Hearing Date and Time: TBD

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

REPLY BRIEF ON APPLICABILITY OF *PIONEER* AND TOLLING ISSUES IN CONNECTION WITH OMNIBUS MOTION BY CERTAIN IGNITION SWITCH PRE-CLOSING ACCIDENT PLAINTIFFS FOR AUTHORITY TO FILE LATE PROOFS OF CLAIM FOR PERSONAL INJURIES AND WRONGFUL DEATHS

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INTRODUCTION

The opening briefs filed by New GM, the GUC Trust, and the Participating Unitholders on the *Pioneer* and tolling issues[1] ignore the reality of this case at the time they now claim the Claimants should have pursued late proofs of claim against the GUC Trust. These proceedings began as motions by New GM to prevent successor liability claims from being asserted against it. At the time of the February 2014 Ignition Switch Defect recalls, approximately 90% of the GUC Trust's assets had already been distributed. *Elliott v. General Motors LLC (In re Motors Liquidation Co.)*, 829 F.3d 135, 148(2d Cir. 2016). Before the February 2014 recalls, Claimants were not aware their accidents were caused by Old GM. On top of that, as discussed in the Claimants' opening brief, the Late Filed Claims Order deemed all claims filed after February 8, 2012 presumptively disallowed. Until the Claimants successfully established a due process violation in connection with the Bar Date – which did not occur until the Court issued its April 2015 Decision/June 2015 Judgment – there was no point in filing a proof of a disallowed claim. New GM, the GUC Trust and the Participating Unitholders also ignore that the same April 2015 Decision/June 2015 Judgment that established the due process violation that gave the Claimants a basis to seek allowance of untimely claims also rendered those very claims worthless as equitably moot.

Not until the Second Circuit affirmed this Court's finding that Old GM had violated the Claimants' due process rights and vacated the equitable mootness ruling, was the time right to pursue proofs of claim against the GUC Trust. Moreover, any attempt by the Claimants to "jump the line" and litigate proofs of claim while the 2014 Threshold Issues were still being litigated

[1] *Opening Brief By General Motors LLC With Respect to Initial Late Claim Motions Issues*, filed March 6, 2017 [Docket No. 13871] (the "New GM Opening Brief"); *Opening Brief of GUC Trust Administrator and Participating Unitholders on the Applicability of Pioneer and Tolling to Plaintiffs' Motions to File Late Claims*, filed March 6, 2017 [Docket No. 13873] (the "GUC Trust Opening Brief"); the *Declaration of Gabriel K. Gillett in Support of the GUC Trust Opening Brief* [Docket No. 13875] (the "Gillett Declaration").

would have been contrary to this Court's scheduling orders and Judge Gerber's understandable desire to control his docket and the sequence in which matters came before him.

For these reasons and the reasons articulated below and in their opening brief, the Claimants respectfully request that the Court reject the arguments presented in the GUC Trust Opening Brief and the New GM Opening Brief and deem the Claimants' proofs of claim timely filed without regard to *Pioneer* and the excusable neglect factors.

1. The Bankruptcy Court's Finding of a Due Process Violation In Connection With the Bar Date Stands.

Both New GM and the GUC Trust attempt to argue that the Bankruptcy Court's ruling in the April 2015 Judgment/June 2015 Judgment that all Ignition Switch Plaintiffs and Ignition Switch Pre-Closing Accident Plaintiffs were denied due process and were prejudiced in connection with the Bar Date was somehow thrown out with the bathwater when the Second Circuit vacated the equitable mootness ruling. *New GM Opening Brief* at 5-8; GUC Trust Opening Brief at 12. The Second Circuit did no such thing.

The only thing that the Second Circuit vacated as advisory was Judge Gerber's ruling that any claims that any claims the Claimants may file in the future would be equitably moot. *See Elliott*, 829 F.3d at 169-70.[2] Thus, it is inaccurate and misleading for the GUC Trust to state that "[a]lthough Judge Gerber nonetheless found that Plaintiffs did not receive due process in connection with the Bar Date Order, ***the Second Circuit subsequently vacated that finding*** because the issue was not actually presented[.]" *GUC Trust Opening Brief* at 12. This Court's findings that Old GM knew of the Ignition Switch Defect prior to the bankruptcy and the Bar Date and that it failed to give affected claimants actual first class mailed notice of the Bar Date

[2] In conflating equitable mootness with the remedy for a due process violation, New GM, the GUC Trust, and the Participating Unitholders ignore that (i) those were two distinct threshold issues briefed separately and (ii) those issues were discussed separately in both the April 2015 Decision and the Second Circuit Opinion.

stand untouched. Following the binding precedent of the Second Circuit's decision, those findings lead to the irrefutable conclusion that the Claimants are not bound by the Bar Date Order and should be able to pursue their proofs of claim without regard to the Bar Date. *Elliott*, 829 F.3d at 166 (citing *In re Johns-Manville Corp.*, 600 F.3d 135, 158 (2d Cir. 2010)) (holding that parties cannot be bound by orders entered in violation of their due process rights).

If the GUC Trust and New GM believed that Judge Gerber had overstepped his bounds when he made these findings, then it was incumbent on them to seek and obtain reconsideration or reversal. They failed to do so and should be forced to live with the consequences.[3]

2. The GUC Trust and Participating Unitholders Should Be Judicially Estopped From Arguing that the Claimants Should Have Filed Proofs of Claim Sooner Than February 2014

It is ironic that the GUC Trust and Participating Unitholders now argue there is no existing ruling there was a due process violation in connection with the Bar Date considering they were one of the parties that helped convince this Court to make that ruling. Because it benefitted them at the time, as part of the 2014 Threshold Issues briefing the GUC Trust and Participating Unitholders successfully argued to this Court that (due to Old GM's concealment of the Ignition Switch Defect) the Claimants were unaware in 2009 of the claims they assert in their

