15-2844(L), 15-2847(XAP), 15-2848(XAP)

United States Court of Appeals

for the

Second Circuit

In the Matter of: Motors Liquidation Company,

Debtor.

(For Continuation of Caption See Inside Cover)

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

BRIEF FOR APPELLANT IGNITION SWITCH PLAINTIFFS

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IGNITION SWITCH PLAINTIFFS, IGNITION SWITCH PRE-CLOSING ACCIDENT PLAINTIFFS, THE STATE OF ARIZONA, PEOPLE OF THE STATE OF CALIFORNIA, GROMAN PLAINTIFFS,

Appellants,

– v. –

GENERAL MOTORS LLC,

Appellee-Cross-Appellant,

WILMINGTON TRUST COMPANY,

Trustee-Appellee-Cross-Appellant,

PARTICIPATING UNITHOLDERS,

Creditor-Appellee-Cross-Appellant.

CORPORATE DISCLOSURE STATEMENT

No corporate disclosure statement is required for the Ignition Switch Plaintiffs, all of whom are individuals.

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I. STATEMENT OF JURISDICTION[1]

The Ignition Switch Plaintiffs ("ISPs") are owners and lessees of cars manufactured by Old GM seeking to recover economic losses after the revelations that first Old GM and then New GM intentionally concealed the Ignition Switch Defect that caused cars to stall and disabled their airbags, and also concealed a plethora of other safety defects resulting from the companies' systemic devaluation of safety.

The ISPs appeal from the April 15, 2015 Opinion (Joint Special Appendix ("SPA")-277-417) and the June 1, 2015 Judgment (SPA-253-73) of the United States Bankruptcy Court for the Southern District of New York (Robert E. Gerber, *Bankruptcy Judge*) which held that the "Free and Clear Provisions" of the Sale Order which gave rise to New GM would be applied against the ISPs to bar many of their claims against New GM even though, as the Bankruptcy Court found, the ISPs were deprived of the notice and opportunity to be heard that the Due Process clause requires. The Bankruptcy Court's Opinion is reported at 529 B.R. 510. The Bankruptcy Court had subject matter jurisdiction to issue the Judgment pursuant to

[1] For ease of reference, the Ignition Switch Plaintiffs adopt the definitions of capitalized terms in the Glossary that appears at the beginning of the *Brief for Ignition Switch Pre-Closing Accident Plaintiffs*, also filed today. Other capitalized terms are defined herein.

28 U.S.C. §§ 157(a), (b), and 1334, but, for the reasons stated herein, it lacked jurisdiction to enjoin direct claims against New GM arising solely from its post-Sale violations of its independent legal duties. The Judgment is a final order that disposes of the ISPs' successor liability claims against New GM, and bars the ISPs from recovery from the assets of the GUC Trust established to administer the Old GM estate. The ISPs filed a timely notice of appeal from the Opinion and Judgment on June 2, 2015 (A-10987-990).

On June 1, 2015, the Bankruptcy Court certified the Judgment for direct appeal pursuant to 28 U.S.C. § 158(d) and Bankruptcy Rule 8006(e) (SPA-274-76). This Court granted the petition of certain parties to appeal on September 9, 2015. SPA-456-57. On October 8, 2015, this Court designated the ISPs as appellants. This Court has jurisdiction over this appeal under 28 U.S.C. § 158(d)(1).

II. STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the Bankruptcy Court err in holding that prejudice, beyond the deprivation of notice and the opportunity to be heard, must be shown to entitle a victim of a due process violation to a remedy?

2. Assuming that a show of prejudice is required, did the Bankruptcy Court err in finding that the ISPs did not show prejudice when the lack of notice

and the opportunity to be heard resulted in the Bankruptcy Court enjoining the ISPs' claims under the Sale Order where neither the Bankruptcy Court, the U.S. government nor the ISPs had any knowledge of the Ignition Switch Defect at the time of the Sale Hearing?

3. Did the Bankruptcy Court err in failing to consider Old and New GM's improper concealment of the Ignition Switch Defect in connection with the enforcement of the Sale Order?

4. Did the Bankruptcy Court err in enforcing the Sale Order against Used Car Purchasers who bought their Old GM vehicles after the Sale?

5. Did the Bankruptcy Court err in holding the Sale Order's injunctive provisions remain in effect to bar direct and independent claims against New GM unless a due process violation is shown?

6. Did the Bankruptcy Court err in applying the doctrine of equitable mootness to prevent recovery on the claims of the ISPs?

III. STATEMENT OF THE CASE

The Sale Order through which New GM acquired substantially all of the assets of Old GM provided New GM immunity against successor liability claims. A-1648-50, ¶¶ 46-47. The Bankruptcy Court upheld the successor liability bar against the ISPs despite holding that the ISPs were deprived of their due process

rights to notice and the opportunity to be heard at the Sale Hearing. Opinion, 529 B.R. 510. However, for years before the entry of the Sale Order, a "critical mass" of Old GM employees (including lawyers, engineers and senior managers) knew, but concealed, that scores of GM vehicles contained the deadly Ignition Switch Defect, which caused sudden stalls and disabled the Subject Vehicles' airbags. Opinion, 529 B.R. at 557-58. When Old GM became New GM via the Sale, New GM inherited Old GM's books and records and employees with knowledge of the Ignition Switch Defect. *Id.* at 538. Old GM's longstanding concealment of the Ignition Switch Defect was over—and New GM's cover-up of the Ignition Switch Defect began. A-5976-6008. For over 12 years Old GM and then New GM hid the truth from the public, federal safety monitors and the Plaintiffs—safety concerns were being sacrificed for profit. *Id.* Under the Sale Order as enforced by the Bankruptcy Court, New GM benefits from a bar against successor liability claims notwithstanding the concealment of the Ignition Switch Defect.

The Ignition Switch Defect causes a vehicle's ignition switch to move from the "Run" position to the "Accessory" or "Off" position during ordinary driving, causing the vehicle to lose power steering and power brakes and disabling the airbags. A-5977, ¶ 1.

Old GM knew of the Ignition Switch Defect for more than five years before the Sale Hearing. A-5978-79, ¶¶ 5-8. In 2004, the first of many otherwise preventable fatal and serious accidents occurred, and many followed during the five years before the Sale. A-5984, ¶ 14(C)(1); A-5988-89, ¶ 14(H)(1); A-5992-93, ¶ 14(L). *See also* A-9761-62, A-9772, A-9778, A-9780.

The cover-up of the Ignition Switch Defect began as soon as Old GM discovered the problem: starting in 2005, Old GM issued original and then updated Service Bulletins to its dealers about the problem that purposefully did not contain the word "stall" or warn of the actual danger inherent in the Subject Vehicles. A-5979-80, ¶ 10. Then, in 2006, based on its knowledge of the Ignition Switch Defect, Old GM redesigned the Ignition Switch ***without fixing the defect*** in some two million cars that were on the road. A-5991, ¶ 14(I)(v). For years leading up to the bankruptcy filing, Old GM knew of the Ignition Switch Defect, but it chose to do nothing to protect the public safety. Opinion, 529 B.R. at 538, 557.

Consumers who purchased or leased cars with the Ignition Switch Defect had no way of knowing of the illegally concealed defect. *Id.* at 538 ("there is no evidence in the record … that any Plaintiff knew of the Ignition Switch Defect before … 2014"). The ISPs received no direct notice of the Sale Hearing, the

Ignition Switch Defect, or the impending bar of successor liability claims. *Id.* at 525.

Nothing changed for five years after the Sale Hearing, as the culture of cover-up and the elevation of costs over safety continued at New GM. A-9787-9906. Not until 2014 did New GM make its long-overdue and federally mandated revelations of the massive and deadly defect and institute recalls for an estimated 2.1 million Subject Vehicles. Opinion, 529 B.R. at 521; *see also* A-5929; A-8796. The adverse publicity occasioned by these massive recalls and the resulting firestorm of investigations belied New GM's contentions that the GM brand was synonymous with safety and reliability. *See, e.g.*, A-9969-10035; A-9639-9963. As soon as they learned of the Ignition Switch Defect, the ISPs brought a number of lawsuits against New GM for its conduct in hiding the Ignition Switch Defect and dozens of other defects while at the same time assuring customers of the safety of its brand, causing significant economic losses; these lawsuits were transferred to the MDL Court. Opinion, 529 B.R. at 521-22.

Following the transfer, the ISPs' filed Consolidated Complaints in the MDL action. A-6347-7735. Among other things, the Complaints seek damages in the form of diminution in value of all Old and New GM vehicles caused by the Ignition Switch Defect and dozens of other defects concealed by New GM until

2014, Old and New GM's respective roles in concealing these defects, and the resulting negative publicity generated by the recall of 27 million vehicles in 2014 (including 13 million vehicles with the Ignition Switch Defect and other similar ignition switch defects). *Id.*

The Bankruptcy Court formulated several "Threshold Issues" to be adjudicated in connection with New GM's Motions to Enforce. A-5778-83. After briefing on these issues, the Bankruptcy Court issued its Opinion, dated April 15, 2015, 529 B.R. 510, and thereafter entered its June 1, 2015 Judgment, SPA-253-73. The Bankruptcy Court's rulings are detailed below in Section E. Immediately below is a brief summary of relevant facts and background.

A. Old GM initiates a chapter 11 bankruptcy and files the Sale Motion.

On June 1, 2009, Old GM and three affiliates commenced jointly administered chapter 11 cases before the Bankruptcy Court, and Old GM filed the Sale Motion seeking approval of, *inter alia*, the Sale Procedures and the Sale. Opinion, 529 B.R. at 530.

In its Sale Motion, Old GM sought authority to sell substantially all of its assets to New GM "free and clear of all other 'liens, claims, encumbrances and other interests,' including, specifically, 'all successor liability claims.'" *Id.* (citations omitted).

