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UNITED STATES DISTRICT 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 (MG) (Jointly Administered)
In re: GENERAL MOTORS LLC IGNITION SWITCH LITIGATION *This Document Relates To All Actions*	No. 14-MD-2543 (JMF) No. 14-MC-2543 (JMF) Hon. Jesse M. Furman

GENERAL MOTORS LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO WITHDRAW THE REFERENCE OF THE ECONOMIC LOSS PLAINTIFFS' RULE 23 MOTION

TABLE OF CONTENTS

Page

INTRODUCTION 1

BACKGROUND 7

I. OLD GM'S BANKRUPTCY AND SALE OF ASSETS TO NEW GM. 7

II. THE MDL 2543 LITIGATION. 8

III. THE PRIOR PROPOSED SETTLEMENT. 8

IV. THE CURRENT PROPOSED SETTLEMENT. 9

ARGUMENT 14

I. THE PROPOSED SETTLEMENT RAISES SUBSTANTIAL PROBLEMS OF CONSTITUTIONAL AND NON-BANKRUPTCY FEDERAL LAW, REQUIRING WITHDRAWAL OF THE REFERENCE. 15

A. The Proposed Settlement Requires Adjudication of Substantial Non-Bankruptcy Issues Under *Ortiz*, *Amchem*, Rule 23, and the Due Process Clause, Mandating Withdrawal of the Reference. 18

B. The Proposed Settlement Requires Adjudication of Whether the Due Process Clause Requires Separate Class Representatives and Counsel to Represent Plaintiffs With Conflicting Interests, Mandating Withdrawal of the Reference. 24

C. The Proposed Settlement Requires Adjudication of Constitutional and Non-Bankruptcy Issues Relating to Whether Plaintiffs With No Injury Can Recover, Mandating Withdrawal of the Reference. 27

II. THE COURT SHOULD PERMISSIVELY WITHDRAW THE REFERENCE FOR CAUSE. 29

A. Withdrawal of the Reference Promotes Judicial Economy. 30

B. Withdrawal of the Reference Will Not Cause Significant Delay. 43

C. Withdrawal of the Reference Promotes Uniformity in Bankruptcy Administration Because the Proposed Settlement Involves Issues More Commonly Addressed in the District Courts. 43

D. Withdrawal of the Reference Is Necessary to Prevent Plaintiffs' Forum Shopping. 45

E. Withdrawal of the Reference Avoids Unnecessary Appeals. 46

CONCLUSION 47

TABLE OF AUTHORITIES

Page(s)

Cases

1800Postcards, Inc. v. Morel,
153 F. Supp. 2d 359 (S.D.N.Y. 2001) 4, 6, 29, 41

Am. Tel. & Tel. Co. v. Chateaugay Corp.,
88 B.R. 581 (S.D.N.Y. 1988) 15

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) ..... passim

Big Rivers Elec. Corp. v. *Green River Coal Co., Inc.*,
182 B.R. 751 (W.D. Ky. 1995) 43

Chemtura Corp. v. U. S.,
2010 WL 1379752 (S.D.N.Y. March 26, 2010) 16

City of New York v. Exxon Corp.,
932 F.2d 1020 (2d Cir. 1991) 3, 14, 15, 47

Complete Mgmt., Inc. v. *Arthur Andersen, LLP (In re Complete Mgmt., Inc.)*,
2002 WL 31163878 (S.D.N.Y. Sept. 27, 2002) 44

Denney v. Deutsche Bank AG,
443 F. 3d 253 (2d Cir. 2006) 27

Dev. Specialists, Inc. v. *Orrick, Herrington & Sutcliffe, LLP*,
2011 WL 6780600 (S.D.N.Y. Dec. 23, 2011) 43, 46

Doe v. Karadzic,
192 F.R.D. 133 (S.D.N.Y. 2000) 23

General Media v. Guccione (In re General Media, Inc.),
335 B.R. 66 (Bankr. S.D.N.Y. 2005) 44

Glatt v. Fox Searchlight Pictures, Inc.,
811 F.3d 528 (2d Cir. 2016) 47

Hansberry v. Lee,
311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940) 24

Houbigant, Inc. v. *ACB Mercantile, Inc. (In re Hourbigant, Inc.)*,
185 B.R. 680 (S.D.N.Y. 1995) 43

In re Adelphia Commmc'ns Corp. Sec. & Derivative Litig.,
2006 WL 337667 (S.D.N.Y. Feb. 10, 2006) 16, 46

In re Ames Dept. Stores Inc.,
512 B.R. 736 (S.D.N.Y. 2014) 15, 16

In re Asalcol Antitrust Litig.,
907 F.3d 42 (2018) 27

In re Bayshore Wire Products Corp.,
209 F.3d 100 (2d Cir. 2000) 47

In re Burger Boys, Inc.,
94 F.3d 755 (2d Cir. 1996) 43

In re Casimiro,
2006 WL 1581897 (E.D. Cal. June 6, 2006) 41

In re Dana Corp.,
379 B.R. 449 (S.D.N.Y. 2007) 30

In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig.,
1999 WL 782560 (E.D. Pa. Sept. 27, 1999) 24

In re Durso Supermarkets,
170 B.R. 211 (S.D.N.Y. 1994) 41

In re Enron Corp.,
2006 WL 544463 (S.D.N.Y. Jan. 17, 2006) 38

In re Ephedra Prod. Liab. Litig.,
329 B.R. 1 (S.D.N.Y. 2005) 6, 30, 31

In re Findley,
993 F.2d 7 (2d Cir. 1993) 26

In re G.M. Crocetti, Inc.,
2008 WL 4601278 (S.D.N.Y. Oct. 15, 2008) 31

In re Gen. Motors LLC Ignition Switch Litig.,
2017 WL 3443623 (S.D.N.Y. Aug. 9, 2017) 38, 45

In re Gen. Motors LLC Ignition Switch Litig.,
2018 WL 1638096 (S.D.N.Y. Apr. 3, 2018) 38

In re Gen. Motors LLC Ignition Switch Litig.,
339 F. Supp. 3d 262 (S.D.N.Y 2018) 34

In re Gen. Motors, LLC Ignition Switch Litig.,
257 F. Supp. 3d 372 (S.D.N.Y. 2017) 34, 37, 38, 45

In re General Motors LLC Ignition Switch Litig.,
2016 WL 3920353 (S.D.N.Y. July 15, 2016) 33, 34, 37, 45

In re J.P. Morgan Stable Value Fund ERISA Litig.,
2017 WL 1273963 (S.D.N.Y. Mar. 31, 2017) 23

In re Joint E. & S. Dist. Asbestos Litig.,
982 F.2d 721 (2d Cir. 1992) 26

In re Katrina Canal Breaches Litig.,
628 F.3d 185 (5th Cir. 2010) 19, 23

In re Literary Works in Elec. Databases Copyright Litig,
654 F.3d 242 (2d Cir. 2011) 25

In re Motors Liquidation Co.,
447 B.R. 150 (S.D.N.Y. 2011).....20

In re Motors Liquidation Co.,
538 B.R. 656 (S.D.N.Y. 2015)..... 28, 29, 31, 46

In re Motors Liquidation Co.,
591 B.R. 501 (Bankr. S.D.N.Y. 2018).....9

In re Motors Liquidation Co.,
829 F.3d 135 (2d Cir. 2016).....7

In re Motors Liquidation Company,
580 B.R. 319 (S.D.N.Y. 2018).....9, 11

In re Nasdaq Mkt.-Makers Antitrust Litig.,
176 F.R.D. 99 (S.D.N.Y. 1997).....27

In re Orion Pictures Corp.,
4 F.3d 1095 (2d Cir. 1993).....30

In re Pan Am Corp,
163 B.R. 41 (S.D.N.Y. 1993).....46

In re Parmalat Finanziaria S.p.A.,
320 B.R. 46 (S.D.N.Y. 2005).....passim

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,
2019 WL 359981 (E.D.N.Y. Jan. 28, 2019).....4

In re Siegmund Strauss, Inc.,
2013 WL 3784148 (Bankr. S.D.N.Y. July 17, 2013).....38

In re Standing Order of Reference Re: Title 11,
12 Misc. 32 (S.D.N.Y. Feb. 1, 2012).....14

In re Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Products Liab. Litig.,
221 F.3d 870 (6th Cir. 2000).....19, 23

In re Wilborn,
609 F.3d 748 (5th Cir. 2010).....47

Jane Doe 30's Mother v. Bradley,
64 A.3d 379 (Del. Super. Ct. 2012).....24

Juris v. Inamed Corp.,
685 F.3d 1294 (11th Cir. 2012).....24

Klein v. O'Neal,
2006 WL 325766 (N.D. Tex. Feb. 13, 2006).....19

LightSquared Inc. v. Deere & Co.,
2014 WL 345270 (S.D.N.Y. Jan. 31, 2014).....15, 17

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992).....27

Mishkin v. Ageloff,
220 B.R. 784 (S.D.N.Y. 1998).....passim

Moreno v. Deutsche Bank Americas Holding Corp.,
2017 WL 3868803 (S.D.N.Y. Sept. 5, 2017) 23

N. Pipeline Constr. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982).....17

Opperman v. Path, Inc.,
2016 WL 3844326 (N.D. Cal. July 16, 2016) 28

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999).....passim

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985).....22, 23, 24

Picard v. Flinn Invs., LLC,
463 B.R. 280 (S.D.N.Y. 2011).....15, 17, 29

Picard v. HSBC Bank PLC,
450 B.R. 406 (S.D.N.Y. 2011).....3, 14

ResCap Liquidating Trust,
518 B.R. at 265-66 .....41, 45

Schoenbaum v. E.I. Dupont De Nemours & Co.,
2009 WL 4782082 (E.D. Mo. Dec. 8, 2009).....35

Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC,
492 B.R. 133 (S.D.N.Y. 2013).....15

Smith v. MCI Worldcom, Inc.,
2000 WL 36726436 (N.D. Okla. Mar. 31, 2000) 26

Solutia, Inc. v. *FMC Corp.*,
2004 WL 1661115 (S.D.N.Y. July 27, 2004).....40

Stott v. Capital Fin. Servs., Inc.,
277 F.R.D. 316 (N.D. Tex. 2011) 18, 19

Sykes v. Mel S. Harris & Assocs. LLC,
780 F.3d 70 (2d Cir. 2015) 27

Tyson Foods, Inc. v. Bouaphakeo,
136 S. Ct. 1036 (2016) 17, 28

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011).....23

Wedtech Corp. v. *London (In re Wedtech Corp.)*,
81 B.R. 237 (S.D.N.Y. 1987) 44

Statutes

28 U.S.C. § 1334(a) 14

28 U.S.C. § 1334(b) 14
28 U.S.C. § 157(d) ..... passim

Other Authorities

2018 Advisory Comm. Notes to the 2018 Amendments to FED. R. CIV. P. 23(e) 36

Rules

Delaware Superior Court Civil Rule 23 24
Federal Rule of Civil Procedure 23 ..... passim

Treatises

1 *McLaughlin on Class Actions* § 5:10 (15th ed. Oct. 2018 Update) 3, 16, 18
2 *Newberg on Class Actions* § 4:4 (5th ed. Nov. 2018 Update) 23

INTRODUCTION

On February 1, 2019, individuals asserting late-filed economic loss claims against the GUC Trust filed a motion seeking approval under Federal Rule of Civil Procedure 23 of a proposed settlement agreement. The motion seeks certification of two so-called "limited fund" nationwide classes—which Movants[1] variously estimate as including somewhere between 9.5 and 26 million individuals[2]—for the purpose of resolving the late-filed economic loss claims as well as the personal injury claims of individuals who do not and cannot satisfy Rule 23.[3] The Movants ask the Bankruptcy Court to appoint unidentified class representatives and certain class counsel, and approve and direct notice to the proposed classes and others, all by March 11, 2019.

The fundamental issue before this MDL Court is whether the Bankruptcy Court should, within a few weeks, determine whether it is likely to certify two nationwide limited fund classes when this Court is poised to resolve myriad issues that would bear on the Bankruptcy Court's assessment of any such certification. As this Court is aware, New GM and the MDL economic loss plaintiffs have already completed class certification briefing for the Bellwether States, as well as summary judgment and *Daubert* briefing. Resolution of the issues raised in those briefs is critical to deciding whether any class of economic loss plaintiffs can be certified in this Court or in the Bankruptcy Court. Indeed, the settling parties have inexorably linked the fate of their

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1 "Movants" refers to Co-Lead MDL Counsel, who purport to have filed the Rule 23 Motion on behalf of "Economic Loss Plaintiffs." But no such plaintiffs or proposed class representatives are identified in the motion or exhibits. (*See* Settlement § 2.67 and Schedule 3 thereto.) Hereinafter, depending on the context, "Plaintiffs" refers to potential class members and others subject to the proposed settlement and/or Co-Lead Counsel.

2 *Compare* 12/20/18 Bankr. Hr'g Tr. at 4-5 (claiming that approximately 11.4 million vehicles are subject to the Recalls at issue, involving between 11.4 and 26 million individuals, but that the number may substantially decrease based on rulings from the MDL Court), excerpts attached as Ex. 1; *with* 5/25/2018 Bankr. Hr'g Tr. at 24 ("[D]on't hold me to the exact numbers, but I think we're down to . . . nine-and-a-half million cars."), excerpts attached as Ex. 2.

3 11/16/16 Bankr. Hr'g Tr. at 70:4-9 (Counsel for Pre-Sale Personal Injury claimants admitting that "with respect to the pre-closing ignition switch accident plaintiffs, we don't believe that could be a class proof of claim"), excerpts attached as Ex. 3.

proposed settlement to proceedings in this Court, acknowledging that this Court's summary judgment decision may affect "the size, scope or composition of the classes" (Settlement § 4.5) and that the GUC Trust should have the unilateral right to terminate the settlement agreement if Co-Lead Counsel appeals that summary judgment decision (Settlement § 10.2). Movants further have advised the Bankruptcy Court that this Court's rulings are "anticipated by June 2019"[4] and "depending on what [this Court] ultimately rules," there could be a "dramatic[] impact [on] the size of the universe, therefore who gets noticed, therefore the cost of notice."[5] All parties agree that Rule 23 issues must be resolved before any settlement can be preliminarily or finally approved and before any other proceedings can occur in the Bankruptcy Court.[6]

Under these circumstances, Judge Glenn should stay proceedings related to the proposed settlement in the Bankruptcy Court pending this Court's resolution of class certification, summary judgment, and *Daubert* briefing or, in the absence of a stay, this Court should withdraw the reference of the Rule 23 Motion from the Bankruptcy Court.[7] Both mandatory and permissive withdrawal of the reference are justified here.[8]

First, withdrawal of the reference is mandatory pursuant to 28 U.S.C. § 157(d) because the

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4 Plaintiffs' Letter dated 2/13/2019 (Bankr. Dkt. No. 14424, Dkt. No. 6480-1).

5 Ex. 1, 12/20/18 Bankr. Hr'g Tr. at 9, 14.

6 *See* Ex. 1, 12/20/18 Bankr. Hr'g Tr. at 4 (Plaintiffs' counsel discussing "amendment to Rule 23(e)(2)(B), which requires that the first step is to seek a finding from this Court, that this Court will likely be able to approve the settlement and our settlement purposes class certification").

7 A copy of *General Motors LLC's Motion Pursuant to Section 105(a) of the Bankruptcy Code to (A) Stay Proceedings Relating to the Proposed Settlement and (B) Grant Related Relief* (without its exhibits, which consist of briefing already before this Court) is attached hereto as Exhibit 4.

8 New GM seeks withdrawal of one of the two motions filed by the settling parties related to the proposed settlement: The Economic Loss Plaintiffs' Rule 23 Motion. (Bankr. Dkt. No. 14408; Dkt. No. 6477-1.) The GUC Trust also filed a motion related to the proposed settlement ("Rule 9019 Motion"). (Bankr. Dkt. No. 14409; Dkt. No. 6477-2.) New GM does not seek withdrawal of the Rule 9019 Motion at this time, because the Rule 23 Motion raises threshold class certification issues that all parties agree must be decided ***before*** either Court can address the Rule 9019 motion or conduct any other proceedings related to the proposed settlement. The GUC Trust itself has acknowledged that the relief requested by the Rule 9019 Motion may be granted only after entry of a proposed order preliminarily certifying the proposed limited fund classes. (Rule 9019 Mot. ¶ 7 ("***Following entry of the Preliminary Approval Order*** (as defined in the Settlement Agreement), the Parties request that this Court enter" the order requested in the Rule 9019 motion) (emphasis added).)

Rule 23 Motion would require the Bankruptcy Court "to engage in significant interpretation . . . of federal laws apart from the bankruptcy statutes." *Picard v. HSBC Bank PLC*, 450 B.R. 406, 409–13 (S.D.N.Y. 2011) (*quoting City of New York v. Exxon Corp*., 932 F.2d 1020, 1026 (2d Cir. 1991)). The goal of the proposed hybrid class and non-class settlement is to generate a purported $10 billion in "allowed general unsecured claims" against Old GM for the purpose of triggering New GM's obligation to pay the maximum number of "Adjustment Shares."[9] To accomplish this goal, the GUC Trust has agreed to: (i) waive all defenses and consent to late-filed proofs of claim for economic loss on behalf of two nationwide putative classes and for personal injury; and (ii) ask the Bankruptcy Court to estimate the value of those claims, which allegedly "may" or "could" exceed more than $10 billion. In return, the GUC Trust would be released from liability for actual and potential economic loss and personal injury claims arising from six vehicle recalls. But other than paying $13.72 million in notice costs, the GUC Trust would provide no relief whatsoever to the putative economic loss classes or personal injury claimants and would retain over $450 million of its own net assets. As structured, the proposed settlement is unprecedented and poses serious non-bankruptcy issues under the Constitution and Rule 23, necessitating mandatory withdrawal:

- The proposed settlement seeks to certify a ***non-opt out*** class involving ***unliquidated monetary damages*** claims, but precisely such a settlement was rejected by the Supreme Court in *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 842 (1999) (rejecting non-opt out limited fund settlement involving unliquidated damages, and noting "serious constitutional" concerns); 1 *McLaughlin on Class Actions* § 5:10, Rule 23(b)(1)(B)—Narrow use of limited fund mechanism post-*Ortiz* (15th ed. Oct. 2018 Update) ("In fact, after *Ortiz*, no decision, other than Judge Weinstein's now-reversed ruling in *In re Simon II Litigation*, . . . has certified a 'limited fund' class involving unliquidated damages, while numerous courts have either denied (b)(1)(B) certification or decertified (b)(1)(B) classes that had been certified under pre-*Ortiz* law.").

- Although the proposed settlement is presented under the guise of Rule 23, it ***excludes*** actual and potential personal injury and wrongful death claimants from the limited fund classes,

[9] *See* 2009 Sale Agreement § 3.2 (requiring New GM to provide Adjustment Shares only if, among other things, "the Bankruptcy Court makes a finding that the estimated aggregate allowed general unsecured claims" against Old GM exceeds $35 billion).

but ***includes*** them as beneficiaries of the purported limited fund. Such a "hybrid" settlement—where the purported limited fund would be shared by class members and non-class members alike—is not recognized under Rule 23, contrary to *Ortiz*, and unsupported in the law.

- The proposed settlement seeks to certify two ***nationwide*** classes, notwithstanding significant variations in state law among the 51 jurisdictions at issue.

- The Rule 23 Motion purports to rely on the opinions of Stefan Boedeker, thus implicating Constitutional and other non-bankruptcy issues that have already been fully briefed and are pending decision in this Court. (Dkt. No. 6132 at 24-32.)

- In violation of *Ortiz*, the proposed settlement allows the defendant (the GUC Trust) to obtain mandatory releases from millions of individuals with no opt out rights while contributing less than 5% of its assets solely for notice costs.

- The proposed settlement would require class members and personal injury plaintiffs to forever waive and release their claims against the GUC Trust without knowing, among other things, whether the Adjustment Shares provision can or will ever be triggered, because such a determination would only be made ***after*** class certification and final approval of the proposed settlement.

Because these issues would require the Bankruptcy Court to engage in significant interpretation of federal laws apart from bankruptcy statutes, withdrawal of the reference is mandated.

Second, and alternatively, because the bankruptcy proceedings are "overlapping and interlocking" with the proceedings in this Court, permissive withdrawal is warranted under 28 U.S.C. § 157(d).[10] Before any proposed nationwide limited fund class could be certified, the reviewing court must make specific findings under amended Rule 23(e) regarding the likely outcome of complex issues that have already been briefed in this Court, and which bear directly on class certification in both courts. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 WL 359981, at *12 (E.D.N.Y. Jan. 28, 2019) (noting that amended Rule

[10] *See, e.g.*, *Mishkin v. Ageloff*, 220 B.R. 784, 800 (S.D.N.Y. 1998) (withdrawal of reference in core proceedings was warranted because the proceedings were "overlapping and interlocking"); *1800Postcards, Inc. v. Morel*, 153 F. Supp. 2d 359, 367 (S.D.N.Y. 2001) (where facts, transactions and issues underlying creditors' committee's complaint overlapped with claims pending in the District Court, "efficiency counsels withdrawing the referral of the Committee's claims").

23(e)(2) "appears to be more exacting" than the prior version of the rule). For example, the Bankruptcy Court would need to determine, based on a solid evidentiary record rather than conclusory pleadings, whether:

- Under Rule 23(a)(3), the claims or defenses of the (as-yet unidentified) class representatives are "typical" of the claims and defenses of the proposed classes or whether any subclasses are required, given that the proposed class claims implicate the laws of 51 jurisdictions;

- Under Rule 23(a)(4) and Rule 23(e)(2)(A), the (as-yet unidentified) class representatives adequately protect the interests of the class;

- Under Rule 23(b)(1) and the Supreme Court's decision in *Ortiz*, "the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims," *id*. at 838-39;

- Under Rule 23(b)(1), 23(e)(2)(D), and the Supreme Court's decision in *Ortiz*, the proposal treats class members equitably relative to each other; *id*.;

- Under Rule 23(e)(2)(C), the relief provided to the putative class members under the proposed settlement is "adequate," including how any recoveries to class members would be individually determined, allocated and distributed; and

- Under Rule 23, Article III of the United States Constitution, and the Rules Enabling Act, whether the proposed classes may include putative class members who have no injury-in-fact or legally cognizable claims, in light of Boedeker's analysis (relied on by the Plaintiffs in both courts) showing that 26.6% to 39.1% of respondents have no injury or damages under Plaintiffs' theory. (Dkt. 6132 at 2.).

These same issues are squarely before this Court in the pending class certification, *Daubert*, and summary judgment briefing, creating overwhelming overlap and justifying permissive withdrawal.

Both proceedings involve virtually all of the same vehicle models, six of the same recalls, most of the same legal issues, the same expert testimony, many of the same personal injury claimants (at least 136), and, with respect to the Delta Ignition Switch Class, more than one million of the same potential class members (depending on which of Movants' widely varying estimations

of the size of the class is used).[11] In addition, the requirements of Rule 23(a) must be met for either a Rule 23(b)(3) class (in the MDL) or a Rule 23(b)(1)(B) class (under the proposed settlement).

The Movants' sole purported expert in connection with their proposed settlement is Boedeker; if the reference is not withdrawn, both this Court and the Bankruptcy Court would be required to determine whether Rule 23, Article III, and the Rules Enabling Act permit certification of a class that includes, according to Boedeker's own analysis, 26.6% to 39.1% of respondents who suffered no injury or damages whatsoever.

Finally, the Bankruptcy Court cannot assess "the totals of the aggregated liquidated claims," as required by *Ortiz*, 527 U.S. at 838-39, without this Court's resolution of summary judgment and Boedeker-*Daubert* issues.

Given the substantial overlap between the proposed settlement and the MDL proceedings, withdrawal of the reference will result in the most efficient use of judicial resources and avoid serious risk of inconsistent rulings.[12] Permissive withdrawal of the overlapping claims is particularly appropriate because this Court has been charged with the "unique responsibility" of overseeing this MDL proceeding. *See In re Parmalat Finanziaria S.p.A.*, 320 B.R. 46, 50–51 (S.D.N.Y. 2005) (the MDL proceeding constitutes a "higher interest" that justifies withdrawal, even of core proceedings); *see also In re Ephedra Prod. Liab. Litig*., 329 B.R. 1, 4 n.1 (S.D.N.Y. 2005).

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[11] *Compare* Rule 23 Mot. at 3 ("The 'Ignition Switch Class' is defined as all persons asserting economic loss claims who, prior to July 10, 2009, owned or leased a vehicle with an ignition switch defect included in Recall No. 14V-047."); 5ACC ¶ 945 (defining the Delta Ignition Switch Defect Successor Liability Subclass as "All persons who bought or leased a Delta Ignition Switch Vehicle on or before July 9, 2009"); 5ACC at 2 (defining "Delta Ignition Switch Vehicles" as "the vehicles included in Recall No. 14v047"); MDL Class Cert Mot. at 6 (defining the Missouri Delta Ignition Switch Defect Successor Liability Class as "All persons who bought or leased in the State of Missouri a Delta Ignition Switch Vehicle at some point before July 10, 2009"). Although MDL plaintiffs are not pursuing Delta Ignition Switch Defect Successor Liability Subclasses in California and Texas, they are pursuing such successor liability claims in other non-bellwether states.

[12] *See, e.g.*, *1800Postcards, Inc. v. Morel*, 153 F. Supp. 2d at 367;*Mishkin v. Ageloff*, 220 B.R. at 800.

Accordingly, for these reasons and as discussed in detail below, this Court should withdraw the reference of the Rule 23 Motion from the Bankruptcy Court.

BACKGROUND

I. OLD GM'S BANKRUPTCY AND SALE OF ASSETS TO NEW GM.

In July 2009, New GM purchased substantially all of Old GM's assets. Section 3.2(c)(i) of the Sale Agreement (as amended) provides that New GM will be required to issue certain "Adjustment Shares" if, among other things, the amount of aggregated general unsecured claims against the estate exceed a certain amount. (Sale Agreement § 3.2(c)(i)) (providing that Old GM may "seek an Order of the Bankruptcy Court (the 'Claims Estimate Order') . . . estimating the aggregate allowed general unsecured claims against Sellers' estates," and "if in the Claims Estimate Order, the Bankruptcy Court makes a finding that the estimated aggregate allowed general unsecured claims against Sellers' estates exceed $35,000,000,000," then New GM will issue additional shares of Common Stock (*i.e.*, the Adjustment Shares)).) The number of Adjustment Shares depends on the amount by which the aggregate allowed general unsecured claims exceed the $35,000,000,000 threshold. (Sale Agreement § 3.2(c).)

After the Sale, at the request of Old GM, the Bankruptcy Court entered an order establishing November 30, 2009 as the deadline for general unsecured creditors to file proofs of claims against Old GM. Following the Second Circuit's decision in *In re Motors Liquidation Co.*, 829 F.3d 135 (2d Cir. 2016)—which held that plaintiffs with claims against the estate relating to the Delta ignition switch defect were not provided adequate notice of the sale of assets from Old GM to New GM and vacated the Bankruptcy Court's equitable mootness ruling—the Bankruptcy Court ordered that any late claims motions related to recalls must be filed by December 22, 2016.[13]

[13] "If other plaintiffs wish to join in a Late Claim Motion, they . . . [were required to] file a joinder (not to exceed two pages) with the [Bankruptcy] Court by January 6, 2017." (Bankr. Dkt. No. 13802.) Only two joinders were

On that date, two economic loss claimants purported to file proposed nation-wide class claims under Rule 23(b)(3).

The current total amount of allowed general unsecured claims asserted against the GUC Trust is less than $32 billion, approximately $3 billion less than the amount necessary to cause New GM to issue any Adjustment Shares, and approximately $10 billion less than the amount necessary to cause New GM to issue the maximum number of Adjustment Shares. (GUC Trust's Quarterly Section 6.2(c) Report, Bankr. Dkt. 14402.)

II. THE MDL 2543 LITIGATION.

In 2014 the Judicial Panel on Multidistrict Litigation established MDL 2543, and transferred to this Court claims related to ignition switch and other alleged defects (*i.e.*, the same defects that are the subject of the proposed settlement) in vehicles manufactured by Old GM and New GM that are subject to certain recalls. The Fifth Amended Consolidated Complaint (the "5ACC") alleges economic loss class claims against New GM on behalf of those who purchased or leased certain Old GM or New GM vehicles. There has been substantial motion practice on the 5ACC, and this Court is now considering motions for summary judgment, class certification, and exclusion of various experts under *Daubert* relating to plaintiffs' economic loss claims in three bellwether states (Texas, Missouri, and California). Resolution of these motions will determine (among other things) whether Plaintiffs' claims and alleged injuries and damages are legally cognizable, and whether Plaintiffs can meet the requirements of Rule 23, Article III, and the Rules Enabling Act.

III. THE PRIOR PROPOSED SETTLEMENT.

On May 3, 2018, the GUC Trust filed a motion in the Bankruptcy Court seeking approval

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filed to the Late Claims Motions by January 6, 2017.

of a proposed settlement that sought, without regard to Rule 23, to resolve claims against Old GM filed by certain personal injury and wrongful death plaintiffs, as well as proofs of claims purportedly on behalf of economic loss plaintiffs nationwide.[14] The Movants filed a notice of "amended" proofs of claims (which "amendment" has not been authorized by any court) seeking relief under Rule 23(b)(3) (the "Proposed Class Claims") on April 24, 2018. At a status conference on May 25, 2018, the Bankruptcy Court requested briefing on the "gating issue" of whether the prior proposed settlement required compliance with Rule 23 and noted that "[i]f the issue was whether . . . economic loss classes should be certified, and that issue is in the process of being briefed in discovery or whatever before Judge Furman, I'm strongly disinclined to try and jump the gun and decide the issue before Judge Furman does." (Ex. 2, 5/25/18 Bankr. Hr'g Tr. 5/25/2018 at 22.)

Following a hearing, the Bankruptcy Court held that the structure of that proposed settlement was fundamentally flawed because it did not seek application of Rule 23. *In re Motors Liquidation Co*., 591 B.R. 501 (Bankr. S.D.N.Y. 2018).

IV. THE CURRENT PROPOSED SETTLEMENT.

The motions filed on February 1, 2019 (*see* n.8, *supra*) seek approval of the proposed settlement of the remaining actual and unasserted personal injury/wrongful death claims as well as potential economic loss claims on behalf of two nationwide classes.[15] Unlike plaintiffs in the MDL, the Plaintiffs do not assert class claims under Rule 23(b)(3) (though they have not sought

[14] On January 18, 2018, the Bankruptcy Court ruled that a still earlier alleged settlement agreement negotiated by plaintiffs and the GUC Trust but never executed was not enforceable. *See In re Motors Liquidation Company*, 580 B.R. 319, 364 (S.D.N.Y. 2018).

