HEARING DATE AND TIME: January 10, 2012 at 9:45 a.m. (Eastern Time)
OBJECTION DEADLINE: December 26, 2011 at 4:00 p.m. (Eastern Time)

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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11 Case No.**
MOTORS LIQUIDATION COMPANY, ***et al.*****,** **f/k/a General Motors Corp.,** ***et al.*****,**	:	**09-50026 (REG)**
Debtors.	:	**(Jointly Administered)**
JOHN MORGENSTEIN, MICHAEL JACOB, as Executor of the Estate of Doris Jacob, and ALANTE CARPENTER individually and on behalf of all others similarly situated,	:	
Plaintiffs,	:	
v.	:	**Adversary Proceeding No. 11-09409**
MOTORS LIQUIDATION COMPANY f/k/a GENERAL MOTORS CORPORATION a Delaware Corporation,	:	
Defendant.	:	

NOTICE OF HEARING ON MOTORS LIQUIDATION COMPANY'S AND MOTORS LIQUIDATION COMPANY GUC TRUST'S AMENDED MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR REVOCATION OF DISCHARGE AND, IN THE ALTERNATIVE, MOTION TO STRIKE CLASS ALLEGATIONS

PLEASE TAKE NOTICE that upon the annexed motion, dated **December 12, 2011**, of Motors Liquidation Company and the Motors Liquidation Company GUC Trust (the "**GUC Trust**," and together with Motors Liquidation Company, "**MLC**") to Dismiss Plaintiffs' Complaint for Revocation of Discharge and, in the Alternative, to Dismiss Class Allegations (the "**Motion**"), a hearing to consider the Motion will be held before the Honorable Robert E. Gerber, United States Bankruptcy Judge, at Room 621 of the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, New York 10004 on **January 10, 2012, at 9:45 a.m. (Eastern Time)**.

PLEASE TAKE FURTHER NOTICE that any responses or objections to the 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, preferably 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 practicable, and served in accordance with General Order M-399, and on (i) Weil, Gotshal & Manges LLP, attorneys for the Motors Liquidation Company and GUC Trust, 767 Fifth Avenue, New York, New York 10153 (Attn: Harvey R. Miller, Esq., Stephen Karotkin, Esq., and Joseph H. Smolinsky, Esq.); (ii) Debtors, c/o Motors Liquidation Company, 401 South Old Woodward Avenue, Suite 370, Birmingham, Michigan 48009 (Attn: Thomas Morrow); (iii) General Motors LLC, 400 Renaissance Center, Detroit, Michigan 48265 (Attn: Lawrence S. Buonomo, Esq.); (iv) Cadwalader, Wickersham & Taft LLP, attorneys for the United States Department of the

Treasury, One World Financial Center, New York, New York 10281 (Attn: John J. Rapisardi, Esq.); (v) the United States Department of the Treasury, 1500 Pennsylvania Avenue NW, Room 2312, Washington, D.C. 20220 (Attn: Joseph Samarias, Esq.); (vi) Vedder Price, P.C., attorneys for Export Development Canada, 1633 Broadway, 47th Floor, New York, New York 10019 (Attn: Michael J. Edelman, Esq. and Michael L. Schein, Esq.); (vii) Kramer Levin Naftalis & Frankel LLP, attorneys for the statutory committee of unsecured creditors, 1177 Avenue of the Americas, New York, New York 10036 (Attn: Thomas Moers Mayer, Esq., Robert Schmidt, Esq., Lauren Macksoud, Esq., and Jennifer Sharret, Esq.); (viii) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Tracy Hope Davis, Esq.); (ix) the U.S. Attorney's Office, S.D.N.Y., 86 Chambers Street, Third Floor, New York, New York 10007 (Attn: David S. Jones, Esq. and Natalie Kuehler, Esq.); (x) Caplin & Drysdale, Chartered, attorneys for the official committee of unsecured creditors holding asbestos-related claims, 375 Park Avenue, 35th Floor, New York, New York 10152-3500 (Attn: Elihu Inselbuch, Esq. and Rita C. Tobin, Esq.) and One Thomas Circle, N.W., Suite 1100, Washington, DC 20005 (Attn: Trevor W. Swett III, Esq. and Kevin C. Maclay, Esq.); (xi) Stutzman, Bromberg, Esserman & Plifka, A Professional Corporation, attorneys for Dean M. Trafelet in his capacity as the legal representative for future asbestos personal injury claimants, 2323 Bryan Street, Suite 2200, Dallas, Texas 75201 (Attn: Sander L. Esserman, Esq. and Robert T. Brousseau, Esq.); (xii) Gibson, Dunn, Crutcher LLP, attorneys for Wilmington Trust Company as GUC Trust Administrator and for Wilmington Trust Company as Avoidance Action Trust Administrator, 200 Park Avenue, 47th Floor, New York, New York 10166 (Attn: Keith Martorana, Esq.); (xiii) FTI Consulting, as the GUC Trust Monitor and as the Avoidance Action Trust Monitor, One Atlantic Center, 1201 West Peachtree Street, Suite 500,

Atlanta, Georgia 30309 (Attn: Anna Phillips); (xiv) Crowell & Moring LLP, attorneys for the Revitalizing Auto Communities Environmental Response Trust, 590 Madison Avenue, 19th Floor, New York, New York 10022-2524 (Attn: Michael V. Blumenthal, Esq.); (xv) Kirk P. Watson, Esq., as the Asbestos Trust Administrator, 2301 Woodlawn Boulevard, Austin, Texas 78703; (xvi) Mark Schlachet, Esq., attorneys for Plaintiffs, 3637 South Green Road, 2nd Floor, Cleveland, Ohio 44122; (xvii) John A. Peca, Esq., Climaco, Wilcos, Peca, Tarantino & Garofoli Co., LPA, attorneys for Plaintiffs, 55 Public Square, Suite 1950, Cleveland, Ohio 44113; (xviii) Adam J. Levitt, Esq., Wolf Haldenstein Adler Freeman & Herz LLC, attorneys for Plaintiffs, 55 West Monroe Street, Suite 1111, Chicago, Illinois 60603; (xix) Joseph J. Siprut, Esq., Siprut PC, attorneys for Plaintiffs, 122 South Michigan Avenue, Suite 1850, Chicago, Illinois 60603, and (xx) Mark Schlachet, Esq., attorney for Plaintiffs, 3637 South Green Road, 2d Floor, Cleveland, Ohio, 44122, so as to be received no later than **December 26, 2011, at 4:00 p.m. (Eastern Time)** (the "**Objection Deadline**").

PLEASE TAKE FURTHER NOTICE that if no objections are timely filed and served with respect to the Motion, MLC may, on or after the Objection Deadline, submit to the Bankruptcy Court the Order annexed to the Motion, which may be entered with no further notice or opportunity to be heard offered to any party.

Dated: New York, New York
December 12, 2011

/s/ Joseph H. Smolinsky
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MOTORS LIQUIDATION COMPANY, *et al.*, **f/k/a General Motors Corp., *et al.,***	**09-50026 (REG)**
Debtors.	**(Jointly Administered)**
JOHN MORGENSTEIN, MICHAEL JACOB, as Executor of the Estate of Doris Jacob, and ALANTE CARPENTER individually and on behalf of all others similarly situated,	
Plaintiffs,	
v.	**Adversary Proceeding No. 11-09409**
MOTORS LIQUIDATION COMPANY f/k/a GENERAL MOTORS CORPORATION a Delaware Corporation,	
Defendant.	

MOTORS LIQUIDATION COMPANY'S AND MOTORS LIQUIDATION COMPANY GUC TRUST'S AMENDED MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR REVOCATION OF DISCHARGE AND, IN THE ALTERNATIVE, MOTION TO STRIKE CLASS ALLEGATIONS

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TO THE HONORABLE ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE:

Motors Liquidation Company and the Motors Liquidation Company GUC Trust (the "**GUC Trust**," and together with Motors Liquidation Company, "**MLC**")[1] respectfully represent:

RELIEF REQUESTED

1. John Morgenstein, Michael Jacob, and Alante Carpenter (collectively, "**Plaintiffs**") filed their Complaint for Revocation of Discharge (the "**Complaint**") 181 days after entry of the Confirmation Order.[2] Plaintiffs argue that they seek a "limited revocation" of the Confirmation Order but purport to allege a claim for untold amounts on behalf of a nationwide putative class covering an unlimited period of time and consisting of an unknown number of claimants, many of whom have experienced no problems with their vehicles (the "**Putative Class**"). Setting aside the Complaint's multiple class allegation defects, Plaintiffs' revocation request threatens to wreak grave prejudice upon MLC and its affiliated debtors, as debtors in possession (collectively, "**Debtors**") and the thousands of creditors who have received millions of dollars of consideration in reliance upon the *confirmed* Plan. Plaintiffs' Complaint should be dismissed with prejudice for the following reasons:

2. First, Plaintiffs' Complaint fails to state a claim upon which relief can be granted under Rule 12(b)(6)[3] of the Federal Rules of Civil Procedure because the Complaint seeks to have the Confirmation Order revoked "in part." However, a court has the power only to

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[1] Motors Liquidation Company and the Motors Liquidation Company GUC Trust together file this motion because the Complaint was filed against Motors Liquidation Company, but the GUC Trust is the real party in interest.

[2] Capitalized terms not defined in this introduction are defined below.

[3] Fed. R. Civ. P. 12(b)(6) is made applicable to adversary proceedings pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure (defined below).

fully – *not partially* – revoke a confirmed chapter 11 plan. To fully revoke the confirmed Plan here would be severely prejudicial to Debtors and the creditors who have relied on the Plan.

3. Second, Plaintiffs' allegations as to fraud in the Complaint fail to meet the particularized pleading requirements established by Rule 9 of the Federal Rules of Civil Procedure.[4] Specifically, Plaintiffs' allegation that Debtors failed to disclose the allegedly defective nature of the Impala vehicles to Plaintiffs cannot, as a matter of law, constitute a sufficient allegation of fraud because section 1144 requires the alleged fraud to be against the Court, not against Plaintiffs. Further, Plaintiffs' allegation that Debtors failed to list Plaintiffs and the members of the Putative Class as creditors of the estate in connection with confirmation of the Plan fails because Plaintiffs have not alleged facts with particularity from which the Court could infer that Debtors ***knew*** of the alleged defects in the vehicles.

4. Third, even if the Court finds that Plaintiffs have articulated a claim upon which relief can be granted, and even if the Court finds that the Complaint's fraud allegations meet Rule 9, Plaintiffs' Complaint should still be dismissed under the equitable mootness doctrine. At this late stage, there is simply no way the Court can reinstate the *status quo ante*.

5. Fourth, Plaintiffs' claims are time barred. Plaintiffs seek to file untimely proofs of claim almost two years after the Bar Date and almost eight months after entry of the Confirmation Order. Such an attempt to circumvent the Bar Date should be denied, as Plaintiffs have made no showing of "excusable neglect" as required by Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**").

6. Finally, and in the alternative, even if Plaintiffs' claims are allowed to proceed, the class allegations in the Complaint should be stricken because the Putative Class

[4] Bankruptcy Rule 7009 makes Fed. R. Civ. P. 9 applicable to adversary proceedings. *See* Fed. R. Bankr. P. 7009.

does not satisfy Rule 23 of the Federal Rules of Civil Procedure, and even if the Putative Class did satisfy Rule 23, the benefits that generally support class certification in civil litigation are not realizable in these chapter 11 cases, especially given that the Putative Class has not been certified by any court and the Plan has already been confirmed. Further, Plaintiffs failed to move for class treatment at the earliest practicable time and have represented to the Court that they will seek costly and time-consuming class certification related discovery even *before* filing their motion for class treatment.

7. For all of these reasons, MLC moved to dismiss Plaintiffs' claims. At the November 22, 2011 status conference, Plaintiffs attempted to salvage their claims by arguing that certain of the above arguments are premature, and that Plaintiffs should be permitted to proceed past summary adjudication of their claims, even though their claims may ultimately be disposed of by the Court. (*See* Tr. of Nov. 22, 2011 Hr'g at 16:19-20, excerpts of which are attached hereto as **Exhibit "A"** ("This is not a case which on its face warrants summary rejection by this Court. ***It may be down the road***….") (emphasis added).) However, it is clear that all of Plaintiffs' claims will fail. The estate should not be forced to spend any further resources defending this action.

JURISDICTION

8. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

RELEVANT FACTUAL BACKGROUND

A. Debtors' Chapter 11 Cases.

9. On June 1, 2009, General Motors Corporation ("**GM**") commenced voluntary cases under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**") before this Court. Shortly after the filing, GM filed a motion to sell substantially all of its assets

and transfer certain liabilities to Vehicle Acquisition Holdings, LLC, which has now changed its name to General Motors Company ("**New GM**"). On July 5, 2009, this Court issued an order approving the sale motion (the "**Sale Order**"). As a result of the Sale Order and the consummation of the sale shortly thereafter, GM changed its name to Motors Liquidation Company.

B. The Bar Date Order.

10. On September 16, 2009, this Court entered the Order Pursuant to Section 502(b)(9) of the Bankruptcy Code and Bankruptcy Rule 3003(c)(3) Establishing the Deadline for Filing Proofs of Claim (Including Claims Under Bankruptcy Code Section 503(b)(9)) and Procedures Relating Thereto and Approving the Form and Manner of Notice Thereof (the "**Bar Date Order**") which, among other things, established November 30, 2009 as the bar date (the "**Bar Date**") and set forth procedures for filing proofs of claim. The Bar Date Order requires, among other things, that a proof of claim must *"set forth with specificity"* the legal and factual basis for the alleged claim and include supporting documentation or an explanation as to why such documentation is not available. (Bar Date Order at 2 (emphasis added).) At great expense to their estates, Debtors published notice of the Bar Date nationwide in *The Wall Street Journal* (Global Edition – North America, Europe, and Asia), *The New York Times* (National), *USA Today* (Monday through Thursday, National), *Detroit Free Press, Detroit News, LeJournal de Montreal* (French), *Montreal Gazette* (English), *The Globe and Mail* (Canada), and *The National Post*. (*Id.* at 7.)

