Hearing Date and Time: February 4, 2015 at 9:45 a.m. (Eastern Time)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11**
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*	:	**Case No.: 09-50026 (REG)**
Debtors.	:	**(Jointly Administered)**

APPENDIX OF EXHIBITS TO REPLY BRIEF BY GENERAL MOTORS LLC ON THRESHOLD ISSUES CONCERNING ITS MOTIONS TO ENFORCE THE SALE ORDER AND INJUNCTION

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Exhibit	**Title**
Exhibit A	Schedule 4.18 of the Amended and Restated Master Sale and Purchase Agreement Disclosure Schedules, dated June 27, 2009 [Dkt. No. 2949-1]
Exhibit B	*In re Chrysler LLC*: Order, Pursuant To Sections 105, 363 And 365 Of The Bankruptcy Code And Bankruptcy Rules 2002, 6004 And 6006, (A) Approving Bidding Procedures For The Sale Of Substantially All Of The Debtors' Assets, (B) Authorizing The Debtors To Provide Certain Bid Protections, (C) Scheduling A Final Hearing Approving The Sale Of Substantially All Of The Debtors' Assets And (D) Approving The Form And Manner Of Notice Thereof (Case No. 09-50002) [Dkt. No. 492]
Exhibit C	*Wolff v. Chrysler Group LLC*: Opinion Granting Defendant's Motion To Dismiss (Adv. Proc. No. 10-05007) [Dkt. No. 43]
Exhibit D	Notice of Hearing on Debtors' Objection To Proofs of Claim Nos. 16440 And 16441 Filed By Michael A. Schwartz [Dkt. No. 8179]
Exhibit E	Debtors' Reply In Support of Objection To Proofs of Claim Nos. 16440 and 16441 Filed By Michael A. Schwartz [Dkt. No. 8973]
Exhibit F	Excerpt of Transcript of February 10, 2011 Hearing, *In re General Motors Corp., et al.* [Dkt. No. 9764]
Exhibit G	*Chemtura Corp. v. Smith*: Memorandum Of Law In Support Of Chemtura Corporation's Motion For A Temporary Restraining Order And Preliminary Injunction Staying The Diacetyl Litigation And Future Diacetyl Actions Against Chemtura Canada Corporation And Citrus & Allied Essences, Ltd. And In Opposition To Motions For Relief From The Stay (Case No. 09-11233) [Dkt. No. 3]
Exhibit H	MDL Order Regarding the Effect of the Consolidated Complaints (Order No. 29) [Dkt. No. 477]
Exhibit I	*In re Chrysler LLC*: Excerpt of Order (I) Authorizing The Sale Of Substantially All Of The Debtors' Assets Free And Clear Of All Liens, Claims, Interests And Encumbrances, (II) Authorizing The Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases In Connection Therewith And Related Procedures And (III) Granting Related Relief (Case No. 09-50002) [Dkt. No. 3232]
Exhibit J	MDL Order Regarding Whether To Defer Briefing On Plaintiffs' Post-Sale Consolidated Complaint Until After The Bankruptcy Court Decides The Pending Motions To Enforce (Order No. 28) [Dkt. No. 477]

Exhibit A

Amended and Restated Master Sale & Purchase Agreement

Disclosure Schedule

Execution Version

First Update to Sellers' Disclosure Schedule

Pursuant to Section 6.5, Section 6.6 and Section 6.26 of that certain Amended and Restated Master Sale and Purchase Agreement, dated as of June 26, 2009 (the "Agreement"), made by and among General Motors Corporation, a Delaware corporation ("Parent"), Saturn LLC, a Delaware limited liability company ("S LLC"), Saturn Distribution Corporation, a Delaware corporation ("S Distribution"), Chevrolet-Saturn of Harlem, Inc., a Delaware corporation ("Harlem," and collectively with Parent, S LLC and S Distribution, "Sellers," and each a "Seller"), and NGMCO, Inc., a Delaware corporation and successor-in-interest to Vehicle Acquisition Holdings LLC, a Delaware limited liability company ("Purchaser"), the Sellers' Disclosure Schedule delivered on June 1, 2009, as amended, is hereby being updated as set forth herein (as amended and updated, this "Sellers' Disclosure Schedule"). Unless otherwise defined herein, all capitalized terms used in this Sellers' Disclosure Schedule have the respective meanings assigned to them in the Agreement.

The representations and warranties of Sellers set forth in the Agreement are made and given subject to the disclosures contained in this Sellers' Disclosure Schedule. Inclusion of information in this Sellers' Disclosure Schedule shall not be construed as an admission that such information is material to the business, operations or condition of the business of Sellers, the Purchased Assets or the Assumed Liabilities, taken in part or as a whole, or as an admission of Liability of any Seller to any third party. The specific disclosures set forth in this Sellers' Disclosure Schedule have been organized to correspond to Section references in the Agreement to which the disclosure may be most likely to relate; provided, however, that any disclosure in this Sellers' Disclosure Schedule shall apply to, and shall be deemed to be disclosed for, any other Section of the Agreement to the extent the relevance of such disclosure to such other Section is reasonably apparent on its face.

Section 4.18

Sellers' Products

(a) Recalls and Field Actions

Field Action Document Number	Field Action Classification	Field Action Description	Vehicle Model Years	Vehicle Make	Vehicle Model
A - 070047	Product Safety Recall	Throttle	2004 - 2005	Chevrolet/Pontiac/ Suzuki	Aveo/Wave/Swift+
N - 060074	Product Safety Recall	Timing Chain	2001	Saturn	L Series
N - 070027	Product Emissions Defect Reports and Product Emissions Recall - GMNA Use Only	Catalytic Converter	2004	Cadillac	SRX
N - 070035	Product Safety Recall	Engine valve cover / spark plug retainer	1997 - 2003	Buick/Pontiac	Regal GS/Gr Prix
N - 070123	Special Coverage	Intake Valve Seat	2004 - 2005	Chevrolet/GMC	Colorado/Canyon
N - 070154	Non-Compliance Recall	Windshield Position	2007	Chevrolet/Pontiac	Equinox/Torrent
N - 070187	Special Coverage	Instrument Panel Gauges	2003 - 2004	Cadillac/Chevrolet/GMC	Escalade/Avalanche/Silverado/ Suburban/Tahoe/Trailblazer/ Denali/Envoy/Sierra
N - 070204	Product Safety Recall	Rear Differential	2005 - 2007	Cadillac/Pontiac/Saturn /Opel/Daewoo	CTS/CTS-V/SRX/STS/STS-V/ Solstice/Sky/GT/G2X
N - 070252	Special Coverage	Fuel Injector	2004	Chevrolet/GMC	Silverado/Kodiak/Sierra/Topkick

Field Action Document Number	Field Action Classification	Field Action Description	Vehicle Model Years	Vehicle Make	Vehicle Model
N - 070318	Product Emission Recall	Battery	2007	Saturn	VUE/Aura
N - 080048	Product Safety Recall	Heated Washer Module	2006, 2007 - 2008	Cadillac/Chevrolet/GMC /Buick/Saturn/Hummer	Escalade/Escalade EXT/ Escalade ESV/Avalanche/Silverado/ Suburban/Tahoe/ Sierra Yukon/ Yukon XL/Acadia/Outlook/ Lucerne/ DTS/H2/ Enclave
N - 080207	Customer Satisfaction Program	Sunroof	2007 - 2008	GMC/Saturn/Buick	Acadia/Outlook/Enclave
N - 080272	Special Coverage	Engine Valve Seat	2006	Chevrolet/GMC/Isuzu	Colorado/Canyon
N - 090047	Product Safety Recall	Valve Cover / Spark plug retainer	1997 - 2003	Pontiac/Buick/ Chevrolet/Oldsmobile	Gr Prix/Regal/Lumina/ Monte Carlo/Impala/Intrigue

(b) None.