[15] Paragraph 50(d) of the 9019 Mot. further states: "In light of the benefits of the Settlement, the GUC Trust agrees that, subject to the entry of the Final Approval Order, it will seek the entry of a Claims Estimate Order that: (i) estimates the aggregate allowed General Unsecured Claims of Plaintiffs against Sellers and/or the GUC Trust pursuant to Section 5.1 of the GUC Trust Agreement, Section 7.3 of the Plan, Section 3.2(c) of the AMSPA, and the Side Letter, in an amount that, as of the date of the Estimation Order, could equal or exceed $10 billion, thus triggering the issuance of the maximum amount of the Adjustment Shares."

to amend their Proposed Class Claims seeking relief solely under Rule 23(b)(3)); instead, the centerpiece of the proposed settlement is certification of the purported economic loss claims of two nationwide non-opt out "limited fund" classes under Rule 23(b)(1)(B) (or Rule 23(b)(1)(A) in the alternative). As in the MDL, Plaintiffs claim to meet all of the requirements of Rule 23(a).

The proposed Ignition Switch Class includes "owners and lessees of vehicles asserting late-filed economic loss claims against the GUC Trust related to the [Delta] Ignition Switch Defect (Recall No. 14V-047)." (Rule 23 Mot. ¶ 41.) Notably, the same Ignition Switch Plaintiffs assert claims in the MDL Court on behalf of the same putative class members.[16] Movants also propose a "Non-Ignition Switch Class" including owners and lessees of vehicles asserting late-filed economic claims against the GUC Trust related to various Non-Ignition Switch Defects (Recall Nos. 14V-355, 14V-394, 14V-400, 14V-118, and 14V-153) (together with the Delta Ignition Switch Recall (14V-047), the "Recalls"). (Rule 23 Mot. ¶ 41.) Economic loss claims related to each of these recalls are at issue in the MDL. Both classes are represented by Co-Lead Counsel. According to Movants, the proposed classes encompass millions of vehicles. (*Id.* ¶ 10.) Plaintiffs assert identical causes of action in the Bankruptcy Court and the MDL: (i) fraudulent concealment; (ii) unjust enrichment; (iii) consumer protection claims; (iv) breach of the implied warranty of merchantability; and (v) negligence. (Rule 23 Mot. ¶ 35; 5ACC at 3-4.)

The proposed settlement also seeks to resolve the claims of any and all "Pre-Closing Accident Plaintiffs," defined broadly in the agreement as "plaintiffs asserting personal injury or wrongful death clams based on or arising from an accident that occurred before the closing Date involving an Old GM vehicle that was later subject to [the same recalls specified in connection

[16] The MDL claims include an additional successor liability component, but both the MDL claims and the Bankruptcy Court claims require plaintiffs to establish Old GM's underlying liability.

with the economic loss claims]." (Settlement Preamble ¶ S.)[17] All of these actual or potential "Pre-Closing Accident Plaintiffs" are "Plaintiffs" who may share in the Settlement Fund, along with members of two proposed economic loss classes. *Id.* § 2.51. A small subset of Pre-Closing Accident Plaintiffs are represented by counsel who signed the agreement, and these 442 plaintiffs are specifically named in the agreement and expressly included in the Release Provision. *See id.* § 5.3.[18] However, as drafted, the proposed Final Order and notices for the proposed settlement purport to ***release*** the claims of any and all Pre-Closing Accident Plaintiffs, regardless of whether they have asserted or filed claims.[19] But Movants neither represent nor seek to certify a class of these Pre-Closing Accident Plaintiffs, which would be the only way to attempt to settle and release these absent parties' claims. *See In re Motors Liquidation Co*., 580 B.R. 319, 364 (S.D.N.Y. 2018) (holding that Rule 23 certification was necessary to settle absent parties' claims).[20] The terms of the settlement agreement are in irreconcilable conflict with the terms of the draft notices and Final Order. If, for example, the draft notices accurately describe the terms of the settlement agreement, then the notices are misleading, because a release in the agreement would be ineffective to bind

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[17] The Rule 23 Motion and exhibits (including the settlement agreement, proposed orders, and proposed notice) contain different, conflicting definitions of the plaintiffs or potential personal injury/wrongful death plaintiffs purportedly covered by the agreement, as New GM will describe in more detail in its Objection to the proposed settlement to be filed in the Bankruptcy Court, a copy of which will be provided to this Court.

[18] Of the 442 plaintiffs specifically identified in the agreement, 152 are already eligible for settlements as a result of agreements in principle reached by their lawyers and New GM in the last several months. Of the remaining 290 named in the agreement, 245 filed or attempted to file proofs of claims in the Bankruptcy Court, and 136 of these have also filed claims in the MDL. At least 45 claimants identified in the proposed settlement never filed or sought leave to file late proofs of claims in the Bankruptcy Court.

[19] *See, e.g.*, Rule 23 Mot. Ex. C, Final Order ¶ 9 (release applies to "All Plaintiffs"); Ex. D, Short Form Notice ("The Settlement includes 'Affected Persons' in the United States who, prior to July 10, 2009, bought or leased certain Old GM vehicles or suffered personal injury or wrongful death in an accident involving certain Old GM vehicles."); Ex. G, Long Form Notice at 5 ("Under the Settlement, each Affected Person will be deemed to have forever waived and released (the 'Waiver') any claims….").

[20] Ex. 3, 11/16/16 Bankr. Hr'g Tr. at 70:4-9 ("MR. WEINTRAUB: Of course, there are two additional wrinkles to the late-filed claim issue. With respect to the pre-closing ignition switch accident plaintiffs, we don't believe that could be a class proof of claim. We— THE COURT: As to the accident plaintiffs, I would agree it couldn't be a class proof of claim.").

persons who are not parties. On the other hand, if the settlement agreement does not purport to release such persons, then the notices are deceptive, because by informing potential plaintiffs that their claims were released, the notices would minimize the likelihood that claims would be filed—thus effectively accomplishing indirectly what the settlement agreement could not accomplish directly.

The Movants propose three "stages" of proceedings with respect to the proposed settlement. (Rule 23 Mot. ¶ 116.) In Stage One, the Movants intend to obtain the Bankruptcy Court's approval of the proposed settlement. *Id.* In this stage, the Movants first ask the Bankruptcy Court to preliminarily approve the proposed settlement under Rule 23(e). If the settlement is preliminarily approved, they seek permission to spend $13.72 million on a "state of the art notice program" for millions of individuals with purported economic loss and/or personal injury claims. *Id.* The Movants seek a hearing for all of this relief on March 11, 2019. If such relief is granted, notice would be mailed a few weeks later. (Ex. 1, 12/20/18 Bankr. Hr'g Tr. at 11.) Finally, after some indeterminate period of time, the Movants will seek the Bankruptcy Court's final approval of the settlement, including final certification of the proposed classes. Among other things, the Movants anticipate that the Bankruptcy Court will also approve full releases in favor of the GUC Trust and non-parties, the GUC Trust Beneficiaries, the Avoidance Action Trust, and defendants in certain term loan litigation pending in the Bankruptcy Court, at this stage. At this point, the proposed settlement will be finally approved, and the release and waiver of claims will be binding, but no class member or personal injury plaintiff will know whether, if ever, they will be eligible to make a claim to receive any settlement consideration, or whether there will ever be a settlement fund from which to recover.

In Stage Two, the Movants intend to pursue a "claims estimation proceeding with guidance

from Judge Furman's rulings in the MDL." (12/12/18 Movants' Letter (Bankr. Dkt. No. 14383); *see also* Rule 23 Mot. ¶ 116.[21]) Movants have not specified any proposed procedures for Stage Two (which will determine, if the proposed settlement is approved, what relief, if any, is available to be shared by the putative classes and personal injury/wrongful death plaintiffs). (Rule 23 Mot. ¶ 116.) Moreover, the Movants acknowledge that the output of the Stage Two estimation proceeding may leave the economic loss and personal injury/wrongful death plaintiffs ***with no recovery at all***, because the GUC Trust is not providing ***any*** consideration to the settlement fund and "there is no guarantee that the claims estimate order will require New GM to issue any shares." (emphasis omitted) (Rule 23 Mot. Ex. D.) It is not until this Stage Two (or afterward) that the claims asserted by the putative classes, the personal injury/wrongful death plaintiffs, or any other potential plaintiffs will become liquidated—and all of this is to occur long after the proposed classes and settlement have been finally and irrevocably approved, and releases granted.

In Stage Three, Movants anticipate seeking the Bankruptcy Court's approval of "allocation and distribution procedures," which are neither specific nor described. (Rule 23 Mot. ¶ 117.) In this stage, Co-Lead Counsel and the personal injury lawyers who signed the settlement agreement propose to determine (subject to court approval) how to allocate the value (if any) in the settlement fund among the proposed classes and any actual or potential personal injury/wrongful death plaintiffs, which purportedly will be "guided by, and flow from, the [Bankruptcy] Court's determinations in the estimation proceedings." *Id.* Movants acknowledge that any allocation may require "additional or different subclasses [to] be created at [Stage Three], if necessary." *Id.* Accordingly, although virtually nothing is disclosed about the proposed allocation procedures, Movants concede that Stage Three may reverse or fundamentally modify any final class

[21] Movants refer to the estimation proceeding as Stage Three in their December 12, 2018 letter, but re-labeled it as Stage Two in the Rule 23 Motion.

certification order obtained in Stage One. Incredibly, Movants affirmatively state that at this late stage, the certified classes may have to be "decertified" or "re-jiggered[.]" (Ex. 1, 12/20/18 Bankr. Hr'g Tr. at 11 ("There is a possibility, at that stage, that the class could be decertified, re-jiggered, you know, if any party in interest felt that their interests weren't being adequately protected in terms of the allocation methodology that the parties ultimately put forward that Your Honor will be asked to approve.").) Movants do not explain how an already settled and finally approved class can be decertified, consistent with the requirements of Rule 23 and the Constitution.

ARGUMENT

United States District Courts have "original and exclusive jurisdiction of all cases under title 11" and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a), (b). In the Southern District of New York, such cases and proceedings are referred automatically from the District Court to the Bankruptcy Court. *See In re Standing Order of Reference Re: Title 11*, 12 Misc. 32 (S.D.N.Y. Feb. 1, 2012).

However, 28 U.S.C. § 157(d) provides two grounds for withdrawal of the reference. First, the district court ***must*** withdraw the reference pursuant to § 157(d) if the bankruptcy court would otherwise "be obliged 'to engage in significant interpretation . . . of federal laws apart from the bankruptcy statutes'" (*i.e.*, mandatory withdrawal). *Picard v. HSBC Bank PLC*, 450 B.R. 406, 409–13 (S.D.N.Y. 2011) (quoting *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991)). Alternatively, the statute permits the district court to withdraw the reference "for cause" (*i.e.*, permissive withdrawal). *Picard*, 450 B.R. 406, 409.[22] Here, both standards are satisfied and

[22] *See* 28 U.S.C. § 157(d) ("The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities

this Court should withdraw the reference to the Bankruptcy Court of Plaintiffs' Rule 23 Motion.

I. THE PROPOSED SETTLEMENT RAISES SUBSTANTIAL PROBLEMS OF CONSTITUTIONAL AND NON-BANKRUPTCY FEDERAL LAW, REQUIRING WITHDRAWAL OF THE REFERENCE.

"The purpose of § 157(d) is to assure that an Article III judge decides issues calling for more than routine application of [federal laws] outside of the Bankruptcy Code." *In re Ames Dept. Stores Inc.*, 512 B.R. 736, 740 (S.D.N.Y. 2014) (citation omitted; alteration in original); *Am. Tel. & Tel. Co. v. Chateaugay Corp.*, 88 B.R. 581, 583-84 (S.D.N.Y. 1988) ("Section 157(d) reflects Congress's perception that specialized courts should be limited in their control over matters outside their areas of expertise . . . [and that non-bankruptcy law] will be considered outside the narrow confines of a bankruptcy court proceeding by a district court, which considers law regulating interstate commerce and is better equipped to determine them than are bankruptcy judges"); *see also Picard v. Flinn Invs.*, LLC, 463 B.R. 280, 288 (S.D.N.Y. 2011) ("'Congress enacted 28 U.S.C. § 157 in response to"' the Supreme Court's holding 'that Congress' broad grant of jurisdiction to the bankruptcy courts . . . was an impermissible vesting of the judicial power of Article III courts in Article I adjuncts.'") (citation omitted).

The district court must withdraw the reference of matters that require "significant interpretation, as opposed to simple application, of federal laws apart from the bankruptcy statutes." *City of N. Y. v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991); *see also LightSquared Inc. v. Deere & Co.*, 2014 WL 345270, at *3 (S.D.N.Y. Jan. 31, 2014) (mandatory withdrawal necessary where bankruptcy court would have to determine issues relating to the Noerr–Pennington doctrine and the First Amendment); *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 492 B.R. 133, 139 (S.D.N.Y. 2013) (mandatory withdrawal needed to consider equitable

affecting interstate commerce.").

doctrine of laches, which is "a matter of federal non-bankruptcy common law"); *Chemtura Corp. v. U. S.*, 2010 WL 1379752, at *2 (S.D.N.Y. March 26, 2010) (CERCLA).

The district court "need not resolve the merits of [the parties'] positions for purposes of th[e] motion," and the matter need not be one of first impression. *In re Ames*, 512 B.R. 736, 741 (alteration in original); *see also In re Adelphia Commmc'ns Corp. Sec. & Derivative Litig.*, 2006 WL 337667, at *4-5 (S.D.N.Y. Feb. 10, 2006) ("[T]he requisite 'substantial and material consideration,' or 'significant interpretation'"… does not … mean that there must necessarily be 'complicated interpretative issues, often of first impression.'") (internal citations omitted).

In this case, withdrawal is required because the Rule 23 Motion requires substantial and material consideration of numerous Constitutional and non-bankruptcy federal law issues, many of which are already pending in this Court. Movants seek to certify non-opt out, nationwide limited fund classes involving tort claims for unliquidated monetary damages. However, the Supreme Court has imposed "strict limitations" on the availability of such classes. 1 *McLaughlin on Class Actions* § 5:10 ("[c]ases interpreting [*Ortiz*] have enforced the strict limitations the Supreme Court imposed on the availability of limited fund class actions with rare exception.").[23] As the Supreme Court has recognized, proposed non-opt out classes involving unliquidated monetary damages claims raise "serious constitutional concerns." *Ortiz*, 527 U.S. at 817 (rejecting limited fund settlement involving unliquidated damages as contrary to Rule 23); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (rejecting settlement class under Rule 23 and stating that the Due Process Clause required representation of plaintiffs with conflicting interests).

In addition to the serious Constitutional concerns posed by its limited fund structure, the proposed settlement implicates other Constitutional issues raised by the proposed economic loss

[23] *See* discussion on page 23 & n.31, *infra*, regarding the post-*Ortiz* cases cited by Plaintiffs.

classes already before this Court. Like the MDL economic loss plaintiffs, Movants rely on the economic loss damages opinions of Stefan Boedeker. (Rule 23 Mot. ¶ 38.) As New GM has previously explained in its opposition to MDL plaintiffs' motion for class certification, Boedeker's own "data shows that 26.6% to 39.1% of respondents have no injury or damages under plaintiffs' theory." (Dkt. No. 6132 at 2.) Rule 23, Article III, the Rules Enabling Act, and Second Circuit precedent all bar certifying a class without common injuries. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1050 (2016) (remanding for further proceedings a litigated class action that included hundreds of uninjured class members, which raised an Article III standing question of "great importance" that was not ripe for review); *see also* Dkt. No. 6132 at 24-32.

These and other Supreme Court cases confirm that Plaintiffs' proposed classes and settlement violate the Due Process Clause, Article III, the Rules Enabling Act, and Rule 23, and raise substantial and material Constitutional and non-bankruptcy federal law issues. Under 28 U.S.C. § 157(d), these important Constitutional and non-bankruptcy federal law questions should be decided by a district court, making withdrawal mandatory.[24] *See Picard*, 463 B.R. at 288 n.3 ("If mandatory withdrawal protects litigants' constitutional interest in having Article III courts interpret federal statutes that implicate the regulation of interstate commerce, then it should also protect, a fortiori, litigants' interest in having the Article III courts interpret the Constitution. This conclusion follows from the Constitution, if not from 28 U.S.C. § 157 itself.") (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83–84 (1982)); *see also LightSquared Inc*, 2014 WL 345270, at *4 (The "determination of whether Noerr–Pennington [doctrine] applies to [plaintiff's state law claims] would require 'significant,' rather than 'simple,' interpretation of

[24] In addition to the issues discussed in this Part I, the Rule 23 Motion raises additional issues under the Constitution and other non-bankruptcy law that would justify mandatory withdrawal, as well as permissive withdrawal, as discussed in Part II.

federal law") (citation omitted).

A. The Proposed Settlement Requires Adjudication of Substantial Non-Bankruptcy Issues Under *Ortiz*, *Amchem*, Rule 23, and the Due Process Clause, Mandating Withdrawal of the Reference.

In *Ortiz v. Fibreboard Corp.*, the Supreme Court reversed certification of a non-opt-out limited fund settlement class that, like the proposed settlement in this case, purported to settle unliquidated claims for monetary relief. 527 U.S. 815 (1999). The Court held that the settlement class failed to meet the requirements of Rule 23(b)(1)(B), which—in order to avoid "serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale" with no opt-out right—requires three elements characteristic of the historic model of a mandatory limited fund class:

> (1) "the totals of the aggregated ***liquidated*** claims and the fund available for satisfying them, set definitely at their maximums, demonstrates the inadequacy of the fund to pay all the claims";
>
> (2) "the whole of the inadequate fund [is] to be devoted to the overwhelming claims"; and
>
> (3) "the claimants identified by a common theory of recovery [are] treated equitably among themselves."

Id. at 845, 873 (emphasis added).

As in *Ortiz*, the proposed settlement in this case fails all three requirements for a Rule 23(B)(1)(b) limited fund class.

First, the claims of the putative class members here are not "liquidated," thus raising the "serious constitutional" issues recognized by the Supreme Court in *Ortiz*. *See also* 1 *McLaughlin on Class Actions* § 5:10. Indeed, *Stott v. Capital Fin. Servs., Inc.*, 277 F.R.D. 316, 328–29 (N.D. Tex. 2011), cited throughout Plaintiffs' Rule 23 motion (Rule 23 Mot. at 33-39), underscores this point:

> The Court thus focuses its attention on the first *Ortiz* factor of whether the totals of

> the aggregated ***liquidated*** claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims. The Court must first consider whether the Representative Plaintiff has demonstrated the total ***liquidated*** amount of the claims and the total amount of the purported 'limited fund.' Many courts have been reluctant to utilize the 'limited fund' device when the claimants have claims for unknown and ***unliquidated*** amounts of damages. *See Ortiz*, 527 U.S. at 850, 119 S.Ct. 2295; *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 193–94 (5th Cir. 2010) (rejecting a proposed 'limited fund' settlement when '[t]he class members in this case suffered a wide variety of injuries, ranging from property damage to personal injury and death, and no method is specified for how these different claimants will be treated vis-a-vis each other'); *Klein v. O'Neal*, 2006 WL 325766, at *4-*5 (N.D. Tex. Feb. 13, 2006) (holding that first *Ortiz* requirement not met in products liability claim relating to intravenous pharmaceutical product when the damages figures were estimated).
>
> However, unlike what has been seen in mass tort cases such as *Katrina* or *Klein*, the amount of losses in this case is known and ascertainable, as each class member can ***easily determine the amount of his or her investment that was lost*** as a result of the collapse of Provident.

Stott, 277 F.R.D. at 328–29 (emphasis added).

Second, the proposed settlement does not and cannot establish that "the whole of the inadequate fund [is] to be devoted to the overwhelming claims." *Ortiz*, 527 U.S. at 839. Movants define the "limited fund" as consisting, by agreement, solely of the Adjustment Shares and *excluding* the GUC Trust's $450 million-plus in net assets.[25] But a "limited fund" cannot be defined by the parties' agreement. *See Ortiz*, 527 U.S. at 821, 839 ("limited fund" under Rule 23(b)(1)(B) does not apply where the available funds are limited only by agreement of the parties; "the whole of the inadequate fund [is] to be devoted to the overwhelming claims"); *In re Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Products Liab. Litig.*, 221 F.3d 870, 882 (6th Cir. 2000) (holding that the fund must include all potential sources of relief, including companies against whom plaintiffs may have possible alter ego claims). The bar against creating

[25] Under the proposed settlement agreement, the GUC Trust would pay no more than $13.72 million in notice costs, but pay nothing with respect to the alleged limited fund. (Rule 23 Mot. at 4.)

a limited fund by agreement is rooted in Constitutional principles. *Ortiz* found that courts could not "deny[] any opportunity for withdrawal of class members whose jury trial rights will be compromised, whose damages will be capped, and whose payments will be delayed" without "assurance that claimants are receiving the maximum fund, not a potentially significant fraction less" *Ortiz*, 527 U.S. at 860, 863.

Relatedly, the proposed classes include economic loss plaintiffs, but omit personal injury/wrongful death plaintiffs, GUC Trust unitholders, and any other party with claims against the GUC Trust. (Rule 23 Mot. ¶ 41.) Thus, in violation of *Ortiz*, the proposed classes fail to include "all those with claims" against the GUC Trust "unsatisfied at the time of settlement negotiations." *See Ortiz*, 527 U.S. at 864-65 ("Assuming, arguendo, that a mandatory, limited fund rationale could under some circumstances be applied to a settlement class of tort claimants, it would be essential that the fund be shown to be limited independently of the agreement of the parties to the action, ***and equally essential under Rules 23(a) and (b)(1)(B) that the class include all those with claims unsatisfied at the time of the settlement negotiations***") (emphasis added).[26] Making matters worse, although personal injury/wrongful death plaintiffs are ***excluded*** from the proposed class, under Movants' proposal, they would make claims against and receive payments from the proposed "limited fund." (Rule 23 Mot. ¶ 148 (discussing future allocation of the settlement fund between the proposed classes and personal injury/wrongful death plaintiffs).) Movants cite no precedent permitting non-class members to benefit from a Rule 23(b)(1)(B) class limited fund.

[26] *See also In re Motors Liquidation Co.*, 447 B.R. 150, 162 n.53 (S.D.N.Y. 2011) ("I don't think that a limited fund rationale would justify certification under Rule 23(b)(1) here. Old GM's available value is, of course, limited, but the claim to that 'limited fund' isn't limited to the putative class action claimants. Old GM has a large number of other creditors who likewise have claims against Old GM's assets. The 'limited fund' thus isn't to be shared solely amongst class action claimants, but instead must be shared by all of Old GM's creditors.").

Third, the proposed settlement cannot establish that "the claimants identified by a common theory of recovery [are] treated equitably among themselves." *Ortiz*, 527 U.S. at 839. Movants fail to identify a "common theory of recovery." *Ortiz*, 527 U.S. at 839. Instead, Movants' proposed Non-Ignition Switch class includes five different recalls with no subclasses. The recalls lumped into this one class include the Electronic Power Steering Recall, the Lambda Side Impact Airbag Recall, and various Key Rotation Recalls. They involve different alleged defects, model vehicles, recalls, and fixes. Some of the recalls involve key rotation, but some do not. Some of the recalls involve airbag non-deployment, but others do not. Nonetheless, Movants ask the Bankruptcy Court to determine that all plaintiffs asserting claims under these different recalls have a "common theory of recovery."

Nor do Movants demonstrate that putative class members will be "treated equitably," as *Ortiz* requires, *id.* at 839, or will "likely" receive "fair, adequate, and reasonable" relief, as required by Rule 23(e)(2). Under the proposed settlement, the sole source of potential relief for the proposed class and actual and potential personal injury plaintiffs are the Adjustment Shares. (Rule 23 Mot. Exhibit D.) But Movants acknowledge that the proposed settlement may not result in the issuance of **any** Adjustment Shares. *Id.* Nonetheless, the proposed settlement would require class members and personal injury plaintiffs to forever waive and release their claims against the GUC Trust **before** knowing: (i) whether the Adjustment Shares provision can or will ever be triggered; (ii) whether they would be eligible to make a claim for compensation from the Adjustment Shares; or (iii) whether, even if they were to make a claim, they would receive any compensation from the Adjustment Shares. Under Movants' proposal, those issues would all be deferred until after the proposed classes are finally certified and the settlement is finally approved. But Movants' proposal to deal with these issues at the estimation and allocation stages is prohibited by the Supreme

Court's decisions in *Ortiz* and *Amchem*.[27]

In sum, Plaintiffs' proposed use of non-opt out classes involving unliquidated monetary damages and an undetermined limited fund raises precisely the "serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale" described by the Supreme Court. *See Ortiz*, 527 U.S. at 845. In *Ortiz*, the Court, following the doctrine of Constitutional avoidance, did not explicitly rule out such a class, but cautioned that it would implicate absent class members' Seventh Amendment right to a jury trial and their Due Process right to their own "day in court":

> "First, the certification of a mandatory class followed by settlement of its action for money damages obviously implicates the Seventh Amendment jury trial rights of absent class members."
> . . .
>
> Second, "mandatory class actions aggregating damages claims implicate the due process 'principle of general application in Anglo–American jurisprudence that one is not bound by a judgment in personam in a litigation in 'which he is not designated as a party or to which he has not been made a party by service of process.'"
> . . .
>
> "The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages claims gathered in a mandatory class."

Ortiz, 527 U.S. at 845-46.

The Supreme Court had earlier "raised the flag on [this Due Process] issue" in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), which held that an absent class member's claim to individual monetary relief could not be extinguished in a mandatory class. *See Ortiz*, 527 U.S.

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[27] *See In re Katrina Canal Breaches Litig.*, 628 F.3d at 193–94 ("the settlement provides for the appointment of a special master to 'provide to the Court a recommended disposition and protocol with regard to the remaining [settlement fund], and treatment of Claims of Class members.' This arrangement simply punts the difficult question of equitable distribution from the court to the special master, without providing any more clarity as to how fairness will be achieved. The lack of any 'procedures to resolve the difficult issues of treating such differently situated claimants with fairness as among themselves,' *id.* at 856, 119 S.Ct. 2295, leads us to reverse the district court's order certifying this class.") (alterations in original).

at 847-48 (discussing *Shutts*).[28] Movants' alternative proposal to settle their individual unliquidated claims for monetary relief under Rule 23(b)(1)(A) presents the same Due Process issues as a limited fund class under Rule 23(b)(1)(B). *See* 2 *Newberg on Class Actions* § 4:4 (5th ed. Nov. 2018 Update) ("Because the so-called mandatory nature of (b)(1) classes clashes with the Due Process Clause's requirement that notice and opt out rights accompany cases primarily for monetary damages, individual money damages are generally unavailable in (b)(1) class actions."); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (holding that claims for individual monetary relief could not be brought in a mandatory Rule 23(b)(2) class, but must be brought under Rule 23(b)(3)); *In re J.P. Morgan Stable Value Fund ERISA Litig.*, 2017 WL 1273963, at *13 (S.D.N.Y. Mar. 31, 2017) (individualized monetary claims belong in a Rule 23(b)(3) class).[29]

Courts since *Ortiz* have strictly enforced the three elements described in that case.[30] Plaintiffs cite no published case certifying, post-*Ortiz*, a Rule 23(b)(1)(B) class of aggregated, unliquidated individual damages claims like those at issue here.[31] To certify the proposed limited

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[28] In *Shutts*, the court rejected the Kansas Supreme Court's "common fund" justification for mandatory certification, holding that, as in this case, there is no identifiable "res" or "limited amount" that might be depleted: "Only by somehow aggregating all the separate claims in this case could a 'common fund' in any sense be created, and the term becomes all but meaningless when used in such an expansive sense." *Shutts*, 472 U.S. at 819-20.

[29] *Compare Moreno v. Deutsche Bank Americas Holding Corp.*, 2017 WL 3868803, at *9 (S.D.N.Y. Sept. 5, 2017) ("Defendants' reliance on *Wal-Mart*—which held that Rule 23(b)(2) does not permit the combination of 'individualized awards of monetary damages' and classwide relief—is misplaced. In contrast to the claims in *Wal-Mart*, Plaintiffs' class claims under Rule 23(b)(1) are ***derivative*** in nature, not individualized.") (emphasis added) (internal citation omitted). Unlike the individual economic loss claims at issue in this case, *Moreno* concerned claims that were *derivative* of a claim for damages to another entity, such as an ERISA plan.

[30] *See, e.g.*, *In re Telectronics*, 221 F.3d at 882; *In re Katrina Canal Breaches Litig.*, 628 F.3d at 193-94.

[31] Plaintiffs cite *dicta* in a footnote in *Doe v. Karadzic*, 192 F.R.D. 133, 141 n.11 (S.D.N.Y. 2000), regarding a "reasonable method" for estimating damages (Rule 23 Mot. ¶ 107), but that case is irrelevant and distinguishable. First, *Karadzic* denied class certification. 192 F.R.D. at 145 ("Rule 23(b)(1)(B) certification cannot be adequately justified on the current record."). Second, the need for liquidated claims was not briefed by the parties in *Karadzic*. *See id.* at 141 n.11 ("Although the parties have not raised this issue, the instant case departs from the traditional limited fund model in that, not unlike the typical mass tort case, there are no liquidated claims."). Third, the *Karadzic* court noted that although "[t]he [*Ortiz*] Court ostensibly left for another day the question of whether this subdivision may ever be used to aggregate individual tort claims," "[n]evertheless, its requirement of strict adherence to the traditional limited fund model may have sounded the death knell for mass tort suits under Rule 23(b)(1)(B)." *Id.* at n.10. Fourth, even assuming *arguendo* that post-*Ortiz* published decisions *had* certified Federal Rule 23 limited fund classes using a "reasonable" method to estimate unliquidated damages, the *In re Diet Drugs* case cited in *Karadzic* indicates that such a method is particularly improper in circumstances not

fund classes in this case, the court would have to confront the "serious constitutional concerns" that Plaintiffs' proposed mandatory classes present, necessitating withdrawal under 28 U.S.C. § 157(d).

B. The Proposed Settlement Requires Adjudication of Whether the Due Process Clause Requires Separate Class Representatives and Counsel to Represent Plaintiffs With Conflicting Interests, Mandating Withdrawal of the Reference.