[3] Both the GUC Trust and New GM point footnote 31 of the Second Circuit Opinion where the Second Circuit noted that counsel to the Ignition Switch Pre-Closing Accident Plaintiffs stated in its brief on the 2014 Threshold Issues that "Plaintiffs are not asserting a due process challenge to a bar date order or a discharge injunction issued in favor of a debtor." *Elliott*, 829 F.3d at 168 n.31. To put that statement in its proper context, the quoted language was contained in the section of a brief entitled "Potential Availability Of Remedies Against Old GM's Estate Is Immaterial," which focused on New GM's argument that the Claimants could not sue New GM on successor liability theories and that their exclusive remedy for a due process violation in connection with the Sale Order was to pursue a claim against the GUC Trust. *See Responsive Brief of Designated Counsel for Pre-Closing Accident Plaintiffs on Threshold Issues Concerning New GM's Motions to Enforce the Sale Order and Injunction*, filed December 16, 2014 [Docket No. 13021], 46-49 (excerpt attached as Exhibit A). The specific point being made was that the remedy for the due process violation in connection with the sale was to permit successor liability claims against New GM and not, as argued by New GM, limited to filing late claims against the GUC Trust (which had already distributed 90% of its assets by the time New GM revealed the existence of the Ignition Switch Defect). The Second Circuit sided with the Claimants and rejected New GM's position on this issue when it held that Ignition Switch Pre-Closing Accident Plaintiffs may bring successor liability claims against New GM as a result of the due process violation inflicted upon them.

proofs of claim and that they remained unaware of those claims until February 2014 when New GM belatedly revealed the existence of the Ignition Switch Defect that caused the Claimants' injuries and deaths.

Now they have changed their tune and argue in their opening brief that "each of the [Pre-Closing Accident Plaintiffs was on notice that they had a potential claim in the Old GM bankruptcy when they were in an accident prior to July 2009" and that these Claimants made a "strategic decision" to "wait more than five years after they suffered accidents to pursue proofs of claim against the GUC Trust." GUC Trust Opening Brief at 4, 15. On judicial estoppel grounds, this Court should prohibit the GUC Trust and Participating Unitholders from making such an "about face." *DeRosa v. Nat'l Envelope Corp.*, 595 F.3d 99, 103 (2d Cir.2010) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position[.]").

The Second Circuit has set forth the test for judicial estoppel as follows:

> Typically, judicial estoppel will apply if: 1) a party's later position is "clearly inconsistent" with its earlier position; 2) the party's former position has been adopted in some way by the court in the earlier proceeding; and 3) the party asserting the two positions would derive an unfair advantage against the party seeking estoppel. The third requirement is sometimes couched in terms of "unfair detriment [to] the opposing party" rather than advantage to the party to be estopped. In this circuit, moreover, "[w]e further limit 'judicial estoppel to situations where the risk of inconsistent results with its impact on judicial integrity is certain.'" This latter requirement means that judicial estoppel may only apply where the earlier tribunal accepted the accuracy of the litigant's statements.

Adelphia Recovery Trust v. HSBC Bank USA, National Association (In re Adelphia Recovery Trust), 634 F.3d 678, 695–96 (2d Cir. 2011) (internal citations omitted). All of these factors are present here.

The GUC Trust's and Participating Unitholders' statements in their opening briefs are clearly inconsistent with the position the GUC Trust and the Participating Unitholders took when trying to convince this Court as part of the 2014 Threshold Issues briefing to find a due process violation by Old GM to allow the Claimants to bring successor liability claims against New GM. Indeed, the brief filed by the GUC Trust and the Participating Unitholders put it eloquently:

> ***While the Pre-Closing Accident Plaintiffs might have contemplated some cause of action against Old GM, they certainly were not aware of the causes of action they assert now***. In July 2009, the ignition switch and other defects that New GM disclosed in 2014 were not known to the Pre-Closing Accident Plaintiffs. Indeed, as New GM admits, neither the direct mail notices nor the publication notices stated that any Old GM vehicles contained one or more serious defects that could cause personal injury, death, or other injuries to persons or property.
>
> ***Without notice of these defects, the Pre-Sale Accident Plaintiffs had no reason to believe that their accidents, or the deaths of their loved ones, were caused by serious defects in those cars (i.e., the defects that New GM revealed for the first time in 2014). Instead, they may well have believed one of the drivers was at fault, that road or weather conditions were to blame, or even that one of the drivers suffered a sudden health crisis.*** The Pre-Sale Accident Plaintiffs did not forfeit their right to adequate notice of their claims simply because they or their loved ones were personally injured or died in pre-Sale accidents involving vehicles that, unbeknownst to them at the time, featured serious safety defects.

Response of GUC Trust Administrator and Participating Unitholders to New GM's Opening Brief on Threshold Issues Concerning Its Motion to Enforce the Sale Order and Injunction, filed December 16, 2014 [Docket No. 13030], 26 (emphasis added; internal citations omitted); *See also* Hrg. Tr. 2/17/14 at 164:23-24 (counsel to the GUC Trust stating "It's undisputed that they didn't know about the defect in the subject vehicles until around February of 2014").[4]

Second, the Bankruptcy Court undeniably adopted and accepted as accurate the position quoted above from the GUC Trust's and Participating Unitholders' briefs. Specifically, the Court wrote in its April 2015 Decision that:

[4] An excerpt of the transcript of the first day of oral argument on the 2014 Threshold Issues containing the GUC Trust's arguments on due process is attached hereto as Exhibit B.

> [T]he 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***;

and that:

> 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.

In re Motors Liquidation Co., 529 B.R. 510, 525, 590 (Bankr. S.D.N.Y. 2015) (emphasis added). Thus, this Court adopted the GUC Trust's and Participating Unitholders' arguments that the Claimants were unaware of the Ignition Switch Defect and that Claimants' due process rights were violated when Old GM concealed the Ignition Switch Defect from them and failed to provide them with actual notice of bankruptcy events that adversely impacted their claims relating to that defect. It would be unjust to now adopt the GUC Trust's and Participating Unitholders' new (and forthcoming) arguments that the Claimants should have filed claims against the GUC Trust prior to New GM's belated public announcement and recalls relating to the Ignition Switch Defect in February 2014.

Allowing the GUC Trust and Participating Unitholders to reverse course and argue that the Claimants should have filed claims prior to February 2014 unfairly advantages the Participating Unitholders and disadvantages the Claimants. Having successfully convinced this Court that the Claimants' due process rights were violated because they were unaware of the Ignition Switch Defect in 2009 (which formed the basis for the Second Circuit's ruling permitting the Claimants to sue New GM on successor liability grounds), the Participating Unitholders should not be permitted to make the opposite argument in order to shield themselves

from the risk of dilution and disgorgement associated with allowing the Claimants to recover from the GUC Trust on their Ignition Switch Defect-related personal injury and wrongful death claims.

