UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Main Case No. 09-50026 (REG); Adv. Pro. No. 11-09409 (REG)

- -x

In the Matter of:

MOTORS LIQUIDATION COMPANY, et al.

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

Debtors.

- -x

JOHN MORGENSTEIN,

Plaintiff,

v.

MOTORS LIQUIDATION CO., et al.,

Defendants.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

January 10, 2012

9:59 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

HEARING re Motors Liquidation Company's and Motors Liquidation Company GUC Trust's Motion to Dismiss Plaintiff's Complaint for Revocation of Discharge and, in the alternative, Motion to Dismiss Class Allegations

Transcribed by: Avigayil Roth

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

EDELSON & ASSOCIATES, LLC

Attorneys for Plaintiff Donna Trusky in Class Action

45 West Court Street

Doylestown, PA 18901

BY: MARC H. EDELSON, ESQ.

WEIL, GOTSHAL & MANGES LLP

Attorneys for Motors Liquidation Company

200 Crescent Court

Suite 300

Dallas, TX 75201

BY: ANGELA C. ZAMBRANO, ESQ.

MATTHIAS J. KLEINSASSER, ESQ. (TELEPHONICALLY)

MILBERG WEISS BERSHAD HYNES & LERACH LLP
Attorneys for Creditor
One Pennsylvania Plaza
New York, NY 10119

BY: JONATHON M. LANDERS, ESQ.

CLIMACO WILCOX PECA TARANTINO & GAROFOLI CO., L.P.A.
Attorneys for Morgenstein Group
55 Public Square
Suite 1950
Cleveland, OH 44113

BY: JOHN A. PECA, ESQ.

NEBLETT, BEARD & ARSENAULT
Attorneys for Morgenstein Group
2220 Bonaventure Court
P.O. Box 1190
Alexandria, LA 71309

BY: SRIVATSA V. GUPTA, ESQ.

MARK SCHLACHET LAW FIRM
Attorneys for Morgenstein Group
The Zipkin Whiting Building
3637 South Green Road
Beachwood, OH 44122

BY: MARK SCHLACHET, ESQ.

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
Attorneys for Morgenstein Group
270 Madison Avenue
New York, NY 10016

BY: MICHAEL JAFFE, ESQ.

P R O C E E D I N G S

THE COURT: Let me get appearances, and then I want you to sit down.

MR. PECA: Good morning, Your Honor. John Peca from Cleveland, Ohio on behalf of the plaintiff.

THE COURT: Okay, Mr. Peca.

MR. JAFFE: Good morning, Your Honor. Michael Jaffe from Wolf Haldenstein on behalf of the plaintiff.

THE COURT: All right, Mr. Jaffe.

MR. SCHLACHET: Good morning, Your Honor. Mark Schlachet on behalf of the plaintiff.

THE COURT: All right, Mr. Schlachet.

MR. GUPTA: Good morning, Your Honor. Srivatsa Gupta on of Neblett, Beard & Arsenault, Alexandria, Louisiana on behalf of the plaintiff.

THE COURT: All right, Mr. Gupta.

MS. ZAMBRANO: Good morning, Your Honor. Angela Zambrano with Weil, Gotshal & Manges on behalf of the Motors Liquidation Corporation.

THE COURT: All right. Thank you, Ms. Zambrano.

Folks, we're going to flip-flop the traditional order of argument. I've read the papers. Gentlemen, for the life of me I can't see how there is a right under 1144 to get a partial revocation --

Sit down, Mr. Schlachet.

-- a partial revocation of a discharge. You're going to do it the old-fashioned way: first, by textual analysis, then by the case law. And help me understand how you think there is a right to partially revoke a confirmation order under 1144.

I want you to focus in particular on why Judge Shannon wasn't right in Northfield Labs when he said that the language of the statute doesn't call for that. And why Judge Myers in Shoshone wasn't also right whether or not you characterize it as dictum. I take it you don't contend that the fact that it came out in a Chapter 9 case would make it any different than 11. You'll also have to explain to me how this stuff is a fraud upon the court, as contrasted to a fraud, if anywhere, on the consuming public, and how I'm supposed to avoid the problems of equitable mootness when I've got billions of dollars of stock and warrants that are already being traded. I need both sides to help me as to whether I need to deal with the class action allegations that are in the complaint at this time.

Ms. Zambrano, two of your five bases for dismissal or for other relief get into that area.

And I would have thought that the thing that I need to do is first determine whether the complaint would stay the cause of action if sought by one person. And then, assuming that it does, deal with the class action issues. And of

course, the Pioneer late claim issues.

All right. Mr. Schlachet, are you going to be the principal speaker for your side?

MR. SCHLACHET: Yes, Your Honor.

THE COURT: All right. Come on up, please.

MR. SCHLACHET: Okay. Thank you, Your Honor.

Your Honor, we are going to proceed precisely as Your Honor has indicated, although I must admit that I was prepared to play Philadelphia fighter this morning and come out after Ms. Zambrano had spoken, but that shouldn't be a problem.

And as Your Honor has indicated, we're going to -- following Your Honor's well-known practices -- begin with textual to the extent we can, and we are going to proceed to apply the text. We're also, Your Honor, going to make reference to the hierarchy of decisional determinants that Your Honor has announced in many, many cases because we feel that is part and parcel of the jurisprudence of every decision that Your Honor makes of any significance. And these are well-known. And the reason they're well-known is because Your Honor has favored the legal community with a body of law and methodology so that there's predictability in proceedings before the bankruptcy court. So that the trauma of Chapter 11 and large commercial bankruptcies can be minimized, and so that parties can do pre-petition planning, as they ought to do, in order to foresee problems down the road.

Now, as Your Honor indicated, the first matter Your Honor indicated was the Northfield Labs and Shoshone cases. I covered those in my brief, Your Honor, and I read those in detail. In Shoshone, for example, Your Honor's asked us to explain why Shoshone wouldn't apply. There were about five different -- yeah?

THE COURT: Well, first my question was wasn't Judge Meyers right in Shoshone, and why wasn't he right?

MR. SCHLACHET: Judge Meyers, Your Honor, in Shoshone, if I recall correctly, Shoshone was an instance where Judge Meyers stated -- if I recall the correct case, and there's a lot of material in this matter. Where he stated that what the plaintiffs were attempting in Shoshone was a frontal assault on a confirmation order. If I recall correctly, there had been a stipulation in that case in which the plaintiffs were full participants in the case. The notion that there cannot be a partial revocation was -- frankly, Your Honor, not only dicta, but I believe we can say that it was obiter dicta as opposed to judicial dicta.

I don't believe --

THE COURT: Forgive me, Mr. Schlachet. I've been doing this for a long time, but either never learned or have forgotten the distinction between the two.

MR. SCHLACHET: Your Honor, let me --

THE COURT: I remember as much as -- of what I was

taught that dicta are statements that aren't necessary to the holding in a decision. But if there is a difference between obiter dicta and the other kind of dicta you were referring to, I need your help on that.

MR. SCHLACHET: Yes, Your Honor.

Your Honor, I believe I'm citing from Patsy's Italian Restaurant v. Banas, 508 F. Supp. 2d 194, 210 out of the Eastern District of New York. When I "the Second Circuit's as well as other Circuits of appeals accord similar respect in discussing dicta. To the Supreme Court dictum a distinction should be drawn between bitra (ph.) dictum" -- which I called obiter dictum -- "which constitutes an aside or unnecessary extension of comments, and those considered judicial dictum, where the court is providing the construction of a statute to guide the future conduct of inferior courts".

