly, that "the Wrongful Transfer Claims should be asserted, in the first instance, by Keene or any other estate representative designated for that purpose."¹³² He likewise blocked the asbestos plaintiffs' efforts to go after the defendants on corporate veil piercing and successor tort liability theories, noting that the thrust of those actions would be to "subject all of the assets of these non-debtor defendants to the claims of Keene's creditors."¹³³ Even with respect to the successor liability claims, he read them as a species of fraudulent transfer claim,¹³⁴ with the purpose of increasing the assets of the estate as a whole to satisfy the claims of the creditor community as a whole.¹³⁵

Given the asbestos plaintiffs' effort in *Keene* to recover assets that should have been recovered for the benefit of all (and, notably, the transfer of their litigation rights to the estate under section 544), Judge Bernstein's ruling in *Keene* was plainly correct. But in *Emoral*, which followed and heavily relied on *Keene*, the distinction between a benefit to all and a benefit to individual creditors seeking to impose successor liability was blurred—and it was this blurring that triggered Judge Cowen's dissent, and, in this Court's view, the greater persuasiveness of Judge Cowen's view.

¹³¹ See *id.* at 848-49; *accord id.* at 850.

¹³² *Id.* at 849.

¹³³ *Id.* at 850.

¹³⁴ *Id.* at 853.

¹³⁵ *Id.* ("In any event, the remedy against a successor corporation for the tort liability of the predecessor is, like the piercing remedy, an equitable means of expanding the assets available to satisfy creditor claims. The class action plaintiffs that invoke it allege a *general* injury, their standing depends on their status as creditors of Keene, and their success would have the effect of *increasing the assets available for distribution to all creditors*. For the same reasons stated with respect to the piercing claims, claims based upon successor liability should be asserted by the trustee on behalf of all creditors.") (emphasis added).

Emoral involved a prepetition sale of assets from a company (known most commonly as Palorome International, but later renamed Emoral) that manufactured diacetyl, a chemical used in the food flavoring industry that was the subject of many toxic tort suits. Emoral later filed for bankruptcy protection, and disputes arose between the Emoral estate's trustee and the buyer of the assets, a company called Aaroma—including, most significantly, claims by the trustee that the prepetition asset sale had been a fraudulent transfer. The trustee and Aaroma settled those disputes; as part of the settlement, the trustee agreed to release Aaroma from any causes of action that were property of the Emoral estate. But at the bankruptcy court hearing considering the propriety of the settlement, the trustee's representative stated that any successor liability claims against Aaroma didn't belong to the Emoral estate, and that the trustee therefore couldn't release them.¹³⁶ Aaroma's counsel argued that whether or not the diacetyl plaintiffs' causes of action were property of the estate (and therefore covered by the release) was not an issue before the bankruptcy court at that time, and the approval order was modified to provide, in substance, that nothing in the approval order or the underlying sale agreement would operate as a bar to prosecution of any claims that weren't property of the Emoral estate.¹³⁷

Thereafter, plaintiffs asserting diacetyl injury claims sued Aaroma, arguing for successor liability and citing the trustee's remarks that their claims didn't belong to the estate, and that the estate couldn't release them. In a 2-1 decision (and disagreeing with the Bankruptcy Court, which had held to the contrary), the *Emoral* majority held, relying heavily on *Keene*, that the claims did in fact belong to the estate, and that Aaroma was

¹³⁶ 740 F.3d at 877.

¹³⁷ *Id.*

thus protected. The two judges in the majority did so based on their view that as a legal matter, the claim for successor liability was for the benefit of all of the estate's creditors. But they did not, so far as this Court can discern, parse the plaintiffs' complaint to focus on what the plaintiffs were actually asking for, to see if that was actually true. Judge Cowen, dissenting (who agreed with the conclusion of the Bankruptcy Court), found the majority's mechanical approach troublesome for several reasons, most significantly because the majority failed to consider, as a factual matter, what he considered to be critical—whether plaintiffs bringing the diacetyl claims would be suing for themselves or for the benefit of all.¹³⁸

The third case, *Alper Holdings*, offered by New GM with a “*See also*,” involved an objection to claims. Somewhat like *Emoral* (though *Emoral* involved successor liability claims, rather than alter ego claims) *Alper Holdings*, decided by Chief Judge Lifland, involved an issue as to whether alter ego claims had been previously released by the estate.¹³⁹ As in all of these cases, the focus was on whether the injury was to creditors as whole or only to particular ones. And as Judge Bernstein had done in *Keene*, and as Judge Cowen dissenting in *Emoral* did (and as his colleagues should have done), Judge Lifland looked, as a factual matter, to the nature of the successor liability claims, to see if they were asserted for the benefit of all of the estate's creditors or only to particular ones.¹⁴⁰

¹³⁸ See *id.* at 885-86 & n.1.

¹³⁹ See 386 B.R. at 446.

¹⁴⁰ See *id.* (“[I]t was clear based upon the conduct alleged by the Holt Plaintiffs that such alter ego claims were of a generalized nature and did not allege a ‘particularized injury’ specific only to the Holt Plaintiffs. Accordingly, this Court held that such alter ego claims were in fact property of Saltire’s bankruptcy estate and were, therefore, released under section 13.1 of the Saltire Plan.”).

Importantly, none of *Keene*, *Emoral*, or *Alper Holdings* involved a 363 sale, nor considered the rights of plaintiffs to be heard before a free and clear order was entered. And for that reason, they are not as important as they might otherwise appear at first blush. But on the principle for which they are cited—that taking away the right to sue on a successor liability theory isn’t a deprivation of property from the person who might wish to sue—they are at best irrelevant to New GM’s position and at worst harmful to it. Each of *Keene*, *Alper Holdings* and Judge Cowen in *Emoral* focused on whether the particular successor liability action sought to recover for the benefit of all, on the one hand, or to secure a private benefit, on the other.¹⁴¹ If it is the latter, a party at risk of losing that private benefit deserves the opportunity to be heard.

As the Court noted in oral argument,¹⁴² 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. Here the Plaintiffs have not purported to sue for the benefit of Old GM creditors generally; they have instead sued to advance their own, personal, interests. They have not asked New GM to make a payment to Old GM; they want New GM’s money for themselves. Taking away the right to recover from that additional defendant (where such a right otherwise

¹⁴¹ In that connection, the Plaintiffs point to a 2013 decision of the Second Circuit, *Picard v. JPMorgan Chase & Co. (In re Bernard L. Madoff Inv. Sec. LLC)*, 721 F.3d 54 (2d Cir. 2013) (“*Madoff*”). *Madoff* is not as closely on point as the Plaintiffs suggest, as it was a *Wagoner* Rule *in pari delicto* case; it involved neither a 363 sale nor claims of successor liability. Nevertheless, the Plaintiffs properly observe (Pl. Br. at 36 n.44) that *Madoff* focused, as a factual matter, on whether the underlying creditor claims, in the *in pari delicto* context, were personal to the creditor or really belonged to the debtor corporation, and it tends to undercut New GM’s position in that regard. See 721 F.3d at 70 (rejecting the trustee’s contention that he could bring claims against third party financial institutions because his “claim [was] a general one, with no particularized injury arising from it,” and that the claims against the financial institutions were “common to all customers because all customers were similarly injured by Madoff’s fraud and the Defendants’ facilitation”).

¹⁴² See Day 1 Arg. Tr. at 41.

exists under the law of those states that permit such) may easily be understood as a matter of bankruptcy policy, and the supremacy clause, but it nevertheless represents a taking of rights from the perspective of the tort plaintiff who loses the right to sue the successor.

New GM's last three reasons for why Plaintiffs would not have any due process rights at all require considerably less discussion. As the third of its five reasons, New GM argues that section 363(f) of the Bankruptcy Code prevails over state laws imposing successor liability. That is true, but that is why New GM should *win on the merits*. It does not justify denying those who might wish to argue otherwise the opportunity to be heard.

As the fourth of its five reasons, New GM argues that the Court already ruled that there was no continuity of ownership between purchaser and seller, and thus no basis for successor liability. Once again that is true, but it was done before the Plaintiffs had appeared in the case. The Court cannot rely on conclusions it reached in a hearing to which the Plaintiffs were not invited as a basis for retroactively blessing the failure to invite them.

As the fifth of its five reasons, New GM argues that there could be no successor liability anyway for Economic Loss Plaintiffs, because, unlike accident victims, they would not get the benefit of the "product line exception." That too might be true (though it could vary depending on the particular state whose law would apply), but it once again goes to the merits—not the Plaintiffs' rights to be heard before successor liability claims were barred.

For these reasons, the Court concludes that the Plaintiffs were entitled to due process in the context of each of the sale and claims processes—requiring the Court then to consider whether they received it.

2. *Notice by Publication*

Having determined that the Plaintiffs did have due process rights, the Court must determine whether those rights were violated. The first (though not last) issue in that inquiry is whether notice by publication to owners of Old GM vehicles not known by Old GM to have been in accidents was, as a general matter, constitutionally sufficient. It plainly was.

As noted above, the Second Circuit has held that the proper inquiry on a due process contention is whether the noticing party (here Old GM)¹⁴³ “acted reasonably in selecting means likely to inform persons affected”¹⁴⁴ The notice required is that “appropriate to the nature of a given case,”¹⁴⁵ and “*the best notice practical under the circumstances.*”¹⁴⁶ The very reason why property is sold under section 363, and not under a reorganization plan, is because time and liquidity constraints do not permit a more leisurely process.¹⁴⁷

¹⁴³ The Court is not persuaded by New GM’s contention that because it was Old GM and not New GM that may have provided insufficient notice, New GM should not be penalized for that. It is the possible failure to provide requisite notice—and not who was responsible for it—that results in the need for the Court to take judicial action. The potential constitutional violation must trump determinations of fault and New GM’s contractual rights.

¹⁴⁴ *Weigner*, 852 F.2d at 649.

¹⁴⁵ *Drexel Burnham*, 995 F.2d at 1144.

¹⁴⁶ *Id.* at 1144 (citing *Mullane*) (emphasis added).

¹⁴⁷ It should go without saying that the urgency of the situation is a hugely important factor in determining what is the best notice practical under the circumstances. Exemplifying this is *Pearl-Phil GMT (Far East) Ltd. v. Caldor Corp. (In re Caldor Corp.)*, 266 B.R. 575 (S.D.N.Y. 2001) (Casey, J.) (“*Caldor-District*”), *aff’d In re Caldor Corp.*, 240 B.R. 180 (Bankr. S.D.N.Y. 1999) (Garrity, J.) (“*Caldor-Bankruptcy*”). There Judge Casey of the District Court, affirming an order of Judge Garrity of this Court, rejected contentions by the appellant that it had been denied due

Actual notice to those in the 27 categories above resulted in mailed notice of the 363 Sale to over 4 million people and entities¹⁴⁸—including any known by Old GM to have been in accidents. But given the urgency of GM’s circumstances, it would be wholly unreasonable to expect individual mailed notice of the 363 Sale hearing to go to the owners of the approximately 70 million GM cars then on the road, or even the approximately 27 million whose cars were then (or later became) the subject of pending recalls.

This is exactly the kind of situation for which notice by publication would be the norm. Old GM’s counsel could hardly be faulted for availing itself of that approach. Under normal circumstances, notice by publication to Old GM vehicle owners—describing the upcoming sale and the fact that New GM would be assuming only very limited types of Old GM liabilities—would be the only kind of notice that would be practical under circumstances like these, and would easily meet the Supreme Court’s and the Second Circuit’s requirements.

3. *Known Claim Analysis*

But Old GM’s ability to provide notice by publication, rather than actual notice, rests on the premise that those who received publication notice only did not have “known” claims. For that reason, both sides debate at length whether owners of cars with

process when it failed to get notice in advance of Judge Garrity’s order (in the face of Caldor’s inability to continue in business during the course of its chapter 11 case) authorizing the prompt wind-down of Caldor’s business operations and restraining payment on anything more than a pro-rata basis, of administrative claims that had accrued before the time of that order. *See* 266 B.R. at 579, 583. Judge Casey applied the Second Circuit’s *Weigner* test of whether the noticing party “acted reasonably,” as contrasted to whether there was actual receipt of notice. And recognizing that Caldor was faced “with the formidable task of providing notice to approximately 35,000 entities,” *id.* at 583, and that the record was “replete with evidence as to Caldor’s dire financial circumstances,” *id.* at n.5, he found Caldor’s actions “reasonable given the circumstances under which it was operating.” *Id.* at 583.

¹⁴⁸ *See* Davidson Decl. ¶ 5, New GM Appx. of Exh. 1 (ECF No. 12982-1).

Ignition Switch Defects—but who had neither been in accidents of which Old GM was aware, nor sued Old GM or manifested any intent to sue—were “reasonably ascertainable (and thus “known”) creditors, on the one hand, or no more than “foreseeable” (and thus “unknown”) creditors on the other.

That question is close. It is true, as New GM argues, that Old GM sent out actual notice of the 363 sale (and later, of the Bar Date) to anyone who had sued it or manifested a possible intention to sue, and that all or nearly all of those with Ignition Switch Defects were not yet in that category. It also is true that sending out notice of a recall is not the same as expecting to be sued; that not all recalls are the same in terms of the risk of resulting death or injury; and indeed that many (and perhaps most) recalls might not result from the risk of death or injury at all.

But it is also true that at least 24 Old GM engineers, senior managers and attorneys knew of the Ignition Switch Defect and the need to send out recall notices—and of the reasons why recall notices had to go out, here. And it is uncontroverted that 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, and knew the names and addresses to whom it had to send them. On balance the Court concludes that by reason of the knowledge of those 24 individuals, 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.

The caselaw does not require actual notice to those whose claims are merely “foreseeable.” But the caselaw requires actual notice to claimants whose identity is

“reasonably ascertainable.”¹⁴⁹ So the Court must consider how this case fits in that spectrum when 24 Old GM personnel knew of the need to conduct a recall (and with that, of the need to fix the cars); and, in addition, a critical safety situation; and, in addition, the exact names and addresses of the owners of the cars that were at risk.

Preliminarily, there can be no doubt that the names and addresses of the car owners whose cars Old GM’s personnel knew to be subject to the recall obligation—and here, to have safety defects as well—were “reasonably ascertainable” and, in fact, actually known. Old GM (like New GM later) was subject to the Safety Act, which requires vehicle manufacturers to keep records of vehicle ownership, including vehicle owners’ names and addresses. Once Old GM knew which cars had the Ignition Switch Defect, Old GM knew exactly to whom, and where, it had to send the statutorily required recall notice.

But not all of those with Ignition Switch Defects would be killed, injured, or want to sue Old GM on economic claims. Those 24 Old GM personnel did not have knowledge of *which particular* car owners with Ignition Switch Defects would later be killed or injured in accidents, but they knew that some would—which is why Old GM needed to conduct the recall. Those Old GM personnel also knew that all of those vehicle owners had a statutory right to get their cars fixed at Old GM’s (and later New GM’s) expense.

Taking the easier element first, the duty to fix the cars with Ignition Switch Defects was owed to every one of those whose cars were subject to the known recall

¹⁴⁹ See pages 49 et seq. *supra*.

obligation. That aspect of Old GM's obligations was not subject to the uncertainty of whether or not there would be a subsequent accident or lawsuit.

The other element is plainly harder, but the Court comes out the same way. Old GM faced the recall obligation and known claims here not by reason of any kind of actuarial foreseeability (or the reality that in any line of endeavor, people can make mistakes and others can be hurt as a result), but by reason of the *known safety risk* that required the recall—*i.e.*, that here there was known death or injury in the making to someone (or many) in the body of people whose names and addresses were known, with the only uncertainty being who, exactly, those killed or injured might be. It is not a satisfactory answer, in this Court's view, to say that because the particular individuals in a known group who would turn out to be accident victims were unknown, all of them were unknown. Rather than concluding that because of that uncertainty, *none* were entitled to notice, the Court concludes that *all* of them were.

New GM understandably points to a considerable body of caselaw holding, in substance, that creditors are not "known" unless their status as such is reflected in the debtor's "books and records." That is true, but what "books and records" means in this context is all important. At oral argument on its motion, New GM understandably did not press its earlier position¹⁵⁰ that its financial accounting (and in particular, liabilities on its balance sheet) would be determinative of whether claims were known.¹⁵¹ And for good reason: such a view would fail to comport with the caselaw or common sense. 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

¹⁵⁰ See New GM Opening Br. at 27-29.

¹⁵¹ See Day 1 Arg. Tr. at 78 ("I agree it's not the financial statements.").

under FASB 5 standards; or on whether the debtor has acknowledged its responsibility for the claim;¹⁵² 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. In the Court's view, the standard requires much more than the fact that somewhere, buried in a company's books, is information from which the liability could be ascertained,¹⁵³ and the Court doubts (though under the facts here it does not need to decide) that the knowledge of one or very few people in a large enterprise would be enough to meet the standard.¹⁵⁴ But "books and records" must be construed in a fashion consistent with the Supreme Court's requirements that "known" liabilities include those that are not just actually known, but also "reasonably ascertainable."

New GM points out that it maintained a "litigation calendar," showing people who had sued it, threatened to do so, or even made claims against it, and that Old GM

¹⁵² See, e.g., *Drexel-Burnham-Bankruptcy*, n.105 *supra*, 151 B.R. at 681-82 (in late proof of claim context, holding that a guaranty liability not booked on the balance sheet was still a known claim, reflected on the debtor's "books and records," and that accounting practices were not determinative).

¹⁵³ See, e.g., *XO Communications*, 301 B.R. at 793-94 (in late proof of claim context, noting that "[w]hat is reasonable depends on the particular facts of each case. A debtor need not be omnipotent or clairvoyant. A debtor is obligated, however, to undertake more than a cursory review of its records and files to ascertain its known creditors.").

¹⁵⁴ The Court has based its conclusion that the Plaintiffs were known creditors here 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. *Cf. Weisfelner v. Fund 1 (In re Lyondell Chemical Co.)*, 503 B.R. 348, 389 (Bankr. S.D.N.Y. 2014) (Gerber, J.) (in a case alleging an intentional fraudulent conveyance in an LBO, rejecting arguments based on automatic imputation of a CEO's alleged intent under ordinary agency rules, and ruling that if a creditor litigation trust pressing those claims could not plead facts supporting intent to hinder, delay or defraud on the part of a "critical mass of the *directors* who made the decisions in question," it would then have to allege facts plausibly suggesting that the CEO, who was only one member of a multi-member Board, could nevertheless control the disposition of Lyondell's property) (emphasis in original).

was careful to provide all of them with actual notice.¹⁵⁵ That of course was the right thing to do, and under other circumstances, it would do the job.¹⁵⁶ But 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.

New GM calls the Court's attention to its earlier decision in *Morgenstein*, in which this Court held that the plaintiffs there were "unknown" creditors, who could not use lack of actual notice to vacate the confirmation order in this case—though admittedly they received notice only by publication. There the plaintiffs (on their own behalf and a class they wished to represent) sought to bring an untimely class proof of claim after the bar date and after Old GM's liquidation plan went effective. But they failed to plausibly allege any evidentiary facts supporting their contention that Old GM *knew* that the alleged design defect affected the vehicles they owned. Nor were their vehicles subject to a recall. Old GM's knowledge of the Ignition Switch Defect here, and of its need to effect a recall of the Plaintiffs' cars here, makes *Morgenstein* a different case.

New GM also calls this Court's attention to Judge Bernstein's decision in *Old Carco*¹⁵⁷—the *Chrysler* chapter 11 case—which in many respects is closely on point, and

¹⁵⁵ See Day 1 Arg. Tr. at 78-79.

¹⁵⁶ New GM also points out that it is much easier for a debtor to recognize contractual obligations than those that may arise in tort, for alleged violations of law, or in other instances where the debtor and possible claimants have not had personal dealings. That is true, and it underscores why publication notice for claimants in the latter categories is normally sufficient. But here, once again, Old GM personnel knew of the need to send out recall notices, where to send them, and why they needed to go out. This changes everything.

¹⁵⁷ See n.15, *supra*.

with which this Court fully agrees. There, after Old Carco's¹⁵⁸ own 363 sale, owners of Jeep Wranglers and Dodge Durangos manufactured by Old Carco brought a class action for economic loss against New Chrysler in the District Court in Delaware, alleging that their cars suffered from a design flaw known as "fuel spit back." As here, the affected car owners in *Old Carco* had received notice only by publication. With the same issue as to whether the *Old Carco* sale order's free and clear provisions barred the economic loss claims there, the Delaware District Court referred that question to the *Old Carco* bankruptcy court. Judge Bernstein concluded that Old Carco's Sale Order did indeed bar those economic loss claims, and found no due process impediment to enforcing the *Old Carco* sale order against those asserting the economic loss claims there—even against those who bought their cars in the used car market¹⁵⁹—finding that their claims had arisen when their cars had been manufactured, which was before Old Carco's 363 sale.

But while *Old Carco* plainly was correctly decided, it is distinguishable from this case, in a highly significant respect. Old Carco had *already* issued at least 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,¹⁶⁰ avoiding the exact problem this Court has identified here.

The publication notice here given, which otherwise would have been perfectly satisfactory (especially given the time exigencies), was insufficient, because from Old GM's perspective, owners of cars with Ignition Switch Defects had "known" claims.

¹⁵⁸ Just as Old GM came to be officially known as "Motors Liquidation Co." after the 363 Sale here, the former Chrysler came to be officially known as "Old Carco" after its 363 sale.

¹⁵⁹ See 492 B.R. at 403.

¹⁶⁰ *Id.* at 395 (Old Carco issued a "safety defect recall in 2002"; "a second safety recall ... in 2005"; and a "further safety recall" in January 2009).

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.

4. *The Requirement for Prejudice*

But the Court's determination that Plaintiffs were denied the notice due process requires does not necessarily mean that they were "denied due process." The latter turns on the extent to which a denial of due process also requires a showing of resulting prejudice.

Plaintiffs argue that once they have shown the denial of the notice that due process requires, any resulting prejudice is simply irrelevant. In their view, the denial of the notice that due process requires means that they need not show anything more, and that the Court need not, and should not, think about how things might have been different if they had received the notice that was denied.

The Court disagrees. The contention runs contrary to massive caselaw, and common sense.

Though the Second Circuit, so far as the parties' briefing has revealed and this Court is aware, has not ruled on this issue,¹⁶¹ no less than six other Circuits have. They have repeatedly, and very explicitly, identified prejudice as an essential element of a denial of due process claim—saying, in exactly these words or words that are very close,

¹⁶¹ In the recent cases in which the Circuit granted relief for denials of due process, the prejudice to the party that had received inadequate notice was obvious, and no other party in the case had made the exact same argument that the party failing to get notice might have made. *See Manville-2010*, 600 F.3d at 154-58 (injunction against insurer's non-derivative claims that had no relation to bankruptcy); *DPWN*, 747 F.3d at 151 (discharge of claim); *Koepp*, 593 Fed. Appx. at 23 (extinguishment of easement).

that “a party who claims to be aggrieved by a violation of procedural due process must show prejudice.”¹⁶² So have lower courts in this District (at both the District Court¹⁶³

¹⁶² *Perry*, 629 F.3d at 17. See also *Rapp v. U.S. Dep’t of Treasury, Office of Thrift Supervision*, 52 F.3d 1510, 1520 (10th Cir. 1995) (“**Rapp**”) (“In order to establish a due process violation, petitioners must demonstrate that they have sustained prejudice as a result of the allegedly insufficient notice.”); *Brock v. Dow Chemical U.S.A.*, 801 F.2d 926, 930-31 (7th Cir. 1986) (“**Brock**”) (in context of review of administrative order affecting an employer where improper notice was alleged, “it must be noted that, unless the employer demonstrates that the lack of formal notice was prejudicial, we will not order that the charges be dismissed”); *Savina Home Indus., Inc. v. Sec’y of Labor*, 594 F.2d 1358, 1365 (10th Cir. 1979) (“**Savina Home Industries**”) (in considering due process claim, fact that “no prejudice has been alleged” was identified as one of two factors supporting conclusion that “no due process violation has been established”); *In re New Concept Housing, Inc.*, 951 F.2d 932, 939 (8th Cir. 1991) (“**New Concept Housing**”) (ruling that failure to give the debtor notice of a hearing on the approval of a settlement violated two of the Federal Rules of Bankruptcy Procedure, but (rejecting the views of the dissenter that the failure to provide notice of the hearing resulted in a denial of due process that could not be subject to harmless error analysis) that “the violation of these rules constituted harmless error, because the Debtor’s presence at the hearing would not have changed its outcome. The Debtor had neither a legal nor factual basis for establishing that the settlement was unreasonable.”). See also *In re Parcel Consultants, Inc.*, 58 Fed. Appx. 946, 951 (3d Cir. 2003) (unpublished) (“**Parcel Consultants**”) (“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. Aug. 1, 1991) (unpublished) (“**Cedar Bluff Broadcasting**”) (creditor complaining of notice deficiency failed to show, among other things, “that it was prejudiced by the lack of notice to general creditors”).

The Plaintiffs cite one case at the Circuit level which they argue would lead to a different conclusion, *Lane Hollow Coal Co. v. Director, Office of Workers’ Compensation Programs*, 137 F.3d 799 (4th Cir. 1998) (“**Lane Hollow Coal**”). They quote a line from the opinion that the claimant is not obligated to demonstrate a “reasonable likelihood that the result of this claim would have been different absent the violation,” *id.* at 807, though this is not the same as holding that there is no requirement to show prejudice, as the *Lane Hollow Coal* court itself seemed to recognize. There the Fourth Circuit vacated, in part, an administrative law judge determination granting benefits to a coal miner’s widow when there was a 17-year delay in notifying the coal mine operator of the claim, by which time evidence was no longer available and the coal mine operator was thus deprived of the opportunity to mount a meaningful defense. *Id.* at 807. The *Lane Hollow Coal* court did not cite or criticize its earlier holding in *Cedar Bluff Broadcasting* that had denied relief based on a failure to show a lack of prejudice, and in fact stated that “[i]o 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...” *Id.* at 808 (emphasis added). Though the other cases were not named or otherwise substantively addressed, the *Lane Hollow Coal* court continued “but these cases are of a much different ilk.” *Id.* And it declined to authorize “speculation about the would-have-been and could-have-been” if notice had not been denied for those 17 years. *Id.* at 807. *Lane Hollow Coal* is insufficient, in this Court’s view, to trump the holdings of the ten cases expressly holding that prejudice is an element of any due process claim. Rather, it is better read as merely assuming that there was in fact prejudice, and holding that a finding of an absence of prejudice when evidence was unavailable after a 17 year delay would necessarily have been based on unacceptable speculation. A later (and very similar) Fourth Circuit holding upon which the Plaintiffs likewise rely, *Consolidation Coal Co. v. Borda*, 171 F.3d 175 (4th Cir. 1999), supports this Court’s view. See *id.* at 183 (“It is not the mere fact of the government’s delay that violates due process, but rather the prejudice resulting from such delay.”) (emphasis added).

and Bankruptcy Court¹⁶⁴ levels), and elsewhere.¹⁶⁵ Several of the above were bankruptcy cases, in which litigants sought to be relieved of bankruptcy court orders based on contentions of denial of due process.¹⁶⁶

Neither the Plaintiffs, nor the GUC Trust (which is allied with the Plaintiffs on this issue), cite any case that contradicts that authority.¹⁶⁷ Rather, they variously argue

¹⁶³ See *Caldor-District*, 266 B.R. at 583 (“even if notice was inadequate, the objecting party must demonstrate prejudice as a result thereof”) (citing, *inter alia*, *Rapp*); *Affirmance Opinion #2*, 430 B.R. at 99 (rejecting appellant Parker’s contentions that he was denied due process as a result of the expedited hearing on the 363 Sale in this case, as “Parker was in no way prejudiced by the expedited schedule”).

¹⁶⁴ See *Caldor-Bankruptcy*, 240 B.R. at 188 (“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.”) (citing, *inter alia*, *Rapp*, *Brock*, and *Savina Home Industries*).

¹⁶⁵ *In re Gen. Dev. Corp.*, 165 B.R. 685, 688 (S.D. Fla. 1994) (Aronovitz, J.) (“**General Development**”) (“A creditor’s due process rights are not violated where the creditor has suffered no prejudice.”).

¹⁶⁶ See *Cedar Bluff Broadcasting*, n.162 *supra* (bankruptcy court order converting case to chapter 7); *Caldor-District* and *Caldor-Bankruptcy*, nn. 163 and 164 *supra* (bankruptcy court wind-down order); *General Development*, n.165 *supra* (bankruptcy court approval of settlement); *Affirmance Opinion #2*, n. 163 *supra* (the Sale Order in this case).

¹⁶⁷ See Pl. Br. at 36-39; GUC Trust Opp. at 27-32 & nn.9 and 10. The GUC Trust does, however, cite and quote at length a Bankruptcy Court decision, *White v. Chance Indus., Inc. (In re Chance Indus., Inc.)*, 367 B.R. 689 (Bankr. D. Kan. 2006) (Nugent, C.J.) (“**Chance Industries**”), in which Judge Nugent addressed a situation in which a child was injured on a debtor-manufactured amusement ride after the confirmation of a reorganization plan, allegedly as a result of the reorganized debtor’s wrongful prepetition conduct. See *id.* at 692. Judge Nugent ruled, correctly in this Court’s view, that because the child was injured after confirmation, and had no prepetition (or even pre-confirmation) relationship with the debtor, see *id.* at 701, the child did not have a claim capable of being discharged, see *id.* at 703-04, and could not be bound by a confirmation order as to which, for obvious reasons, he was not given notice. (Of course that situation is not present here, because New GM expressly assumed liability for death or injuries taking place after the 363 Sale, even if involving vehicles made by Old GM.)

The GUC Trust relies on language that came after that holding in which Judge Nugent declined to agree with an argument that the failure to provide notice to the child was “harmless error,” based on the argument before him that the plan—which provided for no future claims representative, but nevertheless sought to bar future claims—would not have changed after an objection and would have been confirmed anyway. See *id.* at 709. But the GUC Trust takes Judge Nugent’s comments out of context. Judge Nugent made his “harmless error” observations in the context of his discussion, see *id.* at 709-10 & n.81, of the reorganized debtor’s invocation of Fed.R.Bankr.P. 9005, and Fed.R.Civ.P. 61, which together provide that in bankruptcy, as elsewhere, courts should “disregard all errors and defects that do not affect any party’s substantial rights.” Understandably, Judge Nugent considered that the matter before him affected substantive rights. Though the word “prejudice” never was used in his opinion (which of course undercuts the GUC Trust’s argument), he effectively ruled that the child would be substantively prejudiced—by “the extinguishing of an

that “the Due Process Clause protects . . . the right to be heard, not the right to win;”¹⁶⁸ that all of the above cases are distinguishable on their facts;¹⁶⁹ and that imposition of a prejudice requirement would require the Court to speculate as to the outcome if appropriate notice had been provided.¹⁷⁰ The first contention is overly simplistic, the second misses the point; and the third fails based on a mistaken assumption.

As to the first, the issue is not, as Plaintiffs, argue, whether the Due Process clause guarantees “a right to win.” Of course it is true that there is no constitutional right to win—though ironically, under the Plaintiffs’ argument (that inadequate notice automatically gives them the win), they effectively seek exactly that. The real issue is rather whether, assuming that there has been a denial of the right to be heard, more is necessary to establish a *judicially cognizable* due process violation—*i.e.*, a right to the desired curative relief. The caselaw answers that; it requires the arguably injured party to show prejudice from the denial.

unknown claim that has yet to accrue,” *id.* at 709—thus making Rule 61 harmless error analysis inappropriate.

The Plaintiffs also cite *Chance Industries*, see Pl. Br. at 37, but only for further support for their contention (with which, as noted above, the Court agrees) that in defective notice cases, speculation as to what the outcome would have been with proper notice is inappropriate. They read Judge Nugent’s ruling as having rejected the *Chance Industries* debtor’s arguments “notwithstanding [the] debtor’s speculation that the tort claimant’s participation in confirmation process would not have changed the result.” *Id.* This Court agrees with that reading, and would even go farther; it reads Judge Nugent’s *Chance Industries* opinion as suggesting that if the objection had been raised, he would have denied confirmation of the plan on those terms.

Chance Industries represents an excellent example of what courts do when they think parties are prejudiced; it does not stand for the notion that prejudice doesn’t matter. *Chance Industries* did not, and could not, contradict the decisions of its own Tenth Circuit, see *Rapp* and *Savina Home Industries*, n.162, *supra*, that are among those expressly imposing a requirement for showing prejudice.

¹⁶⁸ Pl. Br. at 4.

¹⁶⁹ See *id.* at 37-39; GUC Trust Opp. at 27 n.9 and 29 n.10.

¹⁷⁰ See Pl. Br. at 36-37; GUC Trust Opp. at 27.

The Plaintiffs’ and GUC Trust’s second argument is that “the cases [New GM] cites do not support its contention.”¹⁷¹ But of course they do. Because due process cases are heavily fact-driven, it is hardly surprising that the Plaintiffs can point out factual distinctions between the ten cases discussed above¹⁷² and this one. But the Court does not rely upon those cases for their factual similarity to this one; it relies on them for the *legal principles* that each enunciates, in very clear terms—as stated by the First Circuit in *Perry*, for example, “a party who claims to be aggrieved by a violation of procedural due process *must show prejudice*.”¹⁷³

The third contention does not go to the existence of the requirement for showing prejudice. It goes to *how* the Court should examine possible prejudice—and in particular, whether courts should speculate as to resulting harm once they have been presented with a showing of insufficient notice.

In that third contention, the Plaintiffs cite *Fuentes v. Shevin*,¹⁷⁴ in which the Supreme Court reversed the judgments of three-judge District Courts that had upheld the constitutionality of Florida and Pennsylvania replevin statutes that denied a prior opportunity to be heard before chattels were taken from consumers’ possession, in several instances without a lawsuit.¹⁷⁵ The Plaintiffs do not argue that *Fuentes*, or any principles it articulated, trumped any of the holdings to which this Court has just referred—that a showing of prejudice must be made before court orders entered with insufficient notice are undone. Nor could they, as *Fuentes* involved facts nothing like

¹⁷¹ Pl. Br. at 37; *accord* GUC Trust Opp. at 27 n.9, 29 n.10.

¹⁷² See n.162 *supra*.

¹⁷³ 629 F.3d at 17 (emphasis added).

¹⁷⁴ 407 U.S. 67 (1972) (“*Fuentes*”).

¹⁷⁵ See *id.* at 71-72 and n.4.

this case, and instead involved a facial attack on the constitutionality of statutes that authorized the seizure of property without any notice, and, in many cases, any earlier judicial action at all. The different, later, possible judicial outcomes to which *Fuentes* referred (and upon which the Plaintiffs rely)¹⁷⁶ related to judicial proceedings that never took place, and (for good reasons) needed to take place.

The Plaintiffs then argue a different proposition, on which they are on stronger ground; they say that courts should reject “speculation” that the litigant would have lost anyway. And in this respect, the Court agrees with them. In determining prejudice, courts should not speculate as to outcome if an aggrieved party was denied the notice to which it was entitled. If there is a non-speculative reason to doubt the reliability of the outcome, the Court agrees that it should take action—though the opposite is also true. For that reason, the Court believes that it here should neither deny, nor grant, relief to the Plaintiffs here based on a request by either side that the Court engage in speculation.¹⁷⁷ The Court will refrain from doing so.

Finally, and apart from the caselaw previously noted, the Plaintiffs’ contention that prejudice need not be shown in cases like this one runs contrary not just to existing law, but also fairness and sound policy. Bankruptcy sale due process cases, much more than in plenary litigation, involve competing interests—including those of parties who

¹⁷⁶ See 407 U.S. at 87 (“To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merit.”), quoted at Pl. Br. at 36.

¹⁷⁷ But that view, once again, does not go to the requirement that prejudice must be shown; it goes only to how the required prejudice should or should not be found.

To avoid the need for such speculation, it is very possible that in a case where it made a difference, the Court would not require, incident to ascertaining the existence of prejudice, that the result *would* have been different; the Court might well hold that it should suffice that there is a reasonable likelihood that the result *could* have been different. But the Court does not need to decide that here. In this case, there are no matters argued by either side where the distinction would matter.

have acquired property rights as buyers of estate assets, and have a justifiable expectation that when they acquire assets pursuant to a bankruptcy court order, they can rely on what the order says. That was an important element of the Seventh Circuit’s opinion in *Edwards*,¹⁷⁸ in which that court held that a bona fide purchaser of property in a free and clear sale acquired good title to it, even though a second mortgagee had not received notice of the sale until more than a year later.

The *Edwards* court noted that “[i]f purchasers at judicially approved sales of property of a bankrupt estate, and their lenders, cannot rely on the deed that they receive at the sale, it will be difficult to liquidate bankrupt estates at positive prices,”¹⁷⁹ and that “the liquidation of bankrupt estates will be impeded if the bona fide purchaser cannot obtain a good title, and creditors will suffer.”¹⁸⁰ That does not mean, at least in this Court’s view, that the purchasers of assets automatically should win, but it does mean that their needs and concerns—and the protection of their own property rights—cannot be disregarded either.

The *Edwards* court twice addressed the competing interests on matters of this character:

We are left with the practical question, in what circumstances can a civil judgment be set aside without limit of time and without regard to the harm to innocent third parties? The answer requires a

¹⁷⁸ See n.69 *supra*. The Plaintiffs argue that *Edwards*, which was written by Judge Posner, was wrongly decided. See Pl. Br. at 34. But the Court believes *Edwards* was correct in its result, and in most of its analysis—especially insofar as it focuses on the prejudice (or lack of prejudice) to the party that received inadequate notice, and speaks of others’ property rights that likewise need to be taken into account.

¹⁷⁹ 962 F.2d at 643.

¹⁸⁰ *Id.* at 645.

consideration of competing interests rather than a formula.¹⁸¹

And again:

To take away a person’s property—and a lien is property—without compensation or even notice is pretty shocking, but we have property rights *on both sides of the equation here*, since [the second mortgagee] wants to take away property that [the purchaser] bought and [the purchaser’s lender] financed, without compensating them for their loss.¹⁸²

The Court is mindful of concerns articulated by Chief Judge Jacobs dissenting in *Petrie Retail*¹⁸³ (even though they were not embraced by the *Petrie Retail* majority) that the requirements of law in bankruptcy cases should not be trumped by concerns as to whether they might have a chilling effect on sales in bankruptcy cases, on the one hand, or “promote[] the sale of the assets marketed by bankrupt estates,” on the other. And for reasons discussed below, the Court believes that in the Second Circuit, the requirements of due process would trump the interests of finality and maximizing creditor recovery. But in bankruptcy, the interests inherent in the enforceability of 363 orders (on which the buyers of assets should justifiably be able to rely, and the interests of creditors depending on the maximization of estate value likewise rest) are hugely important. And to the extent that courts can respect and enforce sale orders as written unless there is genuine prejudice, they should do so. Since parties’ competing needs and concerns “are on both sides of the equation here,”¹⁸⁴ that means that in instances in which prejudice has not

¹⁸¹ *Id.* at 644 (citation omitted).

¹⁸² *Id.* at 645 (emphasis added).

¹⁸³ *See Luan Inv. S.E. v. Franklin 145 Corp. (In re Petrie Retail, Inc.)*, 304 F.3d 223, 233 (2d Cir. 2002) (“*Petrie Retail*”) (Jacobs, C.J., dissenting).

¹⁸⁴ *Edwards*, 962 F.2d at 645.

been shown, there is no good reason for depriving asset purchasers of their own property rights—and of the benefits for which they provided value to a chapter 11 estate.

And the facts here (which may present a relatively uncommon situation)—where while insufficient notice was given, others duly given notice made the same, and indeed better, arguments against successor liability, and lost—raise an additional common sense and fairness concern. It defies common sense—and also is manifestly unfair—to give those who have not been prejudiced the bonanza of exemption from a ruling as to which other creditors, with no lesser equities in their favor, were heard on the merits, lost, and now have to live with the result.

For all of these reasons, the Court holds—consistent with the ten other cases that have held likewise—that even where inadequate notice has been given, prejudice is an essential element for vacating or modifying an order implementing a 363 sale.

5. *Application of Those Principles
to Economic Loss Plaintiffs*

Having concluded that the Economic Loss Plaintiffs were denied the notice due process requires, but that establishing a claim for a denial of due process requires a showing of prejudice, the Court must then consider the extent to which they were prejudiced as a result. The Court finds that they were not at all prejudiced with respect to successor liability, but that they were prejudiced with respect to overbreadth of the Sale Order.

(a) *Successor Liability*

After arguing that prejudice need not be shown, and that they should win without any prejudice at all (contentions that the Court has rejected), the Plaintiffs go on to argue

that even if prejudice must be established, it was shown.¹⁸⁵ They argue that if they had the opportunity to be heard, the result would have been different. Insofar as successor liability is concerned, the Court easily rejects that contention.

It is undisputed that although the Plaintiffs did not get adequate notice of the 363 Sale hearing, over 4 million others did, including a very large number who vigorously argued against the Free and Clear Provisions, but ultimately failed. While the Plaintiffs quote from *Mullane* repeatedly, and rely on *Mullane* principles even more often, they overlook the language in *Mullane* that expressly addressed situations where many would be similarly affected—and where all, because of incomplete notice, might not be able to be heard, but many could.

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. It even suggests that in such instances, there is no persuasive claim that even notice was defective. In language that the Plaintiffs fail to address, the *Mullane* court stated:

This type of trust presupposes a large number of small interests. *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.* We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable. ‘Now and then an extraordinary case may turn up, but constitutional law, like other mortal contrivances, has to take

¹⁸⁵ See Pl. Br. at 58-60.

some chances, and in the great majority of instances, no doubt, justice will be done.’¹⁸⁶

Here, as in the situation addressed in *Mullane*, the notice that was sufficient to trigger many objections to the Free and Clear Provisions was “likely to safeguard the interests of all.”¹⁸⁷ If those who got notice and made those objections had been successful, the “objections sustained would inure to the benefit of all.”¹⁸⁸ These observations by the Supreme Court bolster the conclusion that there was no prejudice here. In fact, just as the *Mullane* court declared that “under such circumstances, reasonable risks that notice might not actually reach every beneficiary [were] justifiable,” that element of the *Mullane* holding strongly suggests that notice that did not reach the subset of vehicle owners with Ignition Switch Defects was not constitutionally deficient in the first place.¹⁸⁹

But even if *Mullane* does not by itself dispose of the question, the Plaintiffs’ failure to show any reason why the Free and Clear Provisions were improperly imposed does. That failure underscores the lack of prejudice here.¹⁹⁰ Notably, the Plaintiffs do

¹⁸⁶ *Mullane*, 339 U.S. at 318-19 (emphasis added).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ However, while that conclusion follows from what the Supreme Court said in the quoted language, the Court prefers to analyze the matter in terms of the massive caselaw requiring a showing of prejudice. The distinction doesn’t matter with respect to the Free and Clear Provisions, because so many people argued against them. But it could matter with respect to overbreadth, discussed below, where those with notice didn’t make an overbreadth argument. The Court is more comfortable in denying relief in instances where people made the same argument and lost than it is in instances where those with notice failed to make the argument at all.

¹⁹⁰ See *Paris Industries*, *supra* n.123, 132 B.R. at 510 (“I conclude that [objectors] 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.”); *Austin v. BFW Liquidation, LLC (In re BFW Liquidation, LLC)*, 471 B.R. 652, 672-73 (Bankr. N.D. Ala. 2012) (Cohen, J.) (declining to set aside bankruptcy sale even though a creditor was not given notice of it where creditors’ committee and many creditors participated in the process and court could conclude that all creditors’ interests in the sale were adequately represented by that committee and those creditors, and the creditor “did not allege in

not argue that when the Court barred successor liability back in 2009, it got it wrong.¹⁹¹ They do not bring to the Court's attention any cases that other objectors missed, or any statutory or other authority suggesting a different outcome on the successor liability merits. In fact, they offer no legally based arguments as to why they would have, or even *could* have, succeeded on the successor liability legal argument when all of the other objectors failed.¹⁹²

Rather, while the Plaintiffs recognize that the Court would not have let GM go into the liquidation that would have resulted if the Court denied approval of the 363 Sale, they argue that they could have defeated the successor liability injunction for reasons unrelated to its propriety as a matter of bankruptcy law. While criticizing New GM for improper speculation,¹⁹³ they ask the Court to rely on the speculation they prefer,¹⁹⁴ they

her complaint that she possessed any grounds for opposing the sale which she could have raised had she been notified of the sale before it was authorized").

¹⁹¹ See Pl. Br. at 58-60. The closest they come is an accusation that it is New GM that is engaging in speculation, and a suggestion that the Court would not have written "exactly the same opinion." See Pl. Br. at 58-59 ("New GM's argument speculatively presumes that this Court would have written exactly the same opinion in July of 2009 *even if* it had been aware of the ISD, the now well-documented campaign to cover it up, and Old GM's abdication of its legal duties to owners and lessees of Defective Vehicles.") (emphasis in original). In light of the Plaintiffs' failure to put forward any new successor liability arguments or caselaw authority, the Facts section of any opinion might have added a paragraph or two, but the legal discussion would not at all have changed—nor, more importantly, would the outcome.

The Plaintiffs also argue, though only in a footnote, that if they had an opportunity to be heard, they would have objected to a finding in the Sale Order that New GM was a "good faith purchaser" (relevant under Bankruptcy Code section 363(m)), and that the Court likely would have agreed with them. See Pl. Br. at 59 n.67. That contention does not help them. Their prediction of the Court's ruling if they had made such an argument is speculative, but even if such a ruling might have come to pass, it would not have an effect on the inclusion of provisions imposing successor liability. "Good faith purchaser" findings provide safe harbors for buyers *on appeal*; they do not go to whether or not a sale should be approved, or the nature or extent of any provisions barring successor liability. See section 363(m).

¹⁹² The Court would have fully and fairly considered any such argument now if it had been made, but (presumably because of the absence of supporting authority) that is not the Plaintiffs' argument here.

¹⁹³ See Pl. Br. at 4 ("New GM's self-serving speculation regarding possible outcomes had the ISD been disclosed and notice to the Pre-Sale Class been given are not even plausible."); *id.* at 58 ("New GM's argument speculatively presumes that this Court would have written exactly the

ask the Court to accept the likelihood that by reason of public outrage or public pressure, they could have required Old GM or Treasury to rewrite the deal to accede to their desires.¹⁹⁵ And they know, or should, the fundamental principle of bankruptcy law that a buyer of assets cannot be required to take on liabilities it doesn't want.

So it requires no speculation for the Court to rule that given Old GM's circumstances at the time, the Court would not have disapproved the 363 Sale or conditioned its approval on modifications to the carefully negotiated restructuring to favor one or more groups seeking special treatment.