3. The December 2015 Tolling Arrangement Was Explicitly Meant to Defer the Filing of Fully Executed Proofs of Claim Until the Equitable Mootness Ruling Was Addressed on Appeal.

The GUC Trust and Participating Unitholders argue the December 2015 tolling arrangement with the Claimants somehow confirms that the Claimants should have filed their proofs of claim prior to that date. That is not the case and such logic is flawed.

The December 2015 tolling arrangement came about because counsel to the Claimants had collected almost 200 executed proofs of claim from the Claimants and did not want to ignore the fact that, even though as a practical matter, the Claimants could have filed the PI Late Claims Motion at that time, the motion was still not yet ripe because the April 2015 Decision and June 2015 Judgment were not yet final.[5] Indeed, the opening lines of the email containing the arrangement (which both New GM and the GUC Trust conspicuously omit from their briefs) spell this out:

> As we have discussed in connection with the General Motors case, Goodwin Procter has received proofs of claim of approximately 200 pre-sale accident plaintiffs represented by Mr. Hilliard's firm (the "Pre-Sale Accident Plaintiffs"). Rather than expending resources litigating a motion to allow **these prepetition claims** notwithstanding the passage of the bar date, we propose deferring such motion practice until after the Second Circuit rules on the pending appeal of Judge Gerber's April 15, 2015 equitable mootness ruling (the "Equitable Mootness Ruling") If the Second Circuit affirms the Equitable Mootness Ruling, the prepetition claims of these Pre-Sale Accident Plaintiffs against the GUC trust

[5] In order to be ready to act promptly in the event of a reversal, the Claimants executed their proofs of claim during the latter part of 2015 while the appeal of the April 2015 Decision/June 2015 Judgment to the Second Circuit was still pending. The Second Circuit did not decide the appeal until July 2016 and New GM filed a petition for a writ of *certiorari* after having failed to obtain *en banc* review. Everyone agreed a late claims motion would have been premature before the Second Circuit ruled on equitable mootness and due process. Had the GUC Trust thought otherwise, it simply would have told the Claimants to file the late claims motion at the end of 2015, rather than entering into the tolling stipulation as of December 2015 and then extending that stipulation in August 2016.

> would be moot and no motion would be necessary. If the Second Circuit reverses the Equitable Mootness Ruling, the Pre-Sale Accident Plaintiffs would promptly file a motion seeking to allow these claims against the GUC trust notwithstanding the passage of the bar date.

Gillett Declaration at Exh. 2, pages 2-3. Because the GUC Trust and the Participating Unitholders took the position at the time of the email arrangement that there was not an effective toll on the Claimants' time to file late proofs of claim prior to December 2015, the email arrangement provided that both sides "fully reserved" "all rights and arguments with respect to the period prior to the date of [that] email." *Id.* at 3. Contrary to the GUC Trust's argument, the email agreement is entirely consistent with the Claimants' position about the sequencing set forth in the Court's scheduling orders.[6]

It is also worth noting that, had the Participating Unitholders and GUC Trust believed these proofs of claim were ripe in 2015 and wished the Claimants to file their motion at that time, they would have rejected the email proposal. But they opted for the proposed deferral, as they presumably agreed with counsel to the Claimants that the expenditure of resources on moot claims was not wise.

4. <u>The Claimants Filed Their Proofs of Claim at the Appropriate Time</u>

New GM, the GUC Trust, and the Participating Unitholders try to make much of the Claimants' failure to stop the GUC Trust from making certain distributions to its beneficiaries after New GM revealed the existence of the Ignition Switch Defect in February 2014. This feigned indignity is overblown and is a red herring. First, staying distributions by the GUC Trust is not the same thing as filing late proofs of claim, especially considering that 90% of the GUC Trust's assets were gone by February 2014. In addition, as discussed, any late proof of claim filed after February 2014 would have been (i) disallowed as untimely prior to the establishment

[6] As discussed in the Claimants' opening brief, the tolling in the May 2014 Scheduling Order was embedded in the schedule imposed upon the Claimants in the September 2014 Scheduling Order.

of a due process violation (which did not occur until the April 2015 Decision/June 2015 Judgment) and (ii) disallowed as equitably moot prior to the Second Circuit vacating that ruling in July 2016. After the Second Circuit rendered its decision, the Claimants participated in the meet and confer process that this Court ordered to address remaining issues in light of that opinion (which included the issue of late proofs of claim). That process resulted in the Court's December 13, 2016 Order to Show Cause which staged the litigation over the 2016 Threshold Issues (including the Late Proof of Claim Issue). The Claimants timely filed their PI Late Claims Motion on the date required of them under the Order to Show Cause. Put simply, the Claimants filed their proofs of claim only when the 2014 Threshold Issues had been litigated to the point at which it made sense to do so. The distributions the GUC Trust made to the Participating Unitholders and its other beneficiaries while the 2014 Threshold Issues were being litigated are irrelevant.[7]

Second, what were Claimants to do to stop the GUC Trust from making distributions? The Ignition Switch Economic Loss Plaintiffs tried (at great cost) to stop a $135 million distribution after the issuance of the April 2015 Decision, but this Court sided with the GUC Trust and the Participating Unitholders and conditioned any stay of distribution on the posting of a $10.6 million bond. *In re Motors Liquidation Co.*, 539 B.R. 676, 679 (Bankr. S.D.N.Y. 2015) ("In this contested matter in the chapter 11 case of debtor Motors Liquidation Company, the Ignition Switch Plaintiffs move, under Fed.R.Bankr.P. 8007(a), for a stay pending their appeal from the June 1, 2015 Judgment of a contemplated $135 million distribution from the GUC Trust to its unitholders (the "Unitholders"). I'm granting the request for a stay, subject to the posting of a bond in the amount of $10.6 million."). The Claimants are individual plaintiffs who still

[7] Separate from the prior distributions from the GUC Trust and the remaining (and reserved) assets held by that trust, there is a potential remedy for the Claimants from the so-called "accordion feature" if and when it is triggered. The accordion remedy remains speculative and unknown at this point in time.

have never received a penny from the GUC Trust or New GM for the deaths and serious injuries they or their loved ones suffered more than eight years ago in vehicles that Old GM knew contained a deadly safety defect prior to its bankruptcy and that New GM illegally covered up after it acquired Old GM's assets. These Claimants have contingency fee arrangements with their personal injury counsel and many struggle to make ends meet while they deal with medical costs and other life altering repercussions of their injuries and the deaths of their family members. Thus, even if it were relevant that the Claimants did not try to stop the GUC Trust from making distributions (which it is not), the Claimants lacked the means to post the bond necessary to do so.

