

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026

- - - - -x

In the Matter of:

GENERAL MOTORS CORPORATION, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court  
One Bowling Green  
New York, New York

June 25, 2009  
9:03 AM

B E F O R E:  
HON. ROBERT E. GERBER  
U.S. BANKRUPTCY JUDGE

1  
2 HEARING re Motion of Debtors for Entry of an Order Pursuant to  
3 11 U.S.C. §§ 361, 362, 363, and 364 (i) Authorizing the Debtors  
4 to Obtain Post-petition Financing, Including on an Immediate,  
5 Interim Basis; (ii) Granting Superpriority Claims and Liens;  
6 (iii) Authorizing the Debtors to Use Cash Collateral; (iv)  
7 Granting Adequate Protection to Certain Prepetition Secured  
8 Parties; (v) Authorizing the Debtors to Prepay Certain Secured  
9 Obligations in Full Within Forty-Five Days; and (vi) Scheduling  
10 a Final Hearing Pursuant to Bankruptcy Rule 4001

11  
12 HEARING re Motion of Debtors for Entry of Order Pursuant to 11  
13 U.S.C. Sections 105, 363, and 364 Authorizing Debtors to (i) Pay  
14 Pre-petition Claims of Certain Essential Suppliers, Vendors and  
15 Services Providers; (ii) Continue Troubled Supplier Assistance  
16 Program; and (iii) Continue Participation in the United States  
17 Treasury Auto Supplier Support Program

18  
19 HEARING re Motion of Debtors for Entry of Order Pursuant to 11  
20 U.S.C. §§ 105(a) and 366 (i) Approving Debtors Proposed Form of  
21 Adequate Assurance of Payment; (ii) Establishing Procedures for  
22 Resolving Objections By Utility Companies; and (iii) Prohibiting  
23 Utilities from Altering, Refusing, or Discontinuing Service

24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

HEARING re Motion of Debtors for Entry of Orders Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, and 507 (i) Authorizing Use of Cash Collateral; (ii) Granting Adequate Protection to the Revolver Secured Parties; (iii) Granting Adequate Protection to the Term Loan Secured Parties, and (iv) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001

HEARING re Application For An Order Pursuant To Sections 327(a) And 328(a) of the Bankruptcy Code and Bankruptcy Rule 2014(a) Authorizing the Employment and Retention of Evercore Group L.L.C. as Investment Banker and Financial Advisor for the Debtors Nunc Pro Tunc to the Petition Date

HEARING re Motion of the Debtors Pursuant to 11 U.S.C. § 363 for an Order Authorizing the Debtors to Employ and Retain AP Services, LLC As Crisis Managers and to Designate Albert A. Koch as Chief Restructuring Officer, Nunc Pro Tunc to the Petition Date

HEARING re Motion to Appoint Committee Motion of Ad Hoc Committee of Consumer Victims of General Motors for Appointment of Official Committee of Tort Claimants Pursuant to 11 U.S.C. §1102(a)(2)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

HEARING re Motion to Appoint Committee Motion for an Order  
(i)Appointing a Legal Representative for Future Asbestos  
Personal Injury Claimants; and (ii)Directing the United States  
Trustee to Appoint an Official Committee of Asbestos Personal  
Injury Claimants

HEARING re Application of the General Motors Retirees  
Association for Order to Appoint a Retiree Committee Pursuant  
to 11 U.S.C. Section 1114(d)

HEARING re Motion of Debtors for Entry of Order Pursuant to 11  
U.S.C. Sections 105(a) and 363(b) (i)Authorizing Debtors to Pay  
Prepetition Obligations to Foreign Creditors; and  
(ii)Authorizing and Directing Financial Institutions to Honor  
and Process Related Checks and Transfers

HEARING re Motion of the Debtors Pursuant to 11 U.S.C. Sections  
105(a) and 362 for Entry of (i)Interim and Final Orders  
Establishing Notification Procedures Regarding Restrictions on  
Certain Transfers of Interests in the Debtors; and (ii)Orders  
Scheduling a Final Hearing

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

HEARING re Motion of Debtors for Entry of Order Pursuant to 11 U.S.C. Sections 105(a), 345(b), 363(b) and 363(c) and 364(a), and Fed. R. Bankr. P. 6003 and 6004 (A)Authorizing Debtors to (i)Continue Using Existing Cash Management System; (ii)Honor Certain Pre-petition Obligations Related to Use of Cash Management System; and (iii)Maintain Existing Bank Accounts and Business Forms; (B)Extending Time to Comply with 11 U.S.C. Section 345(b); and (C)Scheduling a Final Hearing

HEARING re Debtors' Motion Pursuant to Section 363 of the Bankruptcy Code for Authority to Exercise Put Rights

HEARING re of Debtors for Entry of Order Granting Additional Time to File Reports of Financial Information or to Seek Modification of Reporting Requirements Pursuant to Bankruptcy Rule 2015.3

HEARING re Application of the Debtors Pursuant to 11 U.S.C. §§ 327(a) and 328(a) and Fed. R. Bankr. P. 2014(a) for Authority to Employ Weil, Gotshal & Manges LLP as Attorneys for the Debtors, Nunc Pro Tunc to the Commencement Date

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

HEARING re Application of the Debtors Pursuant to Section 327(e) of the Bankruptcy Code and Rules 2014(a) and 2016(b) of the Federal Rules of Bankruptcy Procedure for Authorization to Employ and Retain Jenner & Block LLP as Attorneys for the Debtors, Nunc Pro Tunc to the Commencement Date

HEARING re Application Under 11 U.S.C. §§327(e) And 328(a) Authorizing Debtors to Employ and Retain Honigman Miller Schwartz And Cohn LLP as Special Counsel for the Debtors, Nunc Pro Tunc to the Petition Date

HEARING re Application Of Debtors for Entry of Order Pursuant to 28 U.S.C. § 156(c) Authorizing Retention and Employment of The Garden City Group, Inc. as Notice and Claims Agent Nunc Pro Tunc to the Commencement Date

Transcribed by: Lisa Bar-Leib

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

WEIL, GOTSHAL & MANGES LLP

Attorneys for Debtor General Motors Corporation

767 Fifth Avenue

New York, NY 10153

BY: HARVEY R. MILLER, ESQ.

STEPHEN KAROTKIN, ESQ.

JOSEPH H. SMOLINSKY, ESQ.

JENNER & BLOCK LLP

Proposed Special Counsel for GM

919 Third Avenue

37th Floor

New York, NY 10022

BY: PATRICK J. TROSTLE, ESQ.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

JENNER & BLOCK LLP

Proposed Special Counsel for GM

330 North Wabash Avenue

Chicago, IL 60611

BY: DANIEL MURRAY, ESQ.

(TELEPHONICALLY)

KRAMER LEVIN NAFTALIS & FRANKEL LLP

Attorneys for Official Committee of Unsecured Creditors

1177 Avenue of the Americas

New York, NY 10036

BY: LAUREN M. MACKSOUD, ESQ.

THOMAS MOERS MATER, ESQ.

AMY CATON, ESQ.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DEPARTMENT OF JUSTICE  
Office of the United States Trustee  
33 Whitehall Street  
21st Floor  
New York, NY 10004

BY: BRIAN S. MASUMOTO, ESQ.

UNITED STATES DEPARTMENT OF JUSTICE  
U.S. Attorney's Office  
86 Chambers Street  
New York, NY 10007

BY: DAVID S. JONES, AUSA  
MATTHEW L. SCHWARTZ, AUSA

BINGHAM MCCUTCHEM LLP  
Attorneys for Deutsche Bank AG  
399 Park Avenue  
New York, NY 10022

BY: ERIN H. MAUTNER, ESQ.  
JEFFREY S. SABIN, ESQ.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CADWALADER, WICKERSHAM & TAFT LLP

Attorneys for U.S. Treasury Auto Task Force  
One World Financial Center  
New York, NY 10281

BY: LESLIE W. CHERVOKAS, ESQ.

CADWALADER, WICKERSHAM & TAFT LLP

Attorneys for U.S. Treasury Auto Task Force  
1201 F Street, N.W.  
Washington, DC 20004

BY: DOULAS S. MINTZ, ESQ.

FARELLA BRAUN & MARTEL LLP

Attorneys for  
Russ Building  
235 Montgomery Street  
San Francisco, CA 94104

BY: NEIL A. GOTEINER, ESQ.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

HONIGMAN MILLER SCHWARTZ AND COHN LLP

Attorneys for Debtor/Defendant General Motors Corporation

2290 First National Building

660 Woodward Avenue

Detroit, MI 48226

BY: ROBERT B. WEISS, ESQ.

KELLEY DRYE & WARREN LLP

Attorneys for Law Debenture; LBA Realty

101 Park Avenue

New York, NY 10178

BY: JENNIFER A. CHRISTIAN, ESQ.

MCGUIREWOODS LLP

Attorneys for Dominion Retail, Inc.

1345 Avenue of the Americas

Seventh Floor

New York, NY 10105

BY: SHAWN R. FOX, ESQ.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MORGAN, LEWIS & BOCKIUS LLP

Attorneys for JPMorgan Chase Bank

101 Park Avenue

New York, NY 10178

BY: RICHARD S. TODER, ESQ.

ANDREW GOTTFRIED, ESQ.

ORRICK, HERRINGTON & SUTCLIFFE LLP

Attorneys for Ad Hoc Dealer Committee

666 Fifth Avenue

New York, NY 10103

BY: ALYSSA D. ENGLUND, ESQ.

SIMMONSCOOPER LLC

Attorneys for

707 Berkshire Blvd.

East Alton, IL 62024

BY: ROBERT W. PHILLIPS, ESQ.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

SIMPSON THACHER & BARTLETT LLP

Attorneys for Citicorp USA, Inc., as Agent

425 Lexington Avenue

New York, NY 10017

BY: PETER V. PANTALEO, ESQ.

ANNE L. KNIGHT, ESQ.

STUTZMAN, BROMBERG, ESSERMAN & PLIFKA, P.C.

Attorneys for Ad Hoc Committee of Unsecured Creditors

2323 Bryan Street

Suite 2200

Dallas, TX 75201

BY: SANDER L. ESSERMAN, ESQ.)

VEDDER PRICE P.C.

Attorneys for Export Development Canada

1633 Broadway

47th Floor

New York, NY 10019

BY: MICHAEL L. SCHEIN, ESQ.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

VINSON & ELKINS LLP

Attorneys for Mason Capital

666 Fifth Avenue

26th Floor

New York, NY 10103

BY: DENIS F. CRONIN, ESQ.

CRAIG KORNREICH, ESQ.

WHITE AND WILLIAMS LLP

Attorneys for Nicor Gas

One Penn Plaza

250 West 34th Street

Suite 4110

BY: KAREL S. KARPE, ESQ.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ALLARD & FISH, P.C.

Attorneys for Creditor Severstal North America, Inc.

535 Griswold

Suite 2600

Detroit, MI 48226

BY: DEBORAH L. FISH, ESQ.

(TELEPHONICALLY)

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP

Attorneys for LBA Realty Fund III; PruSKS Brannan

Associates

Three Embarcadero Center

12th Floor

San Francisco, CA 94111

BY: IVAN M. GOLD, ESQ.

(TELEPHONICALLY)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

DAVIS POLK & WARDWELL

Attorneys for Interested Party Ford Motor Company

450 Lexington Avenue

New York, NY 10017

BY: BRIAN M. RESNICK, ESQ.

(TELEPHONICALLY)

DLA PIPER LLP U.S.

Attorneys for Creditor Hewlett Packard

550 South Hope Street

Suite 2300

Los Angeles, CA 90071

BY: KAROL K. DENNISTON, ESQ.

(TELEPHONICALLY)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

FROST BROWN TODD LLC

Lexington Financial Center

250 West Main

Suite 2800

Lexington, KY 40507

BY: ROBERT V. SARTIN, ESQ.

(TELEPHONICALLY)

HANGLEY ARONCHICK SEGAL & PUDLIN

Attorneys for NCR Corporation

One Logan Square

18th & Cherry Streets

27th Floor

Philadelphia, PA 19103

BY: MATTHEW A. HAMERMESH, ESQ.

(TELEPHONICALLY)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MOTLEY RICE, LLC

28 Bridgeside Blvd.

Mt. Pleasant, SC 29464

BY: JEANETTE M. GILBERT, ESQ.

(TELEPHONICALLY)

SCHIFF HARDIN LLP

Attorneys for Columbia Gas of Ohio; Columbia Gas of  
Virginia

233 South Wacker Drive

Suite 6600

Chicago, IL 60606

BY: JASON TORF, ESQ.

(TELEPHONICALLY)

SIDLEY AUSTIN LLP

Attorneys for Multiple Lenders

One South Dearborn

Chicago, IL 60603

BY: KENNETH P. KANSA, ESQ.

(TELEPHONICALLY)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

STAHL COWDEN CROWLEY ADDIS LLC  
Attorneys for GM National Retiree Association  
55 West Monroe Street  
Suite 1200  
Chicago, IL 60603

BY: JON D. COHEN, ESQ.  
(TELEPHONICALLY)

## P R O C E E D I N G S

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

THE COURT: Good morning.

ALL: Good morning, Your Honor.

THE COURT: GM. Mr. Miller, good morning. You want to come on up and give me your recommendation as to how you believe we should proceed both with the DIP which we have on for 9:00 and also for the 9:45 calendar matters?

MR. MILLER: Yes, Your Honor. Harvey Miller, Weil Gotshal & Manges for the debtors. Your Honor, there is one matter on the 9:00 calendar, as you pointed out, which is the motion for a final approval of the DIP financing. I believe, Your Honor, all issues with respect to that have been resolved. And Mr. Karotkin will explain that as we go on.

As to the 9:45 calendar, Your Honor, there are listed nine uncontested matters and eight contested matters. As to those contested matters, Your Honor, essentially, most of them have been resolved with the exception, Your Honor, of the motion for the appointment of an ad hoc committee of asbestos claimants and the motion for the appointment of a retiree committee. Those two matters are still open, Your Honor, and would be heard at Your Honor's convenience after the 9:45 calendar call.

The motion, Your Honor, with respect to the retention of Evercore Group LLC, we are requesting, Your Honor, that that matter be adjourned until the hearing scheduled for July 2,

1 2009. We're hopeful to resolve that matter, Your Honor. We  
2 have scheduled tentative meetings with the U.S. trustee's  
3 office in an effort to resolve that application.

4 So, Your Honor, basically, there are two matters  
5 which will be submitted today for Your Honor's determination  
6 with respect to the additional creditors' committees, the  
7 request for the appointment of a future representative for  
8 future asbestos claimants and the motion for the appointment of  
9 a retirees' committee under Section 1114(b) of the Bankruptcy  
10 Code.

11 THE COURT: Okay. Fair enough. Do we want to go  
12 straight then into DIP financing?

13 MR. MILLER: Yes.

14 THE COURT: You're going to hand off to your partner,  
15 Mr. Karotkin, on that?

16 MR. MILLER: I certainly want to, Your Honor.

17 THE COURT: All right. Mr. Karotkin, come on up,  
18 please? Good morning.

19 MR. KAROTKIN: Good morning, Your Honor. Stephen  
20 Karotkin, Weil Gotshal & Manges for the debtors. As Mr. Miller  
21 indicated, Your Honor, we're pleased to report that in  
22 connection with the motion to approve the debtor-in-possession  
23 financing on a final basis, we have reached a consensus with  
24 all of the objecting parties as well as with the creditors'  
25 committee and the secured lenders. And that is embodied in a

1 revised order which I have a blackline copy of which I'm please  
2 to hand up to the Court.

3 THE COURT: That would be very helpful. Thank you.

4 MR. KAROTKIN: May I approach, sir?

5 THE COURT: Yes, sir.

6 MR. KAROTKIN: Your Honor, the proposed order  
7 resolves the four objections that were raised which are,  
8 basically, categorized in four categories. One was by various  
9 governmental entities with respect to liens they have as to  
10 personal property and real property. One is with respect to  
11 NCR as to their assertion of a constructive trust. There was  
12 another objection by Deutsche Bank with respect to the payment  
13 of hedging obligations under the outstanding revolving credit  
14 facility. And the final objection related to a landlord which  
15 wanted its lease hold interests -- the debtors' lease hold  
16 interests with respect to its property carved out of the  
17 collateral grant. And all of those issues have been addressed  
18 in the order.

19 THE COURT: All right. Do you want to pause and give  
20 any counterparties to those objections a chance to confirm that  
21 they're satisfied with the way by which you resolved them?

22 MR. KAROTKIN: Sure.

23 THE COURT: Mr. Sabin, you coming up?

24 MR. KAROTKIN: Before Mr. Sabin speaks, in  
25 anticipation of what he's going to say, hopefully to truncate

1 the hearing, Your Honor, we have agreed -- and I actually think  
2 the DIP order is clear that in connection with the payment of  
3 the pre-petition secured obligations to the JPMorgan group, the  
4 Citigroup group and with respect to the hedging obligations,  
5 the order provides they will be paid three business days after  
6 the approval of the DIP loan on a final basis. And we will  
7 confirm on the record that when we pay the Citibank group and  
8 the JPMorgan group, we will also pay the hedging obligations at  
9 the same time.

10 THE COURT: Okay. Mr. Sabin, good morning.

11 MR. SABIN: Good morning, Your Honor. Jeff Sabin  
12 from Bingham McCutchen on behalf of Deutsche Bank AG.  
13 Paragraph 19 of the revised proposed order that's in front of  
14 you reflects the agreement, resolves in full the obligations.  
15 My thank you to Mr. Karotkin and everyone else for bearing with  
16 us as we work through the resolution. And I think that if this  
17 Court were to enter it with those words in it, it resolves in  
18 full the objections.

19 THE COURT: Okay. Fair enough. Anyone else? All  
20 right. Given that the objections have been resolved and given  
21 the showings that were made at the outset of the case, I'm not  
22 going to make extensive findings on the record now, Mr.  
23 Karotkin. I think they're set forth in your proposed order.

