# 15-2844(L)

## 15-2847(XAP), 15-2848(XAP)

IN THE

# United States Court of Appeals

**FOR THE SECOND CIRCUIT**

IN THE MATTER OF: MOTORS LIQUIDATION COMPANY,

*Debtor.*

CELESTINE ELLIOTT, LAWRENCE ELLIOTT, BERENICE SUMMERVILLE,

*Creditors-Appellants-Cross-Appellees,*

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR APPELLEE-CROSS-APPELLANT GENERAL MOTORS LLC (NEW GM)**

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SESAY and BLEDSOE PLAINTIFFS, IGNITION SWITCH PLAINTIFFS,
IGNITION SWITCH PRE-CLOSING ACCIDENT PLAINTIFFS,
DORIS POWLEDGE PHILLIPS,

*Appellants-Cross-Appellees,*

GROMAN PLAINTIFFS,

*Appellants,*

—against—

GENERAL MOTORS LLC,

*Appellee-Cross-Appellant,*

WILMINGTON TRUST COMPANY,

*Trustee-Appellee-Cross-Appellant,*

PARTICIPATING UNITHOLDERS,

*Creditor-Appellee-Cross-Appellant.*

## CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, General Motors LLC, a Delaware limited liability company, states that its only member is General Motors Holdings LLC. General Motors Holdings LLC's only member is General Motors Company, a Delaware corporation with its principal place of business in Wayne County, Michigan. General Motors Company has 100% ownership interest in General Motors Holdings LLC.

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## INTRODUCTION[1]

This appeal arises from the collapse of the domestic auto industry during the severe economic recession of 2008 and 2009. During that time, the U.S. Government (through the Treasury Department) and the Canadian Government took action to prevent the dire consequences that would have resulted from the distressed liquidation of General Motors Corporation ("Old GM"). After exploring various options, the Governments decided the only path forward was for Old GM to file for bankruptcy, and for the Governments to form a new entity (which ultimately became General Motors LLC ("New GM")) to purchase the assets of Old GM. The Sale was effectuated through Section 363 of the Bankruptcy Code, a commonly used bankruptcy procedure that allows debtors to sell assets free and clear of liens and claims, prior to confirmation of a Chapter 11 plan.

The Sale was unquestionably the best alternative for Old GM's creditors, including alleged unsecured creditors like Appellants.[2] In

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[1] Unless otherwise indicated, New GM uses the definitions in the Glossary at the beginning of the Brief filed by the Ignition Switch Pre-Closing Accident Plaintiffs.

[2] The Appellants are three groups of Old GM vehicle owners: (1) the Ignition Switch Plaintiffs, asserting economic losses relating to

approving the Sale, the Bankruptcy Court found that if it had not been consummated, Old GM would have immediately liquidated with unsecured creditors receiving nothing. Instead, because of the Sale, Old GM creditors received a significant distribution under Old GM's plan of reorganization, which was funded primarily by the Sale proceeds.

Appellants now seek to rescind a key condition of New GM's asset purchase—that New GM would be shielded from Old GM's liabilities, including tort, contract, or successor liability claims. The Bankruptcy Court expressly approved this condition to the Sale as appropriate and reasonable. The Sale would not have occurred without this liability shield, and if there were no Sale, the impact on Appellants and the public—the resulting loss of jobs, the negative cascading effect on the vulnerable domestic economy, and the loss of value for Old GM creditors (and many others)—would have been catastrophic.

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an ignition switch that was recalled in early 2014 (these plaintiffs act through "Lead Counsel" and "Designated Counsel"; in addition, counsel for the Groman Plaintiffs and the Elliott, Sesay and Bledsoe Plaintiffs have advocated, at times, on behalf of their individual clients); (2) the Pre-Closing Accident Plaintiffs, generally acting through Designated Counsel, contending that a manufacturing defect caused an accident before the closing of the Sale; and (3) a handful of Old GM vehicle owners that did not have a vehicle subject to the ignition switch recall claiming economic losses.

In early 2014, New GM announced recalls relating to Old GM vehicles. Shortly thereafter, contravening the Sale Order's explicit free-and-clear provision and its injunction proscribing lawsuits against New GM, Appellants, owners of Old GM vehicles, sued New GM arguing that it was the successor to the liabilities of Old GM. When New GM moved in the Bankruptcy Court to enjoin these actions as violating the Sale Order, Appellants responded that their violations were justified because they had not received sufficient notice of the Sale in 2009.

The central issue before this Court is whether Old GM violated the due process rights of Appellants who received court-approved publication notice and media notice of Old GM's Sale, but did not receive direct-mail notice. Certain Appellants also argue that Old GM should have provided them with a more detailed notice than the one approved by the Bankruptcy Court. They argue that Old GM notifying them of the bar against successor liability claims was not sufficient; they should also have been told as part of the Sale notice that their Old GM vehicle had an ignition-switch defect, and that any monetary-damage claim related thereto would be paid solely by Old GM as part of the bankruptcy proceeding. As a result of this allegedly insufficient

notice by Old GM, Appellants argue they should be entitled to a remedy against New GM, a separate entity, that was a good-faith purchaser for value.

Based on well-established due process principles in bankruptcy cases, the specific facts and circumstances of the debtor's bankruptcy dictate the content of the bankruptcy notice and the notice's recipients. Here, the Sale involved a "melting ice cube" business and a debtor with millions of creditors and equity holders, which required the Bankruptcy Court to focus on, among other things, time and cost factors relating to the Sale notice. Old GM had no meaningful funds other than what the U.S. and Canadian Governments lent to it, and there was a strict deadline as to when the Sale needed to be consummated—or else Old GM and its creditors faced a calamitous fire-sale liquidation.

In approving the form of notice to be sent by mail and publication, the Bankruptcy Court directed Old GM to provide "known" creditors with direct-mail notice of the Sale; "unknown" creditors (*e.g.*, contingent creditors) were provided publication notice. Whether a creditor was "known" or "unknown" to Old GM was determined at the time of the

Sale notice, based on what Old GM's books and records indicated.[3] And the Bankruptcy Court concluded in 2009 that all Old GM vehicle owners who had not made a demand or filed a lawsuit against Old GM—like Appellants—were unknown creditors. A-7765–7797.

Appellants do not, and cannot argue that they received *no* notice of the Sale or were actually unaware of the Sale. As Judge Kaplan observed, "[n]o sentient American is unaware of the travails of the automotive industry in general and of General Motors Corporation, . . . in particular." *In re Gen. Motors Corp.*, No. M 47 (LAK), 2009 WL 2033079, at *1 (S.D.N.Y. July 9, 2009). Rather, they contend that they should be treated better than all other Old GM unsecured creditors because, even though they were aware of Old GM's bankruptcy, they did not receive direct-mail notice of the Sale Motion. Essentially, Appellants want to be exempted from the fundamental free-and-clear condition of the binding Sale Order. And they want this special treatment even though the free-and-clear provision has been in effect

[3] If a party was injured in an accident prior to the Sale and notified Old GM, they were "known" and received direct-mail notice. Certain liabilities relating to accidents that occurred after the Sale are Assumed Liabilities and not implicated by this Appeal.

for over six years, and countless transactions with third parties have occurred based on the validity of this provision.

Appellants are asking for an extraordinary, one-sided "do-over" of the Sale solely for their benefit. Their position is essentially that New GM, the good-faith purchaser for value, should bear the ultimate burden for Old GM's alleged Sale notice transgressions.

The Bankruptcy Court largely rejected Appellants' due process claims because they were not prejudiced by their failure to receive direct-mail notice of the Sale. In particular, the same bankruptcy judge who presided over the Sale Hearing in 2009, concluded in 2015 that the Appellants' objections to the Sale were substantially the same as the objections that he heard and were litigated by many others in 2009 (including by numerous State Attorneys General, consumer advocacy groups, and the Official Committee for Unsecured Creditors, which all represented the interests of Old GM vehicle owners, like Appellants). Since those objections had been previously rejected, the Bankruptcy Court concluded that the result of the Sale Hearing would have been the same had Appellants participated—the Sale would have been

approved, including the liability shield and its bar to successor liability claims.

In its July 2009 Decision, the Bankruptcy Court properly recognized that the Governments had sole discretion in deciding which Old GM liabilities to assume. Every other Old GM liability would be retained by Old GM. At the Sale Hearing, the U.S. Treasury (a significant owner of New GM) refused to allow New GM to assume additional liabilities, including liability for pre-sale accident plaintiffs and economic-loss claims brought by owners of Old GM vehicles. Appellants' claims here are the same as those that the Governments (on behalf of New GM) expressly refused to assume in 2009. Appellants, thus, received due process—*i.e.*, consideration of their objections (made by others who appeared and who shared and represented their interests).

Nonetheless, in reviewing the record from 2009, the Bankruptcy Court in 2015 identified (improperly, in New GM's view) one issue on which some Appellants may have been prejudiced. To cure that purported harm, it carved-out from the liability shield "Independent Claims" relating to Old GM vehicles that are premised solely on New

GM conduct.[4] The Bankruptcy Court held that the Ignition Switch Plaintiffs (and no other claimant) may "assert otherwise viable claims against New GM for any causes of action that might exist arising solely out of New GM's own, independent, post-Closing acts, so long as those Plaintiffs' claims do not in any way rely on any acts or conduct by Old GM." *In re Motors Liquidation Co.*, 529 B.R. 510, 598 (Bankr. S.D.N.Y. 2015) ("*Opinion*"). The Bankruptcy Court's decision to modify the Sale Order six years after it was entered to allow so-called "Independent Claims" was clearly erroneous for at least three reasons.

***First***, there was no due process violation (which is the predicate for modifying the Sale Order) because the Appellants were "unknown" creditors of Old GM at the time of the Sale and, therefore, the widespread publication and media notice of the Sale satisfied due process. None of the Appellants receiving publication notice had asserted any claim against Old GM at the time of the Sale. The books and records of Old GM did not list their claims as liabilities. And while it is true that some Old GM employees were aware in July 2009 of unresolved airbag non-deployment and stall issues with certain Old GM

[4] The carve-out for Independent Claims is one of the issues raised by New GM in its cross-appeal.

vehicles, that does not mean that Old GM had sufficient knowledge in connection with the Sale notice to identify Appellants (asserting an ignition switch defect) as "known" creditors.

***Second***, and more fundamentally, Appellants *never* had any claim against the newly formed *New GM*. Their claims, if any, were against Old GM. Appellants are not entitled to a due process remedy that transforms their claims against Old GM into claims against New GM, the good-faith purchaser for value, simply because Old GM did not provide them with direct-mail notice of the Sale Hearing.

***Third***, to the extent that any Appellant has a viable claim against New GM due solely to a new and separate post-Sale agreement between New GM and the Old GM vehicle owner (for example, a claim against New GM because a New GM dealer sold an Old GM vehicle after the Sale under New GM's Certified Pre-Owned Program, which included a new vehicle warranty), the Sale Order did not need to be (and should not have been) modified to allow this new and separate claim to proceed against New GM.

In sum, this Court should enforce the liability shield including the bar on successor liability as to all Appellants' claims against New GM

and overturn the *Opinion* to the extent that it modified the Sale Order to allow Ignition Switch Plaintiffs to assert so-called "Independent Claims." Further, this Court should affirm that New GM cannot be liable for claims that in any way are based on Old GM's actions, duties or conduct (except for Assumed Liabilities pursuant to the Sale Agreement).

## JURISDICTIONAL STATEMENT

This appeal arises from the Bankruptcy Court's *Opinion* and Judgment, granting in large part New GM's motions to enforce the Bankruptcy Court's prior Sale Order. Bankr. Docs. 13177, 13109. That Judgment is a final order that resolves the applicability of the Sale Order to Appellants' claims.[5] Certain Appellants filed motions for reconsideration, which the Bankruptcy Court denied on July 22, 2015. Bankr. Doc. 13313. Appellants timely filed their appeal and New GM timely filed its cross-appeal.

The Bankruptcy Court certified the Judgment for direct appeal under 28 U.S.C. §158(d) and Federal Rule of Bankruptcy Procedure 8006(e), which this Court granted on September 9, 2015. This Court has jurisdiction over these consolidated appeals under 28 U.S.C. §158(d)(1).

[5] The Groman Plaintiffs appeal the Bankruptcy Court's discussion relating to the legal standard for evaluating a claim for "fraud on the court" under Federal Rule of Civil Procedure 60(d)(3). That issue is not ripe for this Court's review because the Bankruptcy Court's ruling did not finally resolve the application of that standard to any of Appellants' claims.

## STATEMENT OF ISSUES

1. Whether Appellants received appropriate notice of the Sale where, among other things, (a) Appellants were unknown creditors of Old GM; (b) there was wide-spread publication and media notice of the Sale; and (c) objections identical to those now raised by Appellants were fully briefed, argued and overruled by the Bankruptcy Court during the Sale approval process?

2. Whether the Bankruptcy Court had the authority to enforce the injunction in its Sale Order barring Appellants from suing New GM for Old GM's Retained Liabilities, including successor liability claims?

3. Whether the Bankruptcy Court erred in concluding that the Sale Order could be modified years after the appeal of the Sale Order had been finally resolved so that Ignition Switch Plaintiffs could assert so-called "Independent Claims" against New GM with respect to Old GM vehicles?

## STATEMENT OF THE CASE[6]

### I. Old GM's Dire Financial Position

By late 2008, Old GM was in extreme financial distress. A-1527–1528. In the first quarter of 2009, Old GM suffered negative cash flow of $9.4 billion. A-1534. To avoid a collapse of the U.S. auto-industry, Old GM received significant tax-payer funding, but that proved insufficient. A-1528–1533. In March 2009, the Governments gave Old GM 60 days to submit a viable restructuring plan or liquidate. A-5935. Old GM's only viable option became selling its assets under Bankruptcy Code Section 363 to a newly-formed entity (that became New GM) owned by the U.S. Treasury Department and the Canadian Government.

