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GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue, 47th Floor
New York, New York 10166
Telephone: (212) 351-4000
Facsimile: (212) 351-4035
Adam H. Offenhartz (To Argue Motion)
David Feldman
Matthew J. Williams
David J. Kerstein

ATTORNEYS FOR WILMINGTON TRUST COMPANY

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re **MOTORS LIQUIDATION COMPANY *et al.*,** **f/k/a General Motors Corp. *et al.*,** **Debtors.**	Chapter 11 Case No. 09-50026 (REG) (Jointly Administered)
RADHA RAMANA MURTY NARUMANCHI (MURTY) and RADHA BHAVATARINI DEVI NARUMANCHI (DEVI), **Plaintiffs *Pro Se*,** **v.** **GENERAL MOTORS CORP. *et al.*,** **Defendants.**	Adversary Proceeding No. 09-00501 (REG)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT WILMINGTON TRUST COMPANY'S MOTION TO DISMISS PLAINTIFFS' ADVERSARY COMPLAINT

July 16, 2009

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PRELIMINARY STATEMENT

Defendant Wilmington Trust Company ("**WTC**") moves to dismiss plaintiffs' adversary complaint, because, simply put, the single claim raised against it here by plaintiffs has, during the course of the GM Bankruptcy (as defined below), already been raised, briefed, and thoroughly argued by plaintiffs and other similarly situated bondholders. This Court properly rejected plaintiffs' (and other similarly situated parties') arguments when the Court issued its well-reasoned decision (the "**Decision**") granting the debtors' motion (the "**GM Sale Motion**") to approve the 363 Transaction (as defined below). For this reason, plaintiffs' claim against WTC is barred by the doctrines of *res judicata*, collateral estoppel, and law of the case, and must be dismissed with prejudice.

The gravaman of plaintiffs' claim against WTC is that, as indenture trustee under the 1995 Indenture (as defined below), WTC owed duties to certain unsecured bondholders and allegedly breached those duties by failing to take action against GM for purportedly violating that 1995 Indenture. More specifically, plaintiffs allege that, as collateral for pre-petition loans GM received from the U.S. Department of the Treasury ("**Treasury**"), GM improperly encumbered certain properties, triggering an "equal and ratable clause" in the 1995 Indenture and entitling unsecured bondholders to a security interest in certain of GM's assets. However, plaintiffs (as well as another, similarly situated, unsecured bondholder) previously asserted, briefed and argued this exact same claim—the alleged violation of the 1995 Indenture by GM—when they objected to the GM Sale Motion. But this Court expressly rejected plaintiffs' arguments in its Decision granting the GM Sale Motion and approving the 363 Transaction. Accordingly, the doctrines of *res judicata*, claim

preclusion, and law of the case dictate that plaintiffs are not entitled to another "bite of the apple" to establish a claim that was so recently and thoroughly litigated before this very Court.

Even if plaintiffs' claim against WTC was not precluded by the doctrines of *res judicata*, collateral estoppel and law of the case, that claim must be dismissed with prejudice in any event because, as this Court previously and correctly ruled, there was no "violation of the covenants of the indenture" as a result of the liens that were granted to Treasury under the Loan and Security Agreement (the "**LSA**") between GM and Treasury. Indeed, the very documents at the center of plaintiffs' claim, on their face, make crystal clear that GM assets that could not be encumbered under the 1995 Indenture without triggering the "equal and ratable clause" were not encumbered. Instead, they were specifically carved out from the grant of liens to Treasury and labeled "Excluded Collateral."

The 1995 Indenture provides that the "equal and ratable clause" would only be triggered if GM were to grant a lien on any of its domestic manufacturing properties, or on the stock or indebtedness of any domestic subsidiary owning such properties. And that is precisely what the LSA expressly excluded from its grant of liens to Treasury. "Excluded Collateral" in the LSA is defined as "*any Property, including any debt or Equity Interest and any manufacturing plant or facility which is located within the continental United States, to the extent that the grant of a security interest therein to secure the Obligation will result in a lien, or an obligation to grant a lien, in such Property to secure any other obligation*." Indeed, not only are GM's domestic manufacturing properties and the stock and indebtedness of its domestic subsidiaries owning such properties specifically delineated as Excluded Collateral, such assets would further be considered Excluded Collateral as a result of the "catch-all" provision above, which excludes the

grant of a security interest on any assets that would trigger the "equal and ratable clause." For this reason too, such property is Excluded Collateral under the LSA.

Because the core documents referenced in plaintiffs' complaint, on their face, make clear that the "equal and ratable clause" was never triggered, plaintiffs' claim for breach of duty for allowing such a trigger to occur, or not properly notifying bondholders about its occurrence, fails even if it was not barred.

Accordingly, the adversary complaint as it relates to WTC should be dismissed with prejudice.

STATEMENT OF FACTS

A. Wilmington Trust Company and the 1995 Indenture

WTC is the successor indenture trustee to Citibank, N.A., under two indentures with General Motors Corporation ("**GM**") pursuant to which GM issued senior unsecured debt securities: (i) a Senior Indenture, dated as of December 7, 1995, as amended (the "**1995 Indenture**"); and (ii) a Senior Indenture, dated as of November 15, 1990 (collectively, the "**Indentures**"). *See* Ex. 1, 1995 Indenture;[1] *see also* Compl. ¶ 3.2.[2] Plaintiffs' allegations relate