As noted above, the Court agrees with the Plaintiffs and the GUC Trust that speculation is inappropriate on an inquiry of this nature. But gauging the outcome on the bar of successor liability if Plaintiffs had been heard does not at all involve speculation, especially since they offered no authority beyond what the other objectors offered in 2009. Rather, it is the Plaintiffs' alternative argument—that they could have succeeded by reason of public outrage, political pressure, or Treasury's anger with Old GM, when

same opinion in July of 2009"); *id.* at 59 ("New GM cannot support its speculation as to the potential outcome had Old GM disclosed, on the eve of filing for bankruptcy, that it had put millions of cars on the road with a known but hidden life-threatening defect while failing to disclose that fact to those most affected by it.").

¹⁹⁴ See Pl. Br. at 59 ("[I]t is equally or even more likely that Old GM and Treasury—who, New GM acknowledges, was the one to draw 'the line in the sand'—would have chosen to deal with objections from Plaintiffs in the same way it chose to deal with objections from consumer safety groups, by adding Plaintiffs' claims to assumed liabilities."); *id.* at 4 ("[T]here is no way to determine, some five years later, what the outcome would have been had the bombshell of Old GM's concealment of this massive safety defect been made known to the Court, the Treasury, Congress, the public, the press and the various objectors.").

¹⁹⁵ See *id.* at 4-5 ("[H]ad the Court and governmental authorities known that Old GM had knowingly placed millions of cars on the road with a life-threatening safety defect (and that New GM intended to continue to allow such cars to remain on the road with those known defects), it is not reasonable to assume (as New GM does) that such a revelation could only have resulted in a disastrous liquidation and the end of GM as a functioning company. Instead, it is likely that such an outcome would have still been avoided (for numerous reasons, political, national economic and otherwise, that were still significant, compelling and extant), *and that the entry of the Sale Order would have been conditioned on New GM's assumption of all related liabilities so as to ensure the commercial success of the purchasing entity.*") (emphasis added).

they could not prevail in the courtroom—that asks the Court to speculate. For the very reason the Plaintiffs themselves advance, the Court should not, and will not, do so.

Insofar as the Free and Clear Provisions’ prohibition of successor liability claims are concerned, while the Plaintiffs failed to receive the notice due process requires, they were not prejudiced as a result. Thus they have failed to establish a claim for a denial of due process. The Free and Clear Provisions must stand.

(b) New GM’s Own Wrongful Acts

What the Court would have done in the face of a Sale Order overbreadth objection is likewise not subject to speculation. The Court follows its own precedent. If the Plaintiffs had been heard to make the argument back in 2009 that they are making now—that they should have the right to allege claims based on wrongful conduct by New GM alone, without any reliance on anything that Old GM might have done—the Court would have entered a narrower order, as it did in similar situations. In this respect, the Economic Loss Plaintiffs were prejudiced.

The Court has twice dealt with what is effectively the same issue before. In another chapter 11 case on the Court’s watch, quite a number of years before the 363 Sale in this case, Magnesium Corporation of America (“**MagCorp**”), one of the two debtors in that case,¹⁹⁶ had massive bond debt, environmental, and other liabilities, leading to a chapter 11 filing in August 2001. In May 2002, lacking an ability to reorganize, MagCorp sought approval of a 363 sale to US Magnesium, an affiliate, of substantially all of its assets, with free and clear provisions that would protect the purchaser from successor liability on the debtors’ legacy claims—including, most significantly,

¹⁹⁶ *In re Magnesium Corp. of Am.*, No. 01-14312-reg (“**MagCorp**”).

MagCorp's environmental liabilities to the EPA and other U.S. Government entities. Understandably upset that it would have to recover its very substantial claims from a shell that at the time seemed largely worthless, the Government objected to the free and clear provisions.

Consistent with the law at the time (which was even clearer by 2009), the Court nevertheless granted the requested free and clear provisions. But it further ruled that *while successor liability would be proscribed*, US Magnesium would not be protected with respect to any future matters *that were its own liability*. As part of its dictated rulings, the Court stated:

When you are talking about free and clear of liens, it means you don't take it subject to claims which, in essence, carry with the property. It doesn't absolve you from compliance with the law going forward.¹⁹⁷

And though it later rejected an effort by the Government to reargue the free and clear provisions there, the Court then said:

I've made it clear that the new owners will have to comply with the law and will be subject to any and all obligations that the EPA or other regulatory authorities can impose with respect to the new owners of the land, including requiring that they do whatever they have to do with cleaning up their land if it's messed up.¹⁹⁸

The Court's sale order in *MagCorp* therefore included, after its free and clear provisions, a key proviso:

provided, however, that nothing contained herein shall (a) release US Magnesium LLC or any affiliate or insider thereof from any claim of the

¹⁹⁷ Tr. of Hr'g, Jun 4, 2002, No. 01-14312 ECF No. 290, at 129:21-25.

¹⁹⁸ *Id.* at 132:22-133:5 (transcription errors corrected).

United States against US Magnesium or such affiliate or insider which existed immediately prior to the Closing (but not as a successor in interest to the Seller) and (b) *excuse US Magnesium LLC from any obligations under applicable law* (including, without limitation, RCRA or other environmental laws) *as the owner and operator of the Assets (but not as successor in interest to Seller)*.¹⁹⁹

Similarly, at the 2009 sale hearing in this case, certain objectors voiced concerns that any approval order would too broadly release either Old GM or New GM from their respective duties to comply with environmental laws and cleanup obligations. After they did so, the Court noted that it had originally shared their concerns, but that their concerns were addressed by amendments to the proposed order that were made after objections were filed.²⁰⁰ The Sale Order in this case was amended to say:

Nothing in this Order or the [Sale Agreement] releases, nullifies, or enjoins the enforcement of any Liability to a governmental unit under Environmental Laws or regulations (or any associated Liabilities for penalties, damages, cost recovery, or injunctive relief) that any entity would be subject to as the owner, lessor, or operator of property after the date of entry of this Order. Notwithstanding the foregoing sentence, nothing in this Order shall be interpreted to deem the Purchaser as the successor to the Debtors under any state law successor liability doctrine with respect to any Liabilities under Environmental Laws or regulations for penalties for days of violation prior to entry of this Order. Nothing in this paragraph should be construed to create for any governmental unit any substantive right that does not already exist under law.²⁰¹

¹⁹⁹ Order, No. 01-14312 ECF No. 283 (Jun. 5, 2002) ¶ 13 (underlining in original but emphasis by italics added).

²⁰⁰ *See Sale Opinion*, 407 B.R. at 507-08.

²⁰¹ *Id.* at 507. Another provision provided similarly: “Nothing contained in this Order or in the [Sale Agreement] shall in any way (i) diminish the obligation of the Purchaser to comply with Environmental Laws....” *Id.* at 507-08.

Here the Sale Order, in addition to barring successor liability (which for reasons discussed above, remains fully appropriate), also proscribed any claims involving vehicles and parts manufactured by Old GM, even if the claims might rely solely on wrongful conduct by New GM alone. By not having the opportunity to argue that such was inappropriate here (and to seek a proviso similar to the ones granted in *MagCorp* and for the environmental objectors here), the Economic Loss Plaintiffs were prejudiced. They thus established an actionable denial of due process with respect to Sale Order overbreadth.

(c) The Used Car Purchasers

A subset of the Economic Loss Plaintiffs, the Used Car Purchasers (whom the Plaintiffs refer to as the “Post-Sale Class”), assert that they have special rights—to assert claims for successor liability when nobody else can—because they had not yet purchased their cars at the time of the 363 Sale. The Court cannot agree. Aside from the illogic and unfairness of the contention, it is erroneous as a matter of law, for at least two reasons.

First, when the Court issued the Sale Order, approving the disposition of Old GM assets—a matter over which the Court had unquestionable subject matter jurisdiction, derived from its statutory subject matter jurisdiction under 28 U.S.C. § 1334 and, more importantly for these purposes, the *in rem* jurisdiction the Court had over estate assets then being sold—those assets were sold free and clear of successor liability claims. The substance of the Sale Order was to proscribe claims based on the transferor Old GM’s conduct that could be argued to travel with the assets transferred.²⁰² The bar against

²⁰²

See Sale Opinion, 407 B.R. at 501 (as part of Court’s analysis that successor liability claims were “interests” properly subject to a free and clear order, recognizing that “we know that an ‘interest’ is something that may accompany the transfer of the underlying property, and where bankruptcy

successor liability claims premised on continued ownership of the property traveled with the property. The Used Car Plaintiffs would thus be bound by the *in rem* nature of that order except to the extent that its enforcement, by reason of due process concerns, would be improper as to them.

Because they were unknown at the time, and were not even creditors (not having yet acquired the cars they now assert have decreased value), mailed notice was impossible, and publication notice (or for that matter, actual notice) would not have been meaningful to them, even if Old GM had previously sent out recall notices. Thus the Used Car Purchasers were denied the notice due process requires to bind them to the Free and Clear Provisions,²⁰³ just as the remainder of the Plaintiffs were.

But like the other Plaintiffs, the Used Car Purchasers were not prejudiced, because others made the same arguments that Used Car Plaintiffs might have made, and the Court rejected those contentions. Especially since purchasers of estate property under sale orders have property rights too, the methodology for correcting a denial of an opportunity to be heard under such circumstances (if not others as well) should be (1) at least temporarily relieving an adversely affected litigant of the effect of the order, and then (2) giving the adversely affected litigant the opportunity to be heard that was previously denied—referred to colloquially by this Court, in oral argument, as a “do-over”²⁰⁴—fixing any damage that might have resulted from an incorrect or incomplete

policy, as implemented by the drafters of the Code, requires specific provisions to ensure that it *will not* follow the transfer.”) (emphasis in original).

²⁰³ See *Morgan Olson L.L.C. v. Frederico (In re Grumman Olson Indus., Inc.)*, 445 B.R. 243 (Bankr. S.D.N.Y. 2011) (Bernstein, C.J.) (“*Grumman Olson-Bankruptcy*”), *aff’d* 467 B.R. 694, 706-07 (S.D.N.Y. 2012) (Oetkin, J.) (“*Grumman Olson-District*”) (finding due process concerns made bar of successor liability unenforceable against claimants who were unknown, future, claimants at the time of the sale) (collectively, the “*Grumman Olson Decisions*”).

²⁰⁴ See Day 1 Arg. Tr. at 15, 20, 21.

ruling the first time. Granting any more than that would favor the Plaintiffs with an outcome that the Court has already determined is contrary to existing law, and would grant them a wholly inappropriate windfall.

Like the other Economic Loss Plaintiffs (and for that matter, the Pre-Closing Accident Plaintiffs), if the Used Car Purchasers made arguments at this time that were not previously raised, the Court believes that it would be obligated to consider those arguments now, and effectively give Used Car Plaintiffs a do-over. But once again like the other Plaintiffs, the Used Car Plaintiffs have identified no arguments they might have made that others did not. As with the other Plaintiffs, the denial of notice gave them the chance to be heard on the merits at a later time, but not to an automatic win.

Second (assuming *arguendo* that they were injured), the Used Car Owners were injured as the successors in ownership to individuals or entities who had been the prior owners of their Old GM cars. And for each of them, an earlier owner was in the body of owners of Old GM vehicles who were bound by the Free and Clear Provisions. With exceptions not applicable here (such as holders in due course of negotiable instruments), the successor in interest to a person or entity cannot acquire greater rights than his, her, or its transferor.²⁰⁵ That is the principle underlying the *Wagoner* Rule,²⁰⁶ which, while an amalgam of state and federal law, is firmly embedded in the law in the Second Circuit.²⁰⁷

²⁰⁵ See *Tital Real Estate Ventures, LLC v. MJCC Realty L.P. (In re Flanagan)*, 415 B.R. 29, 42 (D. Conn. 2009) (Underhill, J.) (“In acquiring the estate’s rights and interests . . . Titan [the acquiror from a trustee] 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 . . . Titan can only prevail on its claims if, and to the extent that, the Trustee would have prevailed on those claims at the time of the assignment.”).

²⁰⁶ See *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114 (2d Cir. 1991) (“*Wagoner*”).

²⁰⁷ See, e.g., *Buchwald v. The Renco Group, Inc. (In re Magnesium Corp. of America)*, 399 B.R. 722, 757 nn. 113 & 114 (Bankr. S.D.N.Y. 2009) (Gerber, J.) (applying *Wagoner* Rule to hold chapter 7

And that principle has likewise been applied to creditors seeking better treatment than the assignors of their claims.²⁰⁸ Thus it is not at all surprising to this Court that in *Old Carco*,²⁰⁹ Judge Bernstein blocked the suits by those who bought *used* 2005 and 2006 Dodge Durangos or Jeep Wranglers,²¹⁰ distinguishing *Grumman Olson-Bankruptcy* on the ground that those 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.”²¹¹

Thus the caselaw requires that New GM receive the same protection from Used Car Owners’ successor liability claims that it had from their assignors’.

The Used Car Purchasers’ contention that they deserve better treatment than other GM vehicle owners is also illogical and unfair. As New GM argues, with considerable force, “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 . . . 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

trustee to *in pari delicto* defenses applicable to the corporation and its management whom the trustee replaced).

²⁰⁸ See *In re KB Toys, Inc.*, 736 F.3d 247, 252-54 (3rd Cir. 2013) (“**KB Toys**”) (a trade claim that was subject to disallowance in the hands of the original claimant as a preferential transfer was similarly disallowable in the hands of a subsequent transferee). Like the Third Circuit in *KB Toys*, see *id.* at 254 n.11, the Court has considered, but declined to follow, the contrary holding in *Enron Corp. v. Springfield Assocs. (In re Enron Corp.)*, 379 B.R. 425 (S.D.N.Y. 2007) (Scheidlin, J.) (“**Enron-District**”), which had held that susceptibility for equitable subordination and claims disallowance would continue if a transfer was by way of an “assignment,” but not by “sale.” The Third Circuit in *KB Toys* court found this distinction to be “problematic,” *id.*, and for that reason and others, it followed the contrary decisions in *Enron Corp. v. Avenue Special Situations Fund II, LP (In re Enron Corp.)*, 340 B.R. 180 (Bankr. S.D.N.Y. 2006) (Gonzalez, J.) (“**Enron-Bankruptcy**”) (which the *Enron-District* court had reversed), and in *In re Metiom, Inc.*, 301 B.R. 634 (Bankr. S.D.N.Y. 2003) (Drain, J.), with which this Court, like the Third Circuit, agrees.

²⁰⁹ See n.157 *supra*.

²¹⁰ See *Old Carco*, 492 B.R. at 399.

²¹¹ 492 B.R. at 403 (emphasis added).

who purchased the vehicle after the 363 Sale.”²¹² There is no basis in logic or fairness for a different result.

For all of these reasons, the Court concludes, after what is effectively *de novo* review (focused on the non-showing by Used Car Purchasers of anything they might have argued to defeat the Free and Clear Provisions beyond anything previously argued), that Used Car Purchasers have likewise failed to make a showing of prejudice, and the Free and Clear Provisions stand for them as well.

6. *Application of Those Principles
to Pre-Closing Accident Plaintiffs*

Like the Economic Loss Plaintiffs whose claims the Court just addressed, the Pre-Closing Accident Plaintiffs seek to impose successor liability on New GM. But though the Court has found that they did not get the notice due process requires, they were not prejudiced by the failure.

Preliminarily, the Court’s determination that the Economic Loss Plaintiffs were not prejudiced by the Free and Clear Provisions applies equally to the Pre-Closing Accident Plaintiffs. The Pre-Closing Accident Plaintiffs likewise have offered no arguments here as to why the Court’s earlier order proscribing successor liability was wrong. And it requires no speculation here for the Court again to find no basis for a different legal result. In fact, many of the objectors whose contentions the Court rejected back in 2009 were asserting the exact same types of claims the Pre-Closing Accident Plaintiffs have—claims for injury or death from pre-closing accidents, involving vehicles or parts manufactured by Old GM. While the Pre-Closing Accident Plaintiffs’ claims (premised upon actual injury or death, and, at least allegedly, from the safety risk of

²¹² See New GM Opening Br. at 66.

which Old GM was aware), might be regarded by many as more sympathetic than those of Economic Loss Plaintiffs, they nevertheless are efforts to impose successor liability. And contentions that the Pre-Closing Accident Plaintiffs would successfully impose successor liability by reason of political concerns are once again speculative, just as the similar arguments of the Economic Loss Plaintiffs were.

The arguments as to Sale Order breadth that the Economic Loss Plaintiffs might have asserted would not be relevant to the Pre-Closing Accident Plaintiffs. To the extent the Sale Order was overbroad, it was so as to any claims that might arise *solely by reason of New GM's conduct*. The Pre-Closing Accident Plaintiffs suffered the injury or death underlying their claims in Old GM cars, and with Old GM parts. Any actionable conduct causing that injury or death took place before the 363 Sale—and necessarily was by Old GM, not New GM, and indeed before New GM could have done anything wrong.

If the overbreadth objection were sustained and the Sale Order could be, and were, fixed (a matter addressed in Section II below, dealing with Remedies), the Pre-Closing Accident Plaintiffs still could not assert claims against New GM.

The Pre-Closing Accident Plaintiffs did not suffer the prejudice that is an element to a denial of due process claim.

7. Application to Filing of Claims

Much of the analysis above applies equally to the allowance of claims. But due process analysis in the claims allowance context must take into account two differences. First, here there was not the same degree of urgency with respect to the deadline for filing claims. And second, while prejudice is required in the claims context as well, the denial of the opportunity to file a timely proof of claim—and with it, the likely or certain expungement of one's claim—is at least generally, if not always, classic prejudice.

As noted above, due process analysis requires the consideration of the surrounding circumstances. While the need for urgency in a judicial process is the paradigmatic example of a relevant circumstance, the converse is also true. When the urgency is lacking, the hugely important factor of impracticality by reason of time constraints drops out of the picture. In contrast to the 363 sale process, claims could be (and ultimately were) considered in a less hurried fashion.

Nevertheless, were it not for the fact that Ignition Switch Defects were known claims (for reasons discussed in Section I(A)(5) above), service of notice of the Bar Date by the publication that here was utilized²¹³ would still be adequate. Old GM was careful to send out notice of the Bar Date to any who had brought suit against Old GM or expressed to Old GM their belief that they might have claims, and the Court approved Old GM's proposals for notice by publication to those not known by Old GM to have potential claims against the Old GM estate.

But with respect to the allowance of claims, the failure to send out Ignition Switch Defect recall notices, much more clearly than with respect to notice of the 363 Sale, resulted in the denial of the notice that due process requires. And though a showing of prejudice here too is required, the Court finds that the denial of timely notice of the Old

²¹³ The Plaintiffs seek to compare and contrast the highly detailed and carefully structured publication notice that this Court authorized with respect to worker claims that might have arisen by reason of their exposure to the chemical diacetyl, in another case on the Court's watch, *Chemtura* (No. 09-11233 (reg)), where a challenge to the adequacy of the notice was rejected by this Court and later affirmed on appeal. See *Gabauer v. Chemtura Corp. (In re Chemtura Corp.)*, 505 B.R. 427 (S.D.N.Y. 2014) (Furman, J.). The comparison is not an apt one. There, as a result of a shared desire of the debtor and the Court to provide the best notice possible to workers who might have been exposed to diacetyl (and because Chemtura wanted to lean over backwards to get a discharge of such claims on which it could rely), the Court established special measures, such as notices with an unusually detailed discussion of the possibility of illness, postings of notices in each potentially affected plant, notices in local community newspapers, and publication in both English and Spanish. But these measures are properly thought of as "best practices," or at least an excess of caution, which would not establish a minimum standard for the quality of notice that is constitutionally required.

GM Bar Date prejudiced the Plaintiffs with respect to any claims they might have filed against Old GM.

By reason of its failure to provide the Plaintiffs with either the notice required under the Safety Act or any other form of written notice, Old GM failed to provide the Plaintiffs with the notice that due process requires.²¹⁴ And because that failure prejudiced them in filing timely claims, the Plaintiffs were prejudiced as a result. The failure to give the Plaintiffs the notice that due process requires, coupled with the prejudice to them that resulted, denied the Plaintiffs the requisite due process.

II.

Remedies

The second threshold issue requires the Court to determine the appropriate remedies for any denials of due process that the Court may have found. Once again, the Court focuses on the Sale Order and claims allowance process separately.

A.

The Sale Order

The Plaintiffs argue that the Court should simply deny New GM enforcement of the Sale Order “as to the objecting claimant[s] who did not receive due process,”²¹⁵ (*i.e.*, as to *them*), even with respect to the same successor liability as to which the Court ruled against others who got notice and argued against it. They argue, in substance, that they

²¹⁴ The Court does not need to decide, and does not decide (in either this context or in the context of the adequacy of notice of the 363 Sale), a matter also debated by the parties—the extent to which a detailed notice describing the types of claims Plaintiffs might assert (or, by analogy, of how they might be adversely affected by the Free and Clear Provisions) was required as a matter of due process law. Because Old GM failed to send out *any* recall notices, or provide *any* alternative form of notice to those with Ignition Switch Defects, whatever, the degree of detail that might otherwise be required is academic.

²¹⁵ Pl. Br. at 62.

should be permanently absolved from the Sale Order's Free and Clear Provisions irrespective of whether those provisions were right or wrong. Not surprisingly, the Court rejects this contention.

By the same token, New GM argues that the Plaintiffs' remedy, if any, is to enforce their claims against the proceeds of the 363 Sale, and that the unitary nature of the Sale Order requires that the Court either enforce it as a whole or vacate it as a whole—while also reminding the Court (though the Court need hardly be reminded) that unwinding the sale at this point is unthinkable. Though these contentions are not as offensive as the Plaintiffs', these too are flawed.

Like the Due Process issue, the Court analyzes the Remedies issue in ways materially different than the parties here do—in accordance with the discussion that follows.

1. Prejudice As Affecting Remedy

For reasons discussed above,²¹⁶ the Court has already rejected the Plaintiffs' contention that prejudice is irrelevant to the existence of a due process violation resulting from a denial of the requisite notice. That limits, though it does not eliminate, the matters for which a remedy must be crafted.

Here the Plaintiffs failed to receive notice they might have used to join others likewise arguing against the Free and Clear Provisions. But the others made those points, and made them well. And while the prejudice analysis might be different if the Plaintiffs now identified successor liability points others failed to make, here no such points have

²¹⁶ See page 71 & nn.162 through 165 *supra*.

been identified. On the Free and Clear Provisions barring successor liability, there is no prejudice; thus no due process claim; and thus nothing to remedy.²¹⁷

But on the Plaintiffs' second principal matter of concern—the overbreadth of the Sale Order—the situation is different. There is a flaw in the order, protecting New GM from liability on claims that, while they involve Old GM vehicles or Old GM parts, do not rest on successor liability, and instead rely on New GM's alleged wrongful conduct alone. The Plaintiffs could have made overbreadth arguments if given appropriate notice before the 363 Sale hearing, and to that extent they were prejudiced. And for that the Plaintiffs should be entitled to remedial relief to the extent the law otherwise permits.

2. Attaching Claims to Sale Proceeds

So it is necessary then to turn to New GM's points. In several respects, New GM is right, but in material respects New GM extends existing law too far, or fails to recognize the holdings or implications of existing precedent.

Over-extension of existing law is the problem with respect to New GM's first point: its contention that the Plaintiffs' claims should attach to the 363 Sale Proceeds. That often works fine; courts routinely provide that upon sales of estate property subject to a lien, the rights of parties with liens on the collateral that was sold attach to the

²¹⁷ Even if prejudice did not need to be found as an element of a claim of denial of due process in the first place, prejudice would nevertheless be a critical element in determining the proper remedy. As noted above, the Court believes that the methodology for the correction of a denial of an opportunity to be heard in a sale order context should be (1) at least temporarily relieving an adversely affected litigant of the effect of the order, and then (2) giving the adversely affected litigant the opportunity to be heard that was previously denied—repairing any damage that might have resulted from an incorrect or incomplete ruling the first time. Apart from the unfairness of treating the Plaintiffs better than others similarly situated, granting them any more than that would favor the Plaintiffs with an outcome that the Court has already determined is contrary to existing law, and grant them a wholly inappropriate windfall.

proceeds instead.²¹⁸ And since the secured component of a claim protected by a lien cannot exceed the value of the collateral, that will typically eliminate any prejudice to the lien creditor. That was the situation in *Edwards*, which (because it involved a lien) reached the right bottom line. But as this Court noted above,²¹⁹ the claims and interests proscribed by a sale order can go beyond mere liens, and New GM's analysis can work only for liens—or, perhaps, any similar interests whose value is capped by the value of collateral being sold. If another kind of interest was impacted—as it has been here—a different remedy must be considered.

New GM's second point (that the Sale Order cannot be vacated or modified at this late point in time) breaks down into several distinct, but related, points—raising issues of bankruptcy policy and the finality of judicial sales; of due process law; and of respect for the nonseverability provisions in orders upon which many rely. Each raises matters of legitimate concern from New GM's perspective. But they can be taken only so far.

3. *Protection of Purchasers of Estate Assets*

New GM points out that the buyers of assets from chapter 11 estates acquire property interests too—as recognized by the Seventh Circuit in *Edwards*²²⁰—and that taking away those purchasers' contractually bargained-for rights strikes at the heart of understandings critically important to the bankruptcy system. In this respect, New GM is

²¹⁸ In fact, the Court did exactly that at the time of the 363 Sale, with respect to lenders (the “**TPC Lenders**”) who had liens on a transmission manufacturing plant in Maryland, and a service parts distribution center in Tennessee, that went over to New GM in the Sale. *See In re Motors Liquidation Co.*, 482 B.R. 485, 487 (Bankr. S.D.N.Y. 2012) (Gerber, J). After a series of negotiations, the TPC Lenders and Old GM agreed to protective provisions under which the proposed sale could go through while protecting the TPC Lenders' lien rights. The two properties were sold free and clear of liens; cash proceeds were put into an escrow account, to which the TPC Lenders' liens would attach; and the Court later ruled on valuation issues that would determine the TPC Lenders' monetary entitlement.

²¹⁹ *See* page 54 et seq. & n.123, *supra*.

²²⁰ *See* nn.69 & 123 *supra*.

right. The Second Circuit has repeatedly recognized the importance to the bankruptcy system of concerns before the Court here. In one instance, the Circuit observed that “[w]e have long recognized the value of finality in judicial sales.”²²¹ In another, the Circuit affirmed a District Court judgment dismissing successor liability claims after a bankruptcy sale, observing that:

Allowing the plaintiff to proceed with his tort claim directly against [the asset purchaser] would be inconsistent with the Bankruptcy Code’s priority scheme because plaintiff’s claim is otherwise a low-priority, unsecured claim. Moreover, to the extent that the “free and clear” nature of the sale (as provided for in the Asset Purchase Agreement (“APA”) and § 363(f)) was a crucial inducement in the sale’s successful transaction...it is evident that the potential chilling effect of allowing a tort claim subsequent to the sale would run counter to a core aim of the Bankruptcy Code, which is to maximize the value of the assets and thereby maximize potential recovery to the creditors.²²²

For all of these reasons, if it were not for the fact that the Plaintiffs’ claim is a constitutional one, the Court would decline to deny enforcement of the Sale Order, in whole or in part. There is no good reason to give creditors asserting successor liability claims recovery rights greater than those of other creditors. And as importantly or more so, the interests inherent in the enforceability of 363 orders (on which the buyers of assets

²²¹ *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 126 F.3d 380, 387 (2d Cir. 1997) (“*Gucci*”).

²²² *Douglas v. Stamco*, 363 Fed. Appx. 100, 102 (2d Cir. 2010) (summary opinion, Katzmann, Walker, and Feinberg, C.J.J.) (quoting *In re Trans World Airlines, Inc.*, 322 F.3d 283, 292 (3d Cir. 2003) (“To allow the [plaintiff] to assert successor liability claims against [the purchaser] while limiting other creditors’ recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code’s priority scheme.”)) (citation, and footnote reference explaining why “free and clear” nature of the sale was an inducement there, omitted).

should justifiably be able to rely,²²³ and on which the interests of creditors, keenly interested in the maximization of estate value, likewise rest) are hugely important.²²⁴

4. *Effect of Constitutional Violations*

But we here have a constitutional violation—a denial of due process. In such an instance, the Court must then determine whether doctrine that would bar modification of the Sale Order under less extreme circumstances has to give way to constitutional concerns. The Court concludes that it must.

New GM has called the Court’s attention to two decisions in which courts declined to grant relief from sale orders where those seeking the relief received

²²³ See, e.g., *In re Lehman Bros. Holdings Inc.*, 445 B.R. 143 (Bankr. S.D.N.Y. 2011) (Peck, J.) (“*Lehman*”), *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). As Judge Peck observed in *Lehman*, declining to grant Rule 60(b) relief as to a sale order even though significant information was not provided to him (and even while recognizing that sale orders are not exempt from Rule 60(b) relief when cause is shown):

This tension relating to finality naturally exists to some extent in every motion under Rule 60(b) but the Court views final sale orders as falling within a select category of court order that may be worthy of greater protection from being upset by later motion practice. Sale orders 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.

Id. at 149.

²²⁴ There is also a policy concern, though the Court does not suggest that a policy concern could trump the requirements of law, or, especially, parties’ constitutional rights. But those in the bankruptcy community would instantly understand it. As the court noted in *In re White Motor Credit Corp.*, 75 B.R. 944, 951 (N.D. Ohio 1987):

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.

inadequate notice.²²⁵ But in each case the party seeking the relief was found not to have been materially prejudiced or prejudiced at all. New GM has not called the Court's attention to any case in which an order was found to have been entered with a prejudicial denial of due process and the court nevertheless denied relief.²²⁶ By contrast, the Plaintiffs have called the Court's attention, and/or the Court has found, six decisions—including two by the Second Circuit—modifying, or declining to enforce as against adversely affected parties, earlier orders in instances where those parties were denied due process and also prejudiced thereby.²²⁷

²²⁵ See *Edwards*, n.69, and *Paris Industries*, n.123 *supra*.

²²⁶ In its reply, New GM calls the Court's attention to the Supreme Court's decision in *Factors' & Traders Ins. Co. v. Murphy*, 111 U.S. 738 (1884) ("**Factors**"), a case in which one of the several noteholders of four notes secured by a common mortgage failed to get notice of a free and clear sale, and the Court determined that the choices there were to either uphold a free and clear sale order in full or wholly invalidate it. See New GM Reply Br. at 46. It is true that the Court there saw those two options as the only fair alternatives. But the Court's ruling was to that effect not because of a holding that courts lack the power to more selectively enforce orders where a person is denied notice, but because doing so under the facts there (where the party not given notice would get a leg up over her fellow noteholders) would be unfair to the other noteholders, invalidating their liens while upholding only hers. *Factors'* thus does not support New GM's position in the respect for which it was cited. It does, however, support New GM in a different, and ultimately more important, respect—New GM's point that the Plaintiffs cannot secure relief based on a lack of notice alone, without showing prejudice. *Factors'* evidences courts' reluctance to grant windfalls to those who claim to have received deficient notice, and their concern instead with a fair result.

²²⁷ See *Manville-2010*, n.69 *supra*, 600 F.3d at 153-54 (after ruling that due process was denied, ruling that an adversely affected insurer was not bound by an earlier bankruptcy court order); *Koepp*, n.69 *supra*, 593 Fed. Appx. 20 (ruling that easement holder was not deprived of her interest when her predecessor was not given notice of a railroad reorganization consummation order that extinguished the predecessor's interest); *Doolittle v. Cnty. of Santa Cruz (In re Metzger)*, 346 B.R. 806, 819 (Bankr. N.D. Cal. 2006) (Weisbrodt, J.) ("**Metzger**") (finding sale order void to the extent (but only the extent) it affected the rights of an entity with an interest in the sold property that did not receive due process); *In re Polycel Liquidation, Inc.*, 2006 Bankr. LEXIS 4545, at *25-26, 31-34, 2006 WL 4452982, at *9, 11-12 (Bankr. D.N.J. Apr. 18, 2006) ("**Polycel-Bankruptcy**") (Lyons, J.) (after ruling that due process to an entity was denied by reason of failure to provide notice, voiding sale to extent, but only the extent, that it conveyed that entity's property), *aff'd*, 2007 U.S. Dist. LEXIS 955, 2007 WL 77336 (D.N.J. Jan. 8, 2007) ("**Polycel-District**") (Cooper, J.) (holding, *inter alia*, that Bankruptcy Court was not bound to either void the sale or let the sale stand); *Compak Cos., LLC v. Johnson*, 415 B.R. 334, 342 (N.D. Ill. 2009) ("**Compak**") (holding that patent licensors' interests could not be extinguished by a sale order without due process, notwithstanding *Edwards*, given that the lienholder in *Edwards* had suffered only a trivial loss of interest); *Grumman Olson-Bankruptcy*, 445 B.R. 243, *aff'd* 467 B.R.

The latter decisions reached those results by varied means (and some with reference to Fed.R.Civ.P. 60(b) and some without it), but they all came to the same bottom line. They relieved the adversely affected party of the effects of the order insofar as it prejudiced that party. New GM insufficiently recognizes the significance of those decisions.

The decision most closely on point is *Metzger*. There the debtor in a chapter 11 case owned land to be later developed for the construction of townhouses that was subject to a deed restriction entered into with the county under which four of the units later to be constructed had to be sold at below market rates. The debtor sold the property under a free and clear order in 1992, but without notice to the county. In 2006, 14 years after the court issued the sale order, the purchaser's successor found itself in a dispute with the county over the continuing validity of the restriction, and sought to enforce the free and clear provisions. As here, the county contended that it could not be bound by the free and clear provisions, because it was not given notice of the hearing at which the sale was approved.²²⁸

On those facts, the *Metzger* court ruled, under Fed. R. Civ. P. 60(b),²²⁹ that the order was "void as to the County's interest."²³⁰ It continued:

The Court has some flexibility in creating a remedy here and need not and will not find the entire sale void on these facts. The Court need only find, and does find, that the County's interest in the Property survived the sale to [the purchaser]. The 1992 Sale

694, 706-07 (finding due process concerns made bar of successor liability unenforceable against claimants who were unknown, future, claimants at the time of the sale).

²²⁸ See 346 B.R. at 809-10.

²²⁹ With exceptions not applicable here, Rule 60(b) applies in cases under the Bankruptcy Code under Fed. R. Bankr. P. 9024.

²³⁰ *Id.* at 819.

Order is to that limited extent void because the County's due process rights were violated.²³¹

Addressing remedy in the same fashion are the Bankruptcy Court and District Court decisions in *Polycel*. There the debtor sold its property (or what it said was its property) free and clear, in a 363 sale. The property assertedly conveyed to the buyer included commercial molds used in the manufacture of prefabricated panels used to form the interior surface of inground swimming pools. But a third party, Pool Builders Supply of the Carolinas ("**Pool Builders Supply**"), which without dispute was not given notice of the sale, and which contended that it was the true owner of the molds, sought relief from the sale order asserting that its property was taken without due process.

The Bankruptcy Court granted relief under Rule 60(b), voiding the sale order as to Pool Builders Supply alone (keeping the remainder of the sale order intact), and the Bankruptcy Court's determination was affirmed on appeal. The *Polycel-Bankruptcy* court balanced the competing concerns of bankruptcy court finality and due process requirements, and concluded that the latter should prevail. Disagreeing with so much of *Edwards* that considered that the interests of finality to outweigh the due process concerns, the *Polycel-Bankruptcy* court stated:

This court is inclined to disagree with the reasoning of the Seventh Circuit, and instead follows the more persuasive line of cases that recognize the importance of affording parties their due process rights over the interest of finality in bankruptcy sales.

Although this court agrees that the interest of finality is an important part of ensuring participation in bankruptcy sales, this cannot trump

²³¹ *Id.* (citations omitted).

constitutionally mandated due process requirements
for notice and an opportunity to be heard.²³²

Addressing the Remedies issue in the same fashion is *Compak*. There, a suit over patent infringement and the entitlement to patent royalties turned on whether a patent license could be extinguished in a 363 sale of all of the debtor's assets. A sublicensee of the patent rights was not given notice of a 363 sale that would extinguish the sublicensee's claims.²³³ After discussion of the prejudice the sublicensee suffered, and distinguishing *Edwards* because of the much greater "interests at stake," the *Compak* court concluded that "the Sale Order is 'void' insofar as it purports to extinguish the defendants' license."²³⁴

In the *Grumman Olson Opinions*, Judges Bernstein and Oetkin dealt with a factual variant of the 363 sale order cases discussed above. Those decisions, unlike those previously discussed, did not involve individuals who were supposed to get notice but didn't get it, but rather people who the debtor *could not have given notice to*, because they did not have claims or interests yet.

There certain of the assets of the debtor Grumman Olson, a manufacturer of truck bodies that were installed in complete vehicles, had been sold in a 363 sale with protection against successor liability claims. Prior to its bankruptcy, Grumman Olson sold a truck body that was incorporated into a vehicle sold to Federal Express; years later (long after the sale), a FedEx employee was injured when the FedEx truck she was driving hit a telephone pole, and she and her husband (who joined in the lawsuit) sued the asset purchaser under successor liability doctrine. For obvious reasons (as they had no

²³² 2006 Bankr. LEXIS 4545, at *30, 2006 WL 4452982, at *10-11 (citations omitted).

²³³ See 415 B.R. at 337.

²³⁴ See *id.* at 342-43.

contact with the debtor prior to the sale), the woman and her husband were not known to the debtor at the time of the sale and received no notice of the sale hearing. Judge Bernstein ruled that they did not have claims (as they had not yet suffered injuries before the sale, and had no earlier contact with the debtor), but his more important conclusion for our purposes was that they could not be bound by the sale order. He concluded that “the Sale Order does not affect their rights to sue [the purchaser].”²³⁵ He did so without resort to Rule 60(b), and without invalidating the sale order as to anyone else or in any other respect.

The Second Circuit has twice addressed these issues in ways relevant here, though in situations not quite as similar to those addressed above. In *Manville-2010*, the Circuit considered the effect of a denial of due process in connection with a bankruptcy court order—though not in connection with a sale order, or, of course, one with free and clear provisions. Though most of the details of that fairly complex controversy need not be discussed here, *Manville-2010* is important for the Circuit’s conclusion as to the appropriate remedy after it found a due process violation.

There the debtor Manville, which had been subject to massive liabilities resulting from its manufacture of asbestos (and whose insurance policies, notwithstanding coverage disputes, were its most valuable asset), entered into a series of settlements and settlement clarifications in the 1980s with a group of its insurers, including Travelers, its primary insurer, which were approved by Bankruptcy Court orders.²³⁶ Under the settlement documents, in exchange for sizable contributions to a settlement fund, the insurers were relieved of all obligations related to the disputed policies, and the insurers

²³⁵ 445 B.R. at 254.

²³⁶ See 600 F.3d at 138-39.

would be protected from claims based on such obligations by bankruptcy court injunctive orders. By bankruptcy court orders entered in 1986, claims related to the policies were channeled to a trust created for addressing Manville's liabilities, and injunctive orders implemented broad releases protecting the settling insurers on "Policy Claims"—defined as "any and all claims . . . by any Person . . . based upon, arising out of or related to any or all of the Policies" at issue in the settlement.²³⁷

But another insurer, Chubb, was not a party to the settlements approved in the 1980s,²³⁸ and had not received notice then that its own claims would be (or at least could be) enjoined too. Chubb thus argued that it could not, as a matter of due process, be bound by the 1986 Orders' terms.²³⁹

For reasons unnecessary to discuss here, the Circuit agreed that Chubb had been denied due process. But it did not vacate the 1986 Orders in their entirety. It held simply that "[u]nder the unique circumstances of this case, there can be little doubt that the publication notice employed by the bankruptcy court in 1984 was insufficient to bind Chubb to the 2004 interpretation of the 1986 Orders."²⁴⁰

The *Manville-2010* court did not invoke Rule 60(b) in support of its decision, or even mention it. Nor did it expressly discuss whether orders could be invalidated only in part by reason of a denial of due process. But *Manville-2010* necessarily must be read as having concluded that after a denial of due process prejudicing only a single party (even if the order affects other parties, and affecting those other parties is unthinkable), the

²³⁷ *Id.* at 139.

²³⁸ *Id.* at 143.

²³⁹ *See id.* at 148.

²⁴⁰ *Id.* at 157; accord *id.* at 158 ("Chubb is therefore not bound by the terms of the 1986 Orders. Consequently, it may attack the Orders collaterally as jurisdictionally void. And, as we held in *Manville III*, that attack is meritorious.").

partial denial of enforcement of that order, insofar as it binds that party alone, is permissible.

To the same effect is the Circuit's decision in *Koepp*,²⁴¹ which, while a Summary Order not binding on the lower courts in the Second Circuit, further evidences the Circuit's thinking on whether orders can be less than fully enforced without wholly vacating them. *Koepp*, unlike *Manville-2010*, involved a free and clear order. As relevant here, the Circuit considered a party's claim to easements on land conveyed to a reorganized company (in a § 77 railroad reorganization under the now superseded Bankruptcy Act) under a reorganization plan with free and clear provisions not materially different than those in the Free and Clear order here. Notice had not been given to the easement owner's predecessor when the reorganization plan had been approved, and for that reason, the Circuit concluded that the District Court correctly ruled that the railroad reorganization consummation order (analogous to a confirmation order under present law) did not extinguish the easements. Once again, the Circuit did not invoke Rule 60(b), nor did it invalidate the consummation order. It simply declined to find the free and clear provisions enforceable against the adversely affected party.

New GM points out, in this connection, that Rule 60(b) provides that a court "may relieve a party ... from a final judgment, order or proceeding" for the reason, among others, that "the *judgment* is void,"²⁴² and does not speak of relieving parties from *provisions within* judgments or orders—*i.e.*, a partial invalidation. And New GM further points out that the Sale Order expressly provided that it was not severable, and that this was a material element of the understanding under which it acquired Old GM's assets,

²⁴¹ 593 Fed. Appx. 20.

²⁴² Fed. R. Civ. P. 60(b) and 60(b)(4).

and took on many, but not all, of Old GM's liabilities. For that reason, New GM argues that the Court can only void the Sale Order in its entirety (which obviously is not an option here) or enforce the sale order as written. In an ordinary situation—one not involving a denial of due process—the Court would agree with New GM; the Court well understands how 363 sale agreements and sale orders are carefully drafted, and how the buyers of assets contemplate taking on certain identified liabilities, but no more. But here failures of notice gave rise, in part,²⁴³ to denials of due process, and that distorts the balancing under which concerns of predictability and finality otherwise prevail.

In each of *Manville-2010*, *Koepp*, *Metzger*, *Polycel-District*, *Polycell-Bankruptcy*, *Compak*, and the two *Grumman Olson Opinions*, after they found what they determined to be denials of due process, the courts granted what in substance was a partial denial of enforcement of the order in question—either by invocation of Rule 60(b) in some fashion (finding the order void only to a certain extent, or as to an identified party)²⁴⁴ or without mentioning Rule 60(b) at all.²⁴⁵ In *Polycel-Bankruptcy*, for instance, the Bankruptcy Court concluded, after its 60(b) analysis, “[t]o that extent, the Sale Order is void....”²⁴⁶ In *Manville-2010*, the Circuit found the earlier order unenforceable against Chubb without mention of Rule 60(b) at all. Though they reached their bottom lines by different

²⁴³ It will be remembered that the Plaintiffs were denied due process only with respect to the Sale Order's overbreadth. They were not prejudiced with respect to the Free and Clear Provisions, and cannot claim a denial of due process, or, of course a remedy, with respect to those.

²⁴⁴ See *Metzger*, 346 B.R. at 816; *Polycel-District*, 2007 WL 77336, at *9, 2007 U.S. Dist. LEXIS 955, at *28; *Polycel-Bankruptcy*, 2006 WL 4452982, at *1, 6-8, 11, 2006 Bankr. LEXIS 4545, at *1-2, 17-26, 31-34; *Compak*, 415 B.R. at 341.

²⁴⁵ See *Manville-2010*, 600 F.3d at 153-54; *Koepp*, 593 Fed. Appx. at 23; *Grumman Olson-Bankruptcy*, 445 B.R. at 245, 254-55 (considering ability of purchaser's successor after a 363 sale to enforce sale order against one injured after the sale, without reference to Rule 60(b)); *Grumman Olson-District*, 467 B.R. at 696, 699-700 (affirming *Grumman Olson-Bankruptcy*, and likewise not relying on Rule 60(b)).

²⁴⁶ 2006 WL 4452982, at *12, 2006 Bankr. LEXIS 4545, at *34 (emphasis added).

paths, the takeaway from those cases—especially in the aggregate—is effectively as stated by the Bankruptcy Court in *Metzger*—that “[t]he Court has some flexibility in creating a remedy here and need not . . . find the entire sale void on these facts,” and that the sale order was “to that limited extent void.”²⁴⁷

For that reason, 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. And if a court considers it unnecessary even to rely on Rule 60(b) at all (as in *Manville-2010* and *Koepp*), it can selectively decline enforceability as the Circuit did in those cases.

5. Remedies Conclusion

For these reasons, the Court concludes that—as in *Manville-2010*, *Koepp*, and the lower court cases—it can excuse the Economic Loss Plaintiffs²⁴⁸ from compliance with elements of the Sale Order without voiding the Sale Order in its entirety. And the Court further concludes that on the narrow facts here—where the reason for relief is of constitutional dimension—the nonseverability provisions of the Sale Order do not bar such relief.

²⁴⁷ 346 B.R. at 819.

²⁴⁸ It will be recalled that this applies only to the overbreadth objection, and thus does not benefit the Pre-Closing Accident Plaintiffs. For lack of prejudice—and any showing that either group of Plaintiffs would have successfully made any successor liability arguments that others did not make—the Free and Clear Provisions stand.

B.Claims

The remedy with respect to the denial of notice sufficient to enable the filing of claims before the Bar Date is obvious. That is leave to file late claims. And the Court may grant leave from the deadline imposed by the Court's Bar Date Order, just as the Circuit relieved Chubb and the easements owner from enforcement of the earlier orders in *Manville-2010* and *Koepp*.

There is of course a separate issue as to whether the Plaintiffs should have the ability to tap GUC Trust assets that are being held for other creditors and claimants, even if later claims were allowed. But that separate issue is discussed in Section IV below.

III.Assumed Liabilities

Although once regarded as important enough to be a threshold issue, determination of what liabilities New GM agreed to assume (and conversely declined to assume) is now of very little importance. The Plaintiffs have not disputed what the Sale Agreement and Sale Order say.²⁴⁹ Earlier potential disputes over what they say have now been overtaken by the issues as to whether any Sale Order protections are unenforceable.