Exhibit B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
Chrysler LLC, *et al.*,	:	Case No. 09-50002 (AJG)
Debtors.	:	(Jointly Administered)

ORDER, PURSUANT TO SECTIONS 105, 363 AND 365 OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 2002, 6004 AND 6006, (A) APPROVING BIDDING PROCEDURES FOR THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS, (B) AUTHORIZING THE DEBTORS TO PROVIDE CERTAIN BID PROTECTIONS, (C) SCHEDULING A FINAL HEARING APPROVING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS AND (D) APPROVING THE FORM AND MANNER OF NOTICE THEREOF

This matter coming before the Court on the motion (the "Motion")[1] of the above-captioned debtors and debtors in possession (collectively, the "Debtors") seeking, pursuant to sections 105, 363 and 365 of title 11 of the United States Code (the "Bankruptcy Code"), Rules 2002, 6004 and 6006 of the Federal Rules of Bankruptcy Procedures (the "Bankruptcy Rules") and Rules 2002-1, 6004-1, 6006-1 and 9006-1(b) of the Local Rules for the United States Bankruptcy Court of the Southern District of New York (the "Local Bankruptcy Rules"), entry of (i) an order (a) approving bidding procedures attached hereto as Exhibit A (the "Bidding Procedures") for the sale of substantially all of the Debtors' tangible, intangible and operating assets, defined as the "Purchased Assets" in Section 2.06 of the Purchase Agreement, including the Designated Agreements (as defined below), the assets related to the research, design, manufacturing, production, assembly and distribution of passenger cars, trucks and other

[1] Capitalized terms used but not defined herein have the meanings given to such terms in the Motion and all Exhibits thereto.

vehicles (including prototypes) under brand names that include Chrysler, Jeep® and Dodge (the "CarCo Business"), certain of the facilities related thereto and all rights including intellectual property rights, trade secrets, customer lists, domain names, books and records, software and other assets used in or necessary to the operation of the CarCo Business or related thereto (collectively, as defined in the Purchase Agreement, the "Purchased Assets") to the Purchaser (as defined below) and (b) scheduling a final hearing on the sale of the Purchased Assets and the approval of the UAW Retiree Settlement Agreement (the "Sale Hearing") and approving the form and manner of notice thereof; and (ii) after the Sale Hearing, an order (the "Sale Order") (a) authorizing the sale of the Purchased Assets, free and clear all liens, claims (as such term is defined by section 101(5) of the Bankruptcy Code), encumbrances, rights, remedies, restrictions, interests, liabilities, and contractual commitments of any kind or nature whatsoever, whether arising before or after the Petition Date, whether at law or in equity, including all rights or claims based on any successor or transferee liability, all environmental claims, all change in control provisions, all rights to object or consent to the effectiveness of the transfer of the Purchased Assets to the Purchaser or to be excused from accepting performance by the Purchaser or performing for the benefit of the Purchaser under any Assumed Agreement and all rights at law or in equity, excluding any Designated Agreement, all as more specifically set forth and defined in the Sale Motion and the proposed order approving the Sale Transaction (as so defined therein, "Claims") to the Successful Bidder (as such term is defined in the Bidding Procedures), (b) authorizing the assumption and assignment of certain executory contracts and unexpired leases constituting part of the Purchased Assets and related procedures and (c) granting certain related relief, including approval of the UAW Retiree Settlement Agreement; the Court having conducted a hearing on the Motion on May 1, 4 and 5, 2009 (the "Bidding

Procedures Hearing") at which time all interested parties were offered an opportunity to be heard with respect to the Motion; the Court having reviewed and considered (i) the Motion and the exhibits thereto, (ii) the Bidding Procedures attached to hereto as Exhibit A, (iii) all objections to the Bidding Procedures, (iv) the Affidavit of Ronald L. Kolka filed in support of the Debtors' first day papers (Docket No. 23), (v) the Declaration of Scott R. Garberding (Docket No. 49), (vi) the Declaration of Peter Grady (Docket No. 50), (vii) the Declaration of Frank Ewasyshyn (Docket No. 48), (viii) the Declaration of Robert Manzo (Docket No. 52), (ix) the Declaration of Tom W. LaSorda (Docket No. 51), (x) the Declaration of Bradley A. Robbins (Docket No. 173), (xi) the Declaration of James J. Arrigo (Docket No. 53), (xii) the Declaration of John Schendon (Docket No. 54), (xiii) the Supplemental Declaration of Robert Manzo (Docket No. 197) (xiv) the testimony provided at the Bidding Procedures Hearing by the aforementioned Declarants and Affiant, (xv) the Sale Notice attached hereto as Exhibit B, (xvi) the Publication Notice attached hereto as Exhibit C, (xvii) the Assignment Notice attached hereto as Exhibit D, (xviii) the UAW Retiree Notices attached hereto as Exhibit E and (ix) the arguments of counsel made, and the evidence proffered or adduced, at the Bidding Procedures Hearing; and it appearing that the relief requested in the Motion is reasonable and in the best interests of the Debtors' bankruptcy estates, their creditors and other parties-in-interest; and after due deliberation and sufficient cause appearing;

IT IS HEREBY FOUND AND DETERMINED THAT:

A. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

B. As of the Petition Date, the CarCo Business has been idled and the Debtors have advised the Court that they believe they lack the financing and liquidity to reopen

and restart the CarCo Business for the production of 2010 vehicles unless a sale is consummated. The Sale Transaction is a multi-party arrangement that provides the financial wherewithal and the technical expertise to implement accelerated changes in the Debtors' production platform so as to reopen their domestic manufacturing facilities and domestic assembly plants in time to permit the production of 2010 vehicles.

C. The Debtors have articulated good and sufficient reasons for, and the best interests of their estates, creditors, employees, retirees and other parties in interest and stakeholders will be served by, this Court granting certain of the relief requested in the Motion relating to that certain Master Transaction Agreement, dated as of April 30, 2009 (the "Purchase Agreement"),[2] between and among Fiat S.p.A ("Fiat"), New CarCo Acquisition LLC (the "Purchaser"), a Delaware limited liability formed by Fiat, and Chrysler LLC and its Debtor subsidiaries, which, together with certain ancillary agreements, contemplates a set of related transactions (collectively, the "Sale Transaction") for the sale of the Purchased Assets to the Purchaser and, in connection therewith, approval of the UAW Retiree Settlement Agreement, including approval of: (1) the Bidding Procedures, including the minimum overbid amount of $100 million; (2) the procedures described below (the "Contract Procedures") for the determination of the amounts necessary to cure defaults under the Designated Agreements (the "Cure Costs") and to address any other disputes in connection with the assumption and assignment of the Designated Agreements pursuant to section 365 of the Bankruptcy Code; (3) the Breakup Fee described below and (4) the form, timing and manner of notice of the proposed sale, the Bidding Procedures, the Contract Procedures and the other matters described

[2] A copy of the Purchase Agreement, without its voluminous exhibits and schedules, is attached as Exhibit A to the Motion.

herein, including the form of notice of the proposed sale attached hereto as Exhibit B (the "Sale Notice"), the form of publication notice of the sale attached hereto as Exhibit C (the "Publication Notice"), the form of notice of the proposed assumption and assignment of the Designated Agreements attached hereto as Exhibit D (the "Assignment Notice") and the form of (i) special notice to Debtors' retirees represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW") and (ii) Cover Letter to UAW-Represented Retirees (as defined below) describing the proposed sale and the UAW Retiree Settlement Agreement, attached hereto collectively as Exhibit E (collectively, the "UAW Retiree Notices").