The negative consequences of an Old GM fire-sale liquidation (as opposed to a Section 363 sale of Old GM's ongoing business) cannot be overstated. *See Opinion*, 529 B.R. at 530. An immediate liquidation would have left unsecured creditors (including Appellants) with nothing, cost hundreds of thousands of jobs, and resulted in significant

[6] At the request of the Bankruptcy Court, all the parties agreed to a set of stipulated facts for the limited purpose of ruling on the Motions to Enforce. A-5781.

business losses to Old GM's direct and indirect suppliers. *Id.* The Sale avoided those calamitous results and provided a particularly favorable outcome under the circumstances because New GM was not a typical commercial buyer. It was a government-owned entity that was willing to pay far more than the liquidation value of Old GM's assets for "underlying societal interests in preserving jobs and the North American auto industry." A-1536.

## II. Old GM Files for Bankruptcy and the Sale-Related Pleadings

On June 1, 2009, Old GM filed for bankruptcy under Chapter 11 of the Bankruptcy Code. That same day, Old GM filed a motion seeking approval of the Sale. A-109. In its Sale pleadings, Old GM explicitly stated that the Sale was to be "free and clear of liens, claims, encumbrances and interests pursuant to Section 363(f) of the Bankruptcy Code," including *all successor liability claims*. A-128–129.

The Bankruptcy Court understood that the Governments had agreed to continue financing Old GM's business for only a limited time in bankruptcy because it believed that Old GM's already deteriorating business would only worsen in bankruptcy. A-1544–1545. Consequently, the Governments set a strict deadline of just over a

month to consummate the Sale. A-1536, A-1544. If that deadline was not met, the Governments said they would stop financing Old GM's business, forcing Old GM to liquidate under fire-sale conditions. *Id.*

Old GM immediately sought approval from the Bankruptcy Court via the Sale Procedures Order as to how and to whom it should provide direct-mail and publication notice of the Sale. A-133–137. It was clear that direct-mail notice to the 70 million individuals who owned Old GM vehicles would be cost- and time-prohibitive. A-128, A-136. Specifically, it would have cost Old GM approximately $43 million for its court-approved noticing agent to have provided direct-mail notice to the owners of the 70 million Old GM vehicles. A-6250. More importantly, the burden of mailing 70 million individual notices would have delayed the Sale Hearing causing Old GM additional multi-million dollars in operating losses and jeopardizing the Sale itself. *Id.*

Accordingly, the Bankruptcy Court made prompt and precise decisions about the Sale Notice that Old GM had to provide. A-379. It ordered direct-mail notice for "known" creditors. A-385–386. Known creditors are those individuals and entities to whom Old GM owed debts (or could be liable), based on its books and records, including persons

who notified Old GM of their intention to assert a claim. Importantly, the Bankruptcy Court viewed Old GM vehicle owners who had not sued Old GM, or made written demands on Old GM, as contingent creditors.[7] Contingent creditors were deemed "unknown creditors" of Old GM. The Bankruptcy Court ordered publication notice to unknown creditors (A-385), which expressly included all contingent warranty creditors (A-1611–1612).

The Bankruptcy Court approved the form and content of both the direct-mail and publication notices. A-385. The Sale notices' content was consistent with the Official Form of Sale Notice approved by the Bankruptcy Courts for the Southern District of New York.[8] It notified parties in interest of the Sale Motion, the Sale Hearing, the terms of the Sale, the deadline to object, and the bidding procedures for Old GM's assets. A-398–405. The Sale Motion (and the Sale Agreement) made clear that the purchaser would be acquiring Old GM's assets free and

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[7] *See* A-7795–7797; *see also Morgenstein v. Motors Liquidation Co. (In re Motors Liquidation Co.),* 462 B.R. 494, 508 & n.68 (Bankr. S.D.N.Y. 2012).

[8] *See* Bankruptcy Court General Order M-331 (Sept. 5, 2006)(Bernstein, J.).

clear of all Liabilities (except Assumed Liabilities), including all successor liability claims. A-140–142; A-457, A-475, A-537.

The Sale Notice did not contain any creditor-specific information. A-398–405. Indeed, the resolution of Old GM claims was to be made after the Sale Hearing, pursuant to separate bankruptcy procedures to be administered by Old GM. *See In re Gen. Motors Corp.*, 407 B.R. 463, 474-75 (Bankr. S.D.N.Y. 2009). The form and substance of the Sale Notice was fully understood by, among others, the Creditors' Committee and the 44 State Attorneys General who objected to the Sale; a free-and-clear provision meant that all Old GM claims of whatever magnitude or type would be retained by Old GM, and not assumed by New GM.

Old GM published notice of the Sale in (1) the global edition of *The Wall Street Journal*, (2) the national edition of *The New York Times*, (3) the global edition of *The Financial Times*, (4) the national edition of *USA Today*, (5) *The Detroit Free Press/Detroit News*, (6) *Le Journal de Montreal*, (7) *The Montreal Gazette*, (8) *The Globe and Mail*, (9) *The National Post*, and (10) on the public website of Old GM's noticing agent (the "Publication Notice"). A-5939–5940. Old GM's widespread

Publication Notice was in addition to the extensive media attention that the Sale received. In fact, more than 1,250 news stories were written about Old GM's bankruptcy and the Sale in the five short weeks between the Petition Date and the Sale Hearing. A-6298. Unsurprisingly, given this widespread coverage, Appellants do not claim they were unaware of the Sale to New GM.

### A. The Sale Agreement's Free-and-Clear Provision

New GM bought the assets of Old GM free and clear of claims or liabilities based on an Old GM vehicle, part, conduct or duty that is not specifically defined as an Assumed Liability. A-1648. New GM's Assumed Liabilities for Old GM vehicles are limited to the following:

(1) post-sale accidents/incidents involving personal injury, loss of life, or property damage;

(2) repairs or the replacement of parts (but not monetary damages) for a limited duration provided for under the "glove box warranty"; and

(3) Lemon Law claims, which are essentially related to a breach of the glove box warranty remedy.

A-1693–1695. All other liabilities relating to Old GM vehicles were Retained Liabilities of Old GM, including, among others: (1) product liability claims arising in whole or in part from any accidents prior to

the Sale; (2) liabilities to third parties (*i.e.*, Old GM vehicle owners) for claims based on contract, tort, or any other basis; and (3) liabilities related to implied warranty or obligations arising under statutory or common law. A-465–466.

### B. Objections to the Sale by Various Groups Representing Vehicle Owners

The majority of the objections to the Sale challenged only limited aspects of the transaction. A-1571; A-5944–5946. Many of the objectors argued—like Appellants here—that New GM should assume more claims, and that the free-and-clear provisions—particularly with respect to successor liability—were improper or unfair. A-7814, A-7826, A-7866, A-7883, A-7900, A-7989.

The State Attorneys General objected to the Sale, arguing that New GM should assume all consumer claims, including implied warranty claims, additional express warranties, and statutory warranties. A-7883, A-7900. They took the position that the free and clear provision "divest[ed] consumers of substantial legal rights, without any regard for state laws that may, when a claim is eventually made, be read to hold otherwise." A-7887.

The Creditors' Committee, representing all unsecured creditors (including Appellants), objected to the Sale because, they argued, it would cut off state-law successor liability claims and limit any current or future claimants to a recovery from the Sale proceeds and other assets remaining with Old GM. A-7997.

The Ad Hoc Committee of Consumer Victims, attorneys for individual accident litigants, the Center for Auto Safety, Consumer Action, Consumers for Auto Reliability and Safety, the National Association of Consumer Advocates, and Public Citizen (collectively the "Vehicle Owner Objectors") objected to the Sale, arguing that Bankruptcy Code Section 363 did not authorize Old GM to sell its assets free and clear of successor liability. A-7824; *Opinion*, 529 B.R. at 532. The Vehicle Owner Objectors also claimed—just like Appellants—that (1) the Bankruptcy Court did not have jurisdiction to enjoin successor liability claims against a non-debtor (New GM), and (2) the free-and-clear provisions violated due process because vehicle owners who might have claims did not receive meaningful notice that the Sale would affect their rights as against the purchaser. *Id.*

On July 5, 2009, the Bankruptcy Court issued the Sale Order approving the Sale Agreement, and a separate decision supporting the Sale Order. A-1517; A-1609. The court overruled all remaining objections, including the due process and notice objections, made by vehicle owners and their advocates. A-1608. Citing the decision from the Chrysler bankruptcy (which was filed shortly before the Old GM bankruptcy, *see Gen. Motors*, 407 B.R. at 477-498), the Bankruptcy Court ruled that Bankruptcy Code Section 363 authorized the sale of Old GM's assets free and clear of successor liability claims and shielded the purchaser from creditor claims. A-1578–1582. The Sale Order was affirmed on appeal on the merits, and a separate appeal was dismissed years ago as being equitably moot. A-5948–5949. To date, countless transactions have occurred based on the validity and integrity of the Sale Order. *See Parker v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 430 B.R. 65, 82 (S.D.N.Y. 2010) ("In reliance on the Sale Order[] having become effective, countless new transactions have occurred . . . .").

## III. The Ignition Switch Actions and Bankruptcy Litigation

Beginning in February 2014, New GM recalled certain vehicles, including vehicles manufactured by Old GM, many of which contained a defective ignition switch.[9] Immediately after New GM announced the first of the recalls, plaintiffs began suing New GM, ignoring the injunction provisions in the Sale Order shielding New GM from Old GM's Retained Liabilities, including successor liability claims.[10] *Opinion*, 529 B.R. at 521.

The claims at issue here fall into two categories: (1) claims by Old GM vehicle owners (Ignition Switch Plaintiffs and certain Non-Ignition Switch Plaintiffs) for "economic loss" associated with the purported post-recall diminution in value of their vehicle; and (2) pre-Sale accident

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[9] Under the Sale Agreement, New GM agreed to abide by federal recall requirements relative to Old GM manufactured vehicles. *See* A-1734. Importantly, that obligation was not an Assumed Liability, nor did it change the fundamental structure of the Sale Agreement that all Liabilities (except for Assumed Liabilities) to third parties, including vehicle owners, based on contract, tort or otherwise remained with Old GM. A-1697. Also noteworthy, the Sale Agreement expressly prohibited third-party beneficiary claims. A-1763–1764.

[10] On June 9, 2014, the Judicial Panel on Multidistrict Litigation established MDL No. 2543, designating District Judge Jesse M. Furman of the Southern District of New York to conduct coordinated proceedings for the actions assigned to the MDL. More than 250 cases are pending in MDL No. 2543. There are also numerous state court proceedings filed by plaintiffs against New GM.

claims, which were expressly barred by the Sale Order. *Id.* at 521-23. Both categories seek recovery based on successor liability. *Id.* at 521-23, 526.

### A. Motions to Enforce the Sale Order

Starting in April 2014, New GM filed three Motions to Enforce the Sale Order. *See Opinion*, 529 B.R. at 538-39. New GM's first motion related to Ignition Switch Plaintiffs seeking alleged economic losses for Old GM vehicles and parts. *Id.* New GM's second motion sought to enjoin parties who had asserted "economic loss" claims associated with Old GM vehicles that alleged a non-ignition switch defect. *Id.* at 522. New GM's third motion related to pre-Sale accident lawsuits filed against it. *Id.* at 523. The Motions to Enforce argued that these claims were barred by the Sale Order.

### B. The *Opinion* and Judgment

After extensive briefing and two days of oral argument, the Bankruptcy Court issued its *Opinion*, enforcing the Sale Order's free-and-clear injunctive provisions. *See generally Opinion*, 529 B.R. 510. The Bankruptcy Court previously ruled that it had jurisdiction and authority to interpret and enforce its own Sale Order. *See In re Motors Liquidation Co.*, 514 B.R. 377, 379-382 (Bankr. S.D.N.Y. 2014).

Regarding due process, the Bankruptcy Court ruled that, although publication notice in a Section 363 sale is ordinarily satisfactory, it was insufficient here for vehicle owners that had a defect related to the Ignition Switch ("Ignition Switch Defect") because these vehicle owners were "known" creditors. *Opinion*, 529 B.R. at 525.[11] The Bankruptcy Court found that the notice of the Sale for other plaintiffs was sufficient, that they were unknown creditors and that the Sale Order remained fully enforceable as to those plaintiffs. *Id.* at 523-27.

The Bankruptcy Court also ruled that, to establish a due process violation, plaintiffs would have to—but could not—demonstrate prejudice as a result of the alleged insufficient Sale notice, except in one instance relating to the Ignition Switch Plaintiffs. *Id.* at 525-26. As to that one instance, the Bankruptcy Court found that the Sale Order should be modified to permit Ignition Switch Plaintiffs to assert so-called "Independent Claims" against New GM—*i.e.*, those claims "arising solely out of New GM's own, independent post-Closing acts"

[11] However, as demonstrated *infra* at Section I.A.3, the Bankruptcy Court's known-creditor finding is not supported by the stipulated factual record or the law.

relating to Old GM vehicles. *Id.* at 598. The Bankruptcy Court did not opine whether any plaintiff had viable Independent Claims.

The Bankruptcy Court's rulings regarding (i) the purported "known" creditor status of certain plaintiffs, and (ii) whether the Ignition Switch Plaintiffs' due process rights were violated requiring modification of the Sale Order to allow them to assert Independent Claims, are the subject of New GM's cross-appeal.

## STANDARD OF REVIEW

This Court's review of a bankruptcy court's order is plenary. *See In re Palm Coast, Matanza Shores Ltd. P'ship*, 101 F.3d 253, 256 (2d Cir. 1996). A bankruptcy court's conclusions of law are reviewed *de novo*, and its factual findings for clear error. *In re Westpoint Stevens, Inc.*, 600 F.3d 231, 246-47 (2d Cir. 2010). This Court should defer to a lower court's interpretation of its own orders, as is the case here. *See id.* at 247; *Truskoski v. ESPN, Inc.*, 60 F.3d 74, 77 (2d Cir. 1995).