"The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625. Adequate representation is also specifically necessary under Rule 23(e)(2)(A) for class settlements. *See Ortiz*, 527 U.S. at 848 n.24 (noting "the constitutional requirement articulated in *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940), that 'the named plaintiff at all times adequately represent the interests of the absent class members.'") (quoting *Shutts*, 472 U.S. at 812). Plaintiffs' proposed settlement agreement purports to identify class representatives in "Schedule 3," but in fact no class representatives are identified in that Schedule or elsewhere in the agreement or in Plaintiffs' Rule 23 Motion. (*See* Settlement § 2.67 and Schedule 3 thereto.) Because they have failed to identify class representatives, Plaintiffs cannot establish that the interests of differently situated class members are adequately represented. *See Amchem*, 521 U.S. at 627 (reversing class

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involving "jury verdicts" and "white-knuckle settlements." *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig.*, 1999 WL 782560, at *1 (E.D. Pa. Sept. 27, 1999) (declining to certify class where "[t]here has been only one jury verdict rendered to date and no arms length, 'white-knuckle' or 'down to the wire' settlements of individual cases with Interneuron."). But there have been no such "jury verdicts" or "white-knuckle settlements" with respect to the economic loss claims here. To the contrary, Boedeker's "median" damages estimates in his GUC Trust Report vary wildly from "$88 to $8094" per vehicle. (05/09/2017 Boedeker GUC Trust Report at 33.) Using Boedeker's estimate of 11.96 million vehicles in his GUC Trust Report would result in between $1 billion and $96 billion in alleged damages—an enormous range and the antithesis of a "liquidated" amount. In any event, both *Karadzic* and *In re Diet Drugs* underscore the serious constitutional issues associated with certifying a non-opt class involving unliquidated monetary damages claims. Plaintiffs also cite a district court decision affirmed in *Juris v. Inamed Corp.*, 685 F.3d 1294 (11th Cir. 2012), but that case involved a Rule 60(b) challenge to a class certified prior to *Ortiz*. *Id.* at n.45 ("the propriety *vel non* of Judge Pointer's Rule 23(b)(1)(B) certification is an issue which is not before us."). And *Jane Doe 30's Mother v. Bradley*, 64 A.3d 379, 384 n.9 (Del. Super. Ct. 2012), also cited by Movants, involved application of Delaware Superior Court Civil Rule 23, not Federal Rule 23. (Rule 23 Mot. at 37.)

settlement where "[t]he settling parties . . . achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected."); *see also Ortiz*, 527 U.S. at 848 n.24 ("In this case, of course, the named representatives were not even "named [until] after the agreement in principle was reached, . . . and they then relied on class counsel in subsequent settlement negotiations").

The hybrid economic loss-personal injury settlement in this case includes two separate classes—for Ignition-Switch and Non-Ignition Switch Plaintiffs—but it was negotiated by counsel purportedly representing both classes and all class members. For this reason alone, Movants' Rule 23 Motion is infected with significant Constitutional problems. *See, e.g.*, *Ortiz*, 527 U.S. at 848 n.24; *Amchem*, 521 U.S. at 627. Movants do not disclose, for example, how the purported unitary relief negotiated by counsel jointly representing both classes will be divided between the two classes (or how sharing the settlement fund with personal injury/wrongful death plaintiffs and potential plaintiffs benefits the classes). While the Rule 23 Motion acknowledges the necessity of additional subclasses representing parties with different interests under the proposed settlement,[32] Movants inexplicably propose creating sub-classes at the allocation phase, *after* the class is certified and the proposed settlement is finally approved. (Rule 23 Mot. ¶ 117.) Where, as here, differences among plaintiffs (and differences in state laws) require sub-classes, each sub-class should be represented, ***during the negotiations***, by separate class representatives and separate counsel. *See In re Literary Works in Elec. Databases Copyright Litig*, 654 F.3d 242, 252 (2d Cir. 2011) ("[o]nly the creation of subclasses, and the advocacy of an attorney representing each subclass, can ensure that the interests of that particular subgroup are in fact adequately represented.").

[32] In the MDL, plaintiffs propose different classes corresponding to each recall. (Dkt. No. 5646, Pls.' Mot. for Class Certification.)

The very decision to settle Ignition Switch and Non-Ignition Switch claims raises conflicts. The Ignition Switch Plaintiffs, for example, who have already established a Due Process violation with respect to the bankruptcy sale notice, and in May 2014 received a tolling agreement to file late claims, may have preferred to take their chances in establishing the right to file a late claim and to pursue the GUC Trust's existing assets, instead of taking the chance that Plaintiffs' claims may be in excess of $3 billion and thus sufficient to trigger the Adjustment Shares. *See also Amchem*, 521 U.S. at 627 ("[W]e know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. . . . [T]he members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.") (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 742–743 (2d Cir. 1992), *modified on reh'g sub nom. In re Findley*, 993 F.2d 7 (2d Cir. 1993)).

Moreover, unlike in the MDL, Movants seek to certify nationwide classes implicating the laws of 51 jurisdictions. They do not propose to use state-by-state sub-classes at ***any*** stage. This omission precludes Movants from meeting the requirements of Rule 23(a)(3) (typicality), Rule 23 (a)(4) (adequacy of representation), or the "common theory" requirement of *Ortiz*. *See Ortiz*, 527 U.S. at 841, 845; *see Smith v. MCI Worldcom, Inc.*, 2000 WL 36726436, at *8 (N.D. Okla. Mar. 31, 2000) (holding that differences in state law defeated typicality and adequacy of representation under Rule 23(a)).

In sum, the Rule 23 Motion, the success of which depends on novel interpretations of the Due Process Clause, requires substantial and material consideration of non-bankruptcy law, and therefore should be withdrawn under 28 U.S.C. § 157(d).

C. The Proposed Settlement Requires Adjudication of Constitutional and Non-Bankruptcy Issues Relating to Whether Plaintiffs With No Injury Can Recover, Mandating Withdrawal of the Reference.

Plaintiffs state in their Rule 23 Motion that they will rely on Stephan Boedeker to establish alleged class-wide damages. However, Plaintiffs did not submit to the Bankruptcy Court any report or data establishing the claimed damages of any actual member of the purported classes (or any personal injury/wrongful death plaintiff), and instead appear to rely on materials submitted to this Court. Assuming Boedeker's analysis in this case matches his MDL analysis, Boedeker's own "conjoint" survey, if accepted, demonstrates that between 26.6% to 39.1% percent of respondents have no injury, and those with a purported injury have wildly differing alleged damages. *See* Dkt. No. 6132 (New GM's Resp. to MDL Pls.' Mot. for Class Certification) at 24-36 (addressing this issue in greater detail). Indeed, New GM and its experts have presented proof from Boedeker's raw data that millions of putative class members in fact have no injury and damages at all. *Id.*

Certifying a class that includes, according to Plaintiffs' estimates, millions of alleged class members with no injury would violate Article III and the Due Process Clause (as well as the Rules Enabling Act and Rule 23). Article III requires injury in fact. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).[33] Accordingly, "the class must therefore be defined in such a way that anyone within it would have standing" and "no class may be certified that contains members lacking Article III standing." *Denney v. Deutsche Bank AG*, 443 F. 3d 253, 264 (2d Cir. 2006); s*ee also Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 82 (2d Cir. 2015) (no certification if plaintiff lacks "common evidence to show all class members suffered some injury"); *In re Asalcol Antitrust Litig*., 907 F.3d 42, 15 (2018) (reversing class certification where "approximately ten percent of the class had not suffered any injury attributable to defendants' allegedly anticompetitive

[33] "[P]arties cannot either waive or confer standing by agreement." *In re Nasdaq Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 103 (S.D.N.Y. 1997).

behavior"); *Opperman v. Path, Inc.*, 2016 WL 3844326, at *14 (N.D. Cal. July 16, 2016) (rejecting a conjoint survey: "No damages number arising from this model will apply to all class members, particularly since some of the class members, by this measure, will not have been injured at all."). Nor may a class be certified where, as here, individual person-by-person inquiry is necessary to determine whether a proposed class member has an injury in fact.

In *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1050 (2016), the Supreme Court stated that "the question whether uninjured class members may recover is one of great importance," but declined to address the issue, concluding that the question was premature given the record in that case. In a concurring opinion, Chief Justice Roberts agreed that the issue was not ripe and should be decided by the District Court in the first instance, but cautioned that:

> Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not. The Judiciary's role is limited "to provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." . . . Therefore, if there is no way to ensure that the jury's damages award goes only to injured class members, that award cannot stand.

Id. (Roberts, C.J., concurring).

New GM has briefed this precise issue in this Court. (Dkt No. 6132 at 24-32.) For purposes of this motion, the point is that this Court is best positioned to decide this Constitutional issue of "great importance," especially when the issue is already before it. It cannot be, as Movants suggest, postponed until the estimation proceedings, at which time the classes will have already been noticed and certified, and the release will have been approved. Article III is a threshold issue that must be resolved first, before anything else.[34]

[34] The Constitutional and other issues raised in this motion are nothing like the ones in plaintiffs' 2015 motion to withdraw the reference, which concerned application and interpretation of the Bankruptcy Court's Sale Order and Injunction. *See In re Motors Liquidation Co.*, 538 B.R. 656 (S.D.N.Y. 2015). In that motion, plaintiffs argued that "[p]roceedings that require substantial consideration of constitutional law must be withdrawn," Bankr. Dkt. No. 13251, but this Court held that the question whether plaintiffs had an adequate opportunity to be heard on application of the Sale Order and Injunction to their claims was "not particularly novel" and "well within the ken

In short, the Rule 23 Motion requires consideration of significant issues of Constitutional and federal non-bankruptcy law. Withdrawal of the reference is therefore mandatory under 28 U.S.C. § 157(d). *See Picard*, LLC, 463 B.R. at 288 n.3.

II. THE COURT SHOULD PERMISSIVELY WITHDRAW THE REFERENCE FOR CAUSE.

Separate and independent from mandatory withdrawal, good cause exists for permissive withdrawal under 28 U.S.C. § 157(d). The claims against the GUC Trust included in the proposed settlement overlap with the claims against New GM in the MDL. They include many of the same proposed class members (*see* n.11, *supra*), the same counsel, many of the same vehicles and alleged defects, six of the same recalls, the same recall fixes, the same causes of actions, the same expert proofs, many of the same personal injury/wrongful death plaintiffs, and the same dispositive *Daubert* and summary judgment issues. Given this tremendous overlap, withdrawal of the reference will result in the most efficient use of judicial resources. *See, e.g., 1800Postcards, Inc. v. Morel*, 153 F. Supp. 2d 359, 367 (S.D.N.Y. 2001) (finding that where facts, transactions and issues underlying creditors' committee's complaint overlap with non-core claims pending in District Court, "efficiency counsels withdrawing the referral of the committee's claims"); *Mishkin v. Ageloff*, 220 B.R. 784, 800 (S.D.N.Y. 1998) (withdrawing reference of "overlapping and interlocking" core proceedings).

Indeed, permissive withdrawal of the overlapping claims is particularly appropriate because this Court has been charged with the "unique responsibility" of overseeing the MDL proceeding. *See In re Parmalat Finanziaria S.p.A.*, 320 B.R. 46, 50–51 (S.D.N.Y. 2005) (the

of the Bankruptcy Court." 538 B.R. at 662 (internal citations omitted). By contrast, the issues raised in this motion have little, if anything, to do with bankruptcy law or interpretation of the Bankruptcy Court's orders, and instead concern, for example, an unprecedented use of a mandatory class to extinguish the rights of unrepresented parties not before the court, involving significant Constitutional issues.

existence of the MDL proceedings constitutes a "higher interest" that justifies withdrawal, even of core proceedings); *see also In re Ephedra Prod. Liab. Litig.*, 329 B.R. 1, 4 n.1 (S.D.N.Y. 2005). In this MDL role, the Court has developed a deep familiarity with the issues and is presently considering extensive briefing relating to the same issues presented by the proposed settlement. Withdrawal promotes the interest in judicial economy that is the very purpose of MDL proceedings: it "will eliminate duplicative discovery; prevent inconsistent pretrial rulings, including with respect to class certification; and conserve the resources of the parties, their counsel, and the judiciary." (J.P.M.L. Dkt. No. 266, June 9, 2014 Transfer Order at 3); *see In re Parmalat Finanziaria S.p.A.*, 320 B.R. at 50–51; *see also In re Ephedra Prod. Liab. Litig.*, 329 B.R. at 4 n.1 (withdrawing consumer class actions because of the "close relation of these class actions [in the bankruptcy court] to the [MDL] ephedra products liability cases to be tried in the district court").

In *In re Orion Pictures Corp.*, the Second Circuit described the considerations relevant in determining whether there is "cause" to withdraw the reference, including: "whether the claim or proceeding is 'core' or 'non-core' [*i.e.*, whether review in the district court would be *de novo*], whether it is legal or equitable, and considerations of efficiency, prevention of forum shopping, and uniformity in the administration of bankruptcy law." 4 F.3d 1095, 1101 (2d Cir. 1993). Application of these factors is not a straightforward mechanical exercise, but an analysis that relies on the District Court's "discretion." *In re Dana Corp.*, 379 B.R. 449, 454 (S.D.N.Y. 2007). "[T]he critical question is efficiency and uniformity." *See Mishkin v. Ageloff*, 220 B.R. 784, 800 (S.D.N.Y. 1998) (citing *Orion*, 4 F.3d at 1100). Here, withdrawing the reference achieves these objectives.

A. Withdrawal of the Reference Promotes Judicial Economy.

Where, as here, the claims in the Bankruptcy Court involve issues identical to those before the District Court, "concerns of judicial efficiency" constitute a "higher interest" justifying withdrawal, even of core matters. *In re G.M. Crocetti, Inc.*, 2008 WL 4601278, at *5 (S.D.N.Y.

Oct. 15, 2008) ("Failure to withdraw the reference in this case would subject the parties to the risk of inconsistent verdicts on these issues, not to mention significant inefficiency and expense from having to duplicate efforts and litigate the same issues twice.").

Given the substantial overlap between the proposed settlement and the MDL proceedings in this Court, withdrawal of the reference will result in the most efficient use of judicial resources. *See In re Motors Liquidation Co.*, 538 B.R. at 663 (citing "judicial efficiency" as a "higher interest" that may warrant withdrawal of the reference, but declining to withdraw the reference because Judge Gerber was already "fully versed" in the underlying issues that plaintiffs previously sought to withdraw from the Bankruptcy Court); *see also In re Parmalat Finanziaria S.p.A.*, 320 B.R. at 50–51 (S.D.N.Y. 2005); *In re Ephedra Prod. Liab. Litig.*, 329 B.R. at 4 n.1.

This overlap includes, for example:

- Overlapping Class Certification Issues. Plaintiffs seek class certification in both the Bankruptcy Court and the MDL Court, requiring both courts to determine whether, for example: (a) there are questions of law or fact common to the class, as required under Rule 23(a)(2); (b) the named plaintiffs are typical of the potentially millions of class members in the putative classes, as required under Rule 23(a)(3); (c) the named plaintiffs are adequate representatives under Rule 23(a)(4); and (d) under Rule 23, Article III, and the Rules Enabling Act, the proposed classes may include any putative class members that lack an injury-in-fact or legally cognizable claim.

- Overlapping Putative Economic Loss Classes. The putative Delta Ignition Switch class included in the proposed settlement overlaps with the putative Delta Ignition Switch class in the MDL. *Compare* Rule 23 Mot. ¶ 41 ("plaintiffs asserting economic loss claims who, prior to July 10, 2009, owned or leased a vehicle with an ignition switch defect included in Recall No. 14V-047") *with* 5ACC ¶ 34 (general definition of class includes "All persons who bought or leased (i) a Delta Ignition Switch Vehicle on or before February 14, 2014 . . . .").

- Overlap With Respect to Successor Liability Claims. The Ignition Switch Plaintiffs must establish Old GM's liability to prevail on both (i) claims against the GUC Trust and (ii) their successor liability claims against New GM.

- Overlapping Recalls. The proposed settlement involves recalls at issue in the MDL economic loss litigation: (i) MDL Delta Ignition Switch (14-V-047); (ii) Lacrosse / Impala Slotted Key (14-V-355); (iii) CTS / SRX Key Bump & Inadvertent

Rotation (14-V-394); (iv) Malibu / Impala Inadvertent Key Rotation (14-V-400); (v) SIAB Wiring Harness (14v118); and (vi) Electric Power Steering Assist (14v153).[35]

- Overlapping Personal Injury Claimants. The proposed settlement includes 442 Pre-Sale Accident Plaintiffs expressly named in the agreement. Of these, 152 are already eligible for settlements as a result of agreements in principle reached by their lawyers and New GM (with 86 of those plaintiffs also currently having claims in this Court). Of the remaining 290 named in the agreement, 245 filed or attempted to file proofs of claims in the Bankruptcy Court, and 136 of these have also filed claims in the MDL.[36] The proposed settlement purports to include all unasserted personal injury/wrongful death claims, whether or not individuals filed claims in the Bankruptcy Court. *See* pp. 10-12, *supra*.

- Overlap With Respect to the Run-Accessory-Run Theory. In December 2017, this Court ruled that the proposed expert opinions supporting Co-Lead Counsel's "run-accessory-run" theory—for personal injury/wrongful death plaintiffs involved in accidents in which their airbags had deployed—were inadmissible under *Daubert*. *In re General Motors LLC Ignition Switch Litig.*, Dkt. No. 4905. To the extent individuals asserting run-accessory-run theories are included among the personal injury/wrongful death claimants, this ruling should preclude those claims from being considered in connection with the proposed settlement.

- Overlapping Expert Report Issues. Stefan Boedeker's reports form the basis for Plaintiffs' calculation of purported economic loss damages in both the MDL and the proposed settlement. *See* Rule 23 Mot. ¶ 38. This Court is considering New GM's *Daubert* motion to exclude Boedeker's opinions, will also determine whether his claimed damages are even legally cognizable and measurable on a class-wide basis, and whether Plaintiffs in the proposed settlement can establish damages.

- Overlapping Economic Loss Factual Issues. The overlapping factual issues include Plaintiffs' particular experiences (or not) of a defect, what assertions were allegedly made about Plaintiffs' vehicles, whether Plaintiffs relied on those alleged assertions, and whether Plaintiffs sold their vehicles before any recall. This Court has applied and continues to apply its legal rulings to the factual circumstances of specific plaintiffs.

- Overlapping Service Parts Recall Issue. Over 800,000 vehicles included in the proposed settlement are subject to the Service Parts Recall. *See* New GM's March 28, 2014 573 Letter to the National Highway Traffic Safety Administration. These

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[35] The Camaro Ignition Key Bump (14v346) recall, which only involves New GM vehicles, is at issue in the MDL but is not part of the proposed settlement.

[36] *See* n.18, *supra*; *see also* Settlement § 2.56 ("2.56 Proofs of Claim means the late proofs of claim, including late class proofs of claim, that the Ignition Switch Plaintiffs, certain Non-Ignition Switch Plaintiffs and certain Pre-Closing Accident Plaintiffs sought authority to file pursuant to the Late Claims Motions and the Supplemental Late Claims Motion, and any amendments thereto filed prior to the execution of this Agreement.").

vehicles do not contain a defective ignition switch, unless one was installed while the vehicle was being serviced. This Court held that "if [the owners of these vehicles] are ultimately to succeed on their claims with respect to the ignition switch, they will have to show that their cars in fact contained that defect." *In re General Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *20 n.15 (S.D.N.Y. July 15, 2016). The proposed settlement includes the purported damages of vehicle owners included in the Service Parts Recall who have not proved that they received a defective replacement ignition switch.

- Overlapping Causes of Action. The proposed economic loss class proofs of claim include the same causes of action asserted in the MDL, including: (i) fraudulent concealment; (ii) unjust enrichment; (iii) consumer protection claims; (iv) breach of the implied warranty of merchantability; and (v) negligence. (Rule 23 Mot. ¶ 35; 5ACC at 3-4.) These overlapping claims raise exactly the same legal issues being addressed in the MDL. This Court has already made rulings rejecting many of these claims under the laws of different states. (*See* n.37, *infra.*)

1) The Reference Should Be Withdrawn to Prevent Simultaneous and Inefficient Class Proceedings in the Bankruptcy Court and This Court.

Under amended Rule 23(e), to obtain preliminary certification, Movants must "show[] that the court will likely be able to" find that the parties have met the requirements of Rule 23(a), Rule 23(b)(1)(A) or Rule 23(b)(1)(B) (including the requirements set forth by the Supreme Court in *Ortiz*), and Rule 23(e). *Ortiz* holds (among other things) that a limited fund can only be certified if "the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims" and that "claimants identified by a common theory of recovery" are "treated equitably among themselves." *Ortiz*, 527 U.S. at 838-39. Determining that these requirements are "likely" satisfied under Rule 23(e) for purposes of Movants' proposed Preliminary Approval Order necessarily requires consideration of issues already before this Court. For example,

- As Movants concede, "the key rulings on economic loss claims for each state that have been rendered by Judge Furman in the MDL Action have been and will continue to be taken in to account by the Settlement Parties when we get to the estimation phase"—when the claims will be liquidated. (Bankr. Dkt. No. 14424).

- The liquidated amount of Plaintiffs' claims, which then dictates the value of any so-

called "limited fund," depends entirely on whether Boedeker's conjoint survey methodology is admissible and, even if so, whether it calculates legally cognizable damages capable of being calculated on a class-wide basis, issues this Court will decide. These issues cannot be deferred because they are necessary to determine whether any proposed class can be certified and notice can issue.

- Limited fund class certification aims to equitably distribute a limited fund on a *pro rata* basis. *See Ortiz*, 527 U.S. at 864. Here, Movants seek certification of two nationwide classes, implicating the laws of 51 jurisdictions. Thus, to determine whether class members are treated equitably, the court would have to canvass the laws of 51 jurisdictions as well as the facts relating to six different Recalls involving approximately 120 different vehicle make and model years. This Court has already identified distinctions among various state laws that effectively required the MDL Plaintiffs to pursue statewide classes for the Bellwether States, has dismissed the nationwide RICO claim, and has dismissed a variety of claims under the laws of different states.[37] This Court should similarly review these exact same issues that are implicated by the proposed settlement.

- Movants have not identified any proposed class representatives. To the extent Movants identify as class representatives individuals who are named plaintiffs in the proposed class proofs of claim previously filed in the Bankruptcy Court, many of those individuals are also proposed class representatives in this MDL. In this Court, New GM has argued that such individuals are subject to unique defenses or otherwise assert claims that are not typical of the proposed statewide classes. A ruling from this Court that any of the individuals who are proposed class representatives here cannot adequately represent the MDL classes would apply equally to the proposed settlement.

- The alleged Non-Ignition Switch settlement class includes owners of vehicles subject to five different Recalls affecting dozens of different vehicle models. These include the Electronic Power Steering Recall (14v-153), the Side Impact Airbag Recall (14v-118), and the Key Rotation Recalls (14v-355, 14v-394, 14v-400, and 14v-540). Movants identify no legally sufficient issues of law or fact common to the Non-Ignition Switch class. That should come as no surprise because, whereas Movants have placed all Non-Ignition Switch Recalls into one class for purposes of the proposed settlement, the MDL

[37] *See In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *35-37 (S.D.N.Y. July 15, 2016) (dismissing brand devaluation theory; RICO claim; certain claims of Missouri and Oklahoma plaintiffs who lack a manifest defect; Florida fraudulent concealment claims based on economic loss rule; Louisiana claims of plaintiffs with New GM vehicles based on Louisiana Products Liability Act; and various unjust enrichment claims based on a written warranty or adequate remedy at law)*; In re Gen. Motors, LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 430, 451-52 (S.D.N.Y. 2017) (dismissing claims of New York and Texas plaintiffs, and certain claims of Pennsylvania plaintiffs, who lack a manifest defect; Wisconsin fraudulent concealment claims based on economic loss rule; Texas and Michigan fraud claims for lack of a duty to disclose; and various unjust enrichment claims based on a written warranty or adequate remedy at law; also confirming dismissal of brand devaluation claims; and holding that plaintiffs who disposed of their vehicles before the recall announcements lack diminished value damages); *In re Gen. Motors LLC Ignition Switch Litig.*, 339 F. Supp. 3d 262, 343-46 (S.D.N.Y 2018) (holding that overwhelming majority of states hold that "lost time" damages are the equivalent of lost earnings or income; holding that various unjust enrichment claims are barred by a written warranty or adequate remedy at law; holding in accord with parties' agreement that six additional states require a manifest defect to state a claim).

> Plaintiffs have sought different classes for each recall. This Court will rule on the propriety of those classes, which rulings will need to be taken into account in the proposed settlement.

Movants concede that this Court's rulings may affect "the size, scope or composition of the classes" and lead to "refined estimates of the amount of damages" (Settlement § 4.5; Rule 23 Mot. ¶ 40); that "[e]xtensive discovery regarding the Plaintiffs' claims has been completed in the MDL Action" (*id.* ¶ 53); that Co-Lead Counsel's alleged adequacy to serve as lawyers for the proposed settlement classes is based on their work "in the MDL Court" (*id.* ¶ 88); that the proposed settlement was negotiated by "Parties who have been litigating these issues for years in the MDL Action" (*id.* ¶ 131); and that Stage Three will be assisted by "Magistrate Judge Cott as mediator in the MDL Action" (*id.* ¶ 148).[38] These concessions demonstrate the overlap between the issues raised by the Rule 23 Motion and the issues presently being decided by this Court and, accordingly, the need for withdrawal of the reference.

2) The Reference Should Be Withdrawn To Prevent Simultaneous and Inefficient Notice Proceedings.

Before the Bankruptcy Court may approve class notice, it must make specific findings, based on "solid record" evidence, that it will "likely" be able to certify the class and approve the settlement. Rule 23(e)(A); 2018 Advisory Comm. Notes to the 2018 Amendments to Fed. R. Civ.

[38] The Supreme Court's *Amchem* ruling dictates that any class certification motion for purposes of the proposed settlement would require the same degree of scrutiny from the Bankruptcy Court as the certification motion now before this Court. *See, e.g.*, *Amchem Prod., Inc.* v. *Windsor*, 521 U.S. at 620-21 (a court "[c]onfronted with a request for settlement-only class certification " must apply "undiluted, even heightened, attention in the settlement context"); *Schoenbaum v. E.I. Dupont De Nemours & Co.*, 2009 WL 4782082, at *12 (E.D. Mo. Dec. 8, 2009) (holding that a settlement "does not justify less rigorous—and potentially less accurate—class certification proceedings . . ."). In *Schoenbaum*, the court rejected plaintiffs' contention that evaluation of the propriety of a litigation class would unduly delay class certification and approval of a settlement-only class. *Id.* (*citing Amchem Prod., Inc.* v. *Windsor*, 521 U.S. at 621). The *Schoenbaum* court further stated: "It is the Court's duty to balance the often competing goals of resolving matters promptly and resolving matters by the most accurate means possible. The Court finds that these goals are best served by *requiring Plaintiffs to demonstrate that they will be able to certify classes for both settlement and litigation*, instead of permitting Plaintiffs to proceed solely on settlement-related issues and address litigation class certification at a later stage." 2009 WL 4782082, at *12 (emphasis added).

P. 23(e). These findings require consideration of the same evidence and issues pending decision in this Court. Thus, if the Bankruptcy Court approves notice based on findings of fact or legal conclusions that conflict with this Court's rulings on the pending motions, the notice may have to be revised, or may become moot, wasting millions of dollars and causing considerable confusion.

In addition, if the Bankruptcy Court and this Court separately certify overlapping classes of Ignition Switch Plaintiffs, millions of vehicle owners could receive ***multiple conflicting and confusing class notices***.[39] For example, under the proposed settlement, putative class members and potential personal injury plaintiffs will receive a single postcard, directing them to information on a settlement website. They will not be allowed to opt out, but will have to monitor the website for months until further information is posted, requiring them to take action and submit claims in order to share in any settlement proceeds. *See* Long Form Notice, Rule 23 Mot. Ex. G.

By contrast, in the MDL proceedings, if a class is certified, putative class members would presumably be sent notices of 23(b)(3) classes, which would provide them with the opportunity to opt out and ***exclude*** themselves from the class. The confusion resulting from multiple, conflicting notices would impermissibly jeopardize absent class members' rights. Moreover, if this Court agrees with New GM and rejects the MDL plaintiffs' Motion for Class Certification pending in

[39] The Movants propose a notice plan that would provide written notice to "All persons in the United States who, prior to July 10, 2009, purchased or leased a vehicle manufactured by GM that were later included in the following recalls: (1) Delta Ignition Switch Vehicles included in Recall No. 14v047: 2005-2010: Chevy Cobalt, 2006-2011 Chevy HHR, 2007-2010 Pontiac G5, 2007-2010 Saturn Sky, 2003-2007 Saturn ION, and 2006-2010 Pontiac Solstice; and (2) Low Torque Ignition Switch Vehicles, which are included in Recall Nos. 14v355, 14v394, and 14v400: 2005-2009: Buick Lacrosse, 2006-2014 Chevrolet Impala, 2000-2005 Cadillac Deville, 2006-2011 Cadillac DTS, 2006-2011 Buick Lucerne, and 2006-2008 Chevrolet Monte Carlo; 2003-2014 Cadillac CTS and the 2004-2006 Cadillac SRX; and 1997-2005 Chevrolet Malibu, 2000-2005 Chevrolet Impala, 2000-2005 Chevrolet Monte Carlo, 2000-2005 Pontiac Grand Am, 2004-2008 Pontiac Grand Prix, 1998-2002 Oldsmobile Intrigue, and 1999- 2004 Oldsmobile Alero; and (3) Side Airbag Defect Vehicles included in Recall No. 14v118: 2008-2013 Buick Enclave, 2009-2013 Chevrolet Traverse, 2008-2013 GMC Acadia, and 2008-2010 Saturn Outlook; and (4) Power Steering Defect Vehicles included in Recall No. 14v153: 2004-2006 and 2008-2009 Chevrolet Malibu, 2004-2006 Chevrolet Malibu Maxx, 2009-2010 Chevrolet HHR, 2010 Chevrolet Cobalt, 2005-2006 and 2008-2009 Pontiac G6, 2004-2007 Saturn Ion, and 2008-2009 Saturn Aura." Declaration of Cameron Azari, Esq., Rule 23 Mot., Ex. F. at ¶ 13.

this Court, then putative class members would—if the Bankruptcy Court were to preliminarily approve the proposed settlement—receive class wide notice of a settlement inconsistent with the rulings of this Court, further adding to the confusion. A single court should address and decide whether any class certification is appropriate, and if so, determine and approve any notice sent to the millions of non-parties purportedly bound by the proposed settlement or other class actions. Failure to coordinate proceedings risks wasting millions of dollars and confusing millions of alleged class members.

3) The Reference Should Be Withdrawn Because The Bankruptcy Proceeding Raises Overlapping Questions of Law and Fact With the Already Pending District Court Action.