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[1] Unless otherwise stated, citations denominated "Ex. __" refer to Exhibits to the Declaration of David J. Kerstein, dated July 16, 2009 (the "**Kerstein Declaration**"), submitted with this memorandum of law. The Kerstein Declaration attaches Exhibits 1–15, which are all documents this Court may properly consider on this motion. *See In re Merrill Lynch & Co.*, 273 F. Supp. 2d 351, 356–57 (S.D.N.Y. 2003) ("In deciding a Rule 12(b)(6) motion, the Court may consider the following materials: (1) facts alleged in the complaint and documents attached to it or incorporated in it by reference, (2) documents 'integral' to the complaint and relied upon in it, even if not attached or incorporated by reference, (3) documents or information contained in defendant's motion papers if plaintiff has knowledge or possession of the material and relied on it in framing the complaint, (4) public disclosure documents required by law to be, and that have been, filed with the Securities and Exchange Commission, and (5) facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence.") (footnotes omitted), *aff'd in part, rev'd in part sub nom. Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2005). The 1995 Indenture is

[Footnote continued on next page]

only to the 1995 Indenture. *See id.*

The 1995 Indenture contains a provision—the "**equal and ratable clause**"—that, if triggered, requires GM to grant the holders of unsecured bonds issued pursuant to that indenture a security interest in certain assets of GM. *See* Ex. 1, 1995 Indenture, § 4.06. Specifically, the clause is triggered in the event any liens are placed on "any Principal Domestic Manufacturing Property of the Corporation or any Manufacturing Subsidiary or upon any shares of stock or indebtedness of any Manufacturing Subsidiary (whether such Principal Domestic Manufacturing Property, shares of stock or indebtedness are now owned or hereafter acquired)." *Id.*[3]

B. The Pre-Petition Loans

In recent years, GM, the world's largest automotive company, was plunged into a financial crisis. *See* Compl. ¶ 3.1; *see also In re General Motors Corp.*, Ch. 11 Case No. 09-50026, slip op. at 6–7 (Bankr. S.D.N.Y. July 5, 2009).[4] GM turned to the U.S. Government for financial assistance to sustain its operations and avoid near-term collapse, and on December 31, 2008, GM entered into the LSA with the Treasury. *See In re General Motors Corp.*, at 7–9. Pursuant to the LSA, Treasury agreed to loan funds to GM to finance its operations, and, as

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mentioned repeatedly throughout plaintiffs' complaint, incorporated in it by reference, "integral" to and necessarily relied upon by plaintiffs in framing the complaint, and has been filed with the Securities and Exchange Commission.

[2] For the Court's convenience, a copy of plaintiffs' adversary complaint, dated June 16, 2009 (the "**Complaint**"), is attached to the Kerstein Declaration as Exhibit 2.

[3] The triggering of the "equal and ratable clause" is further limited by six detailed carve-outs. *See* Ex. 1, 1995 Indenture, § 4.06.

[4] For the Court's convenience, a copy of *In re General Motors Corp.*, Ch. 11 Case No. 09-50026, slip op. (Bankr. S.D.N.Y. July 5, 2009) (the "**Decision**") has been attached to the Kerstein Declaration as Exhibit 3.

security for those loans, GM granted certain liens and security interests to Treasury. *See* Compl. ¶ 3.1.3; *see also* Ex. 4, LSA.

Section 4.01 of the LSA ("**Section 4.01**") sets forth that these liens and security interests were granted "in all of [GM's] rights, title and interest in and to all personal property and real property wherever located and whether now or hereafter existing and whether now owned or hereafter acquired, of every kind and description, tangible or intangible, . . . whether now or hereafter existing and wherever located," (the "**Collateral**").[5] *Id.* § 4.01(a).

However, certain GM property was specifically excluded, or carved out, of this grant. *See id.* ("provided that, notwithstanding anything to the contrary contained herein . . . the term 'Collateral' . . . shall not include, and the Borrower is not pledging or granting a security interest in, any Property to the extent that such Property constitutes Excluded Collateral."). The specifically excluded property, defined as "**Excluded Collateral**" under § 4.01, included:

> (v) any Property, including any debt or Equity Interest and any manufacturing plant or facility which is located within the continental United States, to the extent that the grant of a security interest therein to secure the Obligations will result in a lien, or an obligation to grant a lien, in such Property to secure any other obligation.

Id. § 1.01.

C. The GM Bankruptcy

Despite the infusion of cash from Treasury, on June 1, 2009, GM and certain of its affiliates (the "**Debtors**") each commenced a voluntary case with this Court under chapter 11 of title 11, United States Code (collectively, the "**GM Bankruptcy**"). The Debtors then sought the entry of a sale order authorizing and approving a Treasury-sponsored section 363 sale transaction

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[5] A list of seven categories of such collateral is also provided, without limitation, in Section 4.01. *See* Ex. 4, LSA, § 4.01(a)(i)–(vii).

pursuant to 11 U.S.C. §§ 105, 363(b), (f), and (m), and 365, and Federal Rules of Bankruptcy Procedure 6004 and 6006 (the "**363 Transaction**"). *See In re General Motors Corp.*, at 1.

On June 3, 2009, the Office of the United States Trustee appointed WTC and fourteen other members to the Official Committee of Unsecured Creditors (the "**Creditors' Committee**"). WTC was elected chairperson of the Creditors' Committee by the other Committee members. *See* Ex. 5, Joinder, ¶ 3.[6]

D. Plaintiffs' Adversary Proceeding Against WTC for Violation of the "Equal and Ratable Clause" of the 1995 Indenture

Plaintiffs Radha Ramana Murty Narumanchi ("**Plaintiff Murty**") and Radha Bhavatarini Devi Narumanchi own unsecured GM senior debentures with a face value of $400,000. *See* Compl. ¶ 1.2.