Finally, it is insulting and inappropriate for New GM (which admitted to criminal liability and paid almost a billion dollars to the federal government to avoid prosecution for covering up the very Ignition Switch Defect that killed and injured the Claimants and their loved ones), the GUC Trust, and the hedge funds that comprise the Participating Unitholders to suggest these Claimants are bad faith actors that strategically waited to pursue claims against the GUC Trust. *See GUC Trust Opening Brief* at 11 (incorrectly stating that the Claimants believe they can "continuously lay-in-wait" and "spring up when the *in terrorem* effect of millions of new claims reached its peak"). There is no evidence before the Court that any Claimant with a personal injury or wrongful death claim stemming from the Ignition Switch Defect did anything other than wait to pursue their proofs of claim until the Court-imposed barriers to them doing so – the Bar Date, the Late Filed Claims Order and the equitable mootness ruling – were undone.

Dated: March 20, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William P. Weintraub, hereby certify that on March 20, 2017 a true copy of the foregoing was filed through the CM/ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ William P. Weintraub

EXHIBIT A

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

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

C. Potential Availability Of Remedies Against Old GM's Estate Is Immaterial

To support its argument that no remedy can be had against it, New GM suggests that Plaintiffs have a "viable remedy" against Old GM's estate. New GM Opening Brief at 56. As an initial matter, New GM incorrectly frames the Remedies Threshold Issue as requiring this Court to specifically choose between allowing either a remedy against Old GM's estate or against New GM. As explained above, the proper remedy for the due process violation is simply

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

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

for the Court to rule that the Plaintiffs are not bound by the injunctive provisions of the Sale Order and Injunction, thereby freeing Plaintiffs to pursue any and all available remedies, including successor liability claims against New GM. The Court need go no further. Such a remedy does not require the Court to determine whether "viable" remedies also exist against Old GM's estate.

To the extent New GM argues that the exclusive remedy for the due process violation is a claim against Old GM's estate, it is mistaken. In support of its position, New GM primarily relies on cases where no due process violation was found or that are otherwise readily distinguishable. New GM Opening Brief at 56-57 (citing in *In re Edwards*, 962 F.2d 641, 643-45 (7th Cir. 1992) (holding that entire sale transaction (including transfer of title) could not be completely unwound based on deficient notice to lien holder where lien holder failed to monitor the case for two years, took no action for months after learning of notice deficiency complained of, did not dispute the adequacy of the sale price, and the lien holder's share of the sale proceeds was still available to pay it); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 94 (2d Cir. 1988) (addressing bankruptcy court order approving settlement that enjoined claims against settling insurers and holding: (i) injunction was not "unfair" because objector retained claim against debtor's estate and (ii) objector's due process rights were not violated because objector was provided with adequate notice of the settlement order and injunction and specifically objected); *Conway v. White Trucks, A Div. of White Motor Corp.*, 885 F.2d 90, 96 (3d Cir. 1989) (affirming dismissal of successor liability claims where plaintiff "did not attempt to assert his inadequate notice argument" in bankruptcy court or district court); *Molla v. Admar of New Jersey, Inc.*, No. 11-6470 (JBS/KMW), 2014 WL 2114848, at *3, *5 (D.N.J. May 21, 2014) (granting defendant's motion to dismiss successor liability claim, in case where no due process

violation was found and defendant acquired assets "free and clear of all claims and interests."); *BFW Liquidation*, 471 B.R. 652 (holding that "free and clear" sale of substantially all of the debtor's assets barred claims against purchaser and that plaintiff could assert its claims against the debtor where no due process violation had occurred)).

Even if the out-of-circuit cases relied by New GM could somehow support its argument that Plaintiffs' remedy is limited to asserting a claim against Old GM's estate – which they do not – that argument would remain at odds with governing Second Circuit precedent holding that a party cannot be bound by the injunctive terms of a bankruptcy court order for which insufficient notice was provided. *Manville IV*, 600 F.3d at 153 ("[T]he primary current contention is the argument of Chubb . . . that 'it was not given constitutionally sufficient notice of the 1986 Orders, so that due process absolves it from following them, whatever their scope.' In our view, Chubb is correct."); *Grumman*, 467 B.R. at 711. More fundamentally, New GM's proposed remedy would not provide redress for the due process violation actually at issue. As New GM is no doubt aware, the operative language of the Due Process Clause provides that "[n]o person shall . . . deprived of . . . property, without due process of law." U.S. Const. amend. V. Here, the property Plaintiffs were deprived of through the Sale Order and Injunction is their right to assert claims against New GM.[26] By suggesting the assertion of a claim against Old GM's estate, New GM proposes a remedy that is disconnected from the constitutional injury. This incongruity further highlights the incorrectness of New GM's argument and the soundness of the Second Circuit's conclusion in *Manville IV*.

[26] Stated differently, Plaintiffs are not asserting a due process challenge to a bar date order or a discharge injunction issued in favor of a debtor. Rather, the due process violation occurred through an order that curtailed their rights vis-à-vis a non-debtor (New GM).

Based on the foregoing, the appropriate remedy for the due process violation at issue is for this Court to determine that Plaintiffs are not bound by the injunctive provisions of the Sale Order and Injunction.

III. CONCLUSION

For the reasons set forth above, the Pre-Closing Accident Plaintiffs respectfully request that the Court deny New GM's Motion to Enforce Sale Order re: Pre-Closing Accident Lawsuits and grant such other and further relief as it deems just and proper.

Dated: December 16, 2014

Respectfully submitted,

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EXHIBIT B

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026-reg

- x

In the Matter of:

MOTORS LIQUIDATION COMPANY, et al.,

f/k/a General Motors Corp., et al.

Debtors.

- x

U.S. Bankruptcy Court

300 Quarropas Street

White Plains, New York

February 17, 2015

9:02 AM

B E F O R E :

HON ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

ECRO: K. HARRIS

Hearing re: Oral Argument on Motion to Enforce.