So you have obiter dictum and you have judicial dictum according to Patsy's reading of the Second Circuit authorities. And they're citing on that, by the way, U.S. v. Bell, 524 F.2d 202, 206 (2d Cir. 1975). Not only was the ruling that Your Honor has referenced to obiter dicta, but it was about the sixth of six reasons why the court held that the plaintiffs were not permitted to make a frontal attack on a confirmation order. What had happened there, Your Honor -- and I'm not distinguishing between Chapter 9 and Chapter 11 -- is the plaintiffs had entered into a stipulation in regard to the

confirmation of the plan. After the plan was confirmed, they didn't like their stipulation.

Now, Your Honor, when we get into our discussion, let me explain one thing that happened in that case that we're going to see in a number of cases. Where parties have come to the court to complain, for example, that a disclosure statement was not appropriate or was fraudulent because circumstances changed after the disclosure statement was issued and there was no update in the disclosure statement. Therefore, Your Honor, the argument was we're dealing with fraudulent stuff. We're going to find -- and there's a collection of cases in Collier's on this exact point. We're going to find that the cases where parties who were before the court with an opportunity to present their position, with an opportunity to enter the crucible of decision-making are going to fare far more weakly when it comes to getting revocation, than where there is a material omission to speak.

Where there's a material omission the cases are legion, and I can get the stream cites for you from -- and will during this presentation, I won't look for them as well now -- from Collier. And the reason for that, Your Honor, is that many times people who have had their chance before the court are disappointed with the result: Delta Airlines. Somebody goes out and they buy in the marketplace 125 million dollars worth of debt. They think they've made a deal where they're

going to make a hundred million dollars, but what happens is the disclosure statement figures didn't take count for the next month or the month after's operating results. And they decide well, we're going to negotiate another -- we only got sixty million instead of a hundred million, so we're going to negotiate. They come in and the judge there said you knew because the disclosure statement told you that these figures weren't going to be updated. And that was only the fifth out of about five or six good reasons why the court didn't permit revocation in that case.

In our case, Your Honor, we're standing on reason number one. So in order for revocation -- that's ll U.S.C. 1144 -- to be held off the table in this case, we've got to attack plaintiff's position or challenge plaintiff's position, which is a pure revocation position by people who never had a chance to be before this court. Your Honor has told this community many times, as I said, the hierarchy of determinants that Your Honor holds by in rendering decisions, to give this community an opportunity to predict what the decision will be given a certain course of action.

The highest level of deference that Your Honor has paid in this case as far as I can see was in -- I believe it was this case or Adelphia, where Your Honor was dealing with 1129(a)(6). And Your Honor said Your Honor is very reluctant to restrain the debtor in the provisions that it regards as

appropriate for a Chapter 11 plan unless not to do so would be constitutionally suspect. Your Honor didn't say there that you needed a final finding. Your Honor didn't say that you're going to take it on briefing. Your Honor said in giving the community its guidance, if it would be constitutionally suspect, that's where discretion starts to get curtailed. And the Constitution -- the anchor for this entire process, for the fairness of the entire bankruptcy system -- becomes a compelling force and a compelling determinant of decision.

Now, after that, Your Honor, you've told many times the community that the Second Circuit's decisions are binding on this court and binding on the district court. On occasion, Your Honor, you've said that you will fill the void -- where there is no decision, you will fill the void with decisions of other Circuits and their lower courts. And when we look at Shoshone, which put its force when it regard revocation in a virtual offhanded comment. And we see there were five decisions before, and we're looking at obiter dicta. And I'm going to tell Your Honor about a decision in the Second Circuit which informs this court's proceedings today.

We will see that Shoshone, which even if it were in the Second Circuit would not hold a candle to the case the plaintiffs bring to this court. And Labs went off on equitable mootness entirely. And in Labs they specifically said you haven't said anything that's fraudulent in your allegations.

Now, Your Honor, you're in the court and the debtor comes in and gives you six arguments and you believe that this case doesn't deserve to be revoked. Yes, an offhanded comment from time to time against a tenacious plaintiff, yeah. And you know what else? You didn't give me any case that cited partial revocation, what do you want from me? You've got five strikes against you; on top of that you didn't give me a case that strikes partial revocation.

Well, Your Honor, I'm going to give you the text now. 11 U.S.C. 1144, "On a request of a party-in-interest at any time before 180 days ... after notice and a hearing the court may revoke such order if an only if such order was procured by fraud" -- [against the court] -- "and an order under this section shall" -- shall, no exceptions, shall -- "contain such provisions as are necessary to protect an entity acquiring rights in good faith, reliance on the order of confirmation". That's the text, Your Honor. That text, Your Honor, was part of the Bankruptcy Code as enacted in 1978. And the Legislative History H.R. 8200, page 419, 95th Cong., 1st Sess. (1977) underscores "shall contain such provisions as protect parties in reliance".

Your Honor, that was not an enactment that was a novel concept in bankruptcy law; that was an enactment that had a long history behind it. And in Creditors v. Michelson, which is in the Eastern District of California, which is case that

has spoken very articulately and been cited both in this court and other courts with acceptance. Congress did not work a major change of pre-Code law when it enacted Sections 1144. There's nothing in the legislative history to suggest the contrary since 1144 was derived from Bankruptcy Act 386 and from Bankruptcy Rule 11-41 without substantial change, the cases decided under the former law retain vitality.

Excuse me, Your Honor, may I?

THE COURT: Um-hum.

MR. SCHLACHET: Your Honor, in the Second Circuit we happen to have -- as unusual as a revocation is, we happen to have in the Second Circuit a decision which looked at revocation, and contains important guidance for this court today. And by the way, Your Honor, what I just read from Michelson regarding the cases that we will follow in construing 1144 -- because in the absence of anything to the contrary we accept those cases to construe 1144 -- is a proposition of law, looking at the pre-Code cases, that Your Honor has adopted in cases.

Your Honor once wrote an opinion on Section 510(c) dealing with equitable subordination. And in that decision -- which I can find for Your Honor now. I think it was in PSINet, Inc. v. Cisco Capital. Your Honor said exactly what that California court said: absent an indication to the contrary, pre-Code law will be -- Your Honor even used the same language.

Your Honor even said in that decision that we're not writing on a clean slate. Congress was not writing on a clean slate when it passed the Bankruptcy Code.

Now, what was said in Seedman v. Friedman that makes this case easy to decide. Seedman v. Friedman, 132 F.2d 290, 295 (2d Cir. 1942). Now, I know that's a 1942 case, Your Honor, and I know that the debtor in their reply brief said Your Honor, it's twenty-nine years or thirty-nine years before the Bankruptcy Code. But in PSINet, Your Honor, Your Honor cited to a case from 1920 as a pre-Code case that Your Honor would look to for guidance in construing the statute regarding equitable subordination. So the fact that something seems to be dated by some standards does not mean that it's not completely alive and vital as we sit here. Informing the community in accordance with Your Honor's pronouncements what they can expect in a revocation situation if there is fraud on the court.

Now, what was said in Seedman v. Friedman, Your Honor, I'm going to quote it. "While 386(3), providing for, modifying or altering an arrangement procured by fraud" -- this is the important language, Your Honor -- "expressly protects those not participating in the fraud or acquiring rights innocently and for value subsequent to the confirmation of the arrangement". Now, Your Honor, this is a case of judicial dictum. This was not the holding of the case; this was only dictum. But as we

said and as we've quoted, the judicial dictum is very, very significant, particularly from this district and particularly where there has been no intervening law or case to enfeeble that dictum.