D. Under the Purchase Agreement, Fiat is entitled to a fee in the amount of $35 million solely in the event that a bidder other than the Purchaser is selected as the Successful Bidder (as defined in the Bidding Procedures) for the Purchased Assets (the "Breakup Fee"). Other than the payment of the Breakup Fee, Fiat is not entitled to any other fees, expenses or compensation in the event that a bidder other than the Purchaser is selected as the Successful Bidder in the auction process described below. The payment of the Breakup Fee, as set forth herein, is an essential inducement and condition relating to the Purchaser's and Fiat's entry into, and continuing obligations under, the Purchase Agreement. The Breakup Fee (1) if triggered, shall be deemed to be an actual and necessary cost and expense of preserving these estates; (2) is reasonable and appropriate in light of the size and nature of the proposed transaction, the necessity to quickly consummate a sale for the Debtors and the considerable efforts and resources that have been and will be expended by the Purchaser pending the Sale Hearing; (3) has been negotiated by the parties and their respective advisors at arms' length and in good faith; and (4) is necessary to ensure that the Purchaser and Fiat will continue to pursue the

closing of the Sale. The Breakup Fee represents less than 1.75% of the cash portion of the purchase price to be paid by the Purchaser, is comparable to similar fees authorized in comparable transactions in this District, represents approximately 35% of the minimum excess value that would be realized by the Debtors' estates from a qualifying overbid under the Bidding Procedures and is commensurate to the benefit conferred by the Purchaser and Fiat upon the estates.

E. The Purchaser and the Debtors are relying on their mutual performance of their obligations set forth in Articles V, VI and VII of the Purchase Agreement, subject for the avoidance of doubt to the Debtors' right under Section 5.18 of the Purchase Agreement, to the extent these obligations relate to the period prior to the termination of the Purchase Agreement or the Closing Date (as defined in the Purchase Agreement and hereafter the "Closing Date"), whichever shall first occur. The Purchaser and the Debtors have entered into the Purchase Agreement expecting all parties to perform these obligations to provide the each other with reasonable assurances that they will be in the position to consummate the transactions contemplated by the Purchase Agreement in the event that the Purchaser is selected as the Successful Bidder.

F. Under the circumstances, and particularly in light of the extensive prior marketing of the Purchased Assets, the Bidding Procedures constitute a reasonable, sufficient, adequate and proper means to provide potential competing bidders with an opportunity to submit and pursue higher and better offers for all or substantially all of the Purchased Assets.

G. The Purchased Assets are "wasting assets" that will not retain going concern value over an extended period of time. Given the wasting nature of the Purchased Assets, the Debtors' estates will suffer immediate and irreparable harm if the relief requested in

the Motion is not granted on an expedited basis consistent with the provisions set forth herein and the Purchase Agreement.

H. The Debtors have articulated good and sufficient reasons for, and the best interests of their estates and stakeholders will be served by, this Court scheduling a Sale Hearing on an expedited basis to consider granting the remaining relief requested in the Motion, including approval of the Sale Transaction and the transfer of the Purchased Assets to the Purchaser (or another Successful Bidder) free and clear of all Claims, pursuant to section 363(f) of the Bankruptcy Code.

I. The Sale Notice is reasonably calculated to provide parties in interest with proper notice of the potential sale of the Purchased Assets, the related Bidding Procedures, the Sale Hearing, the structure of the Sale Transaction and related implications on interested parties, including, without limitation, creditors, customers, suppliers and current and former employees.

J. The Assignment Notice is reasonably calculated to provide all counterparties to the Designated Agreements with proper notice of the potential assumption and assignment of their executory contracts or unexpired leases, any Cure Costs relating thereto and the Contract Procedures.

K. Publication of the Publication Notice as set forth herein is reasonably calculated to provide all potential warranty claimants and all unknown creditors and parties not otherwise required to be served with a copy of the Sale Notice pursuant to this Order with proper notice of the potential sale of the Purchased Assets, the related Bidding Procedures and the Sale Hearing.

L. The UAW Retiree Notices are reasonably calculated to provide the Debtors' retirees and surviving spouses represented by the UAW, including members of

the "Class" as defined in the UAW Retiree Settlement Agreement (collectively, the "UAW-Represented Retirees") proper notice of the potential sale of the Purchased Assets, the related Bidding Procedures, the Sale Hearing, the structure of the Sale Transaction, including, but not limited to, (1) the sale of the Purchased Assets free and clear of any interest the UAW or UAW-Represented Retirees may have in such Purchased Assets, (2) the UAW CBA Assignment and (3) the UAW Retiree Settlement Agreement.

M. The Motion and this Order comply with all applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules and the Guidelines for the Conduct of Asset Sales adopted by this Court pursuant to General Order M-331.

N. The Sale Transaction includes the transfer of "Personally Identifiable Information" (as defined in section 101(41A) of the Bankruptcy Code). The transfer of Personally Identifiable Information shall not be effective until a Consumer Privacy Ombudsman is appointed, issues its findings and the Court has an opportunity to review the findings and issue any rulings that are appropriate.

O. Due, sufficient and adequate notice of the relief granted herein has been given to parties in interest.

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED to the extent set forth herein.

2. All objections to the relief requested in this Motion that have not been withdrawn, waived or settled as announced to the Court at the Bidding Procedures Hearing or by stipulation filed with the Court or the terms of this Order, are overruled except as otherwise set forth herein.

3. The Bidding Procedures, which are attached hereto as Exhibit A and incorporated herein by reference, are hereby approved in all respects and shall govern all bids and bid proceedings relating to the Purchased Assets.

4. The failure specifically to include or reference any particular provision of the Bidding Procedures in this Order shall not diminish or impair the effectiveness of such procedure, it being the intent of the Court that the Bidding Procedures be authorized and approved in their entirety.

5. Any person wishing to submit a higher or better offer for the Purchased Assets, or any portion thereof, must do so in accordance with the terms of the Bidding Procedures.

6. The deadline for submitting a Qualified Bid (as such term is defined in the Bidding Procedures) shall be May 20, 2009 for all Potential Bidders (the "Bidding Deadline"), as further described in the Bidding Procedures.

7. The deadline for objecting to the approval of the Sale Transaction (other than an objection to the proposed assumption and assignment of the Designated Agreements or to any proposed Cure Costs), including the sale of the Purchased Assets free and clear of all Claims pursuant to section 363(f) of the Bankruptcy Code and approval of the UAW Retiree Settlement Agreement shall be May 19, 2009 at 4:00 p.m. (Eastern Time) (the "Objection Deadline") for all parties in interest, including, but not limited to the Debtors' prepetition senior secured lenders (the "Senior Secured Lenders"), the UAW and the official committee of unsecured creditors appointed in these cases (the "Creditors' Committee"); provided, however, that if a determination is made at the Sale Hearing that the Successful Bidder (as such term is

defined in the Bidding Procedures) is a bidder other than the Purchaser, parties in interest may object solely to such determination at the Sale Hearing.

8. The Purchaser shall constitute a Qualified Bidder (as defined in the Bidding Procedures) for all purposes and in all respects with regard to the Bidding Procedures.

9. As further described in the Bidding Procedures, if more than one Qualified Bid is timely received, a Court-supervised auction may be conducted at the outset of the Sale Hearing to determine the Successful Bidder.

10. The Court shall conduct the Sale Hearing on May 27, 2009 at 10:00 a.m. (Eastern Time) at which time the Court will consider approval of the Sale Transaction to the Successful Bidder and approval of the UAW Retiree Settlement Agreement. The Sale Hearing may be adjourned or rescheduled without notice by an announcement of the adjourned date at the Sale Hearing; provided, however, that the Sale Hearing shall not be deemed to have been held until it is substantially complete.

11. The Debtors are hereby authorized to conduct the Sale Transaction (or other similar transaction, if the Successful Bidder is a party other than the Purchaser) without the necessity of complying with any state or local bulk transfer laws or requirements.

12. The Sale Notice, the Publication Notice and the UAW Retiree Notices, substantially in the forms of Exhibit B, Exhibit C and Exhibit E to this Order, are hereby approved.