24 MR. KAROTKIN: They are, Your Honor. And I would  
25 like to point out one of the proposed findings which is in

1 paragraph (f) on page 12 which has been requested by the United  
2 States Treasury. And they are here to address that if you have  
3 any questions with that.

4 THE COURT: Okay. Also, I realize -- and I see Ms.  
5 Caton, you came up perhaps to speak. I gather there was a  
6 dialogue going on with the creditors' committee. And if  
7 there's anything that is desirable for the creditors' committee  
8 to put on the record, I certainly want to give it that  
9 opportunity. Ms. Caton, good morning.

10 MS. CATON: Thank you, Your Honor. Amy Caton from  
11 Kramer Levin Naftalis & Frankel on behalf of the creditors'  
12 committee. As you noted, there were a number of modifications  
13 that were made with the order at the request of the creditors'  
14 committee. And I just want to highlight a couple of those.

15 THE COURT: Of course.

16 MS. CATON: The first one is that one of the  
17 creditors' committee's main concern here is what happens to be  
18 the state after the sale closes. And I think the parties'  
19 intent from the beginning is then that 950 millions or an  
20 amount up to -- well, potentially greater than but, likely, 950  
21 million dollars, will be left behind to fund the wind down of  
22 these estates and pay administrative and priority claims.  
23 However, when we started the negotiation of the DIP order, I  
24 don't believe that these provisions were really made clear.  
25 And that's one of the things that we have done in the DIP

1 order. And that's highlighted in paragraph 21.

2 I think that the new provisions in here will allow us  
3 to hopefully confirm a Chapter 11 plan of distribution and make  
4 sure that the new GM stock and warrants are distributed to  
5 unsecured creditors.

6 The second point that I would like to make clear is  
7 that in paragraphs 5 and 6 of the DIP order that administrative  
8 and priority claims are now senior in right of payment of  
9 repayment to the DIP and that the DIP is non-recourse to the  
10 new GM stock and warrants because this is, as we believe,  
11 intended for distribution to unsecured creditors.

12 We still think that we have a ways to go before we  
13 get to a final wind down to make this -- I guess, the budgets  
14 clear. We're still negotiating the wind down budget. We need  
15 to negotiate an amendment to the DIP credit facility to make it  
16 appropriate for a wind down. Right now, there are a number of  
17 covenants and events of default that are a little stricter than  
18 what we would like to see on a going forward basis. And it's  
19 our understanding that the parties intend to do this prior to  
20 closing of the sale. And paragraph 21 sets out specifically  
21 that the committee is to be included in the negotiations in  
22 this process.

23 Lastly, we did make a few changes to the order vis-a-  
24 vis the committee's rights with respect to the pre-petition  
25 lenders. The highlight of these are that the committee's

1 investigation period of certain claims against the pre-petition  
2 lenders has been extended till July 31st. And secondly, any  
3 claims by the agent on a going forward basis after it's paid  
4 next week for reimbursement of the fees is now nonrecourse to  
5 the new GM stock and warrants..

6 And with those changes, Your Honor, the committee  
7 supports the entry of the DIP order.

8 THE COURT: Okay. Fair enough. Thank you. Good  
9 morning, Mr. Schein.

10 MR. SCHEIN: Good morning, Your Honor. Michael  
11 Schein, Vedder Price, on behalf of Export Development Canada.  
12 Just one clarification made by committee counsel, the carve-out  
13 in paragraph five with respect to the admin claims of the case  
14 and the DIP to priority claim come into effect after a closing  
15 of the 363 sales transaction, not prior to it.

16 THE COURT: Okay. And you're merely helping me  
17 better understand what's in this document?

18 MR. SCHEIN: Correct.

19 THE COURT: Okay. Anybody else? All right. Forgive  
20 me. Mr. Schwartz, United States Attorney's Office.

21 MR. SCHWARTZ: Good morning, Your Honor. Matthew  
22 Schwartz for the United States of America. As the debtors'  
23 papers amply demonstrate, the credit that's being extended by  
24 the government and other lenders in this case was the only  
25 credit that was available to the debtors and the deal was

1 negotiated at arm's length between experienced professionals.  
2 Nonetheless, the source of the DIP funds in this case is  
3 somewhat unusual and so we've asked for the finding that's in  
4 paragraph F of the redline order before you that speaks to the  
5 authority of the United States to expend TARP funds to make the  
6 DIP loan. I think that the language in the paragraph speaks  
7 for itself and the basis for the finding was set forth at  
8 length in the government's opening statement that was filed on  
9 the first day in these cases --

10 THE COURT: Yes. I remember that.

11 MR. SCHWARTZ: -- as well as the documents that were  
12 attached to it and the other document that we asked that the  
13 Court take judicial notice of yesterday.

14 THE COURT: Okay. Fair enough. I see no reason not  
15 to include that. It'll be included.

16 MR. SCHWARTZ: Thank you, Your Honor.

17 THE COURT: Anything else? Anyone? All right. Mr.  
18 Karotkin, for the reasons set forth in the opening papers, as  
19 supplemented by the submission of the United States and  
20 revisions made to deal with other parties' needs and concerns,  
21 the final DIP financing is approved on the form of the order in  
22 which it's been presented to me and subject to the need to get  
23 other stuff done today, it will be entered sometime today.

24 MR. KAROTKIN: Thank you, sir.

25 THE COURT: Thank you. Have a good day. Now --

1 MR. KAROTKIN: Could I make a suggestion, Your Honor?

2 THE COURT: Yes.

3 MR. KAROTKIN: I'm sorry to interrupt. The matter  
4 number 1 on the agenda on page 4, which is -- it relates to two  
5 proposed orders for use of cash collateral and adequate  
6 protection, those are related to the DIP and those also have  
7 been resolved among the parties. The same issues were raised  
8 by the landlords, the state taxing authorities, with respect to  
9 those proposed orders. Again, they have been resolved on the  
10 same basis. The committee raised the same issues that Ms.  
11 Caton addressed as to their time to challenge the liens and  
12 claims of those parties in the same language -- virtually the  
13 same language including -- included in the final DIP order has  
14 been included in those proposed final cash collateral orders as  
15 well. And I do have marked copies from the interim orders  
16 which I can hand up to you, sir.

17 THE COURT: You are reading my mind, Mr. Karotkin.  
18 So long as nobody is prejudiced by their not being here yet,  
19 I'd like to go right into those matters and the one you  
20 suggested is most logically connected. So far as you're aware,  
21 anybody who was going to be here at 9:45 is either here or told  
22 you they wouldn't be here?

23 MR. KAROTKIN: That's my understanding, sir. We  
24 circulated copies to the taxing authority's lawyers, to the  
25 landlord last night and they were -- they were comfortable with

1 the language. In fact, they agreed to the language, so they  
2 are on board, sir.

3 THE COURT: Okay. Fair enough.

4 MR. KAROTKIN: May I approach?

5 THE COURT: In a half a second, you may. I just want  
6 to be sure that the creditors' committee doesn't want to be  
7 heard in any way on this. Ms. Caton?

8 MS. CATON: No, Your Honor.

9 THE COURT: Okay. Yes, Mr. Karotkin -- well  
10 actually, I'm going to ask for a variant of that. I'm going to  
11 ask that you or one of your folks provide all the orders to my  
12 courtroom deputy at a convenient break. You can hand up the  
13 cash collateral to me now but the mechanics of entry will be  
14 separately handled. Am I right that this -- aside from the  
15 fact that of course it's a final -- principally papers the  
16 understandings with the folks who entered those limited  
17 objections?

18 MR. KAROTKIN: Yes, sir.

19 THE COURT: Okay. All right. It's approved and  
20 we're going to deal with this the same way we dealt with the  
21 final DIP.

22 MR. KAROTKIN: Thank you, sir.

23 THE COURT: Thank you. Mr. Miller?

24 MR. MILLER: Your Honor, may I make a suggestion at  
25 this time?

1 THE COURT: Yes, please.

2 MR. MILLER: That we could take the uncontested  
3 matters that's on the 9:45 calendar.

4 THE COURT: Yes. Certainly. And if you know that  
5 your counterparties or folks who want to be heard on further  
6 matters are already here, we can move into that as well. Do  
7 you want to handle the uncontested ones or put them on one of  
8 your folks?

9 MR. MILLER: I'll handle them, Your Honor.

10 THE COURT: Okay.

11 MR. MILLER: They start at number 9 on the agenda for  
12 9:45. The first motion, Your Honor, is the motion to get a  
13 final order authorizing the debtors to pay for pre-petition  
14 obligations to foreign creditors and authorizing and directing  
15 financial institutions to honor and process related checks and  
16 transfers. This was heard, Your Honor, on June 1 and Your  
17 Honor entered an interim order. There are no objections to the  
18 entry of the final order.

19 THE COURT: Okay. Given that and the provisions of  
20 my case management order, motion granted.

21 MR. MILLER: Thank you, Your Honor. Number 10, Your  
22 Honor, is the motion for final orders establishing notification  
23 procedures regarding restrictions on certain transfers of  
24 interest in the debtor. This is the NOL motion, Your Honor.

25 THE COURT: I remembered my dialogue with Mr.

1 Karotkin on this.

2 MR. MILLER: Yeah. He refused to take the lectern  
3 this at this point, Your Honor.

4 THE COURT: Understandably. Granted.

5 MR. MILLER: Thank you, Your Honor. Number 11 is the  
6 order to -- a final order. You entered an interim order, Your  
7 Honor, on cash management. There are no objections to the  
8 final proposed order.

9 THE COURT: Granted.

10 MR. MILLER: Number 12, Your Honor, is the motion of  
11 the debtors to -- for authority to exercise a put. This  
12 relates, Your Honor, to the claims which Your Honor approved  
13 the rejection some time ago at a hearing. One the claims we  
14 have a twenty-five percent interest in and a right to put our  
15 interest to the other party. As a result of this put, Your  
16 Honor, the estate will recover approximately 350,000 dollars.

17 THE COURT: Granted.

18 MR. MILLER: Thank you. Number 13, Your Honor, is  
19 the motion to grant additional time to file reports of  
20 financial information or to seek modification of reporting  
21 requirements pursuant to Bankruptcy Rule 2015.3. There are no  
22 objections to that Your Honor.

23 THE COURT: Granted.

24 MR. MILLER: Number 14, Your Honor, is the  
25 application of the debtors to engage Weil Gotshal & Manges

1 under a general retainer as attorneys for the debtor nunc pro  
2 tunc to the commencement date. This order, that will be  
3 proposed, Your Honor, was negotiated with the Office of the  
4 United States Trustee. There are no objections to this matter.

5 THE COURT: Granted.

6 MR. MILLER: Number 15, Your Honor, is the  
7 application of the debtors to engage the law firm of Jenner &  
8 Block LLP as attorneys for the debtors, pursuant to Section  
9 327(e). Jenner & Block, Your Honor, will be serving, Your  
10 Honor, as conflicts counsel and special corporate counsel.  
11 There is a supplemental declaration of Mr. Murray in connection  
12 with the application and there are no objections to this  
13 application, Your Honor.

14 THE COURT: Granted.

15 MR. MILLER: Number 16, Your Honor, is the  
16 application to engage under Section 327(e) the law firm of  
17 Honigman, Miller, Schwartz & Cohn, LLP as special counsel. Mr.  
18 Weiss appeared before you, Your Honor, in connection with a  
19 suppliant matter two weeks ago. There are no objections to  
20 this application, Your Honor.

21 THE COURT: Granted.

22 MR. MILLER: The last uncontested matter in this part  
23 of the calendar, Your Honor, is the application authorizing the  
24 retention and employment of the Garden City Group, Inc. as  
25 notice and claims agent nunc pro tunc to the commencement date.

1 There are no objections to that, Your Honor.

2 THE COURT: Granted.

3 MR. MILLER: I would also note, Your Honor, that item  
4 on the contested calendar motion, item number -- let me get to  
5 it. I think it's item number 6, Your Honor, which was the  
6 motion of the consumer -- ad hoc consumer victims committee for  
7 the appointment of an additional committee of unsecured  
8 creditors to represent consumer victims was withdrawn without  
9 prejudice.

10 THE COURT: Okay.

11 MR. MILLER: We could do some other motions, Your  
12 Honor. I don't know if --

13 THE COURT: It's all right.

14 MR. MILLER: Subject to Your Honor's ruling that if  
15 somebody shows up at 9:45, we can always go back.

16 THE COURT: Okay. Do you know whether anybody has  
17 indicated to you that they're going to wish to show up on the  
18 motion to pay essential suppliers and all that?

19 MR. MILLER: Mr. Smolinsky, Your Honor.

20 THE COURT: If you're in doubt, I think I need to  
21 wait till 9:45 but I would prefer to deal with the easier ones  
22 most quickly.

23 MR. SMOLINSKY: Your Honor, everything is resolved.  
24 I did represent that I would put one thing on the record and as  
25 long as I do that, I think we're fine to go forward.

1 THE COURT: Sure. Go ahead, Mr. Smolinsky.

2 MR. SMOLINSKY: Your Honor, we're here today seeking  
3 entry of a final order with respect to the debtors' essential  
4 supplier programs. There were two objections filed. One was  
5 filed by Panasonic Electric Works Corporation. The other by  
6 Clements (ph.) Inc. Both objections have been voluntarily  
7 withdrawn but I did agree to clarify on the record -- Your  
8 Honor, you may recall that we attached to our motion a trade  
9 agreement and it was the debtors' intent to require critical  
10 vendors to sign a trade agreement and return it. These two  
11 objections were related to that agreement. They had some  
12 issues with it. I think they understand --

13 THE COURT: They didn't want to give you everything  
14 you were looking for, for the benefit of the estate?

15 MR. SMOLINSKY: That's right, Your Honor. But the  
16 answer was easy. You don't have to sign it and you're not a  
17 critical vendor.

18 THE COURT: You anticipated the first question I  
19 would be asking in the argument, if there had been one.

20 MR. SMOLINSKY: But Your Honor, I think they wanted  
21 me to clarify that because they did not sign the trade  
22 agreement, they're not bound by any of the terms contained in  
23 that trade agreement.

24 THE COURT: If they don't sign an agreement, they're  
25 not bound by it?

1 MR. SMOLINSKY: That's right, Your Honor. And with  
2 that, Your Honor, the objections are resolved. The creditors'  
3 committee did engage us in some dialogue about the form of the  
4 final order. We did add some clarifying language to make  
5 certain that we would provide the creditors' committee with the  
6 information that they need to be up to speed on how we  
7 implemented that order and I'm happy to report that I don't  
8 think there are any issues with respect to that.

9 THE COURT: All right. Fair enough. I do want to  
10 give the creditors' committee a chance to comment if it wants  
11 to. Mr. Mater, good morning.

12 MR. MATER: Good morning, Your Honor. Thomas Moers  
13 Mater for Kramer, Levin, Naftalis & Frankel representing the  
14 committee. We have no issues. We have certain supplier  
15 matters that are referenced in our limited objection to the  
16 general transaction but we're working those through and with  
17 respect to what Mr. Smolinsky put on the record, we have  
18 nothing further to add.

19 THE COURT: Fair enough. Then with the  
20 clarifications and anything that you arranged for, Mr.  
21 Smolinsky, the motion's granted.

22 MR. MILLER: Your Honor, I think we could proceed  
23 with the utilities motion which is item 2.

24 THE COURT: Fair enough.

25 MR. SMOLINSKY: Thank you, Your Honor. Your Honor

1 entered a final order with respect to the utility motion on  
2 June 1st. The procedures provided that objections could be  
3 filed to the form of adequate assurances by the 15th of June.  
4 We received -- of the 261 utilities that were noticed in  
5 connection with the order, we received objections from 35  
6 utilities. We have finally resolved all of the objections  
7 except for a very few, I believe two objections, and we believe  
8 that we have agreements in principle with respect to those two.  
9 What I'd like, Your Honor, and I could share it with chambers  
10 so that the docket accurately reflects the resolution of these  
11 matters is that two of the objections, it's docket number 764  
12 and 915, will be adjourned until the 30th of June so that we  
13 can presumably deliver final resolutions of those matters.

14 THE COURT: Pause, please, Mr. Smolinsky. On those  
15 adjournments, you have comfort that they're not going to turn  
16 off the lights on you between now and then?

17 MR. SMOLINSKY: Yes, Your Honor, we're still within  
18 the thirty days so I don't think that that would be an issue.

19 THE COURT: Okay.

20 MR. SMOLINSKY: With respect to the remaining  
21 motions, they are resolved and I believe they can be marked off  
22 calendar and we could provide Your Honor with the docket  
23 numbers.

24 THE COURT: Okay. Are there folks who are waiting to  
25 be heard on this? Would you come up please? And,

1 unfortunately, I don't know everybody. If you could identify  
2 yourself on the record.

3 MS. KARPE: Apologize, Your Honor. Karel Karpe,  
4 White & Williams for Nicor Gas. Your Honor, I have spoken to  
5 Mr. Smolinsky and we do have an agreement in principle. But I  
6 noticed that there was a first supplemental list filed sometime  
7 very early this morning. And it looks like there's the Nicor  
8 Gas accounts have been transferred to that notice. But it does  
9 look like there may be an additional one.

10 So just to preserve my client's rights, Your Honor,  
11 we filed an objection at docket number 1099 which I didn't hear  
12 referenced this morning. And all I want to do is just get some  
13 assurance on the record that the objection that we previously  
14 filed and any other accounts that Nicor and the debtor may have  
15 are all rolled over to that next one. We believe that we will  
16 have an agreement in the next day and so I don't think that  
17 this is going to prejudice either the debtor and we do not plan  
18 on turning off any utility.