This Court's decisions on the legal rules that govern the viability and value, if any, of MDL plaintiffs' claims are indispensable to the liquidation of the Plaintiffs' claims in the Bankruptcy Court. There are numerous overlapping legal and factual issues for economic loss claims alone:

- Manifest Defect Rule. This Court has held, or plaintiffs agree, that a manifest defect is required for claims in various jurisdictions. For example, this Court ruled that New York and Texas require a manifest defect as a predicate for bringing a claim. *See In re Gen. Motors LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 430-31, 452 (S.D.N.Y. 2017), *modified on reconsideration*, No. 14-MC-2543 (JMF), 2017 WL 3443623 (S.D.N.Y. Aug. 9, 2017). Plaintiffs also agree that at least the following states require a manifest defect: Arkansas, New Hampshire, North Carolina, North Dakota, South Carolina, and Utah.[40] Consequently, the proposed settlement includes persons whose claims would be barred altogether in many states and limited in other states by the prior rulings of this Court.[41]

- Plaintiffs Who Sold Prior to the Recalls. This Court dismissed all economic loss claims

[40] The Court has also ruled that Oklahoma requires a manifest defect for consumer fraud and breach of implied warranty claims, *see In re: Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *36-37; that Pennsylvania requires a manifest defect for fraudulent concealment and breach of implied warranty claims, *see* 257 F. Supp. 3d at 438-440; and that Missouri requires a manifest defect for breach of implied warranty claims, *see In re: Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *35.

[41] Ex. 2, 5/25/18 Bankr. Hr'g Tr. at 24 ("Likewise, any other rulings that have been issued by Judge Furman that has an impact on damages or damage theories, state by state or otherwise, are going to be built into the estimation proffer that we give you.") (Mr. Weisfelner). Plaintiffs claim to have "refined" their damages estimates based on this Court's rulings (Rule 23 Motion at ¶ 40), but they have not shown their work to the Court, the Bankruptcy Court, or New GM. Nor have they adjusted their notice population to reflect any of this Court's rulings. Moreover, plaintiffs' proposed settlement and notice program does not appear to reflect any such efforts at refinement, given the broad scope of the proposed classes and notice recipients.

brought by plaintiffs who had sold, traded in, or returned their allegedly defective vehicles prior to the recalls. *See In re Gen. Motors LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 403 (S.D.N.Y. 2017). The Court granted plaintiffs' motion for reconsideration of its order, *see In re Gen. Motors LLC Ignition Switch Litig.*, 2017 WL 3443623 (S.D.N.Y. Aug. 9, 2017), stating that some claims in some states might not require damages, while continuing to hold that plaintiffs who sold before the recall announcements failed to "articulate a coherent theory" for how to "logically, if not legally, prove . . . damages" for these claims. *Id.* at *2.

- The Effect of New GM's Recall Repairs. In its April 2018 Order on New GM's Motion for Summary Judgment with Respect to Plaintiffs' Claims for Benefit-of-the-Bargain Damages, the Court stated that "that the viability of [p]laintiffs' claims for benefit-of-the-bargain damages is likely to turn on the question of whether New GM actually fixed the recalls at issue in its many recalls." *In re Gen. Motors LLC Ignition Switch Litig.*, 2018 WL 1638096, at *2 (S.D.N.Y. Apr. 3, 2018). That issue has been fully briefed and is presently pending before this Court. The effectiveness of New GM's recall repairs is critical to determining whether the proposed economic loss settlement classes have legally cognizable claims and thus standing under Article III. Indeed, plaintiffs have admitted that, for two of the recalls, the recall repairs worked. *See In re Gen. Motors LLC Ignition Switch Litig.*, 2018 WL 1638096, at *2 n.1 (S.D.N.Y. Apr. 3, 2018) ("The Court recognizes, as New GM argues, that Plaintiffs do not dispute that New GM's recall 'cured' the 'Power Steering Defect.'"); Pls. Opposition to New GM Motion for Summary Judgment Against Bellwether Economic Loss Plaintiffs (Dkt. No. 6059) at 4 n.1 ("Regarding Recall Nos. 14v188 (side-impact airbags) and 14v153 (power steering) . . . Plaintiffs acknowledge that the evidence now demonstrates that the remedies offered under those recalls are effective in repairing the defects.").

To estimate (*i.e.*, liquidate) the claims involved in the proposed settlement, the Bankruptcy Court would have to—for each of the issues set forth above—"apply the legal rules which govern the ultimate value of the claim." *In re Enron Corp.*, 2006 WL 544463, at *4, (S.D.N.Y. Jan. 17, 2006); *accord In re Siegmund Strauss, Inc.*, 2013 WL 3784148, at *8 (Bankr. S.D.N.Y. July 17, 2013). This process would largely duplicate this Court's work for the very same claims.

Furthermore, the Court is already set to decide fundamental issues that directly impact the proposed Stage Two estimation procedures as well as Stage Three allocation and distribution. Counsel for the Movants readily admit as much: "[a]ny merits-based issues that the [MDL Court] has previously made or will make in the future will be reflected by necessity as part of the estimation proceedings." (Ex. 1, 12/20/18 Bankr. Hr'g Tr. at 15.) The Bankruptcy Court has also

noted that this Court has decided these merits-based issues: "[Judge Furman]'s decided many, I'll refer to them as 'merits issues,' that deal with economic loss. Why shouldn't the reference be withdrawn and Judge Furman decide all of the class issues?" *Id.* at 22-25. Movants reiterated this position in their February 13, 2019 letter to the Bankruptcy Court, noting that such rulings "will be taken into account at the estimation proceeding stage." (Plaintiffs' 2/13/19 Letter at 3, Bankr. Dkt. No. 14424, Dkt. No. 6480-1.) Moreover, Movants represented that rulings on the MDL briefing are "anticipated by June 2019" and in any event are "very likely" to be issued "long before the estimation proceedings begin." *Id*. And counsel has also admitted that during the Stage Three distribution and allocation proceedings, the Bankruptcy Court may need to "decertif[y]" or "re-jigger[]" the certified classes because the interests of the class members may not be aligned. (Ex. 1, 12/20/18 Bankr. Hr'g Tr. at 11.) Without knowing the outcome of this Court's future rulings, it is impossible to even guess—let alone predict—the outcome of the Stage Two estimation hearing, which is, in turn, tied to the findings the Bankruptcy Court must make under Rule 23(e) and *Ortiz* concerning the liquidated amount of personal injury claims and the size of the settlement fund. Thus, even putting aside that Movants improperly seek certification of limited fund classes (Stage One) *before* it can be known whether the requirements for such certification can be met (Stages Two and Three), the Bankruptcy Court has no suitable basis in the record to determine that the relief provided for the alleged millions of class members is "likely" to be adequate, much less fair and reasonable.

In addition to the obvious overlap between this Court's future rulings and the impacts those rulings will have at the proposed Stage Two estimation hearing or Stage Three allocation procedures, the settlement agreement directly ties the fate of the proposed settlement to this Court's rulings on the summary judgment briefing. Section 4.5 of the settlement agreement provides that

if this Court "issues an Opinion or Order on [New GM's summary judgment motion] . . . that impacts the size, scope or composition of the classes of Economic Loss Plaintiffs, the Parties shall, within five (5) business days . . . engage in good faith negotiations regarding the applicable provisions of this Settlement Agreement impacted by said decision." Movants thus expressly acknowledge that the summary judgment briefing directly impacts the certification of the proposed classes, and that they (and the Bankruptcy Court) may need to revisit certification after this Court's rulings.

Additionally, the GUC Trust's termination rights in section 10.2 of the settlement agreement confirm the connection between the proposed settlement and the summary judgment briefing in this Court. First, the GUC Trust may unilaterally terminate the settlement agreement if the Preliminary Approval Order is not entered on or before September 15, 2019, which is more than six months after the Movants' requested hearing date. (Settlement § 10.2(a).) There is no reason the Movants would anticipate that the Bankruptcy Court may not enter the Preliminary Approval Order for seven months other than the expectation that the Bankruptcy Court may wait for relevant developments in this Court. Second, the GUC Trust may unilaterally terminate the settlement agreement if Co-Lead Counsel appeals this Court's summary judgment decision. (Settlement § 10.2(b).) Again, this termination right would be pointless if events in this Court were unrelated to approval of the proposed settlement. Presumably, the GUC Trust negotiated for this right because it recognized that a negative ruling from this Court could significantly delay resolution of the issues relating to the proposed settlement.

Where, as here, a bankruptcy proceeding shares overlapping questions of law and fact with an already pending District Court action, the reference should be withdrawn. *See, e.g.*, *Solutia, Inc. v. FMC Corp.*, 2004 WL 1661115, at *3 (S.D.N.Y. July 27, 2004) (granting motion to

withdraw reference; noting "[b]y litigating this non-core matter in the district court, judicial resources will be conserved instead of having two courts administer two rounds of briefing and argument on the same issues."); *1800Postcards, Inc. v. Morel*, 153 F. Supp. 2d 359, 367 (S.D.N.Y. 2001) (finding that where facts, transactions and issues underlying a creditors' committee's complaint overlap with underlying non-core claims pending in District Court, "efficiency counsels withdrawing the referral of the committee's claims"); *Mishkin v. Ageloff*, 220 B.R. 784, 800 (S.D.N.Y. 1998) (withdrawal of reference in core proceedings was warranted, because the proceedings were "overlapping and interlocking"); *In re Casimiro*, 2006 WL 1581897, at *6 (E.D. Cal. June 6, 2006) ("Although bankruptcy courts are empowered to oversee class actions, there is little reason to assume that they regularly do so. On the other hand, the district court has long experience in the management of this complex class of litigation."). Withdrawing the reference ensures uniformity and an appropriate sequence for determining the overlapping issues. *See In re Parmalat*, 320 B.R. at 50 (withdrawing the reference because, *inter alia*, permitting the Bankruptcy Court to decide certain issues in the first instance would be inefficient and counterproductive to the goals of the multi-district litigation); *ResCap Liquidating Trust*, 518 B.R. at 265-66 (finding that withdrawal of the reference was warranted to, *inter alia*, prevent duplicative work); *In re Durso Supermarkets*, 170 B.R. 211, 213-14 (S.D.N.Y. 1994) (noting "unnecessary costs could be avoided by a single proceeding in the district court"). The substantial overlap between the two proceedings justifies withdrawal of the reference to ensure the two proceedings are appropriately coordinated and sequenced.

4) The Reference Should Be Withdrawn Because The Bankruptcy Proceeding Raises Overlapping Questions of Law and Fact With the Already Pending District Court Action.

Withdrawal of the reference is also appropriate here because 136 of the personal injury/wrongful death plaintiffs who are specifically identified in the settlement agreement and

who are not otherwise eligible for a settlement have claims pending in the MDL. The overlapping legal and factual issues concerning these claims—facts and issues that were relevant to the bellwether trials over which this Court presided—include, but are not limited to contributory negligence, accident causation, injury causation, the specific defect at issue, weather and road conditions at the time of the accident, the condition of the vehicle at the time of the accident, the claimant's speed, whether the claimant was intoxicated, the role of other drivers, the credibility of witnesses, the impact of the plaintiff's injuries, spoliation of evidence, and alleged damages.

Moreover, the Court has ***already*** resolved numerous motions relating to personal injury/wrongful death claims. In particular, as discussed above, this Court ruled that the proposed expert opinions supporting Co-Lead Counsel's "run-accessory-run" theory (supporting claims involving airbag deployment) were inadmissible under *Daubert*. *In re General Motors LLC Ignition Switch Litig.*, Dkt. No. 4905. As the Court is aware, on the basis of that ruling, the parties have dismissed numerous airbag deployment claims from the MDL. This Court's run-accessory-run ruling similarly should preclude airbag deployment claims from being allowed or estimated in Bankruptcy Court. In sum, it would be inefficient for the Bankruptcy Court to simultaneously adjudicate the same personal injury/wrongful death claims and defenses that this MDL Court has been charged with overseeing.

5) The Reference Should be Withdrawn Because of This Court's Deep Familiarity With The Facts And Legal Issues Relating to Economic Loss and Personal Injury Claims.

This MDL has been pending for more than four years. During that period, the Court has overseen these consolidated proceedings and issued scores of rulings on substantive and procedural issues. This Court's thorough familiarity with the facts and issues implicated by the economic loss and personal injury/wrongful death claims also weighs in favor of withdrawing the reference. *See Mishkin* 220 B.R. at 799-800 (promoting judicial economy and uniformity is the

critical consideration); *Houbigant, Inc.* v. *ACB Mercantile, Inc. (In re Hourbigant, Inc.)*, 185 B.R. 680, 686 (S.D.N.Y. 1995); *Big Rivers Elec. Corp.* v. *Green River Coal Co., Inc.*, 182 B.R. 751, 756 (W.D. Ky. 1995) (exercising discretion to withdraw the reference and noting that "a judge's knowledge of the facts is a factor that may be considered in deciding a motion to withdraw the reference"); *see also Dev. Specialists, Inc.* v. *Orrick, Herrington & Sutcliffe, LLP*, 2011 WL 6780600, at *4 (S.D.N.Y. Dec. 23, 2011) ("[T]he unfinished business claims involve a pure—and novel—issue of New York law. Although Judge Drain has spoken to the legal viability of those claims, the Bankruptcy Court has no particular expertise to bring to bear on resolving it.").

B. Withdrawal of the Reference Will Not Cause Significant Delay.

In addition to concerns of efficiency, courts should consider the potential delay and the costs to the parties. *In re Burger Boys, Inc.*, 94 F.3d 755, 762 (2d Cir. 1996). Withdrawal of the reference will not cause significant delay. Class certification and class notice issues must be adjudicated before the proposed settlement can be approved. Moreover, Co-Lead Counsel has already confirmed that the Plaintiffs' entitlement to any recoveries under the proposed settlement depends on "merits-based issues that the [MDL Court] has previously made or will make in the future [that] will be reflected by necessity as part of the estimation proceedings." (Ex. 1, 12/20/18 Bankr. Hr'g Tr. at 15.) Accordingly, withdrawal of the reference will not cause delay because the Plaintiffs cannot recover until this Court resolves critical issues that are pending before it, which Movants will then incorporate into Stages Two and Three. Plaintiffs would not receive consideration under the proposed settlement—if they receive any consideration whatsoever—until after the completion of Stage Three.

C. Withdrawal of the Reference Promotes Uniformity in Bankruptcy Administration Because the Proposed Settlement Involves Issues More Commonly Addressed in the District Courts.

Where, as here, Old GM's chapter 11 plan was confirmed long ago and the remaining

claims involve non-bankruptcy issues that are more commonly addressed in district courts, uniformity in bankruptcy administration weighs in favor of withdrawing the reference. *See Complete Mgmt., Inc.* v. *Arthur Andersen, LLP (In re Complete Mgmt., Inc.)*, 2002 WL 31163878, at *3 n.5 (S.D.N.Y. Sept. 27, 2002) (withdrawal of core matters warranted because, among other things, the district court had familiarity with related securities litigation and the proceeding required determination of "legal issues more commonly resolved by [the district] court than the bankruptcy courts"); *Wedtech Corp.* v. *London (In re Wedtech Corp.)*, 81 B.R. 237, 239 (S.D.N.Y. 1987) (rejecting the objector's argument that motion to withdraw should be denied because of the proponent's desire to slow down the proceeding; "issues of fairness and judicial economy militate in . . . favor [of withdrawal] nonetheless."); *General Media v. Guccione (In re General Media, Inc.)*, 335 B.R. 66, 73 (Bankr. S.D.N.Y. 2005) (noting "all courts that have addressed the question have ruled that once confirmation occurs, the bankruptcy court's jurisdiction shrinks").

In addition to the constitutional issues identified in Part I, *supra*, the dispositive non-bankruptcy questions raised by the proposed settlement include:

- Can Co-Lead Counsel and the purported class representatives satisfy the requirements of Rule 23, including the typicality (Rule 23(a)(3)) and adequacy of representation (Rule 23(a)(4)) requirements that have already been briefed in this Court?
- Can Plaintiffs' experts' opinions demonstrate class-wide injury and damages—that is, are they (i) legally cognizable, and (ii) do they satisfy *Daubert*?
- Can millions of individuals who have not experienced a manifest defect recover for economic losses under the laws of 51 jurisdictions?
- Can millions of individuals whose vehicles have been repaired recover economic losses under the laws of 51 jurisdictions?
- Can claimants who sold their vehicles before the recalls recover under the laws of 51 jurisdictions?
- Can personal injury/wrongful death Plaintiffs prove that their accidents and injuries were caused by Old GM?

Approval of the proposed settlement thus depends upon, among many other things, Rule 23, *Ortiz*, *Amchem*, Article III, the Due Process Clause, the Seventh Amendment, the Rules Enabling Act, the case law under *Daubert*, the contract laws of many jurisdictions, and state-by-state common law, rather than issues arising under bankruptcy law. This Court should decide these non-bankruptcy issues, which are critical to assessing the proposed settlement.

In sum, consideration of "what will promote uniformity of bankruptcy administration" weighs in favor of withdrawing the reference. *See ResCap Liquidating Trust*, 518 B.R. at 266–67 (noting that uniformity factor weighs in favor of withdrawal because, among other things, the District Court had more familiarity with claims governed by state law and the claims did not involve "complicated questions of bankruptcy law").

D. Withdrawal of the Reference Is Necessary to Prevent Plaintiffs' Forum Shopping.

Co-Lead Counsel initially pursued their claims based on Old GM's conduct in the MDL. However, after a series of adverse rulings by this Court on the very issues implicated by the settlement,[42] Co-Lead Counsel shifted their focus to the Bankruptcy Court, where they sought to avoid litigation against New GM.

Co-Lead Counsel have repeatedly tailored their Bankruptcy Court strategy to attempt to avoid this Court's class certification procedures and other MDL rulings. For example:

- In February 2015, Co-Lead Counsel's bankruptcy counsel candidly admitted that plaintiffs had made a "strategic" decision not to pursue the GUC Trust, choosing instead to pursue New GM. (2/18/15 Bankr. Hr'g Tr. at 134, excerpts attached as

[42] *See, e.g.*, *In re Gen. Motors LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 430-31, 452 (S.D.N.Y. 2017), *modified on reconsideration*, 2017 WL 3443623 (S.D.N.Y. Aug. 9, 2017) (manifest defect rule required for all claims under New York and Texas law); *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353 (S.D.N.Y. July 15, 2016) (manifest defect rule required for some claims law in certain other states); *In re Gen. Motors LLC Ignition Switch Litig.*, 2017 WL 3443623 at *2 (noting, despite granting reconsideration of the Court's dismissal of claims because of failure to show damages for plaintiffs who had sold, traded in, or returned their allegedly defective vehicles prior to the recalls, plaintiffs' continued failure to "articulate a coherent theory" for how to "logically, if not legally, prove . . . damages" for these claims).

Ex. 5.)

- In denying plaintiffs' motion to withdraw the reference in 2015, this Court noted that "there is some indication that Plaintiffs are forum shopping. Judge Gerber largely ruled against them in resolving New GM's motions to enforce . . . ." *Motors Liquidation Co.*, 538 B.R. 664.

- Prior to this Court's August 2017 successor liability ruling granting New GM summary judgment in various jurisdictions, Co-Lead Counsel admitted to the Bankruptcy Court that "depending on the resolution of [New GM's successor liability summary judgment motion], one could anticipate that the vim and vigor with which the plaintiffs prosecute" their claims against the GUC Trust "may change." (1/12/17 Bankr. Hr'g Tr. at 10:24-11:2, excerpts attached as Ex. 6.)

- Their bankruptcy counsel also admitted that Co-Lead Counsel attempted to design the prior proposed settlement, which did not adhere to Rule 23, to avoid "confus[ion]" with the MDL. (12/18/17 Bankr. Hr'g Tr. at 151:25-152:7 (Weisfelner testimony), excerpts attached as Ex. 7.)

Notably, the Proposed Class Claims that the Plaintiffs sought to resolve (without application of Rule 23) under their prior settlement were asserted under Rule 23(b)(3), the same basis that Plaintiffs assert in the MDL. Following the Bankruptcy Court's ruling in September 2018 that the prior settlement required application of Rule 23, however, the Plaintiffs for the first time adopted a "limited fund" theory pursuant to Rule 23(b)(1)(B). Withdrawing the reference under these circumstances prevents any attempt to forum shop. *Cf. Dev. Specialists*, 462 B.R. at 473 ("[I]nsofar as the Firms are entitled to have their dispute, which implicates only private rights, finally determined in this Court, the Court does not condone forum shopping by allowing them to come here sooner rather than later"); *In re Pan Am Corp*, 163 B.R. 41, 44 (S.D.N.Y. 1993) (finding no forum shopping when party sought to have disputes arising from the same factual context adjudicated in one forum); *Adelphia Commc'ns*, 2006 WL 337667, at *5.

E. Withdrawal of the Reference Avoids Unnecessary Appeals.

The proposed settlement raises dispositive questions of law, including Constitutional issues that prevent certification and approval of the proposed settlement classes as a matter of law. (*See*

Part I, *supra*.) There is no advantage in having the Bankruptcy Court decide these legal questions, which would be reviewed *de novo* in any appeal to this Court. *See Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 538 (2d Cir. 2016) ("We review the district court's class certification ruling for abuse of discretion and the conclusions of law that informed its decision to grant certification *de novo*."); *In re Wilborn*, 609 F.3d 748, 752 (5th Cir. 2010) (similarly reversing bankruptcy court's decision certifying a class under *de novo* review of legal issues); *cf. In re Bayshore Wire Products Corp.*, 209 F.3d 100, 103 (2d Cir. 2000) ("Like the District Court, we review the Bankruptcy Court's findings of fact for clear error [and] its conclusions of law *de novo*.").

CONCLUSION

The proposed settlement raises substantial and material questions of non-bankruptcy federal law, including interpretation of important Constitutional issues identified by the Supreme Court relating to mandatory class action settlements, the effect of the Due Process Clause on the number and timing of subclasses, class notice, and whether a class with millions of uninjured members can be certified. Because these issues require "significant interpretation, as opposed to simple application, of federal laws apart from the bankruptcy statutes," *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991), withdrawal is mandatory.

Independently, there is ample cause to grant permissive withdrawal. It would be inefficient—and risk inconsistent results and unnecessary appeals—for the Bankruptcy Court to address the same issues of non-bankruptcy law that are currently pending in this Court on complex factual and legal issues central to both the proposed settlement and the MDL. Plaintiffs themselves recognize this, which is why they built into the proposed settlement termination rights and obligations to negotiate further over settlement terms dependent upon what this Court rules on the overlapping issues pending in this Court.

New GM therefore respectfully requests that the District Court enter an order withdrawing the reference as to the Rule 23 Motion.

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Dated: February 22, 2019
New York, New York

/s/ Paul M. Basta

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Exhibit 1

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	.	Case No. 09-50026-mg
	.	Chapter 11
MOTORS LIQUIDATION COMPANY, et al., f/k/a GENERAL MOTORS CORP., et al,	.	(Jointly administered)
	.	One Bowling Green
	.	New York, NY 10004
Debtors.	.	
	.	Thursday, December 20, 2018
. . . . .	.	2:00 p.m.

TRANSCRIPT OF CASE MANAGEMENT CONFERENCE
BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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consistent with Your Honor's September 25th decision. The parties are very cautious that, charging up the hill for the third time, this time we need to get it right.

And just to give Your Honor a sense of what the delay has been, first and foremost, we had to get a thorough handle on the path forward, as was outlined in Your Honor's September 25th opinion, understanding through all of the various class action gurus employed by each of our respective firms what the rulings in Manville and the subsequent Ortiz decision means for our path forward and ultimately what the support was for a limited-fund, non-opt-out class or classes.

To complicate matters, as I'm sure Your Honor is aware, there are brand new amendments to Rule 23.

THE COURT: I referenced them in the opinion.

MR. WEISFELNER: And in particular, amendment to Rule 23(e)(2)(B), which requires that the first step is to seek a finding from this Court, that this Court will likely be able to approve the settlement and our settlement purposes class certification.

Which brings us to the next issue, which is notice and notice costs. And, Your Honor, to fully appreciate that, there are two potential universes of class members. In universe one, we are looking at all Old GM registration holders up to the bar date. Our best estimate is that's over 26 million registrants. Not cars, because the cars may have

been owned or leased by multiple parties, but 26 million registrants. And the cost of updating those registrations and getting enough information to be able to do mail notices and subsequent email notices or just the mail notices, our best estimate is $13 million.

Conversely, there's an alternative universe, and that is one where you would take out or subtract anyone who sold their car before the bar date on the theory that you, by definition, therefore sold the car before the recall notices. That's a universe that shrinks down to some 12 million registrants, and the cost of updating all those registrations from the original loan or through as many successive purchasers up until the person who owned the car as of the bar date is estimated at some $7 million.

And again, Your Honor, that's just the cost of updating the registrations. There's additional cost for mailing, additional cost for establishing and maintaining a website.

The other factor is the timing of updating the registration materials. For most states, we are told by the vendor involved that it's a four-to-six-week process. There are, however, a handful of states where you can add yet another six weeks to the time frame because there are a lot more hoops to jump through in those jurisdictions in order to obtain updated registrations.

THE COURT: I think you're right. It said January 3rd. I think you've now pushed that further.

MR. WEISFELNER: Yeah. I'm not sure the letter ever said the 3rd. I think the letter clearly said the end of -- I think it said 31, actually.

THE COURT: Okay. I misremember then. Go ahead.

MR. WEISFELNER: So here's the process as we envision it and when we think we get on file. By the end of January, if not sooner, we will embark on what we refer to as "stage one." In stage one, we will be asking the Court to approve our form of notice, which will be state-of-the-art notice under Rule 23(e)(1); in other words, direct-mail notice. And there will be one of two universes of people who are going to get the notice, depending on what Judge Furman ultimately rules.

We'll ask Your Honor, in stage one, to make a determination that you are likely to approve the settlement under both Rule 9019 and Rule 7023. And once that's accomplished, and we have all the information we need to conduct the notice, the notice will begin.

Now, it will take us, as I indicated before, a period of time to collect the registration data from the vendor and to do the notice itself. So it may very well be that if we're in and out of court in the month of January, early February, we're not back in court probably until May seeking final approval of both the settlement and the certification.

sometime after we file our stage-one pleadings, for their view on those three topics: discovery, which we think there ought not be any until we get the estimation; withdraw the reference; continue motion to stay.

The fourth and final stage, once the estimation is completed, and assuming that there is any trigger of the accordion feature, would be for the plaintiff's side, working together with a mediator or judicial monitor, to come up with what I refer to as "trust distribution procedures," and to present all of that to the Court on notice to affected parties.

There is a possibility, at that stage, that the class could be decertified, re-jiggered, you know, if any party in interest felt that their interests weren't being adequately protected in terms of the allocation methodology that the parties ultimately put forward that Your Honor will be asked to approve.

THE COURT: Come back to stage one.

MR. WEISFELNER: Yes, sir.

THE COURT: Do you contemplate one or more classes or subclasses?

MR. WEISFELNER: We contemplate one or more. And not to be cute about it, the current contemplation is that there will be a class consisting of people who owned or leased the initial defect cars. I'm forgetting my recall numbers, but I think it was 047. And the other class will be all of those

MR. WEISFELNER: For the same exact reason that the last time GM sought to withdraw the reference from the bankruptcy court, the district court denied the withdraw. And those are breaking them down to their two respective groupings. The only summary judgment issue that could at all impact proceedings before this Court is the one that speaks to the size of the universe.

As to the merits decisions that he's made, and is not likely to make any more before we get to estimation, but if he were, all of those merits determinations will be -- will impact our trial preparation. So there's not a decision that Judge Furman has made that won't be reflected in how we try the estimation case.

THE COURT: From your letter, I take it you agree that to the extent proceedings continue in this Court, and Judge Furman has issued decisions and may issue additional decisions that I'll refer to as "merits," those would -- you would agree those would apply in further proceedings here?

MR. WEISFELNER: Absolutely. Either in connection with -- as we plotted out, his near-term decisions are likely to involve summary judgment on the pending papers, which could dramatically impact the size of the universe, therefore who gets noticed, therefore the cost of notice. It makes sense to most of us that we ought to be awaiting that determination before we blow X number of millions of dollars on costs of

notice for people that Judge Furman has decided are entitled to notice. There are some countervailing concerns among some of the folks within the beneficiary and GUC class about just how ironclad a series of protections they want, but I think it'll resolve itself that way.

Any merits-based issues that the judge has previously made or will make in the future will be reflected by necessity as part of the estimation proceedings. Your Honor is not likely to put in the column of adding up to hopefully $10 billion, any dollar amount that reflects damages that Judge Furman has already said, sorry, doesn't fly. So we will be careful, and GM will hold us to our promise to be careful not to try anything that's already been determined. And in that fashion, I think all of Judge Furman's past and future determinations will be reflected in all of the proceedings that Your Honor will be asked to engage in.

THE COURT: New GM's letter, which is ECF 14384, very briefly addressed, because I requested it be addressed, the issue of mediation. And my takeaway from that portion of the letter is that they've been reasonably successful in resolving personal injury/wrongful death -- presale personal injury/wrongful death cases. How, if at all, does that affect the -- your achieving the threshold to trigger the accordion?

MR. WEISFELNER: Your Honor, our co-leads, together with all of our experts, have assured me that we easily get to

C E R T I F I C A T I O N

I, Lisa Luciano, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

LISA LUCIANO, AAERT NO. 327 DATE: December 21, 2018

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Exhibit 2

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	.	Case No. 09-50026-mg
	.	Chapter 11
MOTORS LIQUIDATION COMPANY, et al., f/k/a GENERAL MOTORS CORP., et al,	.	(Jointly administered)
	.	One Bowling Green
	.	New York, NY 10004
Debtors.	.	
	.	Friday, May 25, 2018
	.	10:05 a.m.

TRANSCRIPT OF CASE MANAGEMENT CONFERENCE REGARDING PROPOSED SETTLEMENT BETWEEN THE GUC TRUST AND SIGNATORY PLAINTIFFS
(RELATED DOCUMENT(S) 14292, 14294, 14293, 14298)
BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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require Rule 23 class certification. That's what's pending before me, and that's what I contemplate going ahead and deciding. And when I said at the outset that I contemplated getting -- because I think that's -- it's raised as a gating issue to at least preliminarily decide that issue before $6 million is spent giving notice.

If the issue was whether classes should be certified, economic loss classes should be certified, and that issue is in the process of being briefed in discovery or whatever before Judge Furman, I'm strongly disinclined to try and jump the gun and decide the issue before Judge Furman does.

New GM argues that those issues are before Judge Furman, he's going to decide them. Judge Furman and I had a brief telephone conversation this week. We did not discuss the merits of any -- and we have -- in any of the prior discussions we've had, we have not discussed the merits. He knows that this hearing is going forward today. I believe one of his law clerks was going to have the opportunity to listen in. Whether she's there or not, I don't know. He decides what he has to decide. I'll decide what I have to decide. I want to be careful not to take and decide any issues that he has before him. You may not like the schedule by which it's being done. He's got massive cases, and he's been proceeding in a very orderly fashion.