On June 2, 2009, the Bankruptcy Court entered its Sale Procedures Order. *Id.* at 531.

B. The ISPs were deprived of notice of the Sale and an opportunity to be heard in connection with the Sale Order.

The Sale Procedures Order provided for actual notice to 25 categories of persons who were considered known creditors. *See* A-385-86, ¶¶ 9(a)(i)-(xxv), 9(b)(i)-(ii). The Sale Procedures Order also provided for publication notice of the Sale. A-386, ¶ 9(e). Despite being known creditors of Old GM, the ISPs did not receive actual notice of the Sale Hearing. Opinion, 529 B.R. at 525. Neither direct nor publication notice disclosed the Ignition Switch Defect or that the ISPs' resultant claims were to be foreclosed under the Sale Order. *Id.*

C. The Sale Agreement and Sale Order imposed recall obligations on New GM with respect to Old GM cars and parts, and the GUC Trust was established to distribute the assets of the bankruptcy estate.

The Sale Agreement, originally filed with the Sale Motion on June 1, 2009, was thereafter amended, *inter alia*, to provide that New GM would assume: (i) liabilities under state Lemon Laws; and (ii) responsibility for any and all accidents or incidents giving rise to death, personal injury, or property damage after the date of closing of the Sale, irrespective of whether the vehicle was manufactured by Old or New GM. Opinion, 529 B.R. at 534.

Notably, the Sale Agreement and Sale Order required New GM to comply with recall obligations imposed by federal law, even for cars or parts manufactured by Old GM. In particular, the Sale Order provided that "the Purchaser shall comply with the certification, reporting, and recall requirements of the National Traffic and Motor Vehicle Safety Act, as amended and recodified, including by the Transportation Recall Enhancement, Accountability and Documentation Act,[2] …, and similar Laws, in each case, to the extent applicable in respect of motor vehicles, vehicles, motor vehicle equipment, and vehicle parts manufactured or distributed by the Sellers prior to the Closing." *Id*. at 535; *see also* A-1633-34, ¶ 17.

On March 29, 2011, Old GM's chapter 11 plan of liquidation (the "Plan") was confirmed. Opinion, 529 B.R. at 535. The Confirmation Order authorized the creation of the GUC Trust to distribute assets of the Old GM estate and object to claims. *Id*. at 536. The GUC Trust has distributed assets worth billions of dollars to holders of Allowed General Unsecured Claims under the Plan, currently holds many hundreds of millions of dollars of assets and may obtain additional shares of

[2] The "Safety Act," 49 U.S.C. §§ 30101, *et seq.*, mandates, among other things, that car manufacturers monitor vehicles for safety defects, and conduct recalls when necessary.

New GM common stock (potentially worth a billion dollars) through the exercise of an "Accordion Feature" under the Sale Agreement. *See infra* at 49-50.

D. Consistent with their culture of hiding safety problems, both Old and New GM concealed the Ignition Switch Defect and did not conduct federally-mandated recalls.

New GM's extraordinary delay in conducting its massive 2014 recalls was, in no small part, the result of a culture marked by a "not me" attitude, typified by the notorious "GM Salute" and "GM Nod" where employees were taught to avoid responsibility and passively agree to action that they had no intention of following up on, and exemplified by the practice of training employees to avoid plain safety and defect-related language. A-9903-04.

The result was that at least 24 Old GM personnel (***all of whom were transferred to New GM***), including engineers, senior managers and attorneys, were aware of the Ignition Switch Defect prior to the Sale Motion, but did nothing until New GM finally issued the recalls in 2014.[3] The corporate culture that placed profits over safety ran deep at Old and New GM. *Id.*

It is undisputed that Old GM personnel knew enough as of the time of Old GM's June 2009 bankruptcy filing such that Old GM was obligated, under the

[3] *See* A-5981, ¶ 14; Opinion, 529 B.R. at 538, 557-58.

Safety Act, to conduct a recall of the vehicles with the Ignition Switch Defect. Opinion, 529 B.R. at 557.

E. Disposition below.

The Bankruptcy Court correctly held that Plaintiffs who owned or leased cars with the Ignition Switch Defect were "known" creditors at the time of the Sale, and that they were therefore entitled to ***actual*** notice of the Sale and the Bar Date for filing proofs of claim against the Old GM estate before their rights could be extinguished. Opinion, 529 B.R. at 525. However, the Bankruptcy Court found that "the failure to provide the notice that due process requires" was not enough to "establish[] a due process violation." *Id*. Instead, Plaintiffs were required to show "that they have sustained prejudice as a result" of the lack of notice. *Id*. at 526.

In finding that the Plaintiffs failed to demonstrate prejudice, the Bankruptcy Court relied on the fact that other parties had made arguments against the successor liability bar at the Sale Hearing and that those arguments were properly considered and rejected. *Id*. Consequently, "while the Plaintiffs established a failure to provide them with the notice due process requires, they did not establish a due process violation" with respect to the Sale Order, and "[t]he Free and Clear Provisions stand." *Id*.

However, the Bankruptcy Court found that the Plaintiffs ***were*** prejudiced in one respect because no party at the Sale Hearing "argued a point that they argue now: that the proposed Sale Order was overly broad, and that it should have allowed them to assert claims involving Old GM vehicles and parts so long as they were basing their claims ***solely on New GM*** conduct, and not based on any kind of successor liability or any other act by Old GM." *Id*. at 526-27 (emphasis in original). The Judgment terms these "Independent Claims." SPA-254, ¶ 4. Accordingly, the Judgment allows owners and lessees of vehicles with the Ignition Switch Defect to bring Independent Claims. *Id*. But other Old GM vehicle owners are ***not*** permitted to assert Independent Claims. *Id*. *See also* SPA-441-55 (Form of Judgment Decision), *In re Motors Liquidation Co.*, 531 B.R. 354, 360 (Bankr. S.D.NY. 2015).

The Bankruptcy Court held that "Plaintiffs were plainly prejudiced" by the lack of notice of the Bar Date. Judgment, SPA-254-55, ¶ 6. Accordingly, Plaintiffs would be permitted to seek to file late proofs of claim against the Old GM bankruptcy estate. *Id*. However, the Bankruptcy Court made any such "remedy" illusory since, "based on the doctrine of equitable mootness, in no event shall assets of the GUC Trust held at any time in past, now, or in the future … be used to satisfy any claims of the Plaintiffs." *Id*.

IV. SUMMARY OF ARGUMENT

The Bankruptcy Court properly found that: (i) the ISPs were known creditors entitled to direct notice of the Sale Hearing and the prospective elimination of their successor liability claims against New GM; and (ii) the publication notice provided by Old GM (which failed to disclose the existence of the Ignition Switch Defect) was insufficient for due process purposes. However, the Bankruptcy Court erred in finding that (i) the ISPs needed to show prejudice in order to be entitled to a remedy for the denial of due process, and (ii) no such prejudice had been demonstrated.[4]

When there is neither notice nor an opportunity to be heard, no additional showing of prejudice is required: the denial ***is*** the prejudice. Because due process guarantees the right to be heard, not the right to win, an order issued without providing notice and the right to be heard is unenforceable against the party deprived of that right. There is no way to determine, some five years later, what the outcome would have been had the bombshell of Old GM's concealment of the Ignition Switch Defect been made known to the Bankruptcy Court, the Treasury, Congress, the public, the press and the various objectors. That is precisely why the

[4] These points are discussed more fully in the *Brief for Ignition Switch Pre-Closing Accident Plaintiffs*, also filed today, whose arguments relating to due process are incorporated herein by reference.

case law is so clear that when there is a denial of due process, the resulting order cannot be enforced against the parties so deprived.

Even assuming that prejudice is required, the ISPs ***were*** prejudiced. When New GM sought to enforce the Sale Order's successor liability bar, the Bankruptcy Court erred by failing to consider the overwhelming evidence that (i) Old GM and then New GM illegally concealed the Ignition Switch Defect, and (ii) New GM intended from day one to continue to unlawfully suppress information regarding the Ignition Switch Defect. Enforcing the Sale Order's successor liability bar prejudices the ISPs because the Bankruptcy Court did not know in 2009 what the evidence shows now: Old GM concealed the Ignition Switch Defect at the time of the Sale and New GM continued the illegal concealment and caused the ISPs' massive economic losses. It is impossible to believe that the successor liability ban against the ISPs would have been approved as written in the Sale Order had Plaintiffs, the U.S. government and the Bankruptcy Court been aware of the Ignition Switch Defect and its horrific consequences prior to the Sale Hearing. Given that New GM retained Old GM's books and records and the same employees with knowledge of the Ignition Switch Defect, the only inference is that New GM was effectively "born" with the same bad intent to cover-up the Ignition Switch Defect that motivated Old GM. The enforcement of a Sale Order

protecting a purchaser born with illegal motivations is unwarranted. In sum, Plaintiffs' arguments would likely have resulted in the narrowing or elimination of the successor liability bar in the Sale Order based on a finding that the Ignition Switch Defect was improperly concealed or that New GM was not a "good faith purchaser." The Bankruptcy Court failed to consider the impact of New GM's unclean hands and unlawful conduct in connection with the enforcement of the Sale Order's successor liability bar and therefore committed reversible error.

In addition to its errors relating to the successor liability claims of pre-Sale purchasers and lessees of cars with the Ignition Switch Defect, the Bankruptcy Court erred by enforcing the Sale Order against post-Sale purchasers of Old GM vehicles ("Used Car Purchasers") in violation of their due process rights. Used Car Purchasers were, at the time of entry of the Sale Order, "future claimants" to whom no notice was possible.

Likewise, the Bankruptcy Court erred in holding that only Old GM car owners who suffered a due process violation may bring claims against New GM based solely on New GM's own independent post-Sale conduct. The Bankruptcy Court lacks jurisdiction to enjoin such claims or to condition third-party non-successor liability claims against New GM on a finding of a due process violation.