13. The manner of notice of the proposed sale, the Bidding Procedures and the Sale Hearing and approval of the UAW Retiree Settlement Agreement at such Sale Hearing as set forth in this paragraph 13 are approved in all respects. In particular, no other or further notice

of the proposed sale, the Bidding Procedures, the Sale Hearing and approval of the UAW Retiree Settlement Agreement at such Sale Hearing shall be required except as follows:

(a) within two business days after entry of this Order (the "Mailing Deadline"), the Debtors shall serve the Sale Notice by first-class mail, postage prepaid upon: (i) counsel to the U.S. Treasury; (ii) counsel to the UAW; (iii) counsel to the Purchaser; (iv) counsel to the administrative agent for the Senior Secured Lenders; (v) any party that, in the past year, expressed in writing to the Debtors an interest in acquiring the Purchased Assets, directly or through a merger or alliance; (vi) non-Debtor counterparties to all Designated Agreements; (vii) all parties who are known to assert Claims upon the Assets; (viii) the Securities and Exchange Commission; (ix) the Internal Revenue Service; (x) all applicable state attorneys general, local environmental enforcement agencies and local regulatory authorities; (xi) all applicable state and local taxing authorities; (xii) the U.S. Trustee; (xiii) Federal Trade Commission; (xiv) United States Attorney General/Antitrust Division of Department of Justice; (xv) the U.S. Environmental Protection Agency and similar state agencies; (xvi) United States Attorney's Office; (xvii) the entities set forth in the Special Service List and the General Service List established in these cases; (xviii) counsel to Cerberus; (xix) counsel to Daimler; (xx) counsel to Export Development Canada; (xxi) all entities that have requested notice in these chapter 11 cases under Bankruptcy Rule 2002; and (xxii) any other party identified on the creditor matrix in these cases.

(b) On the Mailing Deadline, or as soon as practicable thereafter, the Debtors shall submit the Publication Notice to be published one time in the national edition of *USA Today*, *The Wall Street Journal* and *The New York Times*, as well as the Worldwide Edition of *The Financial Times*.

(c) On the Mailing Deadline, or as soon as practicable thereafter, the Debtors shall cause the Publication Notice to be published on the website of the Debtors' claims and noticing agent, Epiq Bankruptcy Solutions, LLC, at http://www.chryslerrestructuring.com.

(d) On the Mailing Deadline, the Debtors shall serve the UAW Retiree Notices on all UAW-Represented Retirees by first-class mail, postage prepaid. In addition, on the Mailing Date, or as soon as practicable thereafter, the Debtors shall cause this Order, the Sale Motion, the Purchase Agreement, the UAW Retiree Settlement Agreement (including its exhibits) and that certain Equity Recapture Agreement executed in connection with the UAW Retiree Settlement Agreement to be posted on the website of the Debtors' claims and noticing agent, Epiq Bankruptcy Solutions, LLC, at http://www.chryslerrestructuring.com (together with the mailing of the UAW Retiree Notices as set forth in this subparagraph, "Notice to UAW-Represented Retirees").

14. The manner of notice of the proposed sale, the Bidding Procedures, the Sale Hearing and approval of the UAW Retiree Settlement Agreement, including the Notice to

UAW-Represented Retirees is approved in all respects. In particular, no other or further notice of the proposed sale, the Bidding Procedures, the Sale Hearing or approval of the UAW Retiree Settlement Agreement shall be required other than effectuating the Notice to UAW-Represented Retirees approved herein.

15. To be considered, any objection to the Sale Transaction (other than an objection to the proposed assumption and assignment of the Designated Agreements or to any proposed Cure Costs), including any objection to approval of the UAW Retiree Settlement Agreement, must (a) comply with the Bankruptcy Rules and the Local Bankruptcy Rules and (b) be made in writing and filed with this Court and served upon the following parties (collectively, the "Notice Parties") so as to be received by the Objection Deadline: (i) the Debtors, c/o Chrysler LLC, 1000 Chrysler Drive, CIMS# 485-14-96, Auburn Hills, Michigan 48326-2766 (Attn: Holly E. Leese, Esq.); (ii) Jones Day, counsel to the Debtors, 222 East 41st Street, New York, New York 10017 (Attn: Corinne Ball, Esq. and Nathan Lebioda, Esq.) and 1420 Peachtree Street, N.E., Suite 800, Atlanta, Georgia 30309-3053 (Attn: Jeffrey B. Ellman, Esq.); (iii) Capstone Advisory Group, LLC, Park 80 West, Plaza 1, Plaza Level, Saddle Brook, NJ 07663 (Attn: Robert Manzo); (iv) Kramer Levin Naftalis & Frankel LLP, counsel to the Creditors' Committee, 1177 Avenue of the Americas New York, New York 10036 (Attn: Thomas M. Mayer, Esq. and Kenneth H. Eckstein, Esq.); (v) Simpson Thacher & Bartlett LLP, counsel to the administrative agent for the Senior Secured Lenders, 425 Lexington Avenue, New York, New York 10017 (Attn: Peter Pantaleo, Esq. and David Eisenberg, Esq.); (vi) the U.S. Trustee, 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Brian S. Masumoto, Esq.); (vii) the U.S. Treasury, 1500 Pennsylvania Avenue NW, Room 2312 Washington, D.C. 20220 (Attn: Matthew Feldman, Esq.); (viii) United States Attorney's Office,

Southern District of New York, Civil Division, Tax & Bankruptcy Unit, 86 Chambers Street, 3rd Floor, New York, New York 10007 and Cadwalader, Wickersham & Taft LLP, Of counsel to the Presidential Task Force on the Auto Industry, One World Financial Center, New York, New York 10281 (Attn: John J. Rapisardi, Esq.); (ix) Vedder Price, P.C., counsel to Export Development Canada, 1633 Broadway, 47th Floor New York, New York 10019 (Attn: Michael J. Edelman, Esq.); (x) the Purchaser and Fiat, c/o Fiat S.p.A, Via Nizza n. 250, 10125 Torino, Italy (Attn: Chief Executive Officer); (xi) Sullivan & Cromwell LLP, counsel to the Purchaser and Fiat, 125 Broad Street, New York, New York 10004 (Attn: Scott D. Miller, Esq. and Andrew Dietderich, Esq.) and 1888 Century Park East, 21st Floor, Los Angeles, CA 90067 (Attn: Hydee R. Feldstein, Esq.); (xii) International Union, UAW, 8000 East Jefferson Avenue, Detroit, Michigan 48214 (Attn: Daniel Sherrick, Esq.); (xiii) Cleary Gottlieb Steen & Hamilton LLP, counsel to the UAW, One Liberty Plaza, New York, New York 10006 (Attn: James L. Bromley, Esq.); (xiv) Cohen, Weiss and Simon LLP, counsel to the UAW, 330 W. 42nd St., New York, New York 10036 (Attn: Babette Ceccotti, Esq.); (xv) Togut, Segal & Segal, LLP, conflicts counsel to the Debtors, One Penn Plaza, New York, New York 10119 (Attn: Albert Togut, Esq.); and (xvi) counsel to any other statutory committees appointed in these cases.

16. The failure of any objecting person or entity to timely file its objection shall be a bar to the assertion, at the Sale Hearing or thereafter, of any objection to the Motion, or the consummation and performance of the sale of the Purchased Assets contemplated by the Purchase Agreement or a Marked Agreement (as defined in the Bidding Procedures), if any (including the transfer free and clear of all Claims of each of the Purchased Assets transferred as part of the Sale Transaction) or to the approval of the UAW Retiree Settlement Agreement.

17. The Minimum Overbid Purchase Price and Breakup Fee as set forth in the Purchase Agreement are hereby approved. If Fiat or the Purchaser becomes entitled to receive the Breakup Fee in accordance with the terms of the Purchase Agreement, (a) the Debtors' obligation to pay the Breakup Fee under the Purchase Agreement shall be a joint and several obligation of the Debtors and shall survive termination of the Purchase Agreement; (b) Fiat or the Purchaser (as applicable) shall be, and hereby is, granted an allowed administrative claim in the Debtors' chapter 11 cases in an amount equal to the Breakup Fee, pursuant to sections 503(b) and 507(a)(2) of the Bankruptcy Code and have priority over and be senior to all other claims against the Debtors to the extent of the proceeds realized from the sale of the Purchased Assets to a Successful Bidder other than the Purchaser; (c) such Breakup Fee shall be payable immediately on the third business day following entry of an order approving a Successful Bidder other than the Purchaser or Fiat on the conditions and in accordance with the terms of the Purchase Agreement; and (d) the Debtors are authorized and directed to pay the Breakup Fee to Fiat immediately upon its becoming due without further order of this Court.