So what does this language that I highlighted here say: it says if you weren't participating in the fraud -- which is everybody involved in Chapter 11 that wasn't participating in the fraud -- or if you acquired rights in reliance on the confirmation order, and order of revocation may not operate adversely to you. Now, let's look at 1144 again, Your Honor. 1144 says "an order under this section revoking an order of confirmation shall" -- I'll wait for Your Honor to get it.

THE COURT: Are you talking about (b)(1)?

MR. SCHLACHET: I'm talking about (1), yes, Your Honor.

THE COURT: Oh, forgive me. Yes, subparagraph 1. Okay.

MR. SCHLACHET: "An order under this section revoking an order of confirmation shall contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation." Plaintiff maintains, Your Honor, that that language there -- and by the way, this section comes right out of 11-41 under the Bankruptcy Act. That Section there --

THE COURT: 11-41?

MR. SCHLACHET: The old bankruptcy rule --

THE COURT: Oh, rule, not the act itself.

MR. SCHLACHET: Yes, Your Honor.

THE COURT: All right.

MR. SCHLACHET: That language there, Your Honor, plaintiff maintains absorbs the language in Seedman v. Friedman. Because you see, in Seedman v. Friedman, when the Second Circuit said that they were talking about the essence of revoking any order in a major Chapter 11. So really, if you look at 1144 Your Honor cannot issue an order of confirmation -- an order of revocation unless it does two things. It's got to: one, revoke the confirmation order; and two, contain additional provisions protecting innocent parties.

Therefore, Your Honor, this entire partial revocation argument is an argument born in misfocus. There is no nonpartial revocation. It's not possible to have a nonpartial revocation. How can there be a nonpartial revocation when the order has to both revoke and contain provisions protecting innocent parties? So all of this language in Shoshone, in Labs and in the other cases which we said were utterly inapposite. How can this language from other Circuits come to suggest that in this Circuit with this court's method of decision making and Seedman v. Friedman, that this court should be persuaded by random statements which had nothing to do with the result in

the case?

That's why this court can revoke the order of confirmation. That's why this court can include -- must include in that revocation provisions protecting innocent parties. And that's why the plaintiffs in this case who raise not only statutory questions but constitutional questions, can get relief and be able to pursue perfectly good claims. This isn't a case where you have -- as you did in another one of those cases cited by the debtor. A case where the party had been in court, he appealed the confirmation order, he came back, he went and filed for revocation; this isn't that kind of case.

This is a case, Your Honor, where the first time you saw any of these parties was when they came in and said Your Honor, two months ago we learned that we were left out of this case even though we have claims that appear to be worth at least 450 dollars, which are perfectly good claims. We never had a chance, Your Honor. We never got notice. And when we get to fraud, Your Honor, I'm going to explain to Your Honor exactly how severe non-notice in this case was from the debtor perspective.

That's my partial revocation argument, Your Honor.

THE COURT: All right. Continue.

MR. SCHLACHET: Now, the next question Your Honor raised was fraud on the court.

Your Honor, fraud on the court we always viewed as -- because of its federal nature and because we can't know what's in another person's mind and rely on circumstances, we always view it as a very challenging argument the debtor has made. Let's start with the text of the debtors' argument, Your Honor. I'm going to quote their key proposition. "Plaintiffs' fraud argument is a house of cards. It is premised on a single conclusory allegation, namely that the debtors' knowledge of a defect in Impala is outfitted with a police package, definitively establishes that the debtors knew of the alleged defect in consumer Impalas." That's the key proposition. That's the house of cards proposition.

Your Honor, I submit that the house of cards proposition is a house of cards, and I'll tell you why. Because in that proposition there are three mischaracterizations of the plaintiff's position, and they are these. One, we never said nor do we have to that anything definitively establishes the debtors knew of the alleged defect. This is a motion to dismiss in which the question is have we plausibly alleged that the debtors knew of the defect. That's mischaracterization number one.

Mischaracterization number two: the correct question, according to Michelson is not whether debtors had even knowledge that they were doing a fraud. The correct question is did debtors have material information and fail to disclose

that material information. That's mischaracterization number two. Now, I hasten to add, Your Honor, that we're going to deal with the notion that Your Honor may believe that some level of knowledge of wrongdoing -- some level of knowledge is necessary. But I'm saying that in Michelson the issue is did the debtor have material information and fail to present it.

And I also add, Your Honor, because I think this is the appropriate time to do so, that Michelson -- as they said in that case, once an officer of the court is involved in making the representations regarding which exception is taken, that turns a garden-variety fraud into a fraud on the court. That's what Michelson said. Here we have the quintessential officers of the court. Now, with respect to accepting Michelson, I would point out that Your Honor has -- particularly in cases that are well-reasoned -- stated, as I said before, that to fill vacuums of the Code this court will look to similar decisions by other Circuit courts and lower courts. Your Honor said that in Motors Liquidation 438 B.R. 365, 373.

In Parker v. Motors Liquidation, Your Honor, you said that failure to meet an obligation implicates good faith. You didn't say it in that way. You said it does not implicate good faith inquiry where there as pressure to conclude the relevant sale expeditiously where, as here, there was full disclosure of salient facts. That's what we were talking about, I think,

before, when we said that the revocation cases fare far better where there's an omission than where there's an alleged material misrepresentation as against a complaining party that was deeply involved in the case throughout.

But I think in Parker that Your Honor took the position that full disclosure can take a matter out of the range of good faith. But without full disclosure I think it implies that failure to disclose salient facts brings us into a question of good faith. That's mischaracterization number two: the question is not whether there was knowledge, specific intent. The question is, according to Michelson, was there material information which the debtor had and didn't disclose.

THE COURT: Pause, please. Parker: is that Oliver Addison Parker?

MR. SCHLACHET: No. It's Parker v. Motors Liquidation, 430 B.R. 65, 78.

THE COURT: 430 B.R. -- what's --

MR. SCHLACHET: 65, 78.

THE COURT: That cite doesn't look right. I've never known the B.R. to get up that high. And although I remember Oliver Addison Parker well as a gadfly in the 2009 sale trial. And then he took the 363 order up to the district court, and then perhaps even to the Second Circuit. I have no memory of a case in which Parker himself was a plaintiff against General Motors or Old General Motors or Motors Liquidation Company.

MR. SCHLACHET: You know, I looked it up -- I actually looked it up at about 4 or 5 this morning. Because I said to myself -- because the -- in paren it says Southern District of New York, but when I brought it up on Lexus it said Your Honor's name as the bankruptcy judge writing the opinion.

THE COURT: Um-hum. Well, Parker appealed the 363 order. And there was a district court decision rejecting his contentions, and it may even have gone up again. I think it was Judge Sweet who had his, as contrasted to Judge Buchwald or any of the other judges who took the appeals from that. But I'll try to find it. But I've been doing this now for eleven years and change, I've never seen a B.R. that goes up into the 6,000's.

MR. SCHLACHET: No. No. 430 B.R. --

THE COURT: 65 --

MR. SCHLACHET: -- 65 paren -- I mean, comma, 78. I'm sorry.

THE COURT: Oh, I see.

MR. SCHLACHET: I'm sorry.

THE COURT: All right. Probably Judge Sweet's opinion. I'll read it when I get the opportunity. Go ahead.

MR. SCHLACHET: Thank you, Your Honor.

Mischaracterization number three -- and this is an important one. The key proposition, you recall, said that plaintiffs are claiming that debtors' knowledge of a defect in

police Impalas, by plaintiff's account establishes that debtors knew of the defect in consumer Impalas. That's not what we said, Your Honor. We said there's a defect in all Impalas and the only ones that were recalled were the police Impalas. And paragraphs 3 and 4 of our complaint -- which I could quote to you and won't take the time to do so, unless you ask -- say that exactly.