Finally, the Bankruptcy Court erred by finding equitable mootness applicable as a bar to Plaintiffs' right to recovery against the Old GM estate/GUC Trust (separate and distinct from Plaintiffs' claims against New GM). The Bankruptcy Court properly found a due process violation in connection with the notice of the Bar Date for filing proofs of claim against Old GM and, accordingly, that Plaintiffs should be allowed to file late proofs of claim against the GUC Trust. The doctrine of equitable mootness cannot properly be expanded to bar recovery for creditors who were deprived of due process. However, the Bankruptcy Court found that, based on equitable mootness, none of the past, present or future assets of the GUC Trust may be used to satisfy any subsequently allowed claims of Plaintiffs. The Bankruptcy Court abused its discretion by employing the constitutionally suspect and disfavored doctrine of equitable mootness, without any precedent, to effectuate a complete bar to bankruptcy claims recoveries for Plaintiffs whose due process rights were violated. Furthermore, to the extent they are applicable, the Bankruptcy Court erred by holding that Plaintiffs cannot satisfy three of the five *Chateaugay* factors, and in doing so abused its discretion. Accordingly, the Plaintiffs who were deprived of due process should be allowed to seek a remedy from the GUC Trust separate and distinct from the Plaintiffs' claims against New GM.

V. STANDARD OF REVIEW

On direct appeal, this Court "undertakes an independent examination of the factual findings and legal conclusions of the bankruptcy court." *In re Duplan Corp.*, 212 F.3d 144, 151 (2d Cir. 2000). The Bankruptcy Court's conclusions of law are reviewed *de novo* and its findings of fact are reviewed for clear error. *See In re Barnet*, 737 F.3d 238, 246 (2d Cir. 2013); *Pension Benefit Guar. Corp. v. Oneida Ltd.*, 562 F.3d 154, 156 (2d Cir. 2009). The Bankruptcy Court's equitable mootness ruling is reviewed "for abuse of discretion, under which [the Court] examine[s] conclusions of law *de novo* and findings of fact for clear error." *In re BGI, Inc.*, 772 F.3d 102, 107 (2d Cir. 2014) ("*BGI II*"), *cert. denied*, __ U.S. __, 193 L. Ed. 2d 44 (2015).

VI. ARGUMENT

A. The Bankruptcy Court erred in holding that the ISPs must demonstrate prejudice in order to establish a due process violation.

The Fifth Amendment to the United States Constitution provides that the federal government cannot deprive a person of life, liberty or property without due process of law. "An essential principle of due process is that a deprivation of … property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542

(1985) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

The Supreme Court has called notice and an opportunity to be heard the "root requirement" of due process. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). The purpose of this "root requirement" is "to minimize substantively unfair … deprivations of property." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

The Bankruptcy Court ruled that the ISPs were entitled to, but did not receive, either notice or an opportunity to be heard in connection with the Sale Hearing.[5] The Bankruptcy Court nonetheless held that, because the ISPs could not show they were prejudiced by this deprivation, they could not prevail on their due process claims.[6] By minimizing the "root requirement" of due process—notice and an opportunity to be heard—and by interposing a prejudice requirement, the Bankruptcy Court committed legal error.

The Supreme Court has repeatedly held that the denial of notice and an opportunity to be heard is a *per se* constitutional violation that entitles the injured party to relief—even where (unlike here) the underlying claim is without merit.

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[5] *See* Opinion, 529 B.R. at 554-55, 560.

[6] *See id.* at 560-68. "Prejudice," according to the Bankruptcy Court, required the ISPs to show that the denial of due process would have changed the outcome of the Sale Order proceedings.

See, e.g., *Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("[T]he right to procedural due process is 'absolute' in the sense that it does not depend on the merits of a claimant's substantive assertions[.]"); *Fuentes v. Shevin*, 407 U.S. at 87 (assuming that the defendant had no valid defenses to an action, but nonetheless concluding that "[t]he right to be heard does not depend upon an advance showing that one will surely prevail at the hearing").

It is for good reason that no additional prejudice is required to obtain a remedy for the deprivation of notice and the opportunity to be heard. The absolute nature of the Due Process clause means that "the risk of error" arising when a person is deprived of valuable rights without notice "was more than the Framers would tolerate. We can prevent erroneous deprivations from some only by providing a process to all." *Lane Hollow Coal Co. v. Dir., Office of Workers' Comp. Programs DOL*, 137 F.3d 799, 806 (4th Cir. 1998). "If there has been no fair day in court, the reliability of the result is irrelevant, because a fair day in court is how we assure the reliability of results." *Id.* at 808. The impropriety of a prejudice requirement is amply illustrated on the facts of this case, where the lack of notice and the concealment of the Ignition Switch Defect prevented ***anyone*** from apprising the Bankruptcy Court of the egregious conduct of Old GM in connection with the defect and the resultant severe damage inflicted on Plaintiffs.

See In re New Concept Housing, Inc., 951 F.2d 932, 942 (9th Cir. 1991) (dismissing as "sheer improper speculation" and "hindsight rationalization[]" the argument that an improperly noticed debtor's objection would not have made any difference in approval of settlement). The Due Process clause simply does not permit Monday-morning quarterbacking in connection with a game that Plaintiffs were precluded from playing in real time.

This Court recently rejected a prejudice requirement in *In re Johns-Manville Corp.*, 600 F.3d 135 (2d Cir. 2010) (*per curiam*) ("*Manville IV*"), where it ruled that an entity was not bound by a series of bankruptcy orders when it had never received notice or an opportunity to be heard. *Id.* at 154-56. In *Manville IV*, this Court did not consider whether the complaining party suffered prejudice ***other than*** denial of notice and an opportunity to be heard; rather, this Court's decision was focused squarely (and exclusively) on the denial of those core due process rights. *See id.* at 157. Having determined that the appellant was denied notice and an opportunity to be heard, this Court concluded that the bankruptcy court's orders were not binding on the appellant.[7]

[7] The Bankruptcy Court dismissed application of *Manville IV* to this case, speculating that "prejudice" to the appellant in *Manville IV* was so "obvious" that this Court's opinion neglected to discuss it. *See* Opinion, 529 B.R. at 560 n.161. However, *Manville IV* does not mention the word "prejudice" because the inquiry would have been inapplicable and superfluous: the *Manville IV* appellant was

Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80 (1988), is another case in point. There, a debtor defaulted in a collection suit and his creditor obtained a default judgment. *Id.* at 81-82. Two years later, the debtor challenged the entry of default because the debtor was never served. *Id.* at 82. The creditor conceded that service was deficient, but claimed that the debtor suffered no prejudice because he had no defense on the merits and the outcome, with or without proper service, would have been the same. *Id.* at 82-84. The *Peralta* Court assumed that the debtor would have lost on the merits. It nonetheless called the creditor's argument "untenable," and stated, "[f]ailure to give notice violates 'the most rudimentary demands of due process of law.'" *Id.* at 84 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965)). The Court reversed the state-court orders affirming entry of default against the debtor. *See id.* at 87.

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deprived of notice and an opportunity to be heard, so it could not be bound by the bankruptcy court's prior orders. Indeed, this is precisely how lower courts, other than the Bankruptcy Court here, have interpreted the *Manville IV* decision. *See, e.g.*, *In re Johns-Manville Corp.*, 534 B.R. 553, 561 (Bankr. S.D.N.Y. 2015) (interpreting *Manville IV* as holding that "the Second Circuit held that at least one objecting party … was not bound by the 1986 Orders because it had not received constitutionally sufficient notice of the proceedings"). The *Manville IV* decision also cuts against the Bankruptcy Court's justification for elevating the parties' expectations in finality above due process concerns. *See* Opinion, 529 B.R. at 564. *Manville IV* concerned a bankruptcy proceeding whose "magnitude and complexity … are unparalleled." *Manville IV*, 600 F.3d at 138. Nonetheless, this Court held that due process is critical, and the parties' expectations, even in a complex commercial arrangement, are not sufficient to usurp that bedrock right. *Id.*

In and outside of the bankruptcy context, it is a bedrock principle that the lack of notice and an opportunity to be heard constitutes a due process injury, even when the outcome would have been the same. *See, e.g.*, *USX Corp. v. Champlin*, 992 F.2d 1380, 1384-85 (5th Cir. 1993) (holding that lienholder's due process rights were violated even if adequate notice would likely not have affected outcome of foreclosure sale). *See also N.J. Div. of Youth & Family Servs. v. R.D.*, 23 A.3d 352, 370-72 (N.J. 2011).

A complete deprivation of notice and opportunity to be heard is *per se* prejudice. *See, e.g.*, *Lane Hollow Coal Co.*, 137 F.3d at 806 ("[T]here must be a *process* of some kind; a just result is not enough."); *see also Republic Nat'l Bank v. Crippen*, 224 F.2d 565, 566 (5th Cir. 1955) (reversing bankruptcy court denial of fees—without notice or opportunity to object—to creditor class and observing that denial of notice and an opportunity to be heard is "***never*** harmless error") (emphasis added).

Notably, this precept holds even when others with the same claims as the person who was deprived of notice are given proper notice. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469-72 (2000) (where individual owner of a one-person corporation was determined to be eligible for suit in his individual capacity, the failure to provide him notice and an opportunity to defend was not harmless error

even when individual and corporate party purportedly had the same claims and defenses).

In reaching its determination that prejudice must be shown before a remedy for a due process violation is warranted, the Bankruptcy Court relied on ten cases, eight from outside the Second Circuit, each of which contain the generalized statement that "a party who claims to be aggrieved by a violation of procedural due process must show prejudice."[8] However, these cases neither refute the authority set forth above nor establish that Plaintiffs must prove anything beyond the complete deprivation of notice and an opportunity to be heard to prevail on their due process claim.