C. The Plan and Confirmation Order.

11. On March 28, 2011, the Court entered its Findings of Fact, Conclusions of Law, and Order Pursuant to Sections 1129(a) and (b) of the Bankruptcy Code and Rule 3020 of the Federal Rules of Bankruptcy Procedure Confirming Debtors' Second Amended Joint Chapter

11 Plan (ECF No. 9941) (the "**Confirmation Order**"), which, among other things, confirmed the Debtors' Second Amended Joint Chapter 11 Plan (the "**Plan**").

12. The Plan and the Confirmation Order specify that this Court retains exclusive jurisdiction to consider claims such as those asserted by Plaintiffs. Section 11.1 of the Plan provides, in pertinent part:

> The Bankruptcy Court shall retain exclusive jurisdiction of all matters arising under, arising out of, or related to the Chapter 11 Cases and the Plan . . . for, among other things, the following purposes
>
> . . . .
>
> (b) To determine any motion, adversary proceeding, application, contested matter, and other litigated matter pending on or commenced before or after the Confirmation Date . . . ;

(Plan § 11.1(b).) In addition, the Confirmation Order and the Plan provide that this Court retains exclusive jurisdiction to consider any and all claims against Debtors and MLC "involving or relating to the administration of the Chapter 11 Case [and] the decisions and actions taken during the Chapter 11 Cases." (Confirmation Order ¶ 52; Plan § 12.6.)

D. The Complaint.

13. On September 26, 2011, Plaintiffs filed the Complaint, which seeks to "enforce the rights of Plaintiffs and other [Putative] Class members against the bankruptcy estate of Old GM," (Compl. ¶ 2), by "revoking this Court's Confirmation Order to the extent, and only to the extent, that same precludes Plaintiffs and [the Putative Class] from filing their claims" based upon alleged defects in their model-year 2007-2008 Chevrolet Impalas. (Compl. at 13.)

E. The Allegedly-Defective Rear Wheel Spindle Rods.

14. Plaintiffs' claims purportedly arise from Debtors' introduction, marketing, sale, and/or lease of certain model-year 2007 and 2008 Chevrolet Impalas, which Plaintiffs

allege have defective rear wheel spindle rods, which purportedly cause "rear wheel misalignment resulting in excessive, abnormal, and premature wear to the inboard side of the Impalas' rear tires." (Compl. ¶ 3.) According to Plaintiffs, the defect manifests itself in requiring premature replacement of the vehicle's tires. (*Id.* ¶¶ 25-27.) Plaintiffs further state that the "fix" for the alleged defect is known as the "Rod Kit," which costs approximately $450. (*Id.* ¶ 15.)

15. Plaintiffs allege that GM knew that certain Impalas outfitted with a "police package" ("**Police Package Impalas**") – which are separate and distinct from the Impalas of Plaintiffs and the Putative Class ("**Consumer Impalas**") – had defective rear wheel spindle rods, and that in 2008, GM issued a Technical Service Bulletin giving notification of the problem and offering to replace the rear wheel spindle rods, align the rear wheels, and if necessary, replace the rear tires, at no cost to the consumer. (Compl. ¶¶ 4-9.) Plaintiffs claim that there are no material differences between the rear wheel spindle rods in Police Package Impalas and those in their Consumer Impalas, which lack the police package. (*Id.* ¶ 10.)

16. Plaintiffs allege that GM failed to provide notice of the rear wheel spindle rod defect to Consumer Impala owners and lessees and further failed to notify them of GM's bankruptcy cases and the claim deadlines relating thereto. (*Id.* ¶ 12.) According to Plaintiffs, GM's conduct amounted to a "secret warranty," or "silent recall," by "giving notice as to and fixing only the defective vehicles of Police Package Impala owners," and therefore GM allegedly established "a discriminatory policy to pay for repair of a defect as to certain purchasers without making the defect or the policy known to the public at large." (*Id.* ¶ 13.)

F. The Generalized Fraud Allegations.

17. The Complaint alleges that the Confirmation Order should be partially revoked because the Debtors procured confirmation of the Plan by fraud. In this regard, Plaintiffs allege that Debtors failed: (i) to disclose the allegedly defective nature of the

Consumer Impalas to Plaintiffs and the members of the Putative Class, and (ii) to list Plaintiffs and the members of the Putative Class as creditors of the estate in connection with confirmation of the Plan. (Compl. ¶¶ 43-48.)

G. The Putative Class Allegations.

18. Plaintiffs assert the Complaint on behalf of themselves and a putative class defined as "[a]ll current and former owners or lessees of Consumer Impalas in the United States." (Compl. ¶ 33.) This class definition excludes Police Package Impalas and Impalas sold outside the United States, but it is unlimited in most other respects. Specifically, the class definition purports to include every Consumer Impala ever made regardless of model year or whether its owner ever experienced any problems. (*See generally id.*) The Complaint seeks certification of the Putative Class pursuant to Fed. R. Civ. P. 23(b)(1)(B) and 23(b)(2), (Compl. ¶¶ 41-42), but further alleges that a "Class Action Complaint under Civil Rule (b)(3) will be filed if and when permissible; and a motion for late-filed claim will be filed in due course." (Compl. at 3 n.1.)

THE COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE

I. The Complaint Should Be Dismissed Because a Debtor's Plan May Not Be Partially Revoked Under Section 1144.

19. By the Complaint, Plaintiffs plainly and unequivocally request that the Court partially revoke Debtors' discharges, the Plan, and the Confirmation Order pursuant to section 1144 of the Bankruptcy Code. (Compl. at 1-2 ("[Plaintiffs] seek a *limited* revocation of the confirmation order entered herein on March 29, 2011") (emphasis added).) Numerous other requests for this extraordinary and unprecedented relief are strewn throughout the Complaint.[5]

[5] (*See, e.g.*, Compl. ¶ 1 ("Plaintiffs bring this action for *limited*, carefully crafted plan revocation") (emphasis added); *id.* ¶ 50 ("Plaintiffs seek only a *limited* revocation of discharge as to Known Creditors' specific, unsecured

As discussed in detail below, Plaintiffs have not stated a claim upon which relief may be granted because (i) a confirmation order and a debtor's discharge may only be revoked in their *entirety* under 11 U.S.C. § 1144, (ii) only a debtor or a proponent of a confirmed plan may seek partial plan modification, and (iii) Debtors did not receive a discharge, instead, the liabilities were transferred.

20. Section 1144 provides in pertinent part:

> On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud. An order under this section revoking an order of confirmation shall—
>
> . . .
>
> (2) revoke the discharge of the debtor.

11 U.S.C. § 1144. Whether to revoke a confirmation order under section 1144 rests "in the sound discretion of the court." *Varde Inv. Partners, L.P. v. Comair, Inc. (In re Delta Air Lines, Inc.)*, 386 B.R. 518, 532 (Bankr. S.D.N.Y. 2008). In this regard, a court's discretion is so broad that "the court may decline to revoke an order of confirmation ***even if*** it finds that the order ***was*** procured by fraud." *Id.* (emphasis in original).[6]

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class claim") (emphasis added); *id.* ¶ 53 ("Plaintiffs request that the Court revoke the Debtors' confirmation order . . . provided, however, that the revocation shall go *only to the denial of discharge as to Known Creditors' class claim*, i.e. leaving any and all other events, transfers and transactions wholly unaffected by the Order of Revocation of Discharge as to the Claims of Consumer Impala Owners.") (emphasis added); *id.* at 13 ("Plaintiffs . . . pray for an Order . . . revoking this Court's Confirmation Order to the extent, *and only to the extent*, that same precludes Plaintiffs and Plaintiff Class from filing their claims, pursuing their rights, and otherwise taking appropriate action before this Court . . . .") (emphasis added).)

[6] Plaintiffs admit that the 180-day deadline under section 1144 is "strictly construed" (Compl. at 3 n.1), but failed to file their Complaint until 181 days after entry of the Confirmation Order. For this reason alone, the Complaint should be dismissed. *Cf. In re Delta Air Lines, Inc.*, 386 B.R. at 533 n.11 (noting complaint filed 180 days following entry of confirmation order may be untimely because section 1144 requires the action to be brought "*before* 180 days after the date of the entry of the order of confirmation") (emphasis added). But even if the Complaint was filed within the deadline, and even if Plaintiffs have properly pled a claim under section 1144, Plaintiffs' failure to file their Complaint until 181 days after entry of the Confirmation Order, and 89 days after they

21. As a preliminary matter, Plaintiffs' request to partially revoke Debtors' *discharge* is inapplicable, because Debtors did not receive a discharge.[7] (*See* Plan § 10.3 ("Because the Plan is a liquidating chapter 11 plan, confirmation of the Plan does not provide the Debtors with a discharge under section 1141 of the Bankruptcy Code.").) Instead, Debtors' liabilities were transferred either to New GM or to MLC.

22. In addition, partial revocation is not permissible under section 1144.[8] Indeed, Plaintiffs' position respecting the availability of partial revocation under section 1144 is so extreme and unfounded that only a handful of courts have considered the issue. The few that have considered it have determined that, in accordance with the plain language of section 1144, partial revocation is impermissible. *See The Paul H. Shield, MD, Inc. Profit Sharing Plan v. Northfield Labs. Inc. (In re Northfield Labs. Inc.)*, --- B.R. ---, No. 09-53274 (BLS), 2010 WL 3417229, at *4-5 (Bankr. D. Del. Aug. 27, 2010) (dismissing plaintiffs' complaint seeking partial modification of confirmed chapter 11 plan because "[t]he plain language of section 1144 . . . only provides for revocation of an entire confirmation order"); *In re E. Shoshone Hosp. Dist.*,

admit they had notice of their claims, cuts against whether this Court should exercise its discretion to revoke the Plan. *See In re Delta Air Lines, Inc.*, 386 B.R. at 533 (dismissing complaint where plaintiffs waited until 180th day to file their complaint, even though they had notice of their claims 49 days after entry of the confirmation order, because the complexity of the plan and the numerous parties acting in reliance on it "behooved the plaintiffs to move forward with a great sense of urgency").

[7] Section 1141(d)(3) of the Bankruptcy Code prohibits a debtor who is not an individual from receiving a chapter 11 discharge if "the plan provides for the liquidation of all or substantially all of the property of the estate" and "the debtor does not engage in business after consummation of the plan." 11 U.S.C. § 1141(d)(3); *see also Kitrosser v. CIT Group/Factoring, Inc.*, 177 B.R. 458, 468 (S.D.N.Y. 1995) (explaining that section 1141(d)(3) "precludes the discharge of debts if the plan of reorganization does not meet the rehabilitation goals of Chapter 11").

[8] Courts interpret revocation of a debtors' discharge under section 1144 to mean revocation of the injunction prohibiting enforcement of *all* debts against the debtor, not some of them. *See Solow v. Kalikow (In re Kalikow),* 602 F.3d 82, 94 (2d Cir. 2010) ("'Generally, a discharge in bankruptcy relieves a debtor from *all* pre-petition debt . . . .'") (quoting *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 444 (1st Cir. 2000), *cert. denied*, 532 U.S. 1048 (2001) (emphasis added)); *see also* Black's Law Dictionary 463 (6th ed. 1990) (defining discharge in bankruptcy as "[t]he release of a debtor from *all* of his debts which are provable in bankruptcy, except such as are excepted by the Bankruptcy Code") (emphasis added).

No. 98-20934-9, 2000 WL 33712301, at *5 (Bankr. D. Idaho Apr. 27, 2000) (denying debtor's request to partially revoke confirmation order entered pursuant to chapter 9 of title 11[9] because "[t]here is nothing in the statute, nor has there been authority provided by the [d]ebtor, which recognizes or validates a theory of selective or partial revocation. . . . Either an order of confirmation is revoked or it is not"); *Almeroth v. Innovative Clinical Solutions, Ltd. (In re Innovative Clinical Solutions, Ltd.)*, 302 B.R. 136, 143 (Bankr. D. Del. 2003) (denying plaintiffs' request that the court enter a revocation order that would leave most of the plan intact but allow plaintiffs to pursue claims against non-debtor defendants, since "[p]laintiffs' proposal for fashioning appropriate relief is in fundamental conflict with the requirement of [section 1144] that the revocation order revoke a debtors' discharge"); *S.N. Phelps & Co. v. Circle K Corp. (In re Circle K Corp.)*, 171 B.R. 666, 670 (Bankr. D. Ariz. 1994) (denying plaintiffs' request for a "quick revocation of discharge, amendment of the plan to their satisfaction, and reconfirmation of the amended plan," since "[t]he effect of [revocation of discharge under] section 1144 is to . . . place [the debtor] in the position it occupied before confirmation," thereby "requir[ing] new disclosures and findings [that] the new or amended plan meets all section 1129 [confirmation] elements"). This rejection of the concept of partial revocation is in line with the fundamental concept that a confirmed chapter 11 plan is a contract between a debtor and its creditors; therefore, any partial modification of a plan would impermissibly prejudice the rights of the parties affected by the plan. *See In re Kalikow*, 602 F.3d at 94 (recognizing that "[a] confirmed plan binds both the debtor [] and any creditor"). Accordingly, as courts do not recognize partial

[9] Section 1144 is made expressly applicable in a chapter 9 case via section 901(a) of title 11. 11 U.S.C. § 901(a). Therefore, *East Shoshone Hospital District* is persuasive authority for the proposition that partial revocation is not permitted under section 1144.

revocation as a form of relief available under 11 U.S.C. § 1144, the Complaint should be dismissed.