19 THE COURT: Okay. Mr. Smolinsky?

20 MR. SMOLINSKY: Your Honor, just to clarify, an  
21 additional list was filed this morning, as we're entitled to do  
22 under the order. The purpose of the list was not to add any  
23 contracts or any utilities. The purpose was to actually  
24 eliminate certain utilities that had claims that their  
25 contracts were forward contracts and not utilities. And that

1 was the agreement by which certain of the objections were  
2 resolved. So I'll work with Nicor to make sure that they're  
3 comfortable, but we did not have any utility companies to that  
4 list.

5 THE COURT: Okay. You okay with that, Ms. Karpe?

6 MS. KARPE: Yeah, Your Honor. The only difference  
7 that I noted this morning is that there was a difference in the  
8 account numbers. I'm sure that Mr. Smolinsky and I can work  
9 our issues at and we should have a resolution, we hope, by  
10 tomorrow.

11 THE COURT: Very good. Thank you. Mr. Fox?

12 MR. FOX: Good morning, Your Honor. Shawn Fox from  
13 McGuireWoods on behalf of the Dominion Retail, Inc. With the  
14 debtors' representation that they're not seeking to treat  
15 Dominion Retail as a utility, our objection is resolved.

16 THE COURT: Very good. Thank you. All right.  
17 Anybody else on 366 issues, utility issues? There being no  
18 response, your mechanism is fine, Mr. Smolinsky. So we'll be  
19 locked in for all of those that have been resolved and it'll be  
20 continued for the couple that haven't been?

21 MR. SMOLINSKY: That's right, Your Honor.

22 THE COURT: Very good. Okay. Thank you.

23 MR. MILLER: If Your Honor please, item number 3 has  
24 been resolved. Mr. Karotkin -- that's the use of cash  
25 collateral and the explanation that Mr. Karotkin gave.

1           Item 4, which is the Evercore Group LLC, as stated,  
2 Your Honor, we request that be adjourned to July 2nd.

3           In connection with item number 5, Your Honor, which  
4 is the motion of the debtors to employ and retain AP Services  
5 LLC as crisis managers and to designate Albert A. Koch as chief  
6 restructuring officer nunc pro tunc to the commencement date,  
7 we have reached an agreement, Your Honor, with the Office of  
8 the United States Trustee and we have a statement to put on the  
9 record.

10           (Pause)

11           MR. MILLER: Your Honor, I am just informed by Mr.  
12 Karotkin that we have to meet with the Office of the U.S.  
13 Trustee during break.

14           THE COURT: Okay.

15           MR. MILLER: So we'll put that off.

16           THE COURT: We'll defer that one, then.

17           MR. MILLER: Item 6 is a report, Your Honor, has been  
18 withdrawn without prejudice. And that leaves, Your Honor,  
19 items 7 and 8, 7 being the motion of the ad hoc committee of  
20 asbestos personal injury claimants for an order appointing a  
21 legal representative, a future asbestos personal injury  
22 claimant and directing the United States trustee to appoint an  
23 official committee of asbestos personal injury claimants.

24           THE COURT: Okay. Mr. Esserman here?

25           MR. ESSERMAN: Yes, Your Honor.

1 THE COURT: You want to come on up, please. Somebody  
2 give Mr. Esserman a place to sit at the counsel table?  
3 Although, Mr. Esserman, after my preliminary remarks I'm going  
4 to want you to speak first. And when you do, you'll be at the  
5 main counsel lectern.

6 Give me a moment, please.

7 (Pause)

8 THE COURT: All right. Folks, make your  
9 presentations as you see fit but, Mr. Esserman, when it's your  
10 turn, I'm going to need you to address not just the matters  
11 that were set forth in the papers but the terrain as it now  
12 exists as a consequence of my ruling on Tuesday.

13 We have, as I understand it, in your motion, the  
14 regular tort litigants motion having been withdrawn, double  
15 barreled issues and of course the future claims rep is a little  
16 different then me forming another official committee. But on  
17 the matter of the official committee, in addition to the things  
18 that you've briefed, I would appreciate it if by the time that  
19 you're done you help me understand how it would be, if it is in  
20 fact the case, that your request is different than the one for  
21 the bondholders that I addressed on Tuesday.

22 On the future claims rep portion, the debtors told us  
23 that it's not looking for a channeling injunction and that  
24 we're going to have a liquidation here and that the debtor  
25 isn't going to be looking for a discharge. And I need your

1 help in understanding why those aren't some pretty important  
2 facts.

3 I also want you to address, before you're done, what  
4 seemingly is the case, I forgot which of the briefs I saw said  
5 that, which focus on the fact that this, unlike the other case  
6 in which you've been before me, is hardly an asbestos driven  
7 case and that asbestos claims, compared to the totality of the  
8 claims of all the other creditors in this case, are very, very  
9 small percentage.

10 So, Mr. Esserman, come on up, please. Good to see  
11 you again. Came in from Texas?

12 MR. ESSERMAN: I did, Your Honor. Nice to see you.  
13 Sandy Esserman of Stutzman Bromberg Esserman & Plifka in  
14 Dallas, movant today, and I will address all the questions that  
15 Your Honor asked. First I'd like to say that on behalf of the  
16 ad hoc committee, and we have filed a 9019 --

17 THE COURT: You said a 9019. Did you mean that or a  
18 2019?

19 MR. ESSERMAN: A 2019; sorry.

20 THE COURT: I would have been delighted to hear it  
21 was a 9019 but I didn't think we were quite there yet.

22 MR. ESSERMAN: No. I guess I was anticipating the  
23 future, hopefully. Anyway, Your Honor has raised the  
24 significant issues, I think, that I will address, each one of  
25 those issues. I'd like to address them in this context, in

1 light of the paper filed by the creditors' committee yesterday,  
2 which was, I thought, a very significant paper in which the  
3 creditors' committee filed what they called a limited objection  
4 to the sale but in fact was a statement by the creditors'  
5 committee and a full objection that provided that any sale that  
6 does occur in this case cannot bond future claimants and should  
7 not bond future claimants.

8 In light of the position taken by that committee and  
9 in light of where we are, I no longer wish to proceed and would  
10 adjourn a portion of our motion with regard to seeking a  
11 separate committee at this time. We will continue to be active  
12 in the case; the ad hoc committee is not going away. We are  
13 not seeking official status. This case and the context it was  
14 filed, the motion was filed, coming off the Chrysler situation,  
15 gave us great pause, gave the ad hoc committee great pause.  
16 Just to give Your Honor a context of what I'm referring to, in  
17 the Chrysler case the committee was -- had a lot of creditors  
18 on it which wound up being assumed and paid in full after the  
19 sale was approved, which caused wholesale resignations from the  
20 creditors' committee. In fact, I think a majority of the  
21 creditors' committee in Chrysler had resigned after the sale  
22 was approved because they were paid in full. And that was a  
23 difficult situation for those creditors that were "left behind"  
24 in Chrysler. Hopefully that is not going to be the case in the  
25 GM case or the GM committee, which would, in great part,

1 alleviate the necessity for a separate committee.

2 I would like to distinguish or answer --  
3 nevertheless, I'd like to answer some of your questions very  
4 briefly. For instance, how is this any different from, say, a  
5 Dana which has been referenced in many of the papers, in which  
6 asbestos claims were a relatively small percentage of the  
7 population of claims versus the situation -- similar situation  
8 in Chrysler.

9 In Dana, the asbestos claims -- and I moved for -- it  
10 was pointed out that I moved for a separate committee and I did  
11 and we were very active in that case. But in Dana, they passed  
12 the asbestos claims through. They passed them through as  
13 unimpaired and there was testimony in Dana that asbestos claims  
14 were not only passed through to the entity but any successor  
15 liability claims that anyone wanted to bring against New Dana  
16 could be brought. There was no concession that, in fact, they  
17 were good claims or that they should succeed. But that they  
18 could survive the reorganization.

19 There was also extensive testimony that there was  
20 adequate assets and insurance to pay asbestos claims in full,  
21 in full. So there was a lot of testimony there that, one,  
22 asbestos claims were a very small piece of that puzzle; and  
23 two, they were passed through. Three, there was adequate  
24 provision made for their compensation. And to the extent  
25 people look to Dana as a model case of how to deal with this

1 and how to dispose of not having a futures rep and a  
2 committee -- I'm not necessarily endorsing that. We still  
3 disagree with those decisions, but that example does stand.  
4 And as far as I know, post confirmation, has worked.

5 In this case, if, in fact, those situations --  
6 situation is going to hold true and future claims, as the  
7 creditors' committee has pointed out in their paper filed  
8 yesterday, and I would urge Your Honor to read it at his  
9 convenience, are going to be able to be asserted against what  
10 will be called the New GM. And GM does not seek to channel or  
11 restrict in any way those claims. Perhaps a futures  
12 representative may not be needed. Perhaps a, what I'll call a  
13 future tort czar, future claims tort czar, not just for  
14 asbestos claims but in thinking about this last night you've  
15 got future damage claims, future rollover claims, future design  
16 defect claims, future gas tank explosion claims for GM cars out  
17 there in the public that have not yet occurred. And as long as  
18 those claims are not impaired in any sense and can be brought  
19 against the surviving entity, then I think we need to rethink  
20 this whole -- the direction that I was trying to push the pile,  
21 so to speak.

22 On the other hand, if GM's position is no, Mr.  
23 Esserman, we are absolutely taking this issue on dead square  
24 and we are going to eliminate those claims and leave them  
25 behind with no compensation or no special pot or no trust or no

1       whatever, I think that's a different situation. And I think we  
2       need to then think about how we can protect the public and how  
3       we can protect the future claimants and the people that are  
4       going to be damaged in the future, be it asbestos, be it  
5       consumers, be it rollover victims, be it gas tank explosions,  
6       etcetera. So perhaps this is yet to play out.

7               The way I read GM's papers, and hopefully I'm wrong,  
8       is they intend to constrict those claims. They intend not to  
9       pass those claims through. They intend to, through a 363  
10       device, eliminate those claims for the "New GM" whether they  
11       gave good or bad publicity on that in the future.

12              So, I think, to a certain extent, we sort of need to  
13       see where GM's going to take us on this ride. And see if, in  
14       fact, they're willing to accede to the issues raised by the  
15       creditors' committee and frankly raised first by me in our  
16       papers in the objection to the sale. And in fact, if you will,  
17       pass those claims through the estate.

18              I would note that one comment on appointing of an FCR  
19       that the debtor made was the ad hoc committee -- ad hoc  
20       asbestos claimants request to appoint an FCR at this early  
21       stage of these cases should be denied. Well, I know that if it  
22       had been made later it would have been too late. And I think,  
23       in fact, you need to address this issue up front in a case and  
24       early. And if Your Honor decides to or GM is going to decide  
25       to severely restrict future consumer claims, future tort

1 claims, future asbestos claims, it needs to decide which  
2 direction to go. And if that's the case I think it'd be only  
3 prudent and a protection of the public to appoint somebody to  
4 protect those interests and make sure those interests are  
5 protected.

6 If not, I think the Supreme Court, as recently as  
7 last week, in the Travelers vs. Bailey decision, which I was  
8 involved in from the trial court all the way to the Supreme  
9 Court; and lost, I might add, ultimately. But I think that  
10 it's sort of in the eye of the beholder whether the case is a  
11 loss or a win because you have to look at what the Court said.  
12 And the Court, sort of, said it wasn't -- it said you can't  
13 collaterally attack orders. You can't collaterally attack,  
14 say, a 1986 order in 2004.

15 But on the other hand, it left open the question as  
16 to who's bound by those orders. Were my clients, in that case,  
17 Pearly Bailey -- Pearly Lee Bailey, a widow of a Mizo (ph.)  
18 victim, was she bound by that order? And the Court remanded it  
19 to the Second Circuit to decide whether or not, in fact, she  
20 was bound because she was not present before the Court, didn't  
21 have notice, etcetera. Those issues all remained open, which  
22 is why I say there's a lot of legs left in that case and a lot  
23 of legs left after that decision for me in the Second Circuit  
24 and in the bankruptcy court.

25 But what we can learn from that case is, and what the

1 Supreme Court I think was telling the public and telling the  
2 Court was, you need to protect your rights at the time. You  
3 need to have your rights protected at the time. And Congress,  
4 through 524(g) has in fact; set forth a mechanism to protect  
5 future unknown claims in an asbestos situation. And is  
6 specifically referenced that protection and it said -- the  
7 Court said we do not decide whether any particular respondent  
8 is bound by the 1986 orders. They assumed that everyone was  
9 bound and that relates very much to this case. I think it's  
10 almost dead-on this case.

11 If GM is trying to bind everybody and all the  
12 futures, I think Congress has set forth in the asbestos context  
13 and the Supreme Court affirmed last week, how that's done. And  
14 that's done through a 524(g) situation. Or I could analogize  
15 to that and say that a future tort czar, to protect the  
16 futures. And if not, then due process provides that those  
17 people are not bound. And I'm willing to, frankly, live with  
18 either result. I'm willing, if GM says it wants to go the Dana  
19 route, I think that's a mistake but they can go the Dana route.  
20 If GM wants to proceed a different route, I'm fine with that.

21 So in many respects, I punt this to GM. If GM is in  
22 fact going to try and cut everyone off at the knees for future  
23 claims, I think they need to take this podium and say that.  
24 And then I think they need to either live with the consequences  
25 of not having a future claims tort czar or future claims rep or

1 not. And also risk whether or not the order that they want  
2 gets entered by this Court. Thank you.

3 THE COURT: All right. Thank you. Mr. Miller?

4 (Pause)

5 MR. MILLER: Harvey Miller for the debtors. Your  
6 Honor, I wish Mr. Esserman had called last evening, I might  
7 have gotten another hour of sleep. As I understand his  
8 presentation, the motion for the appointment of additional  
9 committee of asbestos claimants is withdrawn without prejudice.

10 THE COURT: That's my understanding as well. Mr.  
11 Esserman?

12 MR. ESSERMAN: We would prefer to adjourn it.

13 MR. MILLER: We would prefer to have it withdrawn  
14 without prejudice. We don't need it on the calendar, Your  
15 Honor.

16 THE COURT: All right. Gentlemen, one of the things  
17 I would like to do is to get more money into the pockets of  
18 creditors. I don't want to make people file more pieces of  
19 paper then have already been filed in this case. I'm sure you  
20 got less sleep than I did, Mr. Miller, but the goal is the  
21 same.

22 That portion can be continued but, frankly, I'm going  
23 to set it for a date pretty far out, Mr. Esserman, without  
24 prejudice for you to advance it on the calendar. We keep them  
25 on calendar so they don't fall between the outfielders but this

1 is really a distinction without a difference, gentlemen.

2 Continue, Mr. Miller.

3 MR. MILLER: So that leaves, Your Honor, the question  
4 of the future representative. As Your Honor pointed out in  
5 your opening remarks, 524(g) is a section of the Bankruptcy  
6 Code which relates to a debtor proposing a plan of  
7 reorganization that incorporates a channeling order where  
8 asbestos claims are going to be channeled to a particular fund  
9 for satisfaction, which is derivative out of the Johns Mandel  
10 (ph.) case.

11 As we have said in our papers, Your Honor, there is  
12 no intention on the part of GM to propose a channeling order.  
13 And since we are proposing to do a plan of liquidation there  
14 will be no discharge. In that context, Your Honor, there is no  
15 justification for the appointment of a future claimant  
16 representative. And I would direct Your Honor's attention to  
17 the case of Locks vs. U.S. Trustee at 157 B.R. 89, a decision  
18 of the United States District Court for the Western District of  
19 Pennsylvania which held that in a case of a liquidation, rather  
20 than a reorganization, there is no mandatory requirement for a  
21 future claimant representative.

22 We are not proposing, in any way Your Honor, a  
23 channeling order. And as Mr. Esserman has pointed out, there  
24 are negotiations going on with the official creditors'  
25 committee as to the scope of the order which will be requested

1 in connection with the 363 transaction. Where those  
2 negotiations come out at this point, Your Honor, we're not  
3 prepared to say. There is active negotiation on all of the  
4 issues that Mr. Esserman referred to. They will be before Your  
5 Honor on the hearing on June 30th.

6 In the context of where we are today, 524(g) is  
7 simply not applicable and there is no basis here, today, for  
8 the appointment of a future representative for future asbestos  
9 victims. Which, and also, as the Court pointed out in Locks  
10 vs. U.S. Trustee, there is an inherent conflict between the  
11 current asbestos claimants and the future claimants that may  
12 have to be considered at a future date. But in the  
13 circumstances where we find ourselves today, Your Honor, there  
14 is no basis for the appointment of a future representative.  
15 And I say that, Your Honor, without prejudice to a future  
16 application if that becomes appropriate.

17 THE COURT: Okay. Thank you. Mr. Esserman, any  
18 reply? Oh, forgive me. Mr. Mayer, come on up, please.

19 MR. MAYER: Thank you, Your Honor. Tom Mayer, again,  
20 for the official committee. And our limited objection is  
21 exactly what it states to be. But Mr. Esserman is correct that  
22 certain of the issues that he raised we decided to raise  
23 ourselves. And it was no mean feat getting a fifteen-member  
24 committee to agree to take that position. We have on that  
25 committee; I think I can do this from memory, two indentured

1 trustees representing approximately twenty-seven billion  
2 dollars of debt. We have the PBGC whose contingent liability  
3 dwarfs that of the bonds. We have three unions who are  
4 receiving quite disparate treatment. We have three dealers who  
5 are receiving quite disparate treatment. Two suppliers, one  
6 advertising agency, two product liability claimants and an  
7 asbestos representative. I think I got to fifteen.

8 And the issues that Mr. Esserman raised were debated  
9 at considerable length by what is not even so much a model  
10 United Nations and we took the position we took in our papers  
11 with respect to future claims.