On June 16, 2009, plaintiffs initiated an adversary proceeding by filing a complaint against GM and WTC, among others (the "**Complaint**"). *See generally id.* Although it is not entirely clear from its face, it appears that the gravaman of plaintiffs' Complaint against WTC (and the other defendants) is that GM impermissibly granted Treasury a security interest on the assets of GM, its "crown jewels," in violation of the "equal and ratable clause" in the indenture and to the detriment of the unsecured bondholders. *See id*. ¶¶ 3.1.3; 3.1.4.4; 3.2.1; 3.3.4; 3.4.4; 3.4.7.4. Furthermore, plaintiffs appear to allege that WTC's failure to "take suitable action (legal

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[6] As chairperson of the Creditors' Committee, WTC took an active role in Creditors' Committee discussions and deliberations. Specifically, WTC took extensive steps to analyze the GM Bankruptcy and the 363 Transaction, including but not limited to: (a) reviewing, analyzing and engaging in extensive discussions and deliberations regarding the various motions, legal issues, and business concerns surrounding the GM Bankruptcy and the 363 Transaction; (b) fielding and addressing the concerns of GM's bondholders; (c) reviewing and analyzing reports and other analyses of the 363 Transaction, the consideration provided pursuant to the 363 Transaction, and liquidation scenarios prepared by the Debtors, Creditors' Committee counsel and Creditors' Committee financial professionals. *See* Ex. 5, Joinder, ¶ 3.

or otherwise) against GM" for such violation, or notify unsecured bondholders "of the violation of the indenture," was a violation of WTC's duties to unsecured bondholders. *See id.* ¶¶ 3.2.1; 3.2.2.

E. Plaintiffs' Prosecution of Their "Equal and Ratable Clause" Claim in the Bankruptcy Case Through Their Objection to the GM Sale Motion

Also on June 16, 2009, Plaintiff Murty filed his "Objection to Proposed '363 Sale' as per 6-2-2009 Motion of the Bankrupt, General Motors Corporation." *See* Ex. 6, Objection to Proposed '363 Sale'; *see also* Compl. ¶ 1.3 n.2. In that submission, Plaintiff Murty expressed his general objection to the GM Sale Motion and proposed 363 Transaction "as nothing short of fraud being perpetrated on various creditors, especially on the unsecured bondholders, of which I am a class member, at the behest of the federal government. Even otherwise, the sale is illegal and against all equities involved in this case." Ex. 6, Objection to Proposed '363 Sale', at 1. Plaintiff Murty also announced his intent to "ACTIVELY PARTICIPATE IN THE PROPOSED HEARING." *Id.* (emphasis in original).

In his Memorandum of Law in Opposition to Section 363 Transaction ("**Plaintiffs' Objections**"), Plaintiffs also claimed that GM violated the "equal and ratable clause" of the 1995 Indenture by granting the Treasury liens on "all its assets." Ex. 7, Plaintiffs' Objections, at 6–7. Specifically, plaintiffs alleged, *inter alia*, that the Treasury and President Obama's Auto Task Force ("**ATF**"):

> [M]ade GM to breach its fiduciary duty to unsecured bondholders in various ways, to wit, to allow the U.S. Treasury to secure all its assets in violation of the 1995 trust indenture; . . . to aid and abet in the violation and breach of the trust indenture, to violate the fiduciary duty, obligation, and duties to unsecured bondholders etc.

Id. Plaintiffs further alleged that an:

> Illegal security interest was created in breach of the 1995 indenture, to the detriment of unsecured bondholders. **GM** breached the indenture document, and

> the U.S. Treasury instigated, and aided and abetted in such a breach. This action also violated their fiduciary responsibilities, duties, and obligations towards unsecured bondholders (i.e. by both GM and the U.S. Treasury).

Id. at 8 (emphasis in original).

On June 29, 2009, Plaintiff Murty filed notice of his intention to participate in the proceedings on Debtors' Motion for Approval of the 363 Transaction (the "**Sale Hearing**"). *See* Ex. 8, Plaintiffs' Notice of Participation. Specifically, Plaintiff Murty "reserve[d] the right to examine or cross-examine any fact witnesses or expert witnesses presented during the Hearing(s) by any other parties" and "the right to make a presentation of his own in the closing arguments on this Motion." *Id.* at 1.

On July 2, 2009, Plaintiff Murty appeared at the Sale Hearing before this Court and was granted permission to raise his objections. *See* Ex. 9, July 2, 2009 Transcript, at 116:17–121:22. While addressing this Court, Plaintiff Murty specifically re-iterated plaintiffs' "equal and ratable clause" argument. *See id.*

Oliver Parker's Further Prosecution of the "Equal and Ratable Clause" Claim

The "equal and ratable clause" claim was also raised by Oliver Addison Parker ("**Mr. Parker**"), another unsecured bondholder, in the Amendment to Objection of Oliver Addition Parker to the GM Sale Motion, dated June 22, 2009 ("**Parker Objection**").[7] The Parker Objection extensively argued the "equal and ratable clause" claim first advanced in Plaintiffs' Objections. *See* Ex. 10, Parker Objection. Mr. Parker further advanced the "equal and ratable clause" claim before this Court in his examination of Frederick "Fritz" Henderson during the June 30, 2009 Sale Hearing. Specifically, Mr. Parker questioned Mr. Henderson regarding the

[7] Plaintiffs claimed that the idea for Mr. Parker's "equal and ratable clause" claim came from plaintiffs originally. *See* Ex. 9, July 2, 2009 Transcript, at 121:1–121:9.

assets that were encumbered by the "mortgage agreement that . . . General Motors entered into with the United States Treasury" intended to secure repayment of the Pre-Petition Loans, the "equal and ratable clause" of the 1995 Indenture, and whether the LSA encumbered assets in violation of the "equal and ratable clause" of the 1995 Indenture. Ex. 11, June 30, 2009 Transcript, at 181:8–199:12, 206:7–207:3. During his examination of Mr. Henderson, Mr. Parker also introduced evidence in support of the "equal and ratable clause" claim, *see id.* at 196:3–199:6; and asserted that it was his "position the bondholders are actually secured creditors," *id.* at 195:23–195:24.