Now, Your Honor, I'm going to assume for a moment that some level of knowledge is necessary -- some level of particularity in pleading under Rule 9(b) is necessary in order to get beyond what Michelson requires, which is knowledge, material information, failure to -- I'm going to assume that some level of culpability or intent -- circumstances from which intent might be inferred -- could be necessary here. Not admit it, but assume it.

So the issue is, Your Honor, whether plaintiffs had made a plausible claim that such knowledge -- intent, whatever you want to call it -- exists. And citing from Picard v. Chais, which is in the Madoff Securities matter here in this court, 440 B.R. 282, 289, in determining plausibility the court must "draw on its judicial experience and common sense" and determine whether the factual allegations 'raise a right to relief above the speculative level'", citing Twombly.

Your Honor, we need not go very far to know what this Court's judicial experience is as applied to the facts of this

case, because those facts are entirely sufficient if we look within the docket sheet of this case itself. Docket number 6414, this Court sustained a settlement having to do with the parking brakes of certain vehicles in a case that was commenced in Arkansas back in 2000 or thereabouts. In that parking brakes case, Your Honor, the court down in Arkansas -- and I think it went on to the Supreme Court of Arkansas -- issued findings of fact -- and lots of findings of fact from pages 151 to 190 of docket number 6414.

And among those findings of fact, Your Honor, was a sufficient -- in this case, since it's in the record of this case as an exhibit to that docket number -- of which this Court can take judicial notice and we ask do. Among those findings of facts which were born of discovery -- those weren't pled, they were born of discovery. But it's the same layout as this case, Your Honor: a defect, limited recall, failed justification. In that case, General Motors said we didn't mean to do anything wrong; we recalled the cars with manual transmissions but not the one with automatic transmission. But when people went to the owner's manual, Your Honor, they noted -- as the court did in Arkansas -- that General Motors had a great deal to say how important the parking brake was on an automatic-transmission car.

Many millions of dollars were paid for that defect, Your Honor, in that case. And this court sustained that

settlement, as within the business judgment rule. And then, Your Honor --

THE COURT: Settlement -- pause. Settlements aren't evaluated under the business judgment rule. They're evaluated under a best interest of the estate rule.

MR. SCHLACHET: Thank you, Your Honor. I stand corrected.

THE COURT: All right. Go on.

MR. SCHLACHET: Your Honor, then there's another issue before this Court in docket number 9764: timing change. This is the Saturn case. Ms. Zambrano argued that case before Your Honor. In pages 35, et sequa, we hear that the National Highway Transportation Safety Association had been investigating for years. We heard allegations that GM did a 20,000-car recall and left the other hundreds of thousands of cars without a recall. And, Your Honor, as in this case -- and there's an allegation in the complaint to this effect, General Motors was seen selling vehicles with the defect complained of after they issued the recall notice.

So you've got two class actions, Your Honor, that you have presided over in this case in which the plaintiffs are saying that General Motors engaged in a limited recall. And in one of the cases it went up to the Arkansas Supreme Court -- I think it's in the findings of fact that the reason for these limited recalls is to mollify the National Highway Safety

Transportation Association. And in that case I believe the numbers were like this: it cost 6 million dollars to do the recall General Motors did, where it would have cost 350 million to do the recall on all the vehicles for which General Motors eventually paid money.

Your Honor, beyond the class actions that you have dealt with that deal with the same factual layout as this case, I also had occasion to look in section 4.18 of the master purchase agreement. And in that section 4.18 the debtors made the following statement: "to the knowledge of sellers" -- which is General Motors -- "since April 1st, 2007, neither sellers nor any purchase subsidiary has conducted or decided to conduct any material recall or other field action concerning any product developed, designed, manufactured, sold, provided or placed in the stream of commerce by or on behalf of any seller or any purchase subsidiary". And, Your Honor, there was a seller's disclosure that was made as an attachment to that master purchase agreement to support that statement showing recalls only through 2007.

Your Honor, at www.extendedgmwarranty.com/recalls/recalls.html, you see a whole lot of recalls from 2008. One involved 1.5 million cars -- that was June 8th, 2010, and one involved 857,735 equipped with a heated windshield-wiper fluid system, for a potential short-Circuit problem according safety fifth --

federal safety regulators. These are not only consumer recalls, Your Honor, these are safety recalls. General Motors said in their master purchase agreement that they didn't have any 2008 recalls. That wasn't true, Your Honor.

THE COURT: What's the point of that? Because if there is a breach of warranty here or a rep in that connection, at least seemingly the offended party or the victim of that would be New GM rather than some other entity, unless he, she or it is made a third-party beneficiary of the rep.

MR. SCHLACHET: Correct, Your Honor. The point I'm making here is we are dealing with plausibility. Is it plausible that GM had culpable knowledge with respect to the defect complained of by the class. All these facts and circumstances, Your Honor, show that it's quite plausible. And I have a couple other facts I would like to relate to the Court that make it even more plausible.

In paragraph 2.3(ix), all liabilities -- including liabilities for negligence, strict liability, design defect, manufacturing defect, failure to warn, breach of express warranties, merchantability or fitness for a particular purpose, in each case arising out of products delivered to a consumer, lessee, other -- these are the assumed liabilities of New GM after the sale transaction. Here we have GM that seem to show a lot of focused concern about the exact type of claim that this class has in the purchase agreement, but when they

were doing the schedules -- the disclosure statement and hearing before Your Honor -- the confirmation hearing, didn't seem to concern themselves with those types of liabilities.

And you know, Your Honor, Your Honor has had cases where Your Honor has said -- and this is part of your methodology -- to the litigants in every case in a major Chapter 11 this is the practice in the district. Your Honor said that, and I have the cases here in my notes. Your Honor knows that in every case of a major manufacturing Chapter 11 debtor you have seen something just short of an obsession with these types of liabilities: with successor liability, with all the species as they're listed out here, in every case. Where was that obsession when the schedules were produced, Your Honor? Where was that obsession when the disclosure statement? Where was the obsession when the notice package was sent out?

Your Honor, to say that at the pleading stage it is not plausible in light of a consistent, concerted, unwavering suppression of warranty problems in vehicles beyond 2007. To say it is not plausible that the same thing happened here is to maintain something that is inconsistent with every impulse, every reason that a sound-thinking jurist could have.

THE COURT: Pause, please, Mr. Schlachet.

Does your complaint allege any instances in which GM -- at that time there wasn't a distinction between Old GM and New GM -- had gotten complaints of the type that you're

talking about vis-a-vis non-police package vehicles, which put it on notice of non-police package vehicles problems of the type that underline your complaint?

MR. SCHLACHET: Your Honor, I know that I set out a website concerning folks that complained about low mileage tire replacement at 6,000 miles. It might have been in -- I think it was in the complaint, but I'm not sure.

THE COURT: This complaint that I'm asked to uphold or dismiss?

MR. SCHLACHET: When you ask the question a second time, Your Honor, I would have to look at the complaint. But I know that it's either -- hold on, did I -- I think it has to be in the complaint. Because I put it somewhere, and I don't believe at the point we were -- on November 22nd I don't think that I had anything else pending before Your Honor except the complaint. So it should be somewhere in there. I just got a nod from a very trustworthy source that it is in there, Your Honor. It's in a footnote.

THE COURT: Um-hum. Go on.

MR. SCHLACHET: Excuse me, Your Honor.