23. The Complaint should be dismissed even if Plaintiffs' request for "partial revocation" is interpreted as a request to modify the Plan. Section 1127(b) of the Bankruptcy Code provides the sole means for modifying a confirmed plan. *See In re Innovative Clinical Solutions, Ltd.*, 302 B.R. at 144. It provides: "[t]he proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan . . . ." 11 U.S.C. § 1127(b). Here, Plaintiffs are neither proponents of the Plan nor debtors in the underlying bankruptcy case. *See In re Innovative Clinical Solutions, Ltd.*, 302 B.R. at 144 (holding plaintiffs could not seek to modify confirmed plan where they were neither proponents nor debtor). Moreover, the Plan has been substantially consummated. Accordingly, Plaintiffs' request to modify the release and exculpation provisions of the Plan fails to state a claim upon which relief can be granted, and the Complaint should be dismissed.[10]

II. The Complaint Should Be Dismissed Because Plaintiffs Fail to Plead Their Fraud Claims with Particularity as Required By Fed. R. Civ. P. 9(b).

A. Standard of Review.

24. Fraud is the ***only*** avenue for revoking confirmation of a plan under section 1144. *See In re Longardner & Assocs., Inc.*, 855 F.2d 455, 461-62 (7th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989). Accordingly – because Plaintiffs must ***somehow*** allege fraud – the Complaint desperately tries to package its allegations as those evidencing Debtors' fraudulent

[10] Moreover, the Complaint should be dismissed because, even if Debtors committed the fraud alleged by Plaintiffs, the Plan would still have been confirmed. Accordingly, Plaintiffs are not entitled to revocation of the Plan as a form of relief; at most, they would be entitled merely to the amount of damages resulting from any alleged fraud.

intent. But Plaintiffs' vague and conclusory allegations fail to satisfy Fed. R. Civ. P. 9(b)'s heightened pleading requirement. Plaintiffs have not carried their burden with respect to alleging that the Confirmation Order was procured by fraud, and the Complaint should be dismissed.

25. Fed. R. Civ. P. 8(a)(2)[11] requires that a plaintiff provide "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Buchwald v. Renco Group, Inc. (In re Magnesium Corp. of Am.)*, 399 B.R. 722, 741 (Bankr. S.D.N.Y. 2009) (Gerber, J.) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The factual allegations "must be enough to raise a right to relief 'above the speculative level,'" *Twombly*, 550 U.S. at 555, and the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

26. In addition, a plaintiff seeking revocation of a confirmation order pursuant to 11 U.S.C. § 1144 must satisfy Fed. R. Civ. P. 9(b)'s particularity requirements. *See* Fed. R. Civ. P. 9(b); *In re Delta Air Lines, Inc.*, 386 B.R. at 531-32. Rule 9(b) provides: "In alleging fraud . . . a party must state with particularity the circumstances constituting fraud . . . ." Fed. R. Civ. P. 9(b). To maintain an action under section 1144, a creditor must point to specific acts of the debtor involving fraudulent intent. *See In re Longardner & Assocs., Inc.*, 855 F.2d at 461-62; *see also In re Nyack Autopartstores Holding Co.*, 98 B.R. 659, 662 (Bankr. S.D.N.Y. 1989) ("Fraudulent intent on the part of the debtors cannot be inferred . . . . Indeed, if fraud must be inferred from the language in the complaint in order to support a claim for revocation, the complaint must be regarded as legally insufficient because it fails to particularize the fraudulent

[11] Bankruptcy Rule 7008 makes Fed. R. Civ. P. 8(a)(2) applicable to adversary proceedings. *See* Fed. R. Bankr. P. 7008.

conduct . . . ."). "Although under Rule 9(b) a complaint need only aver intent generally, it must nonetheless allege facts which give rise to a strong inference that the defendants possessed the requisite fraudulent intent." *Cosmas v. Hassett*, 886 F.2d 8, 12-13 (2d Cir. 1989); *see also Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). In this regard, Fed. R. Civ. P. 9(b) serves three purposes: "to provide a defendant with fair notice of a plaintiff's claim, to safeguard a defendant's reputation from improvident charges of wrongdoing, and to protect a defendant against the institution of a strike suit." *O'Brien v. Nat'l Prop. Analysts Partners*, 936 F.2d 674, 676 (2d Cir. 1991); *see also Ross v. Bolton*, 904 F.2d 819, 823 (2d Cir. 1990).

27. Conclusory allegations of fraudulent intent are insufficient to support an inference that the defendant acted with the requisite fraudulent intent. *Rombach v. Chang*, 355 F.3d 164, 176 (2d Cir. 2004); *see also Honeyman v. Hoyt (In re Carter–Wallace, Inc. Sec. Litig.)*, 220 F.3d 36, 40 (2d Cir. 2000) ("[C]onclusory allegations do not satisfy the pleading requirements of Rule 9(b).") (internal quotations omitted). Indeed, the tenet that a court must accept a complaint's allegations as true is inapplicable to conclusory statements. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Twombly*, 550 U.S. at 554-55 (holding courts are "not bound to accept as true a legal conclusion couched as a factual allegation") (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

B. Plaintiffs' Fraud Allegations Are Conclusory.

28. Plaintiffs assert two theories in the Complaint by which they claim Debtors engaged in fraudulent conduct. First, Plaintiffs argue that Debtors had a duty to disclose the alleged defects in the Consumer Impalas to Plaintiffs and the members of the Putative Class. (Compl. ¶¶ 47-48.) Second, Plaintiffs argue that Debtors had a duty to list Plaintiffs as scheduled creditors. (*Id.* ¶ 44.) The lynchpin of both of these fraud allegations is Plaintiffs'

averment that because GM issued a Technical Service Bulletin giving notification of a defect in different Impalas – the Police Package Impalas (Compl. ¶¶ 4-9) – GM must have known about the rear wheel spindle rod defect in the Consumer Impalas, and "[t]here are no material differences between the rear wheel spindle rods installed and equipped in Police Package Impalas and the rear wheel spindle rods installed and equipped in [Consumer Impalas]." (*Id.* ¶ 10 (emphasis added).)

29. As a preliminary matter, even though a court is to take the well-pled allegations in a complaint as true for a motion to dismiss, "legal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness." *In re Spiegel, Inc.*, 354 B.R. 51, 56 (Bankr. S.D.N.Y. 2006) (quoting *Mason v. Am. Tobacco Co.*, 346 F.3d 36, 39 (2d Cir. 2003)), *aff'd*, No. 03-11540, 2007 WL 656902 (S.D.N.Y. Feb. 28, 2007), *aff'd*, 269 F. App'x 56 (2d Cir. 2008), *cert. denied*, 555 U.S. 825 (2008). Accordingly, this Court is under no obligation to accept Plaintiffs' allegation that GM must have known about the alleged defect in the Consumer Impalas. *See In re Spiegel, Inc.*, 354 B.R. at 56 (refusing to accept as true allegation that debtor knew about plaintiffs' claims because debtor was aware of similar suit filed by someone else).

30. Moreover, such allegation is insufficient to infer fraudulent intent on behalf of Debtors. Presumably, Plaintiffs hope that the existence of this repair program for the Police Package Impalas will cause the Court to infer that Debtors knew of the alleged defect in the Consumer Impalas and therefore owed a duty of disclosure. But this is exactly the type of conclusory allegation from which a court may not infer fraudulent intent. *See Rombach*, 355 F.3d at 176; *In re Carter–Wallace, Inc. Sec. Litig.*, 220 F.3d at 40. Plaintiffs have not alleged any facts showing that Debtors actually knew of the alleged defect in Plaintiffs' vehicles; rather,

Plaintiffs ask the Court to draw a series of inferences to conclude that Debtors possessed the requisite intent for fraud —*i.e.*, that the rear wheel spindle rods in Police Package Impalas are the same as those in other Impalas and that Debtors, being aware of this similarity, knowingly failed to disclose to Plaintiffs that their vehicles were defective.

31. This Court has previously rejected similar requests by plaintiffs to infer that a debtor knew about other possible creditors based upon the knowledge of similar claims. In *In re Spiegel, Inc.*, Judge Lifland rejected the plaintiffs' contention that the debtors were aware of the plaintiffs' claims against the estate because the plaintiffs' causes of action were similar to those pled by other parties. 354 B.R. at 57. Judge Lifland rejected this contention and dismissed the complaint, because ***the debtors "are not required to employ a crystal ball . . . when one complaint is filed to determine whether any other similar claims exist***." *Id.* (emphasis added). Accordingly, far from "alleg[ing] facts which give rise to a strong inference that the defendants possessed the requisite fraudulent intent," *see Cosmas*, 886 F.2d at 12-13, Plaintiffs have failed to plead this fraud claim with particularity.

C. Plaintiffs' Fraud Allegations Fail to the Extent They Allege Fraud Against Plaintiffs, as Opposed to the Court.

32. In addition, Plaintiffs' allegation that Debtors failed to disclose *to Plaintiffs* the alleged defects in the Consumer Impalas fails because Plaintiffs have made no showing that Debtors committed fraud *on the Court*. *See Longardner*, 855 F.2d at 461-62 (evidence of debtor's intent to defraud court is necessary for court to revoke confirmation order pursuant to section 1144); *Tenn–Fla Partners v. First Union Nat'l Bank*, 229 B.R. 720, 729-30 (W.D. Tenn. 1999), *aff'd*, 226 F.3d 746 (6th Cir. 2000) ("Section 1144 allows a court to revoke the order 'if and only if such order was procured by fraud.' For the order of confirmation to be revocable, therefore, fraud must be directed at the court.") (quoting 11 U.S.C. § 1144). In this

regard, Plaintiffs state only that "[w]hether GM had or has a duty to disclose the defect in the Consumer Impala rear wheel spindle rods to Plaintiffs and the other members of the Class" is a "[q]uestion[] of law and fact . . . common to the Class," (Compl. ¶ 38), and do not even attempt to show with respect to this claim that the alleged fraud was used to procure the Confirmation Order.

D. Plaintiffs' Fraud Allegations Fail Because Debtors Had No Statutory Duty to Disclose Any Alleged Defects.

33. Plaintiffs also argue that the Bankruptcy Code imposes certain statutory duties on Debtors pursuant to which Debtors owed Plaintiffs a duty to disclose the alleged defects. Plaintiffs aver that, as debtors in possession, Debtors owed fiduciary duties to Plaintiffs pursuant to 11 U.S.C. § 1107(a), and therefore were required to disclose the alleged defects to Plaintiffs. (Compl. ¶¶ 1, 14, 38, 46-48, 52.) As before, Plaintiffs base their claim entirely on Debtors' attempt to remedy a defect in Police Package Impalas, praying the Court infer from this good faith action that Debtors knowingly and fraudulently failed to provide notice to Plaintiffs through the bankruptcy process. (*Id.* ¶¶ 4-10.) The fact that Debtors assumed fiduciary duties as debtors in possession pursuant to section 1107(a) has no bearing on Plaintiffs' argument: Plaintiffs have made no showing that Debtors *knew or could have known* of the alleged defects in Plaintiffs' vehicles. The fiduciary duties of a debtor in possession do not require disclosure of alleged defects that are unknown to the fiduciary. *See Tenn–Fla Partners*, 229 B.R. at 734 (fiduciary duties owed by debtor in possession include duty to disclose all *known* material information); *see also In re Spiegel, Inc.*, 354 B.R. at 57. Plaintiffs have, therefore, failed to state this claim with particularity as required by Fed. R. Civ. P. 9(b).

E. Failure to List Creditors on Schedules or Disclosure Statements, Without More, Is Inadequate to Maintain a Claim for Fraudulent Intent.

34. Plaintiffs further assert that Debtors knowingly and fraudulently failed to disclose the existence of Plaintiffs' claims on their bankruptcy schedules and disclosure statement. (*See* Compl. ¶¶ 1, 12, 38, 43, 46.) Courts have held that failure to list a creditor's claim on schedules or a disclosure statement, without an additional showing of fraud, is not sufficient evidence of fraud to justify revoking a confirmation order. *See Longardner*, 855 F.2d at 460-62 (creditor could not sustain a claim under section 1144 where creditor argued that debtor's disclosure statements were "grossly inaccurate and inconsistent" but did not make a showing of fraudulent intent on the part of debtor); *In re D.F.D., Inc.*, 43 B.R. 393, 395 (Bankr. E.D. Pa. 1984) (plaintiff's allegations that debtor deliberately omitted plaintiff's claim from bankruptcy schedules were insufficient to sustain claim under section 1144, where plaintiff failed to offer evidence of fraud at hearing).

F. Plaintiffs Have Resorted to Alleging Fraud Against Debtors in an Improper Attempt to Extract Settlement.

35. Finally, the policies underlying Fed. R. Civ. P. 9(b) – particularly that of discouraging "strike suits," *see O'Brien*, 936 F.2d at 676 – would be frustrated were the Court to allow Plaintiffs to continue their shameless attempt to extract a settlement from Debtors. The only reason Plaintiffs have even attempted to assert fraud is because doing so is their only avenue of relief against Debtors under section 1144, as their alleged previous attempts to shake down Debtors have failed. (Compl. ¶¶ 16-20.)

36. For these reasons, Plaintiffs have failed to plead their fraud claims under section 1144 with particularity as required by Fed. R. Civ. P. 9(b), and accordingly, the Complaint should be dismissed.