New GM is right that it expressly declined to assume any liabilities based on Old GM's wrongful conduct. But the Court's ruling that it will continue to enforce

²⁴⁹

The GUC Trust, however, raises an issue of that character, contending, somewhat surprisingly, that New GM voluntarily assumed economic loss claims—taking on liability (beyond for death and personal injury) for “other injury to Persons” with respect to “incidents first occurring on or after the Closing Date” GUC Trust Br. at 40, citing Sale Agreement § 2.3(a)(ix). But the GUC Trust misunderstands the Sale Agreement. The language to which the GUC Trust referred did not relate to economic loss claims, but rather to death, personal injury, or property damage caused by “accidents or incidents” occurring after the Closing Date—which included, in addition to accidents, things that were similar, such as fires, explosions or a car running off the road. *See GM-Deutsch* and *GM-Phaneuf*, n.33 *supra*.

prohibitions against successor liability makes New GM's concerns as to that academic. And to the extent, if any, that New GM might be liable on claims based solely on any wrongful conduct on its own part (and in no way relying on wrongful by Old GM), New GM would be liable not because it had assumed any Old GM liabilities (or was responsible for anything that Old GM might have done wrong), but only because New GM had engaged in independently wrongful, and otherwise actionable, conduct on its own.

Under the circumstances, the Court need not say any more about what liabilities New GM assumed.

IV. Equitable Mootness

Understandably concerned that the successor liability claims that the Economic Loss and Pre-Closing Accident Plaintiffs seek to saddle New GM with are still prepetition claims—and that the Court could reason that to the extent those claims have merit and New GM is not liable for them, *somebody* is likely to be—the GUC Trust and its Participating Unitholders argue that tapping the recoveries of GUC Trust Unitholders would be barred by the doctrine of Equitable Mootness. Though the Court's original instinct was to the contrary (and it once thought that at least partial relief might be available), the Court has been persuaded that they are right.

A. Underlying Principles

The parties do not dispute the underlying principles, nor that three holdings of the Second Circuit largely determine the mootness issues here—the Circuit's two 1993 *Chateaugay* decisions, involving appeals by the Creditors' Committee of LTV

Aerospace²⁵⁰ and creditor Frito-Lay²⁵¹ in the *LTV* chapter 11 cases, and the Circuit's 2014 *BGI* decision, involving an appeal by creditors seeking to file untimely class proofs of claim against debtor Borders Books in the *BGI* chapter 11 cases.²⁵²

The mootness cases start with the proposition that while the Constitution requires the dismissal of cases as moot whenever effective relief cannot be fashioned, the related, prudential, doctrine of equitable mootness requires dismissal where relief *can* be fashioned, but implementation of such relief would be inequitable.²⁵³ The doctrine of equitable mootness reflects the “pragmatic principle” that “with the passage of time after a judgment in equity and implementation of that judgment, effective relief . . . becomes impractical, imprudent, and therefore inequitable.”²⁵⁴ This principle is “especially pertinent” in proceedings in bankruptcy cases, “where the ability to achieve finality is essential to the fashioning of effective remedies.”²⁵⁵

In *BGI*, the Circuit explained that:

Equitable mootness is a prudential doctrine under which a district court [and by extension, any appellate court] may in its discretion dismiss a bankruptcy appeal “when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable.” The doctrine “requires the district court to carefully

²⁵⁰ See *Chateaugay I*, n.16 *supra*.

²⁵¹ See *Chateaugay II*, n.16 *supra*.

²⁵² See *BGI*, n.16 *supra*.

²⁵³ See *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992); *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 143 (2d Cir. 2005).

²⁵⁴ *Id.* at 144 (quotations and citations omitted); see also *Alsohaibi v. Arcapita Bank B.S.C.(c) (In re Arcapita Bank B.S.C.(c))*, 2014 U.S. Dist. LEXIS 1053, at *14-15, 2014 WL 46552, at *5, (S.D.N.Y. Jan. 6, 2014) (Scheindlin, J.) (“*Arcapita Bank*”).

²⁵⁵ *Chateaugay I*, 988 F.2d at 325; see also *Compania Internacional Financiera S.A. (In re Calpine Corp.)*, 390 B.R. 508, 517 (S.D.N.Y. 2008) (Marrero, J.) (“*Calpine-District*”), *aff’d by summary order*, 354 Fed. Appx. 479 (2d Cir. 2009) (“*Calpine-Circuit*”).

balance the importance of finality in bankruptcy proceedings against the appellant's right to review and relief.”²⁵⁶

And the Circuit there made clear that the doctrine of equitable mootness applies to chapter 11 liquidations as well as reorganizations.²⁵⁷

But while mootness doctrine has been applied most frequently in bankruptcy appeals, it has broader application, including other instances likewise presenting situations where a court has to balance the importance of finality against a party's desire for relief. “[T]he doctrine is not limited to appeals from confirmation orders, and has been applied in a variety of contexts, including . . . injunctive relief, leave to file untimely proofs of claim, class certification, property rights, asset sales, and payment of prepetition wages.”²⁵⁸

In *Chateaugay II*, the Circuit held that substantial consummation of a reorganization plan is a “momentous event,” but it does not necessarily make it impossible or inequitable for an appellate court to grant effective relief in all cases.²⁵⁹ The Circuit synthesized earlier law to say that substantial consummation will not moot an appeal if all of the following circumstances exist:

(a) the court can still order some effective relief;

²⁵⁶ 772 F.3d at 107 (quoting *In re Charter Commc'ns, Inc.*, 691 F.3d 476, 481 (2d Cir. 2012) (“*Charter Communications*”)) (internal quotation marks omitted).

²⁵⁷ 772 F.3d at 109. See also *Schaefer v. Superior Offshore Int'l, Inc. (In re Superior Offshore Int'l, Inc.)*, 591 F.3d 350, 353–54 (5th Cir. 2009) (applying equitable mootness analysis to liquidation plan).

²⁵⁸ *Arcapita Bank*, 2014 Bankr. LEXIS 1053, at *19, 2014 WL 46552, at *5. See also *BGI*, 772 F.3d at 109 (stating that earlier cases “suggest that the doctrine of equitable mootness has already been accorded broad reach, without apparent ill effect,” and citing *Arcapita Bank* approvingly for the latter's statement that the “doctrine of equitable mootness ‘has been applied in a variety of contexts’”).

²⁵⁹ See 10 F.3d at 952.

(b) such relief will not affect “the re-emergence of the debtor as a revitalized corporate entity”;

(c) such relief will not unravel intricate transactions so as to “knock the props out from under the authorization for every transaction that has taken place” and “create an unmanageable, uncontrollable situation for the Bankruptcy Court”;

(d) the “parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings,” and

(e) the appellant “pursue[d] with diligence all available remedies to obtain a stay of execution of the objectionable order . . . if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.”²⁶⁰

Those five factors are typically referred to as the *Chateaugay* factors. “Only if all five *Chateaugay* factors are met, and if the appellant prevails on the merits of its legal claims, will relief be granted.”²⁶¹

B.

Applying Those Principles Here

Here, the parties have stipulated, and the Court has previously found, that the Plan has been substantially consummated.²⁶² That, coupled with the requirement that all of the *Chateaugay* factors must be shown to avoid mootness, effectively gives rise to a presumption of mootness. The Court can find that some of the *Chateaugay* factors necessary to trump that presumption have been satisfied. But the Court cannot find that they all have been.

²⁶⁰ *Id.* at 952-53.

²⁶¹ *Charter Communications*, 691 F.3d at 482; *accord BGI*, 772 F.3d at 110.

²⁶² Equitable Mootness Stipulated Facts ¶ 18. This Court found likewise in an earlier proceeding in Old GM’s chapter 11 case, *Morgenstein*, 462 B.R. at 501 n.36 (“[T]he Plan already has been substantially consummated”). Neither New GM nor the Plaintiffs here were parties to *Morgenstein*, and they thus are not bound by *res judicata* or collateral estoppel as to that finding. But their stipulation to substantial consummation makes those doctrines academic.

1. Ability to Fashion Effective Relief

The first factor that must be established in order to overcome the presumption of equitable mootness is that the Court can fashion effective relief. Fashioning effective relief here would require two steps:

(1) allowing the Plaintiffs to file late claims, after the Bar Date;

and

(2) allowing the GUC Trust's limited assets to be tapped for satisfying those claims.

The first step would not be particularly difficult. But the second could not be achieved. There would be two problems foreclosing the Court's ability to fashion effective relief.

First, the initial step would be effective relief for the Plaintiffs only if the second step could likewise be achieved. And the initial step would be of value (and the second step could be achieved) only if there were assets in the GUC Trust not already allocated for other purposes (such as other creditors' not-yet-liquidated claims, or expenses of the GUC Trust), or if value reserved for others were taken away. It is undisputed that there are no such available assets, and taking away value previously reserved for those whose claims have not yet been either allowed nor disallowed would be inequitable wholly apart from unfairness to GUC Trust investors.²⁶³

²⁶³ Plaintiffs' counsel acknowledged as much. *See* Day 1 Arg. Tr. at 113:15-23 ("by the time of the recalls, by the time the plaintiffs got organized and began their litigation, by the time we were retained in this case, a substantial majority of the funds originally in the GUC Trust had been dispersed to GUC Trust beneficiaries and it would have been impossible or very close to impossible to put the ignition switch defect plaintiffs back in the same position they would have been in had they been given enough information to file a claim before the bar date.").

Old GM's plan of reorganization (which as noted was a liquidating plan), made no distributions on claims for as long as they were disputed—not even partial distributions with respect to any undisputed portions. That was not unusually harsh; it is “a regular feature of reorganization plans approved in this Court.”²⁶⁴ But to ameliorate the unfairness that would otherwise result, Old GM was required to, and did, establish reserves sufficient to satisfy the disputed claims.

Those reserves were a point of controversy at the time of confirmation; creditors whose claims then were disputed contended that the reserves had to be segregated.²⁶⁵ The Court overruled their objection to the extent they demanded *segregated* reserves, but agreed that reserves had to be established, and in the full amount of their disputed claims.²⁶⁶ Removing that protection now would be grossly unfair to holders of disputed claims, who would have understandably expected at least the more modest protection that they did receive.

Additionally, the terms of the Plan that provided for the reserves were binding contractual commitments. They could not be altered without revoking the entirety of the Plan and Confirmation Order.²⁶⁷ But revocation of the Confirmation Order would be impermissible under the Bankruptcy Code, which provides for such revocation only in

²⁶⁴ *Confirmation Decision*, 447 B.R. at 213 & n.34.

²⁶⁵ *See id.* at 216-17.

²⁶⁶ *See id.* at 217 (“While, as noted above, caselaw requires that reserves be established for holders of disputed claims, it does not impose any additional requirement that such reserves be *segregated* for each holder of a disputed claim.”); *id.* at n.50 (“[W]ithout creating reserves of some kind, I have some difficulty seeing how one could provide the statutorily required equal treatment when dealing with the need to make later distributions on disputed claims that ultimately turn out to be allowed, especially in cases, like this one, with a liquidating plan.”).

²⁶⁷ *See Morgenstein*, 462 B.R. at 504 (“A confirmed plan takes on the attributes of a contract . . . modification of a contract only in part, without revoking it in whole, raises grave risks of upsetting the expectations of those who provided the necessary assents.”) (quotations omitted).

limited circumstances that are not present here.²⁶⁸ For that reason or others, no party requests it.

2. *Effect on Re-emergence of Debtor as Revitalized Corporate Entity*

The second factor that needs to be satisfied is that granting relief would not affect the “reemergence of the debtor as a revitalized corporate entity.”

Old GM became the subject of a liquidation. It will not be revitalized. To the extent (which the Court believes is minimal) that any effect on New GM by reason of tapping the GUC Trust’s assets would be relevant, the Court can see no adverse effect on New GM.

This factor can be deemed to be either inapplicable or to have been satisfied.²⁶⁹ Either way, it is not an impediment to relief.

3. *Unraveling Intricate Transactions*

The third factor is that “such relief will not unravel intricate transactions so as to ‘knock the props out from under the authorization for every transaction that has taken place’ and ‘create an unmanageable, uncontrollable situation for the Bankruptcy Court.’”

The manageability problems would not necessarily be matters of great concern, but the Unitholders are right in their contention that granting relief here would “knock the props out” from the transactions under which they acquired their units.

²⁶⁸ See 11 U.S.C. § 1144.

²⁶⁹ See *Beeman v. BGI Creditors' Liquidating Trust (In re BGI, Inc.)*, 2013 U.S. Dist. LEXIS 77740, at *24-25 (S.D.N.Y. May 22, 2013) (Andrew Carter, J.) (“**BGI-District**”) (“All parties agree the second Chateaugay factor is inapplicable because the Debtor has liquidated its assets and will not re-emerge as a new corporate entity.”); cf. *BGI*, 772 F.3d at 110 n.15 (“All parties agreed that the second *Chateaugay* factor—whether such relief will “affect the re-emergence of the debtor as a revitalized corporate entity”—was inapplicable because Borders liquidated its assets and would not emerge as a new corporate entity.”).

Allowing a potential \$7 to \$10 billion in claims against the GUC Trust now would be extraordinarily unjust for the purchasers of GUC Trust units after confirmation. With the Bar Date having already come and gone, they would have made their purchases based on the claims mix at the time—a then-known universe of claims that, by reason of then-pending and future objections to disputed and unliquidated claims, *could only go down*. Of course, the extent to which the aggregate claims would go down was uncertain; that was the economic bet that buyers of GUC Trust units made. But they could not be expected to foresee that the amount of claims would actually go *up*. They also could not foresee that future distributions would be delayed while additional claims were filed and litigated. Allowing the aggregate claims against the GUC Trust now to go up (and by \$7 to \$10 billion, no less) would indeed “knock the props” out of their justifiable reliance on the claims mix that was in place when GUC Trust Units were acquired.

In *Morgenstein*, certain creditors sought, after the Bar Date and Effective Date, to file and recover on a class proof of claim in an estimated amount of \$180 million, “whose assertion . . . would [have been] barred under the Debtor’s reorganization plan . . . and confirmation order.”²⁷⁰ The Court denied the relief sought on other grounds. But it noted that even though the creditors were not seeking to recoup distributions that had already been made, permitting them to proceed even against the assets remaining in the GUC Trust raised “fairness concerns.”²⁷¹ And on the record then before it, the Court added that “mootness concerns may very well still exist.”²⁷² It continued that it suspected, but was not yet in a position to find, that:

²⁷⁰ *Morgenstein*, 462 B.R. at 496-97.

²⁷¹ *Id.* at 509.

²⁷² *Id.*

hundreds of thousands (or more) of shares and warrants, with a value of many millions (or more) of dollars, traded since the Plan became effective, having been bought and sold based on estimates of Plan recoveries *premised on the claims mix at the time the Plan was confirmed*.²⁷³

When the Court made those observations, it lacked the evidentiary record it has now. But the record now before the Court confirms the Court's earlier suspicions.

When a large number of transactions have taken place in the context of then-existing states of facts, changing the terrain upon which they foreseeably would have relied makes changing that terrain inequitable. Thus, understandably, the caselaw has evidenced a strong reluctance to modify that terrain.

BGI is particularly relevant, since there, as here, the issues before the court involved the allowance of late claims and contentions of inadequate notice. In *BGI*, the bankruptcy court, following confirmation of Borders' plan of liquidation, had denied the appellants leave to assert late priority claims, and refused to certify a class of creditors holding unused gift cards issued by the debtor Borders Books.²⁷⁴ The appellants argued that they had not received adequate notice of the bar date, and thus that the bankruptcy court had erred when it denied them that relief.

But the *BGI* liquidating trust had already distributed more than \$80 million, and there was an additional approximately \$61 million remaining for distribution.²⁷⁵ In holding that those appeals were equitably moot, Judge Carter in the District Court approvingly quoted Judge Glenn's finding in the Bankruptcy Court that allowing appellants to file late claims "would result in massive prejudice to the estate because the

²⁷³ *Id.* (emphasis added).

²⁷⁴ See *BGI*, n.16 *supra*, 772 F.3d at 106; *BGI-District*, 2013 U.S. Dist. LEXIS 77740, at *2.

²⁷⁵ *BGI-District*, 2013 U.S. Dist. LEXIS 77740, at *16.

distributions to general unsecured creditors who filed timely proofs of claim would be severely impacted.”²⁷⁶ The Circuit, in affirming Judge Carter’s District Court ruling, approved this finding.²⁷⁷ Other cases too, though not as closely on point as *BGI*, have held similarly.²⁷⁸

Finally, although most courts have held that Bankruptcy Courts have the discretion to allow the filing of class proofs of claim,²⁷⁹ and this Court, consistent with the authority in this district, has adhered to the majority view,²⁸⁰ courts recognize that “[t]he costs and delay associated with class actions are not compatible with liquidation cases where the need for expeditious administration of assets is paramount”—and that “[c]reditors who are not involved in the class litigation should not have to wait for payment of their distributive liquidated share while the class action grinds on.”²⁸¹ Thus Unitholders would be prejudiced even if Plaintiffs’ claims were ultimately disallowed.

The Court cannot find this third *Chateaugay* factor to have been satisfied.

²⁷⁶ *Id.* at *25-26.

²⁷⁷ *See BGI*, 772 F.3d at 110 n.15 (“Observing that the transactions in a liquidation proceeding may not be as complex as those in a reorganization proceeding, the court nonetheless predicted, *persuasively*, that allowing Appellants to file late claims and certifying a class of gift card holders would have ‘a disastrous effect’ on the remainder of the liquidated estate and the distributions under the Plan.”) (emphasis added).

²⁷⁸ *See Calpine-District*, 390 B.R. at 520 (finding that appellant had failed to satisfy the first *Chateaugay* factor based, in part, on the court’s view that “modifying the TEV in a consummated plan of reorganization that so many parties have relied upon in making at least some potentially irrevocable decisions would be inequitable.”); *In re Enron Corp.*, 326 B.R. 497, 504 (S.D.N.Y. 2005) (Marrero, J.) (holding that it would be “manifestly inequitable” to modify even a single provision of a substantially consummated plan “that so many parties have relied upon in making various, potentially irrevocable, decisions.”).

²⁷⁹ *See, e.g., Thomson McKinnon*, 133 B.R. at 40.

²⁸⁰ *See In re Motors Liquidation Co.*, 447 B.R. 150, 156-57 (Bankr. S.D.N.Y. 2011) (Gerber, J.) (“*GM-Apartheid*”).

²⁸¹ *Thomson McKinnon*, 133 B.R. at 41.

4. *Adversely Affected Parties*

The fourth *Chateaugay* factor requires a showing that the third parties affected by the relief sought have had notice of and an opportunity to participate in the proceedings.²⁸² It requires individual notice, and cannot be satisfied by an “assertion . . . that [affected parties] may have constructive or actual notice.”²⁸³ But here there has been no material resulting prejudice from the failure to provide the notice, and this slightly complicates the analysis.

Many who would be adversely affected by tapping GUC Trust assets did not get the requisite notice. They would include the current holders of Disputed Claims; the syndicate members in JPMorgan Chase’s Term Loan; the holders of Allowed Claims who have not yet received a distribution, and third-party Unitholders that have purchased or held GUC Trust Units based on the publicly disclosed amounts of potential GUC Trust Liabilities.

But the briefing by the GUC Trust and so-called “Participating Unitholders” (a subset of the larger Unitholder constituency), and the oral argument by one of the Participating Unitholders’ counsel, very effectively articulated the objections that all, or

²⁸² See *BGI*, 772 F.3d at 110 (“Here, we agree with the District Court that Appellants failed to satisfy at least the fourth . . . *Chateaugay* factor[]: i.e., ensuring adequate process for parties who would be adversely affected . . . As to the fourth factor, Appellants did not establish that the general unsecured creditors—who could be stripped of their entire recovery if the proposed class was certified”—received notice of their appeal to the District Court.”) (citations, internal quotation marks, and brackets deleted); *Arcapita Bank*, 2014 U.S. Dist. LEXIS 1053, at *21, 2014 WL 46552, at *7 (“Appellant does not contend that the numerous third parties who have participated in and relied on the transactions completed pursuant to the Plan have been notified. Accordingly, Appellant fails to satisfy the fourth *Chateaugay* factor.”); *O’Connor v. Pan Am Corp. (In re Pan Am Corp.)*, 2000 U.S. Dist. LEXIS 2562, at *15, 2000 WL 254010, at *4 (S.D.N.Y. Mar. 7, 2000) (Casey, J) (“*Pan Am*”) (the fact that the appellant “did not notify any of the holders of administrative claims of her intent to challenge the distribution order” weighed in favor of a finding of equitable mootness).

²⁸³ See *Calpine-District*, 390 B.R. at 522 (“An assertion by Appellants that purchasers of New Calpine Common Stock may have constructive or actual notice is not sufficient to satisfy their burden of establishing that such purchasers had notice of the Appeals and an opportunity to participate in the proceedings.”).

substantially all, of the absent parties would share. The Court doubts that any of those adversely affected parties could make the mootness arguments any better. Those who did not file their own briefs, or make the same oral argument, were not prejudiced.

Because the other mootness factors are so lopsided, the Court does not need to decide whether prejudice is a requirement here, as it is in the due process analysis discussed above. The Court assumes, in an excess of caution, that this factor is not an impediment to granting relief.

5. *Pursuit of Stay Remedies*

Finally, the Court agrees in part with the contention by the GUC Trust and the Participating Unitholders that the Plaintiffs have not “pursued with diligence all available remedies to obtain a stay of execution of the objectionable order,” and “the failure to do so creates a situation rendering it inequitable to reverse the orders”²⁸⁴—enough to find that this factor has not been satisfied.

Of course the Plaintiffs could not be expected to have sought a stay of the Confirmation Order when they were then unaware of Ignition Switch claims. Nor, for the same reason, could the Plaintiffs be faulted for not having filed claims with Old GM or the GUC Trust before the Ignition Switch Defect came to light. So the Court cannot find this factor to be satisfied based on any inaction before the Spring of 2014, at which time New GM issued the recall notices and alerted the Plaintiffs to the possibility that they might have legal rights of which they were previously unaware.

Rather, this factor has to be analyzed in different terms—focusing instead on the Plaintiffs’ failure to seek a stay of *additional* distributions to Old GM creditors and

²⁸⁴ GUC Trust Opening Br. at 31 (quoting *Affirmance Opinion* #2, 430 B.R. at 80, which in turn quoted *Chateaugay II*, 10 F.3d at 952-53).

Unitholders after it learned, on October 24, 2014, that the GUC Trust announced that it was planning on making another distribution. By this time, of course, the Ignition Switch Defect was well known (and most of the 140 class actions had already been filed), and the Court had identified, as an issue it wanted briefed, whether the Plaintiffs' claims were more properly asserted against Old GM. As the Court noted at oral argument, at that stage in the litigation process—when the Court considered it entirely possible that it would rule that it would be the GUC Trust that is responsible for the Plaintiffs' otherwise viable claims—the Court would have made the GUC Trust wait before making additional distributions “in a heartbeat.”²⁸⁵

Without dispute, the failure to block the November distribution did not result from a lack of diligence. It resulted, as the Plaintiffs candidly admitted, from tactical choice.²⁸⁶ Their reason for that tactical choice would be obvious to any litigator,²⁸⁷ but it was still a tactical choice.

And it is inappropriate to disregard that tactical choice in light of the Plaintiffs' decision to allow further distributions to be made. In November 2014, additional GUC Trust assets went out the door. And while tapping the assets distributed in November 2014 might have been as inequitable as tapping those that now remain, it makes the

²⁸⁵ See Day 1 Arg. Tr. at 111:7-15.

²⁸⁶ See Day 1 Arg. Tr. at 112:13-113:1 (“Now, I will also tell Your Honor . . . yes there was a strategic element to the decision that was taken on our side . . . Yes Your Honor, the decision was made not to pursue it.”) (transcription errors corrected; further explanation for reasons underlying the strategic element deleted).

²⁸⁷ Any litigators in the Plaintiffs' lawyers shoes would understandably prefer to proceed against a solvent entity (New GM) rather than one with much more limited assets (the GUC Trust)—especially since so much of the GUC Trust's assets had already been distributed. And doing anything to suggest that Old GM or the GUC Trust was the appropriate entity against whom to proceed could undercut their position that they should be allowed to proceed against New GM.

challenges of granting even some relief more difficult. Here too circumstances of this character have been regarded as significant in considering the fifth *Chateaugay* factor.²⁸⁸

BGI is relevant in this respect too. The court in *BGI-District*, later affirmed by the Circuit, held that the appellants “did not pursue their claims with all diligence,” noting that the “[a]ppellants’ counsel began reviewing the case in early December and was retained by the end of December,” but that the appellants “did not appear at the confirmation hearing or file any objections to the Plan,” and “did not seek reconsideration of or appeal the confirmation order or seek a stay of the Effective Date.”²⁸⁹ It concluded, and the Circuit agreed, that “[t]he fact that no stay of distributions was sought by Appellants until almost a year after they entered the bankruptcy litigation and the Plan was confirmed indicates the lack of diligence with which Appellants moved.”²⁹⁰

The circumstances here are similar. The Plaintiffs began filing their actions as early as February 2014. Yet the Plaintiffs have taken no steps to seek a stay from the Court preventing the GUC Trust from making further distributions, or, except by one letter, to put affected third parties on notice of an intention to assert claims over the GUC Trust Assets. They have been frank in explaining why: they prefer to pursue claims against New GM first, and resort to the GUC Trust only if necessary. But even though

²⁸⁸ See *Pan Am*, 2000 WL 254010, at *4, 2000 U.S. Dist. LEXIS 2562, at *15 (finding that appellant failed to satisfy the fifth *Chateaugay* factor where she “never sought a stay of execution of the distribution order” and “did not notify any of the holders of administrative claims of her intent to challenge the distribution order.”). See also *Affirmance Opinion #1*, 428 B.R. at 62, and n.30 (“Appellants’ deliberate failure to ‘pursue with diligence all available remedies to obtain a stay of execution of the objectionable order’ has indeed ‘created a situation rendering it inequitable to reverse the orders appealed from’; ‘the Second Circuit has made it clear that an appellant is obligated to protect its litigation position by seeking a stay’”).

²⁸⁹ 2013 U.S. Dist. LEXIS 77740, at *32-33.

²⁹⁰ *BGI-District*, 2013 U.S. Dist. LEXIS 77740, at *33; accord *BGI*, 772 F.3d at 110-11 (quoting *BGI-District*).

their tactical reasoning is understandable, the underlying fact remains; their failure to diligently pursue claims against the GUC Trust precludes them from doing so now.

* * *

Thus at least three of the five *Chateaugay* factors *cut against* overcoming the presumption in favor of mootness, when all must favor overcoming that presumption. And shifting from individual factors to the big picture, we can see the overriding problem. We here don't have a reorganized debtor continuing in business that would continue to make money and that, by denial of discharge, could absorb additional claims. We have a GUC Trust, funded by discrete bundles of assets—that had been reserved for identified claims under Old GM's reorganization plan—with no unallocated assets left for additional claims. Entities in the marketplace have bought units of the GUC Trust as an investment based upon the GUC Trust's ability to *reduce* the once huge universe of claims against New GM, in a context where the universe of claims could not increase. Allowing \$7 to \$10 billion (or even much lower amounts) of additional claims against the GUC Trust would wholly frustrate those investors' legitimate expectations, and, indeed, "knock the props" out from the trading in GUC Trust Units that was an important component of the plan.

Granting relief to the Plaintiffs here would simply replace hardship to the Plaintiffs with hardship to others.

V.

Fraud on the Court

After receipt of the various parties' briefs, it now appears that the standards for establishing fraud on the court (one of the bases for relief under Fed.R.Civ.P. 60(b))—though once regarded as important enough to be a Threshold Issue—are not as important

as they were originally perceived to be. That is so because fraud on the court issues bear on the time by which a motion for 60(b) relief can be brought—but (as discussed in Section II above), several courts, including the Second Circuit, when faced with denials of due process, have invalidated particular provisions in orders *without addressing* Rule 60(b), and because, even under Rule 60(b), an order entered without due process can be declared to be void, and without regard to the time limitations that are applicable to relief for fraud, among other things. But for the sake of completeness, the Court nevertheless decides them.

With exceptions not relevant here, Fed. R. Civ. P. 60, captioned “Relief from a Judgment or Order,” applies in bankruptcy cases under Fed.R.Bankr.P. 9024. Its subsection (b) provides, in relevant part:

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

...

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

... or

(6) any other reason that justifies relief.²⁹¹

²⁹¹ *Id.* (portions that are not even arguably applicable omitted).

Then, Rule 60's subsection (c), captioned "Timing and Effect of the Motion," provides, in relevant part:

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

And its subsection (d), captioned "Other Powers to Grant Relief," provides, in relevant part:

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

...

(3) set aside a judgment for fraud on the court.²⁹²

As explained by the Supreme Court in *Hazel-Atlas Glass*,²⁹³ an early decision considering Rule 60(b), the federal courts have had a long-standing aversion to altering or setting aside final judgments at times long after their entry²⁹⁴ "spring[ing] from the belief that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered."²⁹⁵ But there likewise has been a rule of equity to the effect that under certain circumstances—one of which is after-discovered fraud—relief could be granted against judgments regardless of the term of their entry.²⁹⁶ That equitable rule was fashioned "to fulfill a universally recognized need for correcting

²⁹² This last provision, now in a separate subsection (d), was once part of Rule 60(b). It has been described by the Circuit as a "savings clause." See *Hedges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1325 (2d Cir. 1995) ("*Hedges*").

²⁹³ *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) ("*Hazel-Atlas Glass*").

²⁹⁴ The original rule looked to "the term at which the judgments were finally entered." See *id.* at 244 (emphasis added). The one year time-limit under Rule 60(b) approximates that.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule.”²⁹⁷

As explained by the Second Circuit in its frequently cited 1985 decision in *Leber-Krebs*,²⁹⁸ *Hazel-Atlas* deliberately did not define the metes and bounds of this “fraud on the court” doctrine, but it did make clear that it has always been “characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations.”²⁹⁹

“Out of deference to the deep rooted policy in favor of the repose of judgments entered during past terms, courts of equity have been cautious in exercising their power over such judgments. But where the occasion has demanded, where enforcement of the judgment is ‘manifestly unconscionable’, they have wielded the power without hesitation.”³⁰⁰

It is in that context—where the injustices are “sufficiently gross,” and where enforcement of the judgment would be “manifestly unconscionable”—that federal courts may consider requests to modify long-standing judgments for fraud on the court.

I. Effect on Process of Adjudication

Consistent with that, the Second Circuit has repeatedly stated that a “fraud on the court” under Fed. R. Civ. P. 60(d)(3) embraces:

only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery

²⁹⁷ *Id.*

²⁹⁸ *Leber-Krebs, Inc. v. Capitol Records*, 779 F.2d 895 (2d Cir.1985) (“*Leber-Krebs*”).

²⁹⁹ *Id.* at 899.

³⁰⁰ *Hazel-Atlas Glass*, 322 U.S. at 244-45 (quoting *Pickford v. Talbott*, 225 U.S. 651, 657 (1912)).

cannot perform in the usual manner its impartial
task of adjudging cases³⁰¹

In *Hadges* (one the several Second Circuit decisions making the distinction between fraud of a more generalized nature and defrauding the Court), the Circuit explained that fraud is a basis for relief under both Rule 60(b)(3) and Rule 60's savings clause.³⁰² But "the type of fraud necessary to sustain an independent action attacking the finality of a judgment is narrower in scope than that which is sufficient for relief by timely motion."³⁰³

In its repeatedly cited 1972 decision in *Kupferman*, the Circuit, speaking through Judge Friendly, emphasized the additional requirements for any showing of fraud on the court. "Obviously it cannot be read to embrace any conduct of an adverse party of which the court disapproves; to do so would render meaningless the one-year limitation on motions under F.R.Civ.P. 60(b)(3)."³⁰⁴ Rather, "[f]raud upon the court as distinguished from fraud on an adverse party is *limited to fraud which seriously affects the integrity of the normal process of adjudication*."³⁰⁵

Bankruptcy courts in this district, deciding particular cases under the Circuit's pronouncements, have permitted claims of fraud on the court to proceed in cases with a sufficiently egregious effect on the integrity of the litigation process, but have rejected

³⁰¹ *Kupferman v. Consol. Research and Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972) (***Kupferman***) (quotation marks omitted); accord *Hadges*, 48 F.3d at 1325 (quoting *Kupferman*); *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457, 460 (2d Cir. 1994) (***Transaero***) *on reh'g in part sub nom.* 38 F.3d 648 (2d Cir. 1994); *Gleason v. Jandrucko*, 860 F.2d 556, 558-59 (2d Cir. 1988) (***Gleason***); *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 702 (2d Cir. 1972). See also *Grubin v. Rattet (In re Food Mgmt. Grp., LLC)*, 380 B.R. 677, 714 (Bankr. S.D.N.Y. 2008) (Glenn, J.) (***Food Management Group***) (quoting *Kupferman*).

³⁰² *Hadges*, 48 F.3d at 1325.

³⁰³ *Id.* See also *Gleason*, 860 F.2d at 559; *Transaero*, 24 F.3d at 460.

³⁰⁴ *Kupferman*, 459 F.2d at 1078.

³⁰⁵ *Gleason*, 860 F.2d at 559 (internal quote marks deleted).

them in cases lacking such an effect. In his well known decision in *Clinton Street Foods*,³⁰⁶ Judge Bernstein found *Leber-Krebs* to be instructive,³⁰⁷ and denied a 12(b)(6) motion insofar as it sought to dismiss a trustee's claims of a fraud on the court.³⁰⁸ But that was in the context of a case involving bid-rigging in a bankruptcy court auction. There the complaint alleged that the defendants—the assets' purchaser and three potential competing bidders—lied when the bankruptcy court inquired about any bidding agreements. The defendants' lies contributed to the acceptance of the winning bid and the approval of the Sale Order; the trustee lacked the opportunity to discover the fraud in light of the summary nature of the sale proceeding and the relatively short time frame (only three weeks between the filing of the sale application and the auction); and the defendants benefited from the lie to the Court.³⁰⁹

In *Food Management*, Judge Glenn of this Court, analyzing *Clinton Street Foods* and *Leber-Krebs*, likewise denied a motion to dismiss a fraud on the court claim, where there was once again alleged manipulation of an auction, by reason of a failure to disclose the participation of insiders in an ostensible third party bid for estate assets.³¹⁰

³⁰⁶ *Gazes v. DelPrete*, (*In re Clinton Street Food Corp.*), 254 B.R. 523 (Bankr. S.D.N.Y. 2000) (Bernstein, C.J.) ("*Clinton Street Foods*").

³⁰⁷ *Id.* at 533. He synthesized the bases for the *Leber-Krebs* finding of fraud on the court based on an attachment garnishee's false denials of ownership of debtor property as based on (1) the defendant's misrepresentation to the court, (2) the denial of the motion to confirm the attachment based on the misrepresentation, (3) the lack of an opportunity to discover the misrepresentation and either bring it to the court's attention or bring a timely turnover proceeding against the garnishee, and (4) the benefit the defendant derived by inducing the erroneous decision. *Id.* After *Clinton Street Foods*, these factors, referred to as the *Leber-Krebs* factors, have repeatedly been applied in fraud on the court decisions.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 533.

³¹⁰ See 380 B.R. at 715.

But in *Ticketplanet*,³¹¹ four years earlier, Judge Gropper of this Court, also analyzing *Clinton Street Foods* and *Leber-Krebs*, found the allegations of fraud on the court to be insufficient. He explained that fraud on the court encompasses only that conduct that “seriously affects the integrity of the normal process of adjudication,” and it is available “only to prevent a grave miscarriage of justice.”³¹² There the trustee charged that the defendants’ actions (both before and after the chapter 11 filing) were taken to protect themselves and benefit a secured lender that thereafter obtained relief from the stay to foreclose on estate assets. The alleged wrongful actions included a failure to adequately disclose the competing interest of the debtor’s largest shareholder; the appointment of a straw-man at the helm of the debtor; a direction to the debtor’s counsel not to fight the lift stay motion; and efforts to engineer a dismissal of the initial chapter 11 case rather than a conversion once the lender had taken control of the debtor’s assets. But the basic facts with respect to a relation between the corporate principals, the debtor and its lender were known,³¹³ and the alleged nondisclosure “did not substantially impact the Court’s ruling at the Lift Stay hearing.”³¹⁴ Relief was not necessary “to prevent a grave miscarriage of justice.”³¹⁵

The takeaway from these cases is that relief can be granted only where there has been not just an impact on the *accuracy of outcome* of the Court’s adjudicative process,

³¹¹ *Tese-Milner v. TPAC, LLC (In re Ticketplanet.com)*, 313 B.R. 46, 64 (Bankr. S.D.N.Y. 2004) (Gropper, J.) (*Ticketplanet*).

³¹² *Id.*

³¹³ *Id.* at 65.

³¹⁴ *Id.*

³¹⁵ *Id.*

but also on the *integrity of the judicial process* itself, and then only where a denial of relief would be “manifestly unconscionable.”

2. *Victim of the Fraud*

Thus 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).³¹⁶

In *Hoti Enterprises*, Judge Seibel 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. She 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).³¹⁷ That rule also means that assuming, arguendo, Old GM had attempted to defraud car owners, that would not be enough. It would need to have defrauded *the Court*.

³¹⁶ See, e.g., *Gleason*, 860 F.2d at 559-60; *Hoti Enters., L.P. v. GECMC 2007 C-1 Burnett Street, LLC* (*In re Hoti Enters., L.P.*), 2012 U.S. Dist. LEXIS 182395, at *12-13, 2012 WL 6720378, at * 3-4 (S.D.N.Y. Dec. 27, 2012) (Seibel, J.).

³¹⁷ *Hoti Enters.*, 2012 U.S. Dist. LEXIS 182395, at *12-13, 2012 WL 6720378, at *3-4. Courts from other jurisdictions have reached the same conclusion. See *In re Tevis*, 2014 Bankr. LEXIS 406, at *12, 2014 WL 345207, at *4 (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*, 2011 Bankr. LEXIS 1779, at *21, 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) (Jacobvitz, J.); *In re Galanis*, 71 B.R. 953, 960 (Bankr. D. Conn. 1987) (Shiff, J.) (“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 . . .”).

3. *Particular Standards to Apply*

In each of *Ticketplanet* and *Food Management*, after discussion of *Leber-Krebs* and *Clinton Street Foods*, the courts listed matters to be considered in analyzing a fraud on the court claim for sufficiency, as extracted from *Leber-Krebs* and *Clinton Street Foods*. They were:

- (1) the defendant's misrepresentation to the court;
- (2) the impact on the motion as a consequence of that misrepresentation;
- (3) the 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 defendants derived by inducing the erroneous decision.³¹⁸

With the courts in *Clinton Street Foods*, *Ticketplanet*, and *Food Management* having looked to those factors to supplement the Supreme Court and Circuit holdings discussed above, this Court will too.

Together, the above cases thus suggest a methodology to apply in determining whether any fraud rises to the level of fraud on the court. First, as *Kupferman*, *Hadges* and the other Circuit cases make clear, the Court must ascertain whether the alleged fraud is of a type that defiles the court itself; is perpetrated by officers of the court; or seriously affects the *integrity* of the normal process of adjudication. Then the Court must analyze the alleged fraud in the context of the *Leber-Krebs* factors, as applied in *Clinton Street Foods*, *Ticketplanet*, and *Food Management*. The *Leber-Krebs* factors bring into the

³¹⁸ 313 B.R. at 64.

analysis, among other things, requirements of an interface with the court;³¹⁹ an injury to the court or the judicial system (as contrasted to an injury to one or more individuals);³²⁰ impact by the fraud on the workings of the judicial system; a nexus between the fraud and injury to the judicial system; and one or more benefits to the wrongful actor(s) by reason of the fraud on the court.

The takeaway from these cases is also that there can be no fraud on the court by accident. Those engaging in the fraud must be attempting to subvert the legal process in connection with whatever the court is deciding. There likewise cannot be a fraud on the court by imputation alone. There must be a direct nexus between the knowledge and intent of any wrongdoer and communications to the court. If the fraud has taken place elsewhere (and is unknown to those actually communicating with the court), the requisite attempt to defile the Court itself and subvert the legal process is difficult, if not impossible, to show.

VI.

Certification to Circuit

As the Court did with respect to one other (but much less than all) of its earlier decisions in Old GM's chapter 11 case,³²¹ the Court certifies its judgment here for direct review by the Second Circuit. Here too, in this Court's view, this is one of those rare occasions where the Circuit might wish to consider immediate review as an option.

³¹⁹ Thus, if the fraud is not linked to either a communication to the court, or a nondisclosure to the court under circumstances where there is a duty to speak with the matter that was not disclosed, that requirement is not satisfied.

³²⁰ See *SEC v. ESM Grp., Inc.*, 835 F.2d 270, 273 (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*, 486 U.S. 1055 (1988).

³²¹ See *GM-UCC-3 Opinion*, n.50 *supra*, 486 B.R. at 646-47.

In that connection, 28 U.S.C. § 158 grants a court of appeals jurisdiction to hear appeals from final judgments of the bankruptcy court under limited circumstances. First the bankruptcy court (acting on its own motion or on the request of a party to the judgment), or all the appellants and appellees acting jointly, must certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken....³²²

Then the Court of Appeals decides whether it wishes to hear the direct appeal.³²³

In this case, the Court considers each of the three bases for a certification to be present. With respect to the first prong, the decision here is one of law based on undisputed facts. There are no controlling decisions of the Second Circuit on the issues here beyond the most basic fundamentals. And this is a matter of considerable public importance. Additionally, though the \$7 to \$10 billion in controversy here may be regarded as personal to the Plaintiffs and New GM, the underlying legal issues are important as well, as are their potential effect, going forward, on due process in chapter 11 cases, and on 363 sales and the claims allowance process in particular.

³²² 28 U.S.C. § 158(d).

³²³ *Id.*; see also *In re General Motors Corp.*, 409 B.R. 24, 27 (Bankr. S.D.N.Y. 2009) (Gerber, J.) (“*GM-Sale Appeal Certification Decision*”) (“The Circuit does not have to take the appeal, however, and can decide whether or not to do so in the exercise of its discretion.”).

With respect to the second prong, available authorities, while helpful to a point, came nowhere close to addressing a factual situation of this nature. The issues were complicated by broad language in the caselaw, and conflicting decisions.³²⁴

With respect to the third prong, the Court believes that an immediate appeal from the judgment in this matter is likely to advance proceedings in both this case (if the Court is called upon to do anything further) and the MDL case. Plainly a second level of appeal (which would otherwise be almost certain, given the stakes and importance of the controversy) would have a foreseeable adverse effect on the ability of the MDL Court to proceed with the matters on its watch.

Conclusion

The Court's conclusions as to the Threshold Issues were set forth at the outset of this Decision, and need not be repeated here. Based on its conclusions as to the Threshold Issues as discussed above, the Court will not allow either the Economic Loss Plaintiffs (including the Used Car Purchasers subset of Economic Loss Plaintiffs) or the Pre-Closing Sale Plaintiffs to be exempted from the Sale Order's Free and Clear Provisions barring the assertion of claims for successor liability. The Economic Loss Plaintiffs (but not the Pre-Closing Sale Claimants) may, however, 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. The Plaintiffs may file late claims,

³²⁴

In one of its earlier decisions in the *GM* case, *see GM-Sale Appeal Certification Decision*, 409 B.R. at 27-29, the Court denied certification to the Circuit of the appeals from the Sale Order following the *Sale Opinion*, even though, as the subsequent history of the *Sale Opinion* indicates, *see n.2 supra*, one of them ultimately did go up to the Circuit. This Court denied certification there because while GM's well-being and that of its suppliers, as a business matter, had substantial public importance, the legal issues were not particularly debatable. Here they are plainly so.

and to the extent otherwise appropriate such late claims may hereafter be allowed—but the assets of the GUC Trust may not be tapped to satisfy them, nor will Old GM’s Plan be modified in this or any other respect.

The Court will not lengthen this decision further by specifically addressing any more of the contentions that were raised in the more than 300 pages of briefing on the Motion to Enforce and its sister motions. The Court has canvassed those contentions and satisfied itself that no material points other than those it has specifically addressed were raised and have merit.

The parties are to caucus among themselves to see if there is agreement that no further issues need be determined at the Bankruptcy Court level. If they agree (as the Court is inclined to believe) that there are none, they are to attempt to agree on the form of a judgment (without prejudice, of course, to their respective rights to appeal) consistent with the Court’s rulings here. If they cannot agree (after good faith efforts to try to agree), any party may settle a judgment (or, if deemed preferable, an order), with a time for response agreed upon in advance by the parties. After the Court has been presented with one or more proposed judgments or orders, the Court will enter a judgment or order in the form it regards as most appropriate, and a separate order providing the necessary certification for review under § 158(d).

Dated: New York, New York
April 15, 2015

s/Robert E. Gerber
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

DECISION ON IMPUTATION, PUNITIVE
DAMAGES, AND OTHER NO-STRIKE AND
NO-DISMISSAL PLEADINGS ISSUES

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ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE:

In this contested matter in the chapter 11 case of Debtor Motors Liquidation Company, previously known as General Motors Corporation (“**Old GM**”), the Court once again has to address litigation brought against General Motors LLC (“**New GM**”), the buyer of Old GM’s assets in a free-and-clear sale. After having entered a judgment, dated June 1, 2015 (the “**Judgment**”),¹ implementing its April 2015 decision² addressing the litigation flowing from New GM’s announcement of a defect (the “**Ignition Switch Defect**”) in ignition switches installed in certain GM branded cars, the Court now must determine the extent to which the April Decision and Judgment bar particular claims (and particular allegations) in complaints in other courts in which claims are asserted against New GM.

In particular—and acting in a “gatekeeper” function in which the Court does not decide nonbankruptcy issues involving the merits of plaintiffs’ claims³—the Court here must decide:

(1) the extent to which knowledge of New GM personnel who came over from Old GM may be imputed to New GM; whether the contents of documents generated by Old GM personnel and delivered to New GM under the 363 Sale may be deemed, for notice purposes, to be documents of which New GM may be

¹ ECF #13177.

² See *In re Motors Liquidation Co.*, 529 B.R. 510 (Bankr. S.D.N.Y. 2015) (“**April Decision**”). As relevant here, the April Decision was followed by two others—one addressing the form of the Judgment that would implement it, *In re Motors Liquidation Co.*, 531 B.R. 354 (Bankr. S.D.N.Y. 2015) (“**Form of Judgment Decision**”), and another addressing post-judgment motions by counsel for plaintiff Sharon Bledsoe and others for post-judgment relief. See *In re Motors Liquidation Co.*, 534 B.R. 538 (Bankr. S.D.N.Y. 2015) (“**Bledsoe Decision**”). Familiarity with each is assumed, and their defined terms are for the most part not repeated here.