Your Honor, I could go further into the fraud, but where I would be going would be to distinguish the Longardner case from the Seventh Circuit that the debtor is relying on. And I would ask, since we flip-flopped, that I be afforded if necessary an opportunity to respond to that argument when made.

THE COURT: Well, I'll give you the opportunity to reply if they raise it. And I'll give Ms. Zambrano a chance to surreply. In each case the latter comments limited to what was said ahead of them. But you had asked for an hour for the argument; I said I wouldn't hold you to a time, but you've used more than an hour yourself and I haven't even heard from your opponent.

MR. SCHLACHET: It's a challenging case, Your Honor.

THE COURT: Move on, please.

MR. SCHLACHET: Your Honor asked to hear on equitable mootness. Your Honor, in light of the movement of the argument, I would simply say with respect to equitable mootness that the status quo ante standard that the debtor has superimposed on the equitable mootness doctrine, simply isn't the law. It may be in some cases that it's a convenient way of expressing why something is equitably moot, but in this Circuit, Chateaugay II, the Second Circuit adopted a five-part test.

And we have thoroughly supplied the Court with -- on pages 48 through 49 of our brief -- as to why this court can and should provide relief. This court need not upset any stock issuance, warrants. This court need not harm any innocent third party. The fact that existing Class 3 creditors may receive less than they would have received had this class not shown up, is not a reason to deny similarly situated creditors

pro rata distributions. In fact, just the opposite, Your Honor, it's very important under the Bankruptcy Code which seeks a distribution to similarly situated creditors and similarly situated ratable amounts to provide the class that showed up their due.

So we don't believe equitable mootness, Your Honor, is a serious contention for acceptance before the Court. The relief is there. In their briefs they've -- in their first brief, I don't think it was in their second brief, I'm not sure. But in their original motion they said there's plenty of money to pay the claims, so we can't use Rule 2123(b)(1)(B) because there's no limited fund. So with that concession, Your Honor, I don't think the question of relief was serious.

THE COURT: Let me clarify something that was unclear to me when I read the papers.

Your opponent had originally accused you of not limiting the number of model years. And I understood you to say -- but I'm not sure if I understood you correctly to say that you were limiting your claims to the 2007 and 2008 model years. Is that so?

MR. SCHLACHET: Yes, it is, Your Honor.

THE COURT: All right. So you're limiting it to the 2007 and 2008 years, and you're asking for 450 bucks per car. How many cars are we talking about?

MR. SCHLACHET: We believe the number is 400,000.

THE COURT: 400,000. So am I correct in assuming that the potential liability then is the product of 450 bucks per car times 400,000 cars?

MR. SCHLACHET: Divided by one-fourth, I believe, for the ratable distribution would be about a hundred dollars or a little more a car.

THE COURT: Well, help me with the one-fourth. What does that signify?

MR. SCHLACHET: Well, I think the distribution to date has been in the neighborhood of twenty-five percent on the dollar. So if we had a 450-dollar claim we would get $112.50 theoretically per customer, which would come to something in the neighborhood of 40 million dollars.

THE COURT: Putting it a different way, you're saying that the creditors who have already received distributions have received distributions in the currency which the plan offered it -- which, if I recall correctly was a combination of stock and warrants -- that had a value of approximately twenty-five cents on the dollar vis-a-vis their claims?

MR. SCHLACHET: Yes, Your Honor.

THE COURT: Um-hum. Continue, please.

MR. SCHLACHET: Well, Your Honor, I think I've answered the three preliminary questions -- or primary questions that Your Honor has asked. The next step is if the Court decides that it needs to go into class certification

matters, that would be a whole other branch of argument. And I suspect at this time that I would offer to sit down, if that's Your Honor's wish.

THE COURT: Um-hum. Fair enough. I just want to make sure we're in the same factual terrain. We had a conference call which was off the record in which we discussed whether a separate class action determination would be necessary vis-a-vis the revocation of the -- or modification of the confirmation order -- or limited revocation; and I don't want to characterize that now. And my understanding was that there was no need for there to be a separate class action motion because if I determined that the confirmation order could be modified or revoked in a limited way, it would be just as changed if one person had asked for it as if a whole class had. But I take it you had announced a separate intention to bring a classic class proof of claim on behalf of the 400,000 Chevy purchasers you just described. Am I correct in assuming that you've announced an intention to do it, but you haven't actually filed that motion yet?

MR. SCHLACHET: Your Honor, there's a couple of points that I want to clarify according to what Your Honor just said.

We have not decided -- it was the debtor that suggested that they didn't believe a 23(b)(2) class certification was necessary in this case.

THE COURT: What do you mean by this case? Do you

mean -- case the way it's used in bankruptcy parlance is an umbrella Chapter 11 case. But many people, especially nonbankruptcy lawyers, use "case" to describe adversary proceedings, and I have an adversary proceeding before me: Morgenstein v. Motors Liquidation, caption: complaint for revocation of discharge.

MR. SCHLACHET: I believe that we would, at this point, not wish to withdraw our class certification motion under (b)(2) in this adversary proceeding.

THE COURT: Um-hum.

MR. SCHLACHET: And we have reasons for that, Your Honor. One of them is it hasn't been entirely thought through. Another is that there are many provisions, injunctions, exculpations, releases; and we are concerned about the affect of those within the broader picture of what the rights of the class members are. Well, the debtor has indicated that they didn't think class (b)(2) certification would be necessary in this case; we aren't convinced of that yet.

With respect to a classic proof of claim under (b)(3), we have submitted as attachments to our (b)(2) certification motion in this adversary proceeding, draft papers for precisely what Your Honor has just mentioned: that is, a classic (b)(3) certification. The application under Bankruptcy Rule 9014 of Bankruptcy Rule 7023, which would apply Rule 23 in the court's summary jurisdiction -- in a contested proceeding on a proof of

claim.

THE COURT: You're showing your age. Maybe almost as much age as I have, talking about summary jurisdiction like it's still under the Act.

All right. Continue.

MR. SCHLACHET: We do have those papers ready to go, Your Honor. We have not filed them because we wouldn't be permitted to file them until such time as the Court determines that the confirmation order notwithstanding we may file them.

MR. SCHLACHET: Okay.

MR. SCHLACHET: Thank you, Your Honor.

THE COURT: Thank you.

We've been going on for almost an hour and a quarter. Recess until 11:05, and then I'll hear from you, Ms. Zambrano.

MS. ZAMBRANO: Thank you, Your Honor.

(Recess from 10:59 a.m. until 11:14 a.m.)

THE COURT: Have seats, please.

Ms. Zambrano, may I hear from you please?

MS. ZAMBRANO: Yes Your Honor.

Your Honor, I'd like to address the class allegations first.

THE COURT: Sure.

MS. ZAMBRANO: There are two class action allegations obviously at issue; 23(b)(2) and 23(b)(3). Both however require 23(a), consideration and the plaintiff would be

required to satisfy those elements as well. I'm going to set those aside for this discussion. It doesn't mean to suggest that I don't have real concerns about whether they would be met.

So you're --

THE COURT: I don't -- I think the issue is one of timing. I think I have to ascertain whether I can partially revoke the confirmation order; and if so, I have to consider the class action allegations at a later time if I so rule. But I'm confused as to whether or not I need to deal with those issues at this stage on a 12(b)(6).

MS. ZAMBRANO: I don't believe you need to deal with the 23(b)(2) allegations, and this is why: If you decide to revoke the confirmation order -- and we do believe that it would have to be in whole, in total -- then the relief that the plaintiffs have requested would not require any class to be certified; the order would be revoked.

THE COURT: That's pretty much what we discussed in that conference call, isn't it?