In response to Mr. Parker's assertion of the "equal and ratable clause" claim at the Sale Hearing, this Court explained that the meaning of Section 4.06 of the 1995 Indenture is "a judgment of law that [this Court] would make after hearing appropriate argument when necessary." *Id.* at 189:23–189:24.

Finally, at the July 2, 2009 Sale Hearing, Mr. Parker again made the "equal and ratable clause" claim to this Court. *See* Ex. 9, July 2, 2009 Transcript, at 76:17–81:19.

Debtors' Response to the "Equal and Ratable Clause" Claim

At the July 1, 2009 hearing, counsel for Debtors responded to the "equal and ratable clause" claim raised by plaintiffs and Mr. Parker by explaining that "no lien or security interest was granted to the United States Treasury in violation of any of th[e] indentures." Ex. 12, July 1, 2009 Transcript, at 266:23–270:10.[8] In response, this Court requested that Debtors provide the

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[8] Mr. Miller referred the Court to (a) Section 4.06 of the 1995 Indenture, (b) section 401 of the LSA, and (c) the January 7, 2009 8-K issued by GM. Mr. Miller explained that each of these documents clearly evinces that GM did not encumber any of the assets that would trigger the "equal and ratable clause" of the 1995 Indenture; as this Court phrased it and Mr. Miller confirmed, if an asset "would have triggered the equal and ratable clause it was listed

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Court with citations to the provisions of the LSA because the Court "just need[ed] to be able to read it . . . . [t]o second-guess [Mr. Miller] in that regard."[9] *Id.* at 269:21–270:8. On July 2, 2009, this Court heard Mr. Miller's closing remarks, in which he once again specifically addressed Mr. Parker's "equal and ratable clause" claim. *See* Ex. 9, July 2, 2009 Transcript, at 181:4–182:3.

E. This Court's Final Ruling on Plaintiffs' and Mr. Parker's "Equal and Ratable Clause" Claim

On July 5, 2009, this Court issued its Decision on Debtors' Motion for Approval of (1) Sale of Assets to Vehicle Acquisition Holdings LLC; (2) Assumption and Assignment of Related Executory Contracts; and (3) Entry into UAW Retiree Settlement Agreement, granting the GM Sale Motion. *See In re General Motors Corp.*, Ch. 11 Case No. 09-50026, slip op. (Bankr. S.D.N.Y. July 5, 2009).

In the Decision, this Court addressed and rejected the "equal and ratable clause" claim asserted, briefed, and argued by plaintiffs and Mr. Parker. *See id.* at 82–83. Referring to both Plaintiff Murty and Mr. Parker by name, this "Court agree[d] that the bonds have an equal and ratable clause," but "*[could]not agree that it was triggered" because the LSA "expressly carved out from the grant of the security interest under those documents any instance where it would*

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amongst the excluded assets and, therefore, when the deal was structured it was an intentional effort to avoid triggering the equal and ratable clause." Ex. 12, July 1, 2009 Transcript, at 267:9–268:19. Mr. Miller further explained that the LSA provided that "if by accident a lien had been granted it would be invalidated because it violated the indenture," and, in any event, no such mortgage or UCC lien had been recorded on the Excluded Property. *Id.* at 269:5–269:13.

[9] During the July 2, 2009 Sale Hearing, Debtors' counsel provided the requested information to this Court by letter, specifically addressing Mr. Parker's claim. *See* Ex. 13, July 2, 2009 Letter; Ex. 9, July 2, 2009 Transcript, at 42:13–43:5.

trigger, inter alia, the equal and ratable clause." *Id.* at 82 (emphasis added). An order was entered on July 5, 2009 in accordance with the Decision (the "**Sale Order**"). *See* Ex. 14, July 5, 2009 Order.

STANDARD OF REVIEW

Motions to dismiss are governed by Federal Rule of Bankruptcy Procedure 7012, which incorporates by reference Rule 12(b) of the Federal Rules of Civil Procedure. *See In re Chase*, 392 B.R. 72, 78 (Bankr. S.D.N.Y. 2008), *reconsideration denied*, No. 05-45706(AJG), Adv. Pro. No. 08-01128 (AJG), 2008 WL 4372369 (Sept. 23, 2008). "In reviewing a motion to dismiss under Rule 12(b)(6), a court merely assesses the legal feasibility of the complaint, and does not weigh the evidence that may be offered at trial." *In re Bayou Group, LLC*, 362 B.R. 624, 632 (Bankr. S.D.N.Y. 2007) (internal quotation marks omitted). In so doing, a court "must construe all well-pleaded factual allegations in the complaint in favor of the plaintiff." *Id.* This means that a court "must accept all factual allegations as true, even if the allegations are doubtful in fact." *Buena Vista Home Entm't, Inc. v. Wachovia Bank* (*In re Musicland Holding Corp.*), 374 B.R. 113, 119 (Bankr. S.D.N.Y. 2007), *aff'd*, 386 B.R. 428 (S.D.N.Y. 2008) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007), and *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007)). "This is not to say, however, that *every* statement in a complaint must be accepted as true." *In re Bayou Group, LLC*, 362 B.R. at 632 (emphasis added).

Specifically, a plaintiff has an "obligation to provide the grounds of his entitlement to relief [that] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 127 S. Ct. at 1965 (internal quotation marks omitted). "Instead, the plaintiff must amplify a claim with some factual allegations in those

contexts where such amplification is needed to render the claim *plausible*." *In re Musicland Holding Corp.*, 374 B.R. at 119 (emphasis in original). In other words, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 127 S. Ct. at 1965.