Most of the cases relied on by the Bankruptcy Court stand for the unremarkable proposition that if a party is provided with ***some*** notice, and the party has an ***actual*** opportunity to be heard, it has not suffered a due process violation unless the procedural imperfections caused actual prejudice.[9] In the

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[8] Opinion, 529 B.R. at 560 & n.162 (quoting *Perry v. Blum*, 629 F.3d 1, 17 (1st Cir. 2010)).

[9] *See In re Parcel Consultants, Inc.*, 58 F. App'x 946, 950-51 (3d Cir. 2003) (party claimed it was denied due process when district court did not permit briefing, but party was permitted full briefing and argument on appeal); *Rapp v. U.S. Dep't of Treasury, Office of Thrift Supervision*, 52 F.3d 1510, 1519-20 (10th Cir. 1995) (party received notice of regulatory violations, appeared at hearing to defend, but claimed notice was not sufficiently clear); *Cedar Bluff Broad., Inc. v.*

principal case cited by the Bankruptcy Court, *Perry v. Blum*, 629 F.3d 1 (1st Cir. 2010), the complaining parties had actual notice of the proceedings, were named parties and testified. *Id.* at 16-17. The complainants' argument was not that they had been completely deprived of notice and an opportunity to be heard, but rather that they were not joined as parties to the suit at an earlier time. *Id.* at 17. In none of the cases relied on by the Bankruptcy Court was the complaining party denied all notice and opportunity to be heard. In each case, the party had an opportunity to participate in the proceedings and argue the substantive issues present before the adjudicating body. The ISPs received no such process.

Rasnake, 940 F.2d 651 (4th Cir. 1991) (although all parties did not have notice that a chapter 11 confirmation hearing would also entertain other motions, all interested parties participated in the hearing and had an opportunity to present argument); *Brock v. Dow Chem. U.S.A.*, 801 F.2d 926, 928-30 (7th Cir. 1986) (defendant received notice of OSHA violations and had opportunity to be heard before ALJ, but claimed the notice lacked sufficient specificity); *Savina Home Indus., Inc. v. Secretary of Labor*, 594 F.2d 1358, 1365-66 (10th Cir. 1979) (defendant received notice of OSHA violations and had opportunity to be heard but claimed notice was deficient because it contained wrong docket number and Secretary did not serve defendant with copies of standards violated); *In re Caldor, Inc.*, 240 B.R. 180, 188 (Bankr. S.D.N.Y. 1999) (objector not given notice but provided full opportunity to present its arguments during course of hearing), *aff'd sub nom. Pearl-Phil GMT (Far E.) Ltd. v. Caldor*, 266 B.R. 575, 583-84 (S.D.N.Y. 2001); *In re Gen. Dev. Corp.*, 165 B.R. 685, 688-89 (S.D. Fla. 1994) (party was initially denied notice and an opportunity to be heard, but court vacated order to allow parties who did not receive notice to participate during a rehearing). One of the ten cases relied upon by the Bankruptcy Court did not even involve a due process claim. *See In re New Concept Housing, Inc.*, 951 F.2d at 937 n.7 (finding no due process claim where party had no property interest and thus no constitutional entitlement to notice).

B. The Bankruptcy Court erred in holding that the ISPs failed to demonstrate prejudice in connection with the entry and/or enforcement of the Sale Order where no one knew of the fraudulent concealment of the Ignition Switch Defect at the time of the Sale.

The Bankruptcy Court erroneously concluded that the ISPs "were not prejudiced" with respect to successor liability on the sole basis that other creditors received notice and an opportunity to be heard, and those creditors made all of the arguments and raised all of the objections that the ISPs could have raised. Opinion, 529 B.R. at 568. The Bankruptcy Court reasoned that the ISPs "offer[ed] no legally based arguments as to why they would have, or even ***could have***, succeeded on the successor liability legal argument when all of the other objectors failed." *Id.* at 567 (emphasis in original). The Bankruptcy Court's conclusion is wrong in several respects.

The participation of other known creditors does not supply due process, nor does it afford preclusive effect. Preclusion of the ISPs' claims was constitutionally permissible only through their inclusion in the proceedings, through service of process or notice calculated to fairly inform them of the matters that were instead concealed. *See Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940). The law does not countenance preclusion by proxy.

Without notice and an opportunity to be heard, no one can be bound by decisions made in their absence. "Nor without more, and with the due regard for

the protection of the rights of absent parties which due process exacts, can some be permitted to stand in judgment for all." *Id.* at 44. Class actions afford preclusion by representation, but only upon a showing of "best practicable" notice (usually with a right to opt-out), and a determination that the representative parties' interests fully align with those of the absent members. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Nothing remotely approaching these indispensable requisites occurred here. The Supreme Court has put it bluntly:

> Some litigants-those who never appeared in a prior action-may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence or arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

Blonder-Tongue Labs., Inc. v. University of Illinois Found., 402 U.S. 313, 329 (1971).

The Bankruptcy Court therefore committed legal error when it concluded that the failure to afford the ISPs notice and an opportunity to be heard was somehow cured by the appearance of consumer groups and certain creditors. Opinion, 529 B.R. at 567. The simple fact is that none of the parties arguing against a successor liability ban raised or could have raised issues of intentional

concealment of the deadly Ignition Switch Defect. According to the Bankruptcy Court, "*Mullane* recognizes that where notice is imperfect, the ability of others to argue the point would preclude the prejudice that might result if none could."[10] This reading of *Mullane* is unsound. The *Mullane* decision had nothing to do with prejudice; it was a case wholly concerned with the adequacy of notice. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 307 (1950).

Though the trust beneficiaries in *Mullane* were not personally served, they were deemed to have received constitutionally sufficient notice given the role played by their trustee. *Id.* at 318-19. *Mullane* does not stand for the proposition that notice may be denied to some parties so long as someone with similar interests is capable of being heard. Rather, *Mullane* holds that in certain scenarios, noticing a trustee on behalf of its beneficiaries may be constitutionally sufficient. *See id.*

Here, creditors and consumer groups that appeared at the Sale Hearing had no obligation or authority to speak for the ISPs. Moreover, none of them could have made the arguments advanced below by the Plaintiffs in opposition to the enforcement of the Sale Order because none of them knew that Old GM and then New GM were unlawfully concealing the fact that GM cars were dangerously defective.

[10] Opinion, 529 B.R. at 566.

The ISPs, equipped with an unprecedented set of facts and saddled with millions of vehicles containing life-threatening defects, surely ***would have*** confronted the Bankruptcy Court, Old GM and the U.S. Treasury with highly unique circumstances that demanded a specifically-tailored response.[11] Indeed, the Bankruptcy Court based its no prejudice determination on its speculative hindsight only on what ***it*** might have done, Opinion, 529 B.R. at 567, ignoring that there were other significant actors—Plaintiffs, Old GM, Treasury, the political branches (Congress and the White House), the press and public opinion—whose reactions and actions would have impacted the issue of whether the ISPs' claims would be barred by the Sale Order. That these actors would have acted is clear from the uproar that ensued among the public, in the halls of elected government and in the courts when New GM finally disclosed the Ignition Switch Defect in 2014. *See supra* at 6.

[11] Requiring parties to show prejudice, even after their right to notice and an opportunity to be heard has been denied, invites this sort of speculation. This is yet another reason why a complete deprivation of notice and an opportunity to be heard does not require a litigant to show prejudice—to do so is to speculate. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999) (finding that a 16-year delay in providing notice of a claim stripped the claimant of a full and fair opportunity to defend itself and refusing to speculate on whether the claimant would have been successful on the merits).

Finally, as the ISPs argued below, multiple outcomes may have resulted had Old GM disclosed the Ignition Switch Defect prior to the Sale Hearing.[12] The outcome was not limited to (i) extinguishment of Plaintiffs' claims, or (ii) liquidation of Old GM. Treasury may well have conceded, or the Court may have imposed, ***some*** modification to the Sale Order as a prerequisite for effectuating the Sale. Under the circumstances, a real-time recall should have occurred. And, of course, there is no reason a recall should not have happened five years before it did, particularly given the express finding by the Bankruptcy Court (based on, among other things, a "critical mass" of Old GM personnel knowing about the Ignition Switch Defect at the time of the Sale) that, as of the Sale Hearing in 2009:

> Old GM had enough knowledge of the Ignition Switch Defect to be required, under Safety Act, to send out mailed recall notices to owners of affected Old GM vehicles.[13]

The Bankruptcy Court offers no justification for ignoring the harms to the ISPs. The economic losses (in the form of diminution of value as well as out-of-pocket costs) caused by the delayed vehicle recall—a recall that Old GM should

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[12] *See* Designated Counsel's Opposition to New GM's Motions For Enforcement of Sale Order and Injunction, No. 09-50026-reg, Dkt. No. 13025 at 59 (Dec. 16, 2014) (arguing that Old GM and Treasury may have "chosen to deal with objections from Plaintiffs in the same way it chose to deal with objections from consumer safety groups, by adding Plaintiffs' claims to assumed liabilities").

[13] Opinion, 529 B.R. at 557-558 n.154.

have, as a matter of fact, initiated before 2009—squarely constitute prejudice under any analysis.

C. In enforcing the Sale Order, the Bankruptcy Court erred by failing to take into account the concealment of the Ignition Switch Defect by both Old and New GM and the resulting prejudice to Plaintiffs.

In enforcing the Sale Order's successor liability bar against the ISPs, the Bankruptcy Court erred by failing to take into account facts now known. Unlike at the time of the Sale in 2009, by 2014 when New GM sought to enforce the Sale Order's successor liability bar, it was accepted and widespread knowledge that Old GM had illegally concealed the Ignition Switch Defect and New GM did the same for five additional years.