III. <u>The Complaint Is Barred by the Doctrine of Equitable Mootness</u>.

37. Plaintiffs' section 1144 claim is also barred by the doctrine of equitable mootness. Courts refuse to revoke confirmation orders where they cannot reinstate the *status quo ante* or protect innocent creditors and third parties that relied on the order. *See, e.g.*, *Salsberg v. Trico Marine Servs., Inc. (In re Trico Marine Servs., Inc.)*, 343 B.R. 68, 72-74 (Bankr. S.D.N.Y. 2006) (debtor's issuance under plan of new common stock to noteholders and additional sale of several million shares in reliance on plan precluded restoration of *status quo ante*, and therefore, relief sought by plaintiffs under section 1144); *In re Servico, Inc.*, 161 B.R. 297, 301-02 (S.D. Fla. 1993) (declining to revoke confirmation order where millions of shares of stock had been issued under plan and actively traded); *In re Circle K Corp.*, 171 B.R. at 669-70 (debtors made substantial progress in implementing confirmed chapter 11 plan, including disbursement of millions of dollars to claimants, and thus bankruptcy court could not fashion appropriate protective relief were it to revoke confirmation order).

38. For instance, in *In re Delta Air Lines, Inc.*, Judge Hardin dismissed an action under the equitable mootness doctrine where thousands of transactions involving billions of dollars had been negotiated and executed based upon the debtors' joint plan. 386 B.R. at 534-35. Judge Hardin described these transactions as a "vast omelette which cannot be unscrambled," as the court could not possibly protect the countless numbers of parties who had acquired rights in good faith reliance on the confirmation order. *Id.* at 535.

39. Similarly, here, because the Putative Class contains an untold number of potential members with unknown claim amounts, revocation of the Confirmation Order would mean attempting to restore the *status quo ante* after Debtors have distributed millions of publicly-traded shares and warrants to satisfy billions of dollars of allowed claims to thousands of creditors, each of whom relied on the Confirmation Order. Because such a task could not be

done without prejudicing the rights of creditors who relied on the Plan, Plaintiffs' effort to revoke the Confirmation Order should be denied.

IV. Plaintiffs' Claims Are Time Barred and They Have Not Shown Excusable Neglect.

40. By their own admission, Plaintiffs did not attempt to file claims against Debtors until almost two years after the Bar Date had passed. (Compl. ¶ 17.) Nor have Plaintiffs made even a bare attempt at carrying their burden to show excusable neglect under Bankruptcy Rule 9006(b)(1), discussed below. Instead, Plaintiffs pray that the Court take the extraordinary step of revoking the Confirmation Order so that they need not face the consequences of their indolence. Because Plaintiffs have made no showing of excusable neglect, however, their claims are foreclosed by the Bar Date Order. *Cf. Nute v. Pilgrim's Pride Corp.*, No. 07-0081, 2010 WL 2521724, at *2-3 (W.D. La. June 16, 2010) (granting Pilgrim's Pride Corporation's motion to dismiss claims where claimant failed to file proof of claim before applicable bar date).

41. Bankruptcy Rule 9006(b)(1) provides a means by which a court in its discretion may allow a claimant to file a late proof of claim: "on motion made after the expiration of the specified period [the court may] permit the act to be done where the failure to act was the result of excusable neglect." Fed. R. Bankr. P. 9006(b)(1). The Supreme Court, in interpreting the term "excusable neglect," held that the term "neglect" in its ordinary sense "encompasses both simple, faultless omissions to act and more commonly, omissions caused by carelessness." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380, 388 (1993). The determination of whether a claimant's neglect of a deadline is *excusable*, according to *Pioneer*, however, is an equitable determination in which a court should consider all relevant circumstances surrounding the claimant's omission, such as: "the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the

movant acted in good faith." *Id.* at 395. In applying the *Pioneer* factors to determine whether a late-filed proof of claim was the result of "excusable neglect," the Second Circuit has taken a "hard line" approach that does not give the four factors equal weight. *See In re Enron Corp.*, 419 F.3d 115, 122-24 (2d Cir. 2005); *In re Lehman Bros. Holdings Inc.*, 433 B.R. 113, 119-20 (Bankr. S.D.N.Y. 2010), *aff'd*, 455 B.R. 137 (S.D.N.Y. 2011). The third *Pioneer* factor—the reason for the delay in filing—is the most critical. *In re Enron Corp.*, 419 F.3d at 122-24.

42. The burden of establishing excusable neglect falls squarely on Plaintiffs, not Debtors or the Court. *Id.* at 121 ("The burden of proving excusable neglect lies with the late-claimant."). Despite this, Plaintiffs make no mention of Bankruptcy Rule 9006 nor "excusable neglect" in the Complaint. Instead, Plaintiffs merely state that Debtors failed to disclose the existence of allegedly defective rear wheel spindle rods in the Consumer Impalas and failed to disclose to Plaintiffs and the members of the Putative Class the nature of their claims against the estates. (Compl. ¶¶ 3-15.) Plaintiffs contend that, as a result of this alleged failure to notify them of their claims against Debtors, Plaintiffs did not learn that their cars were defective until July 2011, almost two years after the Bar Date, ***when an unrelated lawsuit was commenced against New GM in the Eastern District of Michigan***. (Compl. ¶ 16.) Notably, however, nowhere in the Complaint do Plaintiffs state at what time their vehicles demonstrated problems or required allegedly "premature" tire replacement. (*See generally id.*) Rather, despite bearing the burden to explain why they missed the Bar Date, Plaintiffs ask the Court to draw the conclusion that Plaintiffs' indolence was due to a lack of notice on the part of Debtors from Debtors' good faith efforts to remedy a defect in Police Package Impalas. Such an allegation further fails because Debtors are not obligated to provide every unknown claimant with a notice that sets forth the bases for every potential claim they could have against the estates. *See In re*

Waterman S.S. Corp., 157 B.R. 220, 221 (S.D.N.Y. 1993) ("[T]he debtor is not required to search out each conceivable or possible creditor and urge the creditor to file a proof of claim."). Plaintiffs have failed to allege sufficient facts showing that their failure to timely file proofs of claim was the result of Debtors' conduct and not simply sloth on the part of Plaintiffs, who very well should have known of the existence of their claims prior to the Bar Date. Plaintiffs therefore have not carried their burden with respect to the third and most important *Pioneer* factor—the reason for their delay in filing. *See In re Enron Corp.*, 419 F.3d at 122-24.

43. Nor do Plaintiffs make even a half-hearted attempt to show that the other *Pioneer* factors – "the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings . . . and whether the movant acted in good faith" – are met in this case. *Pioneer Inv. Servs. Co.*, 507 U.S. at 395. This omission on the part of Plaintiffs is particularly noteworthy given that Plaintiffs are essentially trying to "back door" their late claims via a complaint under section 1144. The relief requested by Plaintiffs under section 1144 implicates two of the *Pioneer* factors – prejudice to the debtor and the potential impact of the delay on judicial proceedings – to a greater extent than the typical motion to allow a late-filed claim. Here, revocation of the Confirmation Order would cause severe prejudice to the numerous creditors and innocent third parties that have received distributions under the Plan. Furthermore, Plaintiffs' failure to explain in the Complaint whether their vehicles broke or required service after the Bar Date goes to the final *Pioneer* factor—whether the movant acted in good faith. It is Plaintiffs' burden—and only Plaintiffs' burden—to prove that their failure to comply with the Bar Date was not the result of bad faith. *In re Enron Corp.*, 419 F.3d at 121. Yet, despite knowing the approximate purchase dates for two of the allegedly defective vehicles and the approximate mileages at which the rear wheels had to be replaced for *all three* vehicles

owned by Plaintiffs, Plaintiffs cannot bring themselves to provide Debtors and the Court with the approximate dates on which their vehicles required such service. (Compl. ¶¶ 25–27.) Plaintiffs have failed to show that their indolence was not the result of bad faith, and therefore have failed to carry their burden with respect to *any* of the *Pioneer* excusable neglect factors. Accordingly, Plaintiffs' claims are foreclosed by the Bar Date Order.

V. The Class Allegations Should Be Stricken.

Even if this Court finds that the Complaint should not be dismissed for the reasons above, it should strike the class allegations therein.

A. Application of Bankruptcy Rule 7023 to a Class Proof of Claim Is Discretionary and Should Be Denied.

44. Through the Complaint, Plaintiffs seek to assert a claim on behalf of a Putative Class (the "**Proposed Putative Class Claim**"). There is no absolute right to file a class proof of claim under the Bankruptcy Code. *See In re Bally Total Fitness of Greater N.Y., Inc.*, 402 B.R. 616, 619 (Bankr. S.D.N.Y.), *aff'd*, 411 B.R. 142 (S.D.N.Y. 2009); *In re Sacred Heart Hosp.*, 177 B.R. 16, 22 (Bankr. E.D. Pa. 1995) (noting that class action device may be utilized in appropriate contexts, but should be used sparingly). Application of Bankruptcy Rule 7023 to class proofs of claim[12] lies within the ***sound discretion*** of the court.[13] In determining whether to

[12] As stated, through the Complaint, Plaintiffs seek to file a claim against Debtors' estates on behalf of a putative class. (*See* Compl. at 3 n.1 ("[A] motion for late-filed claim will be filed in due course.").) But Part VII of the Bankruptcy Rules, which includes Bankruptcy Rule 7023, only applies to adversary proceedings. *See* Fed. R. Bankr. P. 7001. Bankruptcy Rule 9014, however, adopts certain of the rules from Part VII for application in contested matters. Bankruptcy Rule 7023 is not among them. *See* Fed. R. Bankr. P. 9014. Thus, plaintiffs seeking the application of Bankruptcy Rule 7023 (and by implication, Rule 23) to assert a class proof of claim are required to *move* under Bankruptcy Rule 9014 for a court to apply "the rules in Part VII." Fed. R. Bankr. P. 9014; *accord In re Woodward & Lothrop Holdings, Inc.*, 205 B.R. 365, 369 (Bankr. S.D.N.Y. 1997) (stating that "[f]or a Class Claim to proceed . . . the bankruptcy court must direct Rule 23 to apply"); *see also Reid v. White Motor Corp.*, 886 F.2d 1462, 1470 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990); *In re Charter Co.*, 876 F.2d 866, 876 (11th Cir. 1989), *cert. dismissed*, 496 U.S. 944 (1990) (holding that proof of claim filed on behalf of class of claimants is valid, but that "does not mean that the appellants may proceed, without more, to represent a class in their bankruptcy action. Under the bankruptcy posture of this case, Bankruptcy Rule 7023 and class action procedures are applied at the discretion of the bankruptcy judge.").

exercise discretion and permit a class proof of claim, courts primarily look at (i) whether the class claimant moved to extend the application of Fed. R. Civ. P. 23 to its proof of claim; (ii) whether the benefits derived from the use of the class claim device are consistent with the goals of bankruptcy; and (iii) whether the claims which the proponent seeks to certify fulfill the requirements of Fed. R. Civ. P. 23. *See In re Bally Total Fitness*, 402 B.R. at 620; *In re Woodward*, 205 B.R. at 369; *see also In re Ephedra Prods. Liab. Litig.*, 329 B.R. 1, 5 (S.D.N.Y. 2005) ("In exercising that discretion, the bankruptcy court first decides under Rule 9014 whether or not to apply Rule 23, Fed. R. Civ. P., to a 'contested matter,' *i.e.*, the purported class claim; if and only if the court decides to apply Rule 23, does it then determine whether the requirements of Rule 23 are satisfied.").

45. When evaluating these requirements, courts have considered a variety of factors, including, *inter alia*:

- ***whether the debtor intends to liquidate***, *see In re Thomson*, 133 B.R. at 41 (noting that context of liquidating chapter 11 plan supports rejection of class proofs of claim);
- ***whether or not a purported class was previously certified***, *see, e.g.*, *In re Bally Total Fitness*, 402 B.R. at 620 (refusing to allow class proof of claim where class was not certified prepetition); *In re Sacred Heart Hosp.*, 177 B.R. at 23 (classes certified prepetition are the "best candidates" for a class proof of claim);
- ***whether the class claim device will result in "increased efficiency, compensation to injured parties, and deterrence of future wrongdoing by the debtor,"*** *see In re*

[13] *See, e.g.*, *In re Bally Total Fitness*, 402 B.R. at 620 ("[C]ourts may exercise their discretion to extend Rule 23 to allow the filing of a class proof of claim."); *In re Thomson McKinnon Sec. Inc.*, 133 B.R. 39, 40 (Bankr. S.D.N.Y. 1991) (Bankruptcy Rule 7023 and Rule 23 "give the court substantial discretion to consider the benefits and costs of class litigation") (citing *In re Am. Reserve Corp.*, 840 F.2d 487, 488 (7th Cir. 1988)), *aff'd*, 141 B.R. 31 (S.D.N.Y. 1992); *accord In re United Cos. Fin. Corp.*, 277 B.R. 596, 601 (Bankr. D. Del. 2002) ("Whether to certify a class claim is within the discretion of the bankruptcy court."); *In re Kaiser Group Int'l, Inc.*, 278 B.R. 58, 62 (Bankr. D. Del. 2002) (same); *Reid*, 886 F.2d at 1469-70 (stating that "Rule 9014 authorizes bankruptcy judges, within their discretion, to invoke Rule 7023, and thereby Fed. R. Civ. P. 23, the class action rule, to 'any stage' in contested matters, including, class proofs of claim."); *In re Charter Co.*, 876 F.2d at 876 ("Under the bankruptcy posture of this case Bankruptcy Rule 7023 and class action procedures are applied at the discretion of the bankruptcy judge.").