Factual findings, including those based on stipulated facts presented by the parties, are subject to a "clearly erroneous" standard of review. *In re Hamblin*, 251 B.R. 441, 2000 WL 297069, at *2 (B.A.P. 10th Cir. 2000); *see Anderson v. City of Bessemer City*, 470 U.S. 564,

573-75 (1985). "A finding is 'clearly erroneous' if it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with a definite and firm conviction that a mistake has been made." *Hamblin*, 2000 WL 297069, at *2.

## SUMMARY OF ARGUMENT

1. The notice procedure for the Sale satisfied due process. Due process requires only the best practicable notice under the particular circumstances. The notice Old GM provided in 2009 satisfied that standard.

The Bankruptcy Court held in 2009 that Old GM need not provide direct-mail notice to the 70 million vehicle owners who may have had contingent claims against it. Instead, Old GM only needed to provide direct-mail notice to those entities whose claims were "known" to it. Known creditors, in this context, are those vehicle owners who had put Old GM on notice that they would be asserting a claim against it.

Regardless of the type of notice (direct-mail versus publication), its court-approved content told creditors what they needed to know about the Sale. Specifically, the notice, together with the Sale Agreement, explained, among other things, that the purchaser would

acquire Old GM's assets free and clear of whatever claims Appellants had, including all successor liability-type claims.

Appellants were not "known" creditors of Old GM; therefore, the widespread publication and media notice of the Sale satisfied Old GM's notice obligations. The Bankruptcy Court's finding that vehicle owners with an Ignition Switch Defect were "known" creditors is clearly erroneous. The court based this finding on an alleged "admission" that New GM did not make. Specifically, the stipulated facts do not provide that Old GM admitted it had knowledge of Appellants' claims; instead, the stipulated record only admits that some Old GM employees were aware of certain unresolved instances where certain vehicles had issues relating to airbag non-deployment, ignition switches or stalls. Old GM's books and records, on the date that Old GM filed for bankruptcy, did not show these vehicle owners as known claimants and they had not asserted any claims against Old GM at that time.

To provide adequate notice of an urgent bankruptcy sale to millions of creditors, the law does not require a mega-sized debtor to scour every corner of its global enterprise to uncover contingent tort claims, not yet asserted, and determine whether they might become

actual claims at some unspecified date in the future. Courts universally hold that publication notice is sufficient for such contingent claimants, like Appellants. And publication notice is particularly appropriate where, as here, there are millions of creditors, and significant costs and time pressures related to noticing and consummating the Sale.

Even if Appellants were "known" creditors, which they were not, they were not prejudiced by any due process violation by Old GM. As the Bankruptcy Court concluded, harm or prejudice is an element of any due process claim. Appellants' suggestion that prejudice is not required would lead to patently unfair results. This is especially true in the bankruptcy-sale context where there are many parties involved, including other creditors, and the good-faith purchaser who paid fair value was not involved in the alleged notice infirmity. Here, Appellants' Sale objections ***are the same*** as those litigated in 2009 on behalf of all vehicle owners, which were overruled by the Bankruptcy Court. The Bankruptcy Court determined that it would have reached the same result in 2009 if Appellants had added their voices to the chorus of objectors. Accordingly, there is no reason now to give them

preferential treatment over other similarly situated Old GM unsecured creditors.

As the Bankruptcy Court readily acknowledged, the choice before it was stark and binary: either approve the Sale monetizing Old GM's assets for significantly more than their fair market value, or liquidate the company, leaving Old GM's unsecured creditors (including the Appellants) empty handed. Even Appellants recognize that the Sale was the only viable option. A-5941. The free-and-clear provision was a fundamental element of the Sale, and there is no basis to speculate that these Appellants' objections would have changed its terms—especially when the Bankruptcy Court that ruled on the matter in 2009 has unequivocally confirmed in the *Opinion* that they would not have.

For these reasons—because Appellants were not known creditors entitled to direct-mail notice of the Sale and because Publication Notice caused them no prejudice—the Bankruptcy Court correctly enforced the liability shield against Appellants.

2. The Bankruptcy Court was well within its authority to enforce the provisions of its own Sale Order, including the injunction provisions therein. The Bankruptcy Court indisputably had jurisdiction

to interpret and enforce its own order, and Appellants' jurisdictional arguments are specious.

The Bankruptcy Court's enforcement process was sound, and the court properly exercised its discretion. The overwhelming majority of Appellants, including those represented by Designated Counsel, have not raised this issue on appeal. Indeed, they acknowledged the Bankruptcy Court's jurisdiction and endorsed the procedures used. The one group of Appellants (in a brief not joined by the others) arguing that the Bankruptcy Court lacked the power to enjoin them from their continuing violation of the Sale Order essentially makes an impermissible, misguided collateral attack on the Sale Order's "free and clear" provision. There is no question that this key term is valid. Recent case law, including *In re Chrysler LLC*, 576 F.3d 108, 119-20 (2d Cir. 2009), *vacated*, 558 U.S. 1087 (2009), and *Douglas v. Stamco,* 363 F. App'x 100 (2d Cir. 2010), confirm that a good-faith purchaser for value has the right to take assets free and clear of successor liability claims. That is exactly what happened here, and the Bankruptcy Court is unquestionably authorized to protect the integrity of its orders and their terms.

3. Although the Bankruptcy Court correctly enforced the plain terms of the Sale Order, it erred by modifying the Sale Order to permit certain Appellants (*i.e.*, the Ignition Switch Plaintiffs) to proceed with so-called "Independent Claims" against New GM related to Old GM vehicles. That category of claims finds no support in the Sale Agreement or the Sale Order. Claims related to Old GM vehicles are either on the narrow list of Assumed Liabilities of New GM (not at issue here), or Retained Liabilities of Old GM. There was no third category of liabilities in the Sale Agreement or the Sale Order relating to claims of Old GM vehicle owners. That was the fundamental structure of the Sale and it should not have been altered.

New GM, as the good-faith purchaser of Old GM's assets, bargained for the liability shield including the right to buy free and clear of successor liability claims, and the Sale Order unequivocally stated that its terms applied to any known or unknown Old GM creditor. *Any* modification of the Sale Order six years after the Sale would require extraordinary circumstances under either Rule 60(b) of the Federal Rule of Civil Procedure or Section 363(m) of the Bankruptcy Code—both of which generally bar collateral attacks to the terms of a

long-consummated sale. The prohibition of collateral attacks is even more important in this case because all appeals related to the Sale Order were fully and finally disposed of more than four years ago. Not only is there no permissible remedy against New GM because of statutory and equitable mootness, but the decisions affirming the Sale Order preclude Appellants' belated efforts to cherry pick the Sale Order's provisions, including those related to its "free and clear" conditions. Allowing the Sale Order to be modified now, six years later, would go against the appellate rulings affirming the Sale Order.

It would also fundamentally alter the bargain New GM struck when it purchased Old GM's assets. The Bankruptcy Code expressly contemplates that when a debtor needs to monetize its assets to preserve value for creditors, it may condition the asset sale to be free and clear of claims including successor liability claims. The free-and-clear provision trumps state law to the contrary. The Sale Order did not extinguish the creditors' claims, but it can, as it did here, channel recovery on such claims to the Sale proceeds only. This frees the *bona fide* purchaser for value, who the Bankruptcy Code protects, from post-Sale litigation and allows it to pay more to the debtor's estate for having

received the liability shield. In a bankruptcy sale, unsecured creditors' claims are preserved and the *res* from which they can seek recovery is transferred from wasting assets to stabilized sale proceeds.

It is a myth to suggest that the court can relieve a plaintiff from the free-and-clear provision without modifying the Sale Order. The Sale Order clearly states that it applies to all known and unknown creditors (A-1629–1630)—a provision that includes Appellants. Providing them relief against New GM would fundamentally alter the terms of the bargained-for transaction.

Finally, the remedy for an alleged due process violation by a debtor-seller to its creditors cannot be imposed on the good faith purchaser for value. New GM did not manufacture vehicles that were in prepetition accidents. Nor did it manufacture the vehicles that Appellants now contend have suffered diminished re-sale value. Their claims are only against the Old GM estate, and it would be highly prejudicial to New GM to make it responsible for claims that it never incurred, and which the liability shield was intended to protect it from.

## ARGUMENT

### I. The Old GM Sale Notice Procedures Satisfied Due Process.

In procedures approved by the Bankruptcy Court, Old GM provided direct-mail notice of the Sale Order to everyone who had sued or made a demand against Old GM and to any creditor listed on Old GM's books and records. This notice covered all contractual claims and tort claims that had been asserted against Old GM as of the Petition Date. In all, Old GM sent direct-mail notice to approximately four million parties at a cost of approximately $3 million. A-6249; A-6288. Old GM also provided publication notice to all of its potential creditors, including the owners of approximately 70 million Old GM vehicles. A-5940.

This notice was the most practicable notice that Old GM could send under the indisputably extraordinary circumstances it was experiencing in 2009. *See Parker*, 430 B.R. at 97-98. Time was of the essence, and costs were a significant factor. The cost to send direct-mail notice to all Old GM vehicle owners (without regard to the delay to the Sale Hearing caused by mailing so many additional notices) would have been $43 million. A-6250.

One year after it approved the Sale Order, the Bankruptcy Court explained, as part of its rejection of a similar due process challenge by an Old GM vehicle owner, that it simply was not feasible for Old GM to do anything more than it did in 2009 to put its contingent creditors on notice of the Sale. "[Old] GM didn't have the luxury of waiting to send out notice by mail to hundreds of thousands of [Old] GM car owners, and instead gave notice by publication." A-7796.

Despite these rulings, the Bankruptcy Court now has held that Old GM should have done more in 2009 to inform Old GM ignition switch vehicle owners that their claims could not be asserted against the purchaser of Old GM's assets. Not so. The court-approved notice procedures satisfied the parties' due process rights under the extraordinary circumstances of Old GM's Sale, and, regardless, any purported deficiency in those procedures did not prejudice Appellants.

### A. Appellants Received The Requisite Notice Because None Were "Known" Creditors.

Appellants were all unknown creditors of Old GM who, at best, had contingent claims against Old GM. As a matter of law, they were not entitled to any more notice than they received—namely, publication

and media notice. That notice satisfied due process requirements in this complex bankruptcy sale.

### 1. "Unknown" Creditors With Contingent Claims Are Not Entitled To Direct-Mail Notice.

Whether a creditor receives direct-mail or publication notice of a bankruptcy sale depends on whether such party is a "known" or "unknown" creditor at the time of the sale. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 797 (1983); *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995). Appellants agree. *See* Pre-Closing Accident Plaintiffs' Br. 13-15.

Whether a creditor is "known" or "unknown" depends on whether the identity of the claim and the claimant is knowable from the debtors' books and records. *See In re New Century TRS Holdings, Inc.*, No. 07-10416 (BLS), 2014 WL 842637, at *3-6 (Bankr. D. Del. Mar. 4, 2014); *Louisiana Dept. of Environmental Quality v. Crystal Oil*, 158 F.3d 291 (5th Cir. 1998). Put differently, a debtor need not search beyond its own books and records to determine the identity of unknown creditors. *See In re Agway, Inc.*, 313 B.R. 31 (Bankr. N.D.N.Y. 2004) (holding that the plaintiff's claims were not "known" claims on Agway's books and

records even though Agway held significant information regarding the possibility of the claim being brought against it); *In re Best Prods. Co.*, 140 B.R. 353, 358 (Bankr. S.D.N.Y. 1992) (debtor not required to search beyond its own books and records to ascertain the identity of unknown creditors).

In reviewing its books and records, a debtor's "reasonable diligence" does not require "impracticable and extended searches . . . in the name of due process." *In re XO Commc'ns. Inc.*, 301 B.R. 782, 793-94 (Bankr. S.D.N.Y. 2003) (citing *Mullane*, 339 U.S. at 317). A debtor has no "duty to search out each conceivable or possible creditor and urge that person or entity to make a claim against it." *Id.* at 793 (quoting *In re Brooks Fashion Stores, Inc.*, 124 B.R. 436, 445 (Bankr. S.D.N.Y. 1991)). The debtor need not conduct a vast open-ended investigation to identify potential creditors. *Id.*; *Chemetron Corp. v. Jones*, 72 F.3d 341, 347 (3d Cir. 1995).

Due process in the bankruptcy context presents a unique set of circumstances. Aside from the time and cost factors, unlike general civil litigation, bankruptcy proceedings rarely involve a single, readily identifiable plaintiff against a single, readily identifiable defendant.

Where, as here, the debtor was a multi-national corporation with tens of millions of creditors, contingent creditors (especially those with tort-based, unasserted claims) are, by definition, unknown creditors. Requiring debtors with limited financial resources to undertake extensive investigations among their hundreds of thousands of employees to investigate potential, unasserted claims would "completely vitiate the important goal of prompt and effectual administration and settlement of debtors' estates." *In re U.S.H. Corp. of N.Y.*, 223 B.R. 654, 659 (Bankr. S.D.N.Y. 1998) (internal quotations omitted); *Chemetron*, 72 F.3d at 348. For this reason, the law does not charge a debtor "with the knowledge of the existence of a contingent claim absent a claimant's express statement of its intent to lodge a future claim against the debtor." *Agway,* 313 B.R. at 39 (citing *In re Brooks Fashion Stores, Inc.*, No. 92 Civ. 1571 (KTD), 1994 WL 132280 (S.D.N.Y. Apr. 14, 1994)); *In re L.F. Rothschild Holdings, Inc.*, No. 92 Civ. 1129 (RPP), 1992 WL 200834 (S.D.N.Y. Aug. 3, 1992); *In re Best Prods. Co.*, 140 B.R. 353 (Bankr. S.D.N.Y. 1992); *In re Union Hosp. Ass'n*, 226 B.R. 134, 139 (Bankr. S.D.N.Y. 1998).[12]

[12] The Pre-Closing Accident Plaintiffs argue that a "known

### 2. Appellants, Who Held Contingent Claims Against Old GM, Were "Unknown" Creditors As A Matter Of Law.

At the time of the Sale Hearing, almost none of the Appellants had submitted any notifications or made any expression of intent to file claims against Old GM.[13] Similarly, almost none of the Appellants had sued Old GM. Consequently, these Appellants had, at best, contingent claims against Old GM. Under the express terms of the Sale Order, holders of contingent claims (including contingent warranty claims) were unknown creditors. A-1611-1612.