But when I took your -- the three motions, say, as we

choice of law issues, that sort of thing.

THE COURT: And I've read Judge Furman's decisions, you know, deciding on -- for those states that he has decided. One, I read the -- his decision on reconsideration as to New York. And so, you know, I'm generally familiar with it.

MR. WEISFELNER: Sure.

THE COURT: But for settlement purposes, I don't know. What is it you're contemplating?

MR. WEISFELNER: Well, I'll tell you -- I'll give you an example of where, you know, I would suspect it might be relevant to Your Honor. So we've got, a rough estimate, 11.4 million cars at issue. Now, if one were to back out of 11.4 million cars, cars that were sold in jurisdictions where manifestation is a precondition -- don't hold me to the exact numbers, but I think we're down to -- instead of 11.4 million cars, we're down to nine-and-a-half-million cars. Well, I can imagine that as part of the trial on what an appropriate estimation would be, it would be overreach for the plaintiffs to ask you to apply an estimation to 11.4 million cars as opposed to nine and a half million cars.

Likewise, any other rulings that have been issued by Judge Furman that has an impact on damages or damage theories, state by state or otherwise, are going to be built into the estimation proffer that we give you. And if we're stupid enough not to do that, I would assume someone withstanding is

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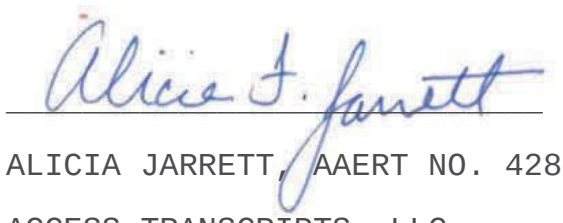

ALICIA JARRETT, AAERT NO. 428 DATE: May 29, 2018

ACCESS TRANSCRIPTS, LLC

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I, Ilene Watson, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

ILENE WATSON, AAERT NO. 447 DATE: May 29, 2018

ACCESS TRANSCRIPTS, LLC

Exhibit 3

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	.	Case No. 09-50026-mg
	.	Chapter 11
MOTORS LIQUIDATION COMPANY, et al., f/k/a GENERAL MOTORS CORP., et al,	.	(Jointly administered)
	.	One Bowling Green
	.	New York, NY 10004
Debtors.	.	
	.	Wednesday, November 16, 2016
. . . . .	.	11:38 a.m.

TRANSCRIPT OF CASE MANAGEMENT CONFERENCE (CC: DOCUMENT NUMBER 13786, RELATED DOCUMENT(S) 13373, 13775, 13697)
BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY COURT JUDGE

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MR. WEINTRAUB: Your Honor --

THE COURT: Yeah, just a second, Mr. Weintraub. Go ahead, Mr. Weintraub.

MR. WEINTRAUB: Of course, there are two additional wrinkles to the late-filed claim issue. With respect to the pre-closing ignition switch accident plaintiffs, we don't believe that could be a class proof of claim. We --

THE COURT: As to the accident plaintiffs, I Would agree it couldn't be a class proof of claim.

MR. WEINTRAUB: We've been moving, timing-wise, in lock step with the economic loss people. We have a motion ready to be filed whenever the Court says it should be filed with respect to 200 proofs of claim. The problem is we don't know that that's all of the proofs of claim that might be filed. Through Mr. Hilliard, we have 200 proofs of claim for his clients. We suspect, but we don't know that there are other plaintiffs attorneys with other clients, and one of the challenges is to how to get notice to those potential people that they should be filing a motion now, too.

THE COURT: Mr. Weintraub, in an entirely different context, this morning, I reviewed -- reasoned to review a prior decision of mine where I denied leave to file a late claim, and the argument was that they didn't have proper notices of bar date, and I denied their leave to file a late claim because once they had notice that they hadn't been -- you know, once

C E R T I F I C A T I O N

I, Alicia Jarrett, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

ALICIA JARRETT, AAERT NO. 428 DATE: November 17, 2016

ACCESS TRANSCRIPTS, LLC

Exhibit 4

Requested Hearing Date: March 11, 2019 at 10:00 a.m. (EDT)
Objection Deadline: March 4, 2019 at 4:00 p.m. (EST)

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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 (MG) (Jointly Administered)

NOTICE OF HEARING ON GENERAL MOTORS LLC'S MOTION PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE TO (A) STAY PROCEEDINGS RELATING TO THE PROPOSED SETTLEMENT AND (B) GRANT RELATED RELIEF

PLEASE TAKE NOTICE that upon the annexed *General Motors LLC's Motion Pursuant to Section 105(a) of the Bankruptcy Code to (A) Stay Proceedings Relating to the Proposed Settlement and (B) Grant Related Relief* (the "Motion"), a hearing has been requested before the Honorable Martin Glenn, United States Bankruptcy Judge, in Room 523 of the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, New York 10004, on March 11, 2019, at 10:00 a.m. (EDT), or as soon thereafter as counsel may be heard.

PLEASE TAKE FURTHER NOTICE that any responses or objections to this Motion must be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court, and shall be filed with the Bankruptcy Court (a) electronically in accordance with General Order M-399 (which can be found at www.nysb.uscourts.gov) by registered users of the Bankruptcy Court's filing system, and (b) by all other parties in interest, on a CD-ROM or 3.5 inch disk, in text-searchable portable document format (PDF) (with a hard copy delivered directly to Chambers), in accordance with the customary practices of the Bankruptcy Court and General Order M-399, to the extent applicable, and served in accordance with General Order M-399 and on (i) Drinker Biddle & Reath LLP, attorneys for Wilmington Trust Company as GUC Trust Administrator, 1177 Avenue of the Americas, 41st Floor, New York, New York 10166 (Attn: Kristin K. Going, Esq. & Marita S. Erbeck, Esq.); (ii) FTI Consulting, as the GUC Trust Monitor, 3 Times Square, 9th Floor New York, NY 10036 (Attn: Conor Tully); (iii) Paul, Weiss, Rifkind, Wharton & Garrison LLP, attorneys for General Motors LLC, 1285 Avenue of the Americas, New York, New York 10019 (Attn: Paul M. Basta, Esq. & Kyle J. Kimpler, Esq.); (iv) King & Spalding LLP, attorneys for General Motors LLC, 1185 Avenue of the Americas, New York, New York 10036 (Attn: Arthur Steinberg, Esq. & Scott Davidson, Esq.); (v) the United

States Department of the Treasury, 1500 Pennsylvania Avenue NW, Room 2312, Washington, D.C. 20220 (Attn: Erik Rosenfeld); (vi) Vedder Price, P.C., attorneys for Export Development Canada, 1633 Broadway, 31th Floor, New York, New York 10019 (Attn: Michael J. Edelman, Esq. and Michael L. Schein, Esq.); (vii) Brown Rudnick LLP, designated counsel in the Bankruptcy Court for the Ignition Switch Plaintiffs and Certain Non-Ignition Switch Plaintiffs, Seven Times Square, New York, New York 10036 (Attn: Edward S. Weisfelner, Esq. & Howard S. Steel, Esq.); (vii) Stutzman, Bromberg, Esserman & Plifka, a Professional Corporation, designated counsel in the Bankruptcy Court for the Ignition Switch Plaintiffs and Certain Non-Ignition Switch Plaintiffs, 2323 Bryan Street, Suite 2200, Dallas, Texas 75201 (Attn: Sander L. Esserman, Esq.); (ix) Hagens Berman Sobol Shapiro LLC, co-lead counsel for the Ignition Switch Plaintiffs and certain Non-Ignition Switch Plaintiffs in the MDL Court, 1301 2nd Ave., Suite 2000, Seattle, WA 98101 (Attn: Steve W. Berman, Esq.); (x) Lieff Cabraser Heimann & Bernstein, LLP, co-lead counsel for the Ignition Switch Plaintiffs and certain Non-Ignition Switch Plaintiffs in the MDL Court, 275 Battery Street, 29th Floor, San Francisco, California 94111 (Attn: Elizabeth J. Cabraser, Esq.); (xi) Andrews Myers, P.C., counsel to certain Pre-Closing Accident Plaintiffs, 1885 St. James Place, 15th Floor, Houston, Texas 77056 (Attn: Lisa M. Norman, Esq. & T. Joshua Judd, Esq.); (xii) the Office of the United States Trustee for the Southern District of New York, U.S. Federal Office Building, 201 Varick Street, Room 1006, New York, New York 10014 (Attn: William K. Harrington, Esq.); and (xiii) Cole Schotz, P.C., counsel for Certain Ignition Switch Pre-Closing Accident Plaintiffs Represented by The Cooper Firm and Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., 1325 Avenue of the Americas, 19th Floor, New York, New York 10019 (Attn: Mark Tsukerman, Esq.) so as to be received no later than March 4, 2019, at 4:00 p.m. (EST) (the "Objection Deadline").

PLEASE TAKE FURTHER NOTICE that if no objections are timely filed and served with respect to the Motion, New GM may, on or before the Objection Deadline, submit to the Court an order substantially in the form of the proposed order attached to the Motion, which order may be entered with no further notice or opportunity to be heard.

Dated: February 22, 2019
New York, New York

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Requested Hearing Date: March 11, 2019 at 10:00 a.m. (EDT)
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Counsel for General Motors LLC

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 (MG) (Jointly Administered)

GENERAL MOTORS LLC'S MOTION PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE TO (A) STAY PROCEEDINGS RELATING TO THE PROPOSED SETTLEMENT AND (B) GRANT RELATED RELIEF

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

BACKGROUND 10

I. THE MDL 2543 LITIGATION. 10

II. THE PRIOR SETTLEMENT. 11

III. THE PROPOSED SETTLEMENT. 11

JURISDICTION 15

RELIEF REQUESTED 16

ARGUMENT 16

I. PRELIMINARY APPROVAL UNDER RULE 23(e) REQUIRES THIS COURT TO HAVE A SUITABLE BASIS IN THE RECORD AT THE MARCH 11 HEARING TO FIND THAT IT CAN LIKELY CERTIFY THE PROPOSED CLASSES. 16

A. Amended Rule 23(e) Sets Forth the Process the Movants Must Follow and the Record this Court Must Have to Preliminarily Certify the Proposed Classes. 16

B. This Court's Determination of the Prospects for Certification Requires Analysis of the Likelihood that the Movants' Proposed Classes Satisfy All Aspects of Rule 23 and Related Certification Prerequisites. 19

1. This Court's Rule 23(e) Determination of the Prospects for Certification Requires Analysis of the Likelihood that the Movants' Proposed Classes Satisfy Rule 23(a) and Certification Prerequisites. 20

2. This Court's Rule 23(e) Determination of the Prospects for Certification Also Requires Analysis of the Likelihood that the Movants' Proposed Classes Satisfies Rule 23(b)(1)(B) and *Ortiz*. 21

II. TO SATISFY RULE 23(E), THIS COURT MUST DEVELOP A SOLID RECORD THAT WOULD SIGNIFICANTLY OVERLAP WITH THE MDL COURT. 23

A. This Court Must Find it Likely that the Proposed Classes Satisfy Certain Necessary Conditions of Limited Fund Classes Set Forth in *Ortiz*. 23

1. This Court Cannot Determine Whether it Is Likely that the Value of the Liquidated Claims Exceeds the Value of

the Settlement Fund Without Considering Issues Being Decided in the MDL Court. 24

2. This Court Cannot Determine Whether it Is Likely that the Proposed Classes Comprise Plaintiffs Sharing a Common Theory of Recovery Without Considering Issues Being Decided in the MDL Court. 27

B. This Court Cannot Find it Is Likely that the Proposed Class Representatives Adequately Represent the Proposed Classes Without Considering Issues Being Decided in the MDL Court. 30

C. This Court Cannot Find it Is Likely that the Relief Provided to the Plaintiffs in the Proposed Classes Is Adequate Without Considering Issues Being Decided in the MDL Court. 32

D. This Court Cannot Find it Is Likely that the Millions of Plaintiffs Have Article III Standing Without Considering Issues Being Decided in the MDL Court. 35

1. This Court Must Have a Suitable Basis in the Record at the March 11 Hearing to Find it Likely that the Constitutional Issues in Boedeker's Methodology Will Be Resolved in Favor of the MDL Plaintiffs. 35

2. This Court Must Have a Suitable Basis in the Record at the March 11 Hearing to Find it Likely that New GM's Recall Repairs Do Not Preclude the Plaintiffs' Claims. 37

E. This Court Cannot Find it Is Likely that the Claims in the Non-Ignition Switch Class Satisfy the Commonality Requirement Set Forth in Rule 23(a)(2) Without Considering Issues Being Decided in the MDL Court. 39

III. THE MOVANTS CONCEDE THE OVERLAP WITH THE MDL PROCEEDINGS. 40

IV. THIS COURT SHOULD NOT ORDER AN EXTENSIVE AND EXPENSIVE NOTICE CAMPAIGN FOR A CLASS ACTION SETTLEMENT THAT WILL SOON BE DRAMATICALLY RESHAPED BY THE MDL COURT'S RULINGS. 41

V. THIS COURT'S ORDER OF A STAY OF PROCEEDINGS RELATED TO THE PROPOSED SETTLEMENT PENDING THE MDL COURT'S RULINGS WILL NOT PREJUDICE ANY PARTY. 43

CONCLUSION 48

TABLE OF AUTHORITIES

Page(s)

CASES

Abraham v. *WPX Energy Prod., LLC*,
322 F.R.D. 592 (D.N.M. 2017) 39

Amchem Prods., Inc. v. *Windsor*,
521 U.S. 591 (1997) ..... passim

In re Beacon Assocs. Litig.,
2012 WL 1372145 (S.D.N.Y. Mar. 19, 2012) 21, 38

In re Bird,
229 B.R. 90 (Bankr. S.D.N.Y. 1999) 44

In re Blood Reagents Antitrust Litig.,
783 F.3d 183 (3d Cir. 2015) 26

De Leon v. *Bank of Am., N.A.*,
2011 WL 13137935 (M.D. Fla. Aug. 31, 2011) 17

In re Delphi Corp.,
Case No. 05-44481 (RDD), ECF No. 9105 (Bankr. S.D.N.Y. Aug. 16, 2007) 44

Denney v. *Deutsche Bank AG*,
443 F.3d 253 (2d Cir. 2006) 21, 35

In re Deutsche Bank AG Securities Litig.,
2018 WL 4771525 (S.D.N.Y. Oct. 2, 2018) 20, 21

In re Diet Drugs Prod. Liab. Litig.,
1999 WL 782560 (E.D. Pa. Sept. 27, 1999) 27

Fleischman v. *Albany Med. Ctr.*,
2008 WL 2945993 (N.D.N.Y. July 28, 2008) 36

Ford Motor Co. Ignition Switch Prods. Liab. Litig.,
174 F.R.D. 332 (D.N.J. 1997) 36

In re Gen. Motors LLC Ignition Switch Litig.
[MDL ECF No. 4838] 10

In re Gen. Motors LLC Ignition Switch Litig.,
2016 WL 3920353 (S.D.N.Y. July 15, 2016) 5, 28, 29, 46

In re Gen. Motors LLC Ignition Switch Litig.,
2017 WL 2839154 (S.D.N.Y. June 30, 2017) 29

In re Gen. Motors LLC Ignition Switch Litig.,
2018 WL 1638096 (S.D.N.Y. Apr. 3, 2018) 38

In re Gen. Motors LLC Ignition Switch Litig.,
257 F.Supp.3d 372 (S.D.N.Y. 2017) 46

In re Hagerstown Fiber Ltd. P'ship,
277 B.R. 181 (Bankr. S.D.N.Y. 2002) 43

Halliburton Co. v. *Erica P. John Fund, Inc.*,
573 U.S. 258 (2014) 19

Hays v. *Eaton Grp. Attorneys, LLC*,
2019 WL 427331 (M.D. La. Feb. 4, 2019) 17, 18

Landis v. *N. Am. Co.*,
299 U.S. 248 (1936) 43

In re Lehman Bros. Holdings Inc.,
Case No. 08-13555 (SCC), ECF No. 42417 (Bankr. S.D.N.Y. Jan. 31, 2014) 44

Lujan v. *Defenders of Wildlife*,
504 U.S. 555 (1992) 6, 35

In re MF Global Holdings, Ltd.,
464 B.R. 619 (Bankr. S.D.N.Y. 2012) (Glenn, J.) 44

In re Motor Fuel Temp. Sales Prac. Litig.,
2011 WL 4431090 (D. Kan. Sept. 22, 2011) 47

In re Motors Liquidation Co.,
580 B.R. 319 (Bankr. S.D.N.Y. 2018) 11

In re Motors Liquidation Co.,
591 B.R. 501 (Bankr. S.D.N.Y. 2018) 3, 11, 20

In re Nickels Midway Pier, LLC,
450 B.R. 58 (D.N.J. 2011) 25

Oladapo v. *Smart One Energy, LLC*,
2017 WL 5956907 (S.D.N.Y. Nov. 9, 2017) 17

Opperman v. *Path, Inc.*
2016 WL 3844326, at *14 (N.D. Cal. July 15, 2016) 36

Ortiz v. *Fibreboard, Corp.*,
527 U.S. 815 (1999) ..... passim

In re Payment Card Interchange Fee Litig.,
2019 WL 359981 (E.D.N.Y. Jan. 28, 2019) 3, 17

In re Payment Card Interchange Fee Litig,
827 F.3d 223 (2d Cir. 2016) 27

In re Rosenblum,
545 B.R. 846 (Bankr. E.D. Pa. 2016) 43

In re S.W. Bach & Co.,
425 B.R. 78 (Bankr. S.D.N.Y. 2010) 43

Schoenbaum v. *E.I. Dupont De Nemours & Co.*,
2009 WL 4782082 (E.D. Mo. Dec. 8, 2009) 20, 46

Sykes v. *Mel S. Harris & Assocs. LLC*,
780 F.3d 70 (2d Cir. 2015) 36

Toney–Dick v. *Doar*,
2013 WL 5295221 (S.D.N.Y. Sept. 16, 2013) 12

Wal-Mart Stores, Inc. v. *Dukes*,
564 U.S. 338 (2011) 26, 30, 39, 40

STATUTES

11 U.S.C. § 105(a) 16, 44

28 U.S.C. § 157(b) 15

28 U.S.C. § 1334 15

28 U.S.C. § 1408 15

28 U.S.C. § 1409 15

OTHER AUTHORITIES

2018 Adv. Comm. Notes to 2018 Amend. Fed R. Civ. P. 23(e) ..... passim

Fed. R. Civ. P. 23 ..... passim

United States Constitution Article III ..... passim

TO THE HONORABLE MARTIN GLENN,
UNITED STATES BANKRUPTCY JUDGE:

General Motors LLC ("New GM") submits this motion (the "Motion") and respectfully represents as follows.[1] On February 1, 2019, certain individuals asserting late-filed economic loss claims (the "Signatory Plaintiffs") filed the Rule 23 Motion.[2] At the same time, the GUC Trust (together with the Signatory Plaintiffs, the "Movants") filed the Rule 9019 Motion,[3] for approval of a proposed class-action settlement (the "Proposed Settlement"), which seeks to resolve both late-filed Rule 23 class claims and late-filed individual non-class claims. The Settlement Motions ask this Court to (1) preliminarily certify two nationwide limited fund settlement classes (the "Proposed Classes") of economic loss claimants (the "Plaintiffs") through an unprecedented "hybrid" limited fund, non-opt structure, (2) appoint class representatives and class counsel, and (3) approve and direct notice to the Proposed Classes and personal injury and wrongful death claimants, even if such individuals did not file claims (the "PIWD Plaintiffs"), all by March 11, 2019. For the reasons set forth below, New GM respectfully requests a stay of proceedings related to the Proposed Settlement and the Settlement Motions.

PRELIMINARY STATEMENT

1. The key issue before this Court is whether it should, within a few weeks, develop an extensive record sufficient to support a finding that it is **likely to certify two nationwide**

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1 Capitalized terms not otherwise defined herein shall have the meanings given to them in the Rule 23 Motion.

2 *The Economic Loss Plaintiffs' Motion to: (1) Extend Bankruptcy Rule 7023 to These Proceedings; (2) Approve the Form and Manner of Notice; (3) Grant Class Certification for Settlement Purposes Upon Final Settlement Approval; (4) Appoint Class Representatives and Class Counsel for Settlement Purposes; and (5) Approve the Settlement Agreement By and Among the Signatory Plaintiffs and the GUC Trust Pursuant to Rule 23* [Docket No. 14408] (the "Rule 23 Motion").

3 *Motion of Motors Liquidation Company GUC Trust to Approve (I) The GUC Trust Administrator's Actions, (II) The Settlement Agreement By and Among the Signatory Plaintiffs and the GUC Trust Pursuant to Bankruptcy Code Sections 105, 363, and 1142 and Bankruptcy Rules 3002, 9014, and 9019, and (III) Authorize the Reallocation of GUC Trust Assets* [Docket No. 14409] (the "Rule 9019 Motion," and together with the Rule 23 Motion, the "Settlement Motions").

limited fund classes comprising, in the Movants' various estimations, somewhere between 9.5 million and 26 million individuals,[4] while the MDL Court, which has spent years developing a voluminous record, has **not yet certified even one statewide class**. New GM and the MDL economic loss plaintiffs (the "MDL Plaintiffs") have already completed briefing (the "MDL Briefing") on class certification (the "Class Certification Briefing"), summary judgment (the "Summary Judgment Briefing"), and *Daubert* (the "Daubert Briefing"). The Movants recently acknowledged that the MDL Court's rulings on the MDL Briefing are "anticipated by June 2019"[5] and may affect the "size, scope or composition of the classes" (and the cost of notice), thus requiring the parties to "engage in good faith negotiations" regarding the "impacted" provisions of the Proposed Settlement. (Settlement Agreement § 4.5.) But rather than wait for these "impacts," the Movants ask this Court to jump ahead of the MDL Court and move forward **now**. To accommodate the Movants' schedule, this Court would have to evaluate issues that have already been fully briefed in the MDL Court, for which rulings are anticipated by June 2019, and that bear directly on class certification (and other issues) in both courts. In addition, this Court would have to rule that it is **likely** that there will be two nationwide limited fund classes, even though differences in state law and controlling limited fund case law make this unlikely.

2. Recent amendments to Rule 23(e) dictate the standard by which the Court must determine whether to preliminarily certify the Proposed Classes. As amended, Rule 23(e) provides that "giving notice is justified by the parties' showing that the court will **likely** be able to . . . **certify the class for purposes of judgement** on the proposal." (FED. R. CIV. P. 23(e)(1)(B)(ii)

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4 *Compare Tr. of Case Mgmt. Conference Before the Hon. Martin Glenn* (Dec. 20, 2018) ("Hr'g Tr. 12/20/2018") at 4-5 (noting that approximately 11.4 million vehicles are subject to the Recalls at issue involving between 11.4 and 26 million individuals, but that the number may substantially decrease based on rulings from the MDL Court); *with Tr. of Case Mgmt. Conference Before the Hon. Martin Glenn* (May 25, 2018) ("Hr'g Tr. 5/25/2018") at 24 ("[D]on't hold me to the exact numbers, but I think we're down to . . . nine-and-a-half million cars.").

5 Plaintiffs' Letter dated 2/13/2019 [Docket No. 14424] ("Plaintiffs' Feb. 13 Letter").

(emphasis added).) Whether certification is likely is not a "sneak peek" that delays the hard work of class certification until a later date. Indeed, amended Rule 23(e) is a "more exacting" standard than before[6] and now makes clear that:

> The decision to give notice of a proposed settlement to the class is an **important event**. It should be based on a **solid record** supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. . . . At the time they seek notice to the class, the proponents of the settlement should ordinarily **provide the court with all available materials** they intend to submit to support approval under Rule 23(e)(2) and that they intend to make available to class members.[7]

3. The mandatory process set forth by amended Rule 23(e) dovetails with two key Supreme Court cases. In *Amchem Prods., Inc.* v. *Windsor*, the Supreme Court held that class certification requires "undiluted, **even heightened**, attention in the settlement context." 521 U.S. 591, 620 (1997) (emphasis added).[8] In *Ortiz* v. *Fibreboard Corp.*, the Supreme Court noted that "certification of a mandatory settlement class, however provisional technically, effectively concludes the proceeding save for the final fairness hearing," and therefore requires "**rigorous adherence**" to Rule 23. 527 U.S. 815, 849 (1999) (emphasis added). As a result, parties settling limited fund classes "must present not only their agreement, but **evidence** on which the district court may ascertain the limit and the insufficiency of the fund, with support in **findings of fact** following a proceeding in which the **evidence is subject to challenge**." *Id.* (emphasis added). Notably, *Ortiz* also cautioned courts against "**uncritical adoption** . . . of figures agreed upon by

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6 *In re Payment Card Interchange Fee Litig.*, 2019 WL 359981, at *12 (E.D.N.Y. Jan. 28, 2019).

7 2018 Advisory Committee Notes to the 2018 Amendments to Federal Rule of Civil Procedure 23(e) (the "Rule 23(e) Adv. Comm. Notes") (emphasis added).

8 *Amchem* undermines the Signatory Plaintiffs' misleading statement that "a *settlement* class under Rule 23(e) . . . involves considerations different from a litigation class . . . ." (Plaintiffs' Feb. 13 Letter (emphasis in original).) *See also In re Motors Liquidation Co.*, 591 B.R. 501, 526 (Bankr. S.D.N.Y. 2018) ("Rule 23's standards for class certification—apart from consideration of whether the case would be manageable to try as a class action—are equally applicable and rigorous in the settlement context.") (citations omitted).

the parties in defining the limits of the fund and demonstrating its inadequacy." *Id.* at 848-54 (emphasis added).

4. In sum, to comply with amended Rule 23(e), *Amchem*, and *Ortiz*, this Court must develop by the March 11 hearing a "solid record" supported by "specific evidentiary findings" and conclude that the Movants will "likely" satisfy, on a final basis, each of the requirements under Rule 23(a), Rule 23(b), *Ortiz*, and Rule 23(e) with respect to the Proposed Classes. This is a gargantuan task, one that would require this Court to make specific and detailed findings regarding the likely outcome of critical threshold issues that are subsumed in the MDL Briefing and pending before the MDL Court. Even a cursory review of the MDL Briefing, attached hereto as Exhibits B through E, demonstrates the number and complexity of issues that bear on class certification in both courts, including, but not limited to, the following:

- **The aggregate liquidated amount of the Plaintiffs' claims**. Under *Ortiz*, the lodestar case on limited fund class action settlements, a limited fund class cannot be certified unless "the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at the maximums, demonstrate the inadequacy of the fund to pay all claims." Here, the Proposed Settlement does not contemplate liquidation of any of the Plaintiffs' claims until the estimation stage, which occurs after final certification of the Proposed Classes. The Movants have also conceded that estimation (*i.e.*, liquidation) of the Plaintiffs' claims will be inextricably tied to the MDL Court's rulings on the MDL Briefing and other future rulings: "rulings on economic loss claims for each state that have been rendered by Judge Furman in the MDL Action have been and will continue to be taken into account when we get to the estimation phase." (Plaintiffs' Feb. 13 Letter.) Additionally, the Plaintiffs' claims are based on the methodologies and reports of their key expert, Stefan Boedeker, and will remain wholly unliquidated until the MDL Court rules on whether Boedeker's methodology satisfies *Daubert* and, even if it does, whether it proves class-wide damages. Similarly, the value of the Settlement Fund (the "limited" fund here), which may be zero, will be unknown until estimation (long after the Proposed Classes are supposed to be finally certified and the releases provided). This Court cannot find the likely amount of the Plaintiffs' unliquidated claims or the likely size of the "limited" fund without making findings that anticipate and preempt the MDL Court's rulings on the MDL Briefing.

- **Whether the Plaintiffs in the Proposed Classes share a common theory of recovery**. Under Rule 23(b)(1)(B), Rule 23(e)(2)(D), and *Ortiz*, the Plaintiffs must be "identified by a common theory of recovery [must be] treated equitably among themselves." *Ortiz*, 527 U.S. at 839. Although the Proposed Classes are nationwide classes, the Movants concede that the Plaintiffs assert claims under the laws of every state and D.C. for: "(i) fraudulent concealment; (ii) unjust enrichment, (iii) consumer protection claims; (iv) breach of the implied warranty of merchantability; and (v) negligence." (Rule 23 Motion ¶ 35.) Given that the claims in the Proposed Classes involve 255 different causes of action, six separate Recalls, and approximately 120 vehicle models, the Plaintiffs cannot have a common theory of recovery, particularly where the MDL Court has held that "subtle differences in state law can dictate different results for plaintiffs in different jurisdictions." *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *18 (S.D.N.Y. July 15, 2016). These issues are all presently in front of the MDL Court. Moreover, the MDL Court will rule on whether Boedeker's methodology (if admissible) proves class-wide (rather than individualized) damages. This Court cannot assess the likelihood that the Plaintiffs share a common theory of recovery under such facts without making findings that anticipate and preempt the MDL Court's rulings on the MDL Briefing. And if the Plaintiffs do not share a common theory of recovery, the Court cannot determine whether they are treated equitably among themselves.

- **The adequacy of the (as-yet unidentified) representatives of the Proposed Classes**. Under Rule 23(a)(3), the class representatives must have "typical" claims and defenses, and under Rules 23(a)(4) and 23(e)(2)(A), the representatives must adequately represent the interests of the class. Yet, the Movants have not identified any proposed class representatives. Even if they had, the likely "adequacy" of these as-yet-unidentified representatives raises myriad questions. If a proposed representative leased a vehicle subject to Recall 14V-355 (Impala Key Rotation) and asserts a claim under the Texas Deceptive Trade Practices Consumer Protection Act, is that representative's claim typical of a Plaintiff that owned a different model vehicle subject to Recall 14V-153 (Electronic Power Steering) asserting a negligence claim under Missouri common law? Can a representative asserting claims under the California Song-Beverly Consumer Warranty Act adequately represent the interests of Plaintiffs asserting unjust enrichment claims under Missouri or Texas common law? If New GM has unique defenses to the claims of the representatives, how can they adequately represent the Proposed Classes? Do differences among applicable state laws, causes of action, the various Recalls, and the many vehicle models at issue require subclasses (which, per Second Circuit law, must be decided for certification of any class action settlement) in order to comply with Rule 23(a) and *Ortiz*? Every one of these questions is before the MDL Court now. This Court cannot assess the likely answers to these questions without making findings that anticipate and preempt the MDL Court's rulings on the MDL Briefing.