Woodward, 205 B.R. at 376 (internal citations omitted); *accord In re Thomson*, 133 B.R. at 40 ("Manifestly, the bankruptcy court's control of the debtor's affairs might make class certification unnecessary.");

- ***whether the entertainment of class claims would subject the administration of the bankruptcy case to undue delay***, *see, e.g.*, *In re Ephedra Prods. Liab. Litig.*, 329 B.R. at 5 ("[A] court sitting in bankruptcy may decline to apply Rule 23 if doing so would . . . 'gum up the works' of distributing the estate."); and

- ***whether or not adequate notice of the bar date was afforded to potential class members***, *see In re Jamesway Corp.*, No. 95 B 44821 (JLG), 1997 WL 327105, at *10 (Bankr. S.D.N.Y. June 12, 1997) (refusing to certify class where adequate notice of bar date was afforded to potential class members, and thus to certify class would be "unwarranted, unfair, and possibly violate the due process rights of other creditors") (internal quotations omitted).

"If application of Bankruptcy Rule 7023 is rejected by the bankruptcy court in an exercise of discretion . . . the result will be that class claims will be denied and expunged." *In re Thomson*, 133 B.R. at 40-41. As set forth below, the Court should exercise its discretion to reject the application of Bankruptcy Rule 7023 and to strike the allegations regarding the Putative Class.[14]

1. Allowing the Proposed Putative Class Claim to Proceed as a Class Action Will Not Be Effective or Efficient.

46. For a class action to proceed, "the benefits that generally support class certification in civil litigation must be realizable in the bankruptcy case." *In re Woodward*, 205 B.R. at 369 (citing *In re Mortg. & Realty Trust*, 125 B.R. 575, 580 (Bankr. C.D. Cal. 1991)). In this case, neither the Putative Class nor the Court would benefit from recognizing a class proof of claim and allowing a class action to proceed.

47. Allowing the Proposed Putative Class Claim to proceed as a class claim would not be effective or efficient, especially at this late stage of these Chapter 11 cases. *In re*

[14] In the event this Court determines to apply Fed. R. Civ. P. 23 to the Proposed Putative Class Claim, Debtors reserve any and all rights to seek class-certification discovery to test Plaintiffs' sweeping, unsubstantiated representations about the nature of the class members' allegations.

Ephedra Prods. Liab. Litig., 329 B.R. at 5 ("[A] court sitting in bankruptcy may decline to apply Rule 23 if doing so would . . . 'gum up the works' of distributing the estate."). Indeed, ***MLC has been unable to find a single bankruptcy case within the Second Circuit in which a class claim was allowed after confirmation.*** *Cf. In re Woodward*, 205 B.R. at 370 (noting that "[i]f a claimant waits until a post confirmation claim objection to first bring the issue to a head, serious prejudice may result to the other creditors and the estate"). Plaintiffs' counsel has failed to timely file their Motion for class certification, even though they are required to do so as soon as practicable. (*Compare* Tr. of Nov. 22, 2011 Hr'g at 9:7-8 (Ex. A) ("[W]e, frankly, never seriously considered filing a motion for class certification.") *with In re Musicland Holding Corp.*, 362 B.R. 644, 654 (Bankr. S.D. N.Y. 2007) (holding motion seeking application of Rule 23 "should be filed as soon as practicable" and should be denied if it comes so late as to prejudice any party).) Further, Plaintiffs' class allegations here would most certainly "gum up the works" as Plaintiffs have represented to the Court that Plaintiffs would seek costly and time-consuming class discovery ***before*** filing their motion for class certification. (*See* Tr. of Nov. 22, 2011 Hr'g at 19:8-16 (Ex. A).)

48. Further, in general, the Bankruptcy Code and Bankruptcy Rules can provide the same benefits and serve the same purposes as class action procedures do in normal civil litigation. *See id.* at 376 ("A bankruptcy proceeding offers the same procedural advantages as the class action because it concentrates all the disputes in one forum."); 6 Herbert Newberg & Alba Conte, Newberg on Class Actions Ch. 20 (Class Actions Under the Bankruptcy Laws) § 20:1 at 265 (4th ed. 2002) (commenting that "bankruptcy proceedings are already capable of handling group claims, which operate essentially as statutory class actions"); *see also In re Standard Metals Corp.*, 817 F.2d 625, 632 (10th Cir. 1987), *reh'g granted*, 839 F.2d 1383 (10th

Cir. 1987), *cert. dismissed*, 488 U.S. 881 (1988). Although members of the Putative Class can no longer file their claims because the Bar Date has passed, as described above, the General Motors bankruptcy was not a secret, and the Putative Class had ample notice of the Bar Date and opportunity to take advantage of these bankruptcy procedures. Notwithstanding the chance to do so, to MLC's knowledge, none of the members of the Putative Class filed a claim against Debtors.

49. The fact that Debtors are liquidating lends further support for denying allowance of a class proof of claim. *See In re Thomson*, 133 B.R. at 41. "The costs and delay associated with class actions are not compatible with liquidation cases where the need for expeditious administration of assets is paramount so that all creditors, including those not within the class, may receive a distribution as soon as possible." *Id.* "Creditors who are not involved in class litigation should not have to wait for the payment of their distributive liquidated share while the class action grinds on." *Id.* Because of the limited assets of the estates, the magnitude of the Proposed Putative Class Claim, and without knowing the identity or merit of the claims held by the members of the Putative Class, should the Plan be revoked, another plan could not be confirmed as long as the Proposed Putative Class Claim is extant and unliquidated absent estimation proceedings. All of MLC's other creditors should not be forced to wait for payment of their distributions while the Proposed Putative Class Claim is litigated and the estates' remaining assets are depleted.

50. The facts of the instant case are similar to the facts of *In re Woodward*, where the court exercised its discretion to deny the class claim, finding that "the class claim will not deter an insolvent, non-operating debtor's management or shareholders, or induce them to police future conduct [where] the debtor has . . . a liquidating plan that wipes out equity. The

managers have moved on to other jobs – the debtor has closed its doors – and the prosecution of the class action will [ ] not affect how they act in the future." 205 B.R. at 376. As this Court previously noted when disallowing a claim filed on behalf of a putative class, "the deterrence class actions often provide would be of little utility in a case like this one, where [MLC] is liquidating, and any punishment for any wrongful [MLC] conduct would be borne by [MLC's] innocent creditors." *See In re Motors Liquidation Co.*, 447 B.R. 150, 166 (Bankr. S.D.N.Y. 2011) (Gerber, J.).

2. The Putative Class Claim Was Not Certified Prior to the Commencement Date.

51. A number of courts have held that class proofs of claim may be inappropriate where a class was not certified prepetition in a non-bankruptcy forum. *See, e.g.*, *In re Trebol Motors Distrib. Corp.*, 220 B.R. 500, 502 (B.A.P. 1st Cir. 1998); *In re Sacred Heart Hosp.*, 177 B.R. at 23; *In re Ret. Builders, Inc.*, 96 B.R. 390, 391 (Bankr. S.D. Fla. 1988); *In re Ephedra Prods. Liab. Litig.*, 329 B.R. at 5. The court in *Sacred Heart Hospital* held that use of the class proof of claim device in bankruptcy cases may be appropriate in certain contexts, but "such contexts should be chosen most sparingly." 177 B.R. at 22. Specifically, the *Sacred Heart Hospital* court noted that cases where (i) a class has been certified prepetition by a nonbankruptcy court, or (ii) a class action has been filed and allowed to proceed as a class action in a nonbankruptcy forum for a considerable time prepetition, may present appropriate contexts for recognizing a class proof of claim. *See id.* ***However, MLC has been unable to find a single bankruptcy case within the Second Circuit in which a disputed pre-certification class claim was allowed.***

52. The Putative Class is not certified. As this Court has previously held, lack of prepetition class certification weighs against allowance of a class claim. *See In re Motors*

Liquidation Co., 447 B.R. at 166. For this reason alone, the Proposed Putative Class Claim should be disallowed and expunged.

3. Adequate Notice of These Chapter 11 Cases and the Bar Date Was Provided to the Putative Class.

53. One of the principal goals of the Bankruptcy Code is to ensure that creditors of equal rank receive equal treatment in the distribution of a debtor's assets. The Bankruptcy Code and the Bankruptcy Rules, therefore, require creditors to file proofs of claim before a bar date. *See* 11 U.S.C. § 502(b)(9); Fed. R. Bankr. P. 3003(c)(3). Regardless of how worthy their claims may be, claimants who fail to file before an applicable bar date "shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution." Fed. R. Bankr. P. 3003(c)(2). These same procedural hurdles must be met by all creditors.

54. In determining whether a class proof of claim should be allowed, courts consider whether adequate notice of the bar date was afforded to potential class members. *See In re Jamesway Corp.*, 1997 WL 327105, at *8. As that court stated:

> The proper inquiry is whether [the debtor] acted reasonably in selecting means likely to inform persons affected by the Bar Date and these chapter 11 proceedings, not whether each claimant actually received notice. . . . As to those plaintiffs who might not have received actual notice of the Bar Date, we find that by complying with the terms of the Bar Date Order, mailing a Claim Package to every known creditor and publishing notice of the Bar Date, [Debtor's] actions satisfy due process.

Id. (internal citations omitted).

55. In this case, the members in the Putative Class received proper notice of Debtors' chapter 11 cases and the Bar Date in accordance with the provisions of the Bar Date Order. At great expense to their estates, Debtors published notice of the Bar Date nationwide in *The Wall Street Journal* (Global Edition – North America, Europe, and Asia), *The New York Times* (National), *USA Today* (Monday through Thursday, National), *Detroit Free Press, Detroit*

News, LeJournal de Montreal (French), *Montreal Gazette* (English), *The Globe and Mail* (Canada), and *The National Post*. (*See* Bar Date Order at 7.) Providing individual notice to all owners of General Motors Corporation vehicles would be impossible or, at minimum, prohibitively expensive, as many persons resell their vehicles and Debtors would have no way to know the identities of the current owners of their products. As this Court has previously held, providing notice of Debtors' bankruptcy cases and the Bar Date by publication, however, constituted a viable alternative to the impracticability, or perhaps even impossibility, of tracking down and providing individual notice to each of the consumer purchasers of Debtors' vehicles. *See In re Motors Liquidation Co.*, 447 B.R. at 166 ("The publication [in these Chapter 11 cases] was by the traditional means, and was well suited to providing notice to creditors of all of the usual types throughout the world . . . ."). Additionally, in this case in particular, Debtors would be hard-pressed to find a handful of Americans who were not aware of the chapter 11 filing of General Motors Corporation.

B. The Putative Class Cannot Satisfy the Requirements of Rule 23.

56. Even if this Court were to permit Plaintiffs to file a class claim, the Putative Class would not satisfy Fed. R. Civ. P. 23. To proceed as a class claim, the Putative Class must meet all four requirements of subsection (a) of Fed. R. Civ. P. 23, as made applicable to bankruptcy cases by Bankruptcy Rule 7023. *See Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002); *see also In re Woodward*, 205 B.R. at 371. Fed. R. Civ. P. 23(a) provides:

> Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all 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;

> (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.

Fed. R. Civ. P. 23(a). In addition, to proceed as a class claim, the Putative Class must satisfy subsections (b)(1) and (b)(2) of Fed. R. Civ. P. 23, as the Putative Class seeks certification as a so-called "limited fund" class as well as injunctive relief. Fed. R. Civ. P. 23(b)(1)(B) provides in relevant part:

> prosecuting separate actions by or against individual class members would create risk of: . . . 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.

Fed. R. Civ. P. 23(b)(1)(B).

57. Rule 23(b)(2) provides in relevant part:

> the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

Fed. R. Civ. P. 23(b)(2).

58. Further, since the Complaint avers that a "Class Action Complaint under Civil Rule (b)(3) will be filed if and when permissible," (Compl. at 3 n.1), the Putative Class must meet the requirements of Rule 23(b)(3), which provides that the court must find:

> that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Id. 23(b)(3).

1. Neither "Commonality" nor "Typicality" Can Be Established by Plaintiffs.

59. To proceed as a class claim, Fed. R. Civ. P. 23(a)(2) and Fed. R. Civ. P. 23(a)(3) require that the putative class representative demonstrate commonality and typicality. To establish typicality, plaintiffs must show that they are situated similarly to class members.[15] The Court cannot "presume" that Plaintiffs' claims are typical of other claims. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158, 160 (1982) ("[A]ctual, not presumed, conformance with Rule 23(a) remains, however, indispensable.").

60. Plaintiffs' claims are not typical of those alleged on behalf of the Putative Class. Each Plaintiff's claim allegedly arises from premature wear to the Consumer Impalas that Plaintiffs claim to have purchased and operated, purportedly caused by defective suspensions. Yet, the Putative Class would include plaintiffs who followed differing maintenance programs, operated their vehicles differently, and purchased vehicles under a variety of factual circumstances. *See*, *e.g.*, *Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp.*, 993 F.2d 11, 14 (2d Cir. 1993) (typicality defeated by plaintiff's broad definition of class as all individuals who signed similar automobile lease agreements), *cert. denied*, 510 U.S. 959 (1993).