12 We agree with Mr. Miller that there is no call for a  
13 futures representative at this time. If it becomes necessary,  
14 we can deal with it at a future time. But it is our position,  
15 as set forth in the papers as Mr. Esserman noted, that we don't  
16 believe that an order entered by this Court can bond future  
17 claimants. We don't believe 524 is applicable here. We don't  
18 think 524 is mandatory and there was no conceivable stretch  
19 under which a 524(g) plan could possibly be confirmed in this  
20 case. It will never be a case where the asbestos claimants are  
21 getting a majority of an operating company and no discharge is  
22 being sought for it.

23 So if at some point in the future it becomes  
24 necessary to deal with a futures claim issue, we can deal with  
25 it at this time. And at this point we see no basis for either

1 the appointment of a committee or the appointment of futures  
2 representatives. If you have questions, I'm happy to answer.

3 THE COURT: No, I really don't. Thank you.

4 MR. MAYER: Thank you, Your Honor.

5 THE COURT: Okay. Mr. Esserman, I'll take any reply.

6 MR. ESSERMAN: Future claims are being passed through  
7 the estate unimpaired. I see no reason for an appointment  
8 either at this time, Your Honor. Thank you.

9 THE COURT: All right. Everybody sit in place for a  
10 second.

11 (Pause)

12 THE COURT: Folks, the motion is denied without  
13 prejudice to renewal if either the debtor proposes a channeling  
14 injunction in the future or decides to propose a standalone  
15 plan.

16 Mr. Esserman, if you want to take this up on appeal,  
17 I'll give you full findings of fact and conclusions of law at  
18 the end of the day today, but I don't want so many people in  
19 the courtroom to have to await a recess for me to deliver those  
20 findings which would likely be as long as they were on Tuesday.

21 MR. ESSERMAN: Unnecessary, Your Honor.

22 THE COURT: All right. Thank you. Is our next  
23 matter the retirees committee?

24 MR. MILLER: Yes, Your Honor.

25 THE COURT: Do you folks want to go straight into it

1 or do you think anybody would want or need a five or ten minute  
2 break?

3 MR. MILLER: I would ask Your Honor for a five minute  
4 break. I would like to have that opportunity to meet with the  
5 U.S. trustee.

6 THE COURT: Certainly. Okay. We're in recess for --  
7 until -- would an extra five minutes be prudent, Mr. Miller?

8 MR. MILLER: Absolutely, Your Honor.

9 THE COURT: Let's resume at 10:15. We're in recess.

10 (Recess from 9:56 a.m. until 10:15 a.m.)

11 THE COURT: Mr. Miller?

12 MR. MILLER: Harvey Miller for the debtors. Your  
13 Honor, may we go back to the motion to engage AP Services?

14 THE COURT: Certainly.

15 MR. MILLER: Mr. Karotkin, please?

16 THE COURT: Mr. Karotkin.

17 MR. KAROTKIN: Thank you, Your Honor. Stephen  
18 Karotkin, Weil Gotshal & Manges, for the debtors. In  
19 connection with the application of the debtors to retain AP  
20 Services, Your Honor, there was only one substantive objection  
21 filed by the Office of the United States Trustee. I believe  
22 that the unsecured creditors' committee either filed a pleading  
23 or requested certain clarification in any proposed order, which  
24 were are more than willing to address.

25 With respect to the objection raised by the Office of

1 the United States Trustee, we have reached a resolution of that  
2 dispute which we propose to embody in a revised proposed order,  
3 which we will circulate with Ms. Adams as well as with the  
4 unsecured creditors' committee. But I would like to state on  
5 the record the resolution that's been agreed to, if I might?

6 THE COURT: Yes. Go right ahead.

7 MR. KAROTKIN: Thank you, sir. I'm just going to go  
8 to the substantive points. With respect to the success fee  
9 described and contained in their retention agreement, there  
10 would be no objection to payment of fifty percent of the  
11 success fee as provided in the retention agreement, on the  
12 closing of the sale transaction, subject to AP Services filing,  
13 prior to such payment, a supplemental affidavit with the Court  
14 summarizing the services rendered by AP Services with respect  
15 to the sale transaction.

16 Second, both the payment of the balance of the  
17 success fee, which is proposed to be paid one year following  
18 the closing of the sale transaction, and any discretionary fee,  
19 as that term is defined in the application, both of those  
20 payments shall be subject to review under the reasonableness  
21 standards set forth in Sections 330 and 331 of the Bankruptcy  
22 Code, including the filing of an appropriate fee application by  
23 AP Services, including time records.

24 And finally, Your Honor, no person from AP Services  
25 involved in the engagement, can bill at a rate higher than the

1 rate billed by Mr. Koch, as that rate may be adjusted from time  
2 to time, on notice to the Office of the United States Trustee.  
3 And I believe that, I hope, accurately sets forth the  
4 understanding. And if I have stated something --

5 THE COURT: Mr. Matsumoto, forgive me. Could you  
6 pull a nearby microphone over unless you want to come to the  
7 main lectern?

8 MR. MATSUMOTO: That's correct, Your Honor.

9 THE COURT: Okay.

10 MR. MATSUMOTO: He's accurately said it.

11 THE COURT: Mr. Mater.

12 MR. MOERS MATER: That is correct, Your Honor. That  
13 reflects the agreement with the committee.

14 THE COURT: All right. Did everybody who weighed in  
15 on this or wanted to, have a chance to be heard? Okay. As  
16 modified by the understandings with the U.S. trustee and the  
17 creditors' committee, that retention is approved. And at your  
18 convenience, you or one of your colleagues can get me the  
19 revised order papering that understanding.

20 MR. KAROTKIN: Thank you, sir.

21 THE COURT: Thank you.

22 MR. MILLER: If Your Honor pleases, Harvey Miller  
23 again. Your Honor, one housekeeping detail.

24 THE COURT: Yes.

25 MR. MILLER: The filing of a memorandum of law in

1 support of the proposed Section 363 transaction is due tonight.  
2 There are objections, Your Honor, that are still coming in.  
3 They've come in every day. They're still streaming in. What  
4 we would propose, Your Honor, is to file our memorandum of law.  
5 But we would like the extension, Your Honor, to amend that  
6 memorandum before the commencement of the hearing on June 30th,  
7 to take into account the additional objections that are coming  
8 in.

9 THE COURT: I need a little help from you here, Mr.  
10 Miller, in a couple of ways. First, I thought the time for  
11 objections to what you're doing had come and gone. You're  
12 dealing with the practical problem that people, either because  
13 they disregarded the deadline or didn't get notice of the  
14 deadline, are still giving you stuff?

15 MR. MILLER: I think one day, Your Honor, ECF was  
16 down and that delayed a lot of things. Some people claim they  
17 did not get notice. And they're just continually streaming in,  
18 Your Honor.

19 THE COURT: I hear you. When were you thinking of --  
20 you did file one brief already. And this, I take it, would be  
21 like a reply brief to the objections?

22 MR. MILLER: Yes, Your Honor.

23 THE COURT: And what was your thought as to when I  
24 would get something I could work with?

25 MR. MILLER: The hearing is on Tuesday, Your Honor.

1 Monday, 5:00, 6:00.

2 THE COURT: Umm --

3 MR. MILLER: I'll make a concession, Your Honor.

4 Noon.

5 THE COURT: I feel like I'm playing Let's Make a  
6 Deal. I'm not going to default you if you can't make noon, but  
7 I'd like you to try very hard to do that.

8 MR. MILLER: Very good, Your Honor. Thank you.

9 THE COURT: Thank you. Mr. Schwartz?

10 MR. SCHWARTZ: On that point. Mr. Miller said that  
11 the deadline was this evening. We were under the impression  
12 that it was tomorrow. And we were intending to put in papers  
13 as well, if that's acceptable.

14 THE COURT: Sure, you can do that.

15 MR. SCHWARTZ: Thank you.

16 THE COURT: Okay. Are we now up to retirees, Mr.  
17 Miller?

18 MR. MILLER: Yes, sir.

19 THE COURT: All right. I would like counsel for the  
20 retirees to come on up, but then, only to get a place at  
21 counsel table. Make room for him, folks. Somehow, make room  
22 for him, because I have some preliminary observations. Mr.  
23 Mater, you get a place at the -- okay, that's fine.

24 Folks, make your presentations as you see fit, but by  
25 the time you're done, I want you to address the following

1 questions and concerns. It seems to me, subject to your rights  
2 to be heard, that 1114(d) has two prongs, one of which is  
3 mandatory, if it applies; the other which is discretionary.  
4 The mandatory part being "shall order, if the debtor seeks to  
5 modify or not pay the retiree benefits"; and the discretionary  
6 part being "or if the Court otherwise determines that it is  
7 appropriate." Now a "shall" proceeds the second also, but when  
8 you give me the ability to determine whether it's appropriate,  
9 it seems to me, that changes it into a discretionary  
10 determination. But it also seems to me, subject to your rights  
11 to be heard, that neither of those requirements applies unless  
12 1114 applies at all.

13 Now, on that, it appears to me that there are two  
14 principal legal issues which I'll get to in half a second. But  
15 I also have a factual question for which I'd like your help,  
16 Mr. Miller, or from whoever on your team is going to be arguing  
17 it; which is, are the debtors' plans the same with respect to  
18 both its retiree pension plans and also its welfare plans,  
19 which I understand to be its health and life insurance plans?  
20 Or is there some distinction between them? That's more in the  
21 nature of a factual predicate, just so I know what we're  
22 talking about, either changing or leaving subject to the  
23 possibility of a change.

24 But then, when we get to the legal prongs, it seems  
25 to me that one of the issues I have to deal with is whether

1 1114 applies at all. And on that -- and forgive me, on behalf  
2 of the retirees, I'm not sure if I got your name?

3 MR. GOTEINER: I'm sorry, Your Honor. Neil Goteiner.

4 THE COURT: Goteiner?

5 MR. GOTEINER: Yes.

6 THE COURT: Thank you. Mr. Goteiner, it appeared to  
7 me that in arguing the issue as to whether 1114 applied, you  
8 took kind of a national perspective. And I'm wondering, and I  
9 would find your help valuable, in telling me whether I should  
10 take a national perspective on the one hand, or whether I, as a  
11 judge sitting in the Second Circuit in the Southern District of  
12 New York, can appropriately consider a national perspective, or  
13 whether I have to give greater attention to a decision of the  
14 Second Circuit and of the case law in the Southern District of  
15 New York.

16 Now, I think many people might believe that a  
17 bankruptcy judge in the Second Circuit is bound by a decision  
18 of the Second Circuit, and I've got the Chateaugay decision.  
19 It's also the case that I'm on record in four or five or six  
20 published decisions as saying that even though I'm not bound by  
21 the decisions of other bankruptcy judges in this district, that  
22 I believe that the interests of consistency for the financial  
23 community, for the bankruptcy community in this district, are  
24 very important, and therefore that I follow the decisions of  
25 other bankruptcy judges in the Southern District of New York,

1 in the absence of clear error.

2 Now, I was a little surprised, Mr. Goteiner, that at  
3 least in your opening brief, unless I missed it, there was no  
4 attention to Judge Drain's decision in Delphi. Now, obviously,  
5 there was greater discussion of it by the debtors and the  
6 creditors' committee when they filed their next round of  
7 briefs. And while you mentioned it in your reply, you didn't  
8 really address, unless again I missed it, the substantive  
9 holdings that Judge Drain had with respect to whether 1114  
10 applies or whether I should follow his decision or whether his  
11 decision was incorrect in any way. Some might regard his  
12 decision, albeit originally dictated, as one of the most  
13 comprehensive and extensive discussions of this area that  
14 anybody has ever written at any level in the federal system.  
15 So I want both sides to address Judge Drain's decision  
16 extensively, either up or down, whether it's right or wrong,  
17 and address whether I should follow it or not.

18 Then we get to Sprague. As I read Sprague, and it's  
19 long and it's complicated, and I'm not claiming to be the only  
20 person who can read it or understand it, it appeared to me to  
21 be an 8-1-1-3 en banc decision. And it looked to me that when  
22 you looked at the plans, insofar as they affected the general  
23 retirees, as contrasted to the early retirees, it was a 10 to 3  
24 decision, putting aside the class action issue, which isn't  
25 material to our concerns. And it also appears to me that for

1 either most or all of the GM community, their situation is more  
2 analogous to the general retiree situation rather than the  
3 early retiree situation, because the principal difference was  
4 the early retirees had separate deals that may have been  
5 explained to them when they were asked to take early  
6 retirement.

7 Now, one thing that was a matter of some difficulty  
8 for me, from both sides, is that the contentions that Sprague  
9 was wrong came up only in the reply brief filed on behalf of  
10 the retiree committee, your folks, Mr. Goteiner. And that  
11 forced the debtor to deal with a whole new issue in a surreply,  
12 which the debtor did, but then you didn't have a chance to  
13 reply to that. Now, debtor has stated in its surreply that res  
14 judicata applies, binding on the retirees here, and also even  
15 that collateral estoppel applies. I'm wondering whether the  
16 more appropriate course is to analyze this, principally, on  
17 bases of stare decisis where you have the classic blue Buick.

18 I don't want to foreclose you folks from other points  
19 that you want to make, but by the time you're done, please be  
20 sure to have covered at least those. Okay. Your motion, Mr.  
21 Goteiner.

22 MR. GOTEINER: Neil Goteiner, General Motors  
23 Retirees' Association. Your Honor, I think the questions you  
24 asked obviously go to the core of issues, and so I'll address  
25 them up front. And basically I'll constrain my general

1 comments to dealing with your questions.

2 THE COURT: You don't have to constrain them, just be  
3 sure you've covered them by the time you're done.

4 MR. GOTEINER: Well, I'm constraining -- I'm saying  
5 I'm constraining them, because they're core.

6 THE COURT: Okay.

7 MR. GOTEINER: And I haven't thought about every  
8 point, but I think I can deal with them. Let me begin by  
9 saying this. If you look at the statute, 1114, and you look at  
10 the way it's structured, you don't have that much legislative  
11 history on tap. We have some, but very little. But if you  
12 look at it, what is it doing? It uses the word "any benefit".  
13 And it's a very, very modest proposal. And this addresses part  
14 of what Judge Drain did as well.

15 What Judge Drain did and what the debtors are doing -  
16 - what some courts are doing, I respectfully submit  
17 incorrectly, is that they're treating this exercise as a  
18 summary judgment motion. Judge Drain asked about abrogation of  
19 rights and that 1114 is not supposed to abrogate rights, and  
20 he's not familiar with other sections with the Bankruptcy Code  
21 that create rights. We're not creating rights here. All that  
22 1114 did was to create a forum, a platform for discussion so  
23 that people, like the 122,000 members of this retiree group who  
24 are not represented, has a chance to deal with and talk with  
25 management about critical -- and this is not overly florid or

1 dramatic -- life-threatening decisions.

2           And Congress understood that. So what happens is,  
3 there's a discussion, a conversation that occurs. And by the  
4 way, Your Honor, it can occur very, very quickly. This is not  
5 going to delay any decisions. There are lawyers on both sides  
6 who can handle these issues, and management can handle them.  
7 So you have the discussion. And usually these things work out  
8 fine, because this particular group, my clients, understands  
9 that there has to be cuts, that there has to be serious cuts.  
10 But the point is, to have those people whose lives are being  
11 affected making the decisions, and not having them be made by  
12 executives; not having them been made by other people who don't  
13 understand and really live these issues.

14           So that needs to be stated. And I didn't really see  
15 that discussion in the cases. This is not a summary judgment  
16 motion. What happens is, if there's going to be a  
17 disagreement, and in the unlikely event that the committee --  
18 if it was selected and formed -- in the unlikely event that the  
19 committee disagreed with the debtor, then what happens? Then  
20 it comes -- then and only then does it come to Your Honor. And  
21 then you deal with some of the Sprague questions versus what we  
22 think should control, which is the Devlin case in the Second  
23 Circuit, which also addresses one of Your Honor's questions.

24           The debtor suggests that it's Sprague all the way.  
25 That's not true. Your Honor, I have not read all Your Honor's

1 decisions on this, but the Second Circuit has pointed out in  
2 the Caesar case, I believe, as well as in other cases when they  
3 were dealing the factors versus the Pro Arcs (ph.) cases, that  
4 was around 1980. I can get the cites to you on that. That  
5 when you're dealing with federal questions, Your Honor should  
6 be looking at courts in the Second Circuit. It's national, it  
7 is national, but still, when you're looking at federal  
8 questions, it's perfectly appropriate, and some courts say you  
9 should look to the Second Circuit.

10 Now, I know that -- and so that means the Court  
11 should also consider the Devlin -- and I'm saying we shouldn't  
12 even be getting into that now, but if you look at the Devlin  
13 burden analysis, in the Devlin burden analysis, you determined  
14 whether there's an ambiguity. Under the Sprague analysis, the  
15 burden is on the retirees there to show it was clear and  
16 unambiguous. That is not the law of the Second Circuit.

17 THE COURT: Pause, please, Mr. Goteiner, because if I  
18 heard you right as you were getting into that, you mentioned  
19 Pro Arts. And sadly, I'm well aware of that case because in  
20 the Adelpia case, I had issued a decision where I expressed  
21 the view that the Third Circuit couldn't understand a matter of  
22 Pennsylvania law correctly, or at least a two-judge majority in  
23 a Third Circuit decision, and that they ignored a decision of  
24 the Pennsylvania Supreme Court. And while I wasn't reversed on  
25 the issue because there were satisfactory alternative grounds,

1 it was pointed out to me that I, as a bankruptcy judge, don't  
2 have the ability to tell a circuit court that it was wrong when  
3 it's construing a matter of state law within its home state  
4 district. And I think that's what Pro Arts stands for among --

5 MR. GOTEINER: State law.

6 THE COURT: State law.

7 MR. GOTEINER: Correct.

8 THE COURT: Now, it appeared to me that even -- when  
9 I was reading Sprague, that even though there isn't much  
10 discussion of Michigan law, when they're talking about contract  
11 formation as contrasted to what ERISA provides, that's got to  
12 be state law.