That fact should end the "known" creditor analysis, as it did in *Morgenstein v. Motors Liquidation Co. (In re Motors Liquidation Co.)*,

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creditor" is one that is "reasonably ascertainable." Pre-Closing Accident Pl. Brief, at 13. However, the case law is clear that "reasonably ascertainable" does not mean "reasonably foreseeable." *Chemetron Corp. v. Jones*, 72 F.3d at 347; *In re XO Commc'ns. Inc.*, 301 B.R. at 793 (citing *Chemetron*). Creditors will be deemed "unknown" even if they "could be discovered upon investigation, [but] do not in due course of business come to [the] knowledge [of the debtor.]" *Mullane*, 339 U.S. at 317. Plaintiffs are such unknown creditors.

[13] The Powledge Appellant sued Old GM prior to the Petition Date, received direct-mail notice of the Sale and timely filed a proof of claim against Old GM. *See In re Motors Liquidation Co.*, 533 B.R. 46, 48-49 (Bankr. S.D.N.Y. 2015). Accordingly, the Powledge Appellant indisputably received proper due process.

462 B.R. 494 (Bankr. S.D.N.Y. 2012) ("*Morgenstein*").[14] There, the Bankruptcy Court held that other Old GM vehicle owners were "unknown" creditors at the time of the bankruptcy, despite their allegations that, before the bankruptcy, Old GM had knowledge of a "latent defect" in model year 2007 and 2008 Chevrolet Impalas vehicles, but concealed it. *Id.* at 505-08. The *Morgenstein* plaintiffs argued that the plan confirmation order should not apply to them or be modified as to them because they did not receive direct-mail notice of the plan. *Id.* at 497 n.6. The Bankruptcy Court rejected the argument that they were "known" creditors under their failure-to-disclose a latent-defect theory. *Morgenstein*, 462 B.R. at 508 & nn. 55, 67, 68. That ruling was upheld on appeal. A-8088–8092. The same rationale applies here.

*Burton v. Chrysler Group, LLC* (*In re Old Carco*), 492 B.R. 392 (Bankr. S.D.N.Y. 2013) ("*Burton*"), is also directly on point. *Burton* involves Old Carco's (Chrysler's) Section 363 sale and a similar due process challenge to the free-and-clear provision in the Chrysler sale order. The *Burton* plaintiffs claimed that vehicles they owned before the sale had a design flaw such that they were entitled to actual notice

[14] *Robley* is also directly on point for this issue. A-7795–7797.

of the sale or of the defect, which did not manifest itself until after the sale. *See* A-8117. The *Burton* court rejected their due process argument, finding that, under the sale order, New Chrysler was shielded from successor liability for alleged defects in prepetition vehicles. *See id.* at 402-03.

The *Burton* court ruled that, despite Old Carco's actual knowledge of the defect before the sale and its failure to put the plaintiffs on notice of the defect—which is what Appellants claim here—affected vehicle owners were not "known" creditors of Old Carco because they had not asserted any claims before the sale. As the court held, "[a]nyone who owns a car contemplates that it will need to be repaired . . . ." *Id.* at 403. In other words, all vehicle owners are necessarily aware that they may have claims against the bankrupt manufacturer, but those vehicle owners are unknown creditors holding contingent claims where their claims are not asserted prior to the sale. *Id.*

The Bankruptcy Court sought to distinguish *Burton* because at least some of plaintiffs' cars had been subject to a recall before Old Carco's 363 sale, while none of the Appellants' cars had been recalled prior to the Old GM sale. *Opinion*, 529 B.R. at 559-560. But the

prepetition recall notice in *Burton* said nothing about the defect that the plaintiffs in that case later complained about. *Burton*, 492 B.R. at 396. Moreover, the recall notice did not apply to *all* of those plaintiffs' vehicles and thus its existence was clearly not an outcome-distinguishing fact. *Id.* at 399-400. Finally, a prepetition recall notice says nothing about the terms of the sale (*i.e.*, who is purchasing the assets, when the sale hearing will take place or if the sale is free-and-clear of claims) and, therefore, has nothing to do with whether publication notice, as contrasted to direct-mail notice, is sufficient for a section 363 sale.

Numerous cases have reached similar holdings. *See In re Enron,* No. 01-16034, 2006 WL 898031, at *5 (Bankr. S.D.N.Y. Mar. 29, 2006) (establishing that even an ongoing formal FERC investigation does not transform a contingent creditor into a known creditor and that simply having an investigation ongoing does not mean it becomes part of the debtor's books and records); *In re New Century TRS Holdings, Inc.*, No. 07-10416 (BLS), 2014 WL 842637 (Bankr. D. Del. Mar. 4, 2014) (holding that an examiner's report highlighting issues with certain lending practices did not mean that a movant asserting some of those same

practices was a "known" creditor and further that the pendency of lawsuits does not make parties with similar but unfiled claims "known" creditors); *In re Spiegel, Inc.*, 354 B.R. 51, 56-57 (Bankr. S.D.N.Y. 2006) (holding that the plaintiffs were "unknown" creditors because even though the debtor knew about litigation by a different party with similar claims prior to confirmation, the plaintiffs themselves did not assert their litigation claims against the debtor until after the debtor's reorganization plan had been approved (citing *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988)); *In re Envirodyne Indus.*, 206 B.R. 468, 473-75 (N.D. Ill. 1997) (holding that plaintiff alleging to be a victim of debtor's antitrust violations was an "unknown" creditor, notwithstanding debtor's receipt of a subpoena, prior to the confirmation of the debtor's reorganization plan, from the United States Justice Department investigating allegations that debtor had violated antitrust laws).

Put simply, a debtor is "not required to employ a crystal ball" to determine whether any contingent or potential litigation claims against it exist. *In re Spiegel, Inc.*, 354 B.R. at 56-57. Vehicle owners like Appellants only have contingent claims against a manufacturer, even if

the manufacturer may have some reason to know of a possible defect. If the potential tort claimant has not put the debtor on notice of his claim, he or she is an unknown creditor.

Moreover, this rule is especially important in cases where the company's financial woes are not due to pervasive tort liability; in such circumstances, as it was with Old GM (*see In re Gen. Motors Corp.*, 407 B.R. 463, 476 (Bankr. S.D.N.Y. 2009)), it is appropriate to treat all potential tort claimants the same. The uniformity and simplicity of this contingent-claimant rule is particularly valuable in the bankruptcy-sale context (as compared to the claims-adjudication context), where the goal is maximizing value under extreme time pressures, and where creditor claims against the debtor are not extinguished, but are instead channeled from the debtor's assets to the sale proceeds.

### 3. The Bankruptcy Court's Factual Finding That Certain Appellants Were Known Creditors Was Clearly Erroneous.

The Bankruptcy Court erroneously ruled that certain Appellants with contingent claims against Old GM were "known" creditors. The evidentiary record simply does not support the Bankruptcy Court's conclusion that Appellants were known at the time of the Sale.

The parties agreed that the ruling on New GM's Motions to Enforce would be based upon the parties' stipulated facts. *Opinion*, 529 B.R. at 529 n.17. The Bankruptcy Court agreed that it could decide the Motions to Enforce based on the stipulated record.[15] *Id.* at 523, 529 n.17. Nevertheless, in concluding that the Ignition Switch Plaintiffs were "known" creditors, the Bankruptcy Court cited to portions of the

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[15] Inexplicably, the Groman Plaintiffs argue that the Bankruptcy Court erred by not permitting additional discovery. *See* Groman Br. 26-38. They are the *only* plaintiffs to preserve this issue—and they press the argument despite the fact that plaintiffs represented by Designated Counsel opposed their request for additional discovery because the issues could be decided on the stipulated record. A-6069–6070.

The Pre-Closing Accident Plaintiffs never requested discovery, but now assert a belated objection to the lack of discovery in a single sentence in their brief. *See* Pre-Closing Accident Plaintiffs Br. 38 n.9. Having not raised the issue below, they cannot do so now. *See, e.g.*, *Readco, Inc. v. Marine Midland Bank,* 81 F.3d 295, 302 (2d Cir. 1996) ("Ordinarily, we 'will not consider an issue raised for the first time on appeal.'").

The Bankruptcy Court ruled applying the summary judgment standard, concluding that no material facts were in dispute, so no further factual development was needed. Significantly, the Groman Plaintiffs did not need, nor seek, discovery with respect to whether they were prejudiced by not receiving the Sale Notice by direct mail, which was the predicate for the Bankruptcy Court's due process ruling. In any event, the Bankruptcy Court was well within its discretion to manage this complex litigation as it saw fit. *See, e.g.*, *In re World Trade Center Disaster Site Litig.*, 722 F.3d 483, 487 (2d Cir. 2013) (recognizing that courts are owed particular deference when reviewing discretionary decisions undertaken to manage especially complex litigation). The Groman Plaintiffs' outlier objection is meritless.

record that did not support this finding and mistakenly attributed "admissions" to New GM that were statements by plaintiffs' counsel.

Specifically, the Bankruptcy Court explained the basis for its "known" creditor ruling as follows:

> The parties stipulated that at least 24 Old GM personnel (all of whom were transferred to New GM), including engineers, senior managers, and attorneys, were informed or otherwise aware of the ignition switch defect prior to the Sale Motion, as early as 2003.
>
> ***New GM does not dispute*** that Old GM personnel knew enough as of the time of Old GM's June 2009 bankruptcy filing for Old GM to have been obligated, under the Safety Act, to conduct a recall of the affected vehicles.

*Id.* at 538 (emphasis added).

In its *Opinion*, the Bankruptcy Court cited the following portions of the record that it believed supported its conclusion,[16] but, on their face, none of them do:

- **Stipulated Facts, Exh. B, ¶ 14 (A-5981–6005):** This Stipulated Fact begins as follows: "Certain Old GM Personnel and New GM Personnel, as they relate to the Ignition Switch, are as follows," and then this "Stipulated Fact" lists various Old GM employees and what they knew with respect to certain investigations and accidents that occurred, over a span of years, prior to the Sale. That included references to certain air-bag non-deployment

[16] *See Opinion*, 529 B.R. at 538 nn. 60 & 61.

product liability cases and instances of stalls in vehicles. As to the latter, there was some information that the turning of the ignition switch out of the "run" position may have been caused by a knee hitting the switch. Notably, the term "Ignition Switch Defect" was never used in Pl. Stipulated Fact ¶ 14. And nowhere is it mentioned that Old GM knew there should have been an ignition switch recall prior to the Sale. In short, Paragraph 14 does not support the conclusion that New GM conceded that certain Old GM employees knew enough to begin a recall at the time of (or before) the Sale.

- **Ignition Switch Plaintiffs Opening Brief on the Four Threshold Issues, at 47:** This citation is to Appellants' opening brief below. It is not a Stipulated Fact and cannot be used to demonstrate that New GM "admitted" any fact.

- **Transcript of Oral Argument (Feb. 17, 2015), at 91:1-18 (A-11226):** The referenced passage is to statements made by counsel for the Ignition Switch Plaintiffs, not New GM.

- **Transcript of Oral Argument (Feb. 18, 2015), at 7:11-19 (A-10737):** The cited passage is as follows:

> Your Honor, yesterday when I was listening to the plaintiff's arguments it seemed that they were trying to make this case into something that it's not. This matter is not about whether Old GM personnel could have done a better investigation of the ignition switch issue or other parts that have been recalled. The issue of what Old GM knew is relevant in this hearing for a singular purpose, that being did Old GM have the requisite knowledge such that economic loss plaintiffs' unasserted tort claims were reasonably ascertainable. If it did, arguably the economic loss plaintiffs were entitled to direct-mail notice. If not, publication notice was sufficient.

> Counsel for New GM then made the argument that the claims were not reasonably ascertainable, and that publication notice was sufficient. Contrary to the court's holding, New GM never stipulated that Old GM employees "knew enough as of the time of Old GM's June 2009 bankruptcy filing for Old GM to have been obligated, under the Safety Act, to conduct a recall of the affected vehicles."[17]

Recognizing the Bankruptcy Court's error, Appellants invite this Court to engage in its own fact-finding to bolster the Bankruptcy Court's ill-founded conclusion. *See* Pre-Closing Accident Plaintiffs' Br. 15-20. The Court should decline their invitation for two reasons. ***First***, Appellants wrongly suggest that New GM does not dispute these findings (*id.* at 15, 20); it does.[18] ***Second***, New GM did not stipulate to these facts, and, therefore, they do not and cannot support the Bankruptcy Court's conclusions. And this Court, as a court of review,

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[17] The Bankruptcy Court's last citation is to the February 18, 2015 Transcript at 13:5-10, but this portion of the transcript concerns a discussion of the *Burton* case. It therefore appears that this citation was in error.

[18] In the briefing in the Bankruptcy Court, New GM unambiguously disputed this assertion. In its reply brief filed with the court, for example, New GM emphasized that "Old GM had not concluded there was a wide-spread problem with the ignition switches it was then investigating," and that the fact that some Old GM employees were investigating switch or airbag concerns *did not mean that Old GM had determined there was a "systematic safety defect*." New GM Reply Br. 1-2, 7, 26 (emphasis added).

should not engage in its own fact finding. *See, e.g.*, *Gross v. Rell*, 585 F.3d 72, 75 n.1 (2d Cir. 2009) ("As an appellate court, we do not engage in fact-finding.").