2. Plaintiffs Are Not Adequate Representatives.

61. To establish that they will adequately represent the proposed class, Plaintiffs must have common interests with the unnamed members of the class and it must appear that Plaintiffs will vigorously prosecute the interests of the class through qualified

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[15] *See Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (typicality "requires that the claims of the class representative be typical of those of the class, and 'is satisfied when each class member's claim arises from the same course of events, and each member makes similar arguments to prove the defendant's liability'") (quoting *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992), *cert. dismissed*, 506 U.S. 1088 (1993)); *see, e.g.*, *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 341 (7th Cir. 1997) ("The typicality and commonality requirements of the Federal Rules ensure that only those plaintiffs or defendants who can advance the same factual and legal arguments may be grouped together as a class.").

counsel. *See, e.g.*, *Edwards v. McCormick*, 196 F.R.D. 487, 495 (S.D. Ohio 2000). However, without evidence of who actually would comprise the class, a court cannot evaluate whether Plaintiffs have a common interest with the unnamed class members, and any determination of adequate representation would be purely speculative. *Id.* Furthermore, the required elements that Plaintiffs have "claims or defenses typical of the class" and that they can "adequately represent and protect the interests of other members of the class" are intertwined: "to be an adequate representative, plaintiff must show that his claims are typical of the claims of the class." *See, e.g.*, *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 669 (1993) ("[T]o be an adequate representative, plaintiff must show that his claims are typical of the claims of the class.") (quoting *Stephens v. Montgomery Ward*, 193 Cal. App. 3d 411, 422 (1987)). As described above, there can be no "typical" plaintiff and thus no adequate representative for any of the Putative Class.

62. Moreover, the burden to move expeditiously for class certification and recognition within a bankruptcy case, in compliance with Fed. R. Civ. P. 23(c)(1), falls on the class representative and "the class representative's failure to move for class certification is a strong indication that he will not fairly and adequately represent the interests of the class." *In re Woodward*, 205 B.R. at 370. As Plaintiffs have failed to move expeditiously for certification – and even failed to notify the Court of their claims until six months after confirmation of the Plan – the Putative Class fails to meet the requirements of Fed. R. Civ. P. 23.

3. The Putative Class Is Not Maintainable Under Fed. R. Civ. P. 23(b)(1)(B).

63. A Rule 23(b)(1)(B) limited fund class action is utilized to prevent exhaustion of a defendant's resources by the first plaintiff who obtains a judgment, thereby leaving subsequent plaintiffs with no source of a recovery. *See Ortiz v. Fireboard Corp.*, 527 U.S. 815, 824 (1999). Classic models of a limited fund class action include claims against a set

corpus of funds, such as trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, or proceeds of a ship sale in a maritime accident. *See Doe v. Karadzic*, 192 F.R.D. 133, 139 (S.D.N.Y. 2000). Adopting a narrow, historically-based model, the Supreme Court has held that class actions under Fed. R. Civ. P. 23(b)(1)(B) are permitted in only narrowly prescribed circumstances and has identified three characteristics that are necessary to satisfy the limited fund rationale for a mandatory class action under Fed. R. Civ. P. 23(b)(1)(B). First, the fund available must be inadequate to satisfy all claims against it. In this regard, *evidence must be proffered* that "the totals of the aggregated liquidated claims and the fund availability for satisfying them, set definitely at the maximums, demonstrate the inadequacy of the fund to pay all of the claims." *See Ortiz*, 527 U.S. at 841. Second, the *whole* of the inadequate fund must be devoted to the claims. *Id.* Third, claimants pursuing a common theory of recovery must be treated *equitably* among themselves. *Id.*

64. As a preliminary matter, Plaintiffs have not alleged, and cannot allege, that there is a set aside fund available to MLC that is inadequate to satisfy the claims of the Putative Class. Where plaintiffs requesting certification under Fed. R. Civ. P. 23(b)(1)(B) fail to show that the purported fund available will be insufficient to satisfy the amount of aggregated unliquidated damages, a court cannot certify a class under a limited fund theory. *See City of St. Petersburg v. Total Containment, Inc.*, 265 F.R.D. 630, 647 (S.D. Fla. 2010) (declining to certify limited fund class under Fed. R. Civ. P. 23(b)(1) in products liability action where plaintiffs made no showing "regarding the amount of aggregated unliquidated damages sought or the availability of those funds"). Further, as to the second requirement, courts must look to all of the funds available to the defendant to satisfy claims when determining whether a limited fund indeed exists. *See Ortiz*, 527 U.S. at 852. Here, MLC has substantial assets that are being

distributed to other claimants; there is no "limited fund" available solely to the members of the Putative Class. Finally, since the Putative Class is defined as "[a]ll current and former owners or lessees of Consumer Impalas in the United States," (Compl. ¶ 33), the members of the Putative Class could not be treated equitably under the settlement because certain groups of claimants – including those whose vehicles have not yet, but will in the future, require tire replacement due to the alleged suspension defect – would be denied any recovery at all. *See Ortiz*, 527 U.S. at 864 (denying certification under Fed. R. Civ. P. 23(b)(1)(B) where claimants were not treated equitably because claimants who did not presently have an asbestos-related disease but were at risk of developing one in the future were denied any recovery at all).

4. The Injunctive Relief Sought by the Putative Class Under Fed. R. Civ. P. 23(b)(2) Is Mooted by Debtors' Liquidation.

65. The Putative Class cannot meet the requirements of Fed. R. Civ. P. 23(b)(2), as any claim for injunctive relief is mooted because MLC does not presently operate a business and is liquidating. *See In re Ephedra Prods. Liab. Litig*., 329 B.R. at 9 n.5 ("Insofar as the class claims seek injunctive relief against Twinlabs under Rule 23(b)(2), they are moot now that Twinlabs has gone out of business and existence."). Even though the Complaint is vague as to the type of injunctive relief sought by the Putative Class, (Compl. ¶¶ 35, 41), to the extent it requests recall or repair of the subject Consumer Impalas, such request is moot.

5. Numerous Individual Issues Predominate Over Any Common Questions.

66. Courts deny certification where "individualized issues of fact abound." *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 209 F.R.D. 323, 349 (S.D.N.Y. 2002); *see also In re Worldcom, Inc.*, 343 B.R. 412, 427 n.26 (Bankr. S.D.N.Y. 2006) ("[T]he need to evaluate factual differences along with divergent legal issues defeats the predominance requirement under Rule 23(b)(3).") (internal quotes and citations omitted). Courts have

specifically held that class actions alleging motor vehicle product liability claims and seeking economic loss damages should not be certified because individual questions of fact will predominate:

> [T]he need to establish injury and causation with respect to each class member will necessarily require a detailed factual inquiry including physical examination of each vehicle, an [sic] mind-boggling concept that is preclusively costly in both time and money. We will not certify a class that will result in an administrative process lasting for untold years, where individual threshold questions will overshadow common issues regarding Defendant's alleged conduct. . . . *Courts are hesitant to certify classes in litigation where individual use factors present themselves, such as cases involving allegedly defective motor vehicles and parts.* The administrative burdens are frequently too unmanageable for a class action to make sense in such cases.

Sanneman v. Chrysler Corp., 191 F.R.D. 441, 449 (E.D. Pa. 2000) (emphasis added).

67. The "preclusively costly" "administrative burdens" warned about in the *Sanneman* case would certainly be present in this action involving all Consumer Impalas in the United States. Here, the issue of whether a particular plaintiff's suspension problems were caused by the alleged defects would alone lead to a sharp divergence in the factual underpinnings of each claim. Such an individualized analysis is crucial in this case because the alleged defect purportedly manifests itself in premature wear to the vehicle's tires, thereby requiring tire replacement, which could result from a host of other causes.

68. Additionally, individualized factual inquiries would need to be performed to address the issues of if, or when, suspension failure occurs; the causation of any such suspension failure; whether the allegedly defective suspension is covered by warranty; whether the allegedly defective suspension was already repaired by MLC; whether the class member provided proper notice of the alleged breach of warranty to MLC; whether MLC and/or the consumer had knowledge of the alleged suspension defect; whether a class member's claims are

barred by the statute of limitations or other affirmative defenses such as comparative negligence (caused by, *inter alia*, the plaintiff's failure to properly maintain the vehicle or improper use of the vehicle); and what the appropriate remedy should be for any particular class member. This nonexclusive list provides a mere sampling of the myriad factual differences that will "overshadow common issues." *See Sanneman*, 191 F.R.D. at 449. When coupled with the variations in law relevant to determining the foregoing facts, Plaintiffs cannot meet their burden of satisfying the predominance requirement and, thus, the class fails to meet the requirements of Fed. R. Civ. P. 23.

69. Finally, determination of whether each class member suffered "actual injury" would require an individualized inquiry as to whether the suspensions and tires in each particular class member's vehicle had been broken, fixed, or replaced – an inquiry that would, once again, swamp any common issues and render class treatment wholly unmanageable. Accordingly, for the reasons stated above, the class allegations in the Complaint should be stricken.

NOTICE

70. Notice of this Motion has been provided to Plaintiffs, by and through their counsel of record, and parties in interest in accordance with the Sixth Amended Order Pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 1015(c) and 9007 Establishing Notice and Case Management Procedures, dated May 5, 2011 (ECF No. 10183). MLC submits that such notice is sufficient and no other or further notice need be provided.

71. No previous request for the relief sought herein has been made by MLC to this or any other Court.

CONCLUSION

WHEREFORE, MLC respectfully requests entry of an order granting the relief requested herein and such other and further relief as is just.

Dated: December 12, 2011
New York, New York

/s/ Joseph H. Smolinsky

Harvey R. Miller
Stephen Karotkin
Joseph H. Smolinsky
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New York, New York 10153
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Attorneys for Motors Liquidation Company and the Motors Liquidation Company GUC Trust

Exhibit A

(Excerpts of Transcript of November 22, 2011 Hearing)

1
2 UNITED STATES BANKRUPTCY COURT
3 SOUTHERN DISTRICT OF NEW YORK
4 Case No. 09-50026(REG)
5 Adv. Proc. Case No. 11-09409
6 -x
7 In the Matter of:
8
9 MOTORS LIQUIDATION COMPANY, et al.
10 f/k/a General Motors Corporation, et al.,
11
12 Debtors.
13
14 -x
15
16 United States Bankruptcy Court
17 One Bowling Green
18 New York, New York
19
20 November 22, 2011
21 10:00 AM
22
23 B E F O R E:
24 HON. ROBERT E. GERBER
25 U.S. BANKRUPTCY JUDGE

1

2 Adv: 1-11-09409 John Morgenstein vs Motors Liquidation Co. Et

3 Al Pretrial Conference

4

5 1-09-50026 General Motors Corporation

6 Debtors' 119th Omnibus Objection to Claims (Duplicate Debt

7 Claims)

8

9 Debtors' 121st Omnibus Objection to Claims (Duplicate Debt

10 Claims)

11

12 Debtors' 122nd Omnibus Objection to Claims (Duplicate Debt

13 Claims)

14

15 Debtors' 126th Omnibus Objection to Claims (Duplicate Debt

16 Claims)

17

18 Debtors' 135th Omnibus Objection to Claims (Eurobond Deutsche

19 Debt Claims)

20

21 Debtors' 137th Omnibus Objection to Claims (Eurobond Deutsche

22 Debt Claims)

23

24 Debtors' 140th Omnibus Objection to Claims (Eurobond Deutsche

25 Debt Claims)

1

2 Debtors' 143rd Omnibus Objection to Claims (Eurobond Deutsche

3 Debt Claims)

4

5 Debtors' 199th Omnibus Objection to Claims (Claims for

6 Preferred Stock)

7

8 Debtors' 203rd Omnibus Objection to Claims (Duplicate Debt

9 Claims)

10

11 Debtors' 213th Omnibus Objection to Claims (Duplicate Debt

12 Claims - Wilmington Trust Bonds)

13

14 242nd Omnibus Objection to Claims (Contingent Co-Liability

15 Claims)

16

17 252nd Omnibus Objection to Claim(s) Number: filed by Barry N.

18 Seidel on behalf of Motors Liquidation Company GUC Trust.

19

20 253rd Omnibus Objection to Claim(s)Number filed by Barry N.

21 Seidel on behalf of Motors Liquidation Company GUC Trust.

22

23 254th Omnibus Objection to Claim(s) Number filed by Barry N.

24 Seidel on behalf of Motors Liquidation Company GUC Trust.

25

1 255th Omnibus Objection to Claim(s) Number filed by Barry N.
2 Seidel on behalf of Motors Liquidation Company GUC Trust
3
4 256th Omnibus Objection to Claim(s) Number filed by Barry N.
5 Seidel on behalf of Motors Liquidation Company GUC Trust
6
7 Hearing on Motion by Dr. Terrie Sizemore to GM's Enforcing 363
8 Sale Order - To Be Adjourned
9
10 Reorganized Debtor (I) Supplemental Claim Objection and (II)
11 Motion to enforce the Plan Injunction and Automatic Stay and to
12 Enjoin Chartis U.S. from Continuing to Retain More than $20
13 Million It Improperly Seized from the Reorganized Debtors -
14 Status Conference.
15
16
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25 Transcribed by: Ellen S. Kolman

1

2 A P P E A R A N C E S :

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9 BY: SHAYA M. BERGER, ESQ.

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7 BY: BRYAN D. LEINBACH, ESQ.
8
9
10 ALSO APPEARING TELEPHONICALLY
11 PATRICIA BENJAMIN appearing on behalf of Cecil Benjamin
12
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1 P R O C E E D I N G S

2 THE COURT: Folks, it's my impression that the General

3 Motors matters that were scheduled for 9:45 after the Park East

4 matters are going to move fairly quickly. Did I see Mr.