³ See page 12 *infra*.

found to have notice as a matter of nonbankruptcy (agency or other) law; and related issues with respect to imputation, including, most significantly, where arguments for imputation should be decided (the “**Imputation Issue**”);

(2) the extent to which claims for punitive damages may be based on Old GM knowledge or conduct in actions in which the assertion against New GM of compensatory damages claims is permissible (the “**Punitive Damages Issue**”); and

(3) the extent to which (by reason of the first two issues or other matters) allegations in particular complaints run afoul of the April Decision and Judgment, and thus must be stricken before affected actions may proceed.

For reasons described below, the plaintiffs (and especially the States of California and Arizona) read the limitations of the Judgment too narrowly; while most of their claims can properly be asserted, a much smaller number of the factual allegations underpinning those claims can’t be, at least in the absence of material amendments to those complaints. Conversely, New GM reads the limitations of the Judgment too broadly, and the plaintiffs can assert considerably more in the way of claims and allegations than New GM contends—though the Court expresses no view on the extent to which claims and allegations that pass muster under the April Decision and Judgment are otherwise actionable under nonbankruptcy law.

For reasons set forth below, the Court rules:

(1) Under the April Decision and Judgment, knowledge of New GM personnel, whenever acquired, may be imputed to New GM. But knowledge of Old GM personnel may not be imputed to New GM except

on assumed Product Liabilities Claims or to the extent that it can be shown (*e.g.*, because it is the knowledge of the same employee or because it was communicated to a New GM employee) that New GM had such knowledge too. Likewise, to the extent, as a matter of nonbankruptcy law, that knowledge may be imputed as a consequence of documents in a company's files, documents in New GM's files may be utilized as a predicate for such knowledge, even if they first came into being before the sale from Old GM to New GM. By reason of the Court's limited "gatekeeper" role, allegations of that knowledge or notice, even if alleged in general terms, can pass through the "gate," with nonbankruptcy courts determining the extent to which they have been alleged sufficiently specifically to warrant findings of imputation.

(2) The Court cannot agree with the plaintiffs' contentions that the Sale Agreement unambiguously provides that New GM assumed punitive damages obligations. At best, it is ambiguous. And to the extent the Sale Agreement is ambiguous, the indicia of intent strongly come down against New GM's assumption of punitive damages obligations premised on anything other than its own knowledge and conduct. Thus New GM did not contractually assume liability for punitive damages based on Old GM knowledge or conduct. Nor is New GM liable for punitive damages based on Old GM conduct under other theories, such as by operation of law as a result of New GM's assumption of certain liabilities for compensatory damages. Consequently, under the April Decision and Judgment, punitive

damages may not be premised on Old GM knowledge or conduct, or anything else that took place at Old GM. Punitive damages may be sought against New GM to the extent—but only the extent—they are based on New GM knowledge and conduct alone.⁴

(3) Though more than a few of the allegations New GM attacks are benign, many other allegations push the envelope way too far—pleading claims based on New GM’s status as a “successor”; pleading paragraph after paragraph of Old GM acts as “background”; asserting that New GM was not “born without sin”; and making other allegations of similar character. Allegations of those types are discussed in the detailed discussion in Part III below.⁵ Also, the claims in the MDL and *Adams* Complaints seeking to hold New GM responsible for Old GM’s failure to give plaintiffs notice in the Old GM chapter 11 case cannot proceed under the April Decision and Injunction because they are in substance successor liability claims “dressed up to look like something else”, and for lack of the requisite duty under federal bankruptcy law. The prohibited claims and allegations must be stricken before the prosecution of the affected actions may continue.

The specifics of the Court’s determinations, and the bases for them, follow.

⁴ Of course, by reason of the Court’s conclusions as to imputation, claims resting on “New GM knowledge and conduct alone” can properly rest, with respect to claims arising after the 363 Sale, on *any* knowledge and conduct after the 363 Sale, including the very earliest days after the sale.

⁵ Obviously, it would be impractical for the Court to address the many hundreds of affected allegations paragraph by paragraph. It has dealt with them by category, making reference to examples of each.

Findings of Fact

Here the Court does not need to, nor does it, make Findings of Fact in the traditional sense. The Court is not called upon to decide any of the facts in the underlying litigation; for the most part, the facts relevant here are simply that various claims have been asserted, and allegations have been made. The truth of those allegations (many of which are likely to be disputed) is immaterial here; the issue is solely whether they are permissible. Whether claims and allegations can be made under the April Decision and Judgment (or the Sale Agreement and Sale Order preceding them) turns on what each of the Sale Agreement, the Sale Order, the April Decision and the Judgment said, and how (in any instances of ambiguity) each should be construed or, where applicable, clarified.

Nevertheless, discussion of some relevant background, and quotation of language in the Sale Agreement that is further addressed in the Discussion that follows, is helpful. The Court provides it here.

1. Background

For reasons more fully described in the April Decision and its two immediate successors,⁶ the Judgment generally prohibits claims against New GM based on Old GM's acts. But the Judgment permits claims to be asserted against New GM to the extent that claims (like Product Liabilities Claims) were contractually assumed under the Sale Agreement, or are “**Independent Claims**”—claims based solely on New GM's alleged wrongful conduct.

⁶ See n.2 *supra*.

As the Court thereafter noted in another decision⁷ (in which it ruled that it would not construe the Judgment to enjoin plaintiffs' efforts to seek withdrawal of the reference on the issues addressed in this Decision),⁸ that, perhaps inevitably, resulted in a situation in which disputes would arise as to which side of the divide particular allegations in complaints would fall. The Judgment included provisions to adjudicate disputes of that character. It provided for procedures ("**No Strike Pleading Procedures**") to gauge allegations in complaints pending in the MDL and elsewhere against the rules imposed under the April Decision and Judgment. Pursuant to the No Strike Pleading Procedures—with disputes to be heard, at least initially, in the bankruptcy court—litigation elsewhere could proceed to the extent, but only the extent, that claims (or allegations supporting claims) weren't violative of the principles set forth in the Decision and Judgment.⁹ This Court, in its gatekeeper role, would determine whether disputed allegations would get through the gate.

⁷ See *In re Motors Liquidation Co.*, 536 B.R. 54 (Bankr. S.D.N.Y. 2015) ("**Withdrawal of Reference Decision**").

⁸ After the Withdrawal of Reference Decision was issued, Judge Furman of the district court considered the plaintiffs' motions asking him to withdraw the reference, but thereafter denied them. See Order dated Aug. 17, 2015, docketed in each of 15-CV-4685 (JMF) (ECF #8), and 15-CV-5056 (JMF) (ECF #23).

⁹ To facilitate the Court's analysis, the parties submitted briefs on the Punitive Damages Issue and the Imputation Issue. With respect to those issues and miscellaneous ones, New GM also submitted marked copies of the Bellwether Complaints, the MDL Complaint, the State Complaints and the complaints in the *Elliott*, *Sesay* and *Bledsoe* actions (represented by the same counsel, Gary Peller, Esq., and referred to by New GM and thus the Court as the "**Peller Complaints**," and together with the others, the "**Marked Complaints**"), and parties commented on the objections to matters in the Marked Complaints by letter. New GM noted its objections by highlighting the pleadings as follows:

Bellwether Complaints (ECF #13456): "(1) pink, for allegations that wrongly assert New GM is the successor of Old GM; (2) orange, for allegations related to punitive damages, which were not assumed by New GM for Product Liability claims; (3) blue, for allegations seeking to impute wholesale Old GM's knowledge to New GM; (4) green, for allegations involving claims that are Old GM Retained Liabilities; and (5) yellow, for allegations based on New GM's

New GM charges plaintiffs with widespread violations of the principles set forth in the April Decision and Judgment. The plaintiffs disagree. The rulings here determine those issues.

2. *Facts Relevant to Imputation*

Because the April Decision and the Judgment permitted Economic Loss Plaintiffs to assert Independent Claims against New GM, “based solely on New GM’s own, independent, post-Closing acts or conduct”¹⁰ (and also Product Liabilities Claims, with respect to post-Sale accidents, where New GM action or inaction might also be involved), what New GM personnel knew and did after the Sale is of obvious importance.

Under applicable nonbankruptcy law, it’s at least arguable that the knowledge of particular New GM employees may be imputed to New GM, or that New GM may be

conduct relating to a supposed failure to warn after the vehicle sale.” (footnote omitted).

MDL Complaint (ECF #13469): “(1) blue, for named plaintiffs and plaintiff classes/subclasses asserting claims based on Old GM vehicles; (2) yellow, for allegations based on Old GM conduct that support claims for Retained Liabilities; (3) pink, for claims alleging that New GM committed fraud in connection with Old GM’s bankruptcy; and (4) orange, for claims alleging plaintiffs are entitled to contractual damages as third-party beneficiaries of the Sale Agreement.” (footnote omitted).

State Complaints (ECF #13470): “(1) yellow, for allegations based on Old GM conduct; and (2) blue, for allegations relating to vehicles manufactured by Old GM.” (footnote omitted).

Peller Complaints (ECF #13523): (1) blue, for allegations involving Old GM manufactured vehicles; (2) green, for claims premised on Old GM conduct; (3) yellow, for claims seeking “to automatically impute Old GM’s knowledge to New GM”; and (4) pink, seeking punitive damages from New GM with respect to Old GM manufactured vehicles.

¹⁰ Judgment ¶ 4.

deemed to be on notice of documents in its files. And as admitted by New GM,¹¹ a great number of Old GM's personnel went over to New GM after the 363 Sale, and many of Old GM's documents did likewise—providing a basis for potential imputation. But because New GM is protected under the April Decision and Judgment from claims based on Old GM conduct, the Court must rule on the extent to which those rulings affect the ability to impute to New GM the employees' knowledge carried over from Old GM, or that might result from records that came over from Old GM.

3. Facts Relevant to Punitive Damages

Under the Sale Agreement, New GM contractually assumed only certain liabilities (the “**Assumed Liabilities**”) from Old GM. Others (the “**Retained Liabilities**”) were not so assumed, and remained liabilities solely of Old GM. The Pre-Closing Accident Plaintiffs (whose claims for Product Liability are already Assumed Liabilities) contend that claims for punitive damages premised on Old GM knowledge or conduct are also among the Assumed Liabilities, and can be asserted along with the compensatory damages that Pre-Closing Accident Plaintiffs have an unquestioned right to seek.

Analysis of that contention requires consideration of what the Sale Agreement said. The section most to the point is Section 2.3, captioned “Assumed and Retained Liabilities.” It had two subsections. The first of them, Section 2.3's subsection (a), began:

¹¹ New GM recognizes that “[t]he 363 Sale contemplated that New GM would offer employment to substantially all of Old GM's employees, and the books and records of Old GM (except those concerning Excluded Assets) would be transferred to New GM.” (footnote omitted) New GM Opening Imputation Br. (ECF #13451) at 6.

The “Assumed Liabilities” shall consist only of the following Liabilities of Sellers.¹²

Section 2.3(a) then went on to list, in individually numbered sub-subparagraphs, 15 kinds of “Liabilities”—a term that likewise was a capitalized defined term, in this case as one of the many defined terms listed (and in many cases defined) in the Sale Agreement’s Section 1.1, captioned “Defined Terms.”¹³

The 9th of those 15 kinds of Liabilities was:

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”), 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 (for avoidance of doubt, Purchaser shall not assume, or become liable to pay, perform or discharge, any Liability arising or contended to arise by reason of exposure to materials utilized in the assembly or fabrication of motor vehicles manufactured by Sellers and delivered prior to the Closing Date, including

¹² Sale Agreement § 2.3(a) (underlining in original). Throughout the Sale Agreement, defined terms were capitalized, surrounded in quotes, and underlined when their definitions were first set forth—much the same way as the Court does, though the Court bolds defined terms so they can more easily be found.

¹³ The term “Liabilities” was defined in that Section 1.1 as follows:
“Liabilities” means any and all liabilities and obligations of every kind and description whatsoever, whether such liabilities or obligations are known or unknown, disclosed or undisclosed, matured or unmatured, accrued, fixed, absolute, contingent, determined or undeterminable, on or off-balance sheet or otherwise, or due or to become due, including Indebtedness and those arising under any Law, Claim, Order, Contract or otherwise.

asbestos, silicates or fluids, regardless of when such alleged exposure occurs). . . .¹⁴

The second of the two subsections of Section 2.3, Section 2.3(b), began, in its first sentence:

Each Seller acknowledges and agrees that pursuant to the terms of this Agreement, *Purchaser shall not assume*, or become liable to pay, perform or discharge, any Liability of any Seller, whether occurring or accruing before, at or after the Closing, *other than the Assumed Liabilities*.¹⁵

It then went on to say, in its second sentence:

¹⁴ Sale Agreement § 2.3(a)(ix). The language quoted is as the Sale Agreement was amended to provide under a First Amendment, dated as of June 30, 2009. Section 2.3(a)(ix) was materially modified by that First Amendment. Before its modification, it read:

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") which arise directly out of accidents, incidents or other distinct and discreet occurrences that happen on or after the Closing Date and arise from such motor vehicles' operation or performance (for avoidance of doubt, Purchaser shall not assume, or become liable to pay, perform or discharge, any Liability arising or contended to arise by reason of exposure to materials utilized in the assembly or fabrication of motor vehicles manufactured by Sellers and delivered prior to the Closing Date, including asbestos, silicates or fluids, regardless of when such alleged exposure occurs.

This too reflected a modification after the original 363 Sale motion was filed on June 1, 2009, the first day of Old GM's chapter 11 case. It originally provided:

all Liabilities (including Liabilities for negligence, strict liability, design defect, manufacturing defect, failure to warn or breach of the express or implied warranties of merchantability or fitness for a particular purpose) to third parties for death, personal injury, other injury to Persons or damage to property (collectively, "Product Liabilities") in each case, arising out of products delivered to a consumer, lessee or other purchaser of products at or after the Closing.

See Original Sale Motion Exh. A, ECF # 92-1. Note that as originally proposed on June 1, New GM assumed responsibility only for products that were *delivered* at or after the Closing, whereas in each of the June 30 and July 5 versions, New GM assumed responsibility for *accidents or incidents* after the Closing, irrespective of when the products were delivered.

¹⁵ Sale Agreement § 2.3(b) (emphasis added).

In furtherance and not in limitation of the foregoing, and in all cases with the exception of the Assumed Liabilities, *neither Purchaser nor any of its Affiliates shall assume*, or be deemed to have assumed, *any Indebtedness, Claim or other Liability of any Seller* or any predecessor, Subsidiary or Affiliates of any Seller *whatsoever*, whether occurring or accruing before, at or after the Closing, including the following (collectively, the “Retained Liabilities”).¹⁶

In Section 2.3(b) too, the introductory language was followed by a list. In this instance, it had 16 items, in individually numbered sub-subparagraphs. By reason of the first sentence of Section 2.3(b), all Old GM liabilities that were not Assumed Liabilities, including those not listed, were Retained Liabilities under the Sale Agreement. Among others, the Retained Liabilities listed in the Sale Agreement included “all Liabilities to third parties for Claims based upon Contract, tort or any other basis...”¹⁷

Interestingly, neither Section 2.3(a), relating to Assumed Liabilities, nor Section 2.3(b), relating to Retained Liabilities, uses the word “damages” or “Damages” at all. But “Damages” was a defined term in the Sale Agreement, included along with other defined terms in Section 1.1. Section 1.1 provided, in relevant part, “‘Damages’ means any and all Losses, *other than punitive damages*.”¹⁸ “Losses,” in turn, was defined in that same Section 1.1 as:

any and all Liabilities, losses, damages, fines, amounts paid in settlement, penalties, costs and expenses (including reasonable and documented

¹⁶ *Id.* (underlining in original; emphasis by italics added).

¹⁷ Sale Agreement § 2.3(b)(xi).

¹⁸ Sale Agreement § 1.1 (Underlining in original; emphasis by italics added).

attorneys', accountants', consultants', engineers' and experts' fees and expenses).¹⁹

The Bankruptcy Court's Role on These Motions

Preliminarily, since arguments made by plaintiffs and New GM tend to understate or overstate the Court's function, the Court needs to clarify its role on these motions, and what it sees as the division of labor between the bankruptcy court and the courts in which the underlying actions are pending.

Here this Court has been called upon to enforce the Sale Order, entered in 2009, and the April Decision and Judgment, issued in April of this year. Those matters, for reasons apparent from the Court's earlier decisions in *Elliott*²⁰ and *Sesay*,²¹ are paradigmatic examples of matters the Court should address itself. And especially when those needs and concerns overlap with issues requiring knowledge of bankruptcy law,²² those matters are this Court's responsibility. The Court believes that it should not leave for a nonbankruptcy court matters that require interpretation and enforcement of the Court's earlier Sale Order and Judgment (and the Sale Agreement, with which the Court has great familiarity), or call for a bankruptcy court's knowledge of bankruptcy law. But like concerns do not apply to matters of nonbankruptcy law.

¹⁹ *Id.* Additionally (though this isn't relevant to punitive damages or even what was included among "Assumed Liabilities," and the Court mentions it here only for the sake of completeness), the Sale Agreement also required New GM to comply with recall obligations imposed by federal and state law, even for cars or parts manufactured by Old GM. *See* Sale Agreement § 6.15(a) ("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 [Old GM].").

²⁰ *In re Motors Liquidation Co.*, 514 B.R. 377, at 379-83 (Bankr. S.D.N.Y. 2014) ("*Elliott Decision*").

²¹ *In re Motors Liquidation Co.*, 522 B.R. 13, 19-21 (Bankr. S.D.N.Y. 2014) ("*Sesay Decision*").

²² *See* n.82 *infra*.

The Court's role, then, is a "gatekeeper" role. It should be the court to decide what claims and allegations should get through the "gate," under the Sale Order, April Decision and Judgment. It also should be the court to decide matters of bankruptcy law—especially when bankruptcy law issues are important to deciding what claims can pass through the gate. But the Court will minimize its role beyond that, refraining from deciding issues that are better decided by the MDL court or other nonbankruptcy courts—courts that can (and undoubtedly will) determine whether claims and allegations that get through the gate are otherwise actionable as matters of nonbankruptcy law.

Discussion

The Court then turns to its rulings on the Imputation and Punitive Damages Issues, and, to the extent not otherwise covered, other aspects of the No-Strike and No-Dismissal Pleadings whose propriety is raised in the Marked Pleadings.

I.

The Imputation Issue

New GM recognizes that it must defend Product Liabilities Claims and Independent Claims on their merits, and that in actions involving each of those, the acts and knowledge of New GM personnel may be imputed to New GM. And New GM also recognizes that in the *Bledsoe* Decision, this Court previously expressed its thinking on imputation (discussed below), in analysis with which New GM doesn't quarrel—which would generally, if not always, permit the imputation of New GM employees' knowledge to New GM, and the use of documents in New GM's files.

But New GM makes a number of other points. New GM argues that there can be no “automatic” imputation,²³ and that any imputation can be found only in the context of individualized allegations, in individualized context.²⁴ New GM further argues that for imputation to be appropriate, the alleged knowledge to be transferred must relate to a “valid claim” against New GM,²⁵ and that the Court should determine what is or isn’t a valid claim incident to its gatekeeper function.

But while the Court agrees that imputation isn’t always warranted in the abstract, and that imputation should be found only in the context of individualized allegations and individualized context, the Court doesn’t believe that it is the only court that can properly do that. Disagreeing with New GM in this respect, the Court believes that it is sufficient that this Court state the principles under which imputation is permissible under the Sale Order, the April Decision and the Judgment (which the Court does now, to the extent it hasn’t done so before), and that there is nothing wrong with another court applying those principles to particular allegations, in individualized context.

Preliminarily, nobody appears to quarrel with the Court’s statements in its *Bledsoe* Decision when speaking of the Court’s intent when issuing the April Decision. In the *Bledsoe* Decision, the Court stated:

But what this Court had in mind when it previously ruled as it did should not be in doubt. This Court

²³ See, e.g. New GM Opening Imputation Br. at 1.

²⁴ New GM Imputation Reply Br. (ECF #13482) at 2.

²⁵ *Id.* at 6. “Valid claim,” as New GM there uses the expression, seems to refer not just to a claim permissible under the April Decision and Judgment, but also one that states a cause of action under nonbankruptcy law—e.g., meeting any nonbankruptcy law requirements, such as any requiring causation. (As examples, New GM points to allegations in the MDL Complaint that vehicle owners were injured by New GM fraudulent concealment after they had already purchased their cars (which may or may not meet causation requirements), and in States Actions alleging consumer fraud that New GM contends must relate to conduct at the point-of-sale and not thereafter. See New GM Imputation Reply Br. at 8-9).

assumed that things New GM did, or knowledge New GM personnel had when acting for New GM (even if those personnel acquired that knowledge while acting for Old GM) would be fair game.²⁶

The Court continued with two examples:

For example, if such were actionable under applicable nonbankruptcy law, New GM could still be held liable, consistent with this Court's ruling, for knowingly installing a part it knew to be defective even if the part had been made by Old GM—just as New GM might be liable for doing that if the part had been manufactured by another manufacturer in the Supplier Chain—and likewise could be held liable for refusing to make a repair that New GM knew had to be made, no matter when its personnel acquired the requisite knowledge.²⁷

And the Court further stated that

New GM would have to live with the knowledge its personnel had from the earliest days they began to serve New GM....²⁸

Those statements described the Court's views when it issued the April Decision and Judgment, and still do.

Perhaps recognizing that, New GM has made the other points described above.

The Court cannot agree with New GM's contention that imputation can never be automatic, because under the law of certain states, in certain factual situations, it may be. But New GM is right in its contentions that the propriety of imputation turns on the specifics of the situation. New GM is also right when it argues that imputation must ultimately be found in the context of the imputation of identified individuals or identified documents, for particular purposes. And most importantly, New GM is right when it says

²⁶ 534 B.R. at 543 n.16.

²⁷ *Id.*

²⁸ *Id.*

that it may not be saddled with imputation of Old GM knowledge to New GM by successorship alone²⁹ as a substitute for showing that a fact was actually known to a New GM employee or could be ascertained from New GM's files.

But in actions alleging Product Liabilities Claims and Independent Claims alike,³⁰ New GM's knowledge may be imputed to it starting with the first day of its existence. The Court's rulings permit allegations in pleadings starting with "New GM knew..." or "New GM was on notice that..." Plaintiffs asserting such claims may as a matter of this Court's gatekeeper role then complete the sentences as they see fit.

With those principles in mind, the Court then turns to whether it personally (or any successor bankruptcy judge) must be the one to apply the principles laid out earlier and here to particular allegations (or to deal with them as they might come up later in depositions or trial), on the one hand, or whether that appropriately may be done by the judges managing the plenary actions themselves, on the other. The latter is sufficient; there is no need for this Court to micromanage the process beyond what it has said previously and in this Decision.

Here the Court has laid out the determinative principles, and in Section III below, speaks of their general application to the most significant pleadings: the Bellwether

²⁹ Thus plaintiffs cannot precede allegations with statements like "As the successor to Old GM, New GM knew..." or do the same by indirection.

³⁰ On Product Liabilities Claims, the analysis is a little different, but the bottom line result is the same. New GM assumed liability for Product Liabilities claims, which (by definition) arose from accidents or incidents taking place *after* the Sale, and thereby became liable for compensatory damages for any Product Liabilities resulting from Old GM's action. And by the time any such accidents or incidents occurred, New GM already was in existence, and allegations that the post-Sale accident could have been avoided (or any resulting injury would have been reduced) if New GM had taken action based on any knowledge its employees had would also pass through the gate. Either way, it would not matter if that knowledge had first come into existence prior to the Sale—because it was still knowledge in fact of employees of New GM, *and* because New GM assumed responsibility for Product Liabilities Claims, which would make it liable for compensatory damages based on anything that even Old GM had done.

Actions Complaints, the MDL Complaint, the States Complaint, and the Peller Complaints. The nonbankruptcy courts hearing those claims and allegations will then be free to decide (and this Court assumes they will decide), the remaining issues—the extent to which plaintiffs must identify specific matters alleged to be known, by whom and by what means, and the legal ground rules necessary to establish imputation as a matter of nonbankruptcy law. Having here provided what other judges will need, the Court considers it unnecessary and inappropriate to say anything more.³¹

Undoubtedly, similar issues will arise hereafter, with respect to other complaints, depositions or trials. But especially since the Court agrees with New GM that imputation matters must be decided in context, there is little reason for this Court to try to rule on issues that haven't arisen yet, or to assume that any other judges might not abide by this Court's rulings.

II.

The Punitive Damages Issue

The Court then turns to the extent to which claims for punitive damages can rest on conduct by Old GM, or on vehicles manufactured by Old GM. As New GM describes the context in which the punitive damages issues arise,³² they come up where punitive damages are based in lawsuits:

³¹ For that reason, the Court does not need to go into the several cases cited by New GM in which judges shut the door to certain imputation arguments. See New GM Opening Imputation Br. at 12-14 (citing *Conmar Prods Corp. v. Universal Studio Fastener Co.*, 172 F.2d 150, 157 (2d Cir. 1949); *Chamberlain Group, Inc. v. Nassimi*, 2010 U.S. Dist. LEXIS 45624, 2010 WL 1875923 (W.D. Wash. May 10, 2010); *Interstate Power Co. v. Kansas City Power & Light Co.*, 909 F. Supp. 1241, 1272 (N.D. Iowa 1993); *Forest Labs., Inc. v. The Pillsbury Co.*, 452 F.2d 621, 626 (7th Cir. 1971); *Weisfelner v. Fund 1 (In re Lyondell Chem. Co.)*, 503 B.R. 348, 389 (Bankr. S.D.N.Y. 2014) (Gerber, J.). Context matters.

³² See New GM Punitives Opening Br. (ECF #13437) at 1.

(i) for personal injuries from accidents after the 363 Sale involving vehicles manufactured by *Old GM*;

(ii) for personal injuries from accidents after the 363 Sale involving vehicles manufactured by *New GM*;

(iii) involving non-Product Liabilities Claims (in both personal injury and economic loss complaints) involving vehicles manufactured by *Old GM* “and/or” *New GM*; and

(iv) “that purport” to assert Independent Claims that New GM argues “are, in reality,”³³ Retained Liabilities of Old GM.

But those four categories are only scenarios in which punitive damages issues *matter*; they don’t necessarily provide the framework for the analysis as to the extent to which punitive damages claims against New GM can rest on Old GM conduct, or otherwise be recoverable. With respect to the latter (and principally in the context of personal injury claims, which are at least largely Product Liabilities Claims), the Post-Closing Accident Plaintiffs argue that punitives can be recovered from New GM based on Old GM conduct by three “pathways”—assertedly because:

(i) claims for punitive damages were contractually assumed by New GM under the Sale Agreement, and thus that “all of Old GM’s conduct is fair game”,³⁴

(ii) even without contractual assumption of liability for punitive damages, punitive damages can be recovered based on Old GM

³³ *Id.* at 1, 3.

³⁴ *See* Arg. Tr. at 11, 18-19.

knowledge or conduct in instances where information about such Old GM conduct was “inherited” by New GM;³⁵ and

(iii) there could have been “information developed solely by New GM post-sale.”³⁶

For the reasons discussed below, reliance on the first pathway is unpersuasive. But the Court agrees as to each of the second and the third.

In light of the two sides’ different presentations of the issues, the Court turns first to the Post-Closing Accident Plaintiffs’ three “pathways.” It then discusses how that analysis affects the claims against New GM in the four contexts listed by New GM.

A. The Post-Closing Accident Plaintiffs’ Three Pathways

(1) Pathway #1: Assumption of Claims for Punitive Damages

The Post-Closing Accident Plaintiffs first argue that New GM contractually assumed claims for punitive damages. The Court finds that contention unpersuasive. It can’t agree with the Post-Closing Accident Plaintiffs’ contention that the Sale Agreement unambiguously so provides. And once it looks at the totality of the contractual language, and extrinsic evidence, and employs common sense, it must agree with New GM’s contention that New GM neither agreed to, nor did, contractually take on Old GM’s punitive damages liability.

³⁵ *Id.* at 19.

³⁶ *Id.* Their counsel then made some additional due process arguments for those in post-Sale accidents. *See id.* at 19-20. The Court does not follow the argument, and in particular, see the necessary prejudice. New GM assumed Product Liabilities Claims asserted by post-sale accident victims anyway. If the Post-Closing Accident Plaintiffs’ point is that they would be prejudiced by being allowed to rely, as a predicate for punitive damages, on knowledge and conduct by New GM only, that is not meaningful prejudice, since those with pre-Sale accidents, after full opportunity to be heard in 2009, could not bring actions against New GM at all.

The Post-Closing Accident Plaintiffs make two principal points with respect to their contention that Old GM's punitive damages liability was contractually assumed, and unambiguously so. They argue that New GM agreed, in Section 2.3(a)(ix), to assume "all 'Liabilities,'" and that under the Sale Agreement's broad definition of Liabilities, punitive damages were thereby contractually assumed. And as reinforcing that conclusion, they argue further that if New GM wanted punitive damages excluded, it easily could have said so, and New GM's failure to affirmatively exclude punitive damages from its Assumed Liabilities makes New GM liable for them. Neither argument is persuasive.

The starting point for this analysis, not surprisingly, is the language employed in the Sale Agreement—the language that the Post-Closing Accident Plaintiffs argue is unambiguously in their favor. All agree as to the importance of Sale Agreement Section 2.3(a)(ix)—the subsection defining the particular Assumed Liabilities that are at issue here—and Section 1.1, in which "Liabilities" is defined. But that is not the only relevant language. The Court also must focus on the lead-in language at the beginning of Section 2.3(a), and also, importantly, 2.3(b), to which the Post-Closing Accident Plaintiffs give much less attention. The former says that Assumed Liabilities "shall consist *only* of the following Liabilities of Sellers."³⁷ And even apart from Section 2.3(a)'s use of the word "only," Section 2.3(a) must be read in conjunction with the subsection that follows it, Section 2.3(b), which importantly says that:

Purchaser *shall not assume*, or become liable to pay,
perform or discharge, *any Liability of any Seller*,

³⁷ Sale Agreement § 2.3(a) (emphasis added).

whether occurring or accruing before, at or after the Closing, *other than the Assumed Liabilities*.³⁸

Thus, under this drafting structure, unless a liability was covered as an Assumed Liability under Section 2.3(b), New GM did *not* assume it. That effectively defeats one of the Post-Closing Accident Plaintiffs' two principal arguments—that punitive damages should be allowed because they easily could have been expressly stated in the Sale Agreement to be excluded. The Court has little doubt that such an exclusion could have been more expressly stated—perhaps easily, and perhaps “for the avoidance of doubt,” as lawyers increasingly say—but express mention of punitive damages was unnecessary to foreclose them, because under the structure of the Sale Agreement, Section 2.3(b) effectively established a default result, causing liabilities not to be assumed unless they were included as Assumed Liabilities in Section 2.3(a).

Then, turning back to Section 2.3(a), and its subsection 2.3(a)(ix), one must focus on what the latter says in its entirety. Taking the same language of Section 2.3(a)(ix), but reformatting it for ease of understanding and adding identifiers in the text for easy reference, it provides:

[1] (ix) all Liabilities

[2] to third parties

[3] for death, personal injury, or other injury to Persons or damage to property caused [a] by motor vehicles designed for operation on public roadways or [b] by the component parts of such motor vehicles

[4] and, in each case, manufactured, sold or delivered by Sellers (collectively, “Product Liabilities”),

³⁸ Sale Agreement § 2.3(b) (emphasis added).

[5] which arise directly out of death, personal injury or other injury to Persons or damage to property [a] caused by accidents or incidents first occurring on or after the Closing Date and [b] arising from such motor vehicles' operation or performance

[6] (for avoidance of doubt, Purchaser shall not assume, or become liable to pay, perform or discharge, any Liability arising or contended to arise by reason of exposure to materials utilized in the assembly or fabrication of motor vehicles manufactured by Sellers and delivered prior to the Closing Date, including asbestos, silicates or fluids, regardless of when such alleged exposure occurs)....

The Post-Closing Accident Plaintiffs rely on the words “All Liabilities,” in Clause [1], but without sufficient regard to the remainder. As with another controversy in this case,³⁹ in which the Court dealt with a very similar contention,⁴⁰ the Court must give due recognition to the fact that the phrase “all Liabilities” does not exist alone. And like the words “arising under” that were the subject of the similar analysis in the *Castillo* Decision, “it has no meaning of its own. Its coverage can be discerned only by examining the words that follow it.”⁴¹

Here, as in the *Castillo* Decision, the words “all Liabilities” in Section 2.3(a)(ix) do not exist in isolation. They have meaning only with respect to the words that follow them, and cover only the subset of “all Liabilities” there listed. They cover only those Liabilities that are covered under the words that follow them—those that satisfy each of

³⁹ *Castillo v. General Motors Co. (In re Motors Liquidation Co.)*, 2012 Bankr. LEXIS 1688, 2012 WL 1339496 (Bankr. S.D.N.Y. Apr. 17, 2012) (“*Castillo Decision*”), *aff’d* 500 B.R. 333 (S.D.N.Y. 2013) (Furman, J.), *aff’d by summary order*, 578 Fed. Appx. 43 (2d Cir. 2014).

⁴⁰ The *Castillo* Decision likewise involved a determination as to whether liabilities were Assumed Liabilities within the meaning of Section 2.3(a).

⁴¹ *Id.*, 2012 Bankr. LEXIS 1688 at *34, 2012 WL 1339496 at *10.

the requirements of Clauses [2], [3], [4] and [5].⁴² Of particular importance is the requirement of Clause [3]—that the Liabilities be for “death, personal injury, or other injury to Persons or damage to property....”⁴³ Claims for punitive damages, which are not to compensate for any of those injuries, but rather accomplish other societal goals, fail that test.

Thus the Court cannot conclude that punitive damages are for “death, personal injury, or other injury....,”⁴⁴ or, at least, conclude that they are unambiguously so. If one relies on plain meaning alone, punitive damages cannot be said to be covered within the meaning of Section 2.3(a)(ix).

But Section 2.3(a)(ix) doesn’t mention punitive damages in express terms. The Court does not believe this fact alone makes Section 2.3(a)(ix) ambiguous. But if one assumes, nevertheless, that Section 2.3(a)(ix) is ambiguous, the extrinsic evidence (well supported in the record of Old GM’s chapter 11 case and findings in this Court’s earlier opinions which the plaintiffs do not dispute) overwhelmingly weighs against New GM’s assumption of Old GM’s punitive damages obligations:

- New GM assumed liability for post-Sale Product Liabilities Claims as a response to concerns voiced by states’ Attorneys General (“AGs”) and

⁴² That makes it unnecessary to rely on still another matter—the illogic of relying on Section 1.1’s broad definition of Liabilities, which, if it were the only measure of what New GM assumed, would cover nearly anything. Definitions of “Liabilities” of the type appearing in Section 1.1 strike a responsive chord to all in the bankruptcy community—who are familiar with the need to deal with claims that often are only contingent, or not yet known, matured, or liquidated. Section 1.1’s definition of Liabilities is best read as evidencing an intent that liabilities of the type listed in Section 1.1 not be *excluded* from coverage because of deficiencies addressed in Section 1.1. In any event, that section cannot reasonably be read as meaning that New GM would assume any “Liabilit[y]” at all.

⁴³ Further, as New GM also observes, *see* New GM Punitives Opening Br. at 7, the words that follow “all Liabilities” narrow the term “Liabilities” to those caused by the motor vehicle itself, *see* Clause [3][a], as contrasted to liabilities arising from the overall conduct of the Seller.

⁴⁴ Section 2.3(a)(ix) Clause [3].

others as to the unfairness of depriving “presently unknown and unknowable future claimants of their rights to bring a future products liability claim.”⁴⁵ But they never asked this Court to require New GM to assume anything more than compensatory damages, and in none of those submissions was punitive damages mentioned.

- Because ridding itself of legacy liabilities was important to its future economic viability, New GM agreed to assume Old GM obligations only to the extent commercially necessary⁴⁶—which liabilities for compensatory damages were, but punitive damages were not.⁴⁷
- Since punitive damages punish past conduct (which, for Liabilities to be assumed, would by definition have been Old GM’s, not New GM’s), and deter future wrongdoing (which could not occur in the case of a liquidating Old GM), imposing punitives for Old GM conduct would not

⁴⁵ See ECF #1926 at 6 (limited objection filed by eight states’ AGs, complaining of language in the Sale Agreement as originally filed excluding from assumed liabilities “all Product Liabilities arising out of products delivered ... prior to the Closing.” *Id.* at 6); *id.* at 14 (“Newco’s purchase of substantially all of the operating assets of the Debtors should not include an impenetrable shield which insulates Newco from all future product liability claims. To the contrary, public policy dictates that *innocent and not yet injured consumers* cannot and should not be compelled to bear the cost of future injuries caused by defective GM vehicles.”) (emphasis added); ECF #2177 (limited objection filed by tort litigants and the Center for Auto Safety, among others, raising same concern) at 2 (“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”); ECF #2362 (objection filed by Creditors’ Committee) at 19-21 (likewise expressing concerns for those not yet injured).

⁴⁶ See *Castillo* Decision, 2012 Bankr. LEXIS 1688 at *13, 2012 WL 1339496 at *4-5 (holding, after discussion of four categories of evidence, that “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”); *Trusky v. General Motors Co. (In re Motors Liquidation Co.)*, 2013 Bankr. LEXIS 620 at *23, 2013 WL 620281 at *8 (Bankr. S.D.N.Y. Feb. 19, 2013) (the “**Trusky Decision**”) (“As I noted in *Castillo*, the intent of the parties was to pass on only those liabilities that were commercially necessary to the success of New GM.”).

⁴⁷ See n.45 above, discussing objections to the 363 Sale focusing on the unfairness to Product Liability plaintiffs whose injuries had not yet occurred.

be consistent with punitive damages’ purposes;⁴⁸ claims for punitive damages if asserted against Old GM would have been at least subordinated, if not disallowed, as they would only penalize innocent creditors (and, in either event, out of the money, given Old GM’s deep insolvency), thus making it implausible to suggest that New GM would ever have intended to assume them anyway.

- Creditors of Old GM, who would receive stock of New GM following the 363 Sale, would not want to receive stock of an entity subject to potentially massive assumed punitive damages exposure.
- In the only place in the Sale Agreement that punitive damages are mentioned, as part of the definition for “Damages” in Section 1.1, “Damages” are defined as “any and all Losses, *other than punitive damages*.”⁴⁹ And finally,
- The notion that anyone would choose to assume millions, if not billions, of dollars of punitive damages exposure—especially without mentioning it—is entirely implausible.

⁴⁸ See page 26-27 & nn.52-55 below.

⁴⁹ The Post-Closing Accident Plaintiffs point out that when that term “Damages”, as defined in Section 1.1, was later used in the Sale Agreement, it was used only in a different context. Nevertheless, the exclusion of punitive damages in Section 1.1’s broadly applicable definition of “Damages” supports New GM’s contention that the parties’ general intent was that New GM would never assume punitive damages relating to any Old GM liability, or relating to any Old GM conduct.

Thus, both by resort to normal textual analysis and extrinsic evidence, the Court comes to the same conclusion—that New GM did not contractually assume punitive damages claims.⁵⁰

And just as the Court concludes that liability for punitive damages was not contractually assumed by New GM, neither was such liability effectively assumed by New GM as a matter of law as a result of New GM’s assumption of certain liabilities for compensatory damages. The two types of damages claims are fundamentally distinct. As New GM properly observes,⁵¹ punitive damages serve a very different purpose than compensatory damages do,⁵² and are of a fundamentally different character.⁵³ “Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor ... and to deter him and others from similar extreme conduct.”⁵⁴ As the Supreme Court has explained:

Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by

⁵⁰ The context in which the three “Pathways” arguments were made was accident cases, rather than Economic Loss actions, in which most, if not all, of the Independent Claims have been asserted. With respect to the latter, the Court does not understand there to have been an assertion that New GM contractually assumed liability for punitive damages in connection with Economic Loss claims; if one had been made, the Court would reject it for the same reasons.

⁵¹ See New GM Punitives Opening Br. at 14-15.

⁵² See *Virgilio v. City of New York*, 407 F.3d 105, 116 (2d Cir. 2005) (“While compensatory damages recompense for one’s injuries, punitive damages under New York law serve an entirely different purpose. Punitive damages are invoked to punish egregious, reprehensible behavior.”); *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 359 (2d Cir. 2001) (“[T]he objectives of punitive damages by definition differ from the objectives of compensatory damages.”).

⁵³ *Molzof v. United States*, 502 U.S. 301, 307 (1992) (“As a general rule, the common law recognizes that damages intended to compensate the plaintiff are different in kind from ‘punitive damages.’”)

⁵⁴ *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67. See also *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 489, 868 N.E.2d 189, 196 (2007) (“Punitive damages are not to compensate the injured party but rather to punish the tortfeasor and to deter this wrongdoer and others similarly situated from indulging in the same conduct in the future.”).

reason of the defendant's wrongful conduct. The latter . . . operate as "private fines" intended to punish the defendant and to deter future wrongdoing.⁵⁵

(2) Pathway #2: Information "Inherited" by New GM

As to Pathway #2, however, Plaintiffs are on considerably stronger ground. For the reasons just discussed, New GM did not assume Product Liabilities Claims. Thus while New GM may be held liable for *compensatory* damages on Product Liabilities Claims based on Old GM conduct, New GM conduct or both, Post-Closing Accident Plaintiffs can base their claims for *punitives* only on New GM conduct or knowledge. Similarly, Independent Claims against New GM can't be based, for either compensatory or punitive damages purposes, on Old GM knowledge and conduct, because damages of any character on Independent Claims must be based solely on New GM's knowledge and conduct.

But on Product Liabilities Claims and Independent Claims alike, New GM may be held responsible, on claims for both compensatory and punitive damages, for its *own* knowledge and conduct. Under the Pathway #2 scenario, New GM might have acquired relevant knowledge when former Old GM employees came over to New GM or New GM took custody of what previously were Old GM records. Reliance on that, for punitive damages purposes, is permissible.

The Post-Closing Accident Plaintiffs refer to knowledge New GM might have acquired in that fashion as "inherited" information, and the Court finds that shorthand to be as good as any. It is possible that New GM may have inherited information from Old

⁵⁵ *Cooper Inds., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001) (citations omitted). See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.").

GM very soon after the 363 Sale. The Court does not know that to be the case—because any such knowledge would have to be acquired in fact, and not by operation of law (such as any kind of successorship theory). But to the extent New GM employees actually had knowledge relevant to post-Sale accident claims or Independent Claims (even if it was inherited), plaintiffs in actions asserting such claims are free to base punitive damages claims on evidence of such knowledge to the extent nonbankruptcy law permits.

(3) *Pathway #3: Information Obtained by
New GM after the Sale*

Information obtained by New GM after the Sale, argued by the Post-Closing Accident Plaintiffs to be usable under Pathway #3, may be used for punitive damages purposes as well. Here the analysis is very similar to that with respect to Pathway #2—the only differences being how and when New GM obtained any information.

The extent to which such after-acquired information is relevant to punitive damages claims is a matter of nonbankruptcy law, as to which the Court expresses no view. The Court rules simply that evidence of information obtained by New GM after the sale “gets through the gate,” and may be relied upon, for punitive damages purposes, to the extent otherwise appropriate in the underlying actions.⁵⁶

B. New GM's Four Contexts

Based on the Court's conclusions in the preceding analysis, it then lays out how those conclusions apply in the four contexts identified by New GM.

⁵⁶ As noted above, *see* n.50 *supra*, the context in which the three “Pathways” arguments were made was accident cases, rather than Economic Loss actions, in which most of the Independent Claims have been asserted. But to the extent Economic Loss plaintiffs (or, for that matter, State Cases Plaintiffs) wish to rely on Pathways #2 and #3, the Court sees no reason why a bankruptcy judge should treat them differently for gatekeeping purposes. For actions of each of those types, evidence introduced under Pathway #2 or #3 gets through the gate. Once again, it is up to the judges hearing those cases to decide the propriety of reliance on evidence admissible under Pathways #2 and #3 to punitive damages claims.

(1) *Personal Injuries in Post-sale Accidents
Involving Vehicles Manufactured by Old GM*

As discussed above, though Product Liabilities *compensatory damages* claims involving vehicles manufactured by Old GM were contractually assumed by New GM (and thus are permissible under the Sale Order, April Decision, and Judgment), *punitive damages* claims were not. Thus punitive damages in such actions may not be premised on anything Old GM knew or did.

Nevertheless, as also discussed above, punitive damages may still be sought in actions based on post-Sale accidents involving vehicles manufactured by Old GM to the extent the punitive damages claims are premised on New GM action or inaction after it was on notice of information “inherited” by New GM, or information developed by New GM post-Sale.

(2) *Personal Injuries in Post-Sale Accidents
Involving Vehicles Manufactured by New GM*

Personal injury compensatory damages claims against New GM involving vehicles manufactured by New GM never were foreclosed under the Sale Order, and remain permissible under the April Decision and Judgment. Claims of this character get past the bankruptcy court gate.

Claims against New GM for punitive damages with respect to vehicles manufactured by New GM were not a focus of the briefing and argument before the Court. Nevertheless, the Court recalls its understandings when it issued the April Decision and Judgment. Claims against New GM for punitive damages involving New GM manufactured vehicles likewise were never foreclosed under the Sale Order, and likewise remain permissible under the April Decision and Judgment. They too get past the bankruptcy court gate.

Though the distinction might not make much of a difference,⁵⁷ the underlying allegations, and evidence, used to support punitive damages claims involving New GM manufactured cars can be anything appropriate under nonbankruptcy law—including, if otherwise appropriate, not just information “inherited” by New GM or developed by New GM post-Sale, but also evidence of Old GM pre-Sale knowledge and conduct. That is so because the Sale Order never professed to affect claims against New GM with respect to New GM manufactured cars in any way.

(3) *Non-Product Liabilities Claims (in both personal injury and economic loss complaints) involving vehicles manufactured by Old GM “and/or” New GM*

This issue requires four separate answers, with respect to four separate scenarios—involving Non-Product Liabilities Claims in: (a) personal injury actions involving vehicles manufactured by (i) Old GM and (ii) New GM; and (b) Economic Loss and other actions (such as State Cases) involving vehicles manufactured by (i) Old GM and (ii) New GM. All four scenarios share the common characteristics that none of the claims in any of these scenarios were assumed—though for claims involving vehicles manufactured by New GM, the Court does not see why they would need to be. And for claims involving New GM manufactured cars, they would not need to be assumed whether the claims were for compensatory damages, on the one hand, or punitive damages on the other.

⁵⁷ That is so because the knowledge that New GM had at the time of any post-Sale events would have been bolstered by the knowledge of former Old GM employees who by this time would have come to New GM; by any documents provided by Old GM; and any information gathered by New GM after the Sale. The distinction would matter only with respect to allegations or evidence relating to events taking place in the Old GM era, as contrasted to New GM’s knowledge, after the 363 Sale, of those events.