To the extent Appellants argue that a "should have known" standard applies, they are wrong. That standard has been rejected by courts within this Circuit. *See, e.g., In re Spiegel, Inc.,* 354 B.R. 51, 57 (Bankr. S.D.N.Y. 2006) (rejecting contention that debtor should have known of plaintiff's claim since it was similar to other pending litigation). And even if "should have known" were enough (which it is not), vehicle owners do not become "known" creditors of a global corporate entity that had hundreds of thousands of employees just because a limited number of discrete employees, had knowledge of isolated incidents relating to certain vehicles, especially when such employees and Old GM had not concluded that there was a system-wide ignition switch safety defect. *See New Century*, 2014 WL 842637, at *5 (rejecting contention that the knowledge of some issues relating to mortgage loans by certain people translated into other customers with similar loan issues becoming known creditors of the debtor).

If the Court agrees with New GM that Appellants were not "known" creditors at the time of Old GM's bankruptcy, that ends the appeal, and the prejudice argument need not be addressed. Appellants admit that if they are "unknown" creditors, they received all the process due them through the widespread publication notice and media notice. Without an alleged due process violation, there is no basis to amend the Sale Order and the cross-appeal would also be resolved in New GM's favor.

### B. The Alleged Insufficiency Of Publication Notice Is Irrelevent Because Appellants Did Not Suffer Any Prejudice.

Even if Appellants were "known" creditors of Old GM, none suffered any prejudice. Accordingly, they cannot maintain a due process claim.

#### 1. A Due Process Claim Related To The Sale Notice Requires A Showing of Prejudice.

As an initial matter, Appellants are wrong to argue that prejudice has nothing to do with a due process claim. Under well settled law, a due process claim requires a showing of prejudice, and Appellants offer no reason to relieve them of this obligation. Indeed, in the context of a Section 363 sale, it is especially important to require a showing of

prejudice before a court can or should set aside bargained-for rights to a good faith purchaser in a sale order years after the sale.

Although this Court has not addressed this precise issue, all seven circuit courts that have addressed it uniformly require a showing of prejudice to sustain a due process claim. *See, e.g., Perry v. Blum*, 629 F.3d 1, 17 (1st Cir. 2010) ("[A] party who claims to be aggrieved by a violation of procedural due process must show prejudice."); *Rapp v. U.S. Dep't of Treasury, Office of Thrift Supervision*, 52 F.3d 1510, 1520 (10th Cir. 1995) ("In order to establish a due process violation, petitioners must demonstrate that they have sustained prejudice as a result of the allegedly insufficient notice."); *In re New Concept Housing, Inc.*, 951 F.2d 932, 939 (8th Cir. 1991) (noting that while the failure to notify debtor of a hearing contravened the Bankruptcy Rules, "violation of these rules constituted harmless error, because the Debtor's presence at the hearing would not have changed its outcome"); *In re Parcel Consultants, Inc.*, 58 F. App'x 946, 951 (3d Cir. 2003) (unpublished) ("Proof of prejudice is a necessary element of a due process claim."); *Cedar Bluff Broad., Inc. v. Rasnake*, 940 F.2d 651 (Table), 1991 U.S. App. LEXIS 17220, at *7, 1991 WL 141035, at *2 (4th Cir. 1991)

(unpublished) (holding that creditor asserting deficient notice failed to demonstrate "that it was prejudiced by the lack of notice to general creditors").[19]

Lower courts, including those within this Circuit, agree. *See Pearl-Phil GMT (Far East) Ltd. v. Caldor Corp.*, 266 B.R. 575, 583 (S.D.N.Y. 2001) ("[E]ven if notice was inadequate, the objecting party must demonstrate prejudice as a result thereof."); *Parker*, 430 B.R. 65, 97-98 (finding that a shortened notice period did not violate an unsecured creditor's due process rights because the creditor "was in no way prejudiced by the expedited schedule which was necessitated by the unique and compelling circumstances of the Debtors' chapter 11 cases and the national interest"); *In re Caldor, Inc.-NY*, 240 B.R. 180, 188 (Bankr. S.D.N.Y. 1999) ("[I]n addition to establishing that the means of notification employed by [the debtor] was inadequate, Pearl must

[19] *See also In re City Equities Anaheim, Ltd.*, 22 F.3d 954, 959 (9th Cir. 1994) (rejecting due process claim for lack of prejudice); *Secs. Investor Prot. Corp. v. Blinder, Robinson & Co., Inc.*, 962 F.2d 960, 967 (10th Cir. 1992); *In re U.S. Kids, Inc.*, 178 F.3d 1297 (Table), 1999 WL 196509, at *5 (6th Cir. 1999) (unpublished); *see also In re Rosson*, 545 F.3d 764, 777 (9th Cir. 2008) ("Because there is no reason to think that, given appropriate notice and a hearing, Rosson would have said anything that could have made a difference, Rosson was not prejudiced by any procedural deficiency.").

demonstrate that it was prejudiced because it did not receive adequate notice."); *In re Gen. Dev. Corp.*, 165 B.R. 685, 688 (S.D. Fla. 1994) ("A creditor's due process rights are not violated where the creditor has suffered no prejudice."); *In re Vanguard Oil & Serv. Co.*, 88 B.R. 576, 580 (E.D.N.Y. 1988).

Appellants argue that all of these courts are wrong. In their view, the failure to receive direct-mail notice of the Sale is a harm in itself that demands a remedy, even if the lack of direct-mail notice did not affect an individual's substantive rights and even if Appellants actually read the Publication Notice. Their position defies logic and the law. In fact, Appellants seem to concede that in a case where some notice did occur, a showing of prejudice is appropriate. *See* Ignition Switch Plaintiffs' Br. 23.

Appellants rely on inapposite non-bankruptcy law. Their cases stand for the unremarkable proposition that a "root requirement" of due process requires "some notice and opportunity to be heard." *See* Ignition Switch Plaintiffs' Br. 17-24. These general statements of non-bankruptcy law shed no light on whether an individual—one of millions of unknown creditors of a multi-national corporation in a complex

bankruptcy—who received publication and media notice of a sale may sustain a due process claim without showing harm or prejudice.

Thus, cases like *Fuentes v. Shevin,* 407 U.S. 67 (1972), on which Appellants heavily rely, hold only that there must be *some* notice before depriving someone of recognized property rights. Appellants, of course, did receive some notice. And, they have never claimed that they were unaware of Old GM's bankruptcy proceeding or the Sale. Further, they did not have any property rights extinguished by the Sale Order.[20]

Appellants reliance on *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988) is also misplaced. Although the *Peralta* Court did not use the word "prejudice," it implicitly recognized that a due process violation requires some showing of resulting harm or injury. *Id.* at 85. *Peralta* involved a single plaintiff who sued a single defendant on a guaranty, but the defendant did not receive notice of the lawsuit or the later post-judgment collection action. After the court entered a default judgment, the plaintiff had the defendant's property levied and sold without any notice to the defendant. The due process violation by the party who

[20] The Ignition Switch Plaintiffs also rely on *Carey v. Piphus*, 435 U.S. 247 (1978), but *Carey* proves New GM's point. There, the Supreme Court recognized that any damages for a due process violation exceeding one dollar would require proof of injury. *Id.* at 262, 266-67.

committed the violation, and the prejudice, were clear. The Supreme Court's terse opinion rejected the notion that the lack of notice had no "serious consequences," because "appellant's property was promptly sold without notice." *Id.* at 85. Had he received notice, he might have chosen to defend the lawsuit, negotiate a settlement, or pay the debt if he received notice. *Id.*

The Bankruptcy Court noted that Appellants have little *bankruptcy* law to support their due process position.[21] *Opinion*, 529 B.R. at 562. The court analyzed, and rejected, the only bankruptcy-related authority that Appellants cited, *White v. Chance Indust., Inc.*, 367 B.R. 689 (Bankr. D. Kan. 2006). It correctly distinguished *White* because that case involved a claim by a *future* creditor (not an unknown, contingent creditor) challenging the notice received for a plan

[21] Appellants cite *Travelers Cas. & Sur. Co. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.)*, 600 F.3d 135 (2d Cir. 2010) ("*Manville IV*"), to argue that a due process violation in the context of a Section 363 sale does not require proof of prejudice or harm. *See* Ignition Switch Plaintiffs' Br. at 20. Appellants stretch *Manville IV* too far. *Manville IV* does not discuss prejudice because the harm to the known creditor was obvious, as no one had represented Chubbs' interests in the settlement proceeding, resulting in a waiver of claims that were not expressly disclosed and were never brought to the court's attention. Here, the Bankruptcy Court was well aware that the free-and-clear provision would extinguish successor liability claims across the class of Old GM vehicle owners, including Appellants.

confirmation (where claims were adjudicated), not a Section 363 sale (where claims are transferred to the sale proceeds).

What bankruptcy law Appellants do cite often involves a different context: the notice required in the claims-resolution or plan/discharge process, not in a Section 363 sale. Appellants' due process argument largely ignores the critical difference in bankruptcy law between the two. The notice required, and the consequence for failing to receive perfect notice, is different in each context for several reasons.

***First***, the scope of the court's inquiry in the Section 363 process is more limited. The critical questions for a bankruptcy court relating to a 363 sale are: (1) whether it was appropriate to sell the debtor's assets; (2) whether the sale process was properly conducted; (3) whether the overall consideration paid for the assets was reasonable under the circumstances; and (4) whether the purchaser acted in good faith. *See, e.g.*, *In re Med. Software Solutions*, 286 B.R. 431, 439-40 (Bankr. D. Utah 2002). The bankruptcy court is not focused on specific creditor claims or the substantive rights of creditors—issues to be resolved in the post-Sale, claims-resolution process.

***Second,*** because of the difference in focus between the sale process and the claims-resolution process, the notice to creditors is different for each.[22] In the sale context, the notice relates primarily to the specifics of the sale. As is often the case in Section 363 sales, the type of notice Old GM provided in 2009 was dictated by extreme time deadlines/cost constraints, with the sale needing to close a little over a month from filing because of the dire nature of Old GM's financial condition. In the claims-resolution process, the notice generally relates to how, when, and what to include in a claim filed against the debtor. Compared to the Sale notice process, there typically is not the same time urgency relating to the claims resolution notice because there is not a hemorrhaging business and purchaser-imposed deadlines.[23]

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[22] Appellants' reliance on *DPWN Holdings (USA), Inc. v. United Airlines*, 871 F. Supp. 2d 143 (E.D.N.Y. 2012), *remanded*, 747 F.3d 145 (and its follow-up, No. 11-CV-564 (JG), 2014 U.S. Dist. LEXIS 130154, at *6 (E.D.N.Y. Sept. 16, 2014) illustrates their erroneous attempt to conflate notice in a sale context and notice in a claims-adjudication/plan context. Pre-Closing Accident Plaintiffs' Br. 29-31. The *DPWN Holdings* cases only dealt with claims-adjudication/plan issues. The alleged failure to provide notice was committed by the entity for which a remedy was sought and there was no final determination as to whether a remedy was appropriate. It is inapposite to the due process sale issues here.

[23] Ultimately, Appellants' prejudice argument presumes that the pursuit of a successor liability claim is a vested property right, like a

***Third***, lack of direct-mail notice in the context of a sales process has different consequences than in the claims-adjudication context. In the latter, an existing claim may get extinguished without direct-mail

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creditor's claim against the debtor's estate. This argument fails for three reasons. ***First***, Appellants could not have a property interest in their state-law successor liability claims because successor liability claims belong to the bankruptcy estate, as derivative claims for all creditors and do not belong to individual creditors. *See In re Emoral, Inc.*, 740 F.3d 875, 882 (3d Cir. 2014), *cert denied sub nom., Diacetyl Plaintiffs v. Aaroma Holdings, LLC*, 135 S. Ct. 436 (2014) (explaining that a "no successor liability" holding would be binding on plaintiffs without regard to the type of notice they received regarding the sale because successor liability claims are general claims of the bankruptcy estate); *see also id.* at 880 ("[S]tate law causes of action for successor liability . . . are properly characterized as property of the bankruptcy estate.") (citing *In re Keene Corp.*, 164 B.R. 844, 849 (Bankr. S.D.N.Y. 1994)).

***Second***, even if successor liability claims belonged to Appellants, the Bankruptcy Code preempts state law to allow "free and clear" sales and there can be no due process violation based on preempted state law. *See In re Gen. Motors Corp.*, 407 B.R. 463, 503 n.99 (Bankr. S.D.N.Y. 2009); *see also In re White Motor Credit Corp.*, 75 B.R. 944, 951 (Bankr. N.D. Ohio 1987) ("The effects of successor liability in the context of a corporate reorganization preclude its imposition. The successor liability specter would deleteriously affect sales of corporate assets, forcing debtors to accept less on sales to compensate for this potential liability. This negative effect on sales would only benefit product liability claimants, thereby subverting specific statutory priorities established by the Bankruptcy Code.").

***Third***, Section 363 does not extinguish claims at all, it merely transfers those claims to the Sale proceeds. Even a secured creditor with clear collateral rights can have its property interests forcibly transferred to the collateral proceeds under Section 363. Unsecured, contingent creditors should fare no better.

notice. In the former, no claim is extinguished—but the creditor's claim is merely channeled to the sale proceeds. A lack of direct-mail notice results only in the loss of the right to object to the sale itself (although here, others made the same objections as Appellants), not an extinguishment of a claim against the debtor.

***Lastly***, in the sale context, there is a third party involved (the *bona fide* purchaser for value) and any sale notice violation by the seller must not unfairly prejudice the rights of that third party purchaser who paid fair value for the assets sold including the liability shield. In contrast, the claims-adjudication process is largely a two-party dispute between the debtor (who sent the claims notice) and the creditor.