MS. ZAMBRANO: That is our position, correct; yes. And what I said and what Your Honor indicated he believed as well, I think that is the answer. I do think though to the extent that Your Honor thinks that a class is necessary to deal with the injunctions that are in place in the Court, there are real concerns about a 23(b)(2) class here. We obviously

haven't briefed this and would want an opportunity to respond, but the argument that jumps off the page to me is, 23(b)(2) injunctions are all about equity. And we think there are very significant equity concerns here with enjoining or revoking a plan and enjoining the enforcement of the plan with respect to holders of securities that were issued those securities, obviously in good faith, pursuant to a confirmed plan over 180 days ago. So with those equities -- and if you balance those equities, which you have to when you're considering whether to certify 23(b)(2) class with the equities of the plaintiffs here, who have had claims for a considerable amount of time. And as we pointed out, our papers have never been clear when exactly they became aware of their claims by going to fix their cars. They've alleged in their papers how long they drove their cars before they were fixed and when they purchased their cars, but the date that's really important here is when they went to fix their cars and learned that they had this problem. And that date has still not been disclosed to the Court. And I think you have to balance that equitable position against the equities of the people who have received consideration under the Court's confirmed plan.

And again, we haven't fully responded, but I don't think it's necessary at this time.

THE COURT: Go on, please.

MS. ZAMBRANO: The other thing that I just want to

note is that obviously if the Court were to certify 23(b)(2) -- think that it needed to certify a 23(b)(2) class to effect relief today, that we would object to that because there is considerable amount of discovery that would be necessary obviously, before Court certified classes they routinely permit discovery. The discovery here would go to exactly the knowledge positions of the class members. Because again, balancing the equities, you can't say that this entire class did not have knowledge of the supposed defects in the cars here. So the answer to your question is, it's not ripe at this time; if you think it's ripe, we'd like an opportunity to brief it and there are a couple reasons why right off the bat we think it shouldn't be granted.

Now, 23(b)(3) -- while I'm here on class -- let me just say, we tried to be clear in our papers; I will be crystal clear here. That is an alternative argument. Mr. Smolinsky was here before and he wanted to make clear that we put in all alternative arguments. And I've read the transcript and it did appear that the Court wanted all of our possible alternative arguments out on the table; we put them in. I don't think you have to get that far. And the reason that you don't, is that starting with, of course the section itself, 1144, we think the text is quite clear that revocation is in total. You either revoke a confirmation order because it was procured by fraud, or you don't. There's no revocation as to a particular

claimant, as to particular party, as to particular class; it's revoked or it isn't. I think that the Shoshone court, while of course it was dicta in that case; and of course it isn't controlling law on this case, I think the -- on this Court, rather -- but I think its observation about the statute is germane. You either revoke it in total or you don't. And so we think its words are right on.

I didn't hear any explanation about the text of the statute that changes our arguments in the papers. It's not that that is an alternative for the Court to consider in the Section 1. Section 1 is just saying when the court finds that an order has been procured by fraud it needs to protect parties that have relied upon its order. I think that that's, you know, that's just pure equity that's embodied in the Code; there's nothing that creates a different exception or partial revocation or limited revocation, whatever you want to call it.

So moving on from that argument -- and I'm trying to be brief, Your Honor -- it --

THE COURT: Well your opponent was all that brief, so you can take the time you need.

MS. ZAMBRANO: Okay.

I think I'm satisfied that I've covered that.

Then moving on, if you determine that you can revoke the plan in part or as to these plaintiffs, then the question is, have they satisfied the burden under the Code that the

order has been procured by fraud. As I understand the different parts of that argument -- and obviously they are required to satisfy 9(b) in making these allegations -- the argument is the debtors knew -- the pre-petition debtors knew -- that there was a problem in the police Impalas. The police Impalas are materially the same vehicle as a consumer Impalas. And therefore the debtors knew that there was a problem with the consumer Impalas. And carrying that through, they knew but yet they didn't disclose that and therefore their schedules in disclosures were wrong and therefore, when we represented to the Court that we gave notice and that our schedules were correct, that that was a fraud on the Court; that's their argument as I understand it.

THE COURT: That may be one way of articulating what Mr. Schlachet says, but I'm not sure if it's the only one. I thought I heard him saying that he was making a claim that he thought was plausible; that GM knew that the axles or -- if I'm describing it, the rear axles, if I'm describing it imperfectly, or axle assemblies, or the struts that attach to the axles -- were bad in the non-police vehicles -- Chevys -- and that his claim is plausible because they were bad in the police package vehicles. I'm not sure if you and he are saying the same thing or whether you are saying something -- you're addressing that contention in simply a different way or you don't understand him to be making that contention.

MS. ZAMBRANO: I'm not sure I know either. But I do know that he has a burden under the Iqbal case. The Supreme Court's decision to be very specific -- not conclusory -- and I don't think they've met that burden. Your Honor asked him if there had ever been -- if there were any allegations in the complaint that the pre-debtor GM were given complaints by consumers about these Impalas and that they knew. And there was a reference to some website; I've read the complaint during the break. There's only one footnote in the complaint, it does not reference any such knowledge. The allegations with respect to the police Impala and the -- if A equals B, B equals C argument that I was just reciting -- I think are the better ones in the complaint. And I still don't think you get there. The allegations directly that GM had knowledge, are virtually absent from this complaint. And there's no -- to say conclusory would be generous. There's no -- besides saying in paragraph 3 that there was this problem and later on that we knew about the problem, that's all there is. And that just does not satisfy Rule 9(b). Rule 9(b) requires specific, non-conclusory allegations of knowledge. And that's just the underlying fraud, as a way I would call it. Then you have to get to the fraud in this Court. And there's been no allegations with respect to how either the officers of the court or the debtors themselves knew about this problem and specifically it was material information that we omitted from

our schedules and omitted from the plan in this case.

I wanted to say too, they are not known creditors; they're not. They are even at best, they would have been entitled to publication knowledge; which we provided. And so they're not known creditors and there's not a heightened requirement that we would have had to notify them. It would have been virtually impossible of course, to notify every Impala owner in the United States; and that was not what would have been required even if they satisfied this sort of -- the lower burden. So I don't think that they've come close to satisfying Rule 9(b) here and so therefore -- even with the underlying alleged fraud, let alone the fraud on the Court --

And so then you get to equitable mootness. And there have been millions of shares here that have been issued pursuant to the Court's confirmed plan. There's significant misunderstanding I believe as to what the plan provides for this class of creditors. There is not -- as I think the Court is aware -- a pot of money sitting somewhere where these creditors would just come in and they would divide the money up differently. There's not even a pot of shares left, Your Honor, at this point. Eighty percent of the shares of course, have been distributed. And the claim of the magnitude that they are alleging is quite significant on the remaining shares, number one; number two, administering that claim on behalf of a class would virtually require the debtors here to liquidate

some of the stock that's sitting in this pool to deal with the claim itself of that magnitude.

Now, when you asked the -- when you did the math -- that I did prior to this hearing -- if each claimant would be entitled to 450 dollars and --

THE COURT: Pause please, Ms. Zambrano; because I'm trying to figure out -- and both from you and also from Schlachet -- and I might have asked it to him in his first chance, but I'll give you a chance after he gives you his answer -- to figure out exactly what we're supposed to do if that claim turns out to be allowed. I asked him about the math and he said there were 400,000 -- if I recall correctly -- class members with claims of 450 bucks each; I think that's somewhere in the ballpark of 1.8 million -- no, 180 million dollars --

MS. ZAMBRANO: That's --

THE COURT: -- and I guess the question we would have is, we haven't yet in this case, to my knowledge, told Old GM to liquidate stock and warrants and then to convert it into a cash distribution. So presumably we're talking about an in kind distribution of up to 180 million bucks-worth of GM securities; or New GM securities.