13 MR. GOTEINER: They didn't -- Your Honor, they didn't  
14 discuss it. And my -- I have the same question. All right?  
15 And it seemed at that level and at the level that Your Honor is  
16 grappling with, it seems that the state issues are subsumed in  
17 federal issues. And look, there are a lot of blanks in  
18 Sprague. And there were a lot of disconnects and  
19 discontinuities between the majority decision and the dissent.  
20 The majority says most of the plans had the termination  
21 language. The dissents, in a robust and animated dissent, says  
22 that some of them did. But in any event, it was clear that it  
23 was all over the lot, and most could be fifty-one percent. So  
24 I'm aware of the point. I'm also aware of Factors, in fact, it  
25 was one of my first cases. I was representing the estate of

1 Elvis Presley and flew down to Graceland. I remember that case  
2 very well.

3 THE COURT: That is Pro Arts, isn't it?

4 MR. GOTEINER: Yes, Factors, Pro Arts. So I'm aware  
5 of that case, as well. So in dealing with these issues, I  
6 think 1114 trumps the analysis for today. And all I'm saying,  
7 1114 is a very modest proposal. And where Judge Drain was  
8 wrong was he started talking about creation of rights and  
9 abrogation of rights. That's not what would happen today if  
10 Your Honor appointed an 1114 committee. And by the way, Judge  
11 Drain did appoint an 1114 committee after this long analysis.

12 THE COURT: Albeit for a fairly limited purpose.

13 MR. GOTEINER: Albeit for a fairly limited purpose,  
14 but there was -- he left wedges in his decision. And it  
15 depends on what was going to come up in that analysis. And  
16 things do come up.

17 But the point is, the fair and equitable calculus  
18 that Congress imposes on the debtor, on the retirees who are  
19 not represented like the UAW -- I just want to make that clear;  
20 it's an obvious statement -- what Congress imposes is a very  
21 reasonable and quick approach. And that was my major problem  
22 with Judge Drain's decision. He -- and by the way, I'll tell  
23 you -- I'll take responsibility for part of that because we  
24 were involved in that, as Your Honor may or may not know. And  
25 we were involved in the briefing, and we were co-counsel on

1 that point. But I got more involved in this matter, and as I  
2 started to look at the literature and I started to look at all  
3 the cases, it became clear to me that, with all due respect to  
4 these -- to very distinguished lawyers and judges, the  
5 fundamental aspect and driving purpose of 1114 has been missed  
6 in all this. And what's happening is -- and so what I'm  
7 looking for is an Occam's razor that gets down to the  
8 fundamentals and explains what 1114 is. And 1114 is as I  
9 stated, I won't repeat it, and I doubt many people would  
10 disagree with me on my right, but that's what it is.

11 And then Judge Drain did more than that. Then Judge  
12 Drain talked about his analysis of 1114(1). What does that  
13 mean? Although I don't think you have to characterize this as  
14 a vested right, as I was just saying, because that's not what  
15 we're doing here. We're not aggregating rights. But what  
16 Congress did do in 1114 is to create at least a vested  
17 procedure outside of bankruptcy, for the 180 days preceding  
18 bankruptcy. To me, it's a dizzying non-sequitur -- and this is  
19 also why I disagree with Judge Drain -- for to say that exists  
20 in a pre-bankruptcy context that doesn't exist during  
21 bankruptcy.

22 1114(1) has meaning. And it only has meaning if you  
23 apply it logically and consistently, and I think Judge Drain  
24 missed that. And frankly, everyone did. But that's what  
25 1114(1) means. And --

1           THE COURT: Well, pause, please, Mr. Goteiner.  
2           Because -- and maybe the creditors' committee picked this point  
3           up in its opposition to you or in -- I don't remember where I  
4           got this from, to tell you the truth -- but there are different  
5           scenarios under which, prepetition, a debtor can adversely  
6           affect its retiree rights. It can do it by exercising the  
7           right that the debtor thinks it has to amend or terminate  
8           unilaterally because it contends that its plan documents  
9           provide it with that entitlement or that right. Or it can do  
10          it because it says we simply can't afford it. And we're  
11          changing it and maybe those guys can sue us. I think it's  
12          agreed that in the second -- or at least not very  
13          controversial -- that in the second category, adversely  
14          affected retirees can have had it and go after the debtor under  
15          1114(1). But I think somebody said, again, I think it was the  
16          creditors' committee, that the jury may still be out -- or the  
17          legal equivalent to that -- as to whether 1114 applies when the  
18          debtor uses a right of amendment or termination that it  
19          otherwise has in its plan documents. Is that your  
20          understanding, as well?

21                 MR. GOTEINER: Well, that's what they're saying, but  
22                 the --

23                 THE COURT: That's what the creditors' committee is  
24                 saying, you're saying?

25                 MR. GOTEINER: Right, well, I think the debtor --

1 THE COURT: Well, I guess what I'm interested in is  
2 your view on that.

3 MR. GOTEINER: Well, I'm interested in their view, as  
4 well. But my point is that the wording of 1114 is so broad, so  
5 all-encompassing with any benefit, Congress was aware that  
6 there are amendable benefits, and with that kind of language.  
7 But when you combine that with the modest procedural rights  
8 that 1114 provides, again, that's the simplest explanation of  
9 what's happening here. It's premature to decide this now. And  
10 we do know, because of announcements that they've been  
11 transparent about this to a degree, that they're going to be  
12 cutting two-thirds of benefits. You know, these are critical  
13 benefits. So it's happening now. This process is happening  
14 now. And it also happened in the six months prior to June 1,  
15 which is an 1114(1) situation.

16 So I just disagree with the -- there's a lot, as I  
17 say, of Talmudic analysis in all these decisions. And  
18 particularly, Judge Drain's was excellent, it's true. I mean,  
19 he covered the ground. But the fact that he had the excellent  
20 legal analysis doesn't say to me that he covered the  
21 fundamental point of what 1114(a) says. And on top -- and  
22 1114(1), as well, where I think he's dead wrong.

23 But on top of that, if we even want to get into this  
24 analysis, he says that bankruptcy law does not create rights.  
25 Well, that's not true. Preference rights, 1113 rights, 363

1 puts limits on a debtor's use of a third party lender's cash  
2 collateral during a Chapter 11 case providing substantive  
3 protections that don't exist outside bankruptcy. Section 363  
4 gives assets buyers the right to buy assets free and clear of  
5 liens. Section 364 gives third party post-petition lenders the  
6 right, under limited circumstances, to get priming liens,  
7 granting them a lien on collateral ahead of existing lenders  
8 which cannot be done outside bankruptcy, so he's wrong on that  
9 as well. And, again, these points were not fully briefed. But  
10 as I read the decision, I started asking these questions, and  
11 they didn't make sense.

12 So I could deal more with Judge Drain's decision, but  
13 I think with respect to those fundamental points, though, and I  
14 know it's the most comprehensive decision out there, today.  
15 Painfully so. But, it doesn't mean he's right. And so I  
16 respectfully suggest this is for Your Honor to wrestle with to  
17 determine whether he is correct or not correct on the  
18 fundamentals and also on this overarching point of whether we  
19 should decide this now. Is that what Congress had in mind?  
20 And I respectfully submit they didn't.

21 So I think I have answered Your Honor's questions.  
22 Let me just look at my notes for one second, Your Honor. Ah,  
23 let's address Sprague just for a minute longer because Your  
24 Honor raised the res judicata possibility. Your Honor also  
25 said well, that was a class action; we don't need to involve

1 ourselves with that. But we do. We have --

2 THE COURT: Your point being that they expressly  
3 denied class action status for both of the two major classes?

4 MR. GOTEINER: Precisely. No -- class actions have  
5 significant meaning, obviously, and they have significant  
6 meeting, and as defendants, we sometimes stipulate to class  
7 certification because of what it means for final peace, global  
8 peace. But there is no class representative there. There is  
9 nothing close to the privity type issues in these virtual  
10 representation cases.

11 THE COURT: Well, pause, please, Mr. Goteiner,  
12 because you're absolutely right on the significance of class  
13 action. But is it the case that if there had been certified a  
14 class action, the decision would be a no-brainer on res  
15 judicata. And the question really is, in the absence of a  
16 class action, what's left?

17 MR. GOTEINER: Well, you said stare decisis, but  
18 again, Your Honor, that really has to do with, you know, there  
19 are all sorts of things that occur in a class action. Okay, I  
20 do that kind of work, as well. And there are all sorts of  
21 decisions that are made. You have to take a look at whether  
22 the subclasses were defined correctly. I don't know, I can't  
23 answer your question because I also -- there are lacunae in  
24 Sprague that don't make sense to me. And it just wasn't  
25 because you had an impassioned chief -- I think it was the

1 chief judge saying it was wrong.

2 THE COURT: It was Martin, if I recall.

3 MR. GOTEINER: I'm sorry? Judge Martin was chief  
4 judge --

5 THE COURT: Yes.

6 MR. GOTEINER: -- at that point.

7 THE COURT: Yes.

8 MR. GOTEINER: And it's not only the lacunae that  
9 exist there, but theoretically, to me, it doesn't make sense  
10 given the ambiguities that did exist. But the Sixth Circuit  
11 said, all right, this is our view, we see no ambiguity. But  
12 the Sixth Circuit went off on the Wise decision. And that was,  
13 as I recall it, that page, that was the first primary decision  
14 they cited was Wise from the Fifth Circuit. However, in  
15 Devlin, the Second Circuit said we can see how the district  
16 court could have been led by Wise into making the decision it  
17 did, but we don't go that direction in the Second Circuit. So  
18 the core theoretical groundwork for Sprague finds itself  
19 rejected in Devlin. Now, I don't think Devlin cited -- I think  
20 Devlin maybe came down a month or two after, I'm not sure. But  
21 there was no cross-referencing of the two. And I also note  
22 that in the debtors' brief, although I read it quickly, I  
23 didn't see a reference to Devlin.

24 So, as I say, it's Sprague. So I don't see  
25 Sprague -- it's certainly not anything close to virtual

1 representation. There's not the privity, there's not the same  
2 motivation, it is not a one-on-one linkage that you found in  
3 Chase. It just isn't. It's an aborted class action. You  
4 cannot cherry-pick from Sprague and take one point, and then  
5 say it binds everyone, all the retirees. You just can't. It  
6 is limited and it is not what the Second Circuit would buy into  
7 as I read Devlin.

8           And I must say, with all due respect, Judge Drain was  
9 wrong there, as well. Now, I do recall that there was briefing  
10 on this choice-of-law issue in the Delphi matter, and I'm not  
11 quite sure because this came in late last night so I haven't  
12 had time to check, I'm not sure because I think the judge in  
13 the -- Judge Drain, in the decision that he announced from the  
14 bench, said the parties hadn't briefed on him on the choice-of-  
15 law issue. Then there was briefing after that pursuant to his  
16 comment. But I don't know what happened between -- and maybe  
17 counsel here does know -- I don't know what happened between  
18 that briefing and Judge Drain's decision. But clearly, he did  
19 not take into account Second Circuit law, and he should have  
20 because the Second Circuit controls Judge Drain in this issue.  
21 Or at least, that's what the Second Circuit in Caesar (ph.)  
22 said, and that's what is drawn from the analysis in Factors v.  
23 Pro Arts.

24           So, let me just see if I -- I think -- Your Honor,  
25 does that cover your main points? I think it does.

1 THE COURT: I think it does, too.

2 MR. GOTEINER: So why don't I stop there and reserve  
3 any additional time after I hear the opposition.

4 THE COURT: Sure.

5 MR. GOTEINER: Thank you very much.

6 THE COURT: Mr. Miller?

7 MR. MATER: Your Honor, please, Harvey Miller on  
8 behalf of the debtors again. Your Honor the law is perfectly  
9 clear that Section 1111 -- I'm sorry, 1114 of the bankruptcy  
10 code, does not apply with respect to a retiree plan that is  
11 terminable or amendable or modifiable unilaterally by the plan  
12 sponsor. And while counsel may refer to Sprague as an aborted  
13 class action case, it's certainly beside that GM had an  
14 unqualified right to modify these retirement plans, and that  
15 was heavily litigated, and that's what the Sixth Circuit  
16 decided in the decision that you referred to. So if GM has the  
17 right to modify or terminate these retirement plans, then  
18 Section 1114 does not apply and there should be no retiree  
19 committee.

20 Counsel claims that Sprague decision should not be  
21 binding on this Court. And he says that the -- there's no  
22 finding that the issues are exactly the same or there was an  
23 alignment. Well, what was Sprague about, Your Honor? It was a  
24 claim violation of ERISA that GM unilaterally modified and  
25 terminated rights that the retirees claim in violation of

1 ERISA, because if it was a plan subject to ERISA, GM could not  
2 do that unilaterally. So this welfare plan, the Sixth Circuit  
3 held, is modifiable by GM and it went through the different  
4 plans and came to the conclusion that all of the plans reserved  
5 to GM the right to modify or terminate and that right  
6 continues, Your Honor. And those are GM plans.

7 Now, counsel says, and the moving parties say, "Well,  
8 now we're in the Second Circuit and Sprague doesn't apply." We  
9 argue, as we have in our brief, Your Honor, that there is  
10 virtual representation. And notwithstanding that the class  
11 action certification was vacated, the claim's rights  
12 asserted -- the same rights that are being asserted in  
13 connection with this motion, Your Honor. So now we move, Your  
14 Honor, to the Delphi case. And what happened in Delphi?  
15 Exactly the same thing.

16 The argument was being made, by the plan  
17 beneficiaries, that Delphi did not have the right to modify or  
18 terminate these benefits unilaterally. That was the issue that  
19 was presented. And the important factor in that, Your Honor,  
20 is that Delphi plans were GM plans because Delphi was a spinoff  
21 from GM, I think, in 1999, and those plans were all GM plans.  
22 And as Your Honor pointed out, Judge Drain, in a very  
23 comprehensive bench decision, came to the conclusion that  
24 Delphi had the unilateral right to terminate and modify the  
25 plans and therefore 1114 was not applicable, but he did appoint

1 a committee. And he appointed a committee for a very limited  
2 purpose.

3 There was a contention made that certain of the  
4 beneficiaries had vested rights and if their rights were vested  
5 then Delphi could not unilaterally modify or terminate those  
6 rights. So he appointed a committee for a specifically limited  
7 purpose to explore and file a report as to whether any of the  
8 rights were vested.

9 THE COURT: Can you help me, if you know, as to why,  
10 especially if these were former GM people, they might have had  
11 vested rights? Like, could they have retired before the first  
12 of the plan descriptions were issued that reserved the right to  
13 modify or was it some different basis?

14 MR. MILLER: No, Your Honor. It wasn't because of a  
15 date or a time. Within Delphi, there were other acquisitions  
16 that form part of Delphi; American Axle Company and some other  
17 companies. It may have been that those companies had plans  
18 that were in existence when they were merged. And there may  
19 have been the employees that came from those companies that  
20 have vested benefits.

21 THE COURT: In other words, they became Delphi  
22 retirees but their retirement rights had been created back when  
23 they were employees for different companies?

24 MR. MILLER: That's correct, Your Honor, as I  
25 understand it.

1 THE COURT: I'm with you now, okay.

2 MR. MILLER: Now, subsequently to the bench opinion,  
3 Your Honor, which was issued on -- in the early part of 2009,  
4 Judge Drain again revisited the issues that were presented and  
5 in a transcript, which I was only able to get last night, Your  
6 Honor.

7 THE COURT: I think it's now on Westlaw also, maybe  
8 Lexis also.

9 MR. MILLER: It's March 11, 2009. He considered the  
10 report that came back from this committee. And if I may, Your  
11 Honor, I would hand up a copy of the transcript.

12 THE COURT: I read it last night.

13 MR. MILLER: And I would refer Your Honor to page --

14 THE COURT: Finding it is a different question. For  
15 that, maybe you do have to hand it up.

16 MR. MILLER: I have one if Your Honor would like it?

17 THE COURT: Yes. Why don't you do that. Give me a  
18 second, please, Mr. Miller.

19 (Pause)

20 THE COURT: Go ahead, please.

21 MR. MILLER: I would refer Your Honor to page 61.  
22 And if I may, I would read. This is in consideration of the  
23 report that the committee that he had appointed rendered.

24 THE COURT: Wait. Did you say 61?

25 MR. MILLER: 61, Your Honor.

1 THE COURT: Oh, I see. The pagination on what I read  
2 yesterday is different than what you just gave me. Go ahead,  
3 please.

4 MR. MILLER: Starting with the first full sentence,  
5 "With respect to the first point, as I noted, probably too much  
6 I lent during oral argument, I continue to believe that the  
7 Sixth Circuit Sprague decision is one in which the Sixth  
8 Circuit at length determined, en banc, that there was no  
9 ambiguity in the respect of GM's reservation of rights to  
10 modify, at will, it's welfare plans. Including for the  
11 period" --

12 THE COURT: Forgive me, Mr. Miller. I'm having  
13 trouble finding it in the one you gave me as well. You said --  
14 this is with respect to Sprague, right?

15 MR. MILLER: Yes, Your Honor.

16 THE COURT: Go on, please. I'm not sure if I can  
17 find it here, but I'll just listen to what you've given to me.

18 MR. MILLER: All right. "That there was no ambiguity  
19 in respect of GM's reservation of rights to modify, at will,  
20 it's welfare plans including for the period in question and  
21 that -- or I could conclude otherwise, I would not be doing so  
22 by applying a different standard than that which is applied in  
23 the Second Circuit under *Bouboulis v. Transport Workers Union*  
24 of American 442 F.3d 55 (2006), namely that the plan documents  
25 contain specific written language that is reasonably

1 susceptible to interpretation as a promise to vest benefits.  
2 Language quoted from Devlin v. Empire Blue Cross and Blue  
3 Shield 274 F.3d 7684 (2001). Instead, what I would be doing  
4 would be, in essence, reversing the majority's conclusion in  
5 the en banc Sprague opinion that there was no ambiguity in the  
6 relevant documents. And that, in fact, it was clearly  
7 understood that GM had reserved the right to modify.