In sum, Appellants have no authority to support their counterintuitive contention that they need not show any harm or prejudice flowing from an alleged failure to receive direct-mail notice of the Sale.

**2. Appellants Cannot Demonstrate Prejudice.**

The Bankruptcy Court properly determined that the Non-Ignition Switch Plaintiffs, the Pre-Closing Accident Plaintiffs, and the Used Car Purchasers failed to show prejudice resulting from their not receiving

direct-mail, versus publication, notice of the Sale. This finding was not clearly erroneous, and Appellants fail to identify an error of law in the Bankruptcy Court's analysis.

To prove prejudice, a party must show that its participation could have made a material difference in the outcome of the proceeding. *In re Edwards*, 962 F.2d 641 (7th Cir. 1992); *In re Rosson*, 545 F.3d 764 (9th Cir. 2008). It is not enough to argue that the Bankruptcy Court would have had more information when it approved the Sale. Rather, Appellants must show that the Sale would not have occurred or its terms would have been different. *See, e.g.*, *In re Paris Indus. Corp.*, 132 B.R. 504, 509-10 (D. Me. 1991) (plaintiffs "have made no showing that, if they had been notified and had appeared, they could have made any arguments to dissuade the Bankruptcy Court from issuing its order that the assets be sold free and clear of all claims").

Appellants cannot meet this standard. The Bankruptcy Court decided the underlying issues back in 2009 and, therefore, it knows what it would have done had Appellants appeared at that time. That court was no stranger to the transaction, and Appellants agreed that

the Bankruptcy Court was free to consider its own knowledge of the case and its circumstances in evaluating prejudice. A-11067–11068.

Drawing on its knowledge of the facts and circumstances, the Bankruptcy Court reasonably concluded that Appellants' belated objections would not have changed its ruling approving the Sale. ***First***, the Bankruptcy Court knew the consequences of cutting off successor liability at the time it approved the Sale Order: "This Court fully understands the circumstances of tort victims, and the fact that if they prevail in litigation and cannot look to New GM as an additional source of recovery, they may recover only modest amounts of any allowed claim." *Gen. Motors*, 407 B.R. at 505. Nevertheless, the court recognized that such tort claimants (including owners of Old GM vehicles) could not assert their claims against New GM. The Bankruptcy Court went on to rule, "the law in this Circuit and District is clear; the Court will permit GM's assets to pass to the purchaser free and clear of successor liability claims . . . ." *Id.* at 505. There was no question as to the importance or legality of the successor liability shield. *See In re Chrysler LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009), *aff'd*, (2d

Cir. June 5, 2009); *Douglas v. Stamco,* 363 F. App'x 100, 102-03 (2d Cir. 2010).[24]

***Second***, the Bankruptcy Court knew that Old GM was selling vehicles up through the day of the Sale and it anticipated that design-related issues might emerge over time in some of those vehicles. Nonetheless, the Sale Agreement and the Sale Order are clear that implied warranty claims, and statutory and common law claims relating to third party claims (including vehicle owners) are Retained Liabilities of Old GM. A-1697. The Bankruptcy Court was clear: hindsight would not, and could not, change the final result, and it would have approved the Sale, and its "free and clear" provision, regardless. *Opinion*, 529 B.R. at 567.

As the Bankruptcy Court explained in in *Morgenstein*:

> We here had a plan of liquidation; Old GM would not survive. It would simply be taking whatever assets it

[24] The Elliott, Sesay and Bledsoe Plaintiffs' Brief suggests that there is an exception or carve-out from the free-and-clear bar on successor liability based on the theory of "continuation of an unlawful activity." Elliott, Sesay, and Bledsoe Plaintiffs' Br. 22-25. Not surprisingly, their brief fails to cite any legal authority whatsoever for this contention. Simply put, the finding to support a sale "free and clear" of successor liability must occur at the time of the sale based on the state of affairs at the time; post-sale events have no relevance to that ruling.

> had and distributing them, *pari passu,* to its creditors. ***If Old GM had known of, and disclosed, the design defect that is alleged, it would have (or at least could have) put up for confirmation the exact same liquidation plan, and the plan would have been just as feasible. If a class claim had been disclosed and ultimately allowed*** (or reserved for), individual creditors' *pari passu* shares of the available pot would have been less, of course (and that no doubt would have been of concern to them), but ***neither the Plan, nor any judicial action by this Bankruptcy Court, would be any different***.

*Morgenstein*, 462 B.R. at 506-07 (emphasis added).

***Third***, not only did the Bankruptcy Court appreciate the consequences of the free-and-clear provision on contingent claims, but during the Sale Order process it *repeatedly rejected* the exact same concerns that Appellants raise here. The Bankruptcy Court received objections to the Sale from many groups representing vehicle owners. Indeed, personal injury plaintiffs—some of whom are also represented here—actually appealed the free-and-clear provision, and lost. *See Campbell v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 428 B.R. 43 (S.D.N.Y. 2010).

Thus, this matter is not like *In re Johns-Manville Corp.*, 600 F.3d 135 (2d Cir. 2010) (*per curiam*) ("*Manville IV*"), where the interests of the party who did not receive notice went unrepresented. To the

contrary, Appellants' interests were fully heard, analyzed and rejected in 2009 by the same judge that ruled on these issues in 2015, and the reasons for that rejection have not changed. The Bankruptcy Court properly held that adding more voices to the cacophony of objectors it heard in 2009 asserting the same arguments, would have made no difference.

As discussed above, the Sale notice spurred comprehensive, substantive objections from a coalition of parties representing the interests of Old GM vehicle owners, including 44 State Attorneys General, and the Creditors' Committee.[25] Like Appellants, they argued that the Sale notice procedures were inadequate and violated due process, and that the successor liability shield should be limited.

Specifically, these groups argued that shielding New GM from successor liability claims arising from defects in vehicles manufactured by Old GM would violate due process because vehicle owners had not received direct-mail notice regarding specific claims relating to their

[25] The Creditors' Committee is an Estate fiduciary which in this case included three tort claimants. It is appointed in a bankruptcy case as the representative for all unsecured creditors. In this respect, Appellants' representatives did participate at the Sale Hearing to protect their interests.

vehicles that were not known to them at the time of the Sale Hearing. A-7814, A-7826, A-7866, A-7883, A-7900, A-7989. But the Bankruptcy Court properly rejected those arguments in 2009, and again in 2015.[26]

To be sure, certain objections did result in amendments to the Sale Order.[27] But New GM refused any further modifications concerning the type of vehicle-owner liabilities now asserted by Appellants. Specifically, New GM refused to assume, and was not required to assume, liabilities for pre-closing accidents (A-1966), or for unconsummated class action settlements relating to economic-loss

[26] The *Opinion* notes that, in the context of discussing holding a "do-over" hearing, the Bankruptcy Court was willing to hear and consider any new objections the Appellants wanted to assert that had not been asserted back in 2009. Appellants could not identify any. *Opinion*, 529 B.R. at 567, 571, 573. Their failure reflects that the original objections by parties representing vehicle owners were robust and thorough.

[27] For example, in negotiations with the State Attorneys General and the Creditors' Committee, New GM agreed to assume responsibility for (1) post-sale accidents and incidents involving Old GM vehicles causing personal injury or property damage, and (2) Lemon Law claims—in addition to the glove-box warranty of repair and replacement of parts (but not monetary damages) that was always a part of New GM's assumed liabilities.

claims.[28] The Governments were willing to take on only those categories of liabilities that were commercially necessary.

In the face of this record, some Appellants (those representing Used Car Purchasers) take a different tact, arguing that those who purchased a used Old GM vehicle after the Sale are "future claimants" that could not be subject to the free-and-clear provision. Ignition Switch Plaintiffs Br. 33-39. But claims by Used Car Purchasers who purchased their vehicles after the Sale are readily distinguishable from the "future" claims addressed in *In re Grumman Olson Indus., Inc.*, 467 B.R. 694 (S.D.N.Y. 2012), on which Appellants rely. *Grumman* involved a post-sale personal injury claim brought against the manufacturer of a product part incorporated into a Federal Express delivery truck. The plaintiff there had no prepetition relationship with the debtor, did not suffer her accident and injury until after the debtor's Section 363 sale,

[28] Classes of product liability claimants that had unconsummated settlements with Old GM, argued that their vehicle owner claims should be assumed. *See Castillo v. Gen. Motors Co. (In re Motors Liquidation Co.)*, No. 09-00509 (REG), 2012 WL 1339496, at *5 (Bankr. S.D.N.Y. Apr. 17, 2012), *aff'd* 500 B.R. 333 (S.D.N.Y. 2013), *aff'd by summary order*, 578 Fed.Appx. 43 (2d Cir. 2014). The Governments said no. *Id.*

and had no reason to believe that the debtor's sale might impact her rights.

Here, Used Car Purchasers (or, for plaintiffs who purchased their Old GM vehicles after the Sale, their predecessors-in-interest) had a prepetition relationship with Old GM. They owned (and then perhaps sold) Old GM vehicles. Regardless of whether they knew of the specific defect, like all car owners, they had reason to know that Old GM's bankruptcy might impact whatever economic interest they had in their vehicles.[29] As the *Burton* court noted: "[P]laintiffs or their predecessors (the previous owners of the vehicles) had a prepetition relationship with Old Carco, and the design flaws that they now point to existed pre-petition." *Burton*, 492 B.R. at 403. At a minimum, they held contingent claims because "the occurrence of the contingency or future event that would trigger liability was 'within the actual or presumed contemplation of the parties at the time the original relationship between the parties was created.'" *Id.*

[29] Moreover, the circumstances of *Grumman* itself could not repeat here, as New GM assumed liability for post-sale accidents involving Old GM vehicles causing personal injury or property damage.

It would make no sense to hold that original owners of Old GM vehicles would be barred by the Sale Order, but that subsequent owners would not be barred; such subsequent owners stand in the shoes of the original owners and are equally bound by the Sale Order. In other words, claims against New GM for Old GM vehicles cannot be created post-Sale, merely because a vehicle owner sells its car to a third party.[30]

Finally, certain Appellants suggest that they were prejudiced by the *content* of the notice because, with more detail about the Ignition Switch Defect, they would have been able to avoid or reduce the scope of the successor liability shield. But the Bankruptcy Court approved the content of both the direct-mail notice and the Publication Notice. These notices informed claimants that no claims of any kind would be permitted against New GM, and that they should object if they sought to challenge this free and clear provision. A-384. Appellants' proposition that a debtor must provide detailed notice of each potential claim that would be subject to the liability shield finds no support in the

[30] As noted *supra*, New GM could only be potentially liable for claims based on a completely separate and new agreement with an owner of an Old GM vehicle that occurs after the Sale (*e.g.*, if a GM dealer resold the vehicle under New GM's Certified Pre–Owned Vehicle Program and New GM issued a new warranty to the buyer).

case law and would be utterly unworkable for debtors, who may face tens of thousands of different types of claims. The purpose of the Sale Notice related to the monetization of the debtor's assets—not the identity or amount of the claims against it.

* * *

Whenever a court approves a Section 363 sale free and clear of successor liabilities, it knows that it is preventing the purchaser from becoming a potential source of recovery for a tort victim. No matter the information that may come to light after the sale—whether a design defect or securities fraud—that claim must be made against the debtor in the bankruptcy-claims process and paid from the proceeds of the sale (or other bankruptcy estate assets). The consequence of the Sale to these Appellants is that, like all other unsecured creditors, including other Old GM vehicle owners, they have no remedy against New GM.

Without the Sale, however, they would have received nothing. Because of the Sale, they had a sizeable Estate (*i.e.*, the Sale proceeds) in which to share. That they did not receive direct-mail notice of the Sale is not a reason for Appellants to receive special treatment ahead of other unsecured creditors (or, for that matter, other Old GM vehicle

owners). It is also not a reason to prejudice the good faith, third party purchaser (New GM) years after the Sale. Appellants' claims are against Old GM, the manufacturer of their vehicles. New GM should not be made responsible for claims that it never incurred, and which the liability shield was intended to protect it from.

In sum, the fact that Appellants did not receive direct-mail notice informing them of (a) the possibility that their economic rights might be affected by Old GM's sale or (b) a possible defect in their vehicle, does not justify modifying the Sale Order as to them—without a showing that they could have somehow changed the outcome in 2009. Since they could not, the Sale Order should be binding on them in all respects.

## II. The Bankruptcy Court Had The Authority To Remedy The Violations Of The Sale Order

Appellants filed complaints against New GM that plainly violated the Sale Order. It was well within the Bankruptcy Court's authority and power to enforce its own Sale Order and, as necessary, direct Appellants, who were subject to the jurisdiction of the Bankruptcy Court, to amend or withdraw their improper pleadings in other courts. Appellants—some of whom question the jurisdiction of the Bankruptcy Court (the Elliott, Sesay, and Bledsoe Plaintiffs) and others of whom

argue (for the first time on appeal) that the court exceeded its authority over the "*res* of the bankruptcy estate" (Ignition Switch Plaintiffs Br. 40)—are wrong to challenge the Bankruptcy Court's authority.

### A. The Bankruptcy Court Had Jurisdiction To Enforce Its Order.

The Bankruptcy Court had jurisdiction over this proceeding. It is well-settled that it is within a bankruptcy court's core jurisdiction to resolve a dispute over the interpretation of its sale order. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009); *Luan Inv. S.E. v. Franklin 145 Corp. (In re Petrie Retail, Inc.)*, 304 F.3d 223, 229-30 (2d Cir. 2002); *In re Gen. Growth Properties, Inc.*, 460 B.R. 592, 598 (Bankr. S.D.N.Y. 2011). Only one group of Appellants, representing a handful of plaintiffs, even asserts this argument. *See* Elliott, Sesay, and Bledsoe Br. 10-18. The rest expressly disagree, conceding that the Bankruptcy Court had jurisdiction and authority to interpret and enforce its own order. *See* Ignition Switch Plaintiffs' Br. 40 ("a bankruptcy court assuredly has jurisdiction to interpret and enforce its own orders"); Pre-Closing Accident Plaintiffs' Br. 1 ("The Bankruptcy Court had subject matter jurisdiction to issue the Judgment pursuant to 28 U.S.C. §§ 157(a), (b) and 1334.").