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THE COURT: I assume you're going to reply next, or --

MR. STEINBERG: The GUC Trust hasn't spoken yet. I'm not --

THE COURT: Oh, yeah. Is GUC Trust going to be -- Ms. Rubin, are you going to be weighing in on what I've heard this morning?

MS. RUBIN: I fully expect to, Your Honor.

THE COURT: Okay. Then Ms. Rubin next, and then you can reply after that, Mr. Steinberg. Now, especially with the extent to which I've interrupted you guys, I'm not going to prevent you from arguing anything, even if it's beyond the original time limits, assuming you're not filibustering or otherwise taxing my patience, but we still have to quit at 3:15 today. If we're not done at that point -- and of course, the resumption is going to be at 2:05, if we're not done, then we're going to have to pick up tomorrow morning. We're in recess.

MR. STEINBERG: Thanks.

(Court in recess at 1:05 PM)

THE CLERK: All rise.

THE COURT: Have seats, please. Okay, are we up to Ms. Rubin?

MS. RUBIN: We are, Your Honor, and if I can help it, I don't intend to take the full balance of my time

today.

THE COURT: Okay.

MS. RUBIN: But I do want to address a number of the issues that you talked about with others today, and hope that I can address some of the questions that you posed to all of us as a group, as well.

THE COURT: Okay.

MS. RUBIN: Your Honor, I want to start from the proposition that you started from this morning, which is that you have been convinced, or at least you assume, where we are right now, that there was enough knowledge at old GM to have warranted a recall in 2009, prior to the sale. Your Honor is clearly aware that the briefing that my client and the participating unit holder submitted, took a different tack, and the reason that we did that is because we wanted to illustrate that even if everything that Mr. Steinberg and his colleagues said was true, there was still a due process violation here, or would be a due process violation here, with respect to the groups of Plaintiffs that Mr. Weisfelner, Mr. Esserman and Mr. Weintraub represent.

That having been said, let’s start from the proposition that Your Honor began with this morning and move from there. The first, and most important reason we believe that that the Plaintiff should be able to proceed against new GM is because, as Mr. Weisfelner and others capably told

you, they have independent claims in both the pre-sale and the post-sale complaint against new GM, that are predicated on conduct of new GM, and for some reason, in their reply, new GM seems to suggest that that's not true of the pre-sale complaint, and I just want to illustrate one example of why that is, in fact, the case. In paragraphs 1063 to 1079 of the pre-sale complaint, the pre-sale Plaintiffs make a claim under California's Unfair Competition law, and that claim is predicated, in part but not in full, on the violation of GM, sorry, new GM, on their violation to comply with the Safety Act, and Your Honor, I want to underscore that that was a knowing violation, by consenting to the order with NITSA. What new GM essentially acknowledged is that they didn't comply with that law, they did not provide NITSA with knowledge within five days of determining there needed to be a recall.

And from what I understand, Mr. Weisfelner's clients' claim, for violation of the Unfair Competition law, could be predicated on that in and of itself alone. Now, there's another reason that these claims -- we discussed whether or not these independent claims against new GM are subject to the sale order, and Mr. Esserman pointed out to you this morning a reason why they are not, based on the findings of fact in the sale decision, and their incorporation in full into the sale order.

Let me suggest to you another reason why, that I think has eluded our discussion so far, and I'll refer Your Honor to Section 2.3(b) of the Master Sale and Purchase Agreement. That is the definition of retained liabilities, and I'll just read it, in part. The definition of retained liabilities starts with, "each seller acknowledges and agrees that, pursuant to the terms and provisions of this agreement, Purchaser shall not assume or become liable to pay, perform or discharge, any liability of any Seller," and let me pause there, Your Honor, because when we're talking about retained liabilities, it pertains to the liability of a Seller. Now, Mr. Steinberg wants to suggest that any liabilities that have to do with private rights of action for failures, for example, to comply with recall obligations, are not assumed liabilities, and therefore, by definition, must be retained. Respectfully, I'll disagree, and agree with the Plaintiffs that it's not a binary universe of assumed, retained and nothing else. New GM covenanted, under Section 6.15(a), that it would comply with all of the Federal recall-related laws and regulations applicable to old GM-manufactured, designed or sold vehicles.

THE COURT: That's in the sale agreement?

MS. RUBIN: That is in the sale agreement, Your Honor.

THE COURT: What section is that, by the way?

MS. RUBIN: It's 6.15(a) and it's addressed in our briefing as well, Your Honor.

THE COURT: I'm well aware of the point, I would just -- wanted to see the citation, too.

MS. RUBIN: So, Your Honor, it would be our position that, having undertaken that covenant, that is the independent duty that Mr. Steinberg insists that his client does not have, irrespective of the wording of the sale order, they agreed to comply with those recall laws in respect of old vehicles. Whether or not the sale order goes beyond that in other respects, and maybe goes too far, is another issue entirely, but at least in terms of the sale agreement itself, the retained liabilities are liabilities of any Seller. I don't hear anybody suggesting, or they shouldn't suggest, that old GM, or the old GM bankrupt estate through the GUC Trust, should somehow be liable for the knowingness conduct of new GM and its failure to disclose to NITSA, disclose to the driving public, to disclose to this Court, and to disclose to anyone at all, that these cars were subject to a safety defect that rose to the level that it warranted a recall.

The other thing that -- one other thing that we would say, Your Honor, is, in terms of why the Plaintiff's claims should be allowed to go forward, let me identify

another group of the Plaintiffs. I believe Mr. Weisfelner is the one who spoke to you at length about the used car purchasers here, and whether or not their claims are subject to the sale order. It's hard for us to see, under the Grumman case, which as Your Honor knows, interprets Chateaugay, how the used car purchasers here could ever have been subject to the sale order and injunction. None of those people had any pre-sale relationship or contact with old GM. Suddenly, they were not aware at the point in time of their sale that their cars were subject to the serious safety defect of which we're all now aware, and it's hard for us to see how the analysis in the Grumman case is any different than that which should be applied to used car purchasers, who are a class of Plaintiffs implicated by the post-sale consolidated complaint.

Now, there was some discussion this morning about the Burton decision, which Your Honor referred to as the Chrysler decision by Judge Bernstein, and to the extent that Your Honor has questions about why these used car purchasers in this situation should be treated any differently than the Burton Plaintiffs, let me try to address that, if I may.