As a consequence, when evaluating the propriety of enforcing the Sale Order's bar on successor liability claims, the Bankruptcy Court was required to evaluate the conduct of the seller Old GM and the purchaser New GM—with the true facts revealed. Under that lens, prejudice to ISPs is vividly demonstrated. The record shows that Old GM knew of the Ignition Switch Defect and unlawfully concealed it to evade liability. *See supra* Section III. New GM did the same. *See id.* Based on that record, the successor liability bar in the Sale Order may have been denied or materially scaled back and enforcement of the successor liability bar against the ISPs as it stands is entirely improper. *See Call Ctr. Techs., Inc. v.*

Grand Adventures Tour, 635 F.3d 48, 52 (2d Cir. 2011); *In re Savage Indus., Inc.*, 43 F.3d 714, 719 (1st Cir. 1994). It strains belief to imagine that had it been known that two million Old GM cars were on the road with a known, but hidden, life-threatening safety defect, there would have been no change to the Sale Order. Instead, it is more than likely that had Old GM made proper disclosures, the Sale Order would not have included Free and Clear Provisions regarding the Ignition Switch Defect. At a minimum, entry of the Sale Order may have been conditioned on either New GM's assumption of ignition switch liabilities or a materially increased contribution to the GUC Trust. Furthermore, New GM's unlawful concealment of the Ignition Switch Defect should have precluded enforcement of the Sale Order or necessitated revocation or modification of the Sale Order's "good faith purchaser" finding. *See, e.g.*, *In re Gucci*, 126 F.3d 380, 389 (2d Cir. 1997); *In re Engels*, 536 B.R. 529, 536 (Bankr. N.D.N.Y. 2015).[14]

[14] When it is discovered that a bankruptcy sale was tainted by unlawful conduct, or that the purchaser was otherwise not acting in good faith, a bankruptcy court is empowered to "fashion[] [a] remed[y] based upon the unique factual matrices" present in a given case. *In re Polycel Liquidation, Inc.*, 2006 WL 4452982, at *11 (Bankr. D.N.J. Apr. 18, 2006), *aff'd*, 2007 WL 77336 (D.N.J. Jan. 8, 2007). (internal quotations and citations omitted). The bankruptcy court may, for example, decline to enter a sale order or to enforce any bar on successor liability. *See In re Global Energies, LLC*, 763 F.3d 1341, 1350 (11th Cir. 2014).

Furthermore, the Bankruptcy Court committed error by failing to consider the record that conclusively shows that New GM inherited the same operative management charged with the same responsibilities for safety and knowledge of the Ignition Switch Defect that beset Old GM. Opinion, 529 B.R. at 538. That knowledge may be imputed to New GM starting with the first day of its existence.[15] The facts known to the Bankruptcy Court as of New GM's Motion to Enforce indisputably prove that New GM inherited the bad motives and intent to conceal the Ignition Switch Defect that Old GM spawned. In other words, at the precise moment the Sale closed, the knowledge and intent of Old GM became the knowledge and intent of New GM (*i.e.*, the knowledge of at least 24 Old GM employees of the Ignition Switch Defect and the books and records identifying the defect were transferred and may be imputed to New GM) and the propriety of the Sale Order's successor liability bar must be evaluated in that context. *See Bangor Punta Operations, Inc. v. Bangor & A. R. Co.*, 417 U.S. 703, 713 (1974) (fiction of corporate separateness "may be disregarded in the interests of justice where it is used to defeat an overriding public policy"); *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int'l, Inc.*, 2 F.3d 24, 26 (2d Cir. 1993) (courts may ignore fiction of

[15] *See In re Motors Liquidation Co.*, 2015 Bankr. LEXIS 3836, at *28 (Bankr. S.D.N.Y. Nov. 9, 2015) ("New GM's knowledge may be imputed to it starting with its first day of existence.").

corporate separateness, *inter alia*, "to prevent fraud or other wrong"). That the Bankruptcy Court failed to do so was an abuse of discretion.

Old and New GM's concealment of the Ignition Switch Defect, taken together with Old GM's failure to provide the Plaintiffs with adequate notice of the Sale, foreclosed the Plaintiffs from making unique arguments against the Sale Order's successor liability bar (or the scope thereof). In ignoring Plaintiffs' allegations of improper concealment and instead concluding that Plaintiffs could not have made an argument that would have affected the successor liability bar, the Bankruptcy Court abused its discretion.

D. Consistent with the Due Process clause and the Bankruptcy Code, the Sale Order cannot be enforced against Used Car Purchasers who did not own their Old GM vehicles at the time of the Sale.

The claims of the post-Sale purchasers of Old GM vehicles (the "Used Car Purchasers") did not exist at the time of the Sale Hearing. The Used Car Purchasers were neither known nor ascertainable, and their eventual claims did not exist. Accordingly, the Used Car Purchasers were "future claimants." *See In re Grumman Olson Indus.*, 467 B.R. 694, 703 (Bankr. S.D.N.Y. 2012) (future claimants are holders of "a claim against a purchaser that is based on pre-bankruptcy conduct of the debtor that did not cause any harm to an identifiable claimant until after the bankruptcy closed"). Because the Used Car Purchasers'

claims had not arisen at the time of the Sale, neither due process nor the Bankruptcy Code permits the enforcement of the Sale Order against them.

Because future claimants cannot possibly be provided notice of a bankruptcy, "for due process reasons, their claims cannot be discharged" by an order of a bankruptcy court. *Grumman*, 467 B.R. at 707; *see also id*. at 704-05 ("Generally, courts have held that future claims cannot be considered 'claims' that are dealt with and discharged.") (collecting cases in support of same).

Grumman is directly on point. There, the bankruptcy court order approving a sale included an injunction against tort claims brought against the purchaser based on allegedly defective products manufactured and sold by the debtor prior to the sale, including any claims based on a successor liability theory. *Id.* at 697. Post-sale, the plaintiff was injured while driving a truck with the debtor's defective product parts, and brought personal injury claims based on theories of state law successor liability against the purchaser.

The district court found that the sale order could not be enforced to enjoin plaintiff's claims, reasoning that enforcing such an injunction against the plaintiff, whose identity was unknown and unknowable at the time of the sale, would violate both the Bankruptcy Code and due process. *Id.* at 696; *see also Koepp v. Holland*, 593 F. App'x 20, 23 (2d Cir. 2014) ("Bankruptcy courts cannot extinguish the

interests of parties who lacked notice of or did not participate in the proceedings."); *In re Chateaugay Corp.*, 944 F.2d 997, 1003 (2d Cir. 1991) (analyzing appropriate notice to be given to claimants who are not only unidentified, but unidentifiable, and noting that "[t]o expect 'claims' to be filed by those who have not yet had any contact whatever with the tort-feasor has been characterized as 'absurd'") (citations omitted). So too here. There was no way Old GM could have provided Used Car Purchasers with constitutionally adequate notice of the Sale Hearing and, therefore, the Sale Order cannot be enforced to bar their state law successor liability claims against New GM.

Enjoining the claims of the Used Car Purchasers is also inconsistent with Section 363(f) of the Bankruptcy Code, which authorizes an order selling property "free and clear ***of any interest***" of any third party (emphasis added). Accordingly, "free and clear" provisions of a sale order can only impact persons who have some "interest" at the time of the sale order; or, as the *Grumman* court put it, a sale order can only extinguish a cause of action that "fall[s] under the definition of 'claim' under the Bankruptcy Code.'" 467 B.R. at 704. A "claim" is defined as "a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(5)(A). Even under this broad definition of

"claim," it simply cannot be said that the Used Car Purchasers had claims of any sort as of the date of the Sale Hearing—before they ever owned their vehicles. *See Chateauguay*, 944 F.2d at 1003-05 (there is only a contingent "claim" under the Bankruptcy Code when the claimant has a pre-petition relationship with the debtor ***and*** the cause of action was "within the actual or presumed contemplation" of the claimant and the debtor at the time of the petition). The Bankruptcy Code simply does not provide the authority to enjoin the Used Car Purchasers' claims.

The Bankruptcy Court agreed that applying the "Free and Clear Provisions" of the Sale Order to bar the Used Car Purchasers' claims was a violation of their due process rights. *See* Opinion, 529 B.R. at 571. As discussed *supra* at Section VI.A., the remedy for this due process violation is that the Used Car Purchasers are not bound by the Sale Order and may proceed with their claims. *Grumman*, 467 B.R. 694. But the Bankruptcy Court backtracked, and found that due process does not "give Used Car Plaintiffs a do-over" to make "arguments they might have made" at the time of the Sale. Opinion, 529 B.R. at 571. However, the Used Car Purchasers by definition could not have "done" anything at the time of Sale. The arguments they now wish to make (and that due process entitles them to make) concern the wrongdoing of Old and New GM, and their resultant harm.

The Bankruptcy Court also erred in cutting off the claims of Used Car Purchasers because they purportedly sought "greater rights" than the original owners of their vehicles. Opinion, 529 B.R. at 571-72. Not so. In fact, unlike the people who sold their Old GM vehicles before the fraud was revealed, the Used Car Purchasers have economic loss injuries relating to diminution of value and are entitled to remedies. The Bankruptcy Court cited no relevant authority for the proposition that the rights of future claimants (such as the Used Car Purchasers) can permissibly be defined or circumscribed by claimants existing at the time of a § 363 sale.