- **The adequacy of the "relief" provided to the Proposed Classes**. Under Rule 23(e)(2)(C), the relief provided to the putative class members under the Proposed Settlement must be "adequate." The likely adequacy of the relief also raises myriad questions. Under Rule 23(e)(2)(C)(i), what are the costs, risks, and delay associated

with waiting a few months for key rulings from the MDL Court? Under Rule 23(e)(2)(C)(ii), what is the effectiveness of the proposed method of distributing relief to the class, which the Movants do not plan to share with this Court until after final certification? Under Rule 23(e)(2)(C)(iii), what are the terms of any proposed award of attorneys' fees, which will not be disclosed until after certification? How can the "adequacy" of the relief be considered at all without first knowing the liquidated amount of the Plaintiffs' claims and the amount of the Settlement Fund? This Court cannot assess the likely answers to these questions without making findings that anticipate and preempt the MDL Court's rulings on the MDL Briefing.

- **Whether millions of Plaintiffs lack Article III standing to assert claims**. Under Article III of the United States Constitution, the Plaintiffs must have suffered injuries-in-fact and have legally cognizable claims. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Otherwise, this Court has no subject-matter jurisdiction over the Plaintiffs and their claims, and thus lacks the power to certify the Proposed Classes. If the MDL Court rules Boedeker inadmissible under *Daubert*, that ruling would control here, and the Plaintiffs' claims would fail, thus depriving the Plaintiffs of Article III standing. Moreover, the MDL Court may soon rule that all (or some) of New GM's Recall repairs were effective and that, as a result, some (or all) of the Plaintiffs will not have any legally cognizable claims. This Court cannot assess whether the Plaintiffs have standing under Article III or whether New GM's Recall repairs fixed the alleged defects without making findings that anticipate and preempt the MDL Court's rulings on the MDL Briefing.

- **Whether there are common questions of law and fact in the Non-Ignition Switch Class**. Under Rule 23(a)(2), no class may be certified unless there are questions of law or fact common to the class. The Plaintiffs in the Non-Ignition Switch Class assert 255 different causes of action involving five separate Recalls. Some of the five Recalls are completely unrelated, which is why the MDL Plaintiffs have sought separate putative classes for each Recall in the Class Certification Briefing. If the MDL Plaintiffs needed separate statewide classes, how can millions of Plaintiffs be classified together here in the proposed nationwide Non-Ignition Switch Class? This Court cannot assess the likelihood that there are common questions of law and fact for the Non-Ignition Switch Class without making findings that anticipate and preempt the MDL Court's rulings on the MDL Briefing.

5. The Movants have failed to provide this Court with **any** record, let alone the required "solid record" on which it could determine any of the complex issues above that bear on whether certification of the Proposed Classes is likely. The Settlement Motions refer vaguely to the "Proffered Evidence," but the Movants have not presented any such "evidence" to this Court, and it appears that such evidence is simply material that is currently subject to challenge in the MDL Briefing. The Movants are left with two options. First, they can rely on the MDL Court's

record, which they acknowledge will continue to develop based on rulings on the MDL Briefing. Second, they can ask this Court to independently develop its own record.

6. Neither suggestion is tenable. Either way, the Movants ask this Court to predict rulings by the MDL Court and make specific findings that may conflict with the MDL Court's future rulings. Instead, this Court should stay proceedings relating to the Proposed Settlement pending the MDL Court's rulings on the issues raised in the MDL Briefing. Such rulings are inextricably tied to, and will provide controlling direction on, the findings this Court is required to make under Rule 23(e) to preliminarily certify the Proposed Classes.

7. The Movants seek to avoid confronting these difficult and clearly overlapping issues at the outset by suggesting that the Court can deal with them after having certified the Proposed Classes. According to the Movants, **after** the Proposed Settlement and Proposes Classes have been finally approved, this Court could somehow "decertif[y]" or "re-jigger[]" the Proposed Classes (Hr'g Tr. 12/20/2018 at 11) because the "Class members may be differently situated" at Stage Three requiring "additional or different subclasses" (Rule 23 Motion ¶ 117). Contrary to these assertions, however, consideration of these complex issues cannot be shelved until after the Proposed Classes have been finally certified. Among other things, whether the Proposed Classes can "likely" be certified as limited fund classes is wholly dependent on whether the Plaintiffs' claims will have been liquidated, and the limited fund will have been established, before any certification. Any suggestion that the myriad Rule 23 issues may be resolved piecemeal and in distinct stages is fundamentally flawed.

8. Moreover, the MDL Court has spent years developing an extensive record (which will be supplemented by rulings on the *Daubert* Briefing and the Summary Judgment Briefing) to **carefully consider all factual and legal issues that bear on class certification prior to the**

certification of any classes. Both proceedings involve many of the same vehicles, many of the same Recalls, many of the same legal issues, many of the same Plaintiffs, and the exact same experts. That the Plaintiffs seek certification of settlement classes under Rule 23(b)(1) rather than litigation classes under Rule 23(b)(3) does not justify a backwards process or minimize the substantial overlap between the two proceedings. The MDL Court has served for over four years as the lead court on these issues, and an attempt to reverse that course of dealing should be rejected.

9. In fact, the Movants have repeatedly acknowledged the overlap between issues in the MDL Court and issues in the Proposed Settlement, having:

- stated that the MDL Court's "**near-term decisions**" on the MDL Briefing will "dramatically impact the size of the universe" of class members (and thus notices that need to be sent) and will "be reflected in all of the proceedings that [this Court] will be asked to engage in" (Hr'g Tr. 12/20/2018 at 14-15);
- linked the fate of the Proposed Settlement to proceedings in the MDL Court, acknowledging that the MDL Court's summary judgment decision may affect "**the size, scope or composition of the classes**" (Settlement Agreement § 4.5);
- provided the GUC Trust with the unilateral right to terminate the Proposed Settlement Agreement if Co-Lead Counsel appeals the **MDL Court's** summary judgment decision (*Id.* § 10.2);
- dismissed the need to "develop an evidentiary record" in this Court because "the extensive record" in the MDL Court means there "is no need for this Court to retread **ground covered in the MDL Action**" (Plaintiffs' Feb. 13 Letter); and
- noted that "rulings on economic loss claims for each state that have been rendered by Judge Furman in the MDL Action **have been and will continue to be taken into account** when we get to the estimation phase" (*Id.*).

10. The Movants' request to have this Court approve a form of notice at the March 11 hearing is also premature. As recently as December 20, 2018, the Movants recognized that future rulings from the MDL Court "could very well implicate whether we're talking about 26 million registrations or 11- or 12-million registrations; a cost would be the 13 million or 7 million." (Hr'g Tr. 12/20/2018 at 6.) Although they still expect such rulings in a matter of months, the Movants

have decided to spend up to $13.72 million and send notice to potentially millions of individuals that may not be eligible class members. The Movants' approach of sending notice to everyone now only to sort out the details later cannot be squared with the Advisory Committee's declaration that "[t]he decision to give **notice** of a proposed settlement to the class is an **important event**" and the fact that "**a court asked to certify a settlement class will lack the opportunity**, present when a case is litigated, **to adjust the class** . . . ." *Amchem*, 521 U.S. at 620 (emphasis added).

11. Finally, as New GM will demonstrate in its forthcoming objection to the Settlement Motions, the Proposed Classes violate **every** requirement set forth in *Ortiz*. The Movants ask this Court to certify, under a hybrid limited fund theory, non-opt-out classes that are comprised of (1) wholly unliquidated claims that (2) share with non-class members (*i.e.*, all PIWD Plaintiffs, regardless of whether they filed claims) a "limited" fund that may never have any assets (3) by design excludes more than 95% of the GUC Trust's assets, even though (4) the confirmed Plan provides for pro rata distributions to holders of allowed general unsecured claims so that no Plaintiff could ever recover at the expense of other Plaintiffs. That the Proposed Settlement is an "adventurous application of Rule 23(b)(1)(B)" that *Ortiz* "counsel[ed] against" is a vast understatement, especially where the Supreme Court has made it "clear that the Advisory Committee did not contemplate that the mandatory class action codified in subdivision (b)(1)(B) would be used to aggregate unliquidated tort claims on a limited fund rationale." 527 U.S. at 843.

12. Accordingly, to avoid the serious and unnecessary risk of inconsistent rulings and waste of resources, and to accord appropriate deference to the MDL Court, New GM respectfully requests a stay of proceedings related to the Proposed Settlement. For the same reasons, New GM is simultaneously filing a motion to withdraw the reference (the "Motion to Withdraw"). For the avoidance of doubt, as New GM stated in its February 11, 2019 letter [Docket No. 14419], New

GM prefers the narrower stay relief requested herein, and any relief sought in the Motion to Withdraw would be unnecessary should this Court enter the Proposed Order or grant similar relief.

BACKGROUND

I. THE MDL 2543 LITIGATION.

13. In 2014, the Judicial Panel on Multidistrict Litigation established the multidistrict litigation proceeding (the "MDL") in the Southern District of New York under Judge Furman (the "MDL Court") to centralize proceedings on claims related to ignition switch and other alleged defects in vehicles manufactured by Old GM and New GM that are subject to certain recalls. The MDL Plaintiffs (many of whom are also Signatory Plaintiffs in this Court) include those who purchased or leased vehicles both before and after the sale of Old GM's assets to New GM, alleging economic harm and/or personal injuries purportedly caused by the defects.

14. More specifically, the Fifth Amended Consolidated Complaint (the "5ACC")[9] filed in November 2017 by the MDL Plaintiffs alleges economic loss class claims against New GM on behalf of those who purchased or leased certain Old GM or New GM vehicles. There has been substantial motion practice on the 5ACC, including the Class Certification Briefing (attached hereto as Exhibit B) for certification of alleged classes in California, Missouri, and Texas (the "Bellwether States"),[10] the Summary Judgment Briefing (Exhibit C) on a wide array of critical issues, the *Daubert* Briefing (Exhibit D) on admissibility of the parties' expert testimony, and ongoing supplemental letter briefing (Exhibit E) to address newly decided cases relevant to the myriad class certification issues. Given the intertwined nature of the issues, the MDL Court

[9] *In re Gen. Motors LLC Ignition Switch Litig.* [MDL ECF No. 4838] (S.D.N.Y. Nov. 27, 2017).

[10] The MDL Court has utilized briefing on the Bellwether States to provide the parties appropriate guidance as to how such issues may be resolved for other states. That same rationale underlies the stay requested herein, as the MDL Court's rulings will provide guidance to this Court, New GM, and the Movants.

scheduled proceedings so that issues raised in the Summary Judgment Briefing and the *Daubert* Briefing could be resolved simultaneously with the issue of certification.

II. THE PRIOR SETTLEMENT.

15. On May 3, 2018, the GUC Trust filed a motion in this Court seeking approval of a settlement (the "Prior Settlement"), which, like the Proposed Settlement here, purportedly resolved all of the Plaintiffs' claims.[11] The Prior Settlement sought to resolve class claims asserted under Rule 23(b)(3) without complying with Rule 23. The Plaintiffs filed a notice of amended Class Claims on April 24, 2018, with hundreds of pages of allegations regarding their (b)(3) class claims.[12] At the status conference on May 25, 2018, this Court requested briefing on the "gating issue" of whether the Prior Settlement required compliance with Rule 23 and noted that "[i]f the issue was whether . . . economic loss classes should be certified, and that issue is in the process of being briefed in discovery or whatever before Judge Furman, I'm strongly disinclined to try and jump the gun and decide the issue before Judge Furman does." (Hr'g Tr. 5/25/2018 at 22.) Following a hearing on July 19, 2018, this Court held that the Prior Settlement required compliance with Rule 23. *In re Motors Liquidation Co.*, 591 B.R. 501 (Bankr. S.D.N.Y. 2018).

III. THE PROPOSED SETTLEMENT.

16. On February 1, 2019, the Movants filed the Settlement Motions. Like the Prior Settlement, the Proposed Settlement seeks to settle all the Plaintiffs' and PIWD Plaintiffs' claims

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[11] *See Motion of Motors Liquidation Company GUC Trust to Approve (I) The GUC Trust Administrator's Actions and (II) The Settlement Agreement By and Among the Signatory Plaintiffs and the GUC Trust Pursuant to Bankruptcy Code Sections 105, 363, and 1142 and Bankruptcy Rules 3002 and 9019 and to (III) Authorize the Reallocation of GUC Trust Assets* [Docket No. 14293] (May 3, 2018). On January 18, 2018, this Court ruled that a still earlier unexecuted settlement agreement that was negotiated by Plaintiffs and the GUC Trust was not enforceable. *See In re Motors Liquidation Co.*, 580 B.R. 319, 364 (Bankr. S.D.N.Y. 2018).

[12] *See Amended Exhibits A and B to Motion For An Order Granting Authority To File Late Class Proofs Of Claim, Dkt. No. 13806* [Docket No. 14280] (Apr. 24, 2018) (the "Proposed Class Claims").

(regardless of whether such claims were filed), which the GUC Trust allegedly continues to believe "could" or "may" in the aggregate exceed $10 billion. (Rule 9019 Motion ¶ 50(d).)

17. Unlike the Prior Settlement, the Plaintiffs no longer assert class claims under Rule 23(b)(3) (though the Proposed Class Claims are still predicated on Rule 23(b)(3)). Instead, the centerpiece of the Proposed Settlement is certification of the Proposed Classes, *i.e.*, two nationwide non-opt-out "limited fund" classes pursuant to Rule 23(b)(1)(B) (or Rule 23(b)(1)(A) in the alternative).[13] The first of the two Proposed Classes is for those owners and lessees of vehicles asserting late-filed economic loss claims against the GUC Trust related to the Delta Ignition Switch Defect (Recall No. 14V-047) (such putative class, the "Ignition Switch Class"). (Rule 23 Motion ¶ 41.) Notably, the Plaintiffs in the Ignition Switch Class are all asserting claims against New GM on a theory of successor liability in the MDL Court, which likewise requires proof of Old GM's liability. The second of the two Proposed Classes is for those owners and lessees of vehicles asserting late-filed economic loss claims against the GUC Trust related to various Non-Ignition Switch Defects (Recall Nos. 14V-355, 14V-394, 14V-400, 14V-118, and 14V-153) (together with Recall 14V-047, the "Recalls") (such putative class, the "Non-Ignition Switch Class"). (Rule 23 Motion ¶ 41.) The Movants are unclear as to how many members are intended to be in the Proposed Classes. While they state there were approximately 11.4 million Old GM vehicles involved in the Recalls, they seek to send notice to multiple owners of the same vehicle. At the same time, the Signatory Plaintiffs recognize that (a) based on MDL rulings already made, it has been determined that many of the 11.4 million vehicle owners have not suffered damages, and (b)

[13] The Movants' alternative Rule 23(b)(1)(A) theory does not work as a matter of law because "[c]ourts in this Circuit have repeatedly recognized that certification under Rule 23(b)(1)(A) is limited to claims for equitable relief." *See Toney–Dick* v. *Doar*, 2013 WL 5295221, at *4 (S.D.N.Y. Sept. 16, 2013) (citing as examples a utility acting toward customers, a government imposing a tax, and a riparian owner using water that would otherwise flow to the downriver owners) (citations omitted). As a result, this Motion focuses on the Movants' request to certify the Proposed Classes under Rule 23(b)(1)(B).

based on the MDL Briefing, a substantial number of the Old GM vehicle owners may not have suffered damages. For example, as part of the MDL Briefing, the MDL Court has been asked to determine whether millions of individuals who disposed of their vehicles prior to the Recalls (and before disclosure of the alleged defects in their vehicles) have incurred an economic loss or have a valid claim of some sort. (Rule 23 Motion ¶ 10; Hr'g Tr. 12/20/2018 at 6.) The Proposed Settlement also seeks to resolve all claims by PIWD Plaintiffs (regardless of whether they filed claims), many of whom are also MDL Plaintiffs, even though the PIWD Plaintiffs who support the Proposed Settlement are not part of either of the two Proposed Classes and will recover from the same "limited" fund that is for the Proposed Classes.

18. The Proposed Settlement also seeks to resolve the claims of "Pre-Closing Accident Plaintiffs," defined broadly in the agreement as "plaintiffs asserting personal injury or wrongful death clams based on or arising from an accident that occurred before the closing Date involving an Old GM vehicle that was later subject to [the same recalls specified in connection with the economic loss claims]." (Settlement Agreement, Preamble ¶ S.) A subset of such plaintiffs are represented by counsel who signed the agreement, and these 442 plaintiffs are specifically identified in the agreement, and expressly included in the Release Provision. (*See* Settlement Agreement § 5.3.)[14] However, the proposed settlement provides that the Adjustment Shares will be distributed to "Plaintiffs," defined to include "Pre-Closing Accident Plaintiffs" (*i.e.*, including all persons asserting pre-closing personal injury/wrongful death claims). (*See* Settlement

[14] Of the 442 plaintiffs specifically identified in the agreement, 152 are eligible for settlements based on agreements in principle reached with New GM in the last several months. Of the remaining 290 named in the agreement, 245 filed or attempted to file proofs of claims in the Bankruptcy Court (albeit well after the deadline set forth in this Court's December 2016 Scheduling Order), and 45 have never even attempted to file claims in this Court. Of the 245 individuals who filed claims in this Court, 136 of them have also filed the same claims in the MDL Court.

Agreement § 2.5.) Furthermore, it appears that the claims of *all* Pre-Closing Accident Plaintiffs are being released, regardless of whether they have asserted claims.[15]

19. The Movants envision three primary "stages" of proceedings with respect to the Proposed Settlement. (Rule 23 Motion ¶ 116.)

20. *First*, the Movants ask this Court to preliminarily approve the Proposed Settlement and certify the Proposed Classes under Rule 23(e) ("Stage One"). (Rule 9019 Motion ¶ 53; Rule 23 Motion ¶ 116.) Thereafter, the GUC Trust will ask the Court for authorization to spend up to $13.72 million for a "state of the art notice program." The Movants anticipate that the hearing to approve this relief will occur on March 11, and that the actual notice will be mailed a few weeks thereafter. (Hr'g Tr. 12/20/2018 at 11.) After an unstated period of time (presumably months), the Movants will then seek the Court's final certification of the Proposed Classes and approval of the Proposed Settlement, which includes full releases (with no opt out provision) for the GUC Trust and certain non-parties (*i.e.*, the GUC Trust Beneficiaries, the Avoidance Action Trust, and the defendants in the term loan litigation).

21. *Second*, the Movants intend, only after the releases have been obtained, to pursue an estimation ("Stage Two") of the Plaintiffs' and PIWD Plaintiffs' claims. (Rule 9019 Motion ¶ 9.) The procedures for Stage Two (which determine what relief, if any, is available to the Plaintiffs) will presumably be spelled out in the Estimation Motion, which was not filed concurrently with the Settlement Motions. (Rule 9019 Motion ¶ 9.) The Movants acknowledge

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[15] As New GM will describe in more detail in its forthcoming objection to the Settlement Motions, the Rule 23 Motion and its exhibits contain different, conflicting definitions with respect to the PIWD Plaintiffs purportedly covered by the Agreement, which (at least in the proposed notices) appear to improperly release the claims of **all** PIWD Plaintiffs, regardless of whether they have asserted claims or are signatories to the Proposed Settlement. *See, e.g.*, Rule 23 Motion Ex. C, Final Order ¶ 9 (release applies to "All Plaintiffs"); Ex. D, Short Form Notice (the Settlement includes 'Affected Persons' in the United States who, prior to July 10, 2009, bought or leased certain Old GM vehicles or suffered personal injury or wrongful death in an accident involving certain Old GM vehicles."); Ex. G, Long Form Notice at 5 ("Under the Settlement, each Affected Person will be deemed to have forever waived and released (the 'Waiver') any claims . . . .").

that the Stage Two estimation proceeding will leave the Plaintiffs and PIWD Plaintiffs with **no recovery** at all if this Court's estimation proceeding, which will be guided by the MDL Court's rulings, does not trigger the Adjustment Shares (even though 95% of the GUC Trust's assets, and assets in the Avoidance Action Trust, could be available to the Plaintiffs and PIWD Plaintiffs but for the Proposed Settlement). (*See, e.g.*, Rule 23 Motion Ex. D.) Thus, it is not until Stage Two (or later)—after the Proposed Classes have been finally certified and the comprehensive releases granted—that any of the Plaintiffs' claims become liquidated and the number of Adjustment Shares (if any) in the Settlement Fund becomes known.

22. *Third*, the Movants anticipate seeking this Court's approval of "allocation and distribution procedures" ("Stage Three"). (Rule 23 Motion ¶ 116.) Stage Three will therefore determine how to allocate the value (if any) in the Settlement Fund among the Proposed Classes and the PIWD Plaintiffs, and will be "guided by, and flow from, the Court's determinations in the estimation proceedings." (Rule 23 Motion ¶ 117.) Such allocation may require "additional or different subclasses [to] be created at [Stage Three], if necessary." (Rule 23 Motion ¶ 117.) Accordingly, although virtually nothing is disclosed about such allocation procedures, the Movants concede that events in Stage Three may undo any certification obtained in Stage One. (*See* Hr'g Tr. 12/20/2018 at 11 ("There is a possibility . . . that the class could be decertified, re-jiggered."); *but see Amchem*, 521 U.S. at 620 ("[A] court asked to certify a **settlement class will lack the opportunity, present when a case is litigated, to adjust the class** . . . .") (emphasis added).)

JURISDICTION

23. With respect to New GM's request for a stay, (i) this Court has subject-matter jurisdiction to consider and determine the relief requested pursuant to 28 U.S.C. § 1334; (ii) this is a core proceeding pursuant to 28 U.S.C. § 157(b); and (iii) venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

RELIEF REQUESTED

24. Pursuant to section 105(a) of title 11 of the United States Code (the "Bankruptcy Code"), New GM requests an order, substantially in the form of the proposed order attached hereto as Exhibit A (the "Proposed Order") granting a stay of proceedings related to the Proposed Settlement and the Settlement Motions and such other relief as is just and proper. Alternatively, New GM requests a stay of proceedings related to the Proposed Settlement pending the MDL Court's resolution of New GM's Motion to Withdraw.

ARGUMENT

I. PRELIMINARY APPROVAL UNDER RULE 23(e) REQUIRES THIS COURT TO HAVE A SUITABLE BASIS IN THE RECORD AT THE MARCH 11 HEARING TO FIND THAT IT CAN LIKELY CERTIFY THE PROPOSED CLASSES.

A. Amended Rule 23(e) Sets Forth the Process the Movants Must Follow and the Record this Court Must Have to Preliminarily Certify the Proposed Classes.

25. To provide the Plaintiffs and PIWD Plaintiffs with notice of the Proposed Settlement, the Movants must obtain preliminary approval of the Proposed Settlement under Rule 23(e), which sets forth the mandatory process for approving a settlement class and states:

> (e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class--or a class proposed to be certified for purposes of settlement--may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
>
> * * *
>
> (B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will ***likely*** be able to:
>
> (i) approve the proposal under Rule 23(e)(2); and
>
> (ii) certify the class for purposes of judgment on the proposal.

26. On December 1, 2018, Rule 23(e) was amended to "alter the standards that guide a court's preliminary approval analysis." *In re Payment Card*, 2019 WL 359981, at *11. Specifically, the standard for such approval is now "more exacting than the prior requirement." *Id.* at *12. Thus, Rule 23(e) now makes clear that a court reviewing a proposed class action settlement "must **assess** whether the parties have **shown** that the court will **likely** be able to grant final approval and **certify the class**." *Id.* at *12, n.21 (emphasis added); *see also Hays* v. *Eaton Grp. Attorneys, LLC*, 2019 WL 427331, at *3 (M.D. La. Feb. 4, 2019) ("The recent amendment to Rule 23(e) makes **clear** that its procedural safeguards apply to a 'class proposed to be certified for purposes of settlement' and requires the Court to **conclude** that it will **likely** be able, after final hearing, to certify the class.") (emphasis added). Even before the changes to Rule 23(e), however, courts had an "independent responsibility to ensure that the requirements of Rule 23(a) and (b) have been met." *See Oladapo* v. *Smart One Energy, LLC*, 2017 WL 5956907, at *8-11 (S.D.N.Y. Nov. 9, 2017) (concluding "[o]n the present record" that it "cannot recommend that the Class be preliminarily certified for settlement purposes," where, among other things, the movants had not presented "one iota" of evidence on the numerosity, typicality, and commonality requirements); *De Leon* v. *Bank of Am., N.A.*, 2011 WL 13137935, at *3 (M.D. Fla. Aug. 31, 2011) ("[T]he Court finds that the evidence and legal authority presented is insufficient . . . until the requirements for class certification are met, preliminary approval of the Settlement Agreement would be premature.").

27. Under amended Rule 23(e), therefore, the Movants must provide this Court with a "solid record" sufficient to determine that "the court will *likely* be able to" both (a) certify the Proposed Classes under Rule 23(a), Rule 23(b)(1)(B) (or Rule 23(b)(1)(A) in the alternative), and applicable law and (b) pursuant to Rule 23(e)(2), find that the Proposed Settlement is "fair,

reasonable, and adequate." The criteria that bear on whether a class settlement is fair, reasonable, and adequate include, among other things, whether representatives and counsel have adequately represented the class, whether the relief provided under the settlement is adequate, and whether the proposal treats class members equitably relative to each other. And even if "both parties desire settlement, this Court is not at liberty to merely rubberstamp approval." *See Eaton Grp. Attorneys, LLC*, 2019 WL 427331, at *8 (applying amended Rule 23(e)).

28. The Advisory Committee Notes to amended Rule 23(e) reinforce the holdings in *Amchem* and *Ortiz*. In *Amchem*, the Supreme Court made clear that class certification requires "undiluted, **even heightened**, attention in the settlement context." *Amchem* 521 U.S. at 620 (emphasis added). In *Ortiz*, the Supreme Court held that threshold limited fund issues should be evaluated "**independent of the agreement** of defendants and conflicted class counsel . . . following a proceeding in which the **evidence is subject to challenge**" rather than the "**uncritical adoption** . . . of figures agreed upon by the parties in defining the limits of the fund and demonstrating its inadequacy." *Id.* at 848-53. Rule 23(e) combines and reinforces these holdings:

> The decision to give notice of a **proposed settlement** to the class is an **important event**. It should be based on a **solid record** supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. . . . **At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit to support approval under Rule 23(e)(2)** and that they intend to make available to class members. (Rule 23(e) Adv. Comm. Notes (emphasis added).)

29. Rule 23(e) goes further: "if a class has not been certified, the [settling] parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. . . . [T]he court cannot make the decision regarding the prospects for certification without **a suitable basis in the record**." (Rule 23(e) Adv. Comm. Notes (emphasis added).) Moreover, under amended Rule 23(e), a court can direct notice to the class "**only after**

determining that the prospect of class certification and approval of the proposed settlement justifies giving notice." (Rule 23(e) Adv. Comm. Notes (emphasis added).)

30. In short, Rule 23(e) requires this Court to develop a "solid record" **now** to support the likelihood of certification of the Proposed Classes. It cannot simply be deferred until after the preliminary approval stage. The Movants concede that proceedings in the MDL Court will impact the scope and viability of the Proposed Settlement, but they also take the position that any decisions from the MDL "will be reflected by necessity as part of the estimation proceedings." (Hr'g Tr. 12/20/2018 at 15; *accord* Plaintiffs' Feb. 13 Letter.) This is backwards, clearly at odds with the Advisory Committee Notes, and conflicts with the approach adopted by the MDL Court to not defer consideration of issues raised in the Summary Judgment Briefing and the *Daubert* Briefing until after certification. The rulings from the MDL Court, even if they relate to damages or affect the Stage Two estimation, **also** bear directly on this Court's mandatory assessment under Rule 23(e) of the likelihood of class certification in connection with preliminarily approving the Proposed Settlement. The Movants' position also directly conflicts with *Ortiz* and *Amchem*, which prohibit the Movants from punting such questions to estimation at Stage Two (although their impermissible desire to punt explains the Movants' admission that their Proposed Classes may have to be "decertified" and "re-jiggered" during Stage Three). (Hr'g Tr. 12/20/2018 at 11; Rule 23 Motion ¶ 117 ("Class members may be differently situated" at Stage Three requiring "additional or different subclasses").)

B. This Court's Determination of the Prospects for Certification Requires Analysis of the Likelihood that the Movants' Proposed Classes Satisfy All Aspects of Rule 23 and Related Certification Prerequisites.

31. As demonstrated by the MDL Briefing, certification of a class (whether pursuant to a limited fund theory or otherwise), requires the Movants to "actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23 . . . ." *Halliburton Co.* v. *Erica P.*

John Fund, Inc., 573 U.S. 258, 275 (2014) (emphasis in original). Further, it makes no difference that Movants are "settling" class certification issues. Notwithstanding the well-established principle that certification of settlement classes requires the same scrutiny as certification of litigation classes, the Signatory Plaintiffs have repeatedly stated that the two standards are "a lot different." (Hr'g Tr. 12/20/2018 at 7; *see also* Plaintiffs' Feb. 13 Letter (arguing that there was no overlap with the MDL Court because "Your Honor is being asked to consider a *settlement* class under Rule 23(e), which involves considerations different from a litigation class . . . ." (emphasis in original).) However, a court "[c]onfronted with a request for settlement-only class certification" must apply "**undiluted, even heightened, attention** in the settlement context." *Amchem*, 521 U.S. at 620. This Court also recognized that "Rule 23's standards for class certification—apart from consideration of whether the case would be manageable to try as a class action—are equally applicable and rigorous in the settlement context." *In re Motors Liquidation Co.*, 591 B.R. 501, 526 (Bankr. S.D.N.Y. 2018) (citation omitted).[16]

1. This Court's Rule 23(e) Determination of the Prospects for Certification Requires Analysis of the Likelihood that the Movants' Proposed Classes Satisfy Rule 23(a) and Certification Prerequisites.

32. "To qualify for class certification," the Movants "must first demonstrate that" the Proposed Classes satisfy the "four requirements of Rule 23(a)." *In re Deutsche Bank AG Securities Litig.*, 2018 WL 4771525, at *4 (S.D.N.Y. Oct. 2, 2018). Rule 23(a) provides as follows:

> (a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;

[16] *See also Schoenbaum* v. *E.I. Dupont De Nemours & Co.*, 2009 WL 4782082, at *12 (E.D. Mo. Dec. 8, 2009 (denying approval of a proposed class settlement, noting that settlement "does not justify less rigorous—and potentially less accurate—class certification proceedings . . . .").

> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

33. In addition to Rule 23(a)'s express prerequisites (numerosity, commonality, typicality, and adequacy of representation), the Movants must also establish that the alleged injuries in the Proposed Classes can be shown by common evidence because "no class may be certified that contains members lacking Article III standing," which requires each member-Plaintiff to "have suffered an 'injury in fact.'" *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). In fact, because all class members must have a cognizable legal injury, a court determining the propriety of class certification may also need to assess the merits of the underlying claims. "[W]hen a claim cannot succeed as a matter of law, the Court should not certify a class on that issue." *In re Beacon Assocs. Litig.*, 2012 WL 1372145, at *2 (S.D.N.Y. Mar. 19, 2012) (citation omitted). As set forth below, these precise issues are being decided by the MDL Court.