8 Based on the analysis of the record, which I believe  
9 is one that is clearly pointed out as such by the dissent of  
10 Chief Judge Martin in that case, I don't believe there's any  
11 difference as far as how the Sprague Court and the Second  
12 Circuit would review the underlying documents.

13 In any event, I believe that that portion of the  
14 report that went beyond my charge or my assignment to the  
15 committee, since it, in essence, sought to reargue my earlier  
16 ruling, and in addition sought to suggest that the assumption  
17 by Delphi pursuant to the master separation agreement, which  
18 appears at Exhibit 90 in the U.S. Employee Matter's Agreement,  
19 which was referred to there and appears in here most readily at  
20 supplemental Exhibit 4, provided for the transfer to Delphi and  
21 the assumption by Delphi of GM's legal responsibilities for  
22 OPEB claims.

23 My conclusion was in February and is now that in  
24 assuming such legal responsibilities at the time, Delphi and GM  
25 were both fully aware of the Sprague decision, which predated

1 these agreements which found that GM has no legal  
2 responsibilities in respect to these claims. And in light of  
3 the clear evidence that all of Delphi's plans and all of GM's  
4 plans, at least since 1985, contained a clear unambiguous  
5 reservation of the right to terminate or plan documents contain  
6 such reservation that I cannot ignore the context of the  
7 Sprague decision as underlying the parameters of what Delphi  
8 adequately assumed and what GM transferred to it."

9 I will submit to Your Honor, that on reconsideration,  
10 Judge Drain went even further than the bench opinion. And I  
11 submit to Your Honor that it's incontestable that GM had the  
12 right and has the right to modify, terminate, any of these  
13 welfare plans. And in that context, Your Honor, then GM is not  
14 subject to 1114 and there is no need for a retiree's committee.

15 As to the -- Your Honor's question with respect to  
16 the salaried OPEB plan and the pension plans, the pension plans  
17 will be assumed by New GM and the salaried retiree plans, as  
18 modified, will be assumed by New GM. There are cuts being  
19 made, Your Honor. These are cuts, and as we pointed out in our  
20 papers, since 2002 we outlined the various changes that have  
21 been made by GM in these particular plans which increase the  
22 cost to the employees from something like twenty-four percent  
23 to forty-one percent over that decade. And these changes were  
24 made unilaterally, Your Honor, by GM and there's never been in  
25 that period in time an action by any salaried retiree

1       contesting that that was a violation of vested benefits in any  
2       way, shape or form.

3               THE COURT:   Pause, please, Mr. Miller.  Let me get it  
4       straight.  I take it, for the retirees that we're talking about  
5       here, they have rights of essentially three times.  They have  
6       pensions, which if I heard you right, are being taken over if  
7       the 363 is approved by New GM and would remain unchanged.  Then  
8       they have a number two, health, and number three, insurance,  
9       which would be taken over by the New GM by the modified form in  
10       which they were modified before the filing date?

11              MR. MILLER:  Yes, Your Honor.

12              THE COURT:  Okay.

13              MR. MILLER:  Now, the pension plan --

14              THE COURT:  And pause, please; a follow-up.  Are  
15       there any changes contemplated beyond those that were  
16       announced --

17              MR. MILLER:  Not currently.

18              THE COURT:  -- prior to the filing date?

19              MR. MILLER:  Not currently.  But I point out, Your  
20       Honor, the pension plan is a defined benefits plan.  The --  
21       which is a qualified plan.  The welfare plans are not  
22       qualified.  These are discretionary plans with GM.

23              THE COURT:  Okay.  Continue, please.

24              MR. MILLER:  Also, Your Honor, in the March 11th oral  
25       decision, subsequent oral decision by Judge Drain, he likewise

1 deals with 1114(1). And he says very specifically in there,  
2 Your Honor, that there is no indication whatsoever that  
3 Congress intended to change the applicability of 1114 when it  
4 adopted 1114(1). In fact, there was nothing in the  
5 congressional record. There is no indication whatsoever that  
6 Congress was changing the laws that existed prior to the  
7 adoption of 1114(1), and I think it was in 2005.

8 So the law is, Your Honor, that if a welfare plan is  
9 subject to unilateral termination or modification, then 1114  
10 doesn't apply.

11 Now, in connection, Your Honor, with discussions with  
12 the company, there's nothing holding back counsel and his group  
13 from contacting GM. You don't need a retiree committee to do  
14 that. There can be discussions and there is actually, a, as I  
15 understand it, Your Honor, a salaried retirees' committee of  
16 some type that does periodically discuss these issues with GM.

17 So we come back to the bottom line issue, Your Honor.  
18 Is 1114 applicable to these particular welfare plans? Judge  
19 Drain, in his very comprehensive bench opinion said, no.  
20 Subsequently, in his consideration of the report of that  
21 committee which was appointed for a specific purpose, he  
22 reiterated that. He also went further, Your Honor, and said  
23 that the Second Circuit, at least in his opinion, would not  
24 vary at all from the Sprague decision. And we would submit to  
25 Your Honor the Sprague decision should be binding. Yes, it's

1 binding on the 114 plaintiffs in that action, but when you look  
2 at the issues that were litigated in that case, they are  
3 precisely the issues that would come up here: did GM have the  
4 right to unilaterally terminate or modify?

5 The Second Circuit en banc, as Your Honor pointed  
6 out, nature as majority, on certain issues, and 1011, on other  
7 issues, found that GM had that right. And all of the plans,  
8 Your Honor, had the reservation of that right. And it's been  
9 consistent. And in that context, Your Honor, there should be  
10 no retiree committee in this case which would just simply add  
11 more cost. And as Your Honor pointed out in your decision last  
12 Tuesday, all that means is you're transferring more costs to  
13 the general creditors. And in that context, Your Honor, we  
14 submit there should be no committee.

15 THE COURT: All right. Thank you. Mr. Mayer,  
16 creditors' committee?

17 MR. MAYER: Thank you, Your Honor. Tom Mayer for the  
18 official committee of unsecured creditors. We echo the  
19 debtors' view that because the contract provides for  
20 modification at GM's will, I don't mean to minimize the  
21 hardship that a termination or modification at the debtors'  
22 option may impose on individuals but that's the agreement they  
23 have; that's the effect of the agreement. And with respect to  
24 the Sixth Circuit versus Second Circuit, if I may pick up on a  
25 comment Your Honor made, one of the unfortunate results of

1 going a different way here is to take a decision on these  
2 precise documents and say the Sixth Circuit got wrong looking  
3 at the documents before it. I think perhaps Your Honor was  
4 referring to a resonance to your earlier decision on the Third  
5 Circuit. Sixth Circuit, it's not just that it's interpreting  
6 ERISA, it's interpreting these documents. And to seek a  
7 different decision in this Court when the Sixth Circuit has  
8 looked at these documents, I think would be very unfortunate.  
9 But that being said, there's one other major point that is sort  
10 of the elephant in the room that is being overlooked and was  
11 critical in the Chrysler case where we were involved, who are  
12 the negotiations with, Your Honor?

13 A statement has been made that "GM" is cutting its  
14 benefits by two-thirds. Who's going to pay the one-third  
15 that's left? It's New GM. The elephant in the room is the  
16 government. The government is the owner of New GM and any  
17 relief that this committee is seeking is going to have to be  
18 paid by New GM. That's the only entity that's going to have  
19 any plans going forward. That's the only entity that's going  
20 to be set up to pay retiree medical benefits going forward.  
21 Any discussion has to be with New GM.

22 And if I may go back to an issue, Your Honor, at the  
23 very beginning of this hearing as a shout point at 1114 and  
24 there is a nay point at 1113. We are not in the shout section,  
25 no one has moved to terminate or modify retiree medical

1 benefits. Largely because no -- the debtor has nothing, the  
2 committee does not think that's necessary.

3 If you're in the nay part of 1114, and this is where  
4 we start diverging from Delphi with respect to the need for any  
5 committee in the first play, the fact of the matter is these  
6 negotiations aren't with Old GM. They're with New GM. And I  
7 think the Court should take that into account just as Judge  
8 Gonzalez did in conjunction with the Chrysler decision where we  
9 had a very similar set of arguments, and Judge Gonzalez  
10 basically said, "Look, your discussion with new co." And 1114  
11 is not set up to facilitate a third party's discussions with an  
12 acquirer. It is the acquirer who is going to make the  
13 decisions here. That's the reality and I think that Your Honor  
14 can take account of that in determining in whether you should  
15 exercise discretion to appoint a committee here. Because I  
16 think that's the elephant in the room.

17 We cited to the Chrysler transcript. We did not  
18 include a copy of it in our pleading because we called chambers  
19 and was told that because that transcript had not been made an  
20 official record yet, it was not appropriate for us to provide  
21 copies to the world by attaching it to our pleadings. I have  
22 copies here if you want --

23 TZIPPY2 14900

24 THE COURT: This is what? For the protection of  
25 court reporters? Because it's a public document.

1           MR. MILLER: Well, yes, Your Honor. I think that's  
2 exactly what it is. I have copies here. I'm happy to hand  
3 them out.

4           THE COURT: Well, I must say, the most important  
5 thing is to get one to Mr. Goteiner because I thought I was  
6 allowed to read that transcript and I read the Gonzalez  
7 transcript.

8           MR. MILLER: I'm happy to provide it and I apologize  
9 for not having done so but we were given instructions.

10          THE COURT: Well, I think we've got to get a copy to  
11 Mr. Goteiner. I mean, you cited that transcript in your brief,  
12 if I recall, at the end as your last point. Didn't you, Mr.  
13 Miller.

14          MR. MILLER: Yes, Your Honor. I did so and as I said  
15 I apologize for not having attached it but we were told by  
16 chambers, because of the court reporter's rules, that we  
17 couldn't make copies available to everybody.

18          THE COURT: Well, I'm sorry. I didn't know that  
19 chambers told you that. Mr. Goteiner should have been given it  
20 before now and I'm going to take a recess to allow him to  
21 comment on it, if he wants to, before we're all done.

22          MR. MILLER: Certain.

23          THE COURT: I'm sorry. Sometimes my chambers tells  
24 people things that I never know about and they don't have the  
25 same sensitivities that I do. There are rules to protect

1 court reporters and sometimes those rules just have to be  
2 trumped. Okay.

3 MR. MILLER: I have nothing further.

4 THE COURT: All right. Does anybody want to be heard  
5 before I give Mr. Goteiner a chance to reply? No. Mr.  
6 Goteiner, your option. Would you like me to take a recess now  
7 to give you a chance to read it? The Gonzalez decision?

8 MR. GOTEINER: Well --

9 THE COURT: On the one hand it was referred to in Mr.  
10 Miller's brief or in his firm's brief, I forgot whether he was  
11 a signer, but on the other hand, the underlying transcript  
12 wasn't there.

13 MR. GOTEINER: Your Honor, if I may, might I respond  
14 for a few minutes to arguments --

15 THE COURT: Certainly.

16 MR. GOTEINER: -- and then take a recess?

17 THE COURT: Yes.

18 MR. GOTEINER: Okay. Well, the one overarching  
19 argument that has not been dealt with is the 1114 process and  
20 that what's gone on in some of the decisions and what debtors  
21 and creditor committee wants to do is to turn this into a  
22 summary judgment determination. It's too premature for that.  
23 And you know it's premature when they get back to Sprague. I  
24 also just read Drain's -- Judge Drain's decision or transcript  
25 and he even points out that he's clear with respect to all the

1 plans, at least since 1985. So what happens to the plans  
2 before 1985? So, there's a large number of retirees who come  
3 within that time period. Judge Drain starts talking about no  
4 ambiguity but it's not a factual issue only, Your Honor. And  
5 this is -- unfortunately, we have to go back and take a look at  
6 the decisions but Devlin -- it's a legal issue. The question  
7 is, what would the Devlin court decide as to whether it was  
8 ambiguous. We respectfully submit that Devlin, again, not  
9 cited to except in Judge Drain's decision but with no analysis,  
10 makes it real clear that under Second Circuit analysis, Judge  
11 Martin was right; it was ambiguous.

12 And the notion of making a decision at this point and  
13 totally sidestepping Congress' provision of an 1114 proceeding  
14 because debtor suggests it's going to be more money, I think  
15 absolutely flies in the face of what Congress intended  
16 particularly when you're talking about billions of dollars of  
17 benefits to people who truly -- this really is the archetypical  
18 situation where you have widows and orphans. And it's just --  
19 it's grossly unfair. But putting aside fairness and equity, it  
20 flies in the face of 1114. That's precisely what Congress  
21 wanted to avoid; a quickly determined summary judgment  
22 determination without giving the retirees a chance to sit down  
23 and at least be the assistant captain of their fate. That is  
24 not what Congress had in mind and the notion of having an  
25 informal ad hoc committee without portfolio as opposed to an

1 1114 committee, I suggest is absurd. And again, flies in the  
2 face of what 1114 does.

3 THE COURT: Pause please, Mr. Goteiner. I didn't  
4 want to interrupt you when you made the point. You pointed out  
5 that Judge Drain's decision said, in substance, I don't  
6 remember the exact words, at least since 1985 retirees had been  
7 told that the company reserved the right to change the welfare  
8 plans. Do you know how many retirees there are who retired  
9 before 1985 and, if I'm allowed to ask a compound question, how  
10 many of them aren't sixty-five where they would get Medicare  
11 rights and therefore their medical needs would be greater than  
12 they would be if you got an entitlement to Medicare?

13 MR. GOTEINER: I do not know that number. I do not  
14 know that number. And as --

15 THE COURT: That's almost twenty-five years ago.

16 MR. GOTEINER: Oh, I understand. I understand. I  
17 don't know that number but there are other rights as well.  
18 There's life insurance, health bene -- you know, health  
19 benefits might -- that would be an issue, I understand that but  
20 if there's life insurance issues. So, all I'm saying is that  
21 there's ambiguity there as well. And when you look at Judge  
22 Martin's decision, I'm not trying to hold close to my bosom the  
23 descending opinion for all purposes. But the point is, for  
24 purposes of Second Circuit analysis, it bears close reading.  
25 Judge Martin pointed out how some of the materials were

1 deceptive. So, yes, the majority opinion decided it was  
2 unambiguous under the Wise standard. That is not, I  
3 respectfully submit, what the Second Circuit would do, not  
4 withstanding Judge Drain's view of it in this transcript.

5 But again, that issue is so premature to what 1114 is  
6 all about but what is does underlie is how this would be  
7 singularly inappropriate, where you have that kind of  
8 ambiguity, that kind of dissension about what these plan  
9 documents mean and decide the issue now and say no 1114  
10 committee because it's going to cost the debtor a few bucks  
11 compared to the billions that are at issue for these people. It  
12 doesn't make sense. And I respectfully submit is not  
13 consistent with what the Second Circuit does.

14 And there may be vested benefits. I know the  
15 debtor's counsel's saying there's no vested benefits. That's  
16 another issue. It could well be, depending upon how the Second  
17 Circuit would rule on whether there was sufficient ambiguity,  
18 that they would find vested benefits. If the Second Circuit  
19 found or agreed with Judge Martin that there was, for instance,  
20 deception or at least unclarity, I think the Second Circuit  
21 would come out differently. And that's what, respectfully  
22 submitted, Your Honor has to grapple with. But again, that's  
23 for a different day. There's been enough of a showing today  
24 and in the papers and in everything that even Judge Drain said  
25 in hi supplement, to make it clear this is singularly

1 unappropriate for the kind of judgment that defendants want  
2 entered today, given what's at risk.

3 So it all -- this is more than just mother and apple  
4 pie. It really has to do with the practicalities of how these  
5 decisions should be made and they can be made very quickly.  
6 Your Honor could put a time period on it. And within a couple  
7 of days, the trustee can select a committee and the parties,  
8 within a few more days after that, can sit down and start to  
9 talk. The down side is so miniscule compared to what's at  
10 stake that I submit that cost benefit analysis mitigates very  
11 heavily in terms of appointing the committee.

12 And I think that covers all issues except this  
13 1411(1). The 1411(1) statute is real clear. There's no doubt  
14 about it. And I see a lot of evasion --

15 THE COURT: Well, isn't it just as ambiguous as  
16 1114(d) is?

17 MR. GOTEINER: Well, Your Honor, okay --

18 THE COURT: I mean, neither one -- each of them could  
19 have said notwithstanding any provision of contract that gives  
20 the company greater rights and then proceed into what it says.

21 MR. GOTEINER: Your Honor --

22 THE COURT: Conversely, I suppose, it could've taken  
23 the opposite view. But one of the practical problems that guys  
24 in my position have is we're sworn to follow instructions from  
25 Congress and Congress sometimes doesn't do its job as well as

1 it might.

2 MR. GOTEINER: Your Honor, I agree with that  
3 obviously but then we have things to help judges and we have a  
4 series of cases from the early 80s from the U.S. Supreme Court.  
5 I think one of them was called Cannon in dealing -- at Touche  
6 Ross -- in dealing with how you interpret congressional statute  
7 when there is preexisting law. And the Congress is presumed to  
8 understand what the law was and yet they didn't put in that  
9 little fillip at the end of the statute, why? Because it was  
10 good enough. It said any benefit. Congress is presumed to  
11 know there is such a thing as amendable benefits. And yes, I  
12 read Judge Drain's point that there was even a proposal to deal  
13 with Doxell (ph.); I saw that. But that Congress rejects that  
14 when Congress has language like any benefit, when the costs are  
15 so minimal, I think speaks volumes. And that is -- that  
16 stubborn and irreducible fact and logic is something that the  
17 defendant -- that the debtors have not dealt with.