The theory adopted by the Bankruptcy Court—that Used Car Purchasers are bound by the Free and Clear Provisions as the "successors-in-interest" to the original owners—cannot apply on the facts of this case. While the Bankruptcy Court quoted *In re Flanagan*, 415 B.R. 29, 42 (D. Conn. 2009), for the proposition that the acquiror from a trustee could "only prevail on its claims if, and to the extent that, the Trustee would have prevailed on those claims at the time of the assignment," the Used Car Purchasers' claims simply did not exist prior to the time they purchased their cars. In any event, *Flanagan* is inapposite, as it applied the wholly distinct rule that a trustee acting pursuant to 11 U.S.C. § 541 is subject to all of the same defenses as the debtor pre-bankruptcy and held that the trustee's §

541 claims to recover assets was barred by *in pari delicto*. *Flanagan*, 415 B.R. at 33-34. To the same effect is *In re Magnesium Corp. of Am.*, 399 B.R. 722, 757-58 (Bankr. S.D.N.Y. 2009) (Gerber, J.) (dismissing Trustee's § 541 claims against third parties on *in pari delicto* grounds because "the trustee stands in the shoes of the debtor and can only assert those causes of action possessed by the debtor"). The other authority relied on by the Bankruptcy Court, *In re KB Toys, Inc.*, 736 F.3d 247, 251-52 (3d Cir. 2013), is also off-point. *KB Toys* merely applied 11 U.S.C. § 502(d), which disallows "any claim of any entity" who received an avoidable transfer. *Id.* Because the transferor had a claim it knew to be disallowed, creating an incentive to sell bad claims was plainly contrary to the wording and purpose of 11 U.S.C. § 502(d). *See KB Toys*, 736 F.3d at 252. And, unlike here, there were no due process concerns at issue; indeed, the purchasers of the bad claims were on notice of the risks of purchasing a claim in bankruptcy, and could easily have learned the claims were avoidable by reading the debtors' publically available filings. *Id.* at 254-55.[16]

[16] The Bankruptcy Court erred in relying on *In re Old Carco LLC*, 492 B.R. 392, 403 (Bankr. S.D.N.Y. 2013) ("*Burton*"), for the proposition that the Used Car Purchasers' claims were properly expunged by the Sale Order since "their predecessor (the previous owners of the vehicles) had a pre-petition relationship with [the debtor-manufacturer], and the design flaws that they now point to existed pre-petition." Opinion, 529 B.R. at 571. But in *Burton*, the plaintiffs and their predecessors had knowledge of the design defects at issue given that a recall had

Finally, contrary to the Bankruptcy Court's ruling, the Used Car Purchasers do not "assert that they have special rights—to assert claims for successor liability when nobody else can.…" Opinion, 529 B.R. at 570. Rather, as discussed above, the Pre-Sale Purchasers who still own their cars should also be permitted to bring successor liability claims despite the Sale Order because their due process rights were violated.

E. The Bankruptcy Court erred by finding that the Sale Order bars any Plaintiff's direct claims arising exclusively from New GM's violations of its own independent legal duties.

The Bankruptcy Court found that, ***only*** as a remedy for the violation of the ISPs' due process rights, could the ISPs assert "Independent Claims," defined in the Judgment as "claims or causes of action asserted by the ISPs against New GM (whether or not involving Old GM vehicles or parts) that are based solely on New GM's own, independent, post-Closing acts or conduct." SPA-254, ¶ 4. Inexplicably, however, the Bankruptcy Court held that Plaintiffs who purchased Old GM cars ***without*** the Ignition Switch Defect cannot bring Independent Claims unless they prove due process violations. *See* Judgment, SPA-254, ¶ 4; Form of Judgment Decision, 531 B.R. at 360 (Under the Opinion and Judgment, Old GM

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occurred. 492 B.R. at 403. In stark contrast, neither the Used Car Purchasers nor their predecessors were aware of the Ignition Switch Defect given Old and New GM's intentional cover-up.

car purchasers cannot bring Independent Claims unless they show "that they were known claimants at the time of the 363 Sale, and that there was any kind of a due process violation with respect to them."). This was plain error.

Assuming that the Sale Order was even intended to bar claims against New GM for its own conduct, such an injunction would extend beyond the jurisdiction of the Bankruptcy Court. Subject matter jurisdiction in a bankruptcy proceeding over third-party claims (such as the Plaintiffs' Independent Claims) can extend only to actions affecting the *res* of the bankruptcy estate. *In re Johns-Manville Corp.*, 517 F.3d 52, 66-68 (2d Cir. 2008) (holding that, despite a "common nucleus of operative facts involving" the debtor and the insurer, bankruptcy order enjoining third-party claims against insurers predicated on insurer's independent misconduct were unrelated to *res* of the estate and outside the scope of the bankruptcy court's injunction power); s*ee also In re Quigley Co., Inc.*, 676 F.3d 45, 61-62 (2d Cir. 2012) (bankruptcy court lacks jurisdiction to enjoin a claim against a third party where such claim would not have an effect on the *res* of the bankruptcy estate).

While a bankruptcy court assuredly has jurisdiction to interpret and enforce its own orders, that ancillary jurisdiction exists only to the extent that the court has the jurisdiction to enter the order itself. *See Zerand-Bernal Grp. v. Cox*, 23 F.3d 159, 164 (7th Cir. 1994) (affirming the bankruptcy court's holding that it "lacked

jurisdiction" to enjoin a post-363 sale claim against a non-debtor: "[T]he fact that the bankruptcy court, in the order approving the bankruptcy sale and later in the plan of reorganization, purported expressly to assume jurisdiction … could not confer jurisdiction. A court cannot write its own jurisdictional ticket."); *see also In re Johns-Manville Corp.*, 517 F.3d at 65 n.22 ("The ancillary jurisdiction courts possess to enforce their own orders 'is itself limited by the jurisdictional limits of the order sought to be enforced.'").

The Bankruptcy Court did not have subject matter jurisdiction to protect the non-debtor New GM by limiting the rights of any Plaintiffs to bring suit against New GM for New GM's own post-Sale misconduct in breach of New GM's own independent legal duties. Subject matter jurisdiction of bankruptcy courts is limited to "civil proceedings arising under Title 11, or arising in or related to cases under Title 11." 28 U.S.C. § 1334(b). Because Plaintiffs' Independent Claims are based solely on the non-debtor New GM's post-Sale conduct, the claims cannot be said to "arise in" or "under" Title 11. *See Zerand-Bernal Grp.*, 23 F.3d at 162 ("arising under" jurisdiction "is limited to questions that arise during the bankruptcy proceeding and concern the administration of the bankrupt estate, such as whether to discharge a debtor"). And Plaintiffs' claims are not "related to" Title 11, since the outcome of the Plaintiffs' action can have no conceivable effect on

the bankrupt estate. *See In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir. 1992); *see also In re Quigley Co., Inc.*, 676 F.3d at 61-62 (bankruptcy court lacks jurisdiction to enjoin a claim against a third party where such claim would not have an effect on the *res* of the bankruptcy estate).

This Court should reject any argument that New GM should get immunity for its own post-Sale misconduct because immunity for the non-debtor increases the value of the estate. That a broad injunction against future claims against a purchaser might result in a buyer paying a higher price for assets in a 363 transaction is pure speculation, and in any event cannot confer jurisdiction over future claims against the purchaser arising from its independent misconduct. *See Zerand-Bernal Grp.*, 23 F.3d at 164 (rejecting the argument that bankruptcy courts may immunize a purchaser from state or federal law in the interests of increasing the value of a debtor's assets). As the *Zerand-Bernal Grp.* court reasoned, the argument that "the price received in a bankruptcy sale will be lower if a court is free to disregard a condition in the sale agreement enjoining claims against the purchaser based on the seller's misconduct" should be rejected because it "proves too much":

> It implies, what no one believes, that by virtue of the arising-under jurisdiction a bankruptcy court enjoys a blanket power to enjoin all future lawsuits against a buyer at a bankruptcy sale in order to maximize the sale

> price; more, that the court could in effect immunize such buyers from all state and federal laws that might reduce the value of the assets bought from the bankrupt[.][17]

There is no sound reason to encourage non-debtors to pay a purchase price in a 363 transaction that reflects a belief that they are forever immunized from liability for breaches of their ***own*** independent legal duties.

Thus, as this Court reiterated in *Manville IV*, 600 F.3d at 153, bankruptcy courts do not have jurisdiction to enjoin "claims against non-debtor third parties" where those claims are based on the non-derivative misconduct of the non-debtor and the claims do not impact the bankruptcy estate. *See also In re 1031 Tax Grp., LLC*, 2011 U.S. Dist. LEXIS 33755, at *7 (S.D.N.Y. Mar. 29, 2011) ("federal courts are without jurisdiction to enjoin actions against third-parties not in bankruptcy when those actions are premised upon an 'independent legal duty'"). Here, Plaintiffs' claims are based on New GM's fraudulent concealment of the scores of defects plaguing GM-branded vehicles; New GM's culture, which systematically devalued safety; and New GM's misrepresentations concerning the safety and reliability of GM vehicles—all in violation of New GM's independent legal duties to refrain from unfair and deceptive trade practices. *See* A-6347-7735. A bankruptcy court simply does not have jurisdiction to enjoin such claims.

[17] *Zerand-Bernal Grp.*, 23 F.3d at 163.

Accordingly, the Sale Order may not be read to bar ***any*** Plaintiff's' Independent Claims—and no Plaintiff need prove up a due process violation as a pre-requisite for bringing those claims.

F. The Bankruptcy Court erred in applying the doctrine of equitable mootness to preclude recovery on Plaintiffs' claims.

1. The Bankruptcy Court erred by finding equitable mootness applicable to Plaintiffs' claims.

Separate and distinct from Plaintiffs' claims against New GM, the Bankruptcy Court reviewed Plaintiffs' recovery potential on any claims they may have against the Old GM bankruptcy estate/GUC Trust. The Bankruptcy Court correctly found that Plaintiffs were prejudiced by the failure to receive constitutionally adequate notice of the Bar Date. *See* Opinion, 529 B.R. at 574. Likewise, it correctly found the appropriate remedy was to allow the Plaintiffs to seek to file late claims against the GUC Trust. *See id.* at 583. However, the Bankruptcy Court then erred by finding that, based on the doctrine of equitable mootness, in no event shall assets of the GUC Trust held at any time in the past, now, or in the future be used to satisfy any subsequently allowed claims of the Plaintiffs. *See id.* at 584, 598. The Opinion precludes Plaintiffs from obtaining any recovery from the Old GM estate and, therefore, the filing of late claims would be a fruitless endeavor. By applying equitable mootness as a complete block to

recovery on any allowed claims the Plaintiffs may be entitled to, the Bankruptcy Court abused its discretion.