Here the focus is on punitive damages claims. The consequences of the Court's rulings in the April Decision and this Section II with respect to punitive damages in each of these four Non-Product Liabilities scenarios follow.

(a)(i) Personal Injury Actions-Old GM Manufactured Vehicles

Because only Product Liabilities claims were assumed by New GM, other claims involving Old GM manufactured vehicles—including claims for compensatory damages on other causes of action and, as discussed above, for punitive damages—are Retained Liabilities. New GM is not responsible for them except to the extent that they are premised solely on its own conduct.

That means that with respect to post-Sale Non-Product Liabilities claims asserted in actions involving personal injuries suffered in vehicles manufactured by Old GM, punitive damages may be assessed to the extent, but only the extent, they are premised on *New GM* knowledge and conduct. That permits reference to inherited knowledge, as discussed beginning at page 27 above, and to knowledge acquired after the 363 Sale, as discussed beginning at page 28 above. But punitive damages sought as an adjunct to claims in this category may not rely on the conduct of Old GM—and this is true, as always, with respect to both allegations in pleadings and any evidence of such.

(a)(ii) Personal Injury Actions-New GM Manufactured Vehicles

For claims involving vehicles manufactured by *New GM*, plaintiffs do not need the Court's permission to assert claims for non-Product Liabilities compensatory damages claims any more than they need the Court's permission to assert claims for Product Liabilities; again, the Sale Order did not foreclose claims against New GM involving New GM manufactured vehicles, and compensatory damage claims (on whatever theory) with respect to New GM manufactured vehicles may proceed against

New GM without interference from the bankruptcy court. Nor, for reasons discussed at page 29 above, do plaintiffs need the Court's permission to assert punitive damages claims incident to non-Product Liabilities Claims involving New GM manufactured vehicles.

With respect to the *evidence used to support* punitive damages claims in actions involving New GM manufactured vehicles, the Court's analysis is similar. Evidence of inherited knowledge and knowledge acquired after the 363 Sale gets past the bankruptcy court gate; that is simply knowledge New GM had before the accident took place. And for reasons set forth on page 30, relevant evidence of Old GM knowledge and conduct gets past the bankruptcy court gate as well.

(b)(i) Economic Loss Actions-Old GM Manufactured Vehicles

As discussed in Section II(B)(3)(a)(i) above, because claims only for Product Liabilities were assumed, other claims involving Old GM manufactured vehicles are Retained Liabilities. New GM is not responsible for them except to the extent that they are premised solely on its own conduct, and hence may be regarded as Independent Claims.

And that is true for punitive damages claims just as it is for compensatory damages claims—and for both the assertion of claims for punitive damages and the evidence that might support them. Thus claims for punitive damages arising from Economic Loss actions involving Old GM manufactured vehicles cannot be asserted except for any that might be recoverable in connection with Independent Claims, and then based only on New GM knowledge and conduct. The same is true with respect to the evidence that might be offered to support those punitive damages claims.

New GM then says that it cannot be that for vehicles already manufactured and sold before New GM came into existence, any Independent Claims for Economic Loss can lie.⁵⁸ And New GM asks this Court to rule, here and now, that such claims cannot lie, and thus to declare that they cannot pass through the bankruptcy court gate.

The Court well understands New GM's point, but also understands, and ultimately agrees with, the Plaintiffs' contention that determining whether such claims can lie is matter of nonbankruptcy law, and not for this Court to decide. This Court thus agrees that it is better decided by the judge(s) hearing the nonbankruptcy claims that have passed through the bankruptcy court gate.

(b)(ii) Economic Loss Actions-New GM Manufactured Vehicles

Here, by contrast, Economic Loss Claims with respect to New GM manufactured vehicles—which by definition were manufactured after New GM came into being—were not proscribed by the Sale Order. Nor did the Sale Order proscribe punitive damages claims sought in actions against New GM for Economic Loss involving New GM vehicles.

The gatekeeping determination for punitive damages in Economic Loss actions involving New GM manufactured vehicles is analytically the same as that applicable to non-Product Liabilities Actions involving vehicles manufactured by New GM. Punitive damages claims may be asserted here too. The evidence used to support such punitive damages claims may include evidence of inherited knowledge; of knowledge acquired after the 363 Sale; and, if the nonbankruptcy court regards such as appropriate, any relevant Old GM knowledge and conduct as well. With respect to any punitive damages

⁵⁸ New GM Punitives Opening Br. at 23.

claims in Economic Loss actions involving New GM vehicles, everything passes through the bankruptcy court gate.

(4) *Assertedly Independent Claims that Are In Reality Retained Liabilities of Old GM*

New GM's fourth scenario, put forward in the context of discussion of punitive damages, applies in actuality to claims for punitive and compensatory damages alike. The focus here is on the punitive damages aspects, but the principles do not differ.

To the extent that any claims against New GM involving *Old GM* manufactured vehicles are for Product Liabilities Claims or genuinely Independent Claims, the rules discussed in Sections II(B)(3)(a)(i) and (b)(i), respectively, apply; punitive damages may be sought in connection with them, but the evidence supporting such claims can be based only on New GM knowledge and acts. That evidence can include inherited knowledge and knowledge acquired after the 363 Sale, but not any acts, or non-inherited knowledge, of Old GM. This issue does not arise in connection with claims against New GM involving vehicles New GM itself manufactured.

It should be self evident, as New GM argues, that plaintiffs cannot proceed with "purportedly Independent Claims" that really are "Retained Liabilities of Old GM." But the real issue is whether, in light of the rulings here, which reflect more detailed discussion of the Court's earlier rulings, claims are or are not independent, and supporting evidence is or is not admissible.⁵⁹

⁵⁹ See *Bledsoe* Decision, 534 B.R. at 543 ("To the extent the Bledsoe Plaintiffs' claims truly are Independent Claims, they already are carved out from the prohibitions in the Judgment. But the Bledsoe Plaintiffs' *assertions* that claims they wish to bring are in fact Independent Claims do not, without New GM's agreement or a ruling by this or a higher Court, make them so.") (emphasis in original).

To the extent forbidden claims and allegations have been brought to the Court's attention, the Court addresses them in Section III below. To the extent they haven't yet been brought to this Court's attention, but New GM wishes objections to such to be heard, they can be heard by the judges hearing the nonbankruptcy cases.

III.

Particular Allegations in Marked Pleadings

The Court then turns to the propriety of particular allegations in particular complaints, as objected to by New GM using marked pleadings to identify particular objections by category.

A. The Bellwether Actions Complaints

New GM identifies five categories of allegations in the Bellwether Marked Complaints, highlighted by color, that New GM contends are violative of the Sale Order, the April Decision, the Judgment, or some combination of them. Taking them by color and by New GM's stated objection to them, the Court rules as follows:

(1) Pink—"Allegations that wrongly assert New GM is the successor of Old GM"

In its Pink Category, New GM objects to allegations in many complaints stating in words or substance that they assert claims against New GM "as a successor and mere continuation of General Motors Corporation."⁶⁰ In some instances (by reason of less blatantly offensive language, or because the underlying context would be the assertion solely of assumed Product Liabilities Claims),⁶¹ New GM's objection would be a

⁶⁰ See, e.g., *Cockram* Cmplt. ¶ 4.

⁶¹ See, e.g., *Cockram* Cmplt. ¶ 28 ("New GM is and was the successor corporation to General Motors Corporation and/or General Motors Company.") That is improper (and if New GM cares, as it apparently does, an allegation like that does not get through the gate), but it could be fixed by alleging, in substance, that New GM "assumed product liability claims" of those companies.

technical one, and in the view of some, hyper-technical.⁶² But in other instances—such as the language in *Cockram* just quoted—the violation is egregious, and the plaintiffs’ counsel should have known better. New GM’s objections to allegations of this character (referring to New GM as “successor” and, especially, as a “mere continuation,” code words for imposing successor liability)—both the egregious violations (as in *Cockram*) and those that are more technical—must be, and are, sustained. Those allegations do not pass the gate, and the affected complaints remain stayed unless and until they are amended consistent with the Court’s rulings.

A variant of that—but equally offensive—is the apparently intentional use by many plaintiffs of allegations that do not distinguish between Old GM and New GM, and that continue to refer to “General Motors” or “GM,” which to almost anyone would muddy the distinction. In light of the Sale Order and all of the rulings that have followed it, the offending counsel, once again, should know better. The Court sustains New GM’s objections to that practice. Complaints using that formulation will remain stayed unless and until they are amended to cure violations of that character.⁶³

⁶² But even so, pleading references to New GM as successor cannot be justified by contentions that New GM is the “*de facto* ‘successor.’” (Pl. 9/28/2015 Ltr. (ECF # 13475) at 2). New GM cannot be faulted for its resistance to efforts by plaintiffs to circumvent what the Court thought were very clear rulings holding that plaintiffs could not play the successor card in any fashion.

⁶³ New GM also objects to yet another variant of that—allegations that New GM engaged in activities that plaintiffs’ counsel “well know” were performed by Old GM, since the allegations concern events that took place prior to New GM’s existence. As an example, New GM points to allegations in the *Barthelemy* complaint alleging that New GM “defectively designed, manufactured, ... distributed, and sold” a 2007 Saturn Sky, when only Old GM could have done so back in 2007, before New GM had come into existence. See New GM 9/21/15 Ltr. (ECF #13456) at 2. It is possible, as New GM recognizes, that this was unintentional, and that counsel meant that the 2007 Saturn Sky was designed by Old GM, but that New GM assumed liability for Product Liabilities resulting from the Saturn Sky’s manufacture or design. If so, the complaint should be amended to say so. Of course, if the allegations were intentional, that is much more serious, as making claims in that fashion would be an easy way to circumvent the Sale Order, April Decision, and Judgment. Either way, the *Barthelemy* action remains stayed until its complaint is fixed.

As noted in the April Decision, plaintiffs' complaints may say, without using code words as euphemisms for imposing successor liability, or muddying the distinctions between Old GM and New GM, that New GM purchased the assets of Old GM; that New GM assumed product liability claims from Old GM; and that New GM acquired specified knowledge from Old GM. But allegations of the types discussed above cross the line—and in some instances go way past the line—and cannot be made.

(2) *Orange—“Allegations related to punitive damages, which were not assumed by New GM”*

In its Orange Category, New GM objects to claims against it for punitive damages in connection with accidents involving Old GM manufactured vehicles. For reasons discussed above, the Court agrees with New GM in part, but only in part. The Court has ruled that claims for punitive damages with respect to Old GM manufactured vehicles—even where compensatory damages might legitimately be sought for Product Liabilities Claims—were not assumed. Thus, punitive damages in such cases cannot be based on pre-Sale Old GM conduct, or evidence of such.

But the Court has also ruled that New GM may still be liable for punitive damages based on knowledge it inherited from Old GM, and any knowledge it developed after the 363 Sale. Punitive damages may be sought in accident cases involving Old GM manufactured vehicles to the extent the factual allegations and evidence supporting the punitive damages claims are consistent with these rulings.

(3) *Blue—“[A]llegations seeking to impute wholesale Old GM's knowledge to New GM”*

In its Blue Category, New GM objects to imputation “on a wholesale basis” of knowledge of events that took place at Old GM, or information contained in Old GM's books and records. The Court has addressed these objections above as well. For reasons

discussed above, the Court agrees that imputation is context specific, but assumes that under the nonbankruptcy law that will be applied in the actions pending against New GM, the acts and knowledge of employees will often be imputed to the principal. The Court assumes that likewise to be true with respect to notice of documents within a company's files.

But the Court has further held that it considers these nonbankruptcy law issues inappropriate for its determination. It has ruled simply that allegations of imputation to New GM premised on the knowledge of New GM employees, or documents in New GM's files, get through the bankruptcy court gate. After that, issues as to the propriety of imputation in particular contexts in particular cases are up to the judges hearing those cases.

(4) *Green—“[A]llegations involving Claims that are Old GM Retained Liabilities”*

In its Green Category, New GM objects to claims against it “involving claims that are Old GM Retained Liabilities.”⁶⁴ This refers to particular kinds of claims not apparent from the generalized reference just quoted—claims involving vehicles manufactured by Old GM *other than Product Liabilities claims*, such as fraud, negligent representation, duty to warn after the vehicle's sale, and violation of consumer protection statutes at the time of sale.

New GM relies on the language of Section 2.3(a)(ix), quoted on page 21 above, defining Assumed Liabilities. New GM argues that claims with respect to Old GM manufactured vehicles other than Product Liabilities claims were not assumed, and that

⁶⁴ New GM 9/21/2015 Ltr at 2.

insofar as Old GM manufactured vehicles are concerned, New GM is liable for Product Liabilities only.

The correctness of that assertion turns on the definition of “Product Liabilities,” as defined in Section 2.3(a)(ix). Upon review of that section, the Court agrees with New GM in material part but not in full. As discussed above,⁶⁵ the language “all Liabilities” in Clause [1] of that subsection was applicable to particular kinds of liabilities, set forth in the clauses that followed it. Of relevance here is Clause [3], which limits New GM’s assumption of Old GM Liabilities to those “for death, personal injury, or other injury to Persons or damage to property caused by motor vehicles...” Claims based on fraud and consumer protection statutes are not for “death” or “personal injury,” and their nexus to any death or personal injury that might thereafter follow is too tangential; many might be victimized by fraud or consumer protection violations without subsequent death or injury. And claims for fraud and violations of consumer protection statutes might somewhat plausibly be argued to be for “other injury to Persons,” but they still would not be “caused by motor vehicles.” They would be caused by the statements or omissions under which the fraud and consumer protection claims arose. These claims cannot be regarded as Assumed Liabilities, and do not get through the gate.

It should be noted, however, that in listing claims that weren’t assumed, the Court did not list claims for alleged breaches of a duty to warn. If there were a duty, under nonbankruptcy law, to warn of the danger of driving a motor vehicle with a known defect, the violation of that duty to warn, when coupled with subsequent death or injury, might reasonably be argued to have had a causal effect on any death or personal injury

⁶⁵ See page 20 above.

that could have been avoided by the warning. Violations of any duty to warn could be said to provide further support for any claims for death or personal injury that would be actionable even as classic Product Liabilities Claims. The Court expresses no view as whether, as a matter of nonbankruptcy law, failures to warn are actionable, or whether the requisite duties exist. But they pass muster under Clause [3] and get through the bankruptcy court gate.

In addition, some allegations highlighted in green aren't subject to the above analysis⁶⁶ because they charge New GM with violations of alleged duties that they assert New GM had to purchasers of earlier purchased vehicles. New GM can argue before other courts that such duties do not exist (or assert any other merits-based defenses to these allegations), but claims of this character that are based on New GM's own conduct and knowledge also get through the bankruptcy court gate.

(5) *Yellow—“[A]llegations based on New GM's conduct relating to a supposed failure to warn after the vehicle sale”*

Finally, in its Yellow Category, New GM objects to allegations underlying a different kind of failure to warn claim—here, alleged failures to warn by *New GM* prior to any accidents, as contrasted to alleged failures by Old GM. Here the Court does not need to determine whether such claims were assumed, as they rest on conduct allegedly on the part of New GM itself. But New GM contends that once it purchased Old GM's assets free and clear of claims and obligations relating to Old GM vehicles, it did not have any ongoing duties to Old GM vehicle owners other than Assumed Liabilities.

⁶⁶ For example, paragraphs 359 through 363 of the *Barthelemy* complaint, which New GM highlighted in green, include allegations only with respect to New GM.

The Court doesn't know this to be true, and doesn't believe it to be properly within the Court's province to decide whether it is. The issue is one of nonbankruptcy law—whether New GM, as an entity that did not manufacture or sell the vehicle, had a duty, enforceable in damages to vehicle owners, to notify people who had previously purchased Old GM vehicles of the Ignition Switch Defect.⁶⁷ Consistent with its role as a gatekeeper, the Court does not decide this issue of nonbankruptcy law either, and does not block the claim based on predictions as to how another court might decide it. This Court leaves the issue to the court hearing the Bellwether actions.

B. The MDL Complaint

The Court then engages in a like analysis of claims alleged in MDL Complaint. That analysis, once more broken down by New GM's color coding, follows.

(1) Blue—“[N]amed plaintiffs and plaintiff classes/subclasses asserting claims based on Old GM vehicles”

In its Blue Category, New GM objects to claims in the MDL Complaint that it says are in fact successor liability claims, notwithstanding assertions to the contrary by plaintiffs asserting those claims. The claims in question, New GM asserts, were asserted in an earlier Economic Loss complaint on behalf of Old GM vehicle purchasers called the Pre-Sale Consolidated Complaint (now abandoned), and then carried over, assertedly with little or no modification, into the Second Amended Complaint that now is the MDL

⁶⁷ The two sides spar over whether New GM's admitted duty to comply with the Motor Vehicle Safety Act, which it agreed to honor under Sale Agreement § 6.15(a), gave rise to any duties to anyone other than the U.S. Government, and to consumers in particular. New GM notes, properly, that this covenant was not an Assumed Liability, and that vehicle owners were not third party beneficiaries of the Sale Agreement. *See* New GM 9/21/2015 Ltr. at 3 n.6. But plaintiffs nevertheless argue, though without any support in this Court, that they have a state law right of action for conduct of that character. Here too the Court leaves this issue to the judge or judges hearing the underlying claims.

Complaint.⁶⁸ New GM continues that the plaintiffs “improperly attempted to sidestep the Judgment by including the same proscribed claims of pre-363 Sale plaintiffs in the MDL Complaint.”⁶⁹

The plaintiffs don’t dispute that the claims in the Pre-Sale Consolidated Complaint effectively moved to the MDL Complaint, but argue that this Court should conclude that those allegations may nevertheless get through the gate as Independent Claims—premised on alleged New GM violations of duty after the vehicles were originally manufactured and sold by Old GM. The Court well understands New GM’s frustration, but New GM’s request that this Court strike all of the claims of those originally covered under the Pre-Sale Consolidated Complaint is overkill. The Court concludes instead that Economic Loss Claims of Ignition Switch Plaintiffs⁷⁰ that once

⁶⁸ See New GM 9/25/2015 Ltr. (ECF #13469) at 2.

⁶⁹ *Id.* at 2-3.

⁷⁰ Ignition Switch Plaintiffs asserting Economic Loss Claims may assert them, to the extent they are Independent Claims, under the April 15 Decision and Judgment. Non-Ignition Switch Plaintiffs cannot. The latter could have tried to show the Court that they had “known claims” and were denied due process back in 2009, but they have not done so. The Court ruled on this expressly in the Form of Judgment Decision. It then held:

The Non-Ignition Switch Plaintiffs' claims remain stayed, and properly so; those Plaintiffs have not shown yet, if they ever will, that they were known claimants at the time of the 363 Sale, and that there was any kind of a due process violation with respect to them. And unless and until they do so, the provisions of the Sale Order, including its injunctive provisions, remain in effect.

531 B.R. at 360. That ruling stands. In the April Decision and resulting Judgment, the Court modified a Sale Order under which the buyer had a justifiable right to rely because a higher priority—a denial of due process, which was of Constitutional dimension—necessitated that. But without a showing of a denial of due process—and the Non-Ignition Switch Plaintiffs have not shown that they were victims of a denial of due process—the critically important interests of finality (in each of the 2009 Sale Order and the 2015 Form of Judgment Decision and Judgment) and predictability must be respected, especially now, more than 6 years after entry of the Sale Order. See April Decision, 529 B.R. at 527 (“But New GM's next several points—that purchasers of assets acquire property rights too, and that taking away purchasers' contractually bargained-for rights strikes at the heart of understandings critically important to the bankruptcy system—have great merit. They have so much merit, in fact, that were it not for the fact that the Plaintiffs' claim is a constitutional one, the Court would not deny enforcement of the Sale Order, in whole or in

appeared in the Pre-Sale Consolidated Complaint can get through the bankruptcy court gate so long as they are genuinely Independent Claims—and where they then will be subject, of course, to determinations in the MDL as to the nature and extent of New GM duties to purchasers of Old GM manufactured vehicles, and whether MDL plaintiffs state causes of action under the applicable nonbankruptcy law.

With respect to vehicles manufactured by Old GM, the Ignition Switch Plaintiffs recognize that they can't premise their claims on anything done by Old GM.⁷¹ Plaintiffs

part.”); *id.* at 528 (“In the absence of a constitutional violation, the Court suspects that the power to deny full enforcement of a sale order (assuming that such is even permissible) will rarely, if ever, be invoked. The principles underlying the finality of 363 sale orders are much too important.”).

⁷¹ The States argue that while they can't assert *claims* based on Old GM conduct, they can still assert *allegations* based on Old GM conduct, and introduce *evidence* of Old GM conduct. See States Ltr. of 10/9/2015 (ECF #13494) at 2. Similar contentions are made with respect to the MDL Complaint. See Pl. MDL Ltr. of 10/9/2015 (ECF # 13495) at 4.) (“allegations are directed at facts, not claims.”).

The Court finds these contentions inexplicable, and easily rejects them. They run flatly contrary to the Judgment and three of the Court's earlier holdings. See Judgment at 6 (“each Plaintiff in a Hybrid Lawsuit wishing to proceed at this time may amend his or her complaint on or before June 12, 2015, such that any *allegations*, claims or causes of action concerning an Old GM vehicle or part seeking to impose liability or damages based on Old GM conduct ... are stricken”) (emphasis added); April Decision, 529 B.R. at 528 (“And to the extent, if any, that New GM might be liable on claims based solely on any wrongful conduct on its own part (*and in no way relying on wrongful conduct by Old GM*), New GM would have such liability not because it had assumed any Old GM liabilities, or was responsible for anything wrong that Old GM did, but only because it had engaged in independently wrongful, and otherwise actionable, conduct on its own.”) (emphasis added); *id.* (“But it is plain that to the extent Plaintiffs seek to impose successor liability, or to rely, in suits against New GM, on any wrongful conduct by Old GM, these are actually claims against Old GM, and not New GM.”) (emphasis added). See also Form of Judgment Decision, 531 B.R. at 358 (“The California complaint includes at least 18 paragraphs alleging events that took place prior to the 363 Sale, and the Arizona complaint includes at least 60 paragraphs alleging pre-363 Sale conduct. *Reliance on allegations of that character* was expressly prohibited under the Court's decision.”) (emphasis added; footnotes omitted); *Bledsoe* Decision, 534 B.R. at 543 n.16 (“But what this Court had in mind when it previously ruled as it did should not be in doubt. ... [T]his Court further believed that New GM *could not be held liable for anything Old GM did*, and that claims for either compensatory or punitive damages would have to be premised solely on New GM's knowledge and conduct.”) (emphasis added).

In support of that contention (made in the States' letter but not with respect to claims in the MDL), the States cite to a decision following Chrysler's chapter 11 case, *Holland v. FCA US LLC*, 2015 U.S. Dist. LEXIS 117643, 2015 WL 5172996 (N.D. Ohio Sept. 3, 2015). But that decision (which did not mention any of the rulings in the *Motors Liquidation* chapter 11 case) said nothing about any distinction between claims and allegations in violation of bankruptcy court rulings or orders, and, importantly, faithfully followed the rulings of the *Chrysler* bankruptcy court.

instead allege claims crafted on the premise that New GM still had duties to owners of cars manufactured by Old GM before New GM came into existence, and that there are private rights of action by vehicle owners for violations of any such duties. To the extent New GM had the requisite duties, the claims are in fact Independent Claims, as the plaintiffs argue. So the issue then turns on whether *this Court* should rule on the nature and extent of the duties upon which the prosecution of the assertedly Independent Claims would rest (and, if so, whether there are private rights of action for the violations of any such duties), or whether the MDL Court should do so instead.

For reasons previously discussed, this Court believes those issues are best determined by the MDL Court. Where this Court has been asked to construe its own opinions, orders or judgments that invoke this Court's knowledge of earlier proceedings in this case, or to address matters invoking this Court's knowledge of bankruptcy law, this Court has addressed those issues itself. But on nonbankruptcy matters (and matters involving determination of the existence of duties under state and federal law that are predicates to the imposition of liability in the MDL⁷² are paradigmatic examples of this), those issues, in this Court's view, should be determined by the MDL Court.⁷³

⁷² These include, though they may not be limited to, claims for violations of the Safety Act; of other statutory or common law requirements imposing a duty to recall; of consumer protection statutes; for fraud; for breach of implied warranties of merchantability and violations of the Magnuson-Moss Warranty Act; and for unjust enrichment.

⁷³ See *In re Motors Liquidation Co.*, 457 B.R. 276, 279 (Bankr. S.D.N.Y. 2011) (the “**UAW Decision**”) (deciding issues with respect to construction of the Sale Order, but abstaining with respect to the remainder, leaving those for determination by a Michigan district court: “But the controversy doesn't involve anything as to which I'd have particular knowledge or expertise warranting my exercise of that jurisdiction—such as knowing what I intended to accomplish when I issued an earlier order—and I think that a Michigan federal judge could decide the controversy at least as well as I could... I think it's better for the New York bankruptcy court ... to act only with respect to matters where the New York Bankruptcy Court has a significant interest, or that truly involve bankruptcy law or policy.”). It is true, as many say colloquially, that bankruptcy judges decide issues of state law “all the time.” But where a nonbankruptcy court already has many of the nonbankruptcy issues before it, and has the superior knowledge of such matters and their context (just as this Court has with respect to the bankruptcy matters), in this Court's view it is

(2) *Yellow—“[A]llegations based on Old GM conduct that support claims for Retained Liabilities”*

In its Yellow Category, New GM objects to what it argues are improper allegations of Old GM conduct—objecting to

(a) allegations of Old GM conduct prefaced by words like “New GM knew that” (arguing that plaintiffs cannot circumvent the Judgment “simply by adding a four-word preface to allegations asserted in prior iterations of the MDL Complaint that were held to be barred by the Sale Order”);

(b) allegations by which conduct of Old GM employees is imputed, “automatically and wholesale,” into a complaint purportedly brought against New GM”; and

(c) allegations containing references to “GM” alone, that merge references to Old GM and New GM.

These objections are sustained in part and overruled in part.

Flipping the objections in order, the Court easily sustains New GM’s objections to the allegations that muddy the distinctions between Old GM and New GM, though it will permit references to “GM-branded vehicles” when the context is clear that they can refer only to New GM—and where they do not, by words or implication, blend the periods during which vehicles were manufactured by Old GM, on the one hand, and New GM, on the other. There is a great potential for abuse in this area, and it was so significant that

better for the court with greater expertise, and that is closer to the issues in question, to address them.

the Court discussed its objectionable nature in one of the several 2014 decisions⁷⁴ preceding the April Decision.

New GM's imputation objection, however, is overruled from a bankruptcy perspective, for the reasons discussed beginning at page 14 above. As there noted, the Court agrees with New GM that imputation matters must be determined in context, and if imputation is to be found, it must be found in the context of the imputation of identified individuals or identified documents for particular purposes. But the Court has also concluded that there is nothing wrong with another court deciding imputation matters, and that other courts will have a better sense of imputation's propriety in context than this Court would.

The final area of controversy involves the instances—many in number—where plaintiffs preceded allegations of Old GM knowledge or conduct with statements like “New GM knew,” or “[f]rom the date of inception, New GM knew....” The Court has already dealt with this.⁷⁵ It can't agree with New GM's contention that the addition of that “four-word preface” is merely a fig leaf to circumvent the Judgment; those four words are of critical importance, and, if proven, transform the basis for imposing liability from successorship to knowledge that is one of the predicates to imposition of liability. Those four words, which now require a showing of New GM knowledge, are essential to establishing New GM's culpability—all apart, of course, from establishing any necessary duties, private rights of action, and any other requirements for stating causes of action

⁷⁴ See *In re Motors Liquidation Co.*, 513 B.R. 467, n.28 (Bankr. S.D.N.Y. 2014) (the “**Phaneuf Decision**”) (noting that the Phaneuf Plaintiffs' effort to treat Old GM and New GM as a single entity was inappropriate, and “[t]hat tactic underscore[d] the Phaneuf Plaintiffs' efforts to muddy the distinctions between the two entities, and to impose liability on New GM based on Old GM's conduct.”).

⁷⁵ See page 16 above.

against New GM for cars manufactured by Old GM. As a condition subsequent to getting through the gate, the plaintiffs will have to prove the New GM knowledge they allege, on the part of identified human beings, and by identified documents, to the satisfaction of the MDL court or any other court hearing those claims—and by competent proof, not on theories that New GM was a “successor” to Old GM. But that is a matter best handled by other courts, and this Court will not block those allegations at this time.

(3) *Pink*—“*[C]laims alleging that New GM committed fraud in connection with Old GM’s bankruptcy*”

In its Pink Category, New GM objects to claims alleging that New GM committed fraud in connection with *Old GM’s* bankruptcy—more specifically, that if New GM had not engaged in fraudulent concealment of ignition switch defects, class members would have filed claims before the Bar Date.⁷⁶ The Court cannot allow these claims to proceed. They are barred by the April Decision and Judgment, as they seek to impose liability based, in material part, on Old GM conduct, and assert forbidden “successor liability claim[s] ‘dressed up to look like something else.’”⁷⁷ And they rest on duties that do not exist under bankruptcy law.

Preliminarily, the Court notes that in both the economic loss and accident contexts, these claims against New GM seek recovery for claims against Old GM that arose prepetition and pre-Sale. New GM did not assume the liabilities for those

⁷⁶ The Court considers claims of this character in two contexts: (1) as a Pink Category objection to Ignition Switch Plaintiffs’ claims of Economic Loss; and (2) in a separate New GM objection to a “No Dismissal” pleading filed by the *Adams* Plaintiffs, asserting a similar claim with respect to accidents involving Old GM manufactured vehicles that took place before the 363 Sale. (See ECF #13359, #13469). This discussion covers both; a judgment implementing the Court’s rulings with respect to the *Adams* action may be entered either separately or by inclusion with the judgment implementing the remainder of these rulings.

⁷⁷ *Burton v. Chrysler Grp. LLC (In re Old Carco LLC)*, 492 B.R. 392, 405 (Bankr. S.D.N.Y. 2013) (Bernstein, C.J.) (“*Old Carco*”).

underlying prepetition and pre-Sale claims, and they are Retained Liabilities under the Sale Order's Section 2.3(b). The MDL plaintiffs' claims here have the effect, if not also the purpose, of circumventing the limitations resulting from that, to effectively convert prepetition claims against Old GM to Independent Claims against New GM.

In the April Decision, the Court ruled, among other things, on the Independent Claims it would permit, and claims based in any way on Old GM conduct were excluded.

At one point, the Court stated:

But it is plain that to the extent the Plaintiffs seek to impose successor liability, or to rely, in suits against New GM, *on any wrongful conduct by Old GM*, these are actually claims against Old GM, and not New GM. It also is plain that any court analyzing claims that are supposedly against New GM only must be extraordinarily careful to ensure that they are not in substance successor liability claims, "dressed up to look like something else." *Claims premised in any way on Old GM conduct* are properly proscribed under the Sale Agreement and the Sale Order, and by reason of the Court's other rulings, the prohibitions against the assertion of such claims stand.⁷⁸

And the Court summarized its earlier holdings by saying that plaintiffs could 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.*"⁷⁹

Likewise, the Judgment provided, in relevant part:

Except for Independent Claims and Assumed Liabilities (if any), all claims and/or causes of action that the Ignition Switch Plaintiffs may have against New GM concerning an Old GM vehicle or

⁷⁸ April Decision, 529 B.R. at 528 (emphasis added; footnote omitted).

⁷⁹ *Id.* at 598 (emphasis added).

part seeking to impose liability or damages *based in whole or in part on Old GM conduct* (including, without limitation, on any successor liability theory of recovery) are barred and enjoined pursuant to the Sale Order....⁸⁰

While the Court well understands plaintiffs' frustration with their inability to tap GUC Trust assets to collect on claims plaintiffs might have against Old GM, this Court's April Decision and Judgment make clear that they are enjoined from looking for their recovery for that to New GM. These allegations, based heavily on a claims process that was the responsibility of Old GM and handled by Old GM—and, of course, the Old GM conduct that resulted in the underlying bankruptcy claim—are barred by both the express terms of the Judgment and the April Decision. They are in substance forbidden successor liability claims, "dressed up to look like something else."⁸¹

Additionally, these claims rest on a premise that does not exist under bankruptcy law.⁸² The Court must find the requisite duty to be lacking, at least on the part of a buyer of estate assets that was protected under a free and clear order, and thereby free from claims arising from the Debtor's failings.

⁸⁰ Judgment ¶ 9 (emphasis added).

⁸¹ See n.77 above. Recognizing that successor liability claims are barred by the April Decision and Judgment, the *Adams* Plaintiffs assert that the Complaint does not seek to hold New GM liable as a successor to Old GM. (*Adams* Plaintiffs' No Dismissal Pleading (ECF #13359) at 4). But that is exactly the effect. The *Adams* Complaint (like the MDL Complaint, whose authors dealt with this issue to a considerably lesser degree) imposes liability on New GM in substantial part based on Old GM's alleged transgressions, both in denying the *Adams* Plaintiffs the opportunity to file proofs of claim in Old GM's chapter 11 case, and in causing the accident in the first place.

⁸² In other places in this decision, the Court has left for the judges in nonbankruptcy plenary actions issues of nonbankruptcy law, such as those requiring consideration of imputation arguments in context, or determination of duties under nonbankruptcy law to owners of vehicles who acquired their vehicles before the asset purchaser was formed. But the Court believes that it should not leave for a nonbankruptcy court matters that require interpretation and enforcement of the Court's earlier Sale Order and Judgment (or the Sale Agreement, with which the Court has great familiarity), or call for the Court's knowledge of bankruptcy law.

The claims in both actions are, as the *Adams* Plaintiffs note with respect to theirs, “Fraud by Concealment [by New GM] of the Right to File a Claim Against Old GM in Bankruptcy,”⁸³ charging that New GM caused harm to the various plaintiffs by “concealing from them the existence of the Ignition Switch Defect,”⁸⁴ with the consequence that some did not file timely claims against Old GM. This “[f]raud by concealment” does not allege misrepresentations; it alleges “concealment”—*i.e.*, failures to disclose—which are actionable if, but only if, there is a duty to speak. But as a matter of bankruptcy law, that duty is lacking under the facts here.

In recognition of the impermissibility of suit against New GM as a successor, the *Adams* Plaintiffs assert that “New GM had an *independent* duty to warn them that their rights vis-à-vis Old GM could be extinguished if they did not timely file a proof of claim.”⁸⁵ But the source of that duty is unexplained, and not supported by authority, and the Court cannot find that duty in the context of a chapter 11 case.

The Bankruptcy Code imposes duties in chapter 11 cases by statute—by sections 1107, 1106 and 1103 of the Code, and by use of a cross-reference to section 704—doling out duties to different players. Section 1107 of the Code, captioned “Rights, powers, and duties of debtor in possession,” imposes duties on a debtor in possession. Section 1106, captioned “duties of trustee and examiner,” imposes duties on trustees and examiners in chapter 11 cases in which they are appointed. Section 704 (cross referenced in section 1106), captioned “Duties of trustee,” imposes duties on trustees in chapter 7 cases and, by reason of the cross reference in section 1106, in chapter 11 cases. And Section 1103 sets

⁸³ *Adams* Plaintiffs’ No Dismissal Pleading at 2.

⁸⁴ *Id.* at 3.

⁸⁵ *Id.* at 5 (emphasis in original).

forth the “Powers and duties of committees” (most commonly creditors and equity committees), though the duties of committees are governed principally by caselaw.⁸⁶

It is obvious from this that the drafters of the Code knew how to impose duties when they wanted to. It also is obvious from a reading of the Code that it doesn’t impose duties on anyone else. While unlikely, it is conceivable, the Court supposes, that caselaw could impose duties upon the buyers of assets from estates, but neither plaintiff group cites to any such caselaw (nor, so far as the Court is aware, is there any), and given the Code’s very considerable express discussion of when and how it imposes duties on the players in a chapter 11 case, the Court cannot and does not find (or create) any such duties here.

It is undisputed that it was Old GM, and its retained professionals, who were responsible for preparing and filing the Debtors’ bankruptcy schedules, establishing a claims bar date, serving the claims bar date, and thereafter resolving claims filed against the Old GM estate, until the GUC Trust took over from Old GM in that last respect. There is no statutory or caselaw basis for imposing duties with respect to these matters on anyone else—and especially the buyer of assets under a free and clear order. The plaintiffs’ request is unprecedented, and cannot be reconciled with the structure of the Bankruptcy Code, which imposes duties by express provision. Additionally, imposing duties of unknown origin on buyers of assets in chapter 11 cases would have the potential

⁸⁶ For example, caselaw makes clear that the duties of committees and their members run to their own constituencies, and not to the estate as a whole, or, indeed, to individual creditors even if they might be members of that constituency. *See, e.g., In re Granite Partners, L.P.*, 210 B.R. 508, 516 (Bankr. S.D.N.Y. 1997) (Bernstein, C.J.) (committee and its members owe a fiduciary duty to *the class* of creditors that the committee represents (*i.e.*, its constituency) not to any particular creditor or any other party, including the estate); 7 *Collier* ¶ 1103.05[2] (16th ed. 2015) (same). That caselaw does not expand the duties of bankruptcy case players; it narrows it.

(as is apparent here) of impairing—if not rendering nugatory—provisions in sale orders that permit the acquirors of assets to take them free and clear of claims.

Thus the Court must find that efforts to impose liability on New GM for Old GM's failures to give Ignition Switch Plaintiffs notice (and, of course, for Old GM's other alleged wrongful acts, with respect to accidents and alleged drops in vehicle value) are "attempts to paint New GM with Old GM acts,"⁸⁷ in violation of the April Decision and Judgment, and also fail for a lack of showing of the requisite duty.

(4) *Orange—[C]laims alleging plaintiffs are entitled to contractual damages as third-party beneficiaries of the Sale Agreement."*

In its Orange Category, in the context of potential claims under the Safety Act, New GM asserts that the MDL Complaint "identifies claims alleging that plaintiffs are somehow third-party beneficiaries under the Sale Agreement," and then points out that the Sale Agreement expressly disclaims any third-party claims."⁸⁸ New GM is plainly right that the Sale Agreement does so.⁸⁹ But the plaintiffs, not disputing that, argue that even without third-party beneficiary status, and even though they "do not assert a private cause of action under the Safety Act,"⁹⁰ they are not precluded from acting under a (presumably existing) state law cause of action.

Though the plaintiffs have not told this Court the basis for such a cause of action, their contention, if true, once more calls for a determination of nonbankruptcy law. For

⁸⁷ *Bledsoe* Decision, 534 B.R. at 543 n.16.

⁸⁸ New GM 9/25/2015 Ltr. at 5. New GM further argues that a claimed breach of the Safety Act does not provide for an individual consumer cause of action. *See id.* at n.10.

⁸⁹ *See* Sale Agreement § 9.11.

⁹⁰ Pl. MDL Ltr. of 10/9/2015 at 5.

that reason, the Court once more does not rule on the extent to which claims of this character are actionable as a matter of nonbankruptcy law.

Since the asserted rights of action, if any, in the Orange Claims category are Independent Claims, the Court rules that they pass the bankruptcy court gate. It leaves the determination as to whether claims of this type are otherwise actionable to the MDL court.

C. The States Complaints

(1) Yellow—Allegations based on Old GM conduct

In its Yellow Category, New GM objects to “multiple paragraphs [in the State Complaints] containing improper allegations of Old GM conduct”—premised on two separate matters:

(a) allegations of pre-Sale conduct, blending allegations relating to both Old GM and New GM without distinction, and referring to “GM-branded vehicles”⁹¹ with the inevitable muddying of the Old GM/New GM distinction in the legal obligations of each; and

(b) attempts to “impute wholesale” to New GM knowledge, policies and practices of Old GM.

The first objection is well taken, and is sustained. The second is governed by the earlier rulings as to Imputation set forth in this Decision.

Flipping the two objections in order, the Court has already addressed Imputation at length in this Decision, and there is no need to repeat that discussion in comparable length here. The Court’s rulings as to Imputation in other actions apply to the States

⁹¹ See Arizona Cmplt. ¶ 5 n.1 (“The term ‘GM-branded vehicles’ refers to vehicles manufactured and sold by both New GM, and its predecessor, ‘Old GM’”); California Cmplt. ¶ 2 (same).

Cases as well. Knowledge of Old GM cannot be imputed to New GM, but New GM knowledge inherited from Old GM may be, as can knowledge developed by New GM, to the extent permissible under nonbankruptcy law.

With respect to New GM's remaining objection, the objection is sustained in considerable part. Turning first to the California complaint, its use of the catch-all "GM-branded vehicles," as the Court has previously held, is impermissible—and emblematic of problems discussed in the Form of Judgment Decision.⁹²

So are the allegations in paragraphs 46 (speaking of acts in 2001), 47 (speaking of DeGiorgio's alleged concealment "while working for Old GM"), 48-54, 58-60, 71, 95-96, 112-114, 189-190, and 200-202,⁹³ all of which allege Old GM conduct. On the other hand, allegations (*e.g.* in paragraphs 9, 11, 16, 18, and 22, 32, 43, 44, and 45) that New GM knew of safety issues (even if from the time of its inception), acquired inherited knowledge of such, or gained new knowledge of such, are benign.

The Court rules similarly with respect to the Arizona complaint, many of whose allegations appear to be identical or nearly identical to California's. Allegations (*e.g.*, those in paragraphs 19, 81, 135, 137, 138, 139, 335 and 499) that New GM knew of matters (even if from the date of its inception) are benign.⁹⁴ But others (*e.g.*, those in paragraphs 92, 93 and 357) that make reference to what plainly was Old GM conduct are

⁹² See 531 B.R. at 358. And allegations of that character are doubly impermissible, by reason of their additional characterization of New GM as the "successor" to Old GM.

⁹³ A number of other allegations (in paragraphs 192, 195, 196, 198, 199, 203 through 206, and 211) do not say whether they make reference to Old GM or New GM. The latter would be permissible, and if that is what was intended, they may pass through the gate once clarified. But at this point they appear to be another, impermissible, blending of Old GM and New GM conduct.

⁹⁴ But not benign—and thus impermissible—is Arizona's allegation (Arizona Cmplt. ¶ 19) that New GM "was not born innocent." In fact (apart from the theatrics of that allegation), New GM *was* born innocent, and the focus must be instead on its own knowledge and acts after it was born.

not, and others that make it impossible to tell are not.⁹⁵ So is paragraph 136's highly offensive allegation that "[t]he knowledge of Old GM is important and relevant because it is **directly attributable** to New GM."⁹⁶ That allegation is not just violative of the Judgment; it is false as a matter of law.

The States Complaints may proceed if, but only if, they are amended to fix the deficiencies in the Yellow Category. They will remain stayed until that happens.

(2) *Blue—Allegations relating to vehicles
manufactured by Old GM*

In this Blue Category, New GM also contends that the States "improperly attempt to assert claims and establish damages based on Old GM vehicles manufactured before the 363 Sale..." New GM further contends that the States "do not explain what purportedly 'Independent Claims' they may have with regard to an Old GM vehicle," and that the States' claims are premised "exclusively on consumer fraud and false advertising statutes, which necessarily concern the time and point of sale."⁹⁷ New GM continues that "[i]t is necessarily impossible for any New GM statement, regardless of its content, to influence the decision to purchase an Old GM vehicle before New GM ever existed..."⁹⁸

⁹⁵ In paragraph 139, the Arizona Complaint alleges that "on or around the day of its formation as an entity, New GM acquired notice and full knowledge of the facts set forth below"—without saying where that list ends. The Arizona Complaint then goes on with about 40 paragraphs speaking of prepetition events (none of which speak of New GM's knowledge), presumably with the thought that the introductory language of paragraph 139 sanitizes them. If more clearly pleaded (and pegged to the arrival of New GM employees), an allegation like paragraph 139 could provide the predicate for permissible allegations—for example, if the facts said to have been learned by New GM were then clearly listed, preferably in subparagraphs as they were in paragraph 288. But for the most part they weren't, as evidenced not just by the 40 paragraphs beginning with paragraph 140, but also by paragraphs 289 (which blended knowledge of Old GM and New GM) and 290-310—some or all of which may have spoken of Old GM alone.

⁹⁶ Arizona Cmplt. ¶ 136 (bold in original).

⁹⁷ See New GM Ltr. of 9/25/2015 (ECF #13470) at 3.

⁹⁸ *Id.*

The Court understands New GM's point—especially with respect to causes of action that rest on acts or omissions at the time of sale, when sales took place before New GM had come into existence—but the nature and extent of New GM's duties under nonbankruptcy law is a matter that the Court does not believe it should decide.

For example, an apparent continuing source of contention is the extent to which New GM can be held liable under nonbankruptcy law (such as the statutory and common law of the states of California and Arizona) for the protection of consumers for acts or omissions *after* the sale of motor vehicles. That may not matter for vehicles manufactured by New GM after the 363 Sale, but it matters greatly for vehicles manufactured by Old GM. It should be clear from the Court's earlier rulings, but the Court will say again in this context now, that New GM cannot be held to be monetarily liable to the States (any more than it can be held liable to other plaintiffs) for any violations (necessarily by Old GM) that took place before the 363 Sale.

The extent to which New GM can be held liable under that nonbankruptcy law for acts or omissions after the 363 Sale—i.e., after sales of vehicles to consumers—is a matter of nonbankruptcy law that the Court leaves to the courts hearing such cases to decide. The Court can and does say, however, that to the extent nonbankruptcy law imposes duties *at the time of a vehicle's sale only*, and the relevant vehicle sales took place when New GM had not yet been formed and only Old GM was in existence, claims premised on any breaches of such duties are barred by each of the Sale Order, the April Decision, and the Judgment.

*D. The Peller Complaints**(1) Blue—Allegations Involving Old GM manufactured vehicles*

In its Peller Complaints Blue Category, New GM objects to claims involving Old GM manufactured vehicles. Its objections are of three types: (a) those said to assert what are in substance successor liability claims; (b) those involving plaintiffs (and portions of proposed classes) who purchased used Old GM manufactured vehicles after the closing of the 363 Sale, from third parties with no connection to New GM; and (c) those asserted on behalf of Non-Ignition Switch Plaintiffs. New GM's Blue Category objections are sustained in part and overruled in part.

With respect to the first type of Blue Category objection, it is plain that the Peller Complaints, to a very substantial degree, assert claims with respect to Old GM manufactured vehicles,⁹⁹ on behalf of clients who never dealt with New GM.¹⁰⁰ But in their substantive claims, the Peller Complaints define their "Class" and "Subclass" periods as running from the inception of New GM in 2009, and seemingly base the actual causes of action on alleged duties of New GM and post-Sale events relating to those pre-Sale manufactured cars. While the complaints are hardly a model of clarity, the Court

⁹⁹ See, e.g., *Elliotts* Cmplt. ¶ 41 ("Plaintiffs are aware that the following GM models contain dangerous ignition switches," with every one of the bulleted cars listed manufactured, at least in some years, by Old GM, though about half were also made by New GM.)