2. This Court's Rule 23(e) Determination of the Prospects for Certification Also Requires Analysis of the Likelihood that the Movants' Proposed Classes Satisfies Rule 23(b)(1)(B) and *Ortiz*.

34. Next, the Movants "must demonstrate that" the Proposed Classes satisfy "Rule 23(b) in one of three ways." *Deutsche Bank*, 2018 WL 4771525, at *4. The Movants seek to certify the Proposed Classes under Rule 23(b)(1), which provides as follows:

> (b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:
>
> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> > (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

35. Because the Movants seek to certify the Proposed Classes as limited fund classes under Rule 23(b)(1)(B), *Ortiz* controls. Pursuant to *Ortiz*, a fund is "limited" only if: (1) "the totals of the aggregated **liquidated** claims and the fund available for satisfying them, set definitely at the maximums, demonstrate the inadequacy of the fund to pay all claims," (2) "the **whole** of the inadequate fund [is] to be devoted to the overwhelming claims," and (3) "the claimants identified by a **common** theory of recovery [are] treated **equitably** among themselves." *Ortiz*, 527 U.S. at 838-39 (emphasis added). As set forth below, issues raised in the MDL Briefing will impact this Court's assessment of the likelihood that these necessary characteristics are satisfied.

36. Although this Court's evaluation of the likelihood that the Proposed Settlement satisfies the first and third criteria of *Ortiz* depends on rulings from the MDL Court, the Proposed Settlement on its face violates the second criterion—that the "the whole of the inadequate fund . . . be devoted to" the Plaintiffs' class claims. Here, the proposed limited fund is an unprecedented hybrid, because the limited fund (if any) would be available not only (i) to the proposed Rule 23 economic loss classes (*i.e.*, the Proposed Classes) but also to (ii) non-class claimants (*i.e.*, the PIWD Plaintiffs, regardless of whether they have filed claims). *See Ortiz* v. *Fibreboard Corp*., 827 U.S. 815, 864-65 (1999) ("Assuming, arguendo, that a mandatory, limited fund rationale could under some circumstances be applied to a settlement class of tort claimants, it would be essential that the fund be shown to be limited independently of the agreement of the parties to the action, and **equally essential under Rules 23(a) and (b)(1)(B) that the class include all those with claims unsatisfied at the time of the settlement negotiations**, with intraclass conflicts addressed by recognizing independently represented subclasses.") (emphasis added).

II. TO SATISFY RULE 23(E), THIS COURT MUST DEVELOP A SOLID RECORD THAT WOULD SIGNIFICANTLY OVERLAP WITH THE MDL COURT.

37. In order to satisfy Rule 23(e)'s requirements and find that the Proposed Classes are likely to be certified, the Court must address various legal and factual issues that have already been briefed in the MDL Court. For this reason, this Court should stay proceedings relating to the Proposed Settlement to await any rulings from the MDL Court that impact the determinations this Court must make as to whether, among other things: (1) the Proposed Classes likely satisfy Rule 23(b)(1)(B) and *Ortiz* and its progeny; (2) the proposed representatives (currently unidentified) likely assert typical and common claims and are otherwise likely to be adequate representatives; (3) the relief provided to the Plaintiffs is likely to be adequate; (4) millions of Plaintiffs lack Article III standing or are otherwise unable to assert legally cognizable claims; (5) the Plaintiffs classified together in the Ignition Switch Class have sufficiently related legal and factual issues to avoid the need for subclasses or separate classes, considering many of them had the newer, non-"defective" ignition switch originally installed in their vehicle, but their vehicle was subject to the Recall because there was some uncertainty as to whether a relatively small number had their vehicle repaired with the older, "defective" ignition switch, and (6) the millions of Plaintiffs classified together in the proposed Non-Ignition Switch Class based on five Recalls have sufficiently related legal and factual issues to avoid the need for subclasses or separate classes.

A. This Court Must Find it Likely that the Proposed Classes Satisfy Certain Necessary Conditions of Limited Fund Classes Set Forth in *Ortiz*.

38. The Movants here seek to certify the Proposed Classes under Rule 23(b)(1)(B) as "limited fund classes." Accordingly, to apply the Rule 23(e) standard to the Proposed Settlement, this Court must find at the requested March 11 hearing that it can likely certify the Proposed Classes under the requirements set forth by the Supreme Court in *Ortiz*. Determining that these requirements are likely met necessarily requires evaluating issues squarely before the MDL Court.

1. This Court Cannot Determine Whether it Is Likely that the Value of the Liquidated Claims Exceeds the Value of the Settlement Fund Without Considering Issues Being Decided in the MDL Court.

39. One necessary characteristic of a limited fund class that is better assessed after the MDL Court rules on the MDL Briefing is that the "totals of the aggregated **liquidated claims** and the fund available for satisfying them, set definitely at the maximums, demonstrate the inadequacy of the fund to pay all claims." *Ortiz*, 527 U.S. at 838 (emphasis added). Therefore, this Court must find that the Plaintiffs have asserted liquidated claims and that the likely value of the aggregated **liquidated** claims asserted by the Plaintiffs exceeds the likely value of the proposed Settlement Fund, which will not become known until the estimation stage. To make a finding as to the liquidated amount of the Plaintiffs' claims and the value of the Settlement Fund, this Court would have to speculate on March 11 as to the outcome of estimation (Stage Two), when the Plaintiffs' claims become liquidated and the value of the Settlement Fund becomes known. The Movants are therefore asking this Court to certify classes first and then determine later whether the requirements of class certification have been met. The Court cannot make even these speculative findings, however, without also predicting the outcome of the MDL proceedings.

40. First, the Movants have already conceded that "the key rulings on economic loss claims for each state that have been rendered by Judge Furman in the MDL Action have been and will continue to be taken into account by the Settlement Parties when we get to the estimation phase." (Plaintiffs' Feb. 13 Letter.) For this Court to determine the liquidated amount of the Plaintiffs' claims and the value of the Settlement Fund, as it is required to do under *Ortiz* and amended Rule 23(e), the Court must necessarily consider the outcome of the estimation phase, which depends on "key rulings" from the MDL Court. Therefore, whether the Court concludes on March 11 that it is likely that the Plaintiffs' claims will be liquidated in the aggregate amount of

$0, $96 billion,[17] or any other amount, the Court will necessarily be guessing at the MDL Court's "key rulings" that bear on the liquidation of the Plaintiffs' claims (including, but not limited to, upcoming rulings on the effectiveness of New GM's Recall repairs and the validity and applicability of the Plaintiffs' various state law causes of action under 51 separate jurisdictions). The Movants have neither identified these key rulings nor submitted any evidence regarding the likely outcome of these key rulings.

41. Second, the liquidated amount of the Plaintiffs' claims, which then dictates the value (if any) of the Settlement Fund, depends entirely on whether the "Proffered Evidence" (which appears to be nothing more than materials from the MDL Court) is admissible under *Daubert* and can demonstrate a class-wide injury. The centerpiece of the Proffered Evidence appears to be Boedeker's conjoint survey methodology. The Plaintiffs would have no claims without Boedeker, as Boedeker's report is their "proof" that the "fund is wholly inadequate to satisfy these claims" as required by *Ortiz*. (Rule 23 Motion ¶ 107.) And if Boedeker's opinions are not admissible or fail to reliably demonstrate legally cognizable damages that are measurable on a class-wide (rather than individualized) basis (issues presently before the MDL Court), then the Plaintiffs have no evidence to support any liquidation of their claims. Simply put, this Court cannot find that it can "likely" certify proposed limited fund classes without, among other things, making a detailed finding on the likely outcome of estimation at Stage Two, and this Court cannot do that without a full *Daubert* analysis.[18]

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[17] If Boedeker's report (which was not submitted to this Court in connection with the Settlement Motions) continues to use "median damages" estimates that range from $88 to $8,094 per vehicle, total aggregate damages for 11.96 million vehicles could range from between $1 billion to $96 billion—an absurdly imprecise range that is the antithesis of a "liquidated" amount.

[18] *See, e.g.*, *In re Nickels Midway Pier, LLC*, 450 B.R. 58, 66-67 (D.N.J. 2011) (remanding issue because of bankruptcy court's failure, as part of a claims estimation proceeding, to "conduct[] a . . . *Daubert* analysis of the admissibility of the expert reports and testimony of [the experts]" and noting that "nothing . . . supports a

42. This same reasoning underscores why courts routinely resolve *Daubert* issues prior to or in connection with certification issues. *See In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) (citing cases adopting that approach); *see also Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 354 (2011) ("doubt[ing]" a court's "conclu[sion] that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings."). Pre-certification resolution of *Daubert* issues is particularly critical in the limited fund context because, according to one treatise, "after *Ortiz*, no decision . . . has certified a 'limited fund' class involving unliquidated damages, while numerous courts have either denied (b)(1)(B) certification or decertified (b)(1)(B) classes that had been certified under pre-*Ortiz* law." (McLaughlin on Class Actions § 5:10 (Oct. 2018).) As shown in the *Daubert* Briefing, the MDL Court will address the *Daubert* issues before certification. Importantly, the rulings on Boedeker go beyond the Bellwether States and affects the claims of **all** Plaintiffs. Because "plaintiff[s] cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*." *In re Blood Reagents*, 783 F.3d at 187.

43. Instead of waiting for the MDL Court's critical rulings which bear on the viability of the Plaintiffs' claims, however, the Movants ask this Court to defer consideration of the admissibility of expert testimony to Stage Two (estimation) when the Proposed Classes will have already been finally certified and releases granted. But the admissibility of Boedeker under *Daubert* and the determination of what Boedeker's report proves (if anything) are critical to demonstrating the existence of both injury and damages, without which the Plaintiffs have no

conclusion that a Bankruptcy Court may estimate claims based on potentially unreliable expert evidence, over the expression objection of a party").

claims to certify. Because limited fund classes require proof of the amount of liquidated claims prior to certification, the MDL Court's rulings on these issues unquestionably impact the Movants' likelihood of certifying the Proposed Classes.

2. This Court Cannot Determine Whether it Is Likely that the Proposed Classes Comprise Plaintiffs Sharing a Common Theory of Recovery Without Considering Issues Being Decided in the MDL Court.

44. Another necessary characteristic of a limited fund class that is better assessed after the MDL Court rules on the MDL Briefing is that the class members must share a "common theory of recovery" and be "treated equitably among themselves." *Ortiz*, 527 U.S. at 839. To apply Rule 23(e) to the Proposed Settlement, this Court must have a suitable basis in the record at the March 11 hearing to determine that both of the Proposed Classes contain only Plaintiffs who share a "common theory of recovery" and are "treated equitably among themselves." And to the extent that the Plaintiffs do not share a common theory of recovery or would not be treated equitably among themselves, then the Court would need to create subclasses at the preliminary approval stage. *See Amchem*, 521 U.S. at 620 ("[A] court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold."). Indeed, "where differences among members of a class are such that subclasses must be established, **we know of no authority that permits a court** to approve a settlement . . . on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups." *In re Payment Card Interchange Fee Litig*, 827 F.3d 223, 235 (2d Cir. 2016) (internal quotations omitted). Moreover, limited fund class certification often requires subclasses represented by separate and independent counsel.[19]

[19] *See Ortiz*, 527 U.S. at 864 (requiring class to include "all those with claims unsatisfied at the time of the settlement negotiations, with intra-class conflicts addressed by recognizing independently recognized subclasses"); *see also In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig.*, 1999 WL 782560, at *9 (E.D. Pa. Sept. 27, 1999) ("To the extent that the causation analysis would be different for those with valvular damage

45. For this Court to find at the March 11 hearing that the Plaintiffs share a common theory of recovery and are treated equitably among themselves, it must, at the very least, canvass the laws of 51 jurisdictions as well as the facts relating to six different Recalls involving approximately 120 different vehicle models. By way of example only, with respect to the Non-Ignition Switch Class, this Court must find it likely that the claims of Plaintiffs who owned a new 2004 Chevrolet Monte Carlo subject to Recall 14V-355 (Impala Key Rotation Recall) under the Alaska Unfair Trade Practices and Consumer Protection Act share a "common theory of recovery" with Plaintiffs who leased a 2004 Chevrolet Malibu subject to Recall 14V-153 (Electronic Power Steering Recall) under the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act, and Plaintiffs who owned a used 2008 Buick Enclave subject to Recall 14V-118 (Side Impact Airbag Recall) under the law of warranty of implied merchantability in North Dakota.

46. These determinations are necessary because, to the extent differences among applicable state laws and the factual circumstances of the various Recalls require the creation of subclasses within the Non-Ignition Switch Class, the Court must find that it can likely certify such subclasses at the March 11 hearing. *See In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *18 (S.D.N.Y. July 15, 2016) ("[T]he Court will separately address each claim with respect to each jurisdiction, as subtle differences in state law can dictate different results for plaintiffs in different jurisdictions."). If the MDL Plaintiffs need separate classes for each of the Recalls (which is their approach in the MDL Class Certification Briefing and an issue that will be further clarified by the MDL Court's rulings on the MDL Briefing), then similarly situated

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as opposed to the more rare PPH condition, there is a fundamental difference in the theory of liability and the grounds for recovery between these two classes . . . The individual question of whether a class member ingested Pondimin and for how long is one that would complicate the claims administration process and, absent a costly individual causation analysis, it would be difficult to ensure that those with a common theory of recovery are treated equitably among themselves.").

Plaintiffs in this Court would also need classes. Pursuant to *Ortiz*, 527 U.S. at 864, any such subclasses would likely require separate counsel, and pursuant to *Amchem*, 521 U.S. at 620, the need for subclasses must be evaluated now. But notwithstanding *Ortiz*, *Amchem*, Rule 23(e), and their own admission that "Class members may be differently situated," the Movants ask this Court to defer consideration of the need for "additional or different subclasses" until the allocation stage, *i.e.*, **well after** this Court has already certified two nationwide classes. (Rule 23 Motion ¶ 117.)

47. As reflected in the Class Certification Briefing and the Summary Judgment Briefing attached as Exhibits B and C, the MDL Court has already begun this strenuous process by requesting substantial briefing on the laws of the Bellwether States. In fact, it should give this Court considerable pause that the Plaintiffs seek nationwide classes, even though the MDL Plaintiffs are pursuing statewide classes for the Bellwether States because the MDL Court has already identified distinctions among state laws that make nationwide classes impossible.[20]

48. For this Court to preliminarily determine, pursuant to Rule 23(e) and *Ortiz*, that all Plaintiffs share a "common theory of recovery," and that all Plaintiffs will be treated equitably without needing subclasses, this Court will need to make findings regarding the "subtle differences in state law [which] can dictate different results for plaintiffs in different jurisdictions." *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *18. The MDL Court has already begun to analyze those differences, however, and its rulings with respect to the Bellwether States (and other future filings) will provide controlling direction for this Court.

[20] *See, e.g., In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *16 (S.D.N.Y. July 15, 2016) (dismissing MDL Plaintiffs' proposed nationwide RICO claim); *id.* at *18 ("[D]espite the repetition it entails—the Court will separately address each claim with respect to each jurisdiction, as subtle differences in state law can dictate different results for plaintiffs in different jurisdictions."); *see generally In re Gen. Motors LLC Ignition Switch Litig.*, 2017 WL 2839154 (S.D.N.Y. June 30, 2017) (analyzing common law and statutes in various states).

B. This Court Cannot Find it Is Likely that the Proposed Class Representatives Adequately Represent the Proposed Classes Without Considering Issues Being Decided in the MDL Court.

49. Even assuming that nationwide classes without any subclasses are appropriate (an assumption largely foreclosed by rulings from the MDL Court), this Court must still have a "suitable basis" in the record at the March 11 hearing to determine that each of the proposed class representatives "fairly and adequately protect the interests of the class." (FED. R. CIV. P. 23(a)(4).) A proposed representative is more likely to be adequate if he or she has a typical claim susceptible to common class-wide proof, so the "requirements [commonality and typicality] therefore also tend to merge with the adequacy-of-representation requirement . . . ." *Wal-Mart Stores*, 564 U.S. at 349 n.5. Rule 23(e)(2)(A) similarly requires an upfront evaluation of whether "the class representatives and class counsel have adequately represented the class." Accordingly, this Court's evaluation of the adequacy of the proposed representatives invokes issues arising under Rule 23(a)(2) (commonality), Rule 23(a)(3) (typicality), and Rules 23(a)(4) and (e)(2)(A) (adequacy of representation).

50. Because the "adequacy of the representation of the class is the **linchpin** to securing the preclusive effect of the class proceedings as to absent members" (McLaughlin on Class Actions § 4:26 (Oct. 2018) (emphasis added)), it is remarkable that the Proposed Settlement does not even identify the representatives of the Proposed Classes. Therefore, at present, this Court has **zero basis**—let alone a "suitable basis" or a "solid record"—to evaluate the likelihood that it will find the proposed representatives to be adequate.[21]

[21] The Rule 23 Motion defines the "Ignition Switch Class Representatives" as the "prospective class representatives for the Ignition Switch Plaintiffs" and the "Non-Ignition Switch Class Representatives" as the "prospective class representatives for the Non-Ignition Switch Plaintiffs" (Rule 23 Motion p. 1.) To add to the confusion, the Ignition Switch Class Representatives and the Non-Ignition Switch Class Representatives are together defined as the "Economic Loss Plaintiffs," a term that is defined in the Settlement Agreement to include all putative members of the Proposed Classes. (Settlement Agreement Preamble § S.b.) Section 2.67 of the Settlement Agreement

51. But assuming for the moment that the proposed representatives are simply the named claimants in the Proposed Class Claims filed before the Prior Settlement, seven of the named claimants in the Proposed Class Claims are also proposed class representatives in the MDL Court, where New GM has argued that such individuals are subject to unique defenses or otherwise assert claims that are not typical of the proposed statewide classes. To the extent that the MDL Court rules that any of the individuals who may be class representatives here cannot adequately represent the MDL classes, it is hard to fathom how they could adequately represent any of the Proposed Classes in these proceedings.

52. The Rule 23(a) elements of commonality and typicality, which (as noted above) necessarily inform whether the proposed representatives are adequate, are also already fully briefed and set to be decided by the MDL Court with respect to the Bellwether States. The rulings for the Bellwether States, combined with any other certification proceedings that may occur in the MDL Court, will determine how many class representatives are necessary to ensure the adequate representation that Rules 23(a) and 23(e) require. That number could be as few as two (one for each of the two Proposed Classes) or could be significantly more (if variations in state law and the number of Recalls at issue, among other things, create a need for subclasses). The MDL Court will also decide other issues relating to the adequacy of representation, including whether individuals are capable of being adequate representatives of classes if they, among other things: (a) disposed of their vehicles prior to the Recalls, (b) cannot show a manifest defect and thus have no claims as a matter of law (a ruling the MDL Court has already made with respect to eight states),

provides that the proposed class representatives are identified on Schedule 3 thereto, but Schedule 3 instead appears to identify three PIWD Plaintiffs represented by two specific law firms.

(c) testified that they did not factor safety into purchase decisions, or (d) cannot demonstrate that their vehicles were unmerchantable.

53. In the absence of rulings from the MDL Court, this Court would be forced to establish a suitable record to determine whether the unidentified proposed representatives are likely adequate, an inquiry rendered even more difficult by the fact that the named claimants in the Proposed Class Claims do not come from all 51 applicable jurisdictions. The Proposed Class Claims, for example, list Frances Howard of Jackson, Mississippi as a named claimant, but do not include any named claimants from certain other states (*e.g.*, Alaska). As a result, this Court would have to find it likely at the March 11 hearing that Ms. Howard (or some other claimant in the Proposed Class Claims) is an adequate representative of the Plaintiffs from Alaska because, among other things, her claims under Mississippi law are typical of claims under Alaska law (including for claims relating to different Recalls). The Movants have failed to provide this Court with any basis—let alone a suitable basis grounded in fact and law—to make such a determination. The MDL Court's rulings will fill in at least some of the gaps left by the Movants' omissions.

54. Of course, without knowing the identities of the proposed representatives, it is hard to say precisely how rulings from the MDL Court will impact this Court's mandated assessment under Rule 23(e). But this Court can only benefit from the MDL Court's rulings on the foregoing issues, all of which bear on whether the proposed representatives (once known) are likely adequate.

C. This Court Cannot Find it Is Likely that the Relief Provided to the Plaintiffs in the Proposed Classes Is Adequate Without Considering Issues Being Decided in the MDL Court.

55. To apply Rule 23(e) to the Proposed Settlement, this Court must have a "suitable basis" in the record at the March 11 hearing to determine that the relief provided to the Plaintiffs under the Proposed Settlement is adequate. (FED. R. CIV. P. 23(e)(2)(C).) Therefore, to determine that the relief is likely adequate, this Court must predict the outcome of the Stage Two estimation

procedure as well as the allocations in Stage Three, which, of course, depend on an allocation methodology that the Movants promise to provide at some later date. Predicting the outcome of the Stage Two estimation procedure, however, necessarily entails predicting the outcome of the MDL Court's ruling on the admissibility of Boedeker's expert reports and damages analysis, along with myriad other issues raised in the MDL Briefing.

56. For their part, the Movants effectively concede that this Court cannot evaluate the adequacy of relief at the March 11 hearing without further rulings from the MDL Court. First, the proposed notice forthrightly states that there is "no guarantee that the claims estimate order will require New GM to issue **any** shares," even though the Plaintiffs "will be prevented from pursuing [their] own lawsuit" because of the non-opt-out release. (Rule 23 Motion Ex. D (emphasis added).) Here, the proposed notice provides neither this Court nor the notice recipients of critical information such as whether the notice recipient is eligible to make a claim for, much less receive, any compensation from the Adjustment Shares. The likelihood of a notice recipient being an eligible claimant who can receive Adjustment Shares depends entirely on future rulings from this Court (through Stage Two estimation and Stage Three allocation) **and** the MDL Court.

57. Second, the Signatory Plaintiffs readily admit that the adequacy of the relief in the Proposed Settlement is tied to future MDL Court rulings: "[a]ny merits-based issues that the [MDL Court] has previously made or will make in the future will be reflected by necessity as part of the estimation proceedings." (Hr'g Tr. 12/20/2018 at 15.) The Signatory Plaintiffs reiterated this position in their letter to the court on February 13, 2019, noting that such rulings "will be taken into account at the estimation proceeding stage." (Plaintiffs' Feb. 13 Letter.) Moreover, the Signatory Plaintiffs stated confidently that rulings on the MDL Briefing are "anticipated by June 2019" and in any event are "very likely" to be issued "long before the estimation proceedings

begin." (Plaintiffs' Feb. 13 Letter.) It is impossible to predict today the output of the Stage Two estimation hearing without engaging in pure speculation. But without even an inkling as to that output, this Court has no suitable basis in the record to determine that the relief provided for millions of Plaintiffs is "likely" to be adequate and sufficient to justify the mandatory releases proposed to be binding on millions of individuals.

58. In addition, Section 4.5 of the Settlement Agreement provides that if the MDL Court "issues an Opinion or Order on [the Summary Judgment Briefing] . . . that impacts the size, scope or composition of the classes of Economic Loss Plaintiffs, the Parties shall, within five (5) business days . . . engage in good faith negotiations regarding the applicable provisions of this Settlement Agreement impacted by said decision." This provision would be wholly unnecessary if, as counsel to the Signatory Plaintiffs stated, the Proposed Classes and the proposed MDL classes "don't overlap" and the impact of such rulings could simply be deferred to estimation. (Hr'g Tr. 12/20/2018 at 7.) Instead, Section 4.5 is an acknowledgement by the Movants that the Summary Judgment Briefing directly impacts the relief available to the Proposed Classes, and that they (and this Court) will have no insight into the adequacy of that relief prior to the MDL Court's rulings.

59. Furthermore, two termination rights afforded to the GUC Trust in the Settlement Agreement cement the connection between the Proposed Settlement and the Summary Judgment Briefing before the MDL Court. First, the GUC Trust may unilaterally terminate the Settlement Agreement if the Preliminary Approval Order is not entered on or before September 15, 2019, more than six months after the requested hearing date. (Settlement Agreement § 10.2(a).) This termination right clearly anticipates that this Court may wait for relevant developments in the MDL Court. Second, the GUC Trust may unilaterally terminate the Settlement Agreement if Co-Lead Counsel appeals the MDL Court's summary judgment decision. (Settlement Agreement

§ 10.2(b).) Again, this termination right, which could make the Preliminary Approval Order advisory, would be pointless if events in the MDL Court were unrelated to approval of the Proposed Settlement. It is hard to square these termination rights based purely on developments in the MDL Court with the Signatory Plaintiffs' insistence that the Proposed Settlement "does not involve substantial overlap with proceedings before the MDL Court." (Plaintiffs' Feb. 13 Letter.)

60. Accordingly, this Court cannot evaluate whether the relief in the Proposed Settlement is likely adequate without evaluating the likely outcome of the Stage Two estimation here, which, by the Movants' own design, is inextricably bound to the MDL Court's rulings.

D. This Court Cannot Find it Is Likely that the Millions of Plaintiffs Have Article III Standing Without Considering Issues Being Decided in the MDL Court.

1. This Court Must Have a Suitable Basis in the Record at the March 11 Hearing to Find it Likely that the Constitutional Issues in Boedeker's Methodology Will Be Resolved in Favor of the MDL Plaintiffs.

61. To apply Rule 23(e) to the Proposed Settlement, this Court must have a "suitable basis" in the record at the March 11 hearing to determine that the Proposed Classes do not contain Plaintiffs who lack Article III standing, an issue that the MDL Court is poised to decide. Even if this Court was comfortable that Boedeker satisfied the *Daubert* standard—an issue that required months of briefing from New GM and the MDL Plaintiffs—this Court must also grapple with whether Boedeker's analysis shows that the Plaintiffs satisfy the "irreducible constitutional minimum of standing" under Article III. *See Lujan*, 504 U.S. at 560 (noting that a plaintiff must have an injury in fact). In a class action, this means that the "class must … be defined in such a way that *anyone* within it would have standing" and "no class may be certified that contains members lacking Article III standing." *Denney*, 443 F.3d at 264 (2d Cir. 2006). As a result, preliminary approval of the Proposed Settlement requires this Court to assess whether the Proposed Classes likely contain non-negligible numbers of Plaintiffs without standing to bring claims.

62. Among other things, as discussed in the Class Certification Briefing and *Daubert* Briefing, Boedeker's "conjoint survey" methodology shows that between 26.6% and 39.1% of the proposed class members—*i.e.*, millions of people—have no injury. This is fatal to any effort to certify any classes because Rule 23 does not permit certification of classes where there is no "common evidence to show all class members suffered some injury." *Sykes* v. *Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 82 (2d Cir. 2015) (citations omitted). Evaluating such a "conjoint survey" approach must therefore take place prior to certification. For instance, in *Opperman* v. *Path, Inc.*, 2016 WL 3844326, at *14 (N.D. Cal. July 15, 2016), the court rejected the plaintiffs' attempt to "prove" the class members' value of privacy in smartphone applications with a conjoint survey, noting that "[n]o damages number arising from this model will apply to all class members, particularly since some of the class members, by this measure, will not have been injured at all."[22]

63. Similarly, individual differences in reliance frequently defeat class certification. In the *Ford Ignition Switch* litigation, for instance, plaintiffs argued that a defective ignition switch found in vehicles had a propensity to short circuit and cause smoke or fires in over 2,000 vehicles. *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 336-37 (D.N.J. 1997). The *Ford* plaintiffs moved to certify classes with fraudulent concealment and state consumer fraud claims. *Id.* at 338. The court denied certification because of individual differences in reliance and causation, noting that the "plaintiffs must persuade the finder of fact that disclosure of the allegedly dangerous nature of the ignition switches would have affected the purchaser's decision whether to purchase the vehicle. Obviously, this determination could not be accurately and fairly made on a class-wide basis . . . ." *Id.* at 346.

[22] Other courts have similarly rejected a proposed "single formula capable of assessing all damages among class members" based on "averages" where such a formula ignored "vast differences" in the circumstances facing each plaintiff. *Fleischman* v. *Albany Med. Ctr.*, 2008 WL 2945993, at *7 (N.D.N.Y. July 28, 2008).

64. The MDL Court did not postpone resolution of these issues until after class certification precisely because such issues are fundamental to establishing that the MDL Plaintiffs have Article III standing, a prerequisite for certification of classes containing millions of putative class members' claims. These critical, Constitutional concerns are just as relevant for the Plaintiffs and for this Court's determination under Rule 23(e) of the likelihood of certifying the Proposed Classes. In fact, the Movants ask this Court to confront the issue by stating in the Preliminary Approval Order that the Court has "subject matter . . . jurisdiction over the Classes." (Preliminary Approval Order ¶ 4.) Because substantial numbers of Plaintiffs have no standing under Article III, this Court cannot exercise subject-matter jurisdiction over their claims (or the Proposed Classes under which their claims are purportedly subsumed).

65. Accordingly, to apply Rule 23(e) to the Proposed Settlement, this Court would not only have to find it likely (with a suitable basis in the record at the March 11 hearing) that Boedeker's methodology is admissible under *Daubert*, but also that such methodology does not necessarily imply that vast numbers of Plaintiffs lack Article III standing and therefore cannot be included in the Proposed Classes. The challenges to Boedeker's methodology raise Constitutional issues that cannot be "estimated" and must be carefully considered by this Court and the MDL Court. Because the MDL Court will soon rule on the MDL Briefing, however, there is no need for this Court to leapfrog the MDL Court on assessing these Constitutional issues.

2. This Court Must Have a Suitable Basis in the Record at the March 11 Hearing to Find it Likely that New GM's Recall Repairs Do Not Preclude the Plaintiffs' Claims.

66. Two critical issues in the Summary Judgment Briefing are whether New GM's recall repairs were effective and, if they were effective, whether such repairs negate the MDL Plaintiffs' claims. As the MDL Court stated in a recent opinion, "many, if not most (or even all) states would factor such evidence [of post-sale mitigation] into the analysis" of whether the MDL

Plaintiffs have suffered any cognizable damages. *In re Gen. Motors LLC Ignition Switch Litig.*, 2018 WL 1638096, at *2 (S.D.N.Y. Apr. 3, 2018). As a result, the "viability of Plaintiffs' claims for benefit-of-the-bargain damages is likely to turn on the question of whether New GM actually fixed" the alleged defects through the Recalls. *Id.* "[W]hen a claim cannot succeed as a matter of law, the Court should not certify a class on that issue." *In re Beacon Assocs. Litig.*, 2012 WL 1372145, at *2. To frame the issue into Constitutional terms, a Plaintiff for whom New GM provided a successful Recall repair likely does not have Article III standing to be a member of the Proposed Classes.