Courts routinely grant motions to dismiss where claims and issues are precluded based upon *res judicata* and collateral estoppel. *See, e.g., In re Chase*, 392 B.R. 72 (Bankr. S.D.N.Y. 2008) (dismissing claim on collateral estoppel grounds on a motion to dismiss by defendant); *In re Aegis Realty Corp.*, 301 B.R. 116 (Bankr. S.D.N.Y. 2003) (dismissing claim on *res judicata* grounds on a motion to dismiss by defendant); *In re Clinton St. Food Corp.*, 254 B.R. 523 (Bankr. S.D.N.Y. 2000) (dismissing claim on *res judicata* and collateral estoppel grounds on a motion to dismiss by defendants).

ARGUMENT

Plaintiffs' adversary complaint against WTC is based on the exact same claim that plaintiffs (and other, similarly situated bondholders, including Mr. Parker) already asserted, briefed, and thoroughly argued in the GM bankruptcy; namely, that GM violated the "equal and ratable" clause of the 1995 Indenture when it entered into the LSA, and that WTC somehow violated its duties by failing to act against this alleged "violation." But this Court already rejected this claim in its Decision approving the GM Sale Motion, finding that while "the bonds have an equal and ratable clause," the Court "cannot agree that it was triggered." *See In re General Motors Corp.*, at 82. Therefore, plaintiffs are barred from re-litigating this claim under the guise of an adversary proceeding, there can be no breach of duty, and, WTC's motion to dismiss should be granted with prejudice.

Plaintiffs' re-litigation of this claim in the instant action is barred by the doctrines of both *res judicata* and collateral estoppel. *See, e.g., In re Toledano*, 299 B.R. 284, 288 (Bankr.

S.D.N.Y. 2003) (holding that plaintiffs in an adversary proceeding were barred under the doctrines of *res judicata* and collateral estoppel from re-litigating issues that had already been "asserted by the Plaintiffs in their Objection to the Trustee's Lease Assignment Motion, . . . brief[ed] . . . in detail, . . . present[ed at] oral argument" and "decided on the merits"). Plaintiffs' claim is also barred by the law of the case doctrine. *See Prisco v. A & D Carting Corp.*, 168 F.3d 593, 607 (2d Cir. 1999) (noting that, once a court has ruled on an issue of law, "that decision should generally be adhered to by that court in subsequent stages in the same case."). Accordingly, plaintiffs have failed to allege WTC's breach of any duty, and their allegations against WTC should be dismissed with prejudice for failure to state a claim upon which relief can be granted.

Finally, even if plaintiffs' claim was not barred, the Complaint against WTC should also be dismissed with prejudice because the 1995 Indenture and the LSA make clear, on their face, that the "equal and ratable clause" of the 1995 Indenture was not triggered by the LSA. Thus absent such a "violation" of the 1995 Indenture, there can be no breach of duty for WTC's alleged failure to take action in response to such a "violation."

A. Plaintiffs' "Equal and Ratable Clause" Claim Is Barred by *Res Judicata*

It is well-settled that, under the doctrine of *res judicata*, litigants, such as plaintiffs, are not permitted more than "one bite of the apple." *Sure-Snap Corp. v. State St. Bank & Trust Co.*, 948 F.2d 869, 870 (2d Cir. 1991). To determine whether the doctrine of *res judicata* bars plaintiffs' re-litigation of this claim, bankruptcy courts in the Second Circuit "consider whether 1) the prior decision was a final judgment on the merits, 2) the litigants were the same parties, 3) the prior court was of competent jurisdiction, and 4) the causes of action were the same." *Corbett v. MacDonald Moving Servs., Inc.*, 124 F.3d 82, 87–88 (2d Cir. 1997).

In addition, "[i]n the bankruptcy context, the Court must also determine 'whether an independent judgment in a separate proceeding would impair or destroy rights or interests established by the judgment entered in the first action.'" *HSBC Bank USA, Nat'l Ass'n v. Adelphia Commc'ns Corp.*, Nos. 07-CV-553A(RJA), 07-CV-555A(RJA), 07-CV-554A(RJA), 2009 WL 385474, at *11 (W.D.N.Y. Feb. 12, 2009) (citing *Corbett*, 124 F.3d at 89).[10]

In their Complaint, plaintiffs re-assert the very same claim they asserted in their objection to the GM Sale Motion; namely, that GM violated the terms of the 1995 Indenture by granting certain liens and security interests to Treasury pursuant to the LSA. *Compare* Compl. ¶¶ 3.1.4.4; 3.2.1; 3.3.4; 3.4.4; 3.4.7.4; *with* Plaintiffs' Objections at 6–8. As detailed above, plaintiffs—as well as another, similarly situated unsecured bondholder, Oliver Parker—already thoroughly briefed and argued this very claim before this Court in the context of their objection to the GM Sale Motion. *See supra* at 6–11. On July 5, 2009, this Court explicitly addressed and rejected this very claim in its Decision granting the GM Sale Motion. *See In re General Motors Corp.*, at 82–83. Therefore, under the doctrine of *res judicata*, plaintiffs are not entitled to re-litigate this claim here.

1. WTC Meets Prongs 1 and 3 of the *Res Judicata* Test: The Order Was a Final Judgment on the Merits Issued by a Court of Competent Jurisdiction

"A bankruptcy court order approving a sale of assets is a final order for *res judicata* purposes." *In re Clinton St. Food Corp.*, 254 B.R. at 530; *see also In re Am. Preferred Prescription, Inc.*, 255 F.3d 87, 92 (2d Cir. 2001) (citing *Hendrick v. H.E. Avent*, 891 F.2d 583,

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[10] For the Court's convenience, a copy of *HSBC Bank USA, Nat'l Ass'n v. Adelphia Commc'ns Corp.*, Nos. 07-CV-553A(RJA), 07-CV-555A(RJA), 07-CV-554A(RJA), 2009 WL 385474 (W.D.N.Y. Feb. 12, 2009) is attached to the Kerstein Declaration as Exhibit 15.