5 Smolinsky there? Do you think that's likely to be so, Mr.

6 Smolinsky?

7 MR. SMOLINSKY: Yes, Your Honor.

8 THE COURT: Come on up then, please.

9 THE CLERK: All parties, Your Honor?

10 THE COURT: On GM matters, yes.

11 MR. SMOLINSKY: Thank you, Your Honor.

12 COURTCALL OPERATOR: Excuse me, Your Honor?

13 THE COURT: Yes.

14 COURTCALL OPERATOR: (Indiscernible) scheduled

15 Nicholas Martin to appear, he has not made an appearance at

16 CourtCall.

17 THE COURT: Nicholas Martin?

18 COURTCALL OPERATOR: Yes, Your Honor.

19 THE COURT: On GM?

20 COURTCALL OPERATOR: Yes.

21 THE COURT: Okay. That was scheduled for 9:45. Am I

22 correct Mr. -- Madam CourtCall?

23 COURTCALL OPERATOR: Yes, Your Honor.

24 THE COURT: All right. It's now 10 o'clock. Keep

25 your line open but we're going to proceed anyway.

1 COURTCALL OPERATOR: Okay.
2 THE COURT: Thank you.
3 COURTCALL OPERATOR: You're welcome.
4 THE COURT: Mr. Smolinsky, go ahead, please.
5 MR. SMOLINSKY: Thank you, Your Honor. Good morning,
6 Joe Smolinsky from Weil Gotshal & Manges for the post-effective
7 date debtors as well as the Motors Liquidation Company GUC
8 Trust. I think we can go through the calendar very quickly
9 today.
10 The first matter is a pre-trial conference. This
11 involves an adversary proceeding filed by, what I'll call the
12 Morganstine (sic) -- Morgenstein Group. This is a class action
13 complaint that was filed seeking to partially revoke the
14 confirmation order and seek to file late claims for a class
15 action arising from product defect.
16 Your Honor, we extended the plaintiffs' time to object
17 to our motion to dismiss the complaint until December 15th. We
18 did have a pre-trial scheduled for today on the adversary
19 proceeding and thought it might be best to go forward in case
20 Your Honor had any preliminary views. From our perspective, we
21 think it's a shame that the estate should be spending its
22 resources defending this action. There is no partial
23 revocation of the confirmation order. The complaint seems to
24 ignore the prior orders of this court relating to class
25 certification and class claims and we don't see any basis for

1 excusable neglect certainly in the context of a class action.
2 So, we'll move forward as quickly as we can with the motion to
3 dismiss but wanted to give Your Honor an opportunity to hear
4 preliminary what this case is about.
5 THE COURT: All right. Is counsel for your opponent
6 here?
7 MR. SCHLACHET: And Your Honor, Mark Schlachet
8 representing the Morgenstein Group.
9 THE COURT: Okay. Shaslay (ph.)?.
10 MR. SCHLACHET: Schlachet, Your Honor.
11 THE COURT: Could you spell that please?
12 MR. SCHLACHET: S-C-H-L-A-C-H-E-T.
13 THE COURT: Okay. Mr. Schlachet.
14 MR. SCHLACHET: And with me, Your Honor, I have my
15 cocounsel who I'll ask to introduce themselves because I don't
16 want to get their names wrong. If I may, Your Honor?
17 THE COURT: Yes. Come to microphone, please,
18 gentlemen.
19 MR. PECA: Good morning, Your Honor. John Peca,
20 P-E-C-A from the Climaco law firm in Cleveland, Ohio.
21 THE COURT: Okay.
22 MR. JAFFE: Good morning, Your Honor. Michael Jaffe
23 from Wolf Haldenstein Adler Freeman & Herz from here in New
24 York.
25 THE COURT: Okay.

1 MR. GUPTA: Good morning, Your Honor. Srivatsa Gupta
2 with Neblett, Beard and Arsenault in Alexandria, Louisiana.
3 THE COURT: Okay. Thank you.
4 MR. SCHLACHET: Good morning, Your Honor. Your Honor,
5 just briefly I note that Mr. Smolinsky referenced class action
6 rulings of Your Honor in the past on other cases. The shame of
7 the estate to spend money. The one thing that Mr. Smolinsky
8 didn't mention is this is an action under 1144 for what we'll
9 call anti-injunctive type relief and those are the issues.
10 THE COURT: 1144 of the Bankruptcy Code?
11 MR. SCHLACHET: Indeed, Your Honor.
12 THE COURT: Go on. Go on, please.
13 MR. SCHLACHET: The issues of 1144 of the Bankruptcy
14 Code, Your Honor, are the issues that we believe are germane to
15 Your Honor's initial interaction with the case. Those issues,
16 Your Honor, are serious issues and issues which Your Honor will
17 bring this court's considerable expertise to bear. But there
18 are a proliferation of issues that have been raised in the
19 motion to dismiss and by way of streamlining, Your Honor, I
20 just wanted to take a moment to explain what we view as the
21 basic layout of the motion to dismiss and why some of the
22 issues may be premature.
23 THE COURT: All right. We're talking about -- I asked
24 the question because I had understood the only grounds for
25 revocation and of a discharge under 1144 were fraud.

1 MR. SCHLACHET: Indeed, they are, Your Honor.
2 THE COURT: And you're alleging fraud?
3 MR. SCHLACHET: We're alleging fraud on the court.
4 THE COURT: All right. Go on, please.
5 MR. SCHLACHET: Your Honor, in this case and I'll --
6 in light of Your Honor's question, I'll explain the background
7 of the case just briefly; maybe a minute, a minute and a half,
8 if I may.
9 In the General Motors portfolio of automobiles, Your
10 Honor, it was the Chevrolet Impala which folks are very
11 familiar with.
12 THE COURT: I learned to drive on a '62 Impala.
13 MR. SCHLACHET: I got my first car, a '58 Impala.
14 THE COURT: Okay.
15 MR. SCHLACHET: Your Honor, the spindle rod of the
16 Impalas in 2007, or thereabouts, were defective. Impala sent
17 out a notice to its fleet users of those Impalas, particular
18 fleet users who had a police package. They did not disclose
19 the defect --
20 THE COURT: Police package you mean made them
21 particular suited for police department usage?
22 MR. SCHLACHET: Yes, Your Honor.
23 THE COURT: Um-hum.
24 MR. SCHLACHET: They did not disclose the defect or
25 provide relief to the other Impala owners who had Impalas

1 without the police package.

2 THE COURT: When did this take place?

3 MR. SCHLACHET: This took place in 2008 that the

4 defect was discovered evidentially by --

5 THE COURT: Before GM's Chapter 11 frame.

6 MR. SCHLACHET: Yes, Your Honor.

7 THE COURT: On June 1st, 2009.

8 MR. SCHLACHET: Yes.

9 THE COURT: Go on.

10 MR. SCHLACHET: And because they didn't disclose it to

11 others until July of this year when somebody filed a case in

12 the Eastern District of Michigan, other Impala owners were

13 ignorant of the defect. At the time that the Michigan case was

14 filed, certain owners came to Mr. Peca and raised with him the

15 fact that they had heard that an action was filed due to a

16 defect in the spindle rod causing un -- premature tire wear.

17 Mr. Peca's firm engaged an expert to determine whether

18 the police vehicles and the nonpolice vehicles were materially

19 substantially identical and the expert came back and said they

20 were. At which time, his firm sent a letter to New GM asking

21 if the affected Impala owners could obtain relief from New GM.

22 Sometime thereafter, New GM wrote a letter then

23 indicated that under this Court's order of sale, Section 363,

24 they were not responsible for product defects but only for

25 maintaining the warranty program as to warrantable defects.

1 They directed Mr. Peca's firm to Old GM. At that
2 point, Mr. Peca called me which was about one week or two weeks
3 before this complaint was filed and as I looked at the
4 complaint, sure enough in order to -- in order to comport with
5 the very strictly construed 188 80-day deadline for filing a
6 Section 1144 complaint based on the fact that GM did not list
7 these creditors in their schedules, they did not disclose the
8 creditors to the Court in the disclosure statement and as a
9 result they obtained a confirmation order on what we believe
10 are false pretenses because we do not believe that had this
11 Court known about this entire class, we believe it's about
12 450,000 vehicles, this entire class of creditors, this Court
13 would have seen that, one, there was a failure to meet the
14 fiduciary standards of 1107, a failure to meet the good faith
15 standards of 1123 and, therefore, obtaining the confirmation
16 order on what we believe were false pretenses.
17 So, we filed the action on what amounts to the
18 calendar, 181st day, but because the 179th and 180th day fell
19 on the weekend under Federal Rule of Civil Procedure 6(b)
20 applicable to these proceedings, we were within the rule by a
21 hair.
22 The important thing that I want to stress, Your Honor,
23 is just two things. One, I believe Mr. Peca and his firm were
24 diligent and will account for their time. There was no
25 prejudice during the lapse of time between July and when we

1 filed the case to any party and the debtors' motion for -- to
2 dismiss, as Mr. Smolinsky just encapsulated, doesn't really --
3 except the word "partial revocation" address the complaint
4 itself as to issues that are presently before the Court.
5 Presently before the Court is whether that complaint
6 states a claim if all the inferences on the plausible
7 allegations, not just conclusory presumptuous all -- the
8 plausible allegations. If those allegations aren't true
9 whether the complaint states a plausible case for relief is the
10 issue on a motion to dismiss.
11 There are -- we believe there are six issues, major
12 issues, and a host of collateral issues raised in the motion to
13 dismiss.
14 The issues of excusable neglect to file a late claim
15 is not before this Court at this time.
16 The issue of striking the class allegations, except in
17 rare circumstances would not be appropriate for a motion to be
18 under 12(b)(6). Those circumstances are not present in this
19 case. This is not a case which on its face warrants summary
20 rejection by this Court. It may down the road and this Court
21 may impose -- and I've read Your Honor's rather prodigious
22 decisions, particularly the Aparte (ph.) decision, we are fully
23 aware that this Court will superimpose bankruptcy
24 considerations on the ordinary Rule 23 criteria. But at this
25 point in time, on a 12(b)(6) motion, and there's much authority

1 to this effect, this is not the time to address that.
2 And addressing the notion of the criteria under Rule
3 23(b)(3) which requires a predominance of common issues over
4 individual issues, that is a certification issue pure and
5 simple. That would not be, in this case, ever. So, many of
6 the issues that are raised -- but there are meaty issues in the
7 case. The first is whether a partial revocation, as the debtor
8 calls it, what we call a limited revocation with this Court
9 exercising its authority under 1144(1) to make such conditions
10 as will assure no prejudice to those who relied on the
11 confirmation order, that is a legitimate issue before the
12 Court.
13 The issue of whether -- of whether we have pled
14 nonconclusory allegations which will support a claim for fraud
15 on the Court, that is an issue presently before the Court which
16 needs to be addressed. The issue of equitable mootness is an
17 issue before the Court which needs to be addressed on a
18 12(b)(6) motion. Those issues are major meaty issues for Your
19 Honor's consideration at this time.
20 We suggest, Your Honor, in your discretion that it
21 would be better to take the premature issues, three of them,
22 which will only increase the rueful expense to the estate.
23 Take those and push them aside until their time comes up in the
24 due process of law.
25 THE COURT: What do you perceive to be the premature

1 issues?

2 MR. SCHLACHET: The --

3 THE COURT: The Pioneer issue of late proof of claim?

4 MR. SCHLACHET: Yes.

5 THE COURT: Suitability for class action? And the

6 adversary proceeding is just to revoke the dischar -- to revoke

7 the confirmation order?

8 MR. SCHLACHET: That is correct, Your Honor.

9 THE COURT: And you articulated or I thought you were

10 about to articulate three things that you thought were

11 premature on the debtors' 12(b)(6). One, Pioneer. The second,

12 what, the class action allegations --

13 MR. SCHLACHET: Striking the class action allegations.

14 THE COURT: And what was the third -- or was there a

15 third?

16 MR. SCHLACHET: The Rule 23(b)(3) criteria. Those

17 are -- those two last issues are under (V).

18 THE COURT: Well, 23(b)(3) deals with predominance of

19 common issues in it being the best way to deal with a class

20 action controversy.

21 MR. SCHLACHET: Yes, Your Honor.

22 THE COURT: And you're saying that what I should do is

23 separate the underlying confirmation from the class action

24 issues?

25 MR. SCHLACHET: Correct.

1 THE COURT: And have you filed a motion for class
2 certification yet?
3 MR. SCHLACHET: We have not, Your Honor.
4 THE COURT: Is there a reason why you haven't?
5 MR. SCHLACHET: The debtor responded with a motion to
6 dismiss and I was -- I was -- we were within what we regard as
7 the earliest time practicable and we, frankly, never seriously
8 considered a motion for class certification. We do believe
9 that a motion for class certification based on what we see
10 emerging from the motion to dismiss would require appropriately
11 some class discovery. That discovery will go --
12 THE COURT: Class discovery before or after you've
13 made your motion?
14 MR. SCHLACHET: Class discovery before we've made our
15 motion.
16 THE COURT: Um-hum. Okay, Mr. Schlachet.
17 MR. SCHLACHET: Yes, Your Honor.
18 THE COURT: Am I pronouncing it wrong? Forgive me.
19 I'm thinking and digesting here because when I've
20 dealt with other class proofs of claim, they were all timely
21 whatever there other strengths and weaknesses might be.
22 Okay. Other thoughts before I give Mr. Smolinsky a
23 chance to respond?
24 MR. SCHLACHET: I don't think so, Your Honor.
25 THE COURT: Okay. Mr. Smolinsky.