18. Other than Fiat's right to the Breakup Fee, no person or entity, shall be entitled to any expense reimbursement, break-up fees, "topping," termination or other similar fee or payment in connection with the Bidding Procedures.

19. The following procedures (the "Contract Procedures") shall govern the assumption and assignment of Designated Agreements in connection with the sale of the Purchased Assets to the Purchaser:[3]

[3] If a party other than the Purchaser is the Successful Bidder, or if a transaction other than the Sale Transaction is consummated for the sale of a substantial portion of the Debtors' operating assets, then these Contract Procedures may be modified if necessary by further order of this Court.

(a) Initial Contract Designations. Not fewer than 13 days prior to the Sale Hearing, the Debtors shall file with this Court and shall serve on each non-debtor counterparty to an executory contract or unexpired lease with any of the Debtors (each, a "Non-Debtor Counterparty") that the Debtors may assume and assign to the Purchaser (the "Initial Designated Agreements"), by overnight delivery service, a notice of assumption and assignment of executory contracts and unexpired leases in substantially the form of the Assignment Notice attached hereto as Exhibit D. The Debtors shall attach to the Assignment Notice a list identifying the Non-Debtor Counterparties to the Initial Designated Agreements and the corresponding Cure Costs under the Initial Designated Agreements as of April 30, 2009; provided that such Assignment Notice shall in no way limit such Non-Debtor Counterparty's entitlement to Cure Costs accruing during the period after April 30, 2009. In addition, the Debtors shall serve a copy of the Assignment Notice on a Non-Debtor Counterparty's counsel of record in these chapter 11 cases as of the date of the Assignment Notice ("Counsel of Record").

(b) Information in Assignment Notice. For each Designated Agreement, on the Assignment Notice, the Debtors shall either (i) indicate the proposed Cure Costs relating to such Designated Agreement or (ii) provide an amount representing the proposed Cure Costs for multiple Designated Agreements with the same Non-Debtor Counterparty, subject, upon request, to providing greater detail to a Non-Debtor Counterparty to identify on a contract-by-contract basis the proposed applicable Cure Costs to the extent reasonably available. On an Assignment Notice, Designated Agreements may be listed individually or in groups of agreements with the Non-Debtor Counterparty, as long as the Non-Debtor Counterparty is provided with sufficient information to identify the contracts to be assumed. The Assignment Notice also may identify any additional proposed terms or conditions of assumption and assignment.

(c) Additional Contract Designations. In accordance with Section 2.10 of the Purchase Agreement, the Debtors may, at the Purchaser's request or with the Purchaser's consent, designate, up to the Agreement Designation Deadline, additional executory contracts and unexpired leases as agreements to be assumed by the Debtors and assigned to the Purchaser pursuant to the Purchase Agreement (the "Additional Designated Agreements" and, together with the Initial Designated Agreements, the "Designated Agreements"). As used herein the "Agreement Designation Deadline" means, as applicable, (i) 30 days after the Closing Date with respect to the Dealer Agreements (as defined below), (ii) 60 days after the Closing Date for executory contracts and unexpired leases with the Debtors' production suppliers and (iii) 90 days after the Closing Date for all other agreements. Upon determining that a specific executory contract or unexpired lease, or a group thereof, are Additional Designated Agreements, the Debtors, at the Purchaser's request, shall serve an Assignment Notice on each of the Non-Debtor Counterparties to such Additional Designated Agreements and their Counsel of Record, indicating (i) that the notice recipient is a Non-Debtor Counterparty to one or more executory contracts or unexpired leases with the Debtors that the Debtors intend to assume and assign to the Purchaser and (ii) the corresponding Cure Cost under the Additional Designated Agreements as of April 30, 2009; provided that such Assignment Notice shall in no way limit such Non-Debtor Counterparty's entitlement to Cure Costs accruing during the period after April 30, 2009.

(d) Purchaser Confirmation Notice. Prior to the Closing Date and no later than June 12, 2009 (the "Pre-Closing Deadline"), the Purchaser shall serve on all applicable Non-Debtor Counterparties a notice indicating those Designated Agreements with respect to which the Purchaser has made a final determination to take assignment of a Designated Agreement (a "Confirmation Notice"), subject only to Cure Costs not being established in an amount greater than the amounts in the Assignment Notice unless otherwise agreed upon in writing by the Purchaser. Designated Agreements listed on a Confirmation Notice are referred to as "Confirmed Agreements." The Purchaser may serve additional Confirmation Notices at any time through the Agreement Designation Deadline. Until a Designated Agreement is listed on a Confirmation Notice, it shall not be considered to be either assumed or assigned and shall remain subject to assumption, rejection or redesignation hereunder.

(e) UAW and GMAC Agreements. Contingent upon the approval of the sale of the Purchased Assets to the Purchaser and concurrently with the consummation of the sale of the Purchased Assets (without prejudice to the conditions thereto set forth in the Purchase Agreement), (i) each of the UAW CBA Assignment and the GMAC MAFA Documents (as such term is defined in the Bidding Procedures attached hereto as Exhibit A) shall be deemed to be Confirmed Agreements as to which no Assignment Notice or Confirmation Notice shall be sent, (ii) the Debtors shall assign to Purchaser, and Purchaser shall be deemed to have assumed, each such agreement as of the Closing Date, and each non-Debtor party to each such agreement shall be deemed to have consented to such assumption and assignment and (iii) the Court order approving such sale shall reflect such assumption and assignment.

(f) Direct Dealer Agreements. Certain executory dealer agreements will be identified as Designated Agreements to be assumed and assigned. Although most U.S. dealers have entered into standard uniform dealership agreements in the form of the Chrysler Corporation Sales and Service Agreement (the "Sales and Service Agreement"), some dealers are party to older agreements in the form of the Chrysler Direct Dealer Agreement (each, a "Direct Dealer Agreement"). If a Direct Dealer Agreement is identified as a Designated Agreement pursuant to the procedures above, then such Direct Dealer Agreement will only be assumed and assigned to the Purchaser if the counterparty to the Direct Dealer Agreement first agrees to modify such Direct Dealer Agreement and restate it in the form of the Sales and Service Agreement (each such modified Direct Dealer Agreement and Sales and Service Agreement, a "Dealer Agreement"). If the counterparty and the Debtors do not so modify and restate such Direct Dealer Agreement in the form of the Sales and Service Agreement, then notwithstanding any other provisions of these Contract Procedures, such Direct Dealer Agreement will not be assumed and assigned pursuant to these Contract Procedures.

(g) Section 365 Objections. Objections, if any ("Section 365 Objections"), to the proposed Cure Costs, or to the proposed assumption and assignment of the Designated Agreements, including, but not limited to, objections related to adequate assurance of future performance or objections relating to whether applicable law excuses the Non-Debtor Counterparty from accepting performance by, or rendering performance to, the Purchaser for purposes of section 365(c)(1) of the Bankruptcy Code, must be in

writing and filed with this Court and served on the Notice Parties so as to be received no later than ten days after service of an Assignment Notice (the "Section 365 Objection Deadline"). Where a Non-Debtor Counterparty to a Designated Agreement files a Section 365 Objection meeting the requirements of this subparagraph (g), objecting to the assumption by the Debtors and assignment to the Purchaser of such Designated Agreement (the "Disputed Designation") and/or asserting a cure amount higher than the proposed Cure Costs listed on the Assignment Notice (the "Disputed Cure Costs"), the Debtors, the Purchaser and the Non-Debtor Counterparty shall meet and confer in good faith to attempt to resolve any such objection without Court intervention.