586 (5th Cir. 1990) ("An order issued by the bankruptcy court authorizing the sale of part of the bankrupt estate is a final judgment even though the order neither closes the bankruptcy case nor disposes of any claim.")). "This rule promotes the important public policy favoring the finality of orders transferring ownership of bankruptcy estate assets." *In re Clinton St. Food Corp.*, 254 B.R. at 530–31. Accordingly, the Sale Order, which incorporated this Court's Decision and, therein, plaintiffs' and Mr. Parker's "equal and ratable clause" claim, constitutes a final order for *res judicata* purposes.

There is no doubt that this Court had jurisdiction over the GM Bankruptcy and 363 Transaction approval pursuant to 28 U.S.C. §§ 157 and 1334, and that the matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (N). Accordingly, the Sale Order "constituted a final judgment on the merits by a court of competent jurisdiction." *HSBC Bank USA, Nat'l Ass'n*, 2009 WL 385474, at *11.

2. WTC Meets The Prong 2 Of The of the *Res Judicata* Test: Plaintiffs, GM and WTC Clearly Were Involved in Both the GM Bankruptcy and This Adversary Proceeding

In addition to GM, plaintiffs and WTC were involved in both the GM Bankruptcy and this adversary proceeding. WTC was a party to the GM Bankruptcy by virtue of its status as the indenture trustee under the 1995 Indenture. S*ee* 11 U.S.C. § 1109(b) ("A party in interest, including . . . any indenture trustee, may raise and may appear and be heard on any issue in a case under" Chapter 11 of the Bankruptcy Code.). Moreover, WTC took an active role in the GM Bankruptcy by, *inter alia*, serving as chair of the Creditors' Committee, submitting papers joining in limited opposition to the sale plan, and speaking through counsel at the Sale Hearing. *See supra* at 6–11.

As alleged in their Complaint, plaintiffs "own unsecured GM senior debentures (8.375% due in 2033) in the face value of $400,000 for which they had paid full par value in hard cash.

They bought these bonds in different lots and have owned them since at least January 2005. They are, therefore, creditors in the current GM's Chapter 11 proceedings." Complaint ¶ 1.2. Therefore, as creditors, plaintiffs clearly were party to the GM Bankruptcy, as well. *See HSBC Bank USA, Nat'l Ass'n*, 2009 WL 385474, at *11 ("[I]n the bankruptcy context, all creditors of a debtor are parties in interest for *res judicata* purposes with respect to orders issued in the administration of a bankruptcy proceeding." (citing *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1550–51 (11th Cir. 1990))).

3. WTC Meets Prong 4 Of The of the *Res Judicata* Test: The Cases Involve the Same Cause of Action Because The Same Transaction, Evidence, and Factual Issues Are Involved in Both Cases

"To determine whether the causes of action are the same," courts will "examine whether the same transaction, evidence, and factual issues are involved in both cases." *Corbett*, 124 F.3d at 89 (citing *Sure-Snap*, 948 F.2d at 874); *see also HSBC Bank USA, Nat'l Ass'n*, 2009 WL 385474, at *11–12).

> Because a bankruptcy case is fundamentally different from the typical civil action, comparison of a bankruptcy proceeding with another proceeding is not susceptible to the standard *res judicata* analysis. Rather, the Court must scrutinize the totality of the circumstances in each action and then determine whether there is identity of causes of action.

HSBC Bank USA, Nat'l Ass'n, 2009 WL 385474, at *12. However, "[n]ew legal theories do not amount to a new cause of action so as to defeat the application of the principle of res judicata." *In re Teltronics Servs., Inc.*, 762 F.2d 185, 193 (2d Cir. 1985) (finding the same cause of action asserted for *res judicata* purposes because "the events constituting the asserted injury are the same in this case as in its predecessors; [and] all the facts necessary to support the claims before [the court] were pleaded, or could have been pleaded, in the first action . . . .").

In re Toledano is instructive and dispositive. 299 B.R. 284 (Bankr. S.D.N.Y. 2003). In *Toledano*, the Chapter 7 trustee filed an application for an order authorizing him to assume and

assign Toledano's interest in a rent-stabilized apartment (the "**Lease Assignment Motion**"). *See id.* at 285–86. In response, plaintiffs-tenants both filed an objection to the Lease Assignment Motion and "commenced the instant adversary proceeding by filing a seventy-two page complaint," that was a "near verbatim restatement of the Objection." *Id.* at 286. After ruling against plaintiffs on the Lease Assignment Motion, the court held that:

> [U]nder the doctrines of *res judicata* and *collateral estoppel*, Plaintiffs are barred from relitigating issues relating to the Trustee's authority to assume and assign the Lease [and] the ability of the Trustee to evict [plaintiffs] in connection with the Lease assignment . . . because these issues have already been decided on the merits in connection with the Trustee's Lease Assignment Motion.

Id. at 288. In particular, the court noted that the "Court ha[d] already addressed the claims and issues set forth in the Complaint and Amended Complaint when they were previously asserted by the Plaintiffs in their Objection to the Trustee's Lease Assignment Motion" after all parties had been "given the opportunity to brief their arguments in detail . . . and present oral argument at the Hearing and Amended Hearing." *Id.* at 288.