The outlier Appellants argue that the Bankruptcy Court lacked "related to" jurisdiction and authority over their "*in personam*" claims (as opposed to "*in rem*" claims). That argument "misses the point." *In re Motors Liquidation Co.*, 514 B.R. 377, 381 (Bankr. S.D.N.Y. 2014). The Bankruptcy Court had "arising in" jurisdiction because it had to interpret and enforce its own order. *Id.* The cases on which these Appellants rely are inapposite in-so-far as they all involve "related to" jurisdiction. Likewise, the Bankruptcy Court (and the district court on appeal) rejected these same arguments years ago when it concluded that under well-settled Second Circuit law, Section 363(f) authorizes a sale of assets "free and clear" of successor tort liability. *Campbell v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 428 B.R. 43, 58 (S.D.N.Y. 2010). Clearly, the Bankruptcy Court had the authority and jurisdiction to enter and enforce the Sale Order—and the Elliott, Sesay, and Bledsoe Plaintiffs' jurisdictional objections lack merit.[31]

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[31] The Bankruptcy Court also properly rejected their additional argument that New GM's "exclusive" remedy for violation of the Sale Order was a contempt motion, and not a motion to enforce. *See* Elliott, Sesay, and Bledsoe Plaintiffs' Br. 28. New GM's Motions to Enforce did not seek a new or successive injunction; rather, they sought to enforce a *preexisting* injunction, which can be done by a motion to enforce. *See, e.g.*, *In re Ritchie Risk-Linked Strategies Trading (Ireland), Ltd.*, 471

### B. The Bankrupcy Court Acted Within Its Discretion To Enforce The Sale Order Against Appellants.

The Bankruptcy Court reasonably exercised its discretion by enforcing the Sale Order's injunction. Indeed, the court afforded the parties additional protection in that, after the Judgment under review, the court permitted plaintiffs to file "No Stay," "No Strike," or "No Dismissal" pleadings to determine whether specific allegations and complaints violated the Sale Order. *See* SPA-256, SPA-257, SPA-258, SPA-260, SPA-263. Through that procedure, Appellants had a second chance to convince the Bankruptcy Court that a particular complaint did not violate the Sale Order. The Bankruptcy Court had the authority to require compliance with its own order, and its remedy for violating that order was not an abuse of discretion.

Other courts addressing similar motions to enforce have also ordered offending complaints dismissed or stricken. *See, e.g., Burton v. Chrysler Group, LLC (In re Old Carco LLC)*, 492 B.R. 392, 407 (Bankr. S.D.N.Y. 2013) ("[T]he plaintiffs have not asserted any assumed products liability claims, and the Sale Order bars all other pre-closing

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B.R. 331, 337 (Bankr. S.D.N.Y. 2012).

claims except Repair Warranty claims and Lemon Law claims relating to vehicles manufactured within five years of the Closing Date. Accordingly, the breach of implied warranty claims asserted in Counts VI, VII and VIII with respect to vehicles manufactured and sold before the closing are dismissed . . . ."); *In re USA United Fleet Inc.*, 496 B.R. 79, 80 (Bankr. E.D.N.Y. 2013) (the court concluded that "(i) it has subject-matter jurisdiction to interpret and enforce the Sale Order; (ii) the DOL has an interest in the assets purchased by Reliant within the meaning of Section 363(f); and (iii) this interest was subject to the 'free and clear' provisions of the Sale Order and Section 363(f)"). Accordingly, the relief New GM received was clearly appropriate.[32]

[32] Again, the Elliott, Sesay and Bledsoe Plaintiffs rely on inapposite cases. In *Alderwoods Grp., Inc. v. Garcia*, 682 F.3d 958, 968 (11th Cir. 2012), the debtors sought to enforce their bankruptcy discharge in a different court from where they obtained their discharge. The Eleventh Circuit specifically held that the second court lacked jurisdiction and did "not reach the other issues on appeal." *Id.* at 961. In *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002), the Ninth Circuit found that the remedy for a discharge violation could only be obtained through a contempt motion, not a claim for damages under the Fair Debt Collections Practices Act. *In re Haemmerle*, 529 B.R. 17 (Bankr. E.D.N.Y. 2015) is another discharge case. None of these cases address a bankruptcy court's interpretation and enforcement of its own sale order.

Perhaps because Appellants cannot in good faith attack the legality of the Sale Order's free-and-clear provision, *see In re Chrysler LLC*, 576 F.3d 108, 119-20 (2d Cir. 2009); *Douglas v. Stamco,* 363 F. App'x 100, 102-03 (2d Cir. 2010), they recast their challenge by questioning the Bankruptcy Court's ability to enjoin third party claims between non-debtor parties—*i.e.*, whether the Sale Order's language enjoining parties from asserting successor liability claims against New GM is enforceable against third parties. That argument is no different than arguing that the successor liability bar is itself invalid, for its only meaningful operation is to do exactly what the Bankruptcy Court held that it did—enjoin claims by third parties against New GM.

Appellants again rely on *Manville IV* (*see* Pre-Closing Accident Plaintiffs' Brief 40-48), but it does not support their position. In *Manville IV*, a non-settling insurer (Chubb) who received no actual notice of the settlement, had cognizable direct claims against one of the settling insurers, Travelers, based upon independent grounds that were separate from the debtor's claims against the settling insurers. Chubb received no consideration for and had no right to seek payment from the settlement funds paid by the settling insurers to the bankruptcy estate,

yet its claims were nevertheless compromised without any notice to it. *Id.* at 152-53. This Court held that Chubb was, therefore, not bound by the settlement agreement. *Manville IV*, 600 F.3d at 158.

*Manville IV* does not support Plaintiffs' assertion. Precedent limiting the enforcement of a settlement order between the debtor and certain of its third-party carriers with respect to *one* claimant, Chubb, with *non-derivative*, independent claims against another carrier, does not undermine the bankruptcy court's ability to approve a Section 363 sale free and clear of successor liability to a good-faith purchaser for value. *Manville IV* is not a due process case; it is a jurisdiction case that limits the bankruptcy court's ability to adjust rights that two non-debtors had *inter se*. Finally, it is significant that *Manville IV* does not "invoke Rule 60(b) in support of its decision, or even mention it." *Opinion*, 529 B.R. at 581.

The Bankruptcy Court correctly remedied the violations it found to its Sale Order. It unquestionably had the jurisdiction and authority not only to enforce its own order, but also to approve the Sale free and clear of successor liability back in 2009. This appeal is an impermissible, belated collateral attack on the free-and-clear provision

itself—an attack that this Court already rejected when it dismissed a previous appeal on equitable mootness grounds. *See Parker v. Motors Liquidation Co.*, Case No. 10-4882-bk (2d Cir. July 28, 2011).

## III. The Bankruptcy Court Should Not Have Modified The Sale Order Six Years After Its Consummation.

To address the only due process violation it found (a separate error on which New GM cross-appeals), the Bankruptcy Court ordered the Sale Order modified to allow one group of Appellants—the Ignition Switch Plaintiffs—to assert so-called "Independent Claims" against New GM for alleged New GM conduct related to Old GM vehicles. Even assuming an alleged due process violation (and there was none), the Bankruptcy Court had no authority to modify the Sale Order six years after it was entered, and long after the Sale was substantially consummated. Indeed, "to modify the Sale Order would knock the props out of" the foundation on which the prior transaction was based. *Parker*, 430 B.R. at 82.

As an initial matter, there is no such thing as an "Independent Claim" related to Old GM vehicles that is not based upon a new and separate agreement between New GM and the Old GM vehicle owner after the Sale. The Sale Agreement expressly divided up all

responsibility for the approximately 70 million vehicles sold by Old GM that were still being driven as of the Sale. Whatever was not an Assumed Liability of New GM remained a Retained Liability of Old GM whether it was a known or unknown claim. A-1629. That was the purpose of the free-and-clear provision. The Sale Order eliminated all of New GM's obligations to Old GM vehicle owners, except for Assumed Liabilities.

And, if "Independent Claims" are viable due to New GM's post-Sale new and separate agreement with the Old GM vehicle owner, the Bankruptcy Court did not need to modify the Sale Order to allow for such claims. By unnecessarily modifying the Sale Order and creating an ill-defined category of Independent Claims, the Bankruptcy Court allowed a flood of new successor liability claims to be asserted in the guise of "Independent Claims," and undermined the liability shield, which was an essential part of New GM's bargained-for rights under the Sale Agreement and Sale Order.

Permitting supposedly "Independent Claims" to override the free-and-clear provision operates as an improper modification to the scope of the Assumed Liability provisions of the Sale Order, as well as a

modification of provisions binding any known or unknown creditor to its terms. The Bankruptcy Court lacked the authority to modify the order—either because the Ignition Switch Plaintiffs cannot satisfy the requirements of Rule 60(b), because Section 363(m) bars such belated modifications, or because this Court already dismissed challenges to the Sale Order years ago as being equitably moot.

### A. Ignition Switch Plaintiffs Could Not Meet the High Bar of Rule 60(b).

Courts have held that Fed. R. Civ. P. 60(b)(4) may be used to set aside a Section 363 sale in its entirety in the extreme circumstance where no notice was provided. *See Cedar Tide Corp. v. Chandler's Cove Inn, Ltd*, 859 F.2d 1127, 1133 (2d Cir. 1988) (bankruptcy court did not err in voiding debtor's post-petition transfer of substantially all of its assets without any notice and a hearing as required by Section 363(b)); *McTigue v. Am. Sav. & Loan Assoc. of Fla.*, 564 F.2d 677, 679 (5th Cir. 1977). This drastic remedy exists to correct complete failures to comply with Section 363 and the corresponding notice requirements of Bankruptcy Rule 2002.

Here, Old GM provided extensive notice to parties in interest including over four million direct-mail notices, extensive Publication

Notice in nine major periodicals, and received broad and widespread media coverage of the Sale. Notice reached its intended audience, and parties in interest, including numerous vehicle owner constituencies and representatives, filed objections to the Sale. The Bankruptcy Court held extensive hearings over multiple days, and considered the objectors' arguments (including the successor liability bar and lack of due process) and the trial evidence. *See generally* A-2127, A-2466, A-1891. After this thorough process, the Bankruptcy Court determined that the consideration New GM offered was fair and provided the creditors with a much more favorable return than liquidation. *See Gen. Motors Corp.*, 407 B.R. at 494. Those findings were upheld on appeal and the Appellants here do not challenge them.

New GM is unaware of any legal authority that would permit the Bankruptcy Court to partially void the Sale Order (which is essentially what it did) under these circumstances simply because a single claimant, or group of claimants, may not have received one type of notice of the Sale. *See In re BFW Liquidation, LLC*, 471 B.R. 652, 669-74 (Bankr. N.D. Ala. 2012).

The Sale Order itself says that it cannot be partially revoked (its provisions are non-severable, ¶ 69), and the District Court readily agreed that it could not perform elective surgery on the Sale Order to carve out any purportedly offensive terms. *Parker*, 430 B.R. at 97. Allowing any partial revocation of the Sale Order years after its entry would violate the well-established bankruptcy policy objectives protecting asset purchasers to maximize the sale value of assets for the benefit of a debtor's creditors. *See, e.g.*, *Stamco*, 363 F. App'x at 102-03 (warning against allowing torts claims against a purchaser who acquired a debtor's assets "free and clear" of such claims, explaining that allowing such claims would run counter to a core aim of the Bankruptcy Code, which is to maximize potential recovery by creditors, and holding that allowing such claims is particularly inappropriate where the "free and clear" nature of the sale was a crucial inducement to the sale).

Modifying the Sale Order itself was not a proper remedy because it undermines the well-established bankruptcy policy to avoid chilling any bidding for bankruptcy estate assets. If bidders knew that they would not be protected from successor liability claims whenever a

debtor's notice of a Section 363 sale was not perfect, then at best debtors would receive far less for their assets, and at worst debtors would be forced to liquidate because of uncertainties regarding whether their assets can be sold free and clear of liabilities. *See Doktor v. Werner Co.*, 762 F. Supp. 2d 494, 498-500 (E.D.N.Y. 2011). That untenable consequence would hurt *all* creditors for the benefit of a few.

### B. The Statutory Mootness Bar Of Section 363(m) Prevents Modification Of The Sale Order.

Section 363(m) of the Bankruptcy Code also bars any belated attempt to modify the provisions of the Sale Order. To ensure finality for bankruptcy sales and encourage parties to bid for assets, Section 363(m) provides that:

> the reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m); *Licensing By Paolo, Inc. v. Sinatra (In re Gucci)*, 105 F.3d 837, 839-40 (2d Cir. 1997). By its terms, Section 363(m) does not permit the modification of a sale order on appeal except under

extremely limited circumstances not applicable here—to say nothing of modifying a sale order in a collateral attack years after its entry. *See Gucci*, 105 F.3d at 839-40.

The Bankruptcy Court concluded that the Governments and thus their assignee, New GM, were a good faith purchaser entitled to Section 363(m) protection. *Gen. Motors*, 407 B.R. at 494. The Sale was fully consummated years ago. Any argument seeking to modify it now would be statutorily moot and already has been determined to be equitably moot. *See, e.g., Gucci*, 105 F.3d at 839-40*; United States v. Salerno*, 932 F.2d 117, 123 (2d Cir. 1991) (holding that it is beyond the power of the court to rewrite the terms of sale where the consummation of the sale was not stayed). By its own terms, therefore, the Sale Agreement cannot be modified as to New GM. *See Campbell*, 428 B.R. at 60-64.