(h) Section 365 Hearing. If any of the Debtors, the Non-Debtor Counterparty or the Purchaser determine that the objection cannot be resolved without judicial intervention, then the determination of the assumption and assignment of the Disputed Designation and/or the amount to be paid under section 365 of the Bankruptcy Code with respect to the Disputed Cure Costs will be determined by the Court at an omnibus hearing established for such purpose that is on a date not less than ten days after the service of such objection or such other date as determined by the Court (a "Section 365 Hearing"), unless the Debtors, the Purchaser and the Non-Debtor Counterparty to the Designated Agreement in dispute agree otherwise. Unless otherwise agreed by the parties, the Section 365 Hearing to consider objections relating to the Initial Designated Agreements shall be conducted on June 4, 2009 at 10:00 a.m., Eastern Time. If the Court determines at a Section 365 Hearing that the Designated Agreement cannot be assumed and assigned, or establishes Cure Costs that the Purchaser is not willing to pay, then such executory contract or unexpired lease shall no longer be considered a Designated Agreement.

(i) Consent to Assumption and Assignment. Any Non-Debtor Counterparty to a Designated Agreement who fails to file timely Section 365 Objection to the proposed Cure Costs or the proposed assumption and assignment of a Designated Agreement by the Section 365 Objection Deadline is deemed to have consented to such Cure Costs and the assumption and assignment of such Designated Agreement, and such party shall be forever barred from objecting to the Cure Costs or such assumption and assignment and from asserting any additional cure or other amounts against the Debtors, their estates or the Purchaser.

(j) Resolution of Assumption/Assignment Issues. If the Non-Debtor Counterparty to a Designated Agreement fails to timely assert a Section 365 Objection as described in subparagraph (g) above, or upon the resolution of any timely Section 365 Objection by agreement of the parties or order of the Court approving an assumption and assignment, such Designated Agreement shall be deemed to be assumed by the Debtors and assigned to the Purchaser and the proposed Cure Cost related to such Designated Agreement shall be established and approved in all respects, subject to the conditions set forth in subparagraph (k) below.

(k) Conditions on Assumption and Assignment. The Debtors' decision to assume and assign the Designated Agreements is subject to Court approval and consummation of the Sale Transaction. Accordingly, subject to the satisfaction of conditions in subparagraph (j) above to address any cure or assignment disputes, the

Debtors shall be deemed to have assumed and assigned to the Purchaser each of the Designated Agreements as of the date of and effective only upon the Closing Date, and absent such closing, each of the Designated Agreements shall neither be deemed assumed nor assigned and shall in all respects be subject to subsequent assumption or rejection by the Debtors under the Bankruptcy Code. Assumption and assignment of the Designated Agreements also is subject to the Purchaser's rights set forth in subparagraphs (c) and (d) above. The Purchaser shall have no rights in and to a particular Designated Agreement until such time as the particular Designated Agreement has been identified by the Purchaser as a Confirmed Agreement and is assumed and assigned in accordance with the procedures set forth herein. Once assumed and assigned as a Confirmed Agreement under these Contract Procedures, a Designated Agreement is not subject to rejection under section 365 of the Bankruptcy Code.

(l) Pre-Closing Assurance Letters. From and after the Pre-Closing Deadline through the Closing Date, with respect to any Designated Agreement not listed in a Confirmation Notice that is a production supply contract or a dealer contract with respect to which the Non-Debtor Counterparty has determined that it must incur costs after the Pre-Closing Deadline to remain in a position to perform in accordance with the Designated Agreement upon assumption by the Purchaser, the Non-Debtor Counterparty may send a letter to the Debtors and to the Purchaser describing such additional costs under such agreement and seeking assurance of the Purchaser's intentions with respect to such agreement (an "Assurance Letter"). In response to an Assurance Letter, the Purchaser may either (i) provide a Confirmation Notice to the Non-Debtor Counterparty; (ii) elect not to deliver a Confirmation Notice at such time but to provide the Non-Debtor Counterparty with assurances that the Purchaser will advance the costs of any ongoing performance by the Non-Debtor Counterparty pending a final determination to assume the underlying Designated Agreement (such advances to be reflected by an appropriate credit against future payments to the Non-Debtor Counterparty under the Designated Agreement only in the event that such Designated Agreement becomes a Confirmed Agreement); or (iii) elect not to deliver a Confirmation Notice at such time but to agree in writing that the Non-Debtor Counterparty may temporarily suspend performance during this period without penalty (and, if applicable, upon assumption and assignment to the Purchaser, toll or delay subsequent deliveries as may be reasonably required to reflect the suspension of performance during such period). If no response to an Assurance Letter is received within five business days, the Non-Debtor Counterparty may temporarily suspend performance of the agreement pursuant to clause (iii) above. Any disputes relating to the foregoing shall be heard by the Bankruptcy Court. For purposes of this paragraph, the Debtors and the Purchaser shall be contacted at the addresses identified in paragraph 15 above.

(m) Post-Closing Assurances. From and after the Closing Date through the applicable Agreement Designation Deadline, Non-Debtor Counterparties may serve a written request on the Debtors and the Purchaser for a final determination of the assumption or rejection of its executory contracts and unexpired leases. Absent a favorable response within ten days, the Non-Debtor Counterparty may file a motion to compel assumption or rejection of such agreement, which may be heard on ten days' notice, subject to the Court's availability; provided, however, that in the event that a

Non-Debtor Counterparty believes that it requires a more expeditious decision regarding assumption or rejection of its executory contract or unexpired lease, such Non-Debtor Counterparty shall be free to seek expedited relief from the Court, without regard to the ten-day periods referenced herein but subject to the legal standards and requirements applicable to requests for expedited consideration, provided further that in such event the counterparty shall give as much advance notice as reasonably practicable under the circumstances to the Debtors and the Purchaser. For purposes of this paragraph, the Debtors and the Purchaser shall be contacted at the addresses identified in paragraph 15 above.

(n) Cure Payments. Except as may otherwise be agreed to by the parties to a Designated Agreement, the defaults under the Designated Agreements that must be cured in accordance with section 365(b) of the Bankruptcy Code shall be cured as follows: the Purchaser shall pay all Cure Costs relating to an assumed executory contract or unexpired lease within ten days after the later of (i) the Closing Date, (ii) the date on which such executory contract or unexpired lease is deemed assumed and assigned, in accordance with subparagraph (k) of these Contract Procedures or (iii) with respect to Dispute Cure Costs, the date the amount thereof is finally determined.

(o) Rights Pending Assumption or Rejection. Nothing in these Contract Procedures limits, restricts or expands the rights of parties to executory contracts and unexpired leases pending assumption or rejection, including any rights to seek further relief from the Bankruptcy Court (including motions to compel a prompt final decision on assumption or rejection), or the rights of other parties in response to such requests.

(p) Filing of Final List of Confirmed Agreements. As soon as reasonably practicable after the Agreement Designation Deadline, the Debtors shall file with the Court a final schedule indicating all Confirmed Agreements and the proposed Cure Costs relating to each Confirmed Agreement scheduled therein.

20. Subject to the Debtors' rights under Section 5.18 of the Purchase Agreement, the Debtors are authorized to and directed to comply with their obligations and undertakings in Articles V, VI and VII of the Purchase Agreement until the earlier of the termination of the Purchase Agreement or the Closing Date. Furthermore, except with respect to the requirement pursuant to this Order that the Purchaser assume all GMAC MAFA Documents (as such term is defined in the Bidding Procedures attached hereto as Exhibit A) upon consummation of the sale of the Purchased Assets, nothing in this Order alters or amends the terms and conditions of, or the rights and obligations of the non-Debtor parties to, the Purchase Agreement, provided that all contracts that have not become Confirmed Contracts as of the

Closing Date shall constitute "Excluded Contracts" for purposes of the Purchase Agreement (without any requirement to update the Company Disclosure Letter) until such time, if any, as such contracts subsequently have become Confirmed Contracts in accordance herewith.

21. The U.S. Trustee is directed to appoint a Consumer Privacy Ombudsman pursuant to sections 332 and 363(b)(1) of the Bankruptcy Code as soon as practicable.

22. Unless expressly set forth herein all time periods set forth in this Order shall be calculated in accordance with Bankruptcy Rule 9006(a).