18 THE COURT: When Congress wanted to overrule Lilly  
19 Ledbetter, it did so pretty clearly, didn't it?

20 MR. GOTEINER: Sometimes they do. Sometimes they do.  
21 But when they don't, all you can do is go back to Sutherland, I  
22 think that's the treatise, and go back to the Supreme Court  
23 cases that talk about how you interpret statutory language when  
24 there is existing law and when there is law that may be  
25 inconsistent. And again, that discussion has not taken place

1 enough here. So, I think with -- that all the practicalities,  
2 all the legislative interpretations that we've been discussing,  
3 point to the appointment of an 1114 committee. And again, the  
4 cost benefit analysis says this very clearly. And I'll stop  
5 there, I'll take a --

6 THE COURT: I don't want you quite to stop, Mr.  
7 Goteiner --

8 MR. GOTEINER: Okay.

9 THE COURT: -- because on the wholly discretionary  
10 point, I guess if 1114 doesn't apply at all, people can debate  
11 about whether I'm even supposed to take a discretionary  
12 analysis, but assume I do. Toward the end of its brief, the  
13 creditors committee pointed out that negotiation is with the  
14 wrong entity and that the negotiation would have to be with  
15 Treasury or new GM or somebody other than the debtor in  
16 possession. And that brings up Judge Gonzalez's holding and  
17 I'm at a mind that I should give you a chance to comment on  
18 that if you want it. And since I'm going to have to take at  
19 least a recess to do this anyway, just to go through what we  
20 have, I wonder if you would like to reserve the right to say  
21 something before I finally rule during a recess to take a look  
22 at Gonzalez's decision and tell me if you thought Arthur  
23 Gonzalez got it wrong.

24 MR. GOTEINER: I'll do that, Your Honor, and you  
25 know, again, I will do that. I just want to make one more

1 point. That -- which is subsumed in my prior points, it's  
2 really not necessary for this Court to say the Sixth Circuit  
3 got it wrong. Again, not today. It's just not. But the only  
4 thing I ask Your Honor to consider in making this decision, you  
5 know debtors speak with certainty that hasn't been seen since  
6 the twelfth century about what amendable benefits are and  
7 whether they exist here and that is just not true. And no  
8 matter how many times you say it, that it's clear, even if  
9 Judge Drain says he doesn't think there's ambiguity, that  
10 doesn't make it true. It is not certain here. And that is  
11 another point that's subsumed in Congress's wisdom about 1114  
12 and I'll take a look at the transcript.

13 THE COURT: Okay. Thank you.

14 MR. GOTEINER: Thank you.

15 THE COURT: Folks, I'd like you to take an early  
16 lunch and be back by 12:30. I can't guarantee you that I'll be  
17 ready by then but hopefully you can get something to eat  
18 between now and then. Give you enough time to both get a  
19 sandwich down and also read Judge Gonzalez's transcript, Mr.  
20 Goteiner. And then I'll try to give you a decision after that  
21 lunch break but not before giving Mr. Goteiner another chance  
22 to be heard if he wants to. Okay, we're in recess.

23 (Recess from 11:30 a.m. until 1:37 p.m.)

24 THE COURT: I apologize for keeping you all waiting.  
25 Before I come to a final decision, I want to give you, Mr.

1 Goteiner, an opportunity to comment on Judge Gonzalez's  
2 decision since it was noted by the creditors' committee and is  
3 at least arguably fairly relevant to this determination.

4 MR. GOTEINER: Thank you, Your Honor. Neil Goteiner,  
5 Farella Braun + Martel, for the General Motors Retirees  
6 Association. I had a chance to take a look at the transcript.  
7 I would just note a couple of distinctions and then get back to  
8 a basic point. Of course, here we do know that GM has  
9 announced that there's going to be cuts in the order of  
10 magnitude of two-thirds. And we also know that there have been  
11 prepetition cuts as well in the six-month period.

12 So were we to abandon at this point the 1114 process,  
13 you would be -- what would be happening is that the committee  
14 would be giving up whatever rights it has under 1114. It would  
15 lose leverage because, of course, New GM would not be a debtor.

16 And -- but I did go beyond that, obviously. I took a  
17 look at the practicalities that Judge Gonzalez was addressing,  
18 and of course there are practicalities, but here it's not the  
19 same sequence and it's not the same -- or different  
20 personalities, completely different personalities, as in  
21 Chrysler.

22 You will have committee speaking with people who are  
23 going to be involved to some degree in New GM. And lots of  
24 things can happen in these negotiations. Yes, it's possible  
25 that the representatives of GM who will be in the New GM will

1 simply say okay, hats have changed, we reject what we agreed to  
2 with you. But it's quite possible that that won't happen and  
3 that there will be some agreements that are reached with the  
4 1114 committee participating that, in the negotiation process  
5 and the relationships that develop during negotiations, will be  
6 passed on to some of the same people in the New GM and they  
7 will abide by what they agreed as they negotiated as part of  
8 the 1114 process.

9 At least there's no reason to assume that will not  
10 happen. And, indeed, I think the way even the creditors'  
11 committee phrased it is that this committee may not be the  
12 appropriate person -- the appropriate party to negotiate now.  
13 And anything is possible, but the atmospherics and the elements  
14 are quite different here than in Chrysler. And there's a  
15 stronger argument/brief of appointing an 1114 committee.

16 And that's what 1114 says should happen in any event.  
17 So that's my submission.

18 THE COURT: Just one question before I give anyone  
19 else a chance to comment, if they wish, because I like your  
20 idea of being realistic. Earlier in your remarks just a moment  
21 ago you said you were concerned about giving up leverage.  
22 Unrealistic to know that leverage tends to be something that  
23 people think about all the time in large bankruptcy cases,  
24 maybe smaller ones too. But to what extent, in your view,  
25 should I, as a judge who's supposed to call balls and strikes

1 the way he sees them, be guided by giving one party or another  
2 leverage against the party with the different perspective?

3 MR. GOTEINER: Well, leverage is whatever is  
4 provided, and I use leverage -- I'm not backing away from the  
5 word "leverage", it's a reasonable word to use, but the whole  
6 panoply of dynamics that are embraced by 1114, because it has  
7 to be equitable and fair, that's the leverage I'm talking  
8 about.

9 So, and that, by the way -- leverages goes both ways,  
10 Your Honor, because my clients, at the end of the day, have far  
11 less leverage than the debtor has. So it's far worse, from my  
12 clients' point of view, than a two-way street.

13 THE COURT: Okay.

14 MR. GOTEINER: So that is why, I respectfully submit,  
15 Your Honor should have not a moment's pause that there's any  
16 untoward leverage given to the 1114 committee. This is  
17 precisely what 1114 contemplated; no more.

18 THE COURT: Okay. Thank you. I know we've been at  
19 this for a long time, but if either the debtors or the  
20 creditors' committee who brought up Judge Gonzalez's decision  
21 want to be heard before I take another brief recess, I'll  
22 permit that. Mr. Mayer?

23 MR. MAYER: Yes, Your Honor, thank you. Unless you  
24 have questions, I don't think I have anything to add.

25 THE COURT: Okay. Mr. Miller?

1 MR. MILLER: And if Your Honor please, I would just  
2 point out, in order for --

3 THE COURT: You're very tall, Mr. Miller. Can you  
4 either lift that microphone up or come to the main lectern?

5 MR. MILLER: Thank you, Your Honor. I would just  
6 point out, in order for this committee to have any effect and  
7 to provide the leverage which counsel says they need, you would  
8 have to determine that GM does not have the right to modify or  
9 terminate any of these claims. And the record is, I think,  
10 crystal clear that GM has the right to terminate or modify any  
11 of these claims.

12 And what we're talking about, Your Honor, is a  
13 situation which hopefully, in my view, is a few days. The sale  
14 hearing is scheduled for Tuesday. Hopefully we will finish it  
15 next week. It's important that this company emerges -- these  
16 assets emerge as part of a New GM that's going to have any  
17 chance of success.

18 Counsel's talking about give the U.S. Trustee three  
19 or four days to appoint a committee, the committee's got to  
20 organize, it's going to have to hire professionals, probably a  
21 financial advisor, a statistician, and so on. By the time all  
22 of that happens, Your Honor, hopefully, if we're right, and  
23 Your Honor approves it, the transaction will have been  
24 consummated.

25 So the leverage that is so important, and which is

1 the only purpose for which this motion has been brought, will  
2 be of no avail because New GM will be off as a new OEM  
3 manufacturing cars and trucks without the stigma, if I can use  
4 that word, of bankruptcy, which is the objective for this  
5 transaction.

6 So the negotiations, Your Honor, are going to be with  
7 the debtor which is going forward with the plan of liquidation.  
8 And in the context of the liquidation, even if 1114 applied,  
9 it's going to have to be rejected under 1114 because there's  
10 not going to be any ongoing company.

11 So what we're down to, Your Honor, and Your Honor put  
12 your finger on it, is leverage, that if Your Honor would grant  
13 this motion and appoint a retirees' committee, the next thing  
14 that will happen is a request to defer the 363 transaction,  
15 which affects a lot of parties-in-interest and affects all of  
16 the creditors and affects the ability of this company to  
17 survive going forward.

18 So there's a real downside, Your Honor, to this  
19 motion, notwithstanding what counsel says.

20 THE COURT: All right. Thank you. All right, folks,  
21 I've made you wait a long time. I'm going to ask you now to  
22 sit in place and wait with me here in the courtroom for a  
23 minute.

24 (Pause)

25 THE COURT: Okay, folks once more I apologize for

1 keeping you all waiting. In this contested matter in a case  
2 under Chapter 11 of the Code, the General Motors Retiree  
3 Association, which I'll refer to as the "Retirees Association",  
4 moves for an order pursuant to Section 1114 of the Code,  
5 appointing an official 1114 committee. Its motion is opposed  
6 by the debtors and the creditors' committee.

7 The motion is denied, though without prejudice to  
8 reconsideration at a later time under appropriate  
9 circumstances, largely in accordance with the ruling by my  
10 colleague Judge Drain in Delphi on March 10 of this year. The  
11 following are my findings of fact, conclusions of law and bases  
12 for the exercise of my discretion in connection with this  
13 determination.

14 Turning first to my findings of fact, as facts I find  
15 that GM offers retiree benefits to salaried retirees who  
16 started work before 1993 under two plans: the GM Salaried  
17 Health Care Program, which I'll refer to as the "Health Care  
18 Program", which includes medical, prescription drug, dental and  
19 vision care; and the GM Life and Disability Benefits Program,  
20 which I'll call the "Life Insurance Program", which provides  
21 life insurance benefits. I refer to the two programs together  
22 as the "Welfare Plans".

23 The inference is compelling, and I so find, that the  
24 benefits offered under the Welfare Plans are quite important to  
25 many retirees, particularly those who are still under sixty-

1 five and who are ineligible for Medicare.

2 The salaried retirees are separate and apart from  
3 hourly retirees whose interests have been represented by the  
4 UAW or other unions. At this point, they have no officially  
5 designated representative, though, from everything I've seen so  
6 far, the Retirees Association has been a forceful and effective  
7 advocate on their behalf. And to the extent any retirees might  
8 have unsecured claims, their interests in that regard would be  
9 well-protected by the official creditors' committee.

10 Retirees are required to reenroll in these plans at  
11 the beginning of each calendar year, prior to which GM provides  
12 enrollment forms accompanied by an enrollment brochure  
13 explaining changes in benefits for the upcoming year. The  
14 debtors assert that these brochures have contained an  
15 unequivocal statement of GM's right to amend, modify or  
16 terminate the plans. But that was not always so. The Retirees  
17 Association asserts that, at least between 1974 and 1987,  
18 salaried retirees were performing under unilateral contracts  
19 that guaranteed lifetime benefits upon retirement without  
20 having also received statements reserving the right to amend or  
21 terminate. And the Retirees Association points to specific  
22 language in benefit handbooks that it asserts could reasonably  
23 be interpreted as a promise to provide such benefits. However,  
24 these matters were a subject of litigation, extensive  
25 litigation, going all the way up to an en banc decision of the

1 Sixth Circuit Court of Appeals, which I'll describe more fully  
2 in my conclusions of law.

3 GM effected changes in its retiree Welfare Plans from  
4 time to time. Prior to these Chapter 11 cases, three changes  
5 were made that are at least arguably significant. On July  
6 2008, effective January 1, 2009, GM eliminated medical, dental,  
7 vision and extended care coverage for salaried retirees, their  
8 surviving spouses and their dependents age sixty-five or older.  
9 In September 2008, GM changed the plans to comply with a cap on  
10 salaried retiree health care; it was approved by the GM board  
11 of directors in 2007. And in February of this year, GM  
12 accelerated a planned reduction in salaried retiree life  
13 insurance, which had previously been announced in 2006 and was  
14 going to be effective in 2017, in respect to whose details are  
15 not material here, effective May 1, 2009. All but the third  
16 change, the one announced in February and effective May 1, were  
17 communicated to salaried retirees more than six months prior to  
18 the filing date, a time which is arguably significant to  
19 parties' rights.

20 GM has not proposed any further changes in either of  
21 the plans, at least insofar as it would implement them. And  
22 under the proposed sale agreement, assuming, of course, that it  
23 is approved, and without prejudging that issue in any way, the  
24 purchaser knew GM will assume responsibility for them going  
25 forward but as modified prepetition in the manner I just

1 described to provide them in lesser amounts.

2           Turning now to my conclusions of law and bases for  
3 the exercise of my discretion, as usual I start with the words  
4 of the statute. Section 1114 of the Code provides, in relevant  
5 part, in its subsection (d), "The Court, upon motion by any  
6 party-in-interest, and after notice and a hearing, shall order  
7 the appointment of a committee of retired employees if the  
8 debtor seeks to modify or not pay the retiree benefits or if  
9 the Court otherwise determines that it is appropriate to serve  
10 as the authorized representative, under this section, of those  
11 persons receiving any retiree benefits not covered by a  
12 collective bargaining agreement. The United States Trustee  
13 shall appoint any such committee."

14           Thus, under the statute, the Court must order the  
15 appointment of the committee if the debtor seeks to modify or  
16 not pay the retiree benefits. Alternatively, it may order the  
17 appointment if the Court otherwise determines that it's  
18 appropriate to serve as a bargaining representative for  
19 retirees not covered by a collective bargaining agreement.

20           The Retirees Association contends that Section 1114  
21 of the Code applies to what the debtors did prepetition and  
22 would do post-petition here and that I thus should appoint a  
23 retirees' committee under each of the two separate regimes  
24 under which a retirees' committee should be appointed. I  
25 disagree with the Retirees Association with respect to the

1 first, and for the most part with respect to the second,  
2 although I think I should reserve room to have the ability  
3 going forward to make a discretionary limited appointment if  
4 circumstances not present now but in the future later warrant.

5 Turning to the matter of mandatory appointment, the  
6 backdrop as to the mandatory appointment issue is the fact  
7 that, as discussed in my findings of fact above, at some point  
8 in time GM started to tell its employees, who were of course  
9 its prospective retirees, that their welfare plans could be  
10 amended, modified or terminated. GM and the creditors'  
11 committee contend that Section 1114 doesn't apply when a debtor  
12 simply exercises the rights to modify or terminate that it has  
13 outside of bankruptcy. But the Retirees Association, in  
14 contrast, contends that 1114 applies to any modification or  
15 termination of retiree rights under a welfare plan, whether  
16 such termination or modification is authorized under non-  
17 bankruptcy law or not. And thus, in substance, it argues that  
18 Section 1114 improves upon non-bankruptcy law rights.

19 Though Sections 1114(d), (e) and (l) are, in my view,  
20 ambiguous, and the cases are somewhat split in this area, I  
21 must agree with GM and the creditors' committee. The Retirees  
22 Association says at page 9 of its motion that, quote, "A few  
23 courts have held, on a divided issue of law where other courts  
24 disagree, that this Section 1114 does not protect in bankruptcy  
25 benefits the Debtor retained the unfettered right to amend

1 outside of bankruptcy", quote. But I can't regard that as a  
2 fully accurate description of the state of the law, especially  
3 in this circuit and district. In fact, I think it's exactly  
4 the opposite.

5 The Retirees Association cites the Second Circuit's  
6 decision in LTV Steel Company v. United Mine Workers, In re  
7 Chateaugay Corporation, 945 F.2d 1205 (2nd Cir. 1991), as being  
8 one of the cases that holds against the retirement committee on  
9 this issue. And, of course, Chateaugay does. Chateaugay says,  
10 in fact, "The Bankruptcy Protection Act", which was the statute  
11 by which 1114's predecessor came into being, and from which  
12 1114 evolved, "requires that during reorganization the parties  
13 continue to provide benefits according to the plan in effect at  
14 the time of the declaration of bankruptcy. The Bankruptcy  
15 Protection Act does not alter the terms of that plan." 945  
16 F.2d at 1209. And that's exactly why Judge Restani dissented  
17 in that case.

18 But while acknowledging Chateaugay, the Retirees  
19 Association doesn't give enough recognition, in my view, to the  
20 fact that Chateaugay is a controlling decision of the Second  
21 Circuit, binding on me and the other judges in this circuit.  
22 Likewise, the Retirees Association cites decisions of a former  
23 visiting judge who sat in this district, and a district who  
24 affirmed him, in the case of Ames Department Stores,  
25 insufficient attention to the fact that those decisions were,

1 with respect, strikingly lacking in consideration of the  
2 applicable case law. They can only be read as having been  
3 roundly criticized by this circuit in a subsequent decision in  
4 Ames (see 76 F.3d 66 at page 71), though not on direct appeal,  
5 and while the thoughts were expressed in dictum.

6 The district court decision, which is available  
7 electronically but isn't published, expressed its conclusions  
8 in what some might say was an ipse dixit fashion, without  
9 parsing the words of the statute or relying upon any case law,  
10 which at that point in time included about nine cases, as  
11 observed by Judge Lifland in *Ionosphere Clubs*, 134 B.R. 515 at  
12 page 517 (1991). Unfortunately, the decision of the bankruptcy  
13 court was equally thin.