Equitable mootness is a judge-made doctrine without constitutional footing. *See In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143 (2d Cir. 2005). It is increasingly disfavored among the Circuits. *See, e.g.*, *In re One2One Commc'ns, LLC*, No. 13-3410, 2015 WL 4430302, at *7 (3d Cir. July 21, 2015) (Krause, J. concurring) (urging the Third Circuit to consider eliminating, or at the very least reforming, equitable mootness). Courts across the country identify it as an "exception" to their responsibility to exercise their jurisdictional mandate that must be used sparingly and construed narrowly. *See, e.g.*, *In re One2One Commc'ns, LLC*, 2015 WL 4430302, at *3-4.[18] It must be applied, if at all, with a scalpel rather than an axe. *See In re Charter Commc'ns, Inc.*, 691 F.3d 476, 482 (2d Cir. 2012).

The doctrine originated to prevent chaos if the requested relief would eviscerate a complex and fully consummated bankruptcy plan of reorganization. *See In re Chateaugay Corp.*, 10 F.3d 944, 952-53 (2d Cir. 1993); *see also In re Metromedia Fiber Network, Inc.*, 416 F.3d at 144. The doctrine was not developed

[18] *Cf. Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 132 S. Ct. 1377, 1386 (2014) (disapproving of abstention doctrines as in tension with the federal courts' obligation to hear and decide cases).

as a complete bar to bankruptcy claims recoveries and has never been employed to thwart a creditor whose due process rights were violated. Indeed, there is no support to expand the disfavored doctrine to bankruptcy claims adjudication, particularly where a creditor has been deprived of due process.[19] Because any other conclusion would amount to an abuse of discretion, this Court should reverse the Opinion and remand to the Bankruptcy Court for adjudication of any late-filed claims by Plaintiffs. If such claims are allowed, the Bankruptcy Court can and should craft appropriate relief that balances the rights of Plaintiffs and the reasonable expectations of GUC Trust beneficiaries.

2. The Bankruptcy Court erred by finding that Plaintiffs cannot satisfy three of the *Chateaugay* factors.

Consideration of the prudential *Chateaugay* factors also demonstrates that the Bankruptcy Court abused its discretion. *See In re Chateaugay Corp.*, 10 F.3d

[19] None of the cases cited by the Bankruptcy Court in support of its equitable mootness holding involved due process violations. All the cases cited by the Bankruptcy Court involve situations where the appellant either appeared in the proceedings or was provided adequate notice. Given that Plaintiffs were denied due process, the application of equitable mootness is itself inequitable and constitutes an abuse of discretion. *See In re Polycel Liquidation, Inc.*, 2007 WL 77336, at *2-8 (D.N.J. Jan. 8, 2007) (affirming bankruptcy court's determination that equitable and statutory mootness did not require dismissal of Rule 60(b)(4) motion for relief from sale order where appellant had no notice of the sale motion); *In re Motors Liquidation Co.*, 428 B.R. 43, 57 n.18 (Bankr. S.D.N.Y. 2010) (noting in *dicta* that "due process concerns render[] mootness and *res judicata* doctrines inapplicable").

at 952-53. Plaintiffs meet all five *Chateaugay* factors and the Bankruptcy Court erred by holding that Plaintiffs cannot satisfy three of the five factors. *See* Opinion, 529 B.R. at 592.[20]

Without adequate notice to the ISPs, Old GM's chapter 11 plan of liquidation was confirmed; the Plan provided equal treatment for allowed claims of the same priority. A-3890-3985. Years later, a Late Claims Order was entered to efficiently manage the influx of late claims. A-4809-10. The Late Claims Order expressly stated that nothing in the order shall prevent any claimant from seeking to have its late claim deemed timely filed. A-4810.

Likewise, the Plan, Confirmation Order and GUC Trust Agreement do not prohibit or prejudice late-filed claims. A late proof of claim may be subsequently adjudicated as an Allowed General Unsecured Claim. *See* Plan § 1.79, A-3914. Indeed, both before and after the Plan Effective Date, late proofs of claim against

[20] These five factors are: (i) the court can still order some effective relief; (ii) such relief will not affect "the re-emergence of the debtor as a revitalized corporate entity"; (iii) such relief will not unravel intricate transactions so as to "knock the props out from under the authorization for every transaction that has taken place" and "create an unmanageable, uncontrollable situation for the Bankruptcy Court"; (iv) the "parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings;" and (v) the appellant "pursue[d] with diligence all available remedies to obtain a stay of execution of the objectionable order … if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from." *In re Chateaugay Corp.*, 10 F.3d at 952-53.

the Old GM estate were deemed timely filed, and subsequently allowed. *See* Opinion, 529 B.R. at 537. Those creditors received equal treatment under the Plan as all other Allowed General Unsecured Creditors. *See* Plan § 4.3, A-3928.

Both before and after consummation of the Plan, sophisticated investors bought and sold claims against Old GM and GUC Trust Units. They were keenly aware of the prospects of late-filed claims and dilution of recoveries. Unitholders were aware that supplemental distributions to them were only appropriate under Section 6.2(*l*) of the Plan "to the extent there are sufficient assets available for distribution," and then at the "appropriate amount." *See* Plan § 6.2(*l*), A-3948. Further, it was common market knowledge that under the GUC Trust Agreement, the GUC Trust Administrator is required to consider previously unknown potential Allowed General Unsecured Claims when assessing whether distributions to Unitholders should be made. *See* GUC Trust Agreement § 5.4(d), A-4583.

Against this backdrop, Plaintiffs' potential distributions would ordinarily be a function of past, present and future GUC Trust Assets. As of the Opinion, the Old GM estate and the GUC Trust had distributed GUC Trust Assets valued at approximately $9 billion[21] (the "Past GUC Trust Assets") to Allowed General

[21] By March 31, 2015, the GUC Trust distributed 137,330,625 shares of New GM common stock, 124,846,071 Series A warrants, 124,846,071 Series B warrants and $3,354,600 in cash on behalf of resolved allowed general unsecured claims

Unsecured Creditors and Unitholders holding aggregate Allowed General Unsecured Claims of approximately $32 billion, for recoveries of roughly 28 cents on the dollar. *See* A-10927-944. As of the Opinion, the GUC Trust held assets not yet distributed worth approximately $945 million (the "Remaining GUC Trust Assets"). A-10930.

Finally, the GUC Trust Assets stand to be augmented upon allowance of Plaintiffs' claims against the GUC Trust through an "Accordion Feature" in the Sale Agreement. *See* Sale Agreement § 3.2(c), A-1699-1700. Under the Accordion Feature, New GM must provide additional consideration in the form of additional shares of stock if the aggregate amount of Allowed General Unsecured Claims exceeds $35 billion. *See id.*[22] If the aggregate value of Allowed General Unsecured Claims reaches $42 billion, New GM would be required to contribute the full value available pursuant to the Accordion Feature, which is 30 million

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and units. *See* A-10931. Valuing the initial distribution based on the price of New GM common stock and warrants at the time of the initial distribution, and the remaining distributions based on the historical average price of New GM common stock and warrants, approximately $9 billion in GUC Trust Assets had been distributed at the time of the Opinion.

[22] As of March 31, 2015, the aggregate value of Allowed General Unsecured Claims is approximately $32 billion. *See* A-1029-42. Based on the claims resolved to date, and the one disputed $20 claim that is still pending, the Allowed General Unsecured Claims will not reach $35 billion without Plaintiffs' claims.

shares of New GM Common Stock, worth approximately $1.029 billion as of market-close on November 13, 2015 (the "Accordion Feature Value").[23]

Without adverse impact on Unitholders, Plaintiffs could receive exclusive access to any Accordion Feature Value. In addition, the Remaining GUC Trust Assets could be earmarked to satisfy Plaintiffs' subsequently allowed claims. Even if the entire balance of the Remaining GUC Trust Assets went to satisfy $10 billion of allowed claims, Plaintiffs would obtain materially less than similarly situated creditors received from the GUC Trust.[24] Finally, Past GUC Trust Assets conceivably could be clawed back and reallocated, especially from known Unitholders.[25] The Bankruptcy Court failed to appropriately consider the above facts and its ability to effectively fashion relief for Plaintiffs. The result was an

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[23] Plaintiffs seek approximately $7-$10 billion in damages. Opinion, 529 B.R. at 521. If claims against the GUC Trust were allowed in that amount, those claims would push the overall amount of Allowed General Unsecured Claims over the $35 billion level and could trigger all or substantially all of the Accordion Feature Value.

[24] Plaintiffs would obtain approximately nine cents on the dollar as compared to a recovery for other similarly situated creditors of approximately 28 cents on the dollar.

[25] Were the Plaintiffs' claims to be allowed at $7 billion, fashioning relief for the Plaintiffs with Accordion Feature Value and Remaining GUC Trust Assets would likely obviate the need to claw-back any distributions of Past GUC Trust Assets. It would closely approximate the equal treatment of similarly situated creditors that is the hallmark of the Bankruptcy Code. *See Begier v. Internal Rev. Serv.*, 496 U.S. 53, 58 (1990).

abuse of discretion, a holding despite clear precedent to the contrary, that Plaintiffs could not meet three of the *Chateaugay* factors. *See* Opinion, 529 B.R. at 592.

a. The Bankruptcy Court misapplied the first *Chateaugay* factor.