First and foremost, the Burton case involved a recurring fuel spit-back problem that had already resulted in two to three recalls prior to Plaintiffs bringing forth claims in that instance. Here, we have a warranty in the

sale agreement by old GM, that there had been no material recalls since 2007. We're not dealing with a factual situation in which anybody who drove one of the vehicles, we'll call them the subject vehicles, that are the subject of this proceeding, nobody is suggesting that drivers should have been on notice of the ignition switch defect by virtue of anything that happened before, as was the case in Burton.

Now, new GM is very fond of quoting to Your Honor a particular sentence from the Burton decision in which Judge Bernstein, and I'm sure I'll mangle this somehow, says that anyone who drives a car should reasonably contemplate that their car will need to be repaired. Again, the end of that sentence, which new GM doesn't quote for you is, "especially whereas here there have already been two to three recalls involving the same problem, and involving some of the same vehicles," but be that as it may, there's another distinction here that I think is a more fundamental and important one.

The claims at issue here are not fundamentally about repairs. The Burton case is one in which the Plaintiffs, who characterized themselves as future claimants and with which Judge Bernstein disagreed, their claims were Duty to Warn claims and failures to honor warranties. Fundamentally, they were upset that their cars weren't being repaired. That's not really the gravamen of the Plaintiff's

complaints and the consolidated complaints here. What are they really talking about, Your Honor? They're saying, there has been such a widespread erosion of GM's reputation for quality, such that all of their vehicles have suffered economic loss, and to the extent that they are also alleging damages for economic losses associated with repairs, again, I would submit that those are not the sort of repair-related claims that a driver of these vehicles could have or should have anticipated. They are claims for things like childcare expenses associated with all of the time necessary to get their cars repaired, their lost wages, their rental car expenses. Your Honor is well aware that there are a number of people who said, "Until GM is able to repair my car consistent with the ignition switch recall, I'm not driving that car, because I know, based on the information that's come out through Feinberg Compensation Fund, that GM has at least admitted that 50+ people died, and has awarded awards under the Feinberg Compensation protocol, to at least 128 people." That being the case, there are people that Mr. Weisfelner and Mr. Esserman represent who say, "I'm not going to drive my car and GM should be liable for the cost of my rental car expenses during that period of time, until my car is 100 percent safe to drive."

Now, Your Honor, putting aside the question of whether these Plaintiffs have independent claims against new

GM, or whether there are future claims on behalf of the used car purchasers that are more akin to the claims in the Grumman/Olsen case, the biggest issue here is obviously whether or not the pre-sale economic loss Plaintiffs suffered a due process violation. And you see in the briefing that there are starkly different visions of the notice that should have been afforded to those claimants.

Let me submit this. If Your Honor can accept that old GM knew enough that they should have recalled the subject vehicles, the notice that was given was never enough, even for the folks that Mr. Weintraub represents, and here's why. Last year, in the DPWN case that went up to the Second Circuit, the Court set forth the standard for evaluating the claims of those who otherwise would be barred by a bankruptcy order. And the Court essentially said, it's a two-part test. The first thing you have to do is look at what the claimants knew or should have known with reasonable diligence, and if the claimant gets across that threshold, the second part of the inquiry is to ask what "the Debtor knew or should have known of the potential liability, such that it should have provided the claimant with notice of his or her potential claim."

Whether or not the folks that Mr. Weisfelner and Mr. Esserman and Mr. Weintraub represent are known Creditors, it is indisputable that old GM knew enough that

it should have afforded them more notice under the DPWN test. And Your Honor shouldn't take my word for the fact that the DPWN test now guides evaluations of due process not just in a post-discharge context, but across all bankruptcy contexts, Your Honor may be aware that Judge Gropper issued an opinion in the Direct Access bankruptcy last month on January 6th, the Westlaw site is 2015 WL 94556, and in doing so, Judge Gropper was asked to pass on whether or not a claimant could file a late Proof of Claim after a confirmation order. Judge Gropper writes as follows, Your Honor: "In DPWN holdings, the Second Circuit recently set forth the showing that a party must make, in order to obtain the right to pursue a claim that otherwise would be barred by virtue of a Debtor's bankruptcy" It wasn't conditioned on what kind of case we were talking about or what stage in the bankruptcy we were at. Judge Gropper interpreted the DPWN case to be the guiding analysis for any time someone comes before this Court or a District Court and says, "I have a claim," and the Defendant says, "No, no, no, you're barred by a sale order and an injunction," or, "You're barred by some other order in bankruptcy."

So under that analysis, Your Honor, the DPWN analysis, we would respectfully submit that old GM knew or should have known of the potential claims that folks like Mr. Weisfelner's clients would have had, even if they didn't

have a bunch of lawsuits before them, even if they didn't make the list of Creditors, even if they didn't appear on the general ledger. The had sufficient knowledge within the company, based on their books and records, construed more broadly, that they should have provided notice of the potential liability before the sale.

Now, Your Honor asked an inform question earlier today, which was, "What should that notice have looked like?" And I think you've heard from Mr. Weintraub and others about what that might have looked like. Let me underscore Mr. Weintraub's presentation and say, we believe that the right notice here would have looked like the Chemtura situation, and respectfully, while Your Honor identifies that as a situation in which Your Honor approved best practices, and certainly, I'll agree that Judge Furman in affirming that, agreed that maybe that wasn't what was constitutionally mandated under the facts of that case, I think the type of notice provided there is constitutionally mandated in this case. You have a situation where on the factual record, Mr. Weisfelner has already convinced Your Honor that old GM knew enough that it should have issued a recall in respect of the subject vehicles. On those facts, why it's not the case that the publication notice should have said, "There is a safety defect of a serious dimension in these makes and models of vehicles, and if you believe

you have been injured by that, now is the time to come forward. There will be a hearing about the sale." That is essentially what was provided in the Chemtura case where the manufacturer understood that a chemical that it produced --

THE COURT: Chemtura was a claims case, that the people worked in factories where diacetyl was used.

MS. RUBIN: Yes, Your Honor.

THE COURT: It wasn't a 363 case.

MS. RUBIN: Well, that's true, Your Honor, it wasn't a 363 case, but respectfully, Your Honor, courts in this District and Circuit and others, borrow, with respect to what notice is constitutionally mandated, from context to context all the time.