Is that what we're talking about; with that to be done out of the remaining twenty percent that otherwise would have gone to the Old GM creditor body? You don't understand him to

be saying -- or do you -- that the creditors who already got shares and warrants have to give that back? Or -- where are we in all this?

MS. ZAMBRANO: I don't know whether that would be required or not; I did the math the same way. That it would be -- if they were successful at least on that number -- obviously it doesn't include attorneys fees; it doesn't include tire damage which they might also be seeking -- but let's just use that number, 1980 million dollars in a value of a claim; 180 million dollar claim. What would that do at this point to the administration of this creditor class. It's my understanding that that would be significant. Whether it would require clawing back stock to satisfy those class members is not clear yet of course, because of the ongoing affirmative claims that the estate is pursuing as well as all the other claims that are outstanding. What I was told by my client is that it would be a very significant claim in the remaining -- with respect to that twenty percent remaining stock -- and certainly could require us to claw back based on the fact that we've distributed, you know, millions of shares already. So I can't say definitively that 180 million dollars would require us to claw things back -- claw stock back -- but it certainly could. What I was alluding to though, is that to administer this class, to deal with the notice that would be required; to deal with the litigation of it, frankly, it's my understanding

that that certainly would require to liquidate -- require us to liquidate -- some stocks for that expense. That just isn't in the estate remaining to deal with the claim of this magnitude.

I hope my answer is clear; it's sort of two parts.

THE COURT: I think you did, but another question flowed from that; give me a moment.

Oh yes; where you had creditors -- or alleged creditors -- who, there was consensus that they were known -- such as those hedge funds with the Nova Scotia claims and so forth -- Old GM did create reserves for those and the creditor community was on notice when they were trading the stock that reserves had been set up. Am I correct?

MS. ZAMBRANO: I'm sorry; I probably would need Mr. Smolinsky to answer that question. I think I'm familiar with what you're asking about, but I don't want to make a representation on behalf of the estate.

THE COURT: I think I made findings on that in the confirmation decision. That GM had proceeded satisfactorily when it had created reserves sufficient to satisfy the disputed claims. And what we are talking about here are disputed claims.

MS. ZAMBRANO: Correct.

THE COURT: Because if they were not disputed, you would have dished out the consideration on them.

MS. ZAMBRANO: Correct; correct.

Obviously it was disputed claims of which we could reserve an estimate for at that time. And these would not fall into that category.

THE COURT: Okay; that's sufficient for my purposes now.

Continue, please.

MS. ZAMBRANO: Okay.

The other side of the equitable moot argument, obviously, we have to look at -- and there are the five factors and I won't go through it in detail -- but we have to look at why the -- at the situation of the plaintiffs here. And again, it has not been alleged that why they're just coming to this Court at this point, having -- and when they fix their vehicles and discovered this problem -- the argument seems to be that the only reason they had knowledge of their claims is that another lawsuit was filed in a different jurisdiction against New GM, and I don't think that's --

THE COURT: Did you say against New GM?

MS. ZAMBRANO: Correct; yes. And I think there's some people in the courtroom regarding that lawsuit.

That's my understanding of how they had knowledge. It seems to be their allegations that we were required to give them notice not just of the GM bankruptcy but of their specific claims in this instance that had to do -- so they knew what type of claim to file. And that's also just not the law, Your

Honor. They were entitled to publication notice as unknown claimants, at best. And that sort of notice has been provided; no further notice was required. They were in the position to know of their claims when they went to fix their vehicle and they simply didn't bring those claims. And the bar date now has long passed and there are other creditors who would be harmed if Your Honor were to revoke the confirmation order and try to unscramble this, as learned judge said, vast omelette.

Just want to check my notes and see if there's anything else I need to cover. I don't believe so, Your Honor. There is no limited revocation to the extent that Your Honor would be inclined to revoke the entire confirmation order; a showing of fraud has not been made that satisfies Rule 9(b) and any revocation that the Court could effect at this point would be moot; the relieve the plaintiff seeks -- the situation would be moot; the stock has been distributed and you cannot put people back in the same situation that they were prior to confirmation.

Thank you.

THE COURT: Okay; thank you.

All right, Mr. Schlachet; any reply?

MR. SCHLACHET: Thank you, Your Honor.

THE COURT: You will of course be limited to what she said.

MR. SCHLACHET: Your Honor, I think the first point

that I think I need to address, because I don't think the class action is -- I believe our conversation on the phone the other day, as Your Honor indicated, took the class action allegations off the table; there are no (b)(3) class actions before Your Honor and the (b)(2) was, upon request of the debtor, deferred in terms of hearing or briefing.

With respect to the 9(b) allegations, I think I thoroughly went through what I had to say. Again, I think that in cases of -- if we were beyond the Michelson standard of material information that was withheld, and we needed some level of knowledge. I think we showed Your Honor that one, we have pled that that knowledge existed. And two, with respect to matters of which this Court can determine plausibility, that our general allegation that they had knowledge plus the plausibility fact that we have adduced here today, namely other class actions where the same scenario manifested itself of a defect, a limited recall -- in one case a subsequent settlement and in another case, no -- I think that, together with the fact that they sent out a PSB, a product service bulletin, the only thing that stops this Court from finding that they knew, if the Court were so inclined, is that they haven't admitted it. They admit it in their -- they admit it in their PSB that the Impalas are defective; they just said they were only recalling police Impalas. We pled all Impalas were defective.

I might also add, Your Honor, one clausibility (sic)

point that I didn't make, that again, this is a question of judicial notice, and I do believe I read a case in the Second Circuit where judges, if they have a gut feeling, I believe the court said -- and I don't remember which court it was but it's either the Eastern District, Second Circuit or the Southern District -- I think one judge -- and I think it was a the Circuit level; and I can submit that briefing to Your Honor -- indicated that in this day of computers and internet, that a judge with a gut feeling can go on the internet and see if his gut feeling is borne out. Now if this judge thinks based on its experience -- if I recall Your Honor, has some mechanical expertise -- if based on this Court's experience it believes that if one Impala's got a suspension problem all Impalas have a suspension problem; this Court can go on the internet in the process of judicial notice to bear out the gut feeling. And I think if Your Honor goes and lo --

THE COURT: Mr. Schalchet, I have a gut feeling that judges shouldn't go around doing their own poking around on the internet to verify or contradict their gut feelings. It seems -- if I were a litigant before me, that would drive me ballistic. How are you going to be heard to determine or to influence me on whether I was right or wrong; whether my effort was careful enough or too sloppy; whether the sources I relied upon were admissible hearsay or otherwise. And how would a reviewing court make a judgment as to the basis upon my

rulings?

It is true that every time that somebody doesn't like the way a case is going they claim that it's a due process violation. But doing secret investigation does walk and quack and talk an awful lot like a due process violation.

MR. SCHLACHET: I was surprised at the case myself, but that's exactly what it said. And the plaintiff did go ballistic and the court sustained -- did not overturn the judge's ruling as a result of going -- bearing out his gut feeling.

But one thing I think we can all agree on, Your Honor, is that the Court can go to the debtor's website and that is something of which the Court can take judicial notice. And if Your Honor goes to the Court's website and take judicial notice of the police package, you will see that there's nothing in there that relates remotely to suspension. So the rear suspension was a problem indigenous to the 2007 and -8 Impalas; not a problem of just police Impalas. And I think we've made that plausible case Your Honor.