23. Notwithstanding the possible applicability of Bankruptcy Rules 6004, 6006, 7062, 9014 or otherwise, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

24. The Debtors are authorized and empowered to take such steps, expend such sums of money and do such other things as may be necessary to implement and effect the terms and requirements established and relief granted in this Order.

25. The Court shall retain jurisdiction over any matter or dispute arising from or relating to the implementation of this Order.

Dated: New York, New York
May 7, 2009

s/Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT A

[Bidding Procedures]

EXHIBIT A TO BIDDING
PROCEDURES ORDER

BIDDING PROCEDURES[1]

By a motion dated May 3, 2009 (the "Motion"), Chrysler LLC ("Chrysler") and 24 of its domestic direct and indirect subsidiaries, as debtors and debtors in possession (collectively with Chrysler, the "Debtors") sought, among other things, approval of the procedures for the sale of substantially all the CarCo Business (as defined below) and substantially all of the Purchased Assets (as defined below) related thereto. On May 8, 2009, the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") entered its order (the "Bidding Procedures Order"), authorizing the Debtors, among other things, to market the Purchased Assets through the bidding procedures described below (the "Bidding Procedures"). As part of the Bidding Procedures, the Bankruptcy Court has scheduled a hearing to consider approval of the sale of the Purchased Assets to the Successful Bidder (as defined below), to be conducted on May 27, 2009, at 10:00 a.m., Eastern Time, in Room 523 at the Bankruptcy Court, Alexander Hamilton U.S. Custom House, One Bowling Green, New York, New York 10004-1408 (the "Sale Hearing").

I. Stalking Horse Bid

The Debtors have executed a Master Transaction Agreement (collectively with all ancillary documents and agreements, the "Purchase Agreement") with Fiat S.p.A ("Fiat") and New CarCo Acquisition LLC (the "Purchaser"), a Delaware limited liability company formed by Fiat, dated as of April 30, 2009, which contemplates a set of related transactions (collectively, the "Sale Transaction") for the sale of the Purchased Assets to the Purchaser in consideration for $2 billion in cash (the "Cash Consideration") and the assumption of certain liabilities (the "Assumed Liabilities").

II. Important Dates for Potential Competing Bidders

These Bidding Procedures provide for an opportunity for interested parties to qualify and participate in the Auction and submit competing bids for all or substantially all of the Purchased Assets. The Debtors shall, in consultation with the official creditors' committee appointed in the Debtors' chapter 11 cases (the "Creditors' Committee"), the United States Department of the Treasury (the "U.S. Treasury") and the UAW (as defined below):

(a) assist Potential Bidders (as defined below) in conducting their respective due diligence investigations and accept Bids (as defined below) until 5:00 p.m., Eastern Time, on May 20, 2009;

[1] Capitalized terms not otherwise defined herein shall have the respective meanings given to them in the Motion and all Exhibits thereto.

(b) negotiate with any Qualified Bidders (as defined below) in advance of the Sale Hearing to be conducted on May 27, 2009;

(c) if there are Qualified Bidders for all or substantially all of the Purchased Assets in addition to the Purchaser, identify one bid (or group of bids) as the Lead Bid (as defined below) for presentation to the Bankruptcy Court and, if necessary, conduct an in-court auction among Qualified Bidders at the Sale Hearing on May 27, 2009 to identify the Successful Bid; and

(d) seek authority to sell all or substantially all of the Purchased Assets to the Successful Bidder(s) (as defined below) at the Sale Hearing to be conducted by the Bankruptcy Court on May 27, 2009.

III. Assets to Be Sold

The Debtors seek to sell substantially all of the Debtors' tangible, intangible and operating assets, defined as the "Purchased Assets" in Section 2.06 of the Purchase Agreement, including the Designated Agreements (as such term is defined in the Bidding Procedures Order), the assets related to the research, design, manufacturing, production, assembly and distribution of passenger cars, trucks and other vehicles (including prototypes) under brand names that include Chrysler, Jeep® and Dodge (the "CarCo Business"), certain of the facilities related thereto and all rights including intellectual property rights, trade secrets, customer lists, domain names, books and records, software and other assets used in or necessary to the operation of the CarCo Business or related thereto (collectively, as defined in the Purchase Agreement, the "Purchased Assets").

IV. The Bidding Process

The Debtors shall: (a) coordinate the efforts of Potential Bidders in conducting their respective due diligence investigations regarding the Purchased Assets; (b) with the assistance of their financial advisor, Capstone Advisory Group, LLC ("Capstone"), determine whether any person or entity is a Qualified Bidder (as defined below); (c) receive and evaluate bids from Qualified Bidders; and (d) negotiate any Qualified Bids. The foregoing activities are referred to, collectively, as the "Bidding Process." Any person or entity who wishes to participate in the Bidding Process must meet the participation requirements for Potential Bidders below and must thereafter submit a Qualified Bid to become a Qualified Bidder. Except as provided by applicable law or court order, neither the Debtors nor their representatives shall be obligated to furnish any information of any kind whatsoever relating to the Purchased Assets to any person or entity who does not comply with the participation requirements below.

V. Participation Requirements

Unless otherwise ordered by the Bankruptcy Court for cause shown, to participate in the Bidding Process, each interested person or entity (a "Potential Bidder") must deliver the following documents to the parties described below (the "Participation Materials"):

(a) An executed confidentiality agreement in form and substance satisfactory to the Debtors; and

(b) A statement demonstrating to the Debtors' satisfaction a *bona fide* interest in purchasing the Purchased Assets, or a substantial portion thereof, from the Debtors.

The Participation Materials must be transmitted by the Potential Bidder so as to be received no later than 4:00 p.m., Eastern Time, on May 15, 2009 by each of the following parties (collectively, the "Notice Parties"): (a) the Debtors, c/o Chrysler LLC, 1000 Chrysler Drive, CIMS# 485-14-96, Auburn Hills, Michigan 48326-2766 (Attn: Holly E. Leese, Esq.); (b) Jones Day, counsel to the Debtors, 222 East 41st Street, New York, New York 10017 (Attn: Corinne Ball, Esq. and Nathan Lebioda, Esq.) and 1420 Peachtree Street, N.E., Suite 800, Atlanta, Georgia 30309-3053 (Attn: Jeffrey B. Ellman, Esq.); (c) Capstone Advisory Group, LLC, Park 80 West, Plaza 1, Plaza Level, Saddle Brook, NJ 07663 (Attn: Robert Manzo); (d) Kramer Levin Naftalis & Frankel LLP, counsel to the Creditors' Committee, 1177 Avenue of the Americas New York, New York 10036 (Attn: Thomas M. Mayer, Esq. and Kenneth H. Eckstein, Esq.); (e) Simpson Thacher & Bartlett LLP, counsel to the administrative agent for the Debtors' prepetition senior secured lenders (the "Senior Secured Lenders"), 425 Lexington Avenue, New York, New York 10017 (Attn: Peter Pantaleo, Esq. and David Eisenberg, Esq.); (f) the Office of the United States Trustee for the Southern District of New York (the "U.S. Trustee"), 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Brian S. Masumoto, Esq.); (g) the U.S. Treasury, 1500 Pennsylvania Avenue NW, Room 2312 Washington, D.C. 20220 (Attn: Matthew Feldman, Esq.); (h) United States Attorney's Office, Southern District of New York, Civil Division, Tax & Bankruptcy Unit, 86 Chambers Street, 3rd Floor, New York, New York 10007 and Cadwalader, Wickersham & Taft LLP, Of counsel to the Presidential Task Force on the Auto Industry, One World Financial Center, New York, New York 10281 (Attn: John J. Rapisardi, Esq.); (i) Vedder Price, P.C., counsel to Export Development Canada, 1633 Broadway, 47th Floor New York, New York 10019 (Attn: Michael J. Edelman, Esq.); (j) the Purchaser, c/o Fiat S.p.A, Via Nizza n. 250, 10125 Torino, Italy (Attn: Chief Executive Officer); (k) Sullivan & Cromwell LLP, counsel to the Purchaser and Fiat, 125 Broad Street, New York, New York 10004 (Attn: Scott D. Miller, Esq. and Andrew Dietderich, Esq.) and 1888 Century Park East, 21st Floor, Los Angeles, CA 90067 (Attn: Hydee R. Feldstein, Esq.); (l) the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW"), 8000 East Jefferson Avenue, Detroit, Michigan 48214 (Attn: Daniel Sherrick, Esq.); (m) Cleary Gottlieb Steen & Hamilton LLP, counsel to the UAW, One Liberty Plaza, New York, New York 10006 (Attn: James L. Bromley, Esq.); (n) Cohen, Weiss and Simon LLP, counsel to the UAW, 330 W. 42nd St., New York, New York 10036 (Attn: Babette Ceccotti, Esq.); (o) Togut, Segal & Segal, LLP, conflicts counsel to the Debtors, One Penn Plaza, New York, New York 10119 (Attn: Albert Togut, Esq.); and (p) any other statutory committees appointed in these cases.