THE COURT: Yes, but you would agree, I take it that, Mullaney talks baby talk about the need to look at the facts and circumstances.

MS. RUBIN: Sure, and Your Honor, I'd also agree that the facts --

THE COURT: As do the other cases, the Second Circuit cases such as Drexel Burnham implementing the Mullaney.

MS. RUBIN: Sure, but Your Honor, I would also say, that in talking about 363 cases or otherwise, the fundamentals of notice, the cornerstones of notice, or not only notice of one's claim, but the opportunity to be heard,

and that doesn't change from context to context, and if we are going to follow the dictates of Mullaney and talk about the facts and circumstances of this case, I think if Your Honor is willing to find that old GM knew enough that it should have recalled the vehicles, certainly it knew enough in those circumstances that it should have incorporated in a publication notice, enough information to put people like Mr. Weisfelner's clients, that if they believed they had a claim, now was the time to come forward. They didn't have to necessarily say, "If you believe you've suffered an economic loss or diminution of value in your car or lost wages," or any of that, that's not the claim-specific notice that we're talking about. But they should have apprised people in the Plaintiffs' position of the facts and circumstances that underlie their case, that there was a serious ignition switch defect that ran throughout the subject vehicles, that was serious enough to warrant a recall, and therefore, anyone who believes that they have been injured thereby, should come forth and file a claim.

Now, Your Honor, there has been a lot made out of the fact that 363 is sort of a separate situation, and I think Your Honor just alluded to it, that in discharge cases or confirmation cases, maybe notice doesn't mean what it should mean in a 363 case. But I'll have your -- I'll say for Your Honor's sake, DPWN, at the District Court level,

which was a known Creditor case, right, DHL didn't know that it has an antitrust claim against United Airlines. They certainly knew that they were a Creditor, they were certainly apprised of the bankruptcy, and deciding what notice is due to DHL, what did the Eastern District -- how did the Eastern District make that decision? Well, they borrowed from the Grumman case, which is, in fact, a 363 case.

Similarly, in the Schwinn case in the Northern District of Illinois, a 363 case involving a purchaser of an exercise bike in 1979, whose grandson is not injured until well after the bankruptcy in the 90s, what does that case do? It borrows from the Chemtron case in the Third Circuit, which again, is a discharge case. So, I would submit to Your Honor that what is fundamentally required for notice before depriving someone of a property interest, the facts and circumstances of the cases might change in terms of dictating what form of notice is required, but the content has to be informed by a larger body of case law that is transferrable from one context to the other.

It's also true that the idea that none of the Plaintiff's property interests here were affected is sort of a preposterous one, right? And to the extent that new GM tries to distinguish some of the 363 cases outside this Circuit by saying, "Well, those cases involve property

interests that were unique and couldn't have been reduced to money," that's actually not true. First of all, those cases were all decided on grounds other than the type of interest invoked, and Rule 60(b) was considered in all of them.

I'll talk about the poly --

THE COURT: Wait, time out. You said 60(b) was considered?

MS. RUBIN: It was considered, and in each of those cases, Polycel, Metzger, and Compak, after referring to Rule 60(b), each of the courts nonetheless held that the claimant before it should be exempt from the sale order, on the basis that the due process rights were violated. I'll quote to you, Your Honor from the Metzger case, where, after considering Rule 60(b), for example, the Court said, "The Court has some flexibility in creating a remedy here, and need not and will not find the entire sale void." But nonetheless, the Court held that it would find that the sale was void as to the claimant before it.

THE COURT: Well, there was no question that Arthur Weissbrodt said that, but I don't have a memory of him discussing the criteria for granting 60(b) relief, and if you say that he mentioned it, and I'm not (indiscernible) to Ms. Rubin, but there was not a material discussion of 60(b), was there?

MS. RUBIN: Your Honor, I don't have the case

right in front of me and I'm unable to answer that question directly, but my recollection is that in at least two of these three cases, there is a discussion by the Defendant that 60(b) only allows for voiding the entire sale order or providing no relief, and in each of those cases, there's a rejection, either implicitly or explicitly, of that theory. So, for example, in the Compaq case -- you know, the other thing I would say, Your Honor, is that certain of these Courts say that notwithstanding Rule 60(b), Rule 60(b) is only one way of getting there. So, for example, in the Compaq case, the Court says, "There's not a Rule 60(b) motion before me, but sua sponte, I can characterize the relief that this claimant is asking for as a 60(b) motion, or alternatively, I can see this as a motion for relief from the sale order." That's an implicit recognition that 60(b) is not the only vehicle by which you can remediate a due process violation. So, respectfully, GM's assertion that the Plaintiffs here have to conform and shoehorn their arguments into a 60(b) analysis in order to prevail is simply not the case. You have an implicit recognition in the Compaq case that that's true, and more importantly, in this District, let me refer Your Honor to the Lehman Brothers decision that new GM cites in its brief at 2014 WL 7229473. Now, Judge Buchwald in that situation determined that the Creditor, who was making arguments before her, in

fact didn't qualify as a Creditor at all, but in clarifying the narrowness of her holdings, she said as follows, Your Honor: "We do not decide to question whether a person with a cognizable property interest may attack a final free and clear sale order in the absence of notice," and then, following that immediately with this sentence: "Nor do we decide whether the lack of notice could be grounds…" there is an ellipses here, "for relief from a sale order under Rule 60(b)." So, you have a District Court Judge in this District, implicitly recognizing that a due process claim, meaning, I didn't get notice of the way in which my property interests would be affected here, could be different from a Rule 60(b) motion.

THE COURT: I'm not sure if I heard you right. I thought you preceded each of those two sentences by "We do not decide that."

MS. RUBIN: And I did, Your Honor, but I still see the case as standing for a recognition, as a District Court Judge in this District, recognizing that these are two alternative ways of getting to the same place. I'll recognize that that's dicta. Judge Buchwald didn't reach those issues in her decision, and she's very clear about that, but notwithstanding that, in clarifying to the larger community reading her decision what she is and is not deciding, she is saying expressly, "I see these things as

possibly two different avenues for relief," and I think it just underscores the fact that in the Compaq decision, for example, the Court says the same thing. "I don't have a Rule 60(b) motion before me. I can sua sponte interpret the arguments that are being made before me as a 60(b) motion, or alternatively, I can grant relief from the sale order." That doesn't sound to me like the musings of a Judge who believes that 60(b) is the only vehicle by which someone who has a due process argument can seek relief from the sale order.