¹⁰⁰ See *id.* ¶ 1 (Elliotts bought a 2006 Chevy Cobalt); *Bledsoe* Cmplt. ¶¶ 3-10 (all plaintiffs purchased Old GM manufactured vehicles, most before the 363 Sale but two after the sale); *Sesay* Cmplt. ¶ 1 (The Sesays own a 2007 Chevy Impala, purchased from a friend in 2012). On the other hand, plaintiff Summerville (a plaintiff in *Elliott*), is alleged to have purchased a 2010 Chevy Cobalt in 2009 after the 363 Sale, and plaintiff Yearwood (one of the plaintiffs in *Sesay*) is alleged to own a 2010 Chevy Cobalt, purchased in 2010, again after the 363 Sale. The *Bledsoe* complaint also includes a number of post-Sale accident claims (some for personal injury and some for property damage), though it does not say what kind of defect allegedly caused each accident. These might be permissible Product Liabilities Claims. And if they are, these claims (along with the Summerville and Yearwood claims) could proceed if severed from the impermissible ones, or after the remaining issues are remedied. So far as the Court can discern, the three complaints do not distinguish between the various types of plaintiffs' rights.

can discern no Blue Category instances in which pre-Sale conduct by Old GM actually is alleged.¹⁰¹ Thus, to the extent they are actionable as matters of nonbankruptcy law, those claims are, as Peller argues,¹⁰² Independent Claims. The real issue with these complaints is whether as matters of nonbankruptcy law, claims can be asserted against New GM under RICO and consumer protection statutes, or for common law fraud, “negligent infliction of economic loss and increased risk,” and “civil conspiracy, joint action and aiding and abetting,” with respect to vehicles manufactured by Old GM, before there ever was a New GM. For reasons discussed above, the Court leaves this issue to nonbankruptcy courts after these complaints are amended to address their more egregious violations, discussed below.¹⁰³

The second type of Blue Category objection involves plaintiffs (and portions of proposed classes) who purchased used Old GM manufactured vehicles after the closing of the 363 Sale. New GM is right that this Court held, in the April Decision, that claims brought by this type of plaintiff were not an exception to the Court’s holding barring claims with respect to Old GM manufactured vehicles and allegations of Old GM conduct, except where Independent Claims were alleged.¹⁰⁴ But once again, because the Court does not discern any allegations of pre-Sale conduct by Old GM in the Peller Complaints on behalf of such plaintiffs, this objection is resolved in the same fashion as its predecessor.

¹⁰¹ They most definitely *are* in the Green Category, discussed below. Several of the Green Category violations are blatantly violative of the Sale Order and this Court’s rulings, and until cured they necessitate the continuing stay of the Peller actions for that reason alone.

¹⁰² See Peller 11/6/2015 Ltr. (ECF #13529) at 2.

¹⁰³ Once again, this is not about “censorship” of pleadings, Peller Ltr. at 2, a mantra repeated by Peller once again. It is about compliance with federal court orders.

¹⁰⁴ See April Decision, 529 B.R. at 570-72.

The third type of Blue Category objection concerns claims asserted on behalf of Non-Ignition Switch Plaintiffs. This objection is sustained, in full, with respect to all assertedly Independent Claims for reasons discussed in n.70 above. And until those deficiencies are cured, the Peller Complaints remain stayed. To the extent those complaints assert claims against New GM with respect to *New GM manufactured* vehicles based on Non-Ignition Switch matters, the Sale Order, April Decision and Judgment do not forbid them.

(2) *Green—Claims Premised on Old GM conduct*

In its Green Category, New GM objects to claims in the Peller Complaints premised on Old GM conduct. New GM's objections in this category are of two main types: (a) those relying on Old GM conduct as the predicate for claims against New GM, and (b) those referring to "GM" without making distinction between the two, muddying the distinction between them. The objections of both types are sustained.

Peller Complaints allegations of the first type are among the most egregious this Court has ever seen. Emblematic of the problem is an allegation in *Bledsoe*:

To the extent that any of the allegation [*sic.*] of wrongdoing alleged in this count involve wrongdoing by Old GM, GM is responsible for that conduct because it is a successor in manufacturing to Old GM and liable for Old GM's wrongdoing.¹⁰⁵

That is the paradigm of a successor liability claim, impermissible under each of the Sale Order, April Decision, and Judgment. And in his letter,¹⁰⁶ Peller did not even try to defend it. The Peller Complaints will remain stayed until they are amended to unambiguously remove any reliance on wrongdoing by Old GM.

¹⁰⁵ *Bledsoe* Cmplt. ¶ 28.

¹⁰⁶ See Peller 11/6/2015 Ltr. at 1-2.

Allegations of the second type are almost as bad. Emblematic of these is the allegation in *Elliott* that “[f]or example, GM chose to use and then conceal defective ignition switches in Plaintiffs’ and class members’ vehicles in order to save approximately \$0.99 per vehicle.”¹⁰⁷ As noted above, most of the Peller Plaintiffs’ vehicles were Old GM manufactured vehicles acquired from a seller other than New GM. The problem is aggravated, not solved, by the Peller Complaints use of alternate defined terms—defining General Motors LLC, which is New GM, as “‘GM’ or ‘New GM,’”¹⁰⁸ or “GM” alone,¹⁰⁹ thereby camouflaging the distinction between the Old GM and New GM. And here too, in his responsive letter,¹¹⁰ Peller did not even try to defend it. For the reasons discussed above in connection with the States Complaints, this practice is unacceptable, and the Peller Complaints will remain stayed until they are amended in this respect as well.

(3) *Yellow—Claims Seeking “to automatically impute Old GM’s knowledge to New GM”*

In its Yellow Category, New GM objects to claims seeking “to automatically impute Old GM’s knowledge to New GM.” The Court deals with these as it has in its other discussion of this same issue above.

(4) *Pink—Claims Seeking Punitive Damages from New GM with respect to Old GM manufactured vehicles.*

In its Pink Category, New GM objects to claims seeking punitive damages from New GM with respect to Old GM manufactured vehicles. The Court deals with these as it has in its other discussion of this same issue above.

¹⁰⁷ *Elliott* Cmplt. ¶ 11.

¹⁰⁸ *See id.* ¶ 6.

¹⁰⁹ *Sesay* Cmplt. ¶ 4

¹¹⁰ *See* Peller 11/6/2015 Ltr. at 1-2.

E. Other Complaints

New GM identifies a few other complaints containing allegations it contends are violative of the Sale Order, the April Decision or Judgment (or some combination of them),¹¹¹ though its objections overlap in substantial part with those just discussed. For the sake of completeness, the Court addresses them here.

(1) “Failure to Recall/Retrofit Vehicles”

In its letter addressing the other complaints, New GM objects to claims, such as those in *Moore v. Ross*, in South Carolina, alleging that “New GM had a duty to recall or retrofit Old GM vehicles.”¹¹² This is effectively the same type of claim previously discussed.

New GM is correct that obligations, if any, that it had to recall or retrofit were not Assumed Liabilities, and that New GM is not responsible for any failures of Old GM to do so. But whether New GM had a duty to recall or retrofit previously sold Old GM vehicles that New GM did not manufacture is a question of nonbankruptcy law.

Consistent with its gatekeeper role, the Court does not decide whether there is the requisite duty under nonbankruptcy law, and allows this claim through the gate, leaving that issue to the court hearing that action.

*(2) “Negligent Failure to Identify Defects
or Respond to Notice of a Defect”*

New GM’s next issue in that same letter involves allegations “that New GM should have identified the defect earlier and taken some sort of action in response.”¹¹³

New GM is correct that claims of this character are the same, for this Court’s purposes, as

¹¹¹ See New GM Ltr. of 9/23/2015 (ECF #13466).

¹¹² *Id.* at 2.

¹¹³ *Id.*

the claims based on an alleged failure to recall or retrofit Old GM vehicles. Here too, whether New GM had a duty to identify or respond to defects in previously sold Old GM vehicles that New GM did not manufacture is a question of nonbankruptcy law.

Thus the Court deals with it with the same way. Consistent with its gatekeeper role, the Court does not decide whether there is the requisite duty under nonbankruptcy law, and allows this claims through the gate, leaving that issue to the court hearing that action.

(3) *“Negligent Infliction of Economic Loss and Increased Risk”*

New GM’s third issue involves claims that New GM had a duty to warn consumers owning Old GM manufactured vehicles of the Ignition Switch Defect but instead concealed it, and by doing so, the economic value of the plaintiffs’ vehicles was diminished. The *Elliott* and *Sesay* complaints, for example, had claims of this type.

Claims of this character are permissible to the extent, but only the extent, that New GM had an independent “duty to warn” owners of Old GM manufactured cars of the defect, as relevant to situations *in which no one is alleged to have been injured* by that failure, but where the vehicles involved are alleged to have lost value as a result. That is a question of nonbankruptcy law, which the Court leaves to the nonbankruptcy court(s) hearing the underlying actions.

(4) *“Civil Conspiracy”*

New GM’s fourth issue, said to arise in the case of *De Los Santos v. Ortega*, in Texas state court, and the Peller Complaints in the District of Columbia, involves claims that New GM was involved “in a civil conspiracy with others to conceal the alleged

ignition switch defect.”¹¹⁴ New GM asserts that the claims are based on “representations, omissions and other alleged acts relating to the supposed concealment rather than, as set forth in the Sale Agreement, being caused by motor vehicles,” “arisi[ing] directly out of” personal injury or property damages, and being “caused by accidents or incidents.”¹¹⁵

Because claims of this character were asserted in the Peller Complaints, the Court addressed them above. For the reasons discussed above, the Court rules that claims of this character were not Assumed Liabilities. The extent to which they might constitute Independent Claims requires a determination of nonbankruptcy law, which for reasons previously noted, this Court not decide.

Thus the Court rules that the Civil Conspiracy claims referred to here are not Assumed Liabilities. Beyond that, it leaves the determination of the nonbankruptcy issue as to whether claims of this sort are actionable, with respect to vehicles previously manufactured and sold by a different entity, to the nonbankruptcy court hearing the underlying action.

(5) “Section 402B—Misrepresentation by Seller”

New GM’s fifth issue involves one of the several claims asserted by the Estate of William Rickard, following his death in an accident involving the decedent’s 2002 S-10 pickup—a vehicle manufactured by Old GM. New GM objects to causes of action premised on Section 402B of the *Restatement (Second) of Torts*,¹¹⁶ which New GM

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Section 402B provides:

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for

argues are misrepresentation claims, not Product Liabilities that were Assumed Liabilities under Sale Agreement Section 2.3(a)(ix).

The Court does not agree. Restatement Section 402B, quoted in the footnote above, makes the defendant subject to liability “for physical harm to a consumer of the chattel...” That provision has as a condition to liability a misrepresentation of material fact concerning the chattel’s character or quality, but ultimately it provides a remedy for the resulting “physical harm.” To the extent there was a violation of Section 402B, it was by *Old GM*, of course (because liability under Section 402B is with respect to “a chattel sold by him,” *i.e.* by Old GM and not New GM), but any Section 402B liability could nevertheless be an Assumed Liability if it passed muster as such under Section 2.3(a)(ix).

Unlike many other misrepresentation claims, Section 402B claims are expressly based on “physical harm to a consumer...” When a Section 402B claim is matched up to the requirements of Section 2.3(a)(ix), it satisfies that subsection’s Clauses [2], [3], [4] and [5], including, most importantly, the all-critical Clause [3], requiring that the Liability be “for death, personal injury, or other injury to Persons...”

Thus the Court disagrees with New GM’s contention that 402B claims should be blocked as sounding in misrepresentation. Section 402B claims pass through the gate.

(6) Claims Based on Pre-Sale Accidents

As its sixth and final issue with respect to the other complaints, New GM objects to claims based on *pre*-Sale accidents, like the *Coleman* action in the Eastern District of

physical harm to a consumer of the chattel caused by
justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

(b) the consumer has not bought the chattel from or
entered into any contractual relation with the seller.

Louisiana, involving, by definition, Old GM manufactured vehicles. These actions should have been dismissed, or at least stayed, long ago. They are impermissible under the Sale Order, April Decision and Judgment, and cannot proceed.

Conclusion

For the reasons stated above:

(1) Any acts by New GM personnel, or knowledge of New GM personnel (including knowledge that any of them might have acquired while previously working at Old GM) may, consistent with the April Decision and Judgment, be imputed to New GM to the extent such is appropriate under applicable nonbankruptcy law. Likewise, to the extent, as a matter of nonbankruptcy law, knowledge may be imputed as a consequence of documents in a company's files, documents in New GM's files may be utilized as a predicate for such knowledge, even if they first came into existence before the sale from Old GM to New GM. Those general principles may be applied in courts other than this one in the context of particular allegations that rely on those principles—without the need for the bankruptcy court to engage in further examination of particular allegations beyond the extent to which it has done so here.

(2) Punitive damages with respect to Product Liabilities Claims or Economic Loss claims involving Old GM manufactured vehicles may be sought against New GM to the extent—but only to the extent—they rely solely on *New GM* knowledge or conduct. Those claims may not be based on Old GM knowledge or conduct. But they may be based on knowledge of New GM employees that was “inherited” from their tenure at Old GM

(or documents inherited from Old GM), and may be based on knowledge acquired after the 363 Sale by New GM.

(3) Allegations in the Bellwether Actions Complaints, MDL Complaint, Peller Complaints, and the other complaints may proceed to the extent, but only the extent, they are consistent with the rulings above, and their allegations are pruned, to the extent necessary, so as not to include allegations prohibited in that discussion.

The parties are encouraged to agree upon a form of judgment implementing these rulings, without prejudice to anyone's right to appeal or cross-appeal. In the event of an inability to timely agree, anyone may settle a judgment, provided that notice of settlement allows no less than five business days' notice to comment on the form of judgment submitted, or submit a counter-judgment. For the avoidance of doubt, the time to appeal these rulings will run from the time of entry of the resulting judgment, and not from the date of this Decision.

Dated: New York, New York
November 9, 2015

s/Robert E. Gerber
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X		
In re	:	Chapter 11 Case No.
	:	
GENERAL MOTORS CORP., <i>et al.</i> ,	:	09- 50026 (REG)
	:	
Debtors.	:	(Jointly Administered)
	:	
-----X		

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

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ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE

In this contested matter in the jointly administered chapter 11 cases of Debtors General Motors Corporation and certain of its subsidiaries (together, “**GM**”), the Debtors move for an order, pursuant to section 363 of the Bankruptcy Code, approving GM’s sale of the bulk of its assets (the “**363 Transaction**”), pursuant to a “Master Sale and Purchase Agreement” and related documents (the “**MPA**”), to Vehicle Acquisitions Holdings LLC (the “**Purchaser**”)²—a purchaser sponsored by the U.S. Department of the Treasury (the “**U.S. Treasury**”)—free and clear of liens, claims, encumbrances, and other interests. The Debtors also seek approval of the assumption and assignment of the executory contracts that would be needed by the Purchaser, and of a settlement with the United Auto Workers (“**UAW**”) pursuant to an agreement (the “**UAW Settlement Agreement**”) under which GM would satisfy obligations to an estimated 500,000 retirees.

GM’s motion is supported by the Creditors’ Committee; the U.S. Government (which has advanced approximately \$50 billion to GM, and is GM’s largest pre- and post-petition creditor); the Governments of Canada and Ontario (which ultimately will have advanced about \$9.1 billion); the UAW (an affiliate of which is GM’s single largest unsecured creditor); the indenture trustees for GM’s approximately \$27 billion in unsecured bonds; and an ad hoc committee representing holders of a majority of those bonds.

² When discussing the mechanics of the 363 Transaction, the existing GM will be referred to as “**Old GM**,” and the Purchaser will be referred to as “**New GM**.”

But the motion has engendered many objections and limited objections, by a variety of others. The objectors include, among others, a minority of the holders of GM's unsecured bonds (most significantly, an ad hoc committee of three of them (the "**F&D Bondholders Committee**"), holding approximately .01% of GM's bonds),³ who contend, among other things, that GM's assets can be sold only under a chapter 11 plan, and that the proposed section 363 sale amounts to an impermissible "*sub rosa*" plan.

Objectors and limited objectors also include tort litigants who object to provisions in the approval order limiting successor liability claims against the Purchaser; asbestos litigants with similar concerns, along with concerns as to asbestos ailments that have not yet been discovered; and non-UAW unions ("**Splinter Unions**") speaking for their retirees, concerned that the Purchaser does not plan to treat their retirees as well as the UAW's retirees.

On the most basic issue, whether a 363 sale is proper, GM contends that this is exactly the kind of case where a section 363 sale is appropriate and indeed essential—and where under the several rulings of the Second Circuit and the Supreme Court in this area, GM's business can be sold, and its value preserved, before the company dies. The Court agrees. GM cannot survive with its continuing losses and associated loss of liquidity, and without the governmental funding that will expire in a matter of days. And there are no options to this sale—especially any premised on the notion that the company could

³ When it filed its objection, the F&D Bondholders Committee, identifying itself as the "Family & Dissident" Bondholders Committee, said it was "representing the interests of" 1,500 bondholders, with bond holdings "believed to exceed \$400 million." (F&D Bondholder Comm. Obj. at 1). But even after it filed the second of its Fed.R.Bankr.P. 2019 statements, it did not identify any other bondholders for whom it was speaking, or provide the holdings, purchases and sales information for any others that Rule 2019 requires. Under these circumstances, the Court must consider that the committee speaks for just those three bondholders.

survive the process of negotiations and litigation that characterizes the plan confirmation process.

As nobody can seriously dispute, the only alternative to an immediate sale is liquidation—a disastrous result for GM’s creditors, its employees, the suppliers who depend on GM for their own existence, and the communities in which GM operates. In the event of a liquidation, creditors now trying to increase their incremental recoveries would get nothing.

Neither the Code, nor the caselaw—especially the caselaw in the Second Circuit—requires waiting for the plan confirmation process to take its course when the inevitable consequence would be liquidation. Bankruptcy courts have the power to authorize sales of assets at a time when there still is value to preserve—to prevent the death of the patient on the operating table.

Nor can the Court accept various objectors’ contention that there here is a *sub rosa* plan. 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. Arrangements that will be made by the Purchaser do not affect the distribution of the *Debtor’s* property, and will address wholly different needs and concerns—arrangements that the Purchaser needs to create a new GM that will be lean and healthy enough to survive.

Issues as to how any approval order should address *successor liability* are the only truly debatable issues in this case. And while textual analysis is ultimately inconclusive and caselaw on a nationwide basis is not uniform, the Court believes in *stare decisis*; it follows the caselaw in this Circuit and District in holding that to the extent the Purchaser

has not voluntarily agreed to accept successor liability, GM's property—like that of Chrysler, just a few weeks ago—may be sold free and clear of claims.

Those and other issues are addressed below. GM's motion is granted. The following are the Court's Findings of Fact, Conclusions of Law, and bases for the exercise of its discretion in connection with this determination.

Findings of Fact⁴

After an evidentiary hearing,⁵ the Court makes the following Findings of Fact.

1. Background

GM is primarily engaged in the worldwide production of cars, trucks, and parts. It is the largest Original Equipment Manufacturer (“OEM”) in the U.S., and the second largest in the world.

GM has marketed cars and trucks under many brands—most of them household names in the U.S.—including Buick, Cadillac, Chevrolet, Pontiac, GMC, Saab, Saturn, HUMMER, and Opel. It operates in virtually every country in the world.

GM maintains its executive offices in Detroit, Michigan, and its major financial and treasury operations in New York, New York. As of March 31, 2009, GM employed approximately 235,000 employees worldwide, of whom 163,000 were hourly employees and 72,000 were salaried. Of GM's 235,000 employees, approximately 91,000 are employed in the U.S. Approximately 62,000 (or 68%) of those U.S. employees were represented by unions as of March 31, 2009. The UAW represents by far the largest

⁴ To avoid making this lengthy decision even longer, the Court has limited its citations in its Findings of Fact to those matters where they are most useful.

⁵ In accordance with the Court's Case Management Order #1, direct testimony was presented by affidavit and cross-examination and subsequent questioning proceeded live. After cross-examination, the Court found all witnesses credible, and takes their testimony as true.

portion of GM's U.S. unionized employees, representing approximately 61,000 employees.

As of March 31, 2009, GM had consolidated reported global assets and liabilities of approximately \$82 billion, and \$172 billion, respectively. However, its assets appear on its balance sheet at book value, as contrasted to a value based on any kind of valuation or appraisal. And if GM had to be liquidated, its liquidation asset value, as discussed below, would be less than 10% of that \$82 billion amount.

While GM has publicly traded common stock, no one in this chapter 11 case has seriously suggested that GM's stock is "in the money," or anywhere close to that. By any standard, there can be no doubt that GM is insolvent. In fact, as also discussed below, if GM were to liquidate, its unsecured creditors would receive nothing on their claims.

2. GM's Dealer Network

Substantially all of GM's worldwide car and truck deliveries (totaling 8.4 million vehicles in 2008) are marketed through independent retail dealers or distributors. GM relies heavily on its relationships with dealers, as substantially all of its retail sales are through its network of independent retail dealers and distributors.

The 363 Transaction contemplates the assumption by GM and the assignment to New GM of dealer franchise agreements relating to approximately 4,100 of its 6,000 dealerships, modified in ways to make GM more competitive (as modified, "**Participation Agreements**"). But GM cannot take all of the dealers on the same basis. At the remaining dealer's option, GM will either reject those agreements, or assume modified agreements, called "**Deferred Termination Agreements.**"

The Deferred Termination Agreements will provide dealers with whom GM cannot go forward a softer landing and orderly termination. GM is providing approximately 17 months' notice of termination.

As of the time of the hearing on this motion, approximately 99% of the continuing dealers had signed Participation Agreements and 99% of the dealers so affected had signed Deferred Termination Agreements.

The agreements of both types include waivers of rights that dealers would have in connection with their franchises. In accordance with a settlement with the Attorneys General of approximately 45 states (the "AGs"), the Debtors and the Purchaser agreed to modifications to the Purchase Agreement and the proposed approval order under which (subject to the more precise language in the proposed order) the Court makes no finding as to the extent any such modifications are enforceable, and any disputes as to that will be resolved locally.

3. GM's Suppliers

As the nation's largest automobile manufacturer, GM uses the services of thousands of suppliers—resulting in approximately \$50 billion in annual supplier payments. In North America alone, GM uses a network of approximately 11,500 suppliers. In addition, there are over 600 suppliers whose sales to GM represent over 30% of their annual revenues. Thus hundreds, if not thousands, of automotive parts suppliers depend, either in whole or in part, on GM for survival.

4. GM's Financial Distress

Historically, GM was one of the best performing OEMs in the U.S. market. But with the growth of competitors with far lower cost structures and dramatically lower benefit obligations, GM's leadership position in the U.S. began to decline. At least as a

result of that lower cost competition and market forces in the U.S. and abroad (including jumps in the price of gasoline; a massive recession (with global dislocation not seen since the 1930s); a dramatic decline in U.S. domestic auto sales; and a freeze-up in consumer and commercial credit markets), GM suffered a major drop in new vehicle sales and in market share—from 45% in 1980 to a forecast 19.5% in 2009.

The Court does not need to make further factual findings as to the many causes for GM's difficulties, and does not do so. Observers might differ as to the causes or opine that there were others as well, and might differ especially with respect to which causes were most important. But what is clear is that, especially in 2008 and 2009, GM suffered a steep erosion in revenues, significant operating losses, and a dramatic loss of liquidity, putting its future in grave jeopardy.

5. U.S. Government Assistance

By the fall of 2008, GM was in the midst of a severe liquidity crisis, and its ability to continue operations grew more and more uncertain with each passing day. As a result, in November 2008, GM was compelled to seek financial assistance from the U.S. Government.

The U.S. Government understood the draconian consequences of the situation—one that affected not just GM, but also Chrysler, and to a lesser extent, Ford (the “**Big Three**”). And the failure of any of the Big Three (or worse, more than one of them) might well bring grievous ruin on the thousands of suppliers to the Big Three (many of whom have already filed their own bankruptcy cases, in this District, Delaware, Michigan and elsewhere); other businesses in the communities where the Big Three operate; dealers throughout the country; and the states and municipalities who looked to the Big Three, their suppliers and their employees for tax revenues.

The U.S. Government's fear—a fear this Court shares, if GM cannot be saved as a going concern—was of a systemic failure throughout the domestic automotive industry and the significant harm to the overall U.S. economy that would result from the loss of hundreds of thousands of jobs⁶ and the sequential shutdown of hundreds of ancillary businesses if GM had to cease operations.

Thus in response to the troubles plaguing the American automotive industry, the U.S. Government, through the U.S. Treasury and its Presidential Task Force on the Auto Industry (the “**Auto Task Force**”), implemented various programs to support and stabilize the domestic automotive industry—including support for consumer warranties and direct loans. Thus at GM's request in late 2008, the U.S. Treasury determined to make available to GM billions of dollars in emergency secured financing in order to sustain GM's operations while GM developed a new business plan. At the time that the U.S. Treasury first extended credit to GM, there was absolutely no other source of financing available. No party other than Treasury conveyed its willingness to loan funds to GM and thereby enable it to continue operating.

The first loan came in December 2008, after GM submitted a proposed viability plan to Congress. That plan contemplated GM's shift to smaller, more fuel-efficient cars, a reduction in the number of GM brand names and dealerships, and a renegotiation of GM's agreement with its principal labor union. As part of its proposed plan, GM sought emergency funding in the form of an \$18 billion federal loan.

But the U.S. Government was not of a mind to extend a loan that large, and after negotiations, the U.S. Treasury and GM entered into a term loan agreement on December

⁶ More than 500,000 workers are employed by companies in the U.S. that manufacture parts and components used by automakers.

31, 2008 (the “**Treasury Prepetition Loan**”), that provided GM up to \$13.4 billion in financing on a senior secured basis. Under that facility, GM immediately borrowed \$4 billion, followed by \$5.4 billion less than a month later, and the remaining \$4 billion on February 17, 2009.

At the time this loan was made, GM was in very weak financial condition, and the loan was made under much better terms than could be obtained from any commercial lender—if any lender could have been found at all. But the Court has no doubt whatever, and finds, that the Treasury Prepetition Loan was intended to be, and was, a loan and not a contribution of equity. As contrasted with other TARP transactions that involved the U.S. Treasury making direct investments in troubled companies in return for common or preferred equity, the U.S. Treasury structured the Treasury Prepetition Loan as a loan with the only equity received by the U.S. Treasury being in the form of two warrants. The agreement had terms and covenants of a loan rather than an equity investment. The U.S. Treasury sought and received first liens on many assets, and second liens on other collateral. The transaction also had separate collateral documents. And the U.S. Treasury entered into intercreditor agreements with GM’s other senior secured lenders in order to agree upon the secured lenders’ respective prepetition priorities.

The Court further finds, as a fact or mixed question of fact and law, looking at the totality of the circumstances, that there was nothing inequitable about the way the U.S. Treasury behaved in advancing these funds. Nor did the U.S. Treasury act inequitably to GM’s creditors, who were assisted, and not injured, by the U.S. Treasury’s efforts to keep GM alive and to forestall a liquidation of the company.

GM had provided a business plan to Congress under which GM might restore itself to profitability, but it was widely perceived to be unsatisfactory. The U.S. Treasury required GM to submit a proposed business plan to demonstrate its future competitiveness that went significantly farther than the one GM had submitted to Congress. As conditions to the U.S. Treasury's willingness to provide financing, GM was to:

(i) reduce its approximately \$27 billion in unsecured public debt by no less than two-thirds;

(ii) reduce its total compensation to U.S. employees so that by no later than December 31, 2009, such compensation would be competitive with Nissan, Toyota, or Honda in the U.S.;

(iii) eliminate compensation or benefits to employees who had been discharged, furloughed, or idled, other than customary severance pay;

(iv) apply, by December 31, 2009, work rules for U.S. employees in a manner that would be competitive with the work rules for employees of Nissan, Toyota, or Honda in the U.S.; and

(v) make at least half of the \$20 billion contribution that GM was obligated to make to a VEBA⁷ Trust for UAW retirees ("**VEBA Trust**") in the form of common stock, rather than cash.

⁷ GM has used trusts qualified as "voluntary employee beneficiary associations" under the Internal Revenue Code (each, a "**VEBA**"), to hold reserves to meet GM's future obligations to provide healthcare and life insurance benefits ("**OPEB**") to its salaried and hourly employees upon retirement. In substance, the employer makes contributions to the VEBA, and the VEBA funds the health benefits to the retirees.

Thereafter, in March 2009, Treasury indicated that if GM was unable to complete an effective out-of-court restructuring, it should consider a new, more aggressive, viability plan under an expedited Court-supervised process to avoid further erosion of value. In short, GM was to file a bankruptcy petition and take prompt measures to preserve its value while there was still value to save.

The Treasury Prepetition Loan agreement (whose formal name was “Loan and Security Agreement,” or “LSA”) provided that, if, by March 31, 2009, the President’s designee hadn’t issued a certification that GM had taken all steps necessary to achieve long-term viability, then the loans due to Treasury would become due and payable 30 days thereafter. And on March 30, the President announced that the viability plan proposed by GM was not satisfactory, and didn’t justify a substantial new investment of taxpayer dollars.

But rather than leaving GM to simply go into liquidation, the President stated that the U.S. Government would provide assistance to avoid such a result, *if* GM took the necessary additional steps to justify that assistance—including reaching agreements with the UAW, GM’s bondholders, and the VEBA Trust. The conditions to federal assistance required substantial debt reduction and the submission of a revised business plan that was more aggressive in both scope and timing.

As an alternative to liquidation, the President indicated that the U.S. Treasury would extend to GM adequate working capital for a period of another 60 days to enable it to continue operations. And as GM’s largest secured creditor, the U.S. Treasury would negotiate with GM to develop and implement a more aggressive and comprehensive viability plan. The President also stated that GM needed a “fresh start to implement the

restructuring plan,” which “may mean using our [B]ankruptcy [C]ode as a mechanism to help [it] restructure quickly and emerge stronger.” The President explained:

What I’m talking about is using our existing legal structure as a tool that, with the backing of the U.S. Government, can make it easier for General Motors . . . to *quickly* clear away old debts that are weighing [it] down so that [it] can get back on [its] feet and onto a path to success; a tool that we can use, even as workers stay on the job building cars that are being sold.

What I’m not talking about is a process where a company is simply broken up, sold off, and no longer exists. We’re not talking about that. And what I’m *not talking about is a company that’s stuck in court for years, unable to get out.*⁸

The U.S. Treasury and GM subsequently entered into amended credit agreements for the Treasury Prepetition Loan to provide for an additional \$2 billion in financing that GM borrowed on April 24, 2009, and another \$4 billion that GM borrowed on May 20, 2009. The funds advanced to GM under the Treasury Prepetition Loan—ultimately \$19.4 billion in total (all on a senior secured basis)—permitted GM to survive through the date of the filing of its bankruptcy case.

On June 1, 2009 (the “**Filing Date**”), GM filed its chapter 11 petition in this Court.

6. GM’s First Quarter Results

On May 8, 2009, about three weeks before the Filing Date, GM announced its first quarter 2009 results. They presented a grim financial picture, and equally grim trends. Specifically:

⁸ Emphasis added.

(a) GM's total net revenue decreased by \$20 billion (or 47.1%) in the first three months of 2009, as compared to the corresponding period in 2008;

(b) Operating losses increased by \$5.1 billion from the prior quarter;

(c) During this same period, GM had negative cash flow of \$9.4 billion;

(d) Available liquidity deteriorated by \$2.6 billion; and

(e) Sales by GM dealers in the U.S. fell to approximately 413,000 vehicles in that first quarter—a decline of approximately 49% as compared to the corresponding period in 2008.

7. The 363 Transaction

As noted above, in connection with providing financing, Treasury advised GM that, if an out-of-court restructuring was not possible,⁹ GM should consider the bankruptcy process. That would enable GM to implement a transaction under which substantially all GM's assets would be purchased by a Treasury-sponsored purchaser (subject to any higher or better offer), in an expedited process under section 363 of the Code.

Under this game plan, the Purchaser would acquire the purchased assets; create a New GM; and operate New GM free of any entanglement with the bankruptcy cases. If the sale could be accomplished quickly enough, before GM's value dissipated as a result of continuing losses and consumer uncertainty, the 363 sale would thereby preserve the

⁹ GM tried to accomplish an out-of-court restructuring, as suggested, but was unsuccessful.

going concern value; avoid systemic failure; provide continuing employment; protect the many communities dependent upon the continuation of GM's business, and restore consumer confidence.

To facilitate the process, the U.S. Treasury and the governments of Canada and Ontario (through their Export Development Canada ("EDC"))¹⁰ agreed to provide DIP financing for GM through the chapter 11 process. But they would provide the DIP financing *only* if the sale of the purchased assets occurred on an *expedited* basis. That condition was imposed to:

- (i) preserve the value of the business;
- (ii) restore (or at least minimize further loss of) consumer confidence;
- (iii) mitigate the increasing damage that GM itself, and the industry, would suffer if GM's major business operations were to remain in bankruptcy; and
- (iv) avoid the enormous costs of financing a lengthy chapter 11 case.

Treasury also agreed to provide New GM with adequate post-acquisition financing.

Importantly, the DIP financing to be furnished by the U.S. Treasury and EDC is the only financing that is available to GM. The U.S. Treasury (with its Canadian EDC co-lender) is the only entity that is willing to extend DIP financing to GM. Other efforts to obtain such financing have been unsuccessful. Absent adequate DIP financing, GM will have no choice but to liquidate. But the U.S. Government has stated it will not

¹⁰ The Canadian EDC participation was sizeable—approximately \$3 billion with approximately an additional \$6 billion to be provided later.

provide DIP financing without the 363 Transaction, and the DIP financing will come to an end if the 363 Transaction is not approved by July 10. Without such financing, these cases will plunge into a liquidation.

Alternatives to a sale have turned out to be unsuccessful, and offer no hope of success now. In accordance with standard section 363 practice, the 363 Transaction was subject to higher and better offers, but none were forthcoming. The Court finds this hardly surprising. 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.

In light of GM's substantial secured indebtedness, approximately \$50 billion, the only entity that has the financial wherewithal and is qualified to purchase the assets—and the only entity that has stepped forward to make such a purchase—is the U.S. Treasury-sponsored Purchaser. But the Purchaser is willing to proceed only under an expedited sale process under the Bankruptcy Code.

8. The Liquidation Alternative

In connection with its consideration of alternatives, GM secured an analysis (the “**Liquidation Analysis**”), prepared by AlixPartners LLP, of what GM's assets would be worth in a liquidation. The Liquidation Analysis concluded that the realizable value of the assets of GM (net of the costs of liquidation) would range between approximately \$6 billion and \$10 billion. No evidence has been submitted to the contrary. This was in the context of an assumed \$116.5 billion in general unsecured claims, though this could increase with lease and contract rejection claims and pension termination claims.

While the Liquidation Analysis projected some recoveries for secured debt and administrative and priority claims, it concluded that there would be *no recovery whatsoever* for unsecured creditors. The Court has no basis to doubt those conclusions. The Court finds that in the event of a liquidation, unsecured creditors would recover nothing.

9. Fairness of the Transaction

Before the 363 Transaction was presented for Court approval, GM's Board of Directors (the "**Board**") (all but one of whose members were independent, and advised by the law firm of Cravath, Swaine & Moore), received a fairness opinion, dated May 31, 2009 (the "**Fairness Opinion**"), from Evercore Group L.L.C. ("**Evercore**").

The Fairness Opinion's conclusion was that the purchase price was fair to GM, from a financial point of view. No contrary evidence has been submitted to the Court.

10. Specifics of the Transaction

The sale transaction, as embodied in the MPA and related documents, is complex. Its "deal points" can be summarized as follows:

(a) Acquired and Excluded Assets

Under the Sale, New GM will acquire all of Old GM's assets, with the exception of certain assets expressly excluded under the MPA (respectively, the "**Purchased Assets**" and the "**Excluded Assets**"). The Excluded Assets chiefly consist of:

- (i) \$1.175 billion in cash or cash equivalents;
- (ii) equity interests in certain Saturn and other entities;
- (iii) certain real and personal property;
- (iv) bankruptcy avoidance actions;
- (v) certain employee benefit plans; and

(vi) certain restricted cash and receivables.

(b) Assumed and Excluded Liabilities

Old GM will retain all liabilities except those defined in the MPA as “**Assumed Liabilities**.” The Assumed Liabilities include:

(i) product liability claims arising out of products delivered at or after the Sale transaction closes (the “**Closing**”);

(ii) the warranty and recall obligations of both Old GM and New GM;

(iii) all employment-related obligations and liabilities under any assumed employee benefit plan relating to employees that are or were covered by the UAW collective bargaining agreement;

and—by reason of an important change that was made in the MPA after the filing of the motion—

(iv) broadening the first category substantially, *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*.

The liabilities being retained by Old GM include:

(i) product liability claims arising out of products delivered prior to the Closing (to the extent they weren’t assumed by reason of the change in the MPA after the filing of objections);

(ii) liabilities for claims arising out of exposure to asbestos;

(iii) liabilities to third parties for claims based upon “[c]ontract, tort or any other basis”;

(iv) liabilities related to any implied warranty or other implied obligation arising under statutory or common law; and

(v) employment-related obligations not otherwise assumed, including, among other obligations, those arising out of the employment, potential employment, or termination of any individual (other than an employee covered by the UAW collective bargaining agreement) prior to or at the Closing.

(c) Consideration

Old GM is to receive consideration estimated to be worth approximately \$45 billion, plus the value of equity interests that it will receive in New GM. It will come in the following forms:

(i) a credit bid by the U.S. Treasury and EDC, who will credit bid the majority of the indebtedness outstanding under their DIP facility and the Treasury Prepetition Loan;

(ii) the assumption by New GM of approximately \$6.7 billion of indebtedness under the DIP facilities, plus an additional \$1.175 billion to be advanced by the U.S. Treasury under a new DIP facility (the “**Wind Down Facility**”) whose proceeds will be used by Old GM to wind down its affairs;

(iii) the surrender of the warrant that had been issued by Old GM to Treasury in connection with the Treasury Prepetition Loan;

(iv) 10% of the post-closing outstanding shares of New GM, plus an additional 2% if the estimated amount of allowed prepetition general unsecured claims against Old GM exceeds \$35 billion;

(v) two warrants, each to purchase 7.5% of the post-closing outstanding shares of New GM, with an exercise price based on a \$15 billion equity valuation and a \$30 billion equity valuation, respectively; and

(vi) the assumption of liabilities, including those noted above.

(d) Ownership of New GM

Under the terms of the Sale, New GM will be owned by four entities.

(i) Treasury will own 60.8% of New GM's common stock on an undiluted basis. It also will own \$2.1 billion of New GM Series A Preferred Stock;

(ii) EDC will own 11.7% of New GM's common stock on an undiluted basis. It also will own \$400 million of New GM Series A Preferred Stock;

(iii) A New Employees' Beneficiary Association Trust ("New VEBA") will own 17.5% of New GM's common stock on an undiluted basis. It also will own \$6.5 billion of New GM's Series A Preferred Stock, and a 6-year warrant to acquire 2.5% of New GM's common stock, with an exercise price based on \$75 billion total equity value; and

(iv) Finally, if a chapter 11 plan is implemented as contemplated under the structure of the Sale transaction, Old GM will own 10% of New GM's common stock on an undiluted basis. In addition, if the allowed prepetition general unsecured claims against Old GM exceed \$35 billion, Old GM will be issued an additional 10 million shares, amounting to

approximately 2% of New GM's common stock. Old GM will also own the two warrants mentioned above.

(e) Other Aspects of Transaction

New GM will make an offer of employment to all of the Sellers' non-unionized employees and unionized employees represented by the UAW. Substantially all of old GM's executory contracts with direct suppliers are likely to be assumed and assigned to New GM.

After the Closing, New GM will assume all liabilities arising under express written emission and limited warranties delivered in connection with the sale of new vehicles or parts manufactured or sold by Old GM.

One of the requirements of the U.S. Treasury, imposed when the Treasury Prepetition Loan was put in place, was the need to negotiate a new collective bargaining agreement which would allow GM to be fully competitive, and "equitize"—*i.e.*, convert to equity—at least one half of the obligation GM had to the UAW VEBA. Ultimately GM did so. New GM will make future contributions to the New VEBA that will provide retiree health and welfare benefits to former UAW employees and their spouses. Also, as part of the 363 Transaction, New GM will be the assignee of revised collective bargaining agreements with the UAW, the terms of which were recently ratified—though contingent upon the approval of the entirety of these motions.

(f) The Proposed Sale Order

Though GM's request has been narrowed, as noted above, to provide that New GM will assume liability for product liability claims arising from operation of GM vehicles occurring after the closing of the 363 Transaction (regardless of when the product was purchased), GM asks this Court, as in the *Chrysler* case, to authorize the

Sale free and clear of all other “liens, claims, encumbrances and other interests,” including, specifically, “all successor liability claims.”

To effectuate this result, GM has submitted a proposed order to the Court (the “**Proposed Sale Order**”) that contains provisions directed at cutting off successor liability except in the respects where successor liability was contractually assumed.

First, the Proposed Sale Order contains a finding—and a decretal provision to similar effect—that the Debtors may sell the Purchased Assets free and clear of all liens, claims, encumbrances, and other interests, including rights or claims based on any successor or transferee liability.

Second, the Proposed Sale Order would enjoin all persons (including “litigation claimants”) holding liens, claims, encumbrances, and other interests, including rights or claims based on any successor or transferee liability, from asserting them against New GM or the Purchased Assets.¹¹

11. Contingent Liabilities

Certain types of GM liabilities are contingent and difficult to quantify. GM’s most recent quarterly report noted present valued contingent liabilities of \$934 million for product liability, \$627 million for asbestos liability, \$307 million for other litigation liability, and \$294 million for environmental liability.

12. Agreement with UAW

Workers in the U.S. do not have government provided healthcare benefits of the type that the employees of many of GM’s foreign competitors do. Over the years, GM and the other members of the Big Three committed themselves to offer many of those

¹¹ Proposed Sale Order ¶ 8.

healthcare benefits, resulting in decreased competitiveness and enormous liabilities. GM tried to reduce the costs of healthcare benefits for its employees, but these costs continued to substantially escalate. Many of these costs were in the form of obligations to pay healthcare costs of union employees on retirement.

In 2007 and 2008, GM settled various controversies with respect to its healthcare obligations by entering into an agreement (the “**2008 UAW Settlement Agreement**”), generally providing that responsibility for providing retiree healthcare would permanently shift from GM to a new plan that was independent of GM. GM would no longer have to pay for the benefits themselves, but instead would have to make specified contributions aggregating approximately \$20.56 billion to be made by GM into the VEBA Trust. The 2008 UAW Settlement Agreement, therefore, fixed and capped GM’s obligations—but in a very large amount.

As part of the 363 Transaction, the Purchaser and the UAW have reached a resolution addressing the ongoing provision of those benefits. New GM will make contributions to the New VEBA, which will have the obligation to fund the UAW retiree health and welfare benefits. And under the “**UAW Retiree Settlement Agreement**,” New GM will put value into the New VEBA, which will then have the obligation to fund retiree medical benefits for the Debtors’ retirees and surviving spouses represented by the UAW (the “**UAW-Represented Retirees**”).

New GM will also assume modified and duly ratified collective bargaining agreements entered into by and between the Debtors and the UAW.

13. Need for Speed

GM and the U.S. Treasury say that the 363 Transaction must be approved and completed quickly. The Court finds that they are right.

Absent prompt confirmation that the sale has been approved and that the transfer of the assets will be implemented, GM will have to liquidate. There are no realistic alternatives available.

There are no merger partners, acquirers, or investors willing and able to acquire GM's business. Other than the U.S. Treasury and EDC, there are no lenders willing and able to finance GM's continued operations. Similarly, there are no lenders willing and able to finance GM in a prolonged chapter 11 case.

The continued availability of the financing provided by Treasury is expressly conditioned upon approval of this motion by July 10, and prompt closing of the 363 Transaction by August 15. Without such financing, GM faces immediate liquidation.

The Court accepts as accurate and truthful the testimony by GM CEO Fritz Henderson at the hearing:

Q. Now, if the U.S. Treasury does not fund on July 10th and the sale order is not entered by that date, what options are there for GM at that point?

A. Well, if they don't continue, we would liquidate.¹²

The July 10 deadline is important because the U.S. Treasury, like GM itself, has been very concerned about the business status of the company in a bankruptcy process.¹³ GM did worse than expected in fleet sales in June, as fleet sales customers pulled back their orders because they didn't know their status in the bankruptcy. Although the company did *better* on retail sales than expected in June, it did so for a number of reasons, one of

¹² Audio Recording of Testimony of June 30, 2009.

¹³ *Id.* at 85.

which was the expectation that the chapter 11 case would move quickly, and that the company, in the 363 process, would be successful.¹⁴ And results were “still terrible.”¹⁵

Even if funding were available for an extended bankruptcy case, many consumers would not consider purchasing a vehicle from a manufacturer whose future was uncertain and that was entangled in the bankruptcy process.

Thus the Court agrees that a lengthy chapter 11 case for the Debtors is not an option. It also agrees with the Debtors and the U.S. Government that it is not reasonable to expect that a reorganization plan could be confirmed in the next 60 days (*i.e.*, 90 days from the Filing Date).

The Auto Task Force talked to dozens of experts, industry consultants, people who had observed General Motors for decades, management, and people who were well versed in the bankruptcy process as part of its planning and work on this matter. None of them felt that GM could survive a traditional chapter 11 process. The Auto Task Force learned of views by one of the leading commentators on GM that GM would be making a tragic mistake by pursuing a bankruptcy filing. It became clear to the Auto Task Force that a bankruptcy with a traditional plan confirmation process would be so injurious to GM as to not allow for GM’s viability going forward.¹⁶

The Court accepts this testimony, and so finds. A 90 day plan confirmation process would be wholly unrealistic. In fact, the notion that a reorganization with a plan confirmation could be completed in 90 days in a case of this size and complexity is ludicrous, especially when one is already on notice of areas of likely controversy.

¹⁴ *Id.* at 85-86.

¹⁵ *Id.* at 103.

¹⁶ Audio Recording of Testimony of July 1, 2009.