The first *Chateaugay* factor looks to whether "at least some effective relief could be granted." *In re Chateaugay Corp.*, 10 F.3d at 954. The Second Circuit has recognized that "[a] claimant should not be out of court on grounds of mootness solely because its injury is too great for the debtor to satisfy in full." *Id.* Contrary to the Bankruptcy Court's holding, it would be neither inequitable nor impossible for the Bankruptcy Court to fashion relief for the Plaintiffs with regard to either the (i) Accordion Feature Value; (ii) Remaining GUC Trust Assets; and/or (iii) Past GUC Trust Assets.

The Opinion's misreading of Plan documents separately warrants reversal. The Plaintiffs may file late proofs of claim. *See* Opinion, 529 B.R. at 598. Those claims may be allowed and Plaintiffs adjudicated as holders of Allowed General Unsecured Claims under the Plan. *See* Plan § 1.79, A-3914. As holders of Allowed General Unsecured Claims, Plaintiffs would be entitled to distributions of GUC Trust Assets in the same percentage as other Allowed General Unsecured Creditors under the Plan and Bankruptcy Code. *See* Plan § 4.3, A-3928-29; 11 U.S.C. § 726. Accordingly, relief can be afforded to Plaintiffs against GUC Trust

Assets without modifying the Confirmation Order or unraveling the Plan. Therefore, Plaintiffs meet the first *Chateaugay* factor.

b. The Bankruptcy Court misapplied the third *Chateaugay* factor.

The Third *Chateaugay* factor asks whether the relief would inequitably impact third parties. *See In re Chateaugay Corp.*, 10 F.3d at 953. In an abuse of discretion, the Bankruptcy Court found that granting Plaintiffs relief would "knock the props out" from the transactions under which Units were acquired. *See* Opinion, 529 B.R. at 587-88. Because there is no support for this conclusion it requires reversal.

The Bankruptcy Court found that purchasers of Units based their expectations on the then-known universe of claims and the assumption that those claims could only go down via subsequent claim objections. *See id.* at 587. The Bankruptcy Court did not discuss how this unsubstantiated expectation, even if true, impedes providing Plaintiffs relief via the Accordion Feature Value. Since the Accordion Feature Value only comes into play upon allowance of Plaintiffs' claims, Unitholders did not have any expectations about this value to dash. Accordingly, the Bankruptcy Court's conclusion that Plaintiffs cannot meet the third *Chateaugay* factor was an abuse of discretion at least as it pertains to the Accordion Feature Value.

The Bankruptcy Court also erroneously found that Unitholders had a reasonable expectation that the total universe of claims filed against Old GM would not increase. *See id.* at 587-89. That conclusion is without basis and the evidence cuts directly against it. Late claims against the GUC Trust have been allowed and have tapped GUC Trust Assets for recoveries. *See id.* at 537. Thus, Unitholders were well aware of the risk of dilution by late-filed claims that are subsequently allowed. Section 6.2(l) of the Plan provides recoveries to Unitholders only "to the extent there are sufficient assets available for distribution," and then only for an "appropriate amount." *See* Plan § 6.2(l), A-3944. Upon disclosure of the Ignition Switch Defect, Unitholders were well aware of potential dilution by Plaintiffs' claims. *See* Opinion, 529 B.R. at 537. The GUC Trust Administrator disclosed in its SEC filings as early as May 16, 2014 that Plaintiffs' claims could impact Unitholders' recoveries. *See* A-13791-95.

The Bankruptcy Court strained *BGI II* to find that Plaintiffs did not meet the third *Chateaugay* factor. *BGI II* is inapplicable since the tardy creditors there had notice, but did not object to the bar date or plan. *See BGI II*, 772 F.3d at 106, 110-11. The subject creditors' appeal was found to be equitably moot. *See id.* Unlike *BGI II*, the Plaintiffs here suffered a violation of their due process rights and the Bankruptcy Court found that the appropriate remedy was filing late proofs of

claim. *See* Opinion, 529 B.R. at 574, 583, 598. Additionally, allowing the late proofs of claim in *BGI* would have eviscerated recoveries to all other general unsecured creditors. *See In re BGI, Inc.*, 2013 WL 10822966, at *7-8 (S.D.N.Y. May 22, 2013) ("*BGI I*"), *aff'd*, 772 F.3d 102 (2d Cir. 2014). Here, at a minimum, Plaintiffs could receive exclusive access to the Accordion Feature Value without ***any*** dilution of other creditors' recoveries. In *BGI II*, allowing the class of gift card holders to file late claims and access the remaining $61 million in the estate would have had a disastrous effect on distributions under the Plan because *BGI II* unsecured creditors were projected to receive as little as four cents on the dollar and would be entirely swamped by the gift card class' claims of about $210 million. *See BGI II*, 772 F.3d at 105 n.2, 110 & n.15. Allowing Plaintiffs to recover from Current GUC Trust Assets (realizing approximately 13 cents on the dollar if all Remaining GUC Trust Assets were made available to Plaintiffs and their claims are allowed at $7 billion) will not reduce recoveries to Allowed General Unsecured Creditors (who will retain payment of 28 cents on the dollar). Even clawing back Past GUC Trust Assets would not have the "disastrous effect" at issue in *BGI*.

Finally, the Bankruptcy Court found that class litigation should not delay distributions to other creditors and that Unitholders would be prejudiced even if

Plaintiffs' claims were ultimately disallowed. *See* Opinion, 529 B.R. at 589. There is no support for this conclusion. Filing class proofs of claim in bankruptcy is commonplace. Adjudicating the bona fides of a late-filed claim under the *Pioneer*[26] factors (including class proofs of claim) is not an unmanageable situation and should not cause undue delay. In fact, aside from the $135 million distribution by the GUC Trust anticipated in November 2015, the GUC Trust does not anticipate distributing any other Remaining GUC Trust Assets until November 2016.

c. The Bankruptcy Court misapplied the fifth *Chateaugay* factor.

The fifth *Chateaugay* factor considers whether an appellant pursued a stay of the objectionable order with diligence. *See In re Chateaugay*, 10 F.3d at 953. As a threshold matter, the Bankruptcy Court erred applying this *Chateaugay* factor because the Plaintiffs are not seeking a stay of any order and thus by its terms this factor is inapplicable. The Plaintiffs were not provided constitutionally adequate notice and were deprived of the ability to seek a stay of the Sale, Bar Date or Confirmation Orders. The Ninth Circuit has found that where a party has done nothing by its own inactions to encourage or permit developments to proceed

[26] *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993).

without its participation, courts should be cautious about reaching a conclusion of equitable mootness. *See In re Thorpe Insulation Co.*, 677 F.3d 869, 881 (9th Cir. 2012). This Court should likewise determine that the Bankruptcy Court abused its discretion in considering the fifth *Chateaugay* factor.

Even if this Court finds the fifth *Chateaugay* factor applicable, the Bankruptcy Court abused its discretion by finding that Plaintiffs did not pursue relief with diligence. *See* Opinion, 529 B.R. at 590-92. The Bankruptcy Court erred in focusing its analysis solely on the GUC Trust's November 2014 distribution which amounted to 2.45% of total Old GM estate value distributed. *See id.*

The Bankruptcy Court abused its discretion because Plaintiffs have pursued their claims with diligence. The Plaintiffs promptly filed suits following disclosure of the Ignition Switch Defect. *See id.* at 538. They immediately contested New GM's Motion to Enforce Sale Order, filing an objection the day after its filing. *See Objection to Motion of General Motors LLC Pursuant to 11 U.S.C. §§ 105 and 363 to Enforce the Court's July 5, 2009 Sale Order and Injunction, In re Motors Liquidation Co.*, No. 09-50026 (REG) (Apr. 22, 2014), ECF No. 12629. The Plaintiffs have actively participated in the Bankruptcy Court's case conferences.

The GUC Trust Administrator has disclosed the risk of Plaintiffs' claims diluting and delaying GUC Trust distributions. *See, e.g.*, A-13791-98.

Indeed, within a week of the GUC Trust's disclosure that it intended to make the November 2014 distribution and well in advance of the distribution, Plaintiffs sent counsel for the GUC Trust Administrator a letter advising that Plaintiffs were known contingent beneficiaries of the GUC Trust and reserves should be established for their claims before any further distributions. A-10360-62. Under Section 5.4(d) of the GUC Trust Agreement, the GUC Trust Administrator was required to consider the Plaintiffs' claims prior to making the November 2014 distribution. A-4583. Undeterred, the GUC Trust Administrator made that distribution in contravention of the GUC Trust's governing documentation. *See Id*. Under the May 16, 2014 Scheduling Order, the Plaintiffs have until final determination of the Threshold Issues to file claims against the GUC Trust and can still seek to clawback the November 2014 and other distributions of Past GUC Trust Assets. A-5691. Accordingly, the Bankruptcy Court abused its discretion in finding that Plaintiffs should have done more than they have, and are consequently shut out of GUC Trust Assets.

VII. CONCLUSION

The ISPs respectfully request that this Court reverse the Bankruptcy Court's Opinion and Judgment finding that (i) the Pre-Sale Plaintiffs and the Used Car Purchasers cannot bring successor liability claims even though their due process rights were violated; (ii) Plaintiffs' Independent Claims against New GM cannot proceed unless they show a due process violation; and (iii) the Pre-Sale Plaintiffs are barred by the doctrine of equitable mootness from recovering against the debtor's estate.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the opening brief is proportionally spaced, has a typeface of 14 points and contains 13,824 words (excluding the cover page, table of contents, table of authorities, certificate of service, and certificate of compliance). In preparing this Certificate, I relied on the word-count program of Microsoft Word 2010.

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