67. To apply Rule 23(e) to the Proposed Settlement, therefore, this Court must review the comprehensive, peer-reviewed testing regime that the MDL Court is already reviewing to determine the efficacy of New GM's Recall repairs. The Virginia Tech Transportation Institute ("VTTI"), an independent and well-respected engineering organization, concluded that New GM's testing regime was "robust" and "acceptable" for assessing the condition regarding inadvertent key rotation. By asking this Court to determine that it can likely certify the Proposed Classes **now**, the Plaintiffs effectively ask this Court to also determine that the conclusions reached by VTTI (which, if true, would force the Movants to substantially reorganize the Proposed Classes) are likely false.

68. The Signatory Plaintiffs admit that the effectiveness of New GM's Recall repairs will be "taken into account at the estimation proceeding stage" (Plaintiffs' Feb. 13 Letter), but the MDL Court's resolution of this disputed issue is critical to determining whether the Plaintiffs have legally cognizable claims (and thus standing under Article III) at all, an issue that must be evaluated prior to this Court preliminarily certifying the Proposed Classes. These issues will be resolved by rulings from the MDL Court, which the Signatory Plaintiffs "anticipate[] by June 2019." (Plaintiffs' Feb. 13 Letter.) This Court should not permit the Plaintiffs to leapfrog the

MDL Court, which will rule on the effectiveness of New GM's Recall repairs in due course, particularly where the MDL Plaintiffs have conceded the effectiveness of at least New GM's Recall repair for Recall 14V-153 (power steering), which is part of the Proposed Settlement.[23]

E. This Court Cannot Find it Is Likely that the Claims in the Non-Ignition Switch Class Satisfy the Commonality Requirement Set Forth in Rule 23(a)(2) Without Considering Issues Being Decided in the MDL Court.

69. To apply Rule 23(e) to the Proposed Settlement, this Court must have a "suitable basis" in the record at the March 11 hearing to determine that the claims in the Non-Ignition Switch Class (which arise under five separate Recalls) likely share "questions of law or fact common to the class" even though the MDL Plaintiffs have established separate classes for each Recall in the MDL Court. Under Rule 23(a)(2), there must be "questions of law or fact common to the class." "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Wal-Mart Stores*, 564 U.S. at 350 (citations omitted). While the commonality requirement was "widely perceived to lack teeth before the Supreme Court's decision in *Wal–Mart*," that changed when *Wal-Mart* "grafted the following requirements onto rule 23(a)(2): (i) that the common question is central to the validity of each claim that the proposed class brings; and (ii) that the common question is capable of a common answer." *Abraham* v. *WPX Energy Prod., LLC*, 322 F.R.D. 592, 642 (D.N.M. 2017).

70. Here, the Non-Ignition Switch Class classifies together Plaintiffs asserting state law causes of action under 51 jurisdictions regarding five different Recalls affecting many different

[23] *See* Exhibit C-2 (MDL Plaintiffs' Opp. to GM's Summ. Judg. Motion) at 4 n.1 ("Regarding Recall Nos. 14v188 (side-impact airbags) and 14v153 (power steering) . . . Plaintiffs acknowledge that the evidence now demonstrates that the remedies offered under those recalls are effective in repairing the defects.").

vehicle models. The alleged defects and Recalls vary significantly. Some involve ignition switch rotation, while others do not. Some involve alleged airbag non-deployment, while others do not. That the Movants identified only a few potentially common issues of law and fact (Rule 23 Motion ¶ 81) is unsurprising given that the MDL Plaintiffs have sought different classes for each Recall, implicitly conceding that the different Recalls negate "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores*, 564 U.S. at 350. In any event, the MDL Court will soon rule on the propriety of the Bellwether State classes, which rulings must be taken into account for evaluating the Proposed Settlement to ensure that only claims satisfying the commonality requirement are lumped into the same class or subclass. Because the MDL Court is making progress on this issue, a stay is warranted.

III. THE MOVANTS CONCEDE THE OVERLAP WITH THE MDL PROCEEDINGS.

71. The overlap between issues that this Court must consider when developing a suitable record and issues that will likely be decided soon by the MDL Court is sufficient to warrant a stay. And to dispel any lingering doubts, the Movants' Settlement Motions and the letter filed by the Signatory Plaintiffs on February 13, 2019, confirm the overlap.

72. First, neither counsel for the Signatory Plaintiffs nor counsel for the GUC Trust responded to the Court's statement at the December 20, 2018 status conference that "the notion of the stay seems almost moot because ***he's*** [Mr. Weisfelner's] suggesting that the class certification doesn't go forward here until Judge Furman has decided the summary judgment motions." (Hr'g Tr. 12/20/2018 at 34.) If the Movants intended then for certification to proceed prior to the MDL Court's decisions, they should have corrected the record.

73. But putting that aside, the Settlement Agreement is tied in multiple ways to the MDL Court's rulings on the Summary Judgment Briefing. Such impacts cannot just "be taken into account . . . when we get to the estimation phase." (Plaintiffs' Feb. 13 Letter.) Instead, the

Settlement Agreement provides that such rulings may affect "the size, scope or composition of the ***classes***." (Settlement Agreement § 4.5 (emphasis added).) Perhaps the most notable aspect of the Plaintiffs' February 13 letter was its failure to address Section 4.5 of the Settlement Agreement, which codifies the link between the Proposed Classes and rulings from the MDL Court (as New GM discussed in its February 11 letter to this Court). Additionally, the Movants state that: (i) "rulings by Judge Furman in the MDL Action" led to "refined estimates of the amount of damages" (Rule 23 Motion ¶ 40); (ii) "[e]xtensive discovery regarding the Plaintiffs' claim has been completed in the MDL Action" (Rule 23 Motion ¶ 53); (iii) Co-Lead Counsel adequately represent the Proposed Classes because of their work "in the MDL Court for over four years" (Rule 23 Motion ¶ 88); (iv) the Proposed Settlement was reached by "Parties who have been litigating these issues for years in the MDL Action" (Rule 23 Motion ¶ 131); and (v) "Magistrate Judge Cott as mediator in the MDL Action" will assist Stage Three (Rule 23 Motion ¶ 148).

IV. THIS COURT SHOULD NOT ORDER AN EXTENSIVE AND EXPENSIVE NOTICE CAMPAIGN FOR A CLASS ACTION SETTLEMENT THAT WILL SOON BE DRAMATICALLY RESHAPED BY THE MDL COURT'S RULINGS.

74. Setting aside the overwhelming overlap with the MDL Court, New GM respectfully submits that authorizing and directing a very expensive nationwide notice campaign is unwise without a "solid record" to support the Proposed Classes. At the December 20, 2018 status conference, counsel to the Signatory Plaintiffs admitted that the MDL Court's "near-term decisions" will "dramatically impact the size of the universe" of class members (in addition to "be[ing] reflected in all of the proceedings that [this Court] will be asked to engage in"). (Hr'g Tr. 12/20/2018 at 14-15.) The scope or composition of the Proposed Classes may also change because whether the Proposed Classes "include prior owners of the same vehicles or prior lessees of the same vehicles[,] is [an] issue that, among others, is up for determination by Judge Furman." (Hr'g Tr. 12/20/2018 at 7.)

75. Therefore, all parties agree that the MDL Court's rulings have—and will continue to have—a significant impact on who is entitled to receive notice of the Proposed Settlement. The Movants' acknowledgement of the overlap traces back (at the very least) to the May 25, 2018 status conference, where counsel to the Signatory Plaintiffs noted that the MDL Court's *prior* rulings had already reduced the number of vehicles at issue in the Recalls from 11.4 million to 9.5 million. (Hr'g Tr. 5/25/2018 at 24.) Now, the Plaintiffs appear to have abandoned this concession and suggest that the MDL Court's *pending* "summary judgment ruling could very well implicate whether we're talking about 26 million registrations or 11- or 12 million registrations; a cost would be the 13 million or 7 million. We expect that ruling fairly soon." (Hr'g Tr. 12/20/2018 at 6.) It is clear that counsel has no idea today whether the approximate number of notices is 9.5 million, 11 million, 12 million, 26 million, or some other number—a range of approximately **16.5 million**. To be fair, New GM agrees with at least two statements made by counsel at the December 20 status conference: (1) "depending on what Judge Furman ultimately rules," there could be a "dramatic[] impact [on] the size of the universe, **therefore who gets noticed**, **therefore the cost of notice**" (Hr'g Tr. 12/20/2018 at 9, 14 (emphasis added)); and (2) "[i]t makes sense to most of us that we ought to be awaiting" decisions from the MDL Court "before we blow **X number of millions of dollars on costs of notice**" (Hr'g Tr. 12/20/2018 at 14-15 (emphasis added)).

76. The risk of a wasteful notice campaign is at the heart of Rule 23(e)(1)(B), which states that the court should only direct notice if "giving notice is justified by the parties' **showing** that the court will **likely** be able to . . . **certify** the class . . ." (emphasis added). The Advisory Committee Notes amplify the link between the decision to approve notice and the prospects for certification: "[t]he decision to give notice of a proposed settlement to the class is an **important event**. It should be based on a **solid record** . . . ." (emphasis added). If a court rubber-stamped

preliminary certification, but later exercised "undiluted, **even heightened**, attention" (as required by *Amchem*, 521 U.S. at 620) and found that certification was not appropriate, the notice campaign would have been a waste. Such a result here would harm the Plaintiffs and PIWD Plaintiffs (many of whom may not end up in the Proposed Class; in the end, Plaintiffs may well become hopelessly confused by a prematurely sent and inaccurate notice), the GUC Trust (which would have wasted up to $13.72 million on ineffective notice), and this Court (which would have wasted its time).

77. In light of the above, New GM respectfully submits that this Court should not authorize an extensive and expensive notice program until, at the very least, the MDL Court issues rulings that New GM and the Movants agree impact the number of notice recipients.

V. THIS COURT'S ORDER OF A STAY OF PROCEEDINGS RELATED TO THE PROPOSED SETTLEMENT PENDING THE MDL COURT'S RULINGS WILL NOT PREJUDICE ANY PARTY.

78. "[T]the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *N. Am. Co.*, 299 U.S. 248, 254 (1936). The court should enter a stay if it will "promote judicial economy, avoidance of confusion and possible inconsistent results without working an undue hardship or prejudice against the plaintiff." *In re Hagerstown Fiber Ltd. P'ship*, 277 B.R. 181, 199 (Bankr. S.D.N.Y. 2002) (citations omitted). A "broad stay" is particularly appropriate where "there [are] common questions of fact . . . , or when the [other proceeding is] likely to dispose of issues common to the claims" in the two proceedings. *In re S.W. Bach & Co.*, 425 B.R. 78, 98 (Bankr. S.D.N.Y. 2010). Bankruptcy courts routinely decide to "hold one lawsuit in abeyance to abide the outcome of another which may substantially affect it or be dispositive of the issues." *See In re Rosenblum*, 545 B.R. 846, 874 (Bankr. E.D. Pa. 2016) (staying numerous matters in the debtor's bankruptcy, including plan confirmation, pending

outcome of state litigation that, although not "the dipositive factor . . . will certainly impact this Court's determination" of a pending motion).[24]

79. Additionally, pursuant to 11 U.S.C. § 105(a), the Court may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. It is unsurprising, therefore, that bankruptcy courts in this district routinely issue stays pursuant to section 105(a). *See, e.g.*, *In re Lehman Bros. Holdings Inc.*, Case No. 08-13555 (SCC), ECF No. 42417 (Bankr. S.D.N.Y. Jan. 31, 2014) (order continuing previously granted stays of certain avoidance actions to allow alternative dispute resolution process to unfold); *In re Delphi Corp.*, Case No. 05-44481 (RDD), ECF No. 9105 (Bankr. S.D.N.Y. Aug. 16, 2007) (order authorizing stay of approximately 740 avoidance actions and granting other related relief).

80. Here, a stay of proceedings related to the Proposed Settlement will not prejudice any party. The MDL Court is already positioned to decide both: (1) identical or substantially similar Rule 23(a) class certification issues; and (2) other key factual, legal, and expert issues that directly bear on this Court's assessment of the likelihood of class certification. As a result, the MDL Court's rulings will affect the scope and viability of the Proposed Classes and the fate of the Proposed Settlement. And even if this Court could move at warp speed to build a record sufficient to preliminarily certify the Proposed Classes, it is hard to justify duplicative proceedings and the concomitant risk of inconsistent rulings where the Movants anticipate the MDL Court's rulings will come in a few months.

81. The proposed stay does not prejudice the Plaintiffs. Co-Lead Counsel has already confirmed that the Plaintiffs' entitlement to any recoveries depends on "merits-based issues that

[24] *Accord In re MF Global Holdings, Ltd.*, 464 B.R. 619, 623-24 (Bankr. S.D.N.Y. 2012) (Glenn, J.) (using power to "stay or dismiss a [duplicative] suit"); *In re Bird*, 229 B.R. 90, 95 (Bankr. S.D.N.Y. 1999) (noting that an adversary proceeding may be "suspended until such time as it were more likely that its adjudication would not be an empty gesture").

the [MDL Court] has previously made or will make in the future [that] will be reflected by necessity as part of the estimation proceedings." (Hr'g Tr. 12/20/2018 at 15.) Thus, the Plaintiffs will not be prejudiced by a stay of proceedings related to the Proposed Settlement pending such rulings, which they anticipate before June 2019. In fact, failure to wait for the MDL Court's rulings may significantly prejudice the Plaintiffs because, if the MDL Court issues rulings after the Proposed Settlement is approved on a final basis that make it very unlikely that the aggregate value of the Plaintiffs' and PIWD Plaintiffs' claims will be sufficient to trigger the Adjustment Shares, the Plaintiffs and PIWD Plaintiffs (regardless of whether they have asserted claims or support the Proposed Settlement) will have already released their claims. And where such rulings are "anticipated by June 2019" and "very likely" to be issued "long before the estimation proceedings begin," a stay of proceedings does not prejudice any Plaintiff. (Plaintiffs' Feb. 13 Letter.)

82. The proposed stay also does not prejudice the GUC Trust or the GUC Trust Beneficiaries. The GUC Trust's right to terminate the Settlement Agreement based on this Court's failure to enter the Preliminary Approval Order does not arise until September 15, 2019, indicating that the Movants were aware of the possibility of a stay at the time they executed the Proposed Settlement. (Settlement Agreement § 10.2(a).) If the GUC Trust truly believed that a stay would be prejudicial, it would have insisted upon a termination right that vests much closer to the hearing date of March 11, 2019 rather than September 15, 2019.

83. Conversely, it is easy to see the prejudice that may result from *not* granting a stay of proceedings related to the Proposed Settlement. Absent such a stay, there is substantial risk that decisions made by this Court in connection with the Proposed Settlement will be inconsistent with past or future rulings from the MDL Court. For example, while the Movants seek to have this Court approve the Proposed (*nationwide*) Classes of Plaintiffs, the MDL Plaintiffs have abandoned

efforts to certify nationwide classes and instead are seeking to certify *statewide* classes in the MDL Court.[25] This inconsistency is particularly puzzling given that the Plaintiffs and the MDL Plaintiffs assert claims based on *identical* state law-based economic loss theories. Here, if the MDL Court rules that the MDL Plaintiffs cannot satisfy the Rule 23(a) certification prerequisites for even one of the three Bellwether States, for example, then it would seem highly unlikely (if not impossible) for this Court to find that the Proposed (nationwide) Classes satisfy Rule 23(a). A similar concern animated denial of a proposed class-action settlement in *Schoenbaum* v. *E.I. Dupont De Nemours & Co.*, where the court noted that proceeding simultaneously with settlement certification and litigation certification "would only serve to draw out this litigation further and could potentially lead to inconsistent results." 2009 WL 4782082, at *16 (E.D. Mo. Dec. 8, 2009).

84. Here, if the MDL Court issues rulings after this Court certifies the Proposed Classes (either preliminarily or finally) that cast doubt on (or preclude) the certification of the Proposed Classes or require subclasses to comply with Rule 23, the Movants will need to re-notice the millions of Plaintiffs bound to the mandatory, non-opt-out Proposed Settlement. The proposed notice is expensive, and no party will benefit from having to redo a notice campaign.

85. For their part, the Movants concede that the certification of classes they seek in the near term from this Court accomplishes basically nothing. As counsel stated at the December 20, 2018 status conference: "it's possible . . . that we may very well have to – and I don't know the exact methodology – **decertify the original settlement class[and] re-certify subclasses to take**

[25] Indeed, given variations in underlying state law, the MDL Court *has already* reached conclusions that effectively preclude nationwide classes. *See, e.g., In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *16 (S.D.N.Y. July 15, 2016) (dismissing MDL Plaintiffs' proposed nationwide RICO claim); *id.* at *18 ("In their briefs, the parties largely addressed these claims together on an issue-by-issue basis. By contrast—and despite the repetition it entails—the Court will separately address each claim with respect to each jurisdiction, as subtle differences in state law can dictate different results for plaintiffs in different jurisdictions."); *see generally id.*; *In re Gen. Motors LLC Ignition Switch Litig.*, 257 F.Supp.3d 372 (S.D.N.Y. 2017) (analyzing the different common law and statutes in various states).

into account people's different expectation levels." (Hr'g Tr. 12/20/2018 at 13 (emphasis added).) Likewise, the Rule 23 Motion states that "Class members may be differently situated in the third stage (approval of allocation and distribution procedures), [so] additional or different subclasses can be created at that time, if necessary." (Rule 23 Motion ¶ 117.) In fact, the Movants expressly acknowledge that the Settlement Agreement itself may change if the MDL Court "issues an Opinion or Order on [New GM's summary judgment motion] . . . that impacts the size, scope or composition of the classes of Economic Loss Plaintiffs . . . ." (Settlement Agreement § 4.5 (in such case, "the Parties shall, within five (5) business days . . . engage in good faith negotiations regarding the applicable provisions of this Settlement Agreement impacted by said decision").)

86. In light of such positions, the Movants should not ask this Court for preliminary certification of the Proposed Classes *now* while simultaneously acknowledging that the Proposed Classes may change in "size, scope or composition" or need to be "decertif[ied]" and "re-jiggered" based on rulings from the MDL Court. Post-hoc reconfiguration of settlement classes is not permitted without essentially restarting the certification process.[26] As a result, New GM agrees with the Movants that "we ought to be awaiting" such "near-term" rulings from the MDL Court "before we blow X number of millions of dollars on costs of notice for people that Judge Furman has decided" may not be included in the Proposed Settlement. (Hr'g Tr. 12/20/2018 at 14-15.)

87. Ultimately, every affected party will be potentially prejudiced if proceedings go forward on parallel tracks. The GUC Trust risks spending $13.72 million on notice up to 26 million individuals, many or all of which may not be putative class members following the MDL

[26] *See Amchem*, 521 U.S. at 620 ("[A] court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold."); *accord In re Motor Fuel Temp. Sales Prac. Litig.*, 2011 WL 4431090, at *7 (D. Kan. Sept. 22, 2011) (rejecting argument by settling parties that notice need not be redone where previously noticed settlement involved one class with five representatives and restructured settlement involved 21 subclasses with 17 new representatives).

Court's rulings. The Plaintiffs and PIWD Plaintiffs (including those who have not asserted claims or signed the Proposed Settlement) risk releasing their rights under a non-opt-out class settlement before they know what—if anything—they stand to gain under the Proposed Settlement. Finally, all parties (and the Court) bear the risk of inconsistent adjudications of key issues that arise in both courts and the concomitant waste of private and judicial resources that duplicative litigation entails. Where all parties acknowledge that the proceedings in the MDL Court and this Court are inextricably intertwined, there is no reason to assume these risks, and a stay should be issued.

CONCLUSION

88. The Movants' desire to push forward with the Proposed Settlement in this Court now, notwithstanding whether critical near-term rulings from the MDL Court will impact this Court's review of the Proposed Settlement under Rule 23(e), is an inefficient and potentially conflicting path forward. This Court should decline the invitation and should instead stay proceedings relating to the Proposed Settlement. As the Movants concede, and the Settlement Motions and Settlement Agreement reflect, rulings from the MDL Court will provide persuasive if not dispositive guidance on the Plaintiffs' ability to satisfy the requirements of Rule 23 or other aspects of class certification. These class certification issues cannot be delayed until the later stages of the Proposed Settlement, as preliminary approval under Rule 23(e) requires this Court to assess the likelihood of class certification **now**. In circumstances where judicial economy is served and no prejudice results to any party, a stay is appropriate.

* * *

WHEREFORE, New GM respectfully requests for all of the reasons stated above that this Court (a) grant the proposed stay as described herein and in the Proposed Order (or, in the alternative, a stay pending the MDL Court's determination of the Motion to Withdraw) and (b) grant such other and further relief as is just and proper.

Dated: February 22, 2019
New York, New York

Paul M. Basta

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Counsel for General Motors LLC

EXHIBIT A

FORM OF PROPOSED ORDER

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 (MG) (Jointly Administered)

[PROPOSED] ORDER GRANTING STAY OF PROCEEDINGS RELATED TO THE PROPOSED SETTLEMENT PURSUANT SECTION 105(a) OF THE BANKRUPTCY CODE

Upon *General Motors LLC's Motion Pursuant to Section 105(a) of the Bankruptcy Code to (A) Stay Proceedings Relating to the Proposed Settlement and (B) Grant Related Relief* (the "Motion"),[1] dated February 22, 2019; and the Court having jurisdiction to consider the Motion and the relief requested therein under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference M-431*, dated January 31, 2012; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided in accordance with the procedures set forth in that certain *Sixth Amended Order Pursuant to 11 U.S.C. § 105(a) and Fed. Bankr. P. 1015(c) and 9007 Establishing Notice and Case Management Procedures* [Docket No. 10183]; and it appearing that no other or further notice need be provided; and a hearing having been held to consider the relief requested in the Motion; and the Court having found and determined that the relief sought in the Motion is in the best interests of all parties and that the legal and factual bases set forth in the Motion establish just

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is

ORDERED that objections to the Motion are hereby overruled; and it is further

ORDERED that the Motion is granted as set forth herein; and it is further

ORDERED that proceedings in this Court relating to the Proposed Settlement or any relief otherwise sought in connection with the Settlement Motions are hereby stayed until further order of this Court;

ORDERED that notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion; and it is further

ORDERED that this Court retains jurisdiction with respect to all matters arising from or related to the implementation of this order.

Dated: _____ 2019
New York, New York

_____
THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE

Exhibit 5

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

One Bowling Green

New York, NY 10004-1408

February, 18, 2015

9:00 AM

B E F O R E :

HON ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

ECRO: K. HARRIS

Trust's distributions after becoming aware of their claims or alleged claims, and because the appellants there had failed to provide notice to general, unsecured Creditors, who would be stripped of their recoveries if the relief that appellants had sought, had been granted.

Here, Plaintiffs' argument that their procedural due process claims should relive them of having to comply with Chateaugay's diligence factor rings especially hollow, given that Plaintiffs chose for strategic reasons, not to pursue claims against the GUC Trust and not to seek to stay the GUC Trust's distributions even after they became aware of their alleged claims, and there's no dispute about that, Your Honor.

Under binding Second Circuit case law, the ramification of that strategic decision is that any claims the Plaintiffs may seek to pursue against the GUC Trust now or in the future, are barred by the doctrine of equitable mootness. And this is the case, Your Honor, even if the Court accepts Mr. Weisfelner's somewhat half-hearted argument that the reason that Plaintiffs chose not to seek a stay was because they believed that they would not have been able to obtain one under the law. Even if that is so, Your Honor, the case law is clear that what is important to satisfy in Chateaugay's diligence factor is that a claimant seek a stay, not that it obtain one.

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Veritext Legal Solutions
330 Old Country Road
Suite 300
Mineola, NY 11501

Date: February 20, 2015

Exhibit 6

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	.	Case No. 09-50026-mg
	.	Chapter 11
MOTORS LIQUIDATION COMPANY, et al., f/k/a GENERAL MOTORS CORP., et al,	.	(Jointly administered)
	.	One Bowling Green
	.	New York, NY 10004
Debtors.	.	
	.	Thursday, January 12, 2017
. . . . .	.	9:30 a.m.

TRANSCRIPT OF (CC: DOC# 13802, 13813, 13819, 13820, 13822) STATUS CONFERENCE REGARDING LATE CLAIMS MOTION; (CC: DOC. NO. 13806) STATUS CONFERENCE RE: MOTION FOR AN ORDER GRANTING AUTHORITY TO FILE LATE CLASS PROOFS OF CLAIM FILED BY EDWARD S. WEISFELNER ON BEHALF OF DESIGNATED COUNSEL FOR THE IGNITION SWITCH PLAINTIFFS & CERTAIN NON-IGNITION SWITCH PLAINTIFFS; (CC: DOC# 13807) OMNIBUS MOTION TO ALLOW CLAIMS, FILE LATE PROOFS OF CLAIM FOR PERSONAL INJURIES AND WRONGFUL DEATHS

BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor:	King & Spalding LLP By: ARTHUR STEINBERG, ESQ. SCOTT DAVIDSON, ESQ. 1185 Avenue of the Americas New York, New York 10036-4003 (212) 556-2158
For the Ignition Switch plaintiffs and certain non-Ignition Switch plaintiffs:	Brown Rudnick LLP By: EDWARD S. WEISFELNER, ESQ. HOWARD S. STEEL, ESQ. 7 Times Square New York, New York 10036 (212) 209-4917

APPEARANCES CONTINUED.

Audio Operator:	Jonathan, ECRO
Transcription Company:	Access Transcripts, LLC 10110 Youngwood Lane Fishers, IN 46038 (855) 873-2223 www.accesstranscripts.com

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

us in advance they would otherwise want from not just our class representatives, but frankly, virtually every state representative plaintiff, every named plaintiff they could find in the MDL. Loads of document and deposition testimony is what they wanted. Our view is, let it happen in the MDL --

THE COURT: These are economic loss plaintiffs?

MR. WEISFELNER: Yes, sir. And Mr. Weintraub will speak for accident plaintiffs, but a similar situation evolves there. Again, there are certain cases that are being prioritized by Judge Furman, and we think those ought to move forward before anyone contemplates discovery, before -- within the context of this bankruptcy case, we think it'll be duplicative and potentially in violation of orders that Judge Furman has put in place. Beyond that, I will tell you that there are additional reasons, in our view, for a 90-day extension.

THE COURT: Are the depositions of the putative class representatives, are those going to occur in the next 90 days?

MR. WEISFELNER: Yes. Beyond that, Your Honor, Judge Furman is currently in the process of adjudicating motions for, I think a summary judgment as opposed to motions to dismiss, motions for summary judgment on the theories behind the plaintiffs' request to hold New GM liable as the success. And depending on the resolution of that motion, one could anticipate that the vim and vigor with which the plaintiffs

prosecute and the adversaries defend the late claims motion may change.

THE COURT: Are those summary judgment motions fully briefed at this point?

MR. WEISFELNER: I think they're in the process of being finalized. We anticipate they'll be fully briefed before the end of January. And, of course, we don't have a schedule for when the judge is going to rule, but if the past is any prologue, we suspect that within this 90-day period, the parties will further be able to assess the nature and value of their respective claims and defenses.

Now, there was a third reason for -- and I hate to characterize it this way, but there is yet a third reason for doing nothing, in our view, for the next 90 days. There was some debate during the meet and confer as to whether or not, putting discovery aside for all the reasons I previously indicated, the parties are to move forward on some briefing schedule to resolve legal issues. And among the legal issues that some folks thought could be advanced was the question of equitable mootness.

Now, Your Honor knows that equitable mootness was part of the threshold issues that Judge Gerber considered and ruled upon, and Your Honor is also aware that that decision went up to the Second Circuit, which ultimately vacated Judge Gerber's ruling on the basis of it being an advisory opinion

C E R T I F I C A T I O N

I, Alicia Jarrett, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

ALICIA JARRETT, AAERT NO. 428 DATE: January 13, 2017

ACCESS TRANSCRIPTS, LLC

Exhibit 7

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.

Cast No.: 09-50026 (MG)

December 18, 2017
9:02 a.m.

One Bowling Green
New York, New York

B E F O R E:

HON. MARTIN GLENN

debated. 11:42:33

Debated by whom? 11:42:33

THE WITNESS: Well, the 11:42:36

principal debaters were Mr. Golden 11:42:37

on the one hand and myself on the 11:42:40

other. But whenever he needed 11:42:42

help, which is rare, he would call 11:42:45

in the folks from Gibson Dunn. 11:42:47

But the resolution of that 11:42:52

issue and how we were going to go 11:42:54

about binding potentially millions 11:42:56

of present or former car owners was 11:42:58

settled on, was part of the 11:43:02

settlement documentation going all 11:43:05

the way back to the first of the 11:43:08

twenty-one drafts that were 11:43:11

exchanged between the parties. And 11:43:12

our thought again there was -- and 11:43:15

there were a lot of reasons to pick 11:43:18

9019 over a Rule 23 class 11:43:20

settlement and those reasons 11:43:26

included but unlimited to Danny and 11:43:29

I are bankruptcy lawyers, what do 11:43:31

we know about class settlements. 11:43:35

More specifically, we understood 11:43:37

that the MDL had as an open issue class certification and we didn't want to start confusing class certification for the purposes of the MDL and class certifications for the purpose of the bankruptcy settlement. 11:43:38 11:43:44 11:43:45 11:43:48 11:43:49 11:43:51 11:43:54

The third reason, as Mr. Karlan quite generously pointed out, all we were getting out of the settlement was fifteen million bucks spread over millions of people, we thought it was much better to worry about things like class certification as when and if there was res that were prepared to be distributed. So if you're talking about fifteen million supplemented by all or some of the potential billions of dollars' worth of GM stock proceeds then it made sense, it seemed to us, to start talking about how do you distribute the rest. And so as long as you had notice and an 11:43:54 11:43:57 11:43:59 11:44:01 11:44:04 11:44:06 11:44:09 11:44:14 11:44:18 11:44:20 11:44:21 11:44:21 11:44:23 11:44:26 11:44:29 11:44:31 11:44:33 11:44:36

CERTIFICATION BY REPORTER

I, Wayne Hock, a Notary Public of the State of New York, do hereby certify:

That said proceeding was held before me at the aforesaid time and place;

That said proceeding was taken stenographically by me, then transcribed under my supervision, and that the within transcript is a true record of the testimony of said proceeding.

I further certify that I am not related to any of the parties to this action by blood or marriage, that I am not interested directly or indirectly in the matter in controversy, nor am I in the employ of any of the counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this day of , 2017.

<%signature%>