Your Honor, I'll move on to talk about remedy, and I'll note that the primary cases on which new GM depends are the Edwards case, and they also place a lot of emphasis on the Paris case, which hasn't been discussed directly by name, but the general principle has been alluded to a lot here, that's the case --

THE COURT: Paris?

MS. RUBIN: Yes.

THE COURT: Mr. Weisfelner had mentioned Paris.

MS. RUBIN: Well, I apologize to Mr. Weisfelner for not hearing that. To the extent that the Court in Paris is saying, "Your interests are not affected here because you have a bunch of assets that can be converted and all Creditors will have access to that." Your Honor, that may be fine and well if we were here four years ago, or five years

ago, but that's not where we are now, and I think to not appreciate the realities of where the GUC Trust finds itself would be a disservice to everyone, right? We have a situation here where the GUC Trust has distributed 90 plus percent of distributable assets. We are three plus years post-confirmation. All of the remaining resources of the GUC Trust have been reserved for express purposes as Your Honor knows, we filed a quarterly GUC Trust report last week. There is literally nothing left right now for the Plaintiffs here, and so to not -- if we're going to consider who would be prejudiced by a remedy here or consider a larger context of prejudice with respect to the remedy, I think that has to be considered, too.

The final thing that I'll say, Your Honor, is the notion that prejudice is somehow a required element of a due process violation is creative, but not sustained by the case law. To the extent that old GM siphoned numbers --

THE COURT: Time out. Before you go too far, Ms. Rubin --

MS. RUBIN: Sure.

THE COURT: -- I need to dust off with you the colloquy I had with Mr. Weisfelner, because I would agree in a heartbeat that you didn't make the supplemental distribution to your constituency last year in the dead of night, but you're saying -- you're talking about hardship,

presumably to the economic loss Plaintiffs, or maybe Mr. Weintraub's people or both. At the same time that your folks were the beneficiaries of Mr. Weisfelner's guys decision for admitted strategic reasons, not to try to tap those funds. So you're trying to exploit the very situation for which your guys were the beneficiary.

MS. RUBIN: I don't believe that it's an attempted exploitation at all, Your Honor.

THE COURT: Well, I'm not accusing you of evil --

MS. RUBIN: I respectfully disagree, if I can.

THE COURT: I'm accusing you of representing a client --

MS. RUBIN: No.

THE COURT: -- but isn't that the bottom line?

MS. RUBIN: No, Your Honor, it's not, and here's why. Your Honor engaged in a colloquy earlier with Mr. Weisfelner, well first of all, to the extent that you engaged in the colloquy earlier with Mr. Weisfelner also about the efficacy of the bar date notice, correct? It may be that the bar date notice was not effective as to certain of these Plaintiffs, but the sale notice wasn't effective as to them either, and they had a choice to make at the outset. It's undisputed that they didn't know about the defect in the subject vehicles until around February of 2014, but at that point in time, they made a choice, and they made a

choice to go after new GM. They never once filed a claim or sought to file a late proof of claim against the GUC Trust.

When there were the initial motions to enforce a few months later, and we came before this Court, the Plaintiffs filed an objection, they filed an adversary proceeding complaint, those issues were not raised there either, and when we first came before Your Honor, let's rehash how the GUC Trust came to be a party here. It wasn't on motion or any suggestion by the Plaintiffs. It was on suggestion by new GM, who said the Plaintiffs should be forced and shoehorned into going after the GUC Trust. But we don't believe that the Plaintiffs should have to do that. We believe that the Plaintiffs' due process rights were violated, and so in making that distribution, I wouldn't characterize it as an exploitation at all. I would say that my client was well within its rights to distribute assets to its existing beneficiaries, consistent with its fiduciary duties and the documents that govern it.

Your Honor, if I can return to prejudice?

THE COURT: Yeah, go ahead.

MS. RUBIN: The notion that prejudice is a required element of a due process violation here, I think, is a fiction, and in advancing that argument, new GM relies on two different strands of cases: one are cases in which, despite a notice defect, the claimants still have an

opportunity to be heard, and that's particularly true of the cases that they cite within this District. The Parker case, I think, is a paradigmatic example of that. The Plaintiff in that case came forward and said they were deprived of their due process rights, but Your Honor found that, notwithstanding that, the guy cross-examined two of the three witnesses during the sale hearing, received ample discovery. There was no due process violation because he had an opportunity to be heard. That certainly was not the case with respect to any of the Plaintiffs here, against whom the notice couldn't have possibly been effective, because to just get the notice without notice of their claim is, as Mr. Weisfelner recognized in the Waterman case, no different than being apprised of your claim and not being apprised of the bankruptcy.

The other cases that they cite are entirely far of field from bankruptcy altogether. Most of them involve procedural irregularities, like failure to enter a substitution of counsel order, and notwithstanding that, the new counsel still gets to be heard, or listing the wrong statute in an administrative proceeding on the cover, where everybody knows what's really at issue. That's certainly not the case in which we found ourselves, so it takes a lot of creativity to cleave onto the due process standard in this Circuit, some prejudice standard. The Manville case

and the Cope case that Your Honor referred to earlier, we understand and appreciate those aren't 363 cases. But to conclude, Your Honor, we would suggest that those should be your guiding principles. Those are recognitions by the Second Circuit that in a bankruptcy situation, no party can be deprived of a property interest without adequate notice of their claim.

Everybody understands, here, that that's not what happened, and to the extent that Your Honor is willing to find on this stipulated factual record, that old GM had sufficient knowledge that it should have recalled the vehicles, it should also be the case that they had sufficient knowledge to put into a publication notice, if not actual mailed notice to all of the people that Mr. Weisfelner and Mr. Esserman and Mr. Weintraub represent. It should have put into that notice greater content to afford people a better and more complete, and consistent with due process, a constitutional understanding of what their claims are. And with that, Your Honor, I'll rest.

THE COURT: All right, thank you. Okay, Mr. Steinberg?

MR. STEINBERG: Your Honor, do we have a stop at a quarter after three today?

THE COURT: Yes.

MR. STEINBERG: I'm not sure if I'll finish with