14. Ultimate Facts

The Court thus makes the following findings of ultimate facts:

1. There is a good business reason for proceeding with the 363 Transaction now, as contrasted to awaiting the formulation and confirmation of a chapter 11 plan.
2. There is an articulated business justification for proceeding with the 363 Transaction now.
3. The 363 Transaction is an appropriate exercise of business judgment.
4. The 363 Transaction is the only available means to preserve the continuation of GM's business.
5. The 363 Transaction is the only available means to maximize the value of GM's business.
6. There is no viable alternative to the 363 Transaction.
7. The only alternative to the 363 Transaction is liquidation.
8. No unsecured creditor will here get less than it would receive in a liquidation.
9. The UAW Settlement is fair and equitable, and is in the best interests of both the estate and UAW members.
10. The secured debt owing to the U.S. Government and EDC (both postpetition and, to the extent applicable, prepetition) is not subject to recharacterization as equity or equitable subordination, and could be used for a credit bid.
11. The Purchaser is a purchaser in good faith.

Discussion

The substantive objections break down into a number of categories by concept, and the Court thus considers them in that fashion.

1. Sale Under Section 363

Determining the propriety of the 363 Transaction requires confirming that section 363 can be utilized for the sale of this much of GM's assets before confirmation of a reorganization plan; that the necessary showings for approval of any section 363 sale have been made; that the 363 Transaction is not a "*sub rosa*" plan; and that various related issues have been satisfactorily resolved. The Court considers these in turn.

(a) Utilization of Section 363

The F&D Bondholders, bondholder Oliver Addison Parker ("**Parker**") and several other objectors contend that by disposing of so much of its assets in a single section 363 sale, GM improperly utilizes section 363. Implicit in that argument is the contention that even under the facts here, section 363 cannot be used to dispose of all or the bulk of a debtor's assets, and that such can be achieved only by means of a reorganization plan. The Court disagrees.

As usual, the Court starts with textual analysis. With exceptions not relevant here, section 363 of the Bankruptcy Code provides, in relevant part:

(b)(1) The trustee,^[17] after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate....

¹⁷ In all respects relevant here, where (as here, and as is the norm) the debtor remains in possession and the court has not ordered otherwise, the debtor has the rights of the trustee. *See* Bankruptcy Code section 1107(a) ("Subject to . . . such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation . . . of a trustee serving in a case under this chapter.").

Notably, section 363 has no carveouts from its grant of authority when applied in cases under chapter 11. Section 363 does not provide, in words or substance, that it may not be used in chapter 11 cases for dispositions of property exceeding any particular size, or where the property is of such importance that it should alternatively be disposed of under a plan. Nor does any other provision of the Code so provide.

Then, section 1123 of the Code—captioned “Contents of plan,” a provision in chapter 11 which sets forth provisions that a chapter 11 reorganization plan *must* do or contain, and *may* do or contain—provides, as one of the things that a plan *may* do:

provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests....¹⁸

But neither section 363 nor section 1123(b)(4) provides that resort to 1123(b)(4) is the *only* way by which all or substantially all of the assets can be sold in a chapter 11 case. Most significantly, neither section 1123(b)(4) nor any other section of the Code trumps or limits section 363, which by its plain meaning permits what GM here proposes to do.

However, the issue cannot be addressed by resort to “plain meaning” or textual analysis alone. GM’s ability to sell the assets in question under section 363 is governed by an extensive body of caselaw. Bankruptcy courts in this Circuit decide issues of the type now before the Court under binding decisions of the U.S. Supreme Court and the Second Circuit Court of Appeals, each of which (particularly the latter) has spoken to the issues here. And bankruptcy courts also look to other bankruptcy court decisions, which, in this District and elsewhere, have dealt with very similar facts. While an opinion of one

¹⁸ Section 1123(b)(4).

bankruptcy judge in this District is not, strictly speaking, binding on another, it is the practice of this Court to grant great respect to the earlier bankruptcy court precedents in this District,¹⁹ particularly since they frequently address issues that have not been addressed at the Circuit level.

Here this Court has the benefit of the decisions of Bankruptcy Judge Gonzalez in the *Chrysler* chapter 11 cases²⁰—affirmed by the Second Circuit, for substantially the reasons Judge Gonzalez set forth in his opinion—on facts extraordinarily similar to those here.²¹ Even more importantly, this Court also has the benefit of the Second Circuit’s decisions in *Lionel*,²² *LTV*,²³ *Financial News Network*,²⁴ *Gucci*,²⁵ and *Iridium*,²⁶ which

¹⁹ See, e.g., *In re Adelphia Communications Corp.*, 359 B.R. 65, 72 n.13 (Bankr. S.D.N.Y. 2007) (“This Court has been on record for many years as having held that the interests of predictability in this District are of great importance, and that where there is no controlling Second Circuit authority, it follows the decisions of other bankruptcy judges in this district in the absence of clear error.”).

²⁰ See *In re Chrysler LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009) (“*Chrysler*”), and 405 B.R. 79 (Bankr. S.D.N.Y. 2009) (“*Chrysler-Standing*”) (Gonzalez, J.), *aff’d for substantially the reasons stated in the opinions below*, No. 09-2311-bk (2d Cir. Jun. 5, 2009) (“*Chrysler-Circuit*”), *temporary stay vacated and further stay denied*, 129 S.Ct. 2275 (Jun. 9, 2009).

²¹ Though the similarities between this case and *Chrysler* are many, there is a noteworthy difference, as that case had one issue not before the Court here. In *Chrysler*, Judge Gonzalez had to analyze rights of participants in a secured lending facility who quarreled with their administrative agent’s decision to consent to a sale free and clear of secured creditor claims and interests. See *Chrysler*, 405 B.R. at 100-104. Here there was no objection by secured creditors, other than a single limited objection by a secured creditor with a lien on property to be transferred, looking for adequate protection as part of the sale. Here the objecting bondholders are holders of *unsecured* debt, and thus lack the greater rights that secured creditors have in bankruptcy cases. Of course, the *Chrysler* case never really concerned, as some asserted, an assault on secured creditors’ rights; it merely involved dissident minority participants in a secured lending facility being bound by the actions of their agent, pursuant to contractual agreements with the agent that they or their predecessors had agreed to.

²² *Comm. of Equity Sec. Holders v. Lionel Corp.* (*In re Lionel Corp.*), 722 F.2d 1063, (2d Cir. 1983) (“*Lionel*”).

²³ *Official Comm. of Unsecured Creditors of LTV Aerospace & Defense Co. v. LTV Corp.* (*In re Chateaugay Corp.*), 973 F.2d 141 (2d Cir. 1992) (“*LTV*”).

²⁴ *Consumer News & Bus. Channel P’ship v. Fin. News Network Inc.* (*In re Fin. News Network Inc.*), 980 F.2d 165 (2d Cir. 1992) (“*FNN*”).

²⁵ *Licensing By Paolo, Inc. v. Sinatra* (*In re Gucci*), 126 F.3d 380 (2d Cir. 1997) (“*Gucci*”).

confirm that section 363 sales of major assets may be effected before confirmation, and lay out the circumstances under which that is appropriate. And this Court also can draw upon the Supreme Court's decision in *Piccadilly Cafeterias*,²⁷ which, while principally addressing other issues, recognized the common practice in chapter 11 cases of selling the bulk of a debtor's assets in a section 363 sale, to be followed by confirmation of a liquidating plan.

In *Chrysler*, Judge Gonzalez discussed at great length the evolution of the law in this area and its present requirements,²⁸ and this Court need not do so in comparable length. Judge Gonzalez, and the Second Circuit affirming him, dealt with the exact issue presented here: whether under Bankruptcy Code section 363, the bulk of the assets of an estate can be sold before confirmation. As Judge Gonzalez noted, *Lionel*—upon whose standards all of the cases considering pre-confirmation section 363 sales have been based—speaks directly to whether assets of a bankruptcy estate can be sold “out of the ordinary course of business and prior to acceptance and outside of any plan of reorganization.”²⁹

The *Lionel* court expressly recognized that section 363(b) “seems on its face to confer upon the bankruptcy judge virtually unfettered discretion” to authorize sales out of the ordinary course.³⁰ And the *Lionel* court further declared that “a bankruptcy judge

²⁶ *Motorola v. Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452 (2d Cir. 2007) (“*Iridium*”).

²⁷ *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, --- U.S. ---, --- n.2, 128 S.Ct. 2326, 2331 n.2, 171 L.Ed.2d 203 (2008) (“*Piccadilly Cafeterias*”).

²⁸ *See Chrysler*, 405 B.R. at 94-96.

²⁹ *Id.* at 94.

³⁰ 722 F.2d at 1069.

must not be shackled with unnecessarily rigid rules when exercising the undoubtedly broad administrative power granted him under the Code,”³¹ and that:

To further the purposes of Chapter 11 reorganization, a bankruptcy judge must have substantial freedom to tailor his orders to meet differing circumstances. This is exactly the result a liberal reading of § 363(b) will achieve.³²

Nevertheless, the Circuit considered it inappropriate to authorize use of section 363(b) to the full extent that section 363(b)’s plain language—with its absence of any express limitations—would suggest. Instead, the Circuit established a standard that was in substance one of common law, but grounded in the overall structure of the Bankruptcy Code. The Second Circuit “reject[ed] the requirement that only an emergency permits the use of § 363(b).”³³ But it also “reject[ed] the view that § 363 grants the bankruptcy judge carte blanche.”³⁴ Concerned that such a construction would “swallow[] up Chapter 11’s safeguards,”³⁵ the *Lionel* court established the more nuanced balancing test that the lower courts in this Circuit have applied for more than 25 years. The Circuit declared:

The history surrounding the enactment in 1978 of current Chapter 11 and the logic underlying it buttress our conclusion that *there must be some articulated business justification*, other than appeasement of major creditors, for using, selling or leasing property out of the ordinary course of business before the bankruptcy judge may order such disposition under section 363(b).³⁶

It went on to say that:

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 1070 (emphasis added).

Resolving the apparent conflict between Chapter 11 and § 363(b) does not require an all or nothing approach. Every sale under § 363(b) does not automatically short-circuit or side-step Chapter 11; nor are these two statutory provisions to be read as mutually exclusive. Instead, if a bankruptcy judge is to administer a business reorganization successfully under the Code, then ... some play for the operation of both § 363(b) and Chapter 11 must be allowed for.³⁷

And it went on to set forth the rule for which *Lionel* is remembered:

The rule we adopt requires that a judge determining a § 363(b) application expressly find from the evidence presented before him at the hearing *a good business reason* to grant such an application.³⁸

With no less than five decisions from the Circuit holding similarly³⁹—not counting the Circuit’s recent affirmance of *Chrysler*—it is plain that in the Second Circuit, as elsewhere,⁴⁰ even the entirety of a debtor’s business may be sold without

³⁷ *Id.* at 1071.

³⁸ *Id.* (emphasis added).

³⁹ See *Lionel*; *LTV*, 973 F.2d at 143-44 (“In *Lionel*, we adopted a rule that ‘requires that a judge determining a § 363(b) application expressly find from the evidence presented before him at the hearing a good business reason to grant such an application,’” and, quoting *Lionel*, reiterating that “First and foremost is the notion that a bankruptcy judge must not be shackled with unnecessarily rigid rules when exercising the undoubtedly broad administrative power granted him under the Code,” and that “a bankruptcy judge must have substantial freedom to tailor his orders to meet differing circumstances.”); *FNN*, 980 F.2d at 169 (in considering sale outside of a plan of reorganization, “a bankruptcy judge must not be shackled with unnecessarily rigid rules when exercising the undoubtedly broad administrative power granted him under the [Bankruptcy] Code”); *Gucci*, 126 F.3d at 387 (“A sale of a substantial part of a Chapter 11 estate . . . may be conducted if a good business reason exists to support it.”); *Iridium*, 478 F.3d at 466 (“In this Circuit, the sale of an asset of the estate under § 363(b) is permissible if the judge determining [the] § 363(b) 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.”).

⁴⁰ See, e.g., *In re Decora Indus.*, No. 00-4459, 2002 WL 32332749, at *3 (D.Del. May 20, 2002) (Farnan, J.) (approving a 363 sale, finding a “sound business purpose” where “the Court understands the precarious financial and business position of Debtors”; their only source of outside financing was a DIP facility that would soon expire, with no source of alternative financing, and where the alternatives were either the proposed sale transaction or termination of business operations and liquidation).

See also 3 COLLIER ON BANKRUPTCY ¶ 363.02[3] (15th ed. rev. 2009) (“*Collier*”) (While sales of

waiting for confirmation when there is a good business reason for doing so. Likewise, in *Piccadilly Cafeterias*, the Supreme Court, while principally addressing a different issue,⁴¹ recognized the use of section 363 sales under which all or substantially all of a debtor's assets are sold. The Supreme Court stated:

Chapter 11 bankruptcy proceedings ordinarily culminate in the confirmation of a reorganization plan. *But in some cases, as here, a debtor sells all or substantially all its assets under § 363(b)(1) before seeking or receiving plan confirmation.* In this scenario, the debtor typically submits for confirmation a plan of liquidation (rather than a traditional plan of reorganization) providing for the distribution of the proceeds resulting from the sale.⁴²

In making the determination as to whether there is a good business reason to effect a 363 sale before confirmation, the *Lionel* court directed that a court should consider all of the “salient factors pertaining to the proceeding” and “act to further the diverse interests of the debtor, creditors and equity holders.”⁴³ It then set forth a nonexclusive list to guide a court in its consideration of the issue:

- (a) the proportionate value of the asset to the estate as a whole;
- (b) the amount of elapsed time since the filing;

substantial portions of a debtor's assets under section 363 must be scrutinized closely by the court, “[i]t is now generally accepted that section 363 allows such sales 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.”).

⁴¹ There the issue involved the debtor's entitlement to the “stamp-tax” exemption of Bankruptcy Code section 1146, after a 363 sale of the entirety of the debtor's assets and confirmation of a plan distributing the proceeds of the earlier 363 sale.

⁴² 128 S.Ct. at 2331 n.2 (emphasis added).

⁴³ 722 F.2d at 1071.

(c) the likelihood that a plan of reorganization will be proposed and confirmed in the near future;

(d) the effect of the proposed disposition on future plans of reorganization;

(e) the proceeds to be obtained from the disposition vis-a-vis any appraisals of the property;

(f) which of the alternatives of use, sale or lease the proposal envisions; and “most importantly perhaps,”⁴⁴

(g) whether the asset is increasing or decreasing in value.⁴⁵

Importantly, the *Lionel* court also declared that a bankruptcy court must consider if those opposing the sale produced some evidence that the sale was not justified.⁴⁶

As the *Lionel* court expressly stated that the list of salient factors was not exclusive,⁴⁷ this Court might suggest a few more factors that might be considered, along with the preceding factors, in appropriate cases:

(h) Does the estate have the liquidity to survive until confirmation of a plan?

(i) Will the sale opportunity still exist as of the time of plan confirmation?

⁴⁴ *Id.*

⁴⁵ *Id.* at 1071.

⁴⁶ *Id.*

⁴⁷ *Id.* (“This list is not intended to be exclusive, but merely to provide guidance to the bankruptcy judge.”); accord *Iridium*, 478 F.3d at 466 n.21.

(j) If not, how likely is it that there will be a satisfactory alternative sale opportunity, or a stand-alone plan alternative that is equally desirable (or better) for creditors? And

(k) Is there a material risk that by deferring the sale, the patient will die on the operating table?

Each of the factors that the *Lionel* court listed, and the additional ones that this Court suggests, go to the ultimate questions that the *Lionel* court identified: Is there an “articulated business justification” and a “good business reason” for proceeding with the sale without awaiting the final confirmation of a plan.

As discussed in Section 1(c) below, a debtor cannot enter into a transaction that “would amount to a *sub rosa* plan of reorganization” or an attempt to circumvent the chapter 11 requirements for confirmation of a plan of reorganization.⁴⁸ If, however, the transaction has “a proper business justification” which has the potential to lead toward confirmation of a plan and is not to evade the plan confirmation process, the transaction may be authorized.⁴⁹ Thus as observed in *Chrysler*:

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 the proceeds of the sale. This strategy is employed, for example, when there is a need to preserve the going concern value because revenues are not sufficient to support the continued operation of the business and there are no viable sources for financing.⁵⁰

As further observed in *Chrysler*, several sales seeking to preserve going concern value have recently been approved in this district, and going back further, many more

⁴⁸ See *Chrysler*, 405 B.R. at 95-96.

⁴⁹ *Id.* at 96.

⁵⁰ *Id.* (citations omitted).

have been, as debtors not infrequently could not survive until a plan could be confirmed. In addition to *BearingPoint*, which Judge Gonzalez expressly noted, many other 363 sales have been approved in chapter 11 cases on this Court's watch, after appropriate consideration of *Lionel* and its progeny. In *Our Lady of Mercy Hospital*,⁵¹ for example, the hospital was sold as a going concern before it ran out of money, saving about 2,300 jobs and a critical supplier of medical services in the Bronx.

In *Adelphia*,⁵² a sale under a *plan* was originally proposed by the debtors, but a section 363 sale had to be effected instead, when intercreditor disputes made it impossible to confirm a plan in time to save the sale opportunity, and more than \$17 billion in sales proceeds nearly was lost.⁵³ Anyone with a knowledge of chapter 11 cases in this District can well understand why none of Harry Wilson's advisors thought that GM could survive a normal plan confirmation process.

After *Lionel*, *LTV*, *FNN*, *Gucci*, *Iridium* and, of course, *Chrysler*, it is now well established that a chapter 11 debtor may sell all or substantially all its assets pursuant to section 363(b) prior to confirmation of a chapter 11 plan, when the court finds a good business reason for doing so. And here the Court has made exactly such a finding. In fact, it is hard to imagine circumstances that could more strongly justify an immediate 363 sale. As the Court's Findings of Fact set forth at length, GM, with no liquidity of its own and the need to quickly address consumer and fleet owner doubt, does not have the luxury of selling its business under a plan.

⁵¹ No. 07-10609 (REG), ECF #284.

⁵² No. 02-41729 (REG).

⁵³ See *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 169 (Bankr. S.D.N.Y. 2007) ("**Adelphia-Confirmation**") (describing the history).

And if that is not by itself enough, the U.S. Treasury's willingness to fund GM is contingent upon the approval of the 363 Transaction by July 10. The Court fully understands the unwillingness of the Government to keep funding GM indefinitely—especially to await the resolution of disputes amongst creditors trying to maximize their recoveries. If the 363 Transaction is disapproved, GM will lose its funding and its liquidity on July 10, and its only alternative will be liquidation.⁵⁴

In its summation, the F&D Bondholders Committee stated that it was not inclined to second guess *GM's* view that it had to proceed with a 363 sale, given GM's lack of alternatives, but that the *Court* should step in to tell everyone that a 363 sale was unacceptable. The premise underlying this contention was that the U.S. Government's July 10 deadline was just posturing, and that the Court should assume that the U.S. Government cares so much about GM's survival that the U.S. Government would never let GM die.

⁵⁴ Thus the Court needn't spend extensive time in individualized discussion of each of the more specific factors articulated in *Lionel*, and by this Court, as aids in determining "good business reason." Where the proportionate value of the assets being sold is high, as they are here, Factor (a) (proportionate value of the assets to the estate as a whole) suggests that the situation be given close factual scrutiny—which the Court has attempted to do, in its rather lengthy Findings of Fact above—but at most Factor (a) tips only mildly against approval here. The same is true with respect to Factor (b) (elapsed time since the filing)—since where the need is most pressing, it would be foolhardy to wait. Factors (d) (effect on reorganization), (e) (proceeds to be realized), and (f) (which alternative is proposed) are inapplicable or favor immediate sale, as the Court finds that a standalone plan of reorganization is not possible, that the sale would not change distribution priorities in any ultimate plan, and there are no opportunities to realize greater value. And all of the other factors weigh *heavily* in favor of approval. Factor (g) (whether the asset is increasing or decreasing in value), expressly stated by the Circuit to be most important, *compels* and not just favors immediate sale. So do Factors (h) (lack of liquidity); (i) (no alternative sale opportunity later); (j) (same, along with no stand-alone plan alternative); and (k) the certainty or near certainty that in the absence of this sale, the patient will indeed die on the operating table. (If it matters, the same conclusion follows even if one does not consider the additional factors this Court suggested.)

The Court also notes the critically important absence of proof tending to support a contrary finding, as also required by *Lionel*. See *Lionel*, 722 F.2d at 1071. Opponents of the sale have produced no evidence that the sale is *not* justified.

The Court declines to accept that premise and take that gamble. The problem is not that the U.S. Treasury would walk away from GM if this Court took an extra day or so to reach its decision. The problem is that if the 363 Transaction got off track, especially by the disapproval the F&D Bondholders Committee seeks, the U.S. Government would see that there was no means of early exit for GM; that customer confidence would plummet; and that the U.S. Treasury would have to keep funding GM while bondholders (and, then, perhaps others) jostled to maximize their individual incremental recoveries. The Court fully takes Harry Wilson at his word.

In another matter in the *Adelphia* cases, this Court was faced with quite similar circumstances. The Government had the ability to effect a forfeiture of Adelphia assets, and even to indict Adelphia (as a corporation, in addition to the Rigases), which would destroy most, if not all, of Adelphia's value. The Government had indicted Arthur Andersen, with those exact consequences, but many Adelphia creditors argued that the Government would never do it again. And they objected to an Adelphia settlement that paid \$715 million to the Government, to forestall all of those potential consequences, among others. This Court approved the settlement, and its determination was affirmed on appeal. This Court stated:

Would the DoJ have indicted Adelphia, with the threat to the recoveries for innocent stakeholders that such an indictment would have entailed? One would think not, but the DoJ had done exactly that to Arthur Andersen, with those exact consequences. It was at least prudent for Adelphia's Board to protect the entity under its stewardship from its destruction, and to avoid taking such a gamble.⁵⁵

⁵⁵ *In re Adelphia Commc'ns Corp.*, 327 B.R. 143, 166 (Bankr. S.D.N.Y. 2005) ("*Adelphia Settlement-Bankruptcy*"), *aff'd* 337 B.R. 475 (S.D.N.Y. 2006) (Kaplan, J.) ("*Adelphia*

This Court further stated that “[o]nce more, the Adelphia Board cannot be faulted for declining to bet the company on what would be little more than a guess as to the decision the DoJ would make.”⁵⁶

GM’s counsel noted in summation that the F&D Bondholders Committee was expecting this Court to play Russian Roulette, and the comparison was apt. So that the F&D Bondholders Committee could throw GM into a plan negotiation process, the Court would have to gamble on the notion that the U.S. Government didn’t mean it when it said that it would not keep funding GM. There is no reason why any fiduciary, or any court, would take that gamble. This is hardly the first time that this Court has seen creditors risk doomsday consequences to increase their incremental recoveries, and this Court—which is focused on preserving and maximizing value, allowing suppliers to survive, and helping employees keep their jobs—is not of a mind to jeopardize all of those goals.

Thus there is more than “good business reason” for the 363 Transaction here. The Creditors’ Committee in this case put it better than this Court could:

The simple fact is that there are no other viable bids—indeed no serious expressions of interest—to purchase GM’s assets and no other feasible way for GM to restructure its business to remain viable. The current transaction is the only option on the table. The Court is thus faced with a clear choice: to approve the proposed sale transaction, preserve the going-concern value of the Debtors’ businesses, and maximize substantial value for stakeholders (despite the pain that this course will inflict on numerous innocent parties), or reject the transaction and precipitate the dismantling and liquidation of GM to the detriment of all involved. *Preventing this harm serves the core purposes of the*

Settlement-District”), appeal dismissed, 222 Fed. App. 7, 2006 WL 3826700 (2d Cir. 2006), cert. denied, 128 S.Ct. 114 (2007).

⁵⁶ *Adelphia Settlement-Bankruptcy*, 327 B.R. at 167.

Bankruptcy Code and constitutes a strong business justification under Section 363 of the Code to sell the debtors' assets outside of a plan process.⁵⁷

While because of the size of this case and the interests at stake, GM's chapter 11 case can hardly be regarded as routine, GM's proposed section 363 sale breaks no new ground. This is exactly the type of situation where under the Second Circuit's many holdings, there is good business reason for an immediate sale. GM does not have the luxury to wait for the ultimate confirmation of a plan, and the only alternative to an immediate sale is liquidation.

(b) Compliance with Standards for Approval of Section 363 Sales

With the Court having concluded that the requisite sound business justification exists for a proposed sale of the type proposed here, the inquiry turns to whether the routine requirements for any section 363 sale, and appropriate exercise of the business judgment rule, have been satisfied. The court must be satisfied that (i) notice has been given to all creditors and interested parties; (ii) the sale contemplates a fair and reasonable price; and (iii) the purchaser is proceeding in good faith.⁵⁸

These factors are all satisfied here. Notice was extensively given, and it complied with all applicable rules. As to the sufficiency of the purchase price, the Court is equally satisfied. No other, much less better, offer was received, and the GM Board even secured a fairness opinion from reputable advisors, expressing the opinion that the consideration was, indeed, fair.

⁵⁷ Creditors' Comm. Ltd. Obj. ¶ 3 (emphasis added).

⁵⁸ See, e.g., *In re Betty Owens Sch., Inc.*, 1997 WL 188127, at *4 (S.D.N.Y. Apr. 17, 1997) (Leisure, J.), citing *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991) (Longobardi, J.). See also Judge Farnan's more recent decision in *Decora Industries*, 2002 WL 32332749, at *2.

Finally, the Court has found that the Purchaser has acted in good faith, and as mixed questions of fact and law, the Court now determines (i) that this legal requirement for a sale has been satisfied, and (ii) that the Purchaser is entitled to a good faith purchaser finding—matters that are relevant to the determination under *Betty Owens Illinois School* and the other cases articulating like requirements, and also to the section 363(m) finding that the U.S. Government understandably desires. In ruling that the U.S. Government has indeed acted in good faith, for both of the purposes for which that ruling is relevant, the Court sees no basis for finding material differences in the standard.

While the Bankruptcy Code does not define the “good faith” that protects transactions pursuant to section 363(m) (or, for that matter, the “good faith” that courts require in approving section 363 sales in the first place), the Second Circuit has explained that:

Good faith of a purchaser is shown by the integrity of his conduct during the course of the sale proceedings; where there is a lack of such integrity, a good faith finding may not be made. A purchaser’s good faith is lost by ‘fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.’⁵⁹

Here there is no proof that the Purchaser (or its U.S. and Canadian governmental assignors) showed a lack of integrity in any way. To the contrary, the evidence establishes that the 363 Transaction was the product of intense arms’-length negotiations. And there is no evidence of any efforts to take advantage of other bidders, or get a leg up over them. In fact, the sad fact is that there *were no* other bidders.

⁵⁹ *Gucci*, 126 F.3d at 390 (quoting *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978)); *accord id.* (noting also that the relevant fraudulent, collusive actions are those “specifically intended to affect the sale price or control the outcome of the sale.”); *Chrysler*, 405 B.R. at 106 (same).

Thus, the Court finds that the Purchaser is a good faith purchaser, for sale approval purposes, and also for the purpose of the protections section 363(m) provides.

The Court additionally determines that it finds GM to be in compliance with the requirements of the business judgment rule, commonly used in consideration of 363 sales in this District and elsewhere.⁶⁰ As noted in this Court's decision in *Global Crossing*, and Judge Mukasey's decision in *Integrated Resources*, that rule entails "(1) a business decision, (2) disinterestedness, (3) due care, (4) good faith, and (5) according to some courts and commentators, no abuse of discretion or waste of corporate assets."⁶¹

Here the Court finds it unnecessary to state, one more time, all of the facts that support a finding that such requirements have been satisfied. The GM Board's decision would withstand *ab initio* review, far more than the business judgment test requires.⁶²

(c) "*Sub Rosa*" Plan

The F&D Bondholders, Parker and other objectors also contend that by proposing the 363 Transaction, GM has proposed the implementation of a forbidden "*sub rosa*" plan. The Court disagrees.

⁶⁰ See *In re Global Crossing Ltd.*, 295 B.R. 726, 742-44 (Bankr. S.D.N.Y. 2003), relying heavily on *Official Comm. of Subordinated Bondholders v. Integrated Resources, Inc. (In re Integrated Resources, Inc.)*, 147 B.R. 650 (S.D.N.Y. 1992) (Mukasey, C.J.).

⁶¹ *Global Crossing*, 295 B.R. at 743.

⁶² When the Court considers "disinterestedness," it looks to the disinterestedness of GM's Board and management, and particularly its Board, which is the ultimate decision maker for any corporation. The Court heard no evidence that either the Board or management chose the sale opportunity over any other alternative either because of a conflict of interest, or because the Government told them to. The Court finds instead that GM's Board and management took the pending opportunity to save the company because it was the only responsible alternative available.

Finally, the U.S. and Canadian governments did not become "insiders" skewing any disinterestedness analysis by reason of their assistance to GM. See *Chrysler*, 405 B.R. at 107 ("Nor did the Governmental Entities control the Debtors in that regard [with respect to the *Chrysler* sale transaction] or become 'insiders' of the Debtors.").

While neither section 363 nor any other provision of the Code defines or otherwise mentions “*sub rosa*” plans, or provides that they are impermissible, caselaw (including caselaw in this Circuit and District) recognizes the impropriety of *sub rosa* plans in instances in which they genuinely exist.⁶³ The idea underlying the prohibition against *sub rosa* plans appears in *Braniff*, the case from which the prohibition emerged. It is that “the debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets.”⁶⁴ A proposed 363 sale may be objectionable, for example, when aspects of the transaction dictate the terms of the ensuing plan or constrain parties in exercising their confirmation rights,⁶⁵ such as by placing restrictions on creditors’ rights to vote on a plan.⁶⁶ A 363 sale may also may be objectionable as a *sub rosa* plan if the sale itself seeks to allocate or dictate the distribution of sale proceeds among different classes of creditors.⁶⁷

But none of those factors is present here. The MPA 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

⁶³ See *Iridium*, 478 F.3d at 466 (citing *Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935, 940 (5th Cir. 1983); *Chrysler*, 405 B.R. at 95-96.

⁶⁴ 700 F.2d at 940.

⁶⁵ See *Abel v. Shugrue (In re Ionosphere Clubs, Inc.)*, 184 B.R. 648, 654 & n.6 (S.D.N.Y. 1995).

⁶⁶ See *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).

⁶⁷ See *Contrarian Funds, LLC v. Westpoint Stevens Inc. (In re Westpoint Stevens Inc.)*, 333 B.R. 30, 51 (S.D.N.Y. 2005) (Swain, J.).

value pursuant to a chapter 11 plan subject to confirmation by the Court. A transaction contemplating that does not amount to a *sub rosa* plan.⁶⁸

In the *TWA* chapter 11 case,⁶⁹ substantially all of the airline's assets were sold to American Airlines, in a 363 sale. There too the contention was made that the 363 sale was a *sub rosa* plan. Judge Walsh rejected the contention. He explained:

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).⁷⁰

Here the objectors principally base their arguments on things the *Purchaser* intends to do. They complain of the Purchaser's intention, in connection with the 363 Transaction, to

- (i) be assigned substantially all executory contracts with direct suppliers,
- (ii) make offers of employment to all of the Debtors' nonunionized employees and employees represented by the UAW, and

⁶⁸ See *In re Naron & Wagner, Chartered*, 88 B.R. 85, 88 (Bankr. D. Md. 1988) (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.").

⁶⁹ See *In re Trans World Airlines, Inc.*, 2001 WL 1820326, at *11 (Bankr. D. Del. Apr. 2, 2001) (Walsh, J.).

⁷⁰ 2001 WL 1820326, at *12 (emphasis added).

(iii) be assigned a modified collective bargaining agreement with the UAW, including an agreement to contribute to the New VEBA to fund retiree medical benefits for UAW members and their surviving spouses.

But these do not give rise to a *sub rosa* plan when the first is merely an example of an element of almost *every* 363 sale (where purchasers designate the contracts to be assumed and assigned), and the second and third are actions by the *Purchaser*.

The Court senses a disappointment on the part of dissenting bondholders that the Purchaser did not choose to deliver consideration to them in any manner other than by the Purchaser's delivery of consideration to GM as a whole, pursuant to which bondholders would share like other unsecured creditors—while many supplier creditors would have their agreements assumed and assigned, and new GM would enter into new agreements with the UAW and the majority of the dealers. But that does not rise to the level of establishing a *sub rosa* plan. The objectors' real problem is with the decisions of the Purchaser, not with the Debtor, nor with any violation of the Code or caselaw.

Caselaw also makes 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 liabilities, or because some contract counterparties' contracts would not be assumed. As Judge Walsh observed in *TWA*:

[N]othing in § 363 suggests that disparate treatment of creditors, such as is likely to occur here, disqualifies a transaction from court approval. The purpose of a § 363(b) sale is to transform assets . . . into cash in an effort to maximize value. *Distribution of the value generated in accordance with § 1129 and other priority provisions occurs and is intended to occur subsequent to the sale.*

He further stated:

The treatment of creditors in a § 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.*⁷¹

Last, but hardly least, the *sub rosa* plan contention was squarely raised, and rejected, in *Chrysler*,⁷² which is directly on point and conclusive here.

The *Chrysler* transaction was structured in a fashion very similar to that here, with a combination of sale proceeds to be provided to the seller, assignments of contracts with suppliers, taking on seller employees, and contribution to a VEBA. Judge Gonzalez rejected the contention that the transaction amounted to a *sub rosa* plan. He noted that:

(i) there was no attempt to allocate sale proceeds away from the objectors (there, first lien lenders);⁷³

(ii) the fact that counterparties whose executory contracts were being assumed and assigned under section 365, at the election of the purchaser, gave counterparties a *Code-authorized* “more favorable treatment,” which neither violated the priority rules nor transformed the sale into a *sub rosa* plan;⁷⁴

(iii) the purchaser’s ability to choose which contracts it considered valuable did not change that result;⁷⁵

⁷¹ 2001 WL 1820326, at *11 (emphasis added).

⁷² See 405 B.R. at 97-100.

⁷³ *Id.* at 98.

⁷⁴ *Id.* at 99.

⁷⁵ *Id.*

(iv) in negotiating with groups essential to its viability (such as its workforce) the purchaser was free to provide ownership interests in the new entity as it saw fit;⁷⁶ and that

(v) the purchaser's allocation of value in its own enterprise did not elevate its measures into a *sub rosa* plan.⁷⁷

In connection with the last two points, Judge Gonzalez made a critically important point—that the allocation of value by the purchaser did not affect the *debtor's* interest. In that connection, Judge Gonzalez observed:

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. *The allocation of ownership interests in the new enterprise is irrelevant to the estates' economic interests.*⁷⁸

Similarly, Judge Gonzalez noted that what the UAW, the VEBA and the U.S. Treasury would be getting in New Chrysler was not on account of any entitlements any of them might have in the case before him. He observed:

In addition, 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.⁷⁹

⁷⁶ *Id.*

⁷⁷ *Id.* at 99-100.

⁷⁸ *Id.* at 99 (emphasis added).

⁷⁹ *Id.* As he further observed, the UAW in *Chrysler* was providing substantial consideration to New Chrysler in the form of “unprecedented modifications” to the UAW’s collective bargaining agreement. *Id.* at 100. The record supports a similar finding here.

As in *Chrysler* and *TWA*, the Court rules that the 363 Transaction does not constitute an impermissible *sub rosa* plan.

(d) Recharacterization or Subordination of U.S. Treasury Debt

The F&D Bondholders and Bondholder Parker contend that some or all of the U.S. Government's secured debt should be recharacterized as equity—or, alternatively, equitably subordinated to unsecured debt—as a predicate for their next contention that it cannot be used as the basis for a credit bid. The Court disagrees with each contention.

In another of its decisions in the *Adelphia* chapter 11 cases,⁸⁰ this Court likewise considered allegations that a secured lender's debt should be recharacterized as equity. In doing so, the Court applied standards articulated by the Fourth Circuit and Sixth Circuit in the *Dornier Aviation*⁸¹ and *AutoStyle Plastics*⁸² cases, which in turn had been based on tax law precedent.

Factors listed in those cases are:

- (1) the names given to the instruments, if any, evidencing the indebtedness;
- (2) the presence or absence of a fixed maturity date and schedule of payments;
- (3) the presence or absence of a fixed rate of interest and interest payments;
- (4) the source of repayments;

⁸⁰ See *Adelphia Commc'ns Corp. v. Bank of America (In re Adelphia Commc'ns Corp.)*, 365 B.R. 24, 73-75 (Bankr. S.D.N.Y. 2007) ("*Adelphia-Bank of America*"), *aff'd as to all but an unrelated issue*, 390 B.R. 80 (S.D.N.Y. 2008) (McKenna, J.).

⁸¹ *In re Official Comm. of Unsecured Creditors for Dornier Aviation (North America), Inc.*, 453 F.3d 225, 233-34 (4th Cir. 2006).

⁸² *In re AutoStyle Plastics, Inc.*, 269 F.3d 726, 749-50 (6th Cir. 2001).

- (5) the adequacy or inadequacy of capitalization;
- (6) the identity of interest between the creditor and the stockholder;
- (7) the security, if any, for the advances;
- (8) the corporation's ability to obtain financing from outside lending institutions;
- (9) the extent to which the advances were subordinated to the claims of outside creditors;
- (10) the extent to which the advances were used to acquire capital assets; and
- (11) the presence or absence of a sinking fund to provide repayments.⁸³

Here the Court finds that GM was inadequately capitalized at the time the loans were made; that GM could not obtain financing from outside lending institutions, and that the record does not show the presence of a sinking fund to provide repayments—three of the eleven factors that would suggest recharacterization. But of the remainder, every single factor supports finding that this was genuine debt. Among other factors, as noted in the Court's Findings of Fact above, this transaction was fully documented as a loan; was secured debt, complete with intercreditor agreements to address priority issues with other secured lenders; had interest terms (albeit at better than market rate) and maturity terms, and, significantly, had *separate* equity features—providing for warrants to accompany the debt instruments. The Court has previously found, as a fact and mixed

⁸³ See *Adelphia-Bank of America*, 365 B.R. at 74 (citing, *inter alia*, *Dornier Aviation* and *AutoStyle*).

question of fact and law, that the Prepetition Secured Debt was, in fact, debt, and the Court now determines that as a conclusion of law.⁸⁴

Likewise, the Court disagrees with contentions (principally by bondholder Parker) that the secured debt held by the U.S. Treasury (and, presumably, the EDC) should be equitably subordinated. The Court addressed the development of the law of equitable subordination (and its first cousin, equitable disallowance) in its decision in *Adelphia-Bank of America*, and need not discuss it in comparable length here. It is sufficient for the purposes of this decision to say that as originally stated in the famous case of *Mobile Steel*,⁸⁵ a party seeking to establish equitable subordination must prove that (i) the holder of the claim being subordinated engaged in inequitable conduct; (ii) the inequitable conduct resulted in injury to creditors or conferred an unfair advantage on the claimant; and (iii) equitable subordination is not inconsistent with the provisions of the Bankruptcy Code.⁸⁶ None of those factors has been established here.

First the Court finds that none of the U.S. Treasury, the Government of Canada, the Government of Ontario, or the EDC acted inequitably in any way. They advanced funds to help thousands of creditors, citizens, employees of GM, and employees of suppliers and others. Their efforts to ensure that they were not throwing their money away in a useless exercise, and were expecting GM to slim down so it could survive without governmental assistance, are hardly inequitable; they were common sense.

⁸⁴ There is no basis for recharacterizing the \$33 billion that was the subject of the DIP loans provided by the U.S. Treasury and the EDC. These were presented to the Court as loans, seeking approval for post-petition financing under section 364 of the Code.

⁸⁵ *Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692 (5th Cir. 1977).

⁸⁶ *Id.* at 700.

Similarly, the Court finds no harm to creditors; without the challenged efforts, GM would have had to liquidate. Nor was there any special benefit to any of the Government entities.

Finally, treating the governmental lenders as lenders is hardly inconsistent with the provisions of the Bankruptcy Code. There is, in short, no basis for equitable subordination here.

(e) Asserted Inability to Credit Bid

In light of the conclusions reached in the preceding section, the U.S. Treasury and EDC may, if they choose, assign their secured debt to the Purchaser, and there is then no reason why the Purchaser may not credit bid.

2. Successor Liability Issues

Many objectors—including the Ad Hoc Committee of Consumer Victims (the “**Consumer Victims Committee**”), individual accident litigants (“the **Individual Accident Litigants**”), and attorneys for asbestos victim litigants (collectively, “the **Asbestos Litigants**”) object to provisions in the proposed sale order that would limit any “successor liability” that New GM might have. Successor liability claims normally are for money damages—as, for example, the claims by the Individual Accident Litigants are. If permitted, such claims would be asserted against the successor in ownership of property that was transferred from the entity whose alleged wrongful acts gave rise to the claim.

“As a general rule, a purchaser of assets does not assume the liabilities of the seller unless the purchaser expressly agrees to do so or an exception to the rule exists.”⁸⁷

⁸⁷ 3 *Collier* at ¶ 363.06[7].

Successor liability is an equitable exception to that general rule.⁸⁸ Successor liability depends on state law, and the doctrines vary from state to state,⁸⁹ but generally successor liability will not attach unless particular requirements imposed by that state have been satisfied.⁹⁰

If a buyer cannot obtain protection against successor liability, “it may pay less for the assets because of the risk.”⁹¹ When the transfer of property takes place in a 363 sale, and the buyer has sought and obtained agreement from the debtor that the sale will be free and clear, the bankruptcy court is invariably asked to provide, in its approval order, that the transferee does not assume liability for the debtor’s pre-sale conduct.

Such a request was likewise made here. Under the proposed order, in its latest form, New GM would voluntarily assume liability for warranty claims, and for product liability claims asserted by those injured after the 363 Transaction—even if the vehicle was manufactured before the 363 Transaction. But New GM would not assume any Old GM liabilities for injuries or illnesses that arose before the 363 Transaction. And the proposed order has a number of provisions making explicit findings that New GM is not subject to successor liability for such matters, and that claims against New GM of that character are enjoined.⁹²

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See id.*

⁹¹ *Id.* Whether the U.S. and Canadian Governments would have lent and ultimately bid a lesser amount here is doubtful, but this consideration provides the context for deciding legal issues that presumably will extend beyond this case.

⁹² The principal provisions in the proposed order provide, in relevant part:

Except for the Assumed Liabilities, pursuant to sections 105(a) and 363(f) of the Bankruptcy Code, the Purchased Assets shall be transferred to the Purchaser in accordance with the MPA, and, upon the Closing, shall be free and clear of all

The issues as to the successor liability provisions in the approval order are the most debatable of the issues now before the Court. Textual analysis is ultimately inconclusive as to the extent to which a 363 order can bar successor liability claims premised upon the transfer of property, and cases on a nationwide basis are split. But principles of *stare decisis* dictate that under the caselaw in this Circuit and District, the Court should, and indeed must, rule that property can be sold free and clear of successor liability claims.

(a) *Textual Analysis*

As before, the Court starts with textual analysis. Section 363(f) provides, in relevant part:

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

liens, claims, encumbrances, and other interests of any kind or nature whatsoever ... including rights or claims based on any successor or transferee liability....

Proposed Order ¶ 7.

...[A]ll persons and entities... holding liens, claims, encumbrances, and other interests of any kind or nature whatsoever, including rights or claims based on any successor or transferee liability, against or in a Seller or the Purchased Assets (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or noncontingent, senior or subordinated), arising under or out of, in connection with, or in any way relating to, the Sellers, the Purchased Assets, the operation of the Purchased Assets prior to the Closing, or the 363 Transaction, are forever barred, estopped, and permanently enjoined from asserting against the Purchaser, its successors or assigns, its property, or the Purchased Assets, such persons' or entities' liens, claims, encumbrances, and other interests, including rights or claims based on any successor or transferee liability.

Proposed Order ¶ 8. Similar provisions are in the MPA.

(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.

Application of section 363(f)'s authority to issue a "free and clear" order with respect to a successor liability claim turns, at least in the first instance, on whether such a claim is an "interest in property." But while "claim" is defined in the Code,⁹³ neither "interest" nor "interest in property" is likewise defined.

So in the absence of statutory definitions of either "interest" or "interest in property," what can we discern from the text of the Code as to what those words mean?

First, we know that "interest" includes more than just a lien. Subsection (f)(3) makes clear that "interest" is broader, as there otherwise would be no reason for (f)(3) to deal with the subset of interests where "such interest is a lien." *Collier* observes that:

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*

⁹³ See Section 101(5) of the Code.

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.⁹⁴

Second, we know that an “interest” is something that may accompany the transfer of the underlying property, and where bankruptcy policy, as implemented by the drafters of the Code, requires specific provisions to ensure that it *will not* follow the transfer.

The Individual Accident Litigants contend that here the Court should presume that “equivalent words have equivalent meaning when repeated in the same statute.”⁹⁵ But while that is often a useful aid to construction, we cannot do so here. That is because “interest” has wholly different meanings as used in various places in the Code,⁹⁶ and assumptions that they mean the same thing here are unfounded.

Thus, those in the bankruptcy community know, upon considering the usage of “interest” in any particular place in the Code, that “interest” means wholly different things in different contexts:

(i) a nondebtor’s *collateral*—as used, for example, in consideration of adequate protection of an interest under sections 361 and 362(d)(1), use of cash collateral under section 363(c)(2), or in many 363(f) situations, such as where a creditor has a lien;

⁹⁴ 3 *Collier* at ¶ 363.06[1] (emphasis added).

⁹⁵ *Indiv. Accident Litigants Br. 4*, quoting *Cohen v. de la Cruz*, 523 U.S. 213, 220 (1998).

⁹⁶ See Postings of Stephen Lubben, Professor at Seton Hall Law School, to Credit Slips, <http://www.creditslips.org/creditslips/2009/06/claim-or-interest.html> (June 13, 2009, 8:25 PM EST); and <http://www.creditslips.org/creditslips/2009/06/claim-or-interest-part-2.html> (June 14, 2009, 6:42 PM EST). Blogs are a fairly recent phenomenon in the law, providing a useful forum for interchanges of ideas. While comments in blogs lack the editing and peer review characteristics of law journals, and probably should be considered judiciously, they may nevertheless be quite useful, especially as food for thought, and may be regarded as simply another kind of secondary authority, whose value simply turns on the rigor of the analysis in the underlying ideas they express.

(ii) *a legal or equitable ownership of property*—as used, for example, in section 541 of the Code, or in other section 363(f) situations, where a nondebtor asserts competing ownership, a right to specific performance, or the like— or, quite differently,

(iii) *stock* or other equity in the debtor, *as contrasted to debt*—as used, for example, in section 1111 (“[a] proof of claim or interest is deemed filed under section 501”), or where a reorganization plan is to establish classes of claims and interests, under sections 1122 and 1123.