Again, we cited Your Honor to the September 30th, 2011 report of the GEC trustee; the administrator. We cited it in our brief. It showed I believe a billion-two on hand. We cited the plethora of imponderables that will or will not add money to that, including the 1.5 billion dollar case that could inure to the benefit of that fund. We know this is a pot plan;

it's been called a pot plan. So while we have counsel's general statement that there's no pot of money out there, we don't think that's something to -- we're dealing with statutory and constitutional issues. The Court's methodologies are clear. We think that Your Honor ought permit this case to proceed.

THE COURT: Can you confirm that no way, shape, or form are you asking for creditors who already got distributions to give any of them back?

MR. SCHLACHET: Absolutely confirmed; on the authority of case law.

THE COURT: All right. So that issue you're telling me, is off the table?

MR. SCHLACHET: Yes Your Honor.

THE COURT: All right.

Anything further?

MR. SCHLACHET: No, Your Honor.

THE COURT: Okay.

MR. SCHLACHET: Thank you, Your Honor.

MS. ZAMBRANO: Your Honor?

THE COURT: Ms. Zambrano?

MS. ZAMBRANO: May I respond very briefly, Your Honor?

THE COURT: Yes. Again, of course limited to what we just heard from Schlachet.

MS. ZAMBRANO: He didn't say the name of the case so I

don't know what court he's referring to. But I want to be very clear about the standard here under 12(b)(6); and in particular 9(b).

The Supreme Court in Ashcroft v. Iqbal said very clearly that a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference the defendant is liable for the misconduct. And so as I see it, they either had to plead that the consumer Impalas had the defect and GM knew about it directly. And that is completely absent from the complaint.

Or they had to do it by inference with facts to support it through the police Impala argument. I believe they tried to do it more directly with the latter, through the police Impalas. It is not accurate to say that GM admitted in the bulletin that all Impalas were defective; that's just not true. If you read the bulletin which is attached as Exhibit 1 to the complaint, and which can be considered by the Court in a motion to dismiss, it's very careful to always say that they were talking about the police Impalas. There was no recall for consumer Impalas; and there was no finding that we're aware of as the debtors, of anything that was wrong with the consumer Impalas prior to the petition.

So it is not accurate to say that they have pled with facts to satisfy the Supreme Court's standard. That there was problem with the consumer Impala; and it's also not accurate to

say that they have pled that there was a problem with the police Impala, that should have made and did make GM aware that there was a problem with the consumer Impala; it's just not accurate.

And the argument today that I heard for the first time, that you could go to the defendant's website and make that determination or that link, is also not proper. The standard on a 12(b)(6) motion is of course to look at the complaint and anything that's attached to the complaint, which would include the police service bulleting -- excuse me, the PSB -- or anything that it was incorporated by reference in the complaint -- specifically incorporated by reference. And that's the Second Circuit's holdings of course. And there has been no reference to the defendant or any other website in that complaint. And so Your Honor's burden of course is to look at the four corners of the complaint and determine whether they've satisfied a burden under -- satisfied their burden -- to stay the claim under 12(b)(6), and they have not; they have certainly not satisfied Federal Rule 9(b).

Then I just want to address the pot plan because we're having so much misunderstanding about this. Yes, it was a pot plan for unsecured creditors of course, that that class of creditors were just to receive stock and warrants; that's all there was for that particular class of creditor. And my understanding that there was a lot of effort that went into

reserving for those claims; how much they should be reserved for; how much the size of the total pot. And there was also a lot of effort that went into determining what affirmative claims the estate would have and how much those might contribute to the pot for that class of creditors. But there is not cash available obviously for this type of a creditor even if the Court were to allow the claim. And the issue of whether stock would have to be returned cannot be guaranteed at this point. If there is a 180 million dollar claim, it is not at all clear that there will be 180 million dollars of stock sitting -- or warrants -- sitting available for these claimants. I would submit that that can't be guaranteed if the -- if some of the claims that we put in the -- we reserve to be worth a certain amount don't end up being fruitful, and maybe some of the claims that we reserved lower amounts actually they're adjudicated to be worth more, there very much could be a situation where we would have to claw back stock. It's just not clear at this point. Certainly what we know is that eighty percent has been distributed and 180 million dollars is a significant portion for the remaining claims that are left in that class.

And finally, there's been so much misunderstanding about the limited funds statement that we made in the context of a 23(b)(2) allegation. Let me just be very clear what we meant.

The case law under class action Rule 23(b)(2), there's a very specific exception that's not used very much, but when there is a limited pool of money available, sometimes a court will certify a class so that they can deal with that pot of money. Courts have looked at that to see in the bankruptcy context whether does that make sense, right? Because in the bankruptcy context, there's by definition usually, a limited pot of money. And the courts say no, that's not the type of limited fund that we're talking about; you can't certify a 23(b)(2) class every time you have a bankruptcy, that's not what it's for. So that's what our statement was. We did not say -- and nor did we intend to say -- that this was an unlimited fund -- there were unlimited funds available here; that's probably obvious to the Court, but I want to state it for the record because it's a misinterpretation of what we said in the context of Rule 23(b)(2).

That's all, Your Honor.

THE COURT: All right; thank you.

MS. ZAMBRANO: Excuse me.

THE COURT: Everybody sit in place for a minute.

(Pause)

THE COURT: All right, ladies and gentlemen, with the benefit of the briefs and the oral argument, I think it's pretty clear how my decision is going to be coming out here. And nothing I heard in oral argument has changed my views based

upon my earlier reading of the briefs and associated exhibits.

With that said, I think that any reviewing court would prefer to have my views laid out more extensively than I could practically in a dictated decision off the bench. So I'll write on it in due course, given other matters that need to be dealt with in this case and others.

At this juncture however, all proceedings in this adversary proceeding, motions for further class certification, motions for leave to file late proofs of claim and all discovery will be stayed. Everything in this case is coming to a full stop. It's very clear to me that the underlying premise of all of this -- that you can have a limited revocation of a confirmation order -- just runs contrary to the Bankruptcy Code and all relevant case law on point. Even putting aside the Rule 8 and Rule 9 issues vis-a-vis the alleged fraud upon the Court, and the equitable mootness issues.

So no judgment will be entered until I've done that. But as I said, this adversary proceeding will be fully stayed.

I will require however, Ms. Zambrano, that we have a stop, look, and listen before any further distributions are made to creditors with respect to that remaining twenty percent of the New GM securities that the debtor is still holding. I may or may not interfere with any further distributions but I don't want value leaving the estate until I can finalize my ruling in this regard.

MS. ZAMBRANO: Your Honor, may I be heard?

THE COURT: I'm sorry?

MS. ZAMBRANO: May I be heard briefly, Your Honor?

THE COURT: Yeah, sure.

MS. ZAMBRANO: I believe that there was a distribution that was sort of put in process very recently. And I can check and report back to the Court if you would like.

THE COURT: Well, why don't you do that. I must say, that based upon my understanding of how I'm going to rule, the chances are remote that I'm going to interfere with it; but I need to know.

MS. ZAMBRANO: I will do that; thank you, Your Honor.

THE COURT: Okay. All right, we're adjourned.

(Whereupon these proceedings were concluded at 11:53 AM)

I N D E X

RULINGS

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

I, Avigayil Roth, certify that the foregoing transcript is a true and accurate record of the proceedings.

Avigayil Roth

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AVIGAYIL ROTH

AAERT Certified Electronic Transcriber CET**D-640

Also transcribed by:

DEVORA KESSIN

AAERT Certified Electronic Transcriber CET**D 636

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: January 12, 2012