The same is true here. Turning to the three factor analysis discussed in *Corbett*, there is clearly an identity of claims. First, the claims in Plaintiffs' Objections and their Complaint involve the same transaction: the execution of the LSA between GM and Treasury. *Compare* Compl. ¶¶ 3.1.4.4; 3.2.1; 3.3.4; 3.4.4; 3.4.7.4; *with* Ex. 7, Plaintiffs' Objections, at 6–8. Second, the same evidence—the 1995 Indenture and the LSA—is involved in both the Sale Approval and this adversary proceeding. *See id.* Third, both cases involve the same factual issues: namely, whether, pursuant to the LSA, GM granted Treasury a lien or security interest in any property covered by the 1995 Indenture's "equal and ratable clause." *See id.*

A different judgment in this proceeding would also "'impair or destroy rights or interests established by the judgment entered in the"' GM Bankruptcy. *HSBC Bank USA, Nat'l Ass'n*, 2009 WL 385474, at *11 (quoting *Corbett*, 124 F.3d at 89). If this Court reconsidered plaintiffs'

"equal and ratable clause" claim and decided, contrary to its holding in the Decision, that GM breached the terms of the 1995 Indenture's "equal and ratable clause," the predicates underlying the Court's decision would be undermined and the entire Decision approving the sale would be thrown into question.

B. Plaintiffs Are Collaterally Estopped from Re-litigating the "Equal and Ratable Clause" Issue

In addition, or in the alternative, plaintiffs' are barred by the doctrine of collateral estoppel—or issue preclusion—from re-litigating the "equal and ratable clause" issue in this adversary proceeding.

As with *res judicata*, "[t]he underlying principle of issue preclusion is that one who has actually litigated an issue should not be allowed to relitigate it." *In re Chase*, 392 B.R. at 81 (internal quotation marks omitted).

> Federal principles of collateral estoppel, which [courts] apply to establish the preclusive effect of a prior federal judgment, require that (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.

Ball v. A.O. Smith Corp., 451 F.3d 66, 69 (2d Cir. 2006) (internal quotation marks omitted).

1. Leading Cases Illustrate That WTC Meets All Four Prongs of the Collateral Estoppel Test

In *In re Chase*, a Chapter 7 debtor brought an adversary proceeding against his former wife, claiming that she was attempting to collect on a debt that was dischargeable. 392 B.R. at 77. In response, the ex-wife moved to dismiss the complaint based on preclusive effect of bankruptcy court's prior order in connection with a motion to hold the ex-wife in contempt for violating the automatic stay by attempting to collect on a dischargeable debt. *Id.* at 78. The Bankruptcy Court granted the ex-wife's motion, holding that its prior determination that the stay

was not violated because the ex-wife had been attempting to collect debt in nature of "alimony, maintenance, or support" was sufficient to prevent the debtor, based on principles of issue preclusion, from contesting the nature of the underlying debt in a subsequent dischargeability proceeding. *Id.* at 85. Moreover, the court held that "the determination that the debt was alimony, maintenance, or support was a necessary element of resolving the contempt motion." *Id.* at 83.

In *In re Key Book Services, Inc.*, various book publishers initiated an adversary proceeding for a declaratory judgment that neither the Chapter 11 debtor ("**Key**") nor its secured creditor ("**CBT**") had any interest in certain unsold books and accounts receivable from sold books. 114 B.R. 344, 346 (Bankr. D. Conn. 1990). During the prior bankruptcy proceedings, CBT had moved for protection under section 363(e) of the Bankruptcy Code, and as a result "[a]n issue of fact raised, litigated, and decided"—in the negative—"was whether CBT or Key had any interest in the unsold books under the Marketing Agreement." *Id.* at 348. The publishers argued that the doctrine of collateral estoppel applied to the larger question in the adversary proceeding—whether Key or CBT had any interest in the unsold books *and* the accounts receivable from sold books—because "the conclusion reached in the [363(e)] decision was based upon findings which necessarily lead to the conclusion that CBT and Key have no interest in the accounts receivable." *Id.* at 347. The court agreed, noting that it "necessarily follows from the [363(e)] decision that they have no interest in the accounts receivable," for "[t]o hold otherwise would require this court to revisit the findings made in the [363(e)] decision." *Id.* at 348.

Similarly, the fact that WTC could not have breached any duty to plaintiffs under the 1995 Indenture "necessarily flows from" this Court's ruling on plaintiffs' "equal and ratable

clause" claim because plaintiffs have not alleged that such a breach could have arisen out of a source other than the "equal and ratable clause" argument.

As discussed above in detail, the identical issue now raised in this adversary proceeding—whether the "equal and ratable clause" was triggered—was already raised, litigated, and decided previously in the context of the plaintiffs' objections to the GM Sale Motion, and plaintiffs had a full and fair opportunity to, and did, litigate the issue. *See supra* at 6–11; *In re General Motors Corp.*, at 82–83. Moreover, the Court's decision on this issue in response to Plaintiff Murty and Parker's objections, was necessary to support a valid and final judgment on the merits. Accordingly, plaintiffs' claims are also barred by the doctrine of collateral estoppel. *See In re Chase*, 392 B.R. at 85.

C. Plaintiffs' Claim Is Barred Under the Law of the Case Doctrine

Plaintiffs are also barred from re-litigating the "equal and ratable clause" issue by the law of the case doctrine.

"The 'law of the case' doctrine posits that if a court decides a rule of law, that decision should continue to govern in subsequent stages of the same case." *Sagendorf-Teal v. County of Rensselaer*, 100 F.3d 270, 277 (2d Cir. 1996). The law of the case is "a discretionary doctrine which does not constitute a limitation on the court's power but merely expresses the general practice of refusing to reopen what has been decided." *Brody v. Village of Port Chester*, 345 F.3d 103, 110 (2d Cir. 2003). Nevertheless, the situations justifying reconsideration are generally limited to (1) "an intervening change of controlling law," (2) "the availability of new evidence," or (3) "the need to correct a clear error or prevent manifest injustice." *See Doe v. New York City Dep't of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir. 1983).