1 MR. SCHLACHET: Thank you, Your Honor.
2 MR. SMOLINSKY: I hate to say this is nonsense, but
3 this is nonsense. The cars that we're talking about here were
4 manufactured and sold between 2007 and 2008. Those are the two
5 model years that are the prime subject of the action.
6 The police package is a completely different car and
7 that could be established later but that's a question of fact.
8 What remains is the fact that we're not aware of one proof of
9 claim being timely filed with respect to this product defect.
10 Your Honor has heard before this court many claims asserting
11 product defects. Of this 450,000 potential claimants, not a
12 one.
13 I just replaced tires on my 2010 car. This is 2007,
14 2008 and to file a -- on the last day of a motion to revoke a
15 discharge, which I think -- we didn't get a discharge, so it's
16 not really an action --
17 THE COURT: Oh, was it a motion to -- I thought it was
18 a motion to irrevocate the confirmation order rather than the
19 discharge.
20 MR. SMOLINSKY: It wasn't clear. There was some
21 language in the complaint and maybe they'll fine tune that to
22 address that issue but we did brief that on a motion to
23 dismiss.
24 THE COURT: The point is a liquidating 11 so there
25 'aint a discharge.

1 MR. SMOLINSKY: It's a liquidating 11; that's right,
2 Your Honor.
3 THE COURT: Yes. Go on, please.
4 MR. SMOLINSKY: So, to file it on the 181st day
5 following confirmation of a plan over three years after the bar
6 date, doesn't make sense. If someone had complained to counsel
7 about a defective car you'd think that they would have known --
8 known it before four years after the car was purchased.
9 So, I don't want to get into the facts. I don't think
10 we need to today. I know your calendar is tight. But we would
11 like to address this in as few hearings as possible and not
12 drag this out over a matter of months. So, if Your Honor
13 believes that a motion for class certification is necessary to
14 get full and final relief, we would want that filed as soon as
15 possible and consolidate that so we can deal -- address this
16 complaint in one shot.
17 THE COURT: All right. Everybody had a chance to
18 speak their piece?
19 Gentlemen, this, of course, is only a status
20 conference and I'm not in a position nor should I do anything
21 more than simply manage the litigation of this. Mr. Smolinsky,
22 I'm going to permit you to raise as many or as few issues as
23 you choose in your motion to dismiss to which your opponents
24 will respond. And if they are of the mind when they respond to
25 say that some or all of the issues that you raise aren't yet

1 ripe, they're free to do it at that time as to which you're
2 going to have to reply.
3 It's premature, Mr. Smolinsky for me to determine the
4 extent, if any, to which their claims are frivolous or
5 inappropriate. If you're making the motion after I've heard
6 your opponent's views, I'll rule on it.
7 For the time being, there will be no discovery but
8 that's without prejudice for it -- to a request that I permit
9 discovery on some more issues after I have a better handle as
10 to the nature of the controversy what is being asked for, it's
11 bases in law and I'm in a better position to evaluate case
12 management issues going forward.
13 For now, what I need is for both people to lay out
14 their legal positions in writing and not just verbally so I can
15 manage it effectively going forward. Mr. Smolinsky?
16 MR. SMOLINSKY: Your Honor, if I may, we extended the
17 plaintiffs' time to respond to our motion to dismiss until
18 December 15th. Perhaps -- what we'd like to do, if Your Honor
19 is okay with it, is to review the transcript and see whether
20 there are any -- any revisions to the motion to dismiss that
21 may be appropriate to refine in view of this hearing, the
22 issues so that we can tackle as much as we can on the return
23 date of the motion. So, perhaps giving us until December 7th
24 to -- if it's necessary; I don't think it is but if it is to
25 amend the motion. In the meantime, we could extend the

1 defendant's time to respond one week to the 21st. And we'd
2 look to have a hearing on this in late January.
3 THE COURT: Did you have a dialogue with your
4 opponents as to whether they wanted more time to respond to
5 your motion to dismiss and what the timing would be for a
6 replay on your side?
7 MR. SMOLINSKY: We did, Your Honor. We understood
8 that there were some significant issues raised in our papers.
9 They contacted us and asked for more time. We always want to
10 give Your Honor at least a week to read reply papers. So, we
11 were looking initially at a hearing in early January and that's
12 why we picked December 15th to give us a week to respond. But
13 in speaking to my litigation partner, he's not available till
14 the end of January anyway so perhaps we can use this time to
15 our advantage to try to resolve as many issues at that motion
16 as we can.
17 THE COURT: Well, without prejudging the merits of the
18 issues in any way, it seems to me that if the controversy is of
19 the type that was described to me verbally, it will benefit
20 from both more time for your opponent to respond and for a time
21 for you to reply.
22 Mr. Schlachet, do you want to be heard on his request
23 that he be permitted to update his motion if he chooses to do
24 so?
25 MR. SCHLACHET: Your Honor, if I had a concept of what

1 Mr. Smolinsky -- Smolinsky has in mind with respect to a
2 revision of the motion to dismiss, I could then confer with my
3 cocounsel just very briefly and see what their immediate
4 reaction is to it. I don't know if Mr. Smolinsky is suggesting
5 that there may be issues that can be paired or if there -- if
6 he's suggesting there are going to be issues that could be
7 added. If I knew that, I certainly would be responsive to the
8 Court.
9 THE COURT: Well, since I was a litigator for about
10 two decades before I went into the bankruptcy business, I can
11 speculate that he isn't asking me for permission to drop claims
12 down the road that he's more interested in seeing whether
13 anything that you raise causes him additional concerns. He
14 could have dropped contentions with a one sentence letter. So,
15 I think that you're on notice that he may wish to broaden his
16 concerns rather than narrow them. I may be speculating
17 inappropriately but I was a litigator and a bankruptcy
18 litigator for thirty years before I came over to the bench.
19 MR. SCHLACHET: Well, Your Honor, if we had -- if we
20 had new claims migrating into this action --
21 THE COURT: But he's not talking about new claims.
22 He's talking about new defenses. That's what a Rule 12(b)
23 motion is. He's already got notice of what your claims are
24 except he's trying to figure out whether he needs to massage
25 his motion or not and I'm asked to decide whether I should

1 adjust this schedule to let both its sides get out there best
2 legal positions early rather than later.
3 MR. SCHLACHET: Well, what I would say, Your Honor, is
4 why don't we -- if you're asking me subject to my cocounsel's
5 comments why don't we add -- this is the 22nd. If we could get
6 Mr. Smolinsky's revised motion to dismiss, say in a week
7 instead of two weeks, it would be better for me personally
8 because I'm going to be in California -- or in Florida and
9 California -- I'm supposed to be there in February and March,
10 so I will have to fly back unless the hearing is set in
11 January, which I will do; it's not a problem. But if we could
12 get the revisions within a week then I would say that we could
13 possibly get our response -- oh, then, he wants to reply --
14 then he wants to reply. So, we have December 15th, if we can
15 get it in a week, we would shoot for December 15th.
16 THE COURT: Forgive me, Mr. Schlachet, I'm not going
17 to allow my courtroom to be used as the place for let's make a
18 deal. My narrow question was whether you opposed or not. I
19 think I'm going to take it out of the consensual range. I'm
20 just going to tell you guys what we're going to do.
21 We're now two days before Thanksgiving. I'm not going
22 to tell any lawyer in my courtroom that he, she or it has to do
23 stuff over a Thanksgiving weekend and respond in a week. I'm
24 going to give the estate side, call it Old GM, call it the GUC
25 Trust, whatever, a reasonable time to update its motion if it

1 chooses to or to inform you and your allies that the estate
2 elects not to do it. The parties are also authorized to give
3 your side a reasonable amount of time to respond and to allow
4 Old GM and the GUC Trust a reasonable time to reply and to get
5 a date for hearing upon which all parties can appear without
6 significant inconvenience and that allows me no less than a
7 business week to read the papers before oral argument.
8 I'm not going to micromanage that process beyond that
9 which I just stated. Instead, you're to prepare a stip or
10 consent order that papers of scheduling deal, without prejudice
11 to your underlying rights and positions in any way, shape or
12 form. Unless it's unreasonable, I will so order it and you can
13 rely upon the fact that if both sides have agreed to it, it's
14 likely to be reasonable.
15 I do have to caution you all that I have other matters
16 on my plate, both in the GM case and in the other twenty
17 megacases that I have in my docket and the other hundred
18 Chapter 11 cases that I have in my docket and the other 2,000
19 other bankruptcy cases that I have in my docket, so, I don't
20 want anybody to be a jerk about putting his or her or its
21 opponent under pressure for getting this done because you're
22 going to have to accommodate those other needs and concerns
23 anyway.
24 MR. SMOLINSKY: Thank you, Your Honor.
25 THE COURT: Okay. Anything else? Either side.

1 (No response)
2 THE COURT: Okay. Mr. Smolinsky, next matter on your
3 calendar, please. Those who are here just on this matter are
4 free to leave, if they wish.
5 MR. SMOLINSKY: The next ten matters on the calendar
6 all relate to objections filed, omnibus objections, to
7 duplicate debt claims. These are claims that were filed by
8 bondholders seeking to obtain recoveries outside of our plan.
9 As Your Honor's aware, under our plan we allowed claims on
10 behalf of all of the fiscal paying agents and venture trustees
11 and we've made distributions on account of those claims.
12 As Your Honor is aware, we've been working through
13 these motions. This should be the last set of duplicate debt
14 claims that are out there except for claims that either
15 partially or totally overlap the Nova Scotia litigation that
16 we've left on the side. So, if I may, I'd like to go through
17 each one individually and see if there are responses beyond
18 those that were attached to the responsive pleadings.
19 The first is the 119th omnibus objections to claim.
20 There was one remaining response of Johann Conrad Von
21 Waldthausen, W-A-L-D-T-H-A-U-S-E-N. In our binder, we have
22 included a letter sent in by the claimant. We're not sure what
23 he's seeking beyond what I described as distributions on
24 account of his claims.
25 THE COURT: Okay. Anybody want to be heard in

1 proof -- the confirmation notice for Cecil Benjamin to your
2 clerk?
3 THE COURT: Sure, if you want to.
4 MS. BENJAMIN: All right. Thank you.
5 THE COURT: Okay. Park Eastside.
6 (Whereupon these proceedings concluded at 10:55 AM)
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1 I N D E X

2 RULINGS

		Page	Line
3			
4	Morgenstein Group to prepare stip and	26	12
5	include scheduling		
6	Debtors' 119th omnibus objection granted	26	13
7	Debtors' 121st omnibus objection granted	29	19
8	Debtors' 122nd omnibus objection granted	29	24
9	Debtors' 126th omnibus objection granted	30	3
10	Debtors' 135th omnibus objection granted	30	6
11	Debtors' 137th omnibus objection granted	30	13
12	Debtors' 140th omnibus objection granted	30	20
13	Debtors' 143rd omnibus objection granted	30	23
14	Debtors' 203rd omnibus objection granted	31	1
15	Debtors' 213th omnibus object granted	31	4
16	Debtors' 252nd omnibus objection and order	38	8
17	to expunge claims granted		
18	Debtors' 253rd omnibus objection and order	38	21
19	to expunge thirty-two claims granted		
20	Debtors' 254th omnibus objection and order	39	4
21	to expunge seven claims granted		
22	Debtors' 255th omnibus objection and order	39	16
23	to expunge twenty-five claims granted		
24	Debtors' 256th omnibus object to reduce,	40	3
25	allow and reclassify granted		

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

3

4 I, Ellen S. Kolman, certify that the foregoing transcript is a

5 true and accurate record of the proceedings.

6

7 Ellen S. Kolman Digitally signed by Ellen S. Kolman DN: cn=Ellen S. Kolman, c=US Date: 2011.11.23 13:51:06 -05'00'

8

9 Ellen S. Kolman (CET**D-568)

10 AAERT Certified Electronic Court Transcriber

11

12 Veritext

13 200 Old Country Road

14 Suite 580

15 Mineola, NY 11501

16

17 Date: November 23, 2011

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HEARING DATE AND TIME: January 10, 2012 at 9:45 a.m. (Eastern Time)

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Attorneys for Motors Liquidation Company and
the Motors Liquidation Company GUC Trust

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11 Case No.**
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*,	:	**09-50026 (REG)**
Debtors.	:	**(Jointly Administered)**
JOHN MORGENSTEIN, MICHAEL JACOB, as Executor of the Estate of Doris Jacob, and ALANTE CARPENTER individually and on behalf of all others similarly situated,	:	
Plaintiffs,	:	
v.	:	**Adversary Proceeding No. 11-09409**
MOTORS LIQUIDATION COMPANY f/k/a GENERAL MOTORS CORPORATION a Delaware Corporation,	:	
Defendant.	:	

ORDER GRANTING MOTORS LIQUIDATION COMPANY'S AND MOTORS LIQUIDATION GUC TRUST'S AMENDED MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR REVOCATION OF DISCHARGE AND, IN THE ALTERNATIVE, MOTION TO STRIKE CLASS ALLEGATIONS

Upon the Motion, dated December 12, 2011 (the "**Motion**"),[1] of Motors Liquidation Company and the Motors Liquidation Company GUC Trust (together, "**MLC**"), to dismiss Plaintiffs' Complaint for Revocation of Discharge and, in the Alternative, Motion to Strike Class Allegations, all as more fully described in the Motion; and due and proper notice of the Motion having been provided, and it appearing that no other or further notice need be provided; and the Court having found and determined that the relief sought in the Motion is in the best interests of MLC, the Debtors' estates, creditors, and all parties in interest and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is

ORDERED that the Motion is granted in its entirety; and it is further

ORDERED that the claims asserted against MLC in Plaintiffs' Complaint for Revocation of Discharge are dismissed with prejudice; and it is further

ORDERED that all costs are taxed against the party originally incurring same; and it is further

ORDERED that this Order constitutes a final judgment that disposes of all claims and all parties.

ALL RELIEF NOT EXPRESSLY GRANTED HEREIN IS DENIED.

Dated: New York, New York
______________, 2012

____
THE HONORABLE ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE

[1] Capitalized terms used herein and not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.