The Individual Accident Litigants place particular emphasis on section 1141(c) of the Code, asking this Court to compare and contrast it. They argue that

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 actions intentionally and purposely’ when it ‘includes particular language in one section of a statute but omits it in another.’”⁹⁷

But this is not an apt comparison, since when “interests” is used in section 1141(c), it is used with the wholly different definition of (iii) above—*i.e.*, as stock or another type of equity—in contrast to the very different definitions in (i) and (ii) above, which are ways by which “interests in property” may be used in section 363(f).

⁹⁷ Indiv. Accident Litigants Br. 4.

Thus, as Lubben suggests, and the Court agrees, in section 1141 “interest” matches up with “equity,” and “claim” matches up with debt.⁹⁸ Section 1141 is of no assistance in determining whether litigation rights transmitted through transfers of property fall within the meaning of “interests in property.” Section 1141 does not provide a yardstick by which section 363(f)’s meaning can be judged.

So where does textual analysis leave us? It tells us that “interest” means more than a lien, but it does not tell us how much more. Textual analysis does not support or foreclose the possibility that an “interest in property” covers a right that exists against a new party solely by reason of a transfer of property to that party. Nor does textual analysis support or foreclose the idea that an “interest” is a right that travels with the property—or that it would do so unless the Code cut it off. Ultimately textual analysis is inconclusive. Neither the Code nor interpretive aids tells us how broadly or narrowly—in the particular context of section 363(f)—“interest in property” should be deemed to be defined.⁹⁹

⁹⁸ See Posting of Stephen Lubben, Professor at Seton Hall Law School, to Credit Slips, <http://www.creditslips.org/creditslips/2009/06/claim-or-interest.html> (June 13, 2009, 8:25 PM EST).

⁹⁹ The Individual Accident Litigants also place heavy reliance on *Butner v. United States*, 440 U.S. 48 (1970), see *Indiv. Accident Litigants Br. 8*, suggesting that *Butner* requires deference to state law that might impose successor liability and that this would require excluding successor liability damages claims from any definition of “interest.” But the Court cannot agree. First, when quoted in full, *Butner* (whose bottom line was that the issue of whether a security interest extended to rents derived from the property was governed by state law) stated:

The Bankruptcy Act does include provisions invalidating certain security interests as fraudulent, or as improper preferences over general creditors. Apart from these provisions, however, Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.

440 U.S. at 54. *Butner* further stated (in language the Individual Accident Litigants did not quote):

Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently

(b) Caselaw

Therefore, once again—as in the Court’s earlier consideration of *Lionel* and its progeny and the cases establishing the judge-made law of *sub rosa* plans—the Court must go beyond the words of the Code to the applicable caselaw.

Viewed nationally, the caselaw is split in this area, both at the Circuit Court level and in the bankruptcy Courts. Some courts have held that section 363(f) provides a basis for selling free and clear of successor liability claims,¹⁰⁰ and others have held that it does not.¹⁰¹

But the caselaw is *not* split in this Circuit and District. 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.

simply because an interested party is involved in a bankruptcy proceeding.

Id. at 55. But the *Butner* court laid out principles by which we determine what is property of the estate; it did not address the different issue of whether a state may impose liability on a transferee of estate property by reason of something the debtor did before the transfer. Moreover, *Butner* noted that provisions of the Code can and do sometimes trump state law. And section 363(f), for as much or as little it covers, is exactly such a provision. In fact, 363(f) is a classic example of an instance where a “federal interest requires a different result.” *Butner* neither supports nor defeats either party’s position here.

¹⁰⁰ See, e.g., *Chrysler*, 405 B.R. at 111; *In re Trans World Airlines, Inc.*, 322 F.3d 283, 288-90 (3d Cir. 2003) (“*TWA*”); *United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573, 581-82 (4th Cir. 1996).

¹⁰¹ See, e.g., *Michigan Empl. Sec. Comm. v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1147-48 (6th Cir. 1991); *Precision Indus., Inc. v. Qualitech Steel SBQ, LLC (In re Qualitech Steel Corp.)*, 327 F.3d 537, 545-46 (7th Cir. 2003); *Fairchild Aircraft Corp. v. Campbell (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).

See also *Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.)*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) (concluding that 363(f) could not be utilized, but that section 105(a) could be used to effect 363 sale free and clear of claims).

This Court has previously noted how *Chrysler* is so closely on point, and this issue is no exception. Judge Gonzalez expressly considered it. In material reliance on the Third Circuit's decision in *TWA*, "the leading case on this issue," Judge Gonzalez held that *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. The Court follows *TWA* and overrules the objections premised on this argument. ... [I]n 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.¹⁰²

This Court has already noted its view of the importance of *stare decisis* in this district,¹⁰³ and feels no differently with respect to this issue. This Court follows the decisions of its fellow bankruptcy judges in this district, in the absence of plain error, because the interests of predictability in commercial bankruptcy cases are of such great importance. Apart from the underlying reasons that have caused *stare decisis* to be embedded in American decisional law, *stare decisis* is particularly important in commercial bankruptcy cases because of the expense and trauma of any commercial bankruptcy, and the need to deal with foreseeable events, by pre-bankruptcy planning, to the extent they can be addressed. Likewise, litigation, while a fact of life in commercial bankruptcy cases, takes money directly out of the pockets of creditors, and predictability fosters settlements, since with predictability, parties will have an informed sense as to how any disputed legal issues will be decided.

¹⁰² 405 B.R. at 111.

¹⁰³ See 27-28, n.19 above.

Though for all of these reasons, this Court would have followed *Chrysler* even if that case had no subsequent history, we here have a hugely important additional fact. The Circuit affirmed *Chrysler*, and for “substantially for the reasons stated in the opinion below.”

Those two matters are somewhat different, and each merits attention. Appellate courts review judgments (or orders), not statements in opinions.¹⁰⁴ With the Circuit having affirmed, application of that principle would not, in the absence of more, necessarily suggest agreement with any reasoning Judge Gonzalez utilized in reaching his conclusion. But it would necessarily support agreement with his bottom line—at least on matters that were argued to the Circuit on appeal. Otherwise, the Circuit would not have affirmed.

Here, of course, there is more—because the Circuit did not simply affirm without opinion, but it stated, as part of its order, that Judge Gonzalez’s decision was affirmed “for substantially the reasons stated in the opinions below.” While that might hint that the Circuit generally agreed with Judge Gonzalez’s reasoning as well, it does not compel that conclusion. At this point, the Court concludes merely that the Circuit agreed with Judge Gonzalez’s successor liability issues bottom line.

But that alone is very important. One of the matters argued at length before the Circuit on the appeal was successor liability, both with respect to present claims¹⁰⁵ and

¹⁰⁴ See, e.g., *O’Brien v. State of Vermont (In re O’Brien)*, 184 F.3d 140, 142 (2d Cir. 1999); *Mangosoft, Inc. v. Oracle Corp.*, 525 F.3d 1327, 1330 (Fed. Cir. 2008).

¹⁰⁵ See Tr. of Arg. before Second Circuit, No. 09-2311 (2d Cir. June 5, 2009) (“**2d Cir. Arg. Tr.**”) at 17-22 (current tort claims); 47-49 (current tort claims); 60-62 (current tort claims).

unknown future claims.¹⁰⁶ They were hardly trivial elements of the appeal, and were a subject of questioning by members of the panel.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹

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

¹⁰⁶ 2d Cir. Arg. Tr. at 22-26 (future and, to a limited extent, current, product liability claims); 26-29 (current and future asbestos claims); 45-46 (future asbestos and tort claims); 62-64 (future asbestos claims).

¹⁰⁷ This Court has previously noted that it is hesitant to draw too much from the questions judges ask in argument. See *In re Adelpia Commc’ns Corp.*, 336 B.R. 610, 636 n.44 (“Thoughts voiced by judges in oral argument do not always find their way into final decisions, often intentionally and for good reason.”) Thus the Court does not rely on anything that was said in the way of questions in the *Chrysler* appeal for the purpose of trying to predict the Circuit’s thinking or leanings. This Court looks to the *Chrysler* argument questioning solely for the purpose of noting the issues that were before the Circuit, and that got its substantive attention.

¹⁰⁸ The Court cannot agree with the suggestion that *Chrysler* is distinguishable because the purchaser there, Fiat, was a commercial entity, and that the purchaser here is an entity formed by the U.S. and Canadian Governments. We are talking about an issue of statutory interpretation here, and the Code makes no distinction in that regard.

¹⁰⁹ *Collier* states that “[a]lthough some courts have limited the term [“interest in property,” as used in section 363(f)] to *in rem* interests in the property, the trend seems to be in favor of a broader definition that encompasses other obligations that may flow from ownership of the property.” 3 *Collier* at ¶ 363.06[1]. Though *Collier* is of course consistent with this Court’s conclusion, the Court regards the caselaw holdings in this Circuit and District as more important.

not have other defendants who can also pay.¹¹⁰ 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.¹¹¹

3. *Asbestos Issues*

The Asbestos Litigants raise the same successor liability issues just addressed, and, additionally advance the interests of future victims of asbestos ailments (though their counsel do not represent any); *future* victims would not yet know that they have any asbestos ailments, or to whom they might look to bring litigation, if necessary. The Asbestos Litigants' concerns as to a sale free and clear of asbestos liability claims, like those of tort litigants, have already been discussed, and the Court, while also sympathetic to asbestos victims, must rule similarly.

But the Court must separately address the separate issues concerning asbestos ailments, in light of the reality that those ailments may take many years to be discovered, during which asbestos victims would not know that they should be filing claims.

The Asbestos Litigants object to GM's effort to "channel all present and future asbestos personal injury claims to Old GM and to shield New GM from 'successor liability' claims . . . without the appointment of a future claims representative and the other express requirements mandated by Congress in 11 U.S.C. § 524(g)."¹¹² But that

¹¹⁰ They may have to resort to dealers, and the proposed sale motion also contemplates that New GM will indemnify dealers for losses of this type, whenever the claims arose. While this would seemingly greatly reduce the number of instances where a plaintiff cannot recover meaningful amounts if liability is established, the Court does not suggest that it will cover all of them.

¹¹¹ Findings and an injunction of the character requested were issued in each of *Chrysler* and *TWA*. See *Chrysler*, No. 09-50002 (Bankr. S.D.N.Y. June 1, 2009) (Order Granting 363 Sale ¶¶ W-BB, 9-23); *TWA*, 322 F.3d at 286-87.

¹¹² Asbestos Br. at 2.

overstates, in material part, what GM is trying to do. It is unnecessary to “channel” present asbestos injury claims to GM, as that is where they already are, and belong. And New GM has not yet done anything wrong, if it ever will. So the bulk of the Asbestos Litigants’ contention is simply a variant of the successor liability issues that the Court just addressed, and must be decided the same way.

Where there *is* a separate issue is claims for *future* injuries that people exposed to asbestos might suffer when they don’t yet know of their ailments or the need to sue or assert a claim. The Court refers to those as “**Future Claims**,” while noting that they are not yet “claims” as defined in the Bankruptcy Code. Efforts to deal with such circumstances led to the enactment of section 524(g) of the Code, which *inter alia* authorizes injunctions, under a reorganization plan, to enjoin actions against nondebtors by those who have a right of recovery from a trust created to address their claims, in accordance with more detailed provisions set out in section 524(g). (Those provisions also include the appointment of a future claims representative.)

The Debtors ask for findings that New GM will not be deemed to be a successor of Old GM, and ask for an injunction barring those holding Future Claims, like others, from pursuing New GM. The Asbestos Litigants contend that such an injunction would walk, talk and quack like a section 524(g) injunction, and that it thus is impermissible. The Debtors respond that we do not yet have a request to approve a plan, and that these issues are now premature—better to be considered if and when they ever ask for a 524(g) injunction.

The Court does not have to decide these issues now, except in a modest way. The Asbestos Litigants’ counsel represent only individuals with *present* asbestos ailments,

and do not represent future claimants. Thus the Court has material difficulty in seeing how they have standing to assert *other's* needs and concerns, or how they would be persons aggrieved, on any appeal, if the Court ruled adversely to them on future claims issues.

By the same token, the Court fully recognizes 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.¹¹³

This objection raises classic standing *and* ripeness issues. And, in addition, the Court does not know if anyone in the future would have a legally valid objection as to the requested injunction—especially if Old GM were still in existence, and a claim could be filed with Old GM. The Court is doubtful that it should be erecting barriers to GM's ability to reorganize by creating hurdles at the behest of people who lack standing, but at the same time, is not of a mind to do anything that might be constitutionally suspect. The Future Claims issues, in the Court's view, are best addressed here by adding language to the injunction paragraph to which objection has been made, applicable (only) to asbestos claims and demands, making the injunction enforceable "to the fullest extent constitutionally permissible." That limitation should address both sides' legitimate future claims concerns. The Court's order will read accordingly.

4. *Environmental Issues*

Certain objectors—most notably, New York's Attorney General (the "**New York AG**"), who enforces New York's environmental laws, and the St. Regis Mohawk Tribe

¹¹³ See *Chrysler Arg. Tr.* at 46, 47, 72-73 (colloquy, principally with Judge Sack, with respect to this issue). Once more, the Court does not read those questions as telegraphing any views or decision of the Circuit as to these issues, but rather as helping this Court focus on matters worthy of consideration.

(the “**Tribe**”), in upstate New York (together, the “**Environmental Matters Objectors**”)—have voiced concerns as to whether any approval order would too broadly release either Old GM or New GM from their respective duties to comply with environmental laws and cleanup obligations. Objections of this character were a matter of concern to this Court as well, but they were addressed—very well, in this Court’s view—by amendments to the proposed order that were made after objections were due. The additional language provides that:

Nothing in this Order or the MPA releases, nullifies, or enjoins the enforcement of any Liability to a governmental unit under Environmental Laws or regulations (or any associated Liabilities for penalties, damages, cost recovery, or injunctive relief) that any entity would be subject to as the owner, lessor, or operator of property after the date of entry of this Order. Notwithstanding the foregoing sentence, nothing in this Order shall be interpreted to deem the Purchaser as the successor to the Debtors under any state law successor liability doctrine with respect to any Liabilities under Environmental Laws or regulations for penalties for days of violation prior to entry of this Order. Nothing in this paragraph should be construed to create for any governmental unit any substantive right that does not already exist under law.¹¹⁴

Another paragraph goes on to say:

Nothing contained in this Order or in the MPA 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. The definition of Environmental Laws in the MPA shall be amended to delete the words “in existence on the date of the

¹¹⁴ Proposed Order ¶ 61

Original Agreement.” For purposes of clarity, the exclusion of asbestos liabilities in section 2.3(b)(x) of the MPA shall not be deemed to affect coverage of asbestos as a Hazardous Material with respect to the Purchaser’s remedial obligations under Environmental Laws.¹¹⁵

Especially collectively, they make it quite clear that neither Old GM nor New GM will be relieved of its duty to comply with environmental laws.

Those changes deal with much, but not all, of the Environmental Matters Objectors’ concerns. The remaining objections, however, must be overruled.

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

Indeed, further reinforcing that view (as well as the Court’s decision to follow *Chrysler*) is this Court’s decision, seven years ago, in *MagCorp*.¹¹⁶ There, upon the sale of property with substantial environmental issues, this Court was faced with the exact same issue—to what extent could that property be sold free and clear of environmental claims under 363(f). This Court ruled that one had to make a distinction. Under section 363(f), there could be no successor liability imposed on the purchaser for the seller MagCorp’s monetary obligations related to cleanup costs, or any other obligations that were obligations of the seller. But the purchaser would have to comply with its environmental responsibilities starting with the day it got the property, and if the property

¹¹⁵ *Id.* ¶ 62.

¹¹⁶ Tr. of Hr’g, *In re Magnesium Corporation of America*, No. 01-14312 (Bankr. S.D.N.Y. June 4, 2002) (ECF #290).

required remediation as of that time, any such remediation would be the buyer's responsibility:

When you are talking about free and clear of liens, it means you don't take it subject to claims which, in essence, carry with the property. It doesn't absolve you from compliance with the law going forward.¹¹⁷

Those same principles will be applied here. Any Old GM properties to be transferred will be transferred free and clear of successor liability,¹¹⁸ but New GM will be liable from the day it gets any such properties for its environmental responsibilities going forward. And if the State of New York (or, to the extent it has jurisdiction, the Tribe) feels a need to cause any acquiror of Old GM property to engage in remedial action because of environmental issues existing even at the outset of the acquiror's ownership, nothing in this Court's order will stand in its way.

5. *Splinter Union Retiree Issues*

Three unions—the IUE, the Steelworkers, and the Operating Engineers (referred to by all parties as the “**Splinter Unions**”) also have filed an objection. The Splinter Unions submit affidavits from many of their retirees, describing, in moving detail, their difficulties in getting by, and how decreased medical benefits would directly impact them. The hardship would be particularly great on those not yet eligible for Medicare, as the U.S. does not yet have comparable medical insurance for those below the qualifying age, if it ever will.

¹¹⁷ *Id.* at 129.

¹¹⁸ The Court understands that the Purchaser does not want the Massena site and that it will not be transferred to New GM, but it is unclear to the Court whether Old GM will want to sell the Massena site to someone else or abandon it. Certainly, if the Purchaser does not wish to take the Massena site, it does not have to. If Old GM wishes to abandon the Massena site, the Environmental Matters Objectors, or some of them, will have rights to be heard, and may have substantive future rights. The Court does not decide any of those additional issues at this time.

But fully acknowledging, as one must, the hardship that the Splinter Union Retirees would suffer, the legal issue before this Court is whether section 1114 of the Code applies to a transaction of the type we have here, and whether a purchaser of assets must assume liabilities that it does not want to voluntarily assume. The answer to each of those questions must be “no.”

The Splinter Unions understandably rely on section 1114 of the Code, a provision that was added to the Code to provide additional rights to retiree insurance benefits, most significantly, medical and life insurance (for the purposes of this discussion, “**Retiree Benefits**”). Generally speaking, section 1114 attempts to balance the needs and concerns of retirees with the reality that large legacy Retiree Benefits obligations not infrequently can impair debtors’ ability to reorganize, and that chapter 11 debtors often cannot afford to pay Retiree Benefits as they were previously offered.

While section 1114 is too long to quote here in full, it provides, in substance, for a procedure that must be complied with before a chapter 11 debtor can modify or not pay Retiree Benefits. Modifying or ending benefits requires a motion to be approved by the bankruptcy court. Prior to filing such a motion, the debtor or trustee must first make a proposal to the retirees’ representative—usually their union, if there is one, or alternatively a committee to act on their behalf.

The proposal is supposed to provide “for those necessary modifications in the retiree benefits that are necessary to permit the reorganization of the debtor and assure[] that all creditors, the debtor and all of the affected parties are treated fairly and equitably....” The parties are then “to confer in good faith in attempting to reach mutually satisfactory modifications of such retiree benefits.”

If agreement is not forthcoming, the motion may proceed further. Under section 1114(g) (with exceptions and provisos not relevant here):

The court shall enter an order providing for modification in the payment of retiree benefits if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (f);

(2) the authorized representative of the retirees has refused to accept such proposal without good cause; and

(3) such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities....

Here GM has stated that before Old GM stops paying or modifies Retiree Benefits, it will comply with section 1114. But as a practical matter, Old GM will be liquidating, and it will not be able to keep making these payments very much longer. After that, even if Old GM makes a proposal in good faith (as the Court assumes it will), the Splinter Union retirees may well be left with unsecured claims, with the relatively low recoveries on their unsecured claims that all other unsecured creditors will receive, and with the delays in getting distributions on allowed claims that are an unfortunate reality of the bankruptcy process.

And New GM has not agreed to assume liability for the Splinter Union Retiree Benefits.¹¹⁹ It declined to do so, while going further for other unions, especially the

¹¹⁹ New GM has offered to assume the liability to provide Retiree Benefits to a certain extent, but in a dramatically reduced amount. Its proposal in that regard was unacceptable to the Splinter Unions, and a counterproposal by the Splinter Unions has not been accepted. On July 2, the Court

UAW, because with very limited exceptions, the Splinter Unions no longer have active employees working for GM, and the U.S. Treasury—triaging its ability to undertake obligations, and trying to make New GM as lean and as viable as possible—allocated its available money to spend it only where necessary to build a new and stronger GM.¹²⁰

With that by way of backdrop, the Court considers the legal issues. The Splinter Unions argue in substance, that the 363 Transaction constitutes a forbidden *sub rosa* plan. But this contention has previously been addressed. The remaining issue is the extent, if any, to which special 1114 rights for retirees make an otherwise permissible transaction impermissible.

Once more the Court starts with textual analysis, and looks to the words of the statute. The most relevant portions of section 1114 are the portions that impose the continuing duties to pay retiree benefits; not to end or modify them; and to negotiate with unions or other retiree representatives before changing them. Apropos the first (the continuing duty to pay), section 1114(e) is relevant. It provides, in relevant part:

(e)(1) Notwithstanding any other provision of this title, *the debtor in possession, or the trustee if one has been appointed under the provisions of this chapter (hereinafter in this section “trustee” shall include a debtor in possession)*, shall timely pay and shall not modify any retiree benefits, except that—

(A) the court, on motion of the trustee or authorized representative, and after notice and a hearing, may order modification of

approved settlements between GM and other non-UAW unions under which New GM would assume Retiree Benefits for them, but again in dramatically reduced amounts.

¹²⁰

The obligations in question are very sizeable—more than \$3 billion in retiree health care and hundreds of millions more for retirement life insurance. Splinter Union Obj. ¶ 4. Those large figures show why the Splinter Unions care about the issue, and why New GM feels that it cannot assume those obligations when such a small number of Splinter Union members will be working for New GM.

such payments, pursuant to the provisions of subsections (g) and (h) of this section, or

(B) the trustee and the authorized representative of the recipients of those benefits may agree to modification of such payments,

after which such benefits as modified shall continue to be paid by the *trustee*.¹²¹

Thus, under the words of the statute, these are duties imposed upon the trustee (which includes, by express reference, the debtor in possession)—not anyone else.

With respect to the second (the duty not to end or modify), the relevant portion is that same section 1114(e) (“the debtor in possession, or the trustee if one has been appointed ... shall not modify any retiree benefits”). Once more, the duty not to end or modify is not statutorily imposed on anyone else.

With respect to the third (the duty to negotiate before filing a motion to modify benefits) the relevant portion is 1114(f):

(f)(1) Subsequent to filing a petition and prior to filing an application seeking modification of the retiree benefits, the *trustee* shall—

(A) make a proposal to the authorized representative of the retirees

Here too, by the words of the Code, the duty is imposed upon the trustee.

Finally, the Court notes that section 363 is silent with respect to any need to first comply with section 1114 before effecting a section 363 sale.

Turning beyond textual analysis to the caselaw, the Court has seen nothing to establish a violation of law. The Splinter Unions cite no authority holding or suggesting that a purchaser of assets from an entity with section 1114 obligations must assume the

¹²¹ Section 1114(e) (emphasis added).

debtor seller's duty to comply with section 1114's provisions. Nor do they cite such law considering section 1113 of the Code, which, while dealing with collective bargaining agreements, imposes similar duties.

On the other hand, *Chrysler* is helpful, though it did not expressly address this issue. In considering a closely similar transaction, Judge Gonzalez did not find there to be section 1114 impediments, even for non-UAW retirees.¹²²

The Splinter Unions argue that "section 1114 cannot be ignored in the § 363 process,"¹²³ but that is not what GM is asking the Court to do. GM acknowledges its duties to comply with section 1114, and so far as the record reflects, has not failed in any of its duties in that respect so far. If, in the future, GM does not comply with its section 1114 duties (or is perceived to be failing to comply in that regard), the Splinter Unions, or anyone else with standing, could of course bring that to the Court's attention. But the Splinter Union's real objection is that the Purchaser is not volunteering to comply with section 1114, and under the words of the statute, the Purchaser is not within the zone of persons upon whom section 1114 places duties.

¹²² With respect to section 1114 matters and related issues, he stated:

The objecting retirees represented by the UAW objected to the modification of retiree benefits under the settlement agreement between New Chrysler and the UAW, but those objections are overruled because the UAW was the objectors' authorized representative under section 1114, and the modifications were negotiated in good faith pursuant to that section. The objecting retirees not represented by the UAW whose benefits are adversely impacted may have unsecured claims against the Debtors' estates, but the purchased assets are sold free and clear of those potential unsecured claims. For those reasons, their objections to the Sale Motion are overruled. Further, the 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 any retirees, all of whom would be unsecured creditors.

405 B.R. at 110.

¹²³ Splinter Union Obj. ¶ 79.

The Splinter Unions note that there is another arguably relevant provision of the Code that must be considered, section 1129(a)(13). Section 1129 sets forth the requirements for confirmation of a chapter 11 plan, and the provisions in its subsection (a) include a list of requirements for confirmation of any chapter 11 plan. Section 1129(a) provides, in relevant part:

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

...

(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.

There can be no doubt that compliance with section 1129(a)(13), along with the other 15 subsections of section 1129(a), is a requirement for confirmation of a plan. But the Court has already addressed arguments of this character, as raised by bondholders in different contexts. The Court is not here considering confirmation of a plan; it is considering a section 363 transaction, and because there is a good business reason for selling the assets now, and there is not here a *sub rosa* plan, requirements of section 1129, including section 1129(a)(13), do not apply.

The Court fully realizes that UAW retirees will get a better result, after all is said and done, than Splinter Union Retirees will, but that is not by reason of any violation of the Code or applicable caselaw. It is because as a matter of reality, the Purchaser needs a properly motivated workforce to enable New GM to succeed, requiring it to enter into

satisfactory agreements with the UAW—which includes arrangements satisfactory to the UAW for UAW retirees. And the Purchaser is not similarly motivated, in triaging its expenditures, to assume obligations for retirees of unions whose members, with little in the way of exception, no longer work for GM.

The Court has also considered the Splinter Unions' point that in pre-bankruptcy planning, GM and the U.S. Treasury focused on the duties to Splinter Union Retirees, and made a conscious decision that Splinter Union retirees would not be offered as good a deal as others. But the Court cannot find that there was any "conspiracy" in that regard, nor that there was any intention to disregard applicable law. The U.S. Treasury, in making hard decisions about where to spend its money and make New GM as viable as possible, made business decisions that it was entitled to make, and the fact that there were so few Splinter Union employees still working for GM was an understandable factor in that decision. The Court's responsibility is not to make fairness judgments as to those decisions, but merely to gauge those decisions under applicable law.

The Splinter Unions' objection must be overruled.

6. Dealer Issues

As noted, the 363 Transaction contemplates that GM's present dealer network of about 6,000 dealers will be made more efficient, continuing approximately 4,100 of its dealers, and ending its relationship, though not instantly, with approximately 1,900 others.¹²⁴ In cooperation with States AGs, and the Unofficial Dealers Committee¹²⁵ (the

¹²⁴ Henderson Decl. ¶¶ 92-93.

¹²⁵ The Unofficial GM Dealers Committee was formed prior to the filing of GM's chapter 11 case by the GM National Dealer Council in coordination with the National Automobile Dealers Association. It was formed to act as a voice for the dealer body's collective interests in connection GM's restructuring efforts. Its members sell and service vehicles under GM brands in locations all over the country.

“**Dealer Committee**”), GM and the Purchaser agreed on additional language in the sale order for the protection of dealers, and the AGs and the Dealer Committee withdrew their objections to the sale. However, a local dealers association, the Greater New York Automobile Dealers Association (the “**New York Dealers Association**”), seeking to be heard as an *amicus*, filed a brief contending that the Participation Agreements and Deferred Termination Agreements that more than 99% of GM dealers entered into were coerced and unlawful.

Initially, the Court deals with a matter of standing, to which it became more sensitive, after oral argument, upon rereading the New York Dealers Association’s *amicus* brief. The New York Dealers Association does not purport to speak for a single identified GM dealer. It does not seek standing under section 1109. It speaks only as an *amicus*. And in addition, the main thrust of the New York Dealers Association *amicus* brief is not the protection of GM dealers. It is the protection of their *competitors*. The interests of GM dealers were the subject of the negotiations with the Dealer Committee and the AGs, and resolved to their satisfaction. While the New York Dealers Association objection professes to be speaking for the interests of GM dealers, its principal thrust is very different; it is to protect the interests of others who are competing with GM and (especially since it is a dealers’ organization), competing with GM dealers.¹²⁶

Under these circumstances, the Court must note the lack of standing and that the New York Dealers Association may be heard as nothing more than as an *amicus*; note that the New York Dealers Association does not have section 1109 rights; and note that at

¹²⁶ See, e.g., N.Y. Auto Dealers Obj. at ¶¶ 19, 20 (“GM seeks, through this proceeding, to gain advantage over other manufacturers.”); *id.* (“Permitting GM in bankruptcy, to ignore state dealer laws upsets the competitive balance among GM and every other automotive manufacturer.”).

least seemingly, if not plainly, the New York Dealers Association has interests largely adverse to those whom it is professing to help.¹²⁷

Then, turning to the merits of the New York Dealers Association arguments (assuming that, as *amicus*, it has any standing to make them), any objection that the New York Dealers Association might make—though it never says that it is making an “objection”—would have to be overruled, and to the extent it is making an objection, it *is* overruled. While the Court understands the unattractive choices that many dealers had to face, the Court cannot go so far as to hold that these agreements were “coerced” or are unlawful—even if (as the Court assumes, without deciding) those dealer rights could not be so modified outside of bankruptcy.

Implementation of federal bankruptcy policy permits debtors, for the benefit of the creditor body as a whole, to alter creditors’ and contract counterparties’ contractual rights. Corporate reorganization, by its nature, requires parties in interest to consider unattractive choices. One of the relevant rights in bankruptcy is the right of a debtor to reject an executory contract with its contract counterparty, for the benefit of the debtor’s other creditors. All concerned with GM’s future knew that GM had to slim down and improve its dealer network, and that this required modifying dealer agreements before they were assumed and assigned—a process that led to the Participation Agreements. Similarly, as an alternative to simply leaving dealers who would otherwise be terminated in the lurch, GM proposed giving them a soft landing, in exchange for waivers of other rights – a process that led to the Deferred Termination Agreements. Those offers secured

¹²⁷

It also at least seemingly would not be a person aggrieved with standing to appeal, but that is an issue for the appellate courts.

widespread acceptance; 99% of the continuing dealers accepted, and 99% of the dealers who eventually would be terminated took the offer.

The alternative, in each case was rejection. Contract counterparties do not have to accept what they are offered, and they may elect to stand on their rights. But here GM was not obligated, as a matter of law, to choose between leaving its dealer contracts unmodified or rejecting them. It could, if it wished, offer its contract counterparties deals that would more appropriately meet each side's needs and concerns, without fear that such deals would be subject to collateral attack by reason of assertions of coercion.

Directly on point are comments this Court made at the bankruptcy court level, and Judge Kaplan made at the district court level, in the *Adelphia* chapter 11 cases. There, in connection with the DoJ Settlement discussed above,¹²⁸ Adelphia agreed to provide \$715 million to the United States Government (on behalf of both the DoJ and the SEC) in exchange for dropping threats of indictment and forfeiture, and settling claims that might otherwise have been pursued by the SEC. The settlement was attacked by Adelphia creditors, who charged that it was the result of unlawful coercion. In the same decision to which this Court previously referred, this Court disagreed, and on appeal, so did Judge Kaplan.

This Court stated:

[W]here the “coercion” results from differences in bargaining power, as a consequence of law or fact, or governmentally granted authority and discretion (such as the authority and discretion we grant to prosecutors, to achieve a common good), that is a wholly different kind of “coercion.” As one of the

¹²⁸ See discussion at 37, above.

banks' counsel aptly noted in argument on this motion, it is what we call “leverage.”¹²⁹

Judge Kaplan, affirming, agreed—even going so far as to quote the language this Court just used—and continued:

What the appellants characterize as coercion was no different in principle than the pressure that leads the overwhelming majority of defendants in criminal cases to plead guilty—the risk that a conviction after trial will result in a harsher sentence than is likely to be imposed following a guilty plea. Yet guilty pleas in such circumstances rightly are considered voluntary and uncoerced in any relevant sense.¹³⁰

For decades, counterparties to executory contracts with bankruptcy debtors have known that their agreements could be rejected, and debtors and contract counterparties have negotiated deals as alternatives to that scenario. When they have been so negotiated (with all knowing that the debtor has the option to reject if the existing deal is not modified to its satisfaction), that has never been regarded as unlawful coercion. Rather, it has been recognized as an appropriate use of the leverage that Congress has given to debtors for the benefit of all of the other creditors who are not contract counterparties, and for whom the restructuring of contractual arrangements is important to any corporate restructuring.

The Court’s observation in questioning at oral argument, with respect to dealer contract modifications, that “no good deed goes unpunished” (perhaps naively thinking at the time that the New York Dealers Association was advocating the interests of *GM* dealers) was, as it probably sounded, an indication of frustration with the New York

¹²⁹ *Adelphia Settlement-Bankruptcy*, 327 B.R. at 166.

¹³⁰ *Adelphia Settlement-District*, 337 B.R. at 477.

Dealers Association's argument. And what the Court could have said then, and what it is saying now, is that the *last* thing bankruptcy courts should be doing is to be forcing debtors and their contract counterparties into situations where rejection is the only lawful alternative, subjecting other creditors to dilution on their recoveries by running up rejection damages, and subjecting contract counterparties to the full hardships of an executory contract rejection. There is no basis in law or fact for holding that these contractual modifications were unlawfully "coerced." Disapproving contractual modifications of the type here would be squarely inconsistent with the goals of corporate reorganization.

As a practical matter, modifications negotiated by the Dealers Committee and the State Attorneys General mooted out many, if not all, of the New York Auto Dealers' complaints about the loss of dealer protection laws. To the extent they did not, however, the Court notes that Judge Gonzalez dealt with these same contentions in another decision in *Chrysler*. 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 365.¹³¹ To the extent that laws of the type relied upon by the New York Dealers Association—either state or federal—impair the ability to reject, or to assume and assign, they must be trumped by federal bankruptcy law. And to the extent that nonbankruptcy law prohibits debtors and their contract counterparties from finding mutually satisfactory less draconian alternatives to rejection, it likewise must be trumped.

¹³¹ See *In re Old Carco LLC*, 2009 WL 1708813, *11-*17 (Bankr. S.D.N.Y. Jun. 19, 2009); 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.¹³²

Judge Gonzalez also made clear that 28 U.S.C. § 959(b), on which the New York Dealers Association's *amicus* brief heavily relies, did not alter the Court's "preemption analysis," because that provision "does not de-limit the precise conditions on contract rejection"—particularly where, as in *Chrysler* and here, the pertinent state laws concern "consumer convenience and costs and the protection of local businesses, rather than a concern over public safety."¹³³

¹³² 2009 WL 1708813 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).

¹³³ 2009 WL 1708813, at *14-15. *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

To the extent that the New York Auto Dealers Association complains that GM gets a “competitive advantage over others not in bankruptcy,”¹³⁴ that likewise is a complaint with respect to federal bankruptcy policy, which gives companies a chance to reorganize and shed burdensome obligations to achieve a greater good. That GM’s reorganization will make New GM and GM dealers more competitive is not a bad thing; it is exactly the point.

The New York Auto Dealers’ Association lacks standing to have its comments deemed to be an objection. To the extent that its *amicus* comments can be deemed to constitute an objection, any such objection is overruled.

7. ECC Trust

The Environmental Conservation and Chemical Corporation Site Trust Fund (the “**ECC Trust**”) has also filed a limited objection. The ECC Trust was created as a means to implement a Consent Decree that GM and other parties entered into with the United States and the State of Indiana to clean up hazardous materials at the EnviroChem Superfund Site in Zionsville, Indiana (the “**Zionsville Site**”). The Consent Decree was approved in 1991 by the United States District Court for the Southern District of Indiana. Under the authority of the Consent Decree, the Trustee for the ECC Trust issued an assessment on April 20, 2009, requiring GM to pay approximately \$63,000 into the ECC Trust. Shortly before the due date, GM notified the ECC Trust that it would not be paying its share, and filed its chapter 11 petition shortly thereafter.

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)).

¹³⁴ N.Y. Auto Dealers Obj. ¶ 20.

For now it is sufficient to note that the ECC Trust requests that this Court, using its “equitable powers,” require that the Purchase Agreement be modified such that the ECC Trust’s claim be designated an “Assumed Liability.” Unfortunately, the Court cannot do that.

This Court need not, at this juncture, decide the vast majority of the issues presented by the parties at oral argument—including, especially, whether a consent decree is considered a contract or a judicial decree for enforcement purposes, and whether this particular consent decree created a monetary obligation, which would be regarded like any other unsecured claim, or was in fact a mandatory injunction to clean up the Site.

The ECC Trust’s present rights are against *Old GM*. Under the ECC Trust’s best case scenario, as argued, the ECC Trust may be able to secure equitable relief against Old GM. But whether the ECC Trust can enforce an injunction against Old GM, or must instead live with an unsecured claim, is an issue for another day.

Whatever the ECC Trust’s rights are against Old GM, there is no basis for this Court to use its “equitable powers” to force the Purchaser to assume this liability. 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. As this Court noted in another of its *Adelphia* decisions, it is not free to use its equitable powers to circumvent the Code.¹³⁵ Decisions of the Second Circuit make it clear that, even with the presence of section 105(a), bankruptcy judges are not free to do whatever feels right.¹³⁶

¹³⁵ See *In re Adelphia Commc’ns Corp.*, 336 B.R. 610, 664 (Bankr. S.D.N.Y. 2006).

¹³⁶ See, e.g., *In re Momentum Mfg. Corp.*, 25 F.3d 1132, 1136 & n. 4 (2d Cir. 1994) (“It is well settled that bankruptcy courts are courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process.... We have repeatedly emphasized the

Insufficient justification has been provided for this Court to force the Purchaser to assume this liability, in the face of section 363(f)'s explicit language allowing the sale of property "free and clear" of such liabilities. The Court is aware that the requested relief would have a very modest impact on the Purchaser, but is nevertheless required to issue a principled decision.

8. "Equally and Ratably" Issues

Pro se unsecured bondholders Parker and Radha R. M. Narumanchi raise objections that they should be treated as secured creditors, and have not been. They contend that the indenture for their bonds (the 1995 issue, whose indenture trustee, represented by skilled counsel, did not raise a similar objection) had an "equal and ratable clause," boosting their bonds to secured debt status if liens were thereafter put on certain manufacturing facilities. They then contend that when the 2008 Prepetition Financing was put in place, it triggered their equal and ratable clauses, making them secured.

The Court agrees that the bonds have an equal and ratable clause. But it cannot agree that it was triggered. The 2008 Prepetition Financing Documents expressly carved out from the grant of the security interest under those documents any instance where it would trigger, *inter alia*, the equal and ratable clause.

importance of the bankruptcy court's equitable power." But "[t]his power is not unlimited. Thus, a bankruptcy court may not exercise this power in contravention of provisions of the Code."); *In re Joint Eastern & Southern District Asbestos Litig.*, 982 F.2d 721, 751 (2d Cir. 1992) ("*Asbestos Litigation*") ("[A] reorganization is assuredly governed by equitable considerations, but that guiding principle is not a license to courts to invent remedies that overstep statutory limitations."); see also *In re Aquatic Dev. Group, Inc.*, 352 F.3d 671, 680 (2d Cir. 2003) (Straub, J., concurring) ("*Aquatic Development*") ("[T]his Court has repeatedly cautioned that 105(a) 'does not "authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity."')", quoting *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003) ("*Dairy Mart*"), in turn quoting *U.S. v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986).

The 2008 Prepetition Financing granted the U.S. Treasury a lien, subject to exceptions not applicable here, on a wide array of property. But it expressly did not put a lien on what it called “**Excluded Collateral.**”¹³⁷ Excluded Collateral included, among other things:

(v) any Property, including any debt or Equity Interest and any manufacturing plan or facility which is located within the continental United States, to the extent that the grant of a security interest therein to secure the Obligations *will result in a lien, or an obligation to grant a lien, in such Property to secure any other obligation.*¹³⁸

Thus when liens were granted in favor of the U.S. Treasury in December 2008, the U.S. Treasury was not granted a lien on any of the Excluded Collateral—including, as relevant here, anything that would trigger the equal and ratable clause.¹³⁹

9. *Unauthorized Use of TARP Funds Issues*

Bondholder Parker (so far as the Court can tell, the only one of the 850 objectors) objects to the 363 Transaction on the additional ground that the U.S. Government was not authorized to use TARP funds to assist the auto industry, and hence that the 363 Transaction is unlawful. The Court agrees with the United States Attorney that the issue of the U.S. Treasury’s lending authority now is moot, and that Mr. Parker lacks standing to raise the issue. Thus the Court does not need to reach the third issue.

¹³⁷ See 2008 Prepetition Agreement Section 4.01 (proviso generally providing that collateral would not include “Excluded Collateral,” a term defined elsewhere in that agreement).

¹³⁸ *Id.* Section 1.01 – “Excluded Collateral”(v) (“Definitions”) (emphasis added).

¹³⁹ It does not matter if, as Parker suggested but did not prove, the U.S. Treasury unintentionally or even intentionally recorded a mortgage or UCC-1 covering the property mentioned in the equal and ratable clause. Doing so would only have *perfected* a lien, assuming that one was granted in the first place. Here there was no grant of any lien, and perfecting such a nonexistent lien would be meaningless.

First, the Court agrees that the objection is moot. The 363 Transaction does not involve any expenditure of TARP funds. It simply involves a credit bid by the Purchaser—as an assignee of secured debt held by the EDC (as to whom no objection is made) and the U.S. Treasury—of amounts due on previous loans under the U.S. Treasury Prepetition Loan and the DIP Financing Facility.

No party objected to the use of TARP funds in connection with the DIP Financing Facility, or when GM got the assistance it did before the filing of GM’s chapter 11 case. And the Court approved the DIP Financing Facility after full hearing and notice. It was *then* that the U.S. Treasury became a lender, not now. Complaints that the U.S. Treasury should not have lent the money to GM are now moot.

Second, the Court once more agrees with the United States Attorney that Mr. Parker lacks standing to challenge the U.S. Government’s lending authority here. Judge Gonzalez addressed this exact issue in *Chrysler-Standing*,¹⁴⁰ the second of the two decisions that were affirmed by the Circuit.

The Court does not need to repeat all of the elements of Judge Gonzalez’s analysis in *Chrysler-Standing*, nor what this Court has stated previously with respect to the importance of *stare decisis*, or its compliance with decisions of the Second Circuit. Here, as in *Chrysler-Standing*, an unsecured creditor like Mr. Parker does not establish the injury-in-fact necessary to establish constitutional standing under Article III because “all holders of unsecured claims are receiving no less than what they would receive in a liquidation.”¹⁴¹ And even assuming that the 363 Transaction itself injured bondholders like Mr. Parker (though it is difficult to see how, since without the 363 Transaction, GM

¹⁴⁰ See 405 B.R. at 83.

¹⁴¹ *Chrysler-Standing*, 405 B.R. at 83.

would have to liquidate), Mr. Parker cannot demonstrate standing because he cannot show that any such injury is “fairly traceable” to the Government’s use of TARP funds, as opposed to the 363 Transaction itself.

As Judge Gonzalez explained in *Chrysler-Standing*, “[i]f a non-governmental entity were providing the funding in this case, the [objectors] would be alleging the same injury. . . . In this light, it is not the actions of the lender that the [objectors] are challenging but rather the transaction itself. Specifically, the [objectors’] alleged injury is not fairly traceable to the U.S. Treasury’s actions because the [objectors] would suffer the same injury regardless of the identity of the lender.”¹⁴²

Under these circumstances, the Court need not address Mr. Parker’s third point. This objection is overruled.

10. Cure Objections

Many contract counterparties—more than 500—voiced objections to GM’s estimated cure amounts, generally expressing different perceptions as to the exact amounts GM owes them. These differences would eventually have to be resolved, since to assume an executory contract (and GM is assuming thousands of them), most prepetition defaults would have to be cured.

GM proposed a mechanism for fixing the cure amount entitlements—an amalgam of exchanges of information, negotiation, ADR, and court determination, if needed. Significantly, while many parties had differing views as to the amounts to which they were entitled, none voiced objections to the method GM proposed. As those counterparties will remain eligible for their full legal entitlements, the Court finds the

¹⁴²

Id.

proposed mechanism fully satisfactory, and it is unnecessary and inappropriate to rule on all of the cure amount issues here.

11. UAW Settlement Objections

Approximately 56 UAW retirees—somewhat numerous in number, but a miniscule portion of the estimated 500,000 covered under the UAW Settlement Agreement—object to the UAW Settlement Agreement. In general, they express (understandable) disappointment with a settlement that results in a reduction of their health benefits. But they do not articulate objections legally cognizable under the law.

The Curson testimony, in particular, evidences the sensitivity to member and retiree needs and concerns evidenced by the UAW leadership. As discussed at considerable length above, the UAW had to make very hard decisions as to concessions it would make on behalf of its members and retirees to preserve GM's viability—and to avoid a liquidation that would be disastrous for the people the UAW was trying to help. The UAW was successful in preserving an acceptable level of core medical benefits. And as the UAW properly observes in its brief, if the UAW had not done as well as it did, its agreement would not have been ratified.

Given the alternatives, it is easy to find that the UAW settlement is fair and equitable, from the perspective of both the GM estate and UAW members. It falls well within the range of reasonableness from GM's perspective, and is fair, reasonable and in the best interest of the UAW retirees.

12. Stockholder Objections

Many GM stockholders, understandably disappointed that the 363 Transaction will leave them with no recovery, have voiced objections. Once again, the Court is sensitive to their concerns, but cannot help them. GM is hopelessly insolvent, and there

is nothing for stockholders now. And if GM liquidates, there will not only be nothing for stockholders; there will be nothing for unsecured creditors.

Under those circumstances, GM stockholders cannot claim to be aggrieved by the transactions before the Court here.

13. Miscellaneous Objections

The Court cannot lengthen this decision further by specifically addressing any more of the approximately 850 objections that were raised on this motion. The Court has canvassed them and satisfied itself that no material objections other than those it has specifically addressed were raised and have merit. To the extent those objections were not expressly addressed in this decision, they are overruled.

Conclusion

The 363 Transaction is approved. The Court is entering an order in accordance with this Decision.¹⁴³

Dated: New York, New York
July 5, 2009

s/Robert E. Gerber
United States Bankruptcy Judge

¹⁴³ The order entered by the Court differs from the revised proposed order submitted by the Debtors in a few respects: The order entered by the Court adds this Decision to the places where Findings of Fact are set forth and where Conclusions of Law may be found. It adds “to the fullest extent constitutionally permissible” in connection with the injunction as to successor liability claims, to address notice or other due process issues that might otherwise exist with respect to future asbestos claims or “demands” as discussed above. And like the order entered by Judge Gonzalez in *Chrysler*, the order shortens the Fed.R.Bankr.P. 6004(h) period, but still provides 4 days, so as to avoid effectively precluding any appellate review.