The law of the case doctrine is based on the sensible principle that "where litigants have once battled for the court's decision, they should neither be required, nor without good reason

permitted, to battle for it again." *Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003) (internal quotations and citation omitted). Thus, for example, in *In re Manhattan Invest. Fund. Ltd*, 343 B.R. 63 (S.D.N.Y. 2006), the United States Court for the Southern District of New York refused to permit defendant to re-litigate its motion to withdraw the reference to the Bankruptcy Court of certain counts (counts I and IV) in plaintiff's complaint, on the grounds that such grounds dealt with non-bankruptcy issues. *Id.* at 65–66. Defendant's motion followed prior decisions by both the Bankruptcy Court and District Court which, *inter alia*, denied defendant's motion to dismiss counts I and IV and granted a motion to withdraw the reference with respect other claims asserted by plaintiff (counts II and III). *Id.* at 65–66. While the District Court in *In re Manhattan Inv. Fund* agreed with defendant that the court's prior written decision had not specifically addressed defendant's arguments concerning counts I and IV, the Court also noted that the defendant had previously sought to remove the reference as to *all* counts in plaintiff's complaint, and made arguments in that regard at oral argument. *Id.* at 67. The Court had rejected defendant's argument, instead deciding that only some claims (counts II and III) would be withdrawn from the reference. *Id.* Because defendant had previously raised and litigated the same issue, the District Court held that the law of the case doctrine applied, and barred defendant's new motion. *Id.* at 67–68.

Here, as in *In re Manhattan Inv. Fund*, plaintiffs have already extensively litigated their claim concerning the "equal and ratable clause." Plaintiffs have submitted detailed briefs and documentation to support their argument. This Court considered plaintiffs' arguments and expressly rejected them in its July 5, 2009 Decision. Thus, the law of the case doctrine applies

and there is no compelling basis to disregard it.[11] This Court's Decision which rejected plaintiffs "equal and ratable clause" argument while approving the Sale, should continue to govern this case and accordingly, plaintiffs' claims should be dismissed with prejudice for this reason as well.

D. The LSA Does Not in Fact Trigger the "Equal and Ratable Clause" of the 1995 Indenture

Even if this Court had not already considered and expressly rejected plaintiffs' (and Mr. Parker's) "equal and ratable clause" claim in the GM Bankruptcy, there is no doubt that this claim should fail here, as well.

It is clear from its plain language of the documents referenced in plaintiffs' complaint that § 4.01 of the LSA ("**Section 4.01**") was carefully drafted to avoid triggering the "equal and ratable clause" of the 1995 Indenture. The "equal and ratable clause" is only triggered if GM or one of its Manufacturing Subsidiaries:

> issue[s] or assume[s] any Debt secured by a Mortgage upon any Principal Domestic Manufacturing Property of the Corporation or any Manufacturing Subsidiary or upon any shares of stock or indebtedness of any Manufacturing Subsidiary (whether such Principal Domestic Manufacturing Property, shares of stock or indebtedness are now owned or hereafter acquired).[12]

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[11] There has been no intervening change in controlling law since the July 5, 2009 Decision, nor have plaintiffs presented any new or additional evidence, no can plaintiffs claim that this Court committed clear error. *See Wilder v. Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988) ("[T]he jurisprudential concerns that underlie the law-of-the-case doctrine counsel against reopening issues previously decided in an action absent compelling circumstances to justify taking a 'second look.'").

[12] Capitalized terms used within this sentence are defined in the 1995 Indenture. *See* Ex. 1, 1995 Indenture, §§ 1.01; 4.08.

Ex. 1, 1995 Indenture, § 4.06. While the LSA granted the U.S. Treasury liens on essentially "all of [GM's] rights, title and interest in and to all personal property and real property," *it expressly excluded*:

> *any Property, including any debt or Equity Interest and any manufacturing plant or facility which is located within the continental United States, to the extent that the grant of a security interest therein to secure the Obligation will result in a lien, or an obligation to grant a lien, in such Property to secure any other obligation.*

Ex. 4, LSA, § 1.01.

Accordingly, the LSA does not place a lien on any property covered by the "equal and ratable clause" for two reasons: *first*, the LSA excludes the same "Principal Domestic Manufacturing Property of the Corporation or any Manufacturing Subsidiary or . . . any shares of stock or indebtedness of any Manufacturing Subsidiary" that is expressly covered by the 1995 Indenture; and *second*, any property covered by the "equal and ratable clause" is, by definition, property that, if encumbered, would "result in a lien, or an obligation to grant a lien, in such Property to secure" the obligation to the unsecured bondholders imposed by the "equal and ratable clause" itself, and thus, for this reason too, it is Excluded Collateral under the LSA.

Absent a trigger or "violation" of the "equal and ratable clause" by the LSA, which the LSA and 1995 Indenture, read in conjunction, specifically prohibit, there can be no breach of duty claim against WTC for its alleged failure to take action with respect to such a "violation." This Court got it right the first time around when the plaintiffs raised and litigated this claim, and the Court's decision should stand.

CONCLUSION

For the foregoing reasons, WTC respectfully requests that this Court dismiss all of the claims against them in plaintiffs' Complaint, with prejudice.

Dated: New York, New York
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Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Adam H. Offenhartz

Adam H. Offenhartz (AO-0952)
David Feldman (DF-8070)
Matthew J. Williams (MW-4081)
David J. Kerstein (DK-7017)
200 Park Avenue, 47th Floor
New York, New York 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-4035

Attorneys for Defendant
Wilmington Trust Company