14 In that later Ames decision, the circuit held, "We  
15 think that there's a substantial room for disagreement with the  
16 categorical holding in the district court's orders that the  
17 debtor was required to follow the requirements of Section  
18 1114;" reading from page 71, 76 F.3d at 71. And while the  
19 circuit in that Ames decision merely held that it couldn't be  
20 said that the argument for the debtor's interpretation was  
21 frivolous, that being an appeal of a sanctions determination or  
22 a denial of fees for pursuing a frivolous argument, and while  
23 the circuit expressly stated that it wasn't examining the,  
24 quote, "present status of the pertinent law", quote, *id* at 71,  
25 it was hardly an endorsement of the lower court's views. In

1 fact, the circuit made a point to cite Chateaugay and Daskocil,  
2 Federated Department Stores, New Value, and Collier as examples  
3 of authorities that had gone the other way. And it went on to  
4 observe that Collier -- Collier on Bankruptcy, of course --  
5 provides that Section 1114 does not, however, protect retiree  
6 benefits beyond the contractual obligations of the debtor.

7 And the circuit observed, with respect to the  
8 bankruptcy court and district court Ames decisions upon which  
9 the Retirees Association relies, not one of the foregoing  
10 authorities was discussed or even mentioned by either the  
11 bankruptcy court or the district court. More importantly,  
12 neither court cited any interpretative authority that  
13 conflicted with that above cited.

14 Now, make no mistake, I don't read that decision as  
15 having ruled in favor of the principle for which the debtors  
16 and the creditors' committee argue here. In fact, it expressly  
17 stated that it was not then ruling on the existing law. But  
18 what I think it very effectively does, if not conclusively so,  
19 is say that I shouldn't be relying on those lower court Ames  
20 decisions.

21 But perhaps most importantly, in its briefing on this  
22 motion the Retirees Association failed even to mention Judge  
23 Drain's decision in March of this year in Delphi, 2009 WL  
24 637315 (Bankr. S.D.N.Y. Mar. 10, 2009), until the Retirees  
25 Association filed its reply. And even then the Retirees

1 Association failed sufficiently, in my view, in that reply to  
2 acknowledge all of the things Judge Drain said and to discuss  
3 his substantive analysis before the retirees' committee  
4 properly commented on the relatively limited relief that Judge  
5 Drain had ultimately granted in Delphi. Of course, the  
6 Retirees Association made up for that in oral argument, but I  
7 think Judge Drain's decision in Delphi is of great importance.

8 I've previously noted many times in writing my view  
9 as to the importance of consistency in the decisions in the  
10 bankruptcy court in this district and that I follow the  
11 decisions of the other bankruptcy judges in this district, in  
12 the absence of clear error. But when we're talking about the  
13 Delphi decision, I think that's feigned praise since, in my  
14 view, Judge Drain's analysis was plainly correct and, by far,  
15 the most comprehensive and well-reasoned of any of the  
16 decisions in the 1114 area.

17 I note, by the way, that when I talk of Judge Drain's  
18 decision, although I'm principally speaking of his decision of  
19 March 10, there was a supplemental argument on or about March  
20 11, as evidenced in a separate transcript to which I'll be  
21 referring in a moment or two, and that getting one's arms  
22 around Judge Drain's Delphi rulings is best achieved by  
23 consideration of both of the two decisions.

24 Judge Drain also dealt with the argument that I also  
25 heard here, that Chateaugay was overruled by statute by the

1 inclusion of new Section 1114(l) in BAPCPA. Judge Drain  
2 disagreed, and so do I. As Judge Drain observed, Section  
3 1114(l), however, does not specifically deal with the issue of  
4 plans modifiable as of right and could conceivably apply to  
5 pre-bankruptcy breaches by debtors in financial distress of  
6 vested rights.

7 More importantly, even if it does apply to modifiable  
8 plans, I do not view Section 1114(l), which applies to a  
9 specific type of prepetition action, as overruling Daskocil and  
10 the line of cases that follow it which apply to post-petition  
11 actions. Nor does there appear to me to be any legislative  
12 history or other policy statements accompanying the 2005  
13 amendment that would clearly set forth Congress's intention  
14 generally in Section 1114(l) to override, beyond its specific  
15 terms, the fundamental principle that bankruptcy does not give  
16 new rights to individual parties-in-interest or to cut back on  
17 the tenet set forth by the Supreme Court in *Butner*.

18 Now, I have not discussed the underlying principles  
19 as thoroughly as Judge Drain did there. In this oral dictated  
20 decision, I don't know if that's necessary or appropriate. But  
21 I've carefully read Judge Drain's analysis and I concur in it  
22 in full, even putting aside the deference in respect to which I  
23 give the decisions of my colleague judges. And since  
24 *Chateaugay* and *Delphi* are in alignment, I'm ruling in  
25 accordance with each of them that Section 1114 doesn't apply to

1 employee benefit plans that are terminable or amendable  
2 unilaterally by the plan sponsor. Putting it another way,  
3 Section 1114 does not trump any agreement between a company and  
4 its employee that gives the company the right to amend or  
5 terminate a welfare plan.

6 Thus, in terms of arguably persuasive authority,  
7 we're left only with the decision in Farmland Dairies. If one  
8 were to look solely at the words of the statute, which, as I've  
9 noted, is ambiguous, the Farmland Dairies view is not  
10 necessarily an unreasonable one. But Farmland can't be  
11 reasonable with the weight of authority in this area, only part  
12 of which I've noted above, and Farmland Dairies is inconsistent  
13 with the law in this circuit and district. Of course, when I  
14 speak of the weight of the authority I'm not counting noses;  
15 I'm looking at it qualitatively and at what level it was  
16 decided. That consideration is particularly relevant to  
17 Chateaugay and Delphi. And, as I've noted, I regard Delphi as  
18 by far the most thoughtful and comprehensive decision in this  
19 area. So for any retirees as to whom the debtor reserved the  
20 right to modify before they retired, they don't have rights  
21 under 1114.

22 So then we get to Sprague. GM and the creditors'  
23 committee each cite the Sixth Circuit's en banc decision in  
24 Sprague v. General Motors Corp., 133 F.3d 388 (6th Cir. 1998),  
25 as having ruled that the health care programs explicitly permit

1 GM to unilaterally amend or terminate benefits under those  
2 programs. Sprague does hold that, although the Retirees  
3 Association is correct in noting that Sprague was a split  
4 decision and that it also isn't binding on me. And I agree  
5 with the Retirees Association, and perhaps the debtors agree  
6 with it as well -- I don't think they addressed it one way or  
7 the other -- that, on a question of federal law, Second Circuit  
8 law, and not Sixth Circuit law, controls in any area where the  
9 law of the two circuits is inconsistent.

10 But Judge Drain ruled, and I concur, that, and I'm  
11 quoting Judge Drain, "I continue to believe that the Sixth  
12 Circuit Sprague decision is one in which the Sixth Circuit at  
13 length determined en banc that there was no ambiguity in  
14 respect of GM's reservation of rights to modify at will its  
15 welfare plans, and that, were I to conclude otherwise, I would  
16 not be doing so by applying a different standard than that  
17 which is applied in the Second Circuit under *Bouboulis v.*  
18 *Transport Workers Union of America*, 442 F.3d 55 (2nd Cir.  
19 2006), namely, that the plan documents contained, quote,  
20 'specific written language that is reasonably susceptible to  
21 interpretation as a promise to vest benefits', end quote." I'm  
22 quoting from the transcript of the Delphi hearing of March 11,  
23 2009, which probably should be read as a supplemental and  
24 second Delphi decision. See also the comments Judge Drain made  
25 in the course of argument at page 11.

1           And I recognize that sometimes judges say things in  
2 oral argument that they don't mean or that they're throwing up  
3 just to be devil's advocates, but from the context I believe  
4 that Judge Drain meant it here. If you read the opinions, they  
5 really are applying the same standard. They're basically  
6 saying there was nothing ambiguous.

7           Now, when I use the words above, quote, "specific  
8 written language that is reasonably susceptible to  
9 interpretation as a promise", quote, those words being the  
10 words that Judge Drain used, they in turn were a quotation from  
11 Bouboulis, 442 F.3d at page 61. And the Bouboulis words, in  
12 turn, were a quotation from the Second Circuit's decision in  
13 Devlin v. Blue Cross and Blue Shield, 274 F.3d at 84.

14           So when I rely on Judge Drain's analysis in this area  
15 and I concur with it, it's very clear to me that he gave  
16 careful consideration to both Bouboulis and Devlin and made a  
17 knowing and accurate determination that there was no material  
18 difference between Second Circuit law and Sixth Circuit law in  
19 this regard.

20           Thus, at the risk of a slight repetition, stating a  
21 similar thing a different way, I find insufficient basis to  
22 conclude that the standard that the Sixth Circuit applied in  
23 Sprague would be materially different than the standard that  
24 the Second Circuit would apply.

25           Now, is the Sprague conclusion debatable under those

1 standards? I think it plainly is. And if I were writing on a  
2 clean slate, I think I might well have agreed with the Boyce  
3 Martin dissent. But as to the issues upon which GM relies upon  
4 it, Sprague was an eight-to-five decision as to the early  
5 retirees, and a ten-to-three decision as to the general  
6 retirees. And the general retirees' analysis is the one that's  
7 more closely on point here.

8 A ten-to-three split isn't close, but once more I'd  
9 agree that this isn't a counting game. Rather, I look at it  
10 qualitatively and see things as Judge Drain commented on in  
11 argument. Judge Drain observed, "You may agree with Judge  
12 Martin, and maybe if one were writing on a clean slate one  
13 might agree with Judge Martin, but the Sixth Circuit ruled, and  
14 I find it very hard for me, when there's no difference in the  
15 standard, to say oh, the Sixth Circuit was wrong;" reading from  
16 the March 11 transcript at page 11.

17 Where the circuit court, with ten judges no less,  
18 having ruled as it did with respect to general retirees,  
19 addressing the same issues we have here, I think that as a  
20 matter of stare decisis I should respect its ruling and follow  
21 it.

22 Folks, as is implied by what I just said, I note that  
23 I'm doing so as a matter of stare decisis. I am not so ruling  
24 on the applicability of res judicata one way or the other, and  
25 I'm not relying on the doctrine of res judicata. I have some

1 reservations as to whether res judicata applies is not very  
2 similar to those Judge Drain had. But I don't need to reach  
3 that issue. In my view, Sprague and Delphi are so dramatically  
4 on point that they counsel the result I reach here on  
5 traditional bases of stare decisis. We have what we refer to  
6 in law school as the "blue Buick".

7 So now we get to the application of Section 1114(d).  
8 Turning first to its mandatory portion, GM hasn't moved for  
9 permission to change any retiree welfare plan benefits, which  
10 is hardly surprising in light of its position that it doesn't  
11 need court approval to do so and the case law that I described  
12 above, and I'm going to follow that it has the right to  
13 unilaterally amend or terminate such benefits. As at least the  
14 first portion of 1114 doesn't apply at all, if not the entirety  
15 of 1114(d), or 1114 at all for that matter, there's no occasion  
16 to apply the mandatory portion of Section 1114. So I'm going  
17 to deny appointment insofar as it's premised on the contention  
18 that appointment is mandatory.

19 Turning now to discretionary appointment, though  
20 appointment of a retiree committee isn't mandatory, I need also  
21 to consider discretionary appointment. As I noted, Section  
22 1114(d) provides that the Court shall order the appointment of  
23 a committee of retired employees if the Court otherwise  
24 determines that it is appropriate. One can make an argument  
25 that if 1114 doesn't apply at all, there's no occasion to apply

1 the provision in 1114 providing discretionary authority either.  
2 But I think the better view might be consistent with what Judge  
3 Drain concluded in Delphi: that bankruptcy judges should have  
4 the discretion to appoint a retirees' committee, especially if  
5 its budget can be kept under control, in any instances where it  
6 would really accomplish something.

7 I don't reach that issue today because I here do not  
8 consider the appointment of a committee now to be necessary or  
9 appropriate for retirees for whom GM has the right to amend or  
10 terminate benefits, for, while I well understand the importance  
11 of these kinds of benefits to any retiree, believe me I do, I  
12 can't change retirees' non-bankruptcy rights. And there is no  
13 need to form a committee to argue or negotiate with respect to  
14 entitlements under Section 1114(1) as that can be done by the  
15 Retirees Association as an ad hoc committee with rights under  
16 Section 1109. See In re Anchor Glass Container Corp., 342 B.R.  
17 878 at page 882, Middle District of Florida 2005 decision by  
18 Judge Alex Paskay.

19 As Judge Paskay noted in that case, "Unlike Section  
20 1114(e), which contemplates motions brought by, and the debtor  
21 negotiating with, an authorized representative, Section  
22 1114(1), similar to Section 1114(d), depends upon a motion  
23 brought by a party-in-interest. Section 1114(1) does not  
24 require, nor does it contemplate, the appointment of a  
25 committee."

1 I also made a similar point when I considered the  
2 application of the Ad Hoc Committee of Family and Dissident  
3 Bondholders a couple of days ago. In most, if not all, cases  
4 under the Code, an ad hoc committee can be heard perfectly  
5 satisfactorily under 1109 without being designated as a formal  
6 official committee.

7 Similarly, I share concerns articulated by the  
8 creditors' committee as to unnecessary costs in this case. And  
9 I also agree with another creditors' committee point, which, in  
10 my view, is quite significant. Even assuming that New GM were  
11 to be making further modifications in the future, assuming, of  
12 course, that I approve the 363 sale, all salaried retiree  
13 benefits would be entirely New GM's responsibilities. Thus,  
14 any modifications to such benefits would have to be negotiated  
15 with New GM and/or the U.S. Treasury.

16 As Judge Gonzalez noted in Chrysler, "A retiree  
17 committee should be appointed only if it's necessary to  
18 negotiate with the debtors, not with a purchaser of the  
19 debtors' assets." See the transcript of Judge Gonzalez's May  
20 14 hearing in Chrysler at page 35.

21 With all of that said, I can't rule out the  
22 possibility that appointing a retirees' committee might be  
23 desirable and thus appropriate to facilitate some kind of  
24 negotiations in the future or any kind of a settlement,  
25 including with respect to any appeal of the determination I'm

1 making today, or in connection with some other matters where it  
2 would bring something to the table beyond appearing and being  
3 heard in a fashion for which it could already do that under  
4 1109. That might be helpful, by way of example, to bind absent  
5 parties or dissenters.

6 That appears to be the rationale upon which Judge  
7 Drain allowed the formation of a committee, or one of them --  
8 the other isn't applicable here -- though with a limited  
9 200,000 dollar budget. And if it turned out to be necessary or  
10 desirable to do that here, I might be of a mind to do the same  
11 thing if asked. But that isn't now necessary, if it ever will  
12 be. For instance, I don't need a supplemental report of the  
13 type that Judge Drain did, and which was an element of the  
14 limited appointment authority that he granted. I'll simply  
15 note now that this ruling is without prejudice to any such  
16 eventuality.

17 Accordingly, the motion is denied without prejudice  
18 to reconsideration in the event of an eventuality of the type I  
19 just described.

20 Mr. Miller, you or your folks are to settle an order  
21 in accordance with this ruling at your earliest reasonable  
22 convenience.

23 MR. MILLER: Yes, sir.

24 THE COURT: All right, folks. Do we have any further  
25 business for today?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MR. MILLER: No, Your Honor.

THE COURT: All right, I want to thank you for waiting as long as you did on the matter that I had taken under advisement. We're adjourned for the day. Have a good day.

ALL: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 2:25 p.m.)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

## I N D E X

## R U L I N G S

DESCRIPTION	PAGE	LINE
Debtors' motion for final order authorizing debtors to pay pre-petition obligations to foreign creditors and authorizing and directing financial institutions to honor and process related checks and transfers granted	30	20
Debtors' motion for final orders establishing notification procedures regarding restrictions on certain transfers of interest in the debtor granted	31	4
Debtors' motion for final order on cash management granted	31	9
Debtors' motion for authority to exercise a put	31	17
Debtors' motion to grant additional time to file reports of financial information or to seek modification of reporting requirements granted	31	23
Debtors' application to retain Weil Gotshal & Manges as attorneys nunc pro tunc to commencement date granted	32	5

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X, cont'd

R U L I N G S

DESCRIPTION	PAGE	LINE
Debtors' application to retain Jenner & Block LLP pursuant to Section 327(e) as conflicts counsel and special corporate counsel granted	32	14
Debtors' application to retain under Section 327(e) Honigman, Miller, Schwartz & Cohn, LLP as special counsel granted	32	21
Debtors' application authorizing retention and employment of The Garden City Group, Inc. as notice and claims agent nunc pro tunc to commencement date granted	33	2
Debtors' motion seeking entry of final order with respect to the debtors' essential supplier programs granted	35	21
Motion of ad hoc committee of asbestos personal injury claimants for order appointing a future asbestos personal injury claimant denied without prejudice	52	12

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X, cont'd

R U L I N G S

DESCRIPTION	PAGE	LINE
Debtors' motion to retain AP Services LLC as crisis managers and to designate Albert A. Koch as chief restructuring officer nunc pro tunc to commencement date	55	17
Application of the General Motors Retirees Association for order to appoint retiree committee pursuant to 11 U.S.C. Section 1114(d) denied without prejudice to reconsideration	117	17

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

I, Lisa Bar-Leib, certify that the foregoing transcript is a true and accurate record of the proceedings.

\_\_\_\_\_

LISA BAR-LEIB  
AAERT Certified Electronic Transcriber (CET\*\*D-486)

Also transcribed by: Tzippy Geralnik  
Pnina Eilberg  
Penina Wolicki  
Dena Page  
Ellen Kolman  
Clara Rubin

Veritext LLC  
200 Old Country Road  
Suite 580  
Mineola, NY 11501

Date: June 26, 2009