In *Campbell*, Judge Buchwald refused to "rewrite," "unravel," or "carve out" any provisions from the "integrated terms of this extensively negotiated transaction." *Id.* at 60-61. Specifically, the *Campbell* court ruled:

> As the Bankruptcy Court found, and as discussed above, the various terms of the Sale Order and Injunction providing for the free and clear sale of the Purchased Assets were of critical significance to the 363 Transaction. *See, e.g.*, Sale

> Order and Injunction ¶ DD. Following the renegotiation of the agreements between Debtors and the Purchaser providing that the Purchaser would assume the Future Products Claims, the newly-expanded Assumed Liabilities still did not include the Existing Products Claims. *See, e.g.*, Appellants Br. 7–8. Moreover, the parties anticipated and contracted against the sort of interlinear relief Appellants request here. *See id*. App. B(MPA) Art. VII § 7.1. In other words, the Bankruptcy Court could not have modified the Sale Order and Injunction without the parties' consent or written waiver. Cf. Sale Op., 407 B.R. at 517 ("This Court has found that the Purchaser is entitled to a free and clear order. The Court cannot create exceptions to that by reason of this Court's notions of equity."). This Court likewise lacks the power to rewrite the Sale Order and Injunction.

*Id.* at 61-62. Although *Campbell* involved a request to modify a sale order on appeal, the law provides that it is *harder*, not easier, to modify a Sale Order when collaterally attacking it under Rule 60(b).

In *In re Fernwood Markets*, the court explained why the partial revocation of a sale order is improper:

> First, we believe that either the sale is totally void or voidable, or it is valid. We do not believe that it can be valid, or "reaffirmed," as to one lienholder and not to another. Secondly, we believe that allowing Shrager to retain its lien—or, more practically, pursue a claim against the TICP—while requiring other lienholders, who may be senior to Shrager, to resort to the sale proceeds just because of the fortuitous circumstance that Shrager failed to get proper notice of the sale would be to provide Shrager with an unjustified and unjustifiable windfall.

73 B.R. 616, 621 (Bankr. E.D. Pa. 1987). The same is true here. Appellants' suggestion that the Sale Order can be valid and binding against all of Old GM's creditors except them would result in an unjustified windfall.[33] If the Court is convinced that there was a due process violation and Appellants are entitled to seek a remedy, it should be only against the entity that was liable for the claim and that committed the due process violation; that being, the Old GM estate vis-à-vis the Motors Liquidation Company General Unsecured Creditors Trust ("GUC Trust").

Further, Appellants' request also ignores the language of the Sale Order itself, that the numerous terms of the final Sale cannot be selectively enforced. A-1656. The Sale Agreement was an "Integrated Transaction" and contained "Conditions to Closing" provisions in which New GM expressly conditioned its purchase on the enforceability of the entirety of the Sale Agreement. *See* A-1720, A-1751–A-1752. As such,

[33] *See, e.g., In re Trans World Airlines, Inc.*, 322 F.3d 283, 291-93 (3d Cir. 2003) (holding that allowing the claimants to seek a recovery from the successor entity while creditors which were accorded higher priority by the Bankruptcy Code obtained their recovery from the limited assets of the bankruptcy estate would "subvert the specific priorities which define Congressional policy for bankruptcy distribution to creditors").

the Appellants' relief is effectively the same as the request made in *Morgenstein* to rewrite the confirmation order, which was properly rejected. *See Morgenstein*, 462 B.R. at 500-05. The Bankruptcy Court's failure to follow its own prior ruling on this issue highlights the legal error.

The decision *In re BFW Liquidation, LLC*, 471 B.R. 652 (Bankr. N.D. Ala. 2012), arising from an analogous Section 363 context involving due process arguments by a contingent creditor, is instructive. Shortly after filing for bankruptcy, the debtor sold leases following an extensive sale process that included successor liability protection for the purchaser. The debtor provided comprehensive notice, including direct-mail and publication notice, to a substantial numbers of creditors. Following various court hearings, the court approved the asset sale under Section 363, free and clear of successor liability. *Id.* at 658. Well after the sale closed, a plaintiff asserting a contingent litigation claim, filed suit against the good-faith purchaser seeking to hold the purchaser liable under a successor theory for the debtor's alleged bad actions, and to set aside the sale on the grounds that she did not receive actual notice. *Id.* at 669.

The *BFW Liquidation* court distinguished the case before it from the ones where (i) no notice was given, (ii) there was a dispute as to the propriety of the sale process, or (iii) the consideration paid. *Id.* at 673. The court held that there was no basis to object to the sale itself and that plaintiff's interests had been protected by the creditors' committee and other parties. *Id.* In short, the *BFW Liquidation* court held plaintiff was not prejudiced by her lack of notice. The court also noted that the plaintiff was in the same position as many other creditors that did not receive direct notice of the sale based on the court's order limiting and specifying notice. Lastly, the *BFW Liquidation* court held: "More importantly, from a practical perspective, it would simply be impossible to undo the sale, reassemble all of the things sold and since resold, and reimburse the buyer's purchase price money and other outlays at this late date." *Id.* Instead, the proper remedy was to permit the plaintiff to seek a claim against the debtor. In no event did the plaintiff have any remedy against the good faith purchaser. *Id.* at 669-74; *see also Molla v. Adamar of New Jersey, Inc.*, No. 11-6470 (JBS/KMW), 2014 WL 2114848, at *4 (D. N.J. May 21, 2014) (holding that if plaintiff did not receive adequate notice of the bankruptcy

proceeding that is relevant to whether its claims will be discharged, but is not a basis to impose liability on a purchaser who acquired assets "free and clear" of such claims).

In sum, the Bankruptcy Court erred in modifying the Sale Order so that Ignition Switch Plaintiffs can pursue claims against New GM for allegedly independent conduct related to Old GM vehicles as a remedy for Old GM allegedly providing defective notice. This remedy directly conflicts with controlling precedent protecting good-faith purchasers who acquire a debtor's assets "free and clear" of claims.

### C. Modification Of The Sale Order Is Particularly Inappropriate Here.

The Bankruptcy Court's modification to the Sale Order six years later impermissibly weakens a cornerstone of the Sale: the free-and-clear bar. Appellants suggest that this Court can undo the alleged due process error simply by choosing not to enforce the Sale Order against them, without modifying its terms.[34] This argument is the functional

[34] Appellants cite to *In re Johns-Manville Corp.*, 759 F.3d 206 (2d Cir. 2014)("*Manville V*"), for this contention. However, *Manville V* does not support this contention; instead, the case dealt with whether certain conditions to the funding of a settlement occurred. As a follow-up to its earlier *Manville IV* decision, this Court rejected Travelers' position that Chubb's ability to pursue it equated to a failure to satisfy one of the

equivalent of modifying the Sale Order to weaken the liability shield that New GM bargained for in the Sale Agreement. Indeed, the Sale would not have closed without the "free and clear" provision. A-1623. Permitting Appellants to pursue liability claims against New GM would fundamentally alter one of the most significant provisions in the Sale Order. *See also infra* at Section III (arguing that Bankruptcy Court had no authority to modify the Sale Order to remedy a due process violation).

This Circuit and its brethren have repeatedly upheld the legality of "free and clear" provisions and protected good-faith purchasers of bankruptcy assets from collateral attacks. *See In re Chrysler LLC*, 576 F.3d at 119-20; *Douglas v. Stamco,* 363 F. App'x at 102-03.[35] For this

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funding conditions, noting that sophisticated parties would not have bargained for an impermissible injunction. *Id*. at 215. As cited above, this Court's rulings have agreed that a Section 363 sale can be free and clear of successor liability claims, thus an injunction in a sale order prohibiting those claims is permissible. *Manville V* is not applicable to the issues here.

[35] Appellants continued reliance on the dated decision in *Zerand-Bernal Grp. v. Cox*, 23 F.3d 159 (7th Cir. 1994) contravenes rulings by courts in this Circuit. *See Campbell*, 428 B.R. at 57 n.17 ("[W]e note that courts in this District have declined to follow the more 'restrictive' interpretation of section 363(f) evinced in *Zerand–Bernal Group*." (citing *In re Portrait Corp. of Am., Inc.,* 406 B.R. 637, 641 (Bankr. S.D.N.Y. 2009)).

reason, under Section 363(m) of the Bankruptcy Code, statutory mootness protects purchasers like New GM from having crucial sale terms overturned on appeal. *See In re Gucci*, 105 F.3d 837 (2d Cir. 1997); *Weingarten Nostat, Inc. v. Serv. Merch. Co.*, 396 F.3d 737 (6th Cir. 2005).

*None* of the Appellants discuss Rule 60(b) of the Federal Rule of Civil Procedure, which provides the *only* possible ground for modifying or amending the Sale Order to permit them to pursue successor liability claims against New GM. That omission is not surprising because a court may only grant Rule 60 relief in the "most exceptional of circumstances" and cannot "impose undue hardship on other parties." *In re Old Carco LLC*, 423 B.R. 40, 45 (Bankr. S.D.N.Y. 2010), *aff'd*, 2010 WL 3566908 (S.D.N.Y. Sept. 14, 2010), *aff'd*, *Mauro Motors Inc. v. Old Carco LLC*, 420 Fed. App'x 89 (2d Cir. 2011); *see also United States v. Int'l Bhd. Of Teamsters*, 247 F.3d 370, 391 (2d Cir. 2001) (relief under Fed. R. Civ. P. 60(b) is "not favored and is properly granted only upon a showing of exceptional circumstances"); *Dickerson v. Bd. of Educ. of Ford Heights, Ill.*, 32 F.3d 1114, 1116 (7th Cir. 1994).

Here, Rule 60(b) relief is impossible against New GM because it would impose undue hardship on New GM, which specifically bargained for the liability shield. Stripping New GM of the liability shield years later would have the effect of dramatically increasing the purchase price of the Sale, thrusting liability on New GM that it (and the Governments) did not agree to accept.

The Sale did *not* extinguish Appellants' claims against Old GM related to product defect or economic loss. The Sale Order simply ensured that these claims remained liabilities of Old GM's estate, not of New GM. Appellants could have asserted their claims against Old GM through the post-Sale bankruptcy-claims process, but chose not to.

Equally important, any infirmity in the Sale notices was not caused by New GM, and it would be unfair and prejudicial to impose a remedy on it for the acts of others. Moreover, what Appellants seek goes beyond a "do-over." Old GM and its creditors (including these Appellants) seek to retain the full benefits of the Sale, while depriving New GM of the benefit of its bargain. As explained *supra*, there cannot be a "do-over" six years later when countless transactions have occurred based on the integrity of the Sale Order.

Finally, the concept of a "do-over" makes little sense with respect to Appellants' claims. New GM simply never assumed any liability for the claims now advanced by Appellants for vehicles that it did not manufacture or sell. Appellants' attempt to foist Old GM's liabilities on New GM in contravention of the liability shield in the Sale Order is not, in any sense, a return to the *status quo*.

According to the Pre-Closing Accident Plaintiffs, the relief they seek "does not affect title to any of the assets sold to New GM in 2009." Pre-Closing Accident Plaintiffs' Br. 51 n.16. This contention ignores that New GM obtained title to the assets subject to certain terms, conditions, and, most importantly, protections. There is no ability to revise the basic Sale terms now, particularly the price that New GM paid and the successor liability shield that New GM bought.

Moreover, Section 363 sale orders and injunctions "fall[] within a select category of court orders that may be worthy of *greater* protection from being upset by later motions practice." *In re Lehman Bros. Holdings Inc.*, 445 B.R. 143, 149-50 (Bankr. S.D.N.Y. 2011), *aff'd in part and rev'd in part on other grounds*, 478 B.R. 570 (S.D.N.Y. 2012), *aff'd*, 761 F.3d 303 (2d Cir. 2014). Even if a "more perfect hearing" might

have apprised the bankruptcy court of more details relevant to the sale, and even if "in retrospect" there may be "a glaring problem of flawed disclosure" relating to the assets sold, courts are exceedingly reluctant to modify or amend sale-order provisions to permit claims that otherwise would be barred. *Id.* at 150.

Here, the situation is much easier than in *Lehman* (which upheld the sale) because the issue is not the disclosure of the assets being sold. Instead, the issue is the impact of the "free and clear" provision on a subset of the billions of dollars in unsecured claims bound by the no-successor liability finding in the Sale Order.

Finally, not only would any modification of the Sale Order unfairly harm the good-faith purchaser of Old GM's assets, but it would also unfairly reward Appellants for sitting on the sidelines. ***First***, Appellants were aware of the Sale Motion. The law clearly places the burden on the individual creditor, not the debtor with millions of creditors, to determine how a widely-publicized sale might impact their rights. ***Second***, in the days and weeks after New GM initiated its recalls in 2014, Appellants filed suit against New GM claiming that their Old GM vehicles may have had a defect. Plainly, Appellants had

sufficient knowledge to take steps to file a claim against the GUC Trust (the successor to the Old GM bankruptcy estate by virtue of Old GM's confirmed bankruptcy plan) or prevent the GUC Trust from distributing Sale proceeds because they knew that the GUC Trust was making distributions to its beneficiaries in 2014. A-11246–11248. They strategically chose not to take any action. *Id.* Their strategic decisions do not create a basis to pursue New GM.

## CONCLUSION

For these reasons, this Court should hold that the notice procedure for Old GM's 363 sale did not violate Appellants' due process rights and that the Sale Order cannot be modified six years after it was issued to allow for purportedly "Independent Claims" against New GM. At a minimum, the Court should confirm that New GM cannot be liable for claims that in any way are based on acts or conduct by Old GM.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, as modified by the Order of this Court, dated November 2, 2015 [Doc. No. 176], because it contains 19,717 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century School 14-point font.

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