If the Debtors determine, in consultation with the Creditors' Committee, the UAW and the U.S. Treasury, that a potential bidder has a *bona fide* interest in the Purchased Assets, or a substantial portion thereof, no later than two business days after the Debtors make that determination and have received from a Potential Bidder all of the materials required above, the Debtors will deliver to the Potential Bidder: (a) a confidential memorandum containing information and financial data with respect to the Purchased Assets (the "Confidential Memorandum"); (b) an electronic copy of the Purchase Agreement; and (c) access information for a confidential electronic data room concerning the Purchased Assets (the "Data Room").

VI. Due Diligence

Until the Bid Deadline (as defined below), the Debtors will afford any Potential Bidder such due diligence access or additional information as may be reasonably requested by the Potential Bidder that the Debtors, in their business judgment, determine to be reasonable and appropriate under the circumstances. All additional due diligence requests shall be directed to Robert Manzo of Capstone at Park 80 West, Plaza 1, Plaza Level, Saddle Brook, NJ 07663, (201) 587-7100. The Debtors, with the assistance of Capstone, shall coordinate all reasonable requests for additional information and due diligence access from Qualified Bidders. If the Debtors determine that due diligence material requested by a Potential Bidder is reasonable and appropriate under the circumstances, but such material has not previously been provided to any other Potential Bidder, the Debtors shall post such materials in the Data Room and provide email notice of such posting to all Potential Bidders, as well as to the Notice Parties.

Unless otherwise determined by the Debtors, the availability of additional due diligence to a Potential Bidder will cease on the earlier of (a) the time that the Potential Bidder fails to become a Qualified Bidder, (b) the Bid Deadline or (c) the time that the Bidding Process is terminated in accordance with its terms. Except as provided above with respect to the Confidential Memorandum and the copy of the Purchase Agreement provided by the Debtors to the Potential Bidders, and information in the Data Room, neither the Debtors nor their representatives will be obligated to furnish any information of any kind whatsoever relating to the Purchased Assets to any party.

VII. Bid Deadline

A Potential Bidder that desires to make a bid shall deliver written and electronic copies of its bid to the Notice Parties so as to be received not later than 5:00 p.m., Eastern Time, on May 20, 2009 (the "Bid Deadline"). Electronic delivery information for bids will be posted in the Data Room.

VIII. Bid Requirements

To participate in the Auction, if any, a Qualified Bidder must deliver to the Debtors a written offer, which must provide, at a minimum, the items noted below to be deemed a "Qualified Bid:"

(a) The Potential Bidder offers to purchase the Purchased Assets, or a substantial portion thereof, from the Debtors at the purchase price and upon the terms and conditions set forth in an executed agreement in substantially the form of the Purchase Agreement and submit the executed clean copy together with a market copy showing any proposed changes, amendments and modifications to the Purchase Agreement (the "Marked Agreement");

(b) The bid is not subject to any due diligence or financing contingency, is not conditioned on bid protections, other than those contemplated in the Bidding Procedures for subsequent overbids and is irrevocable until one

business day following the closing of the Sale Transaction with the Successful Bidder;

(c) The bid provides that (i) the Potential Bidder agrees to the assumption by the Debtors and assignment to such Potential Bidder of any collective bargaining agreements entered into by and between the Debtors and the UAW with the exception of (1) the Debtors' agreement to provide certain retiree medical benefits specified in the Memorandum of Understanding Post-Retirement Medical Care, dated October 12, 2007, between Chrysler and the UAW, (2) the Memorandum of Understanding Post-Retirement Medical Care, dated April 29, 2009, between Chrysler and the UAW and (3) the 2008 Settlement Agreement; and (ii) the Potential Bidder will enter into the UAW Retiree Settlement Agreement;

(d) The purchase price in such bid is a higher and better offer for the Purchased Assets, and such offer shall not be considered a higher or better offer unless such bid provides for net consideration to the Debtors' estates of at least $100 million more than the $2 billion cash consideration provided by the Purchaser, such amount to be deemed to include the amount of the Breakup Fee (the "Minimum Overbid Purchase Price");

(e) The bid provides for the assumption by the Potential Bidder (pursuant to assumption documentation reasonably acceptable to Chrysler LLC, said Potential Bidder (or Purchaser), the U.S. Treasury, Export Development Canada and GMAC) of all obligations of Chrysler LLC under the GMAC MAFA Term Sheet (the "GMAC Term Sheet") attached to the Purchase Agreement as Exhibit A, or, if executed, the definitive GMAC Master AutoFinance Agreement, which agreement shall be substantially on the same terms as the GMAC Term Sheet or the Annexes thereto, as well as any intellectual property licensing agreements entered into connection therewith and all the other agreements that are specified in the GMAC Term Sheet, including, without limitation, one or more repurchase agreements with substantially the same terms as set forth in Annex D to Exhibit A of the Purchase Agreement (collectively with the GMAC Term Sheet, the "GMAC MAFA Documents"); provided, however, that GMAC makes available to said Potential Bidder in accordance with Article VI of these Bidding Procedures, the terms and conditions upon which the GMAC MAFA Documents have been based, including, but not limited to, the GMAC Term Sheet subject to customary confidentiality provisions (which shall include, without limitation, restrictions on the use and disclosure of information) satisfactory to GMAC;

(f) The bid is received by the Bid Deadline;

(g) The bid does not entitle a bidder to any break-up fee, termination fee or similar type of payment or reimbursement; and

(h) The bid is accompanied by a list of any executory contracts or unexpired leases that are to be assumed and/or assigned under such bid and demonstrate the Qualified Bidder's commitment to pay all Cure Costs and provide adequate assurance of future performance under any such executory contracts or unexpired leases to be assumed and/or assigned pursuant to such bid.

A Potential Bidder shall accompany its bid with: (a) written evidence of available cash, a commitment for financing or ability to obtain a satisfactory commitment if selected as the Successful Bidder or the Backup Bidder (as defined below) and such other evidence of ability to consummate the Sale Transaction as the Debtors may reasonably request; (b) a copy of a board resolution or similar document demonstrating the authority of the Potential Bidder to make a binding and irrevocable bid on the terms proposed; and (c) any pertinent factual information regarding the Potential Bidder's operations that would assist the Debtors in their analysis of issues arising with respect to any applicable antitrust laws or other aspects of the bid.

No later than the Bid Deadline, a Potential Bidder must transfer to a deposit agent selected by the Debtors (the "Deposit Agent") a cash deposit (the "Good Faith Deposit") equal to 10% of the purchase price set forth in the Marked Agreement. The Good Faith Deposit must be made by certified check or wire transfer and will be held by the Deposit Agent in accordance with the terms of the Escrow Agreement to be provided with the Purchase Agreement.

A bid received from a Potential Bidder will be considered a "Qualified Bid" if (a) it meets the above requirements or (b) after consultation with the Creditors' Committee, the U.S. Treasury and the UAW, it is determined by the Debtors in the exercise of their fiduciary duties to be a Qualified Bid. Each Potential Bidder that submits a Qualified Bid will be considered a "Qualified Bidder." For purposes hereof, the Purchaser is a Qualified Bidder and the Purchase Agreement executed by the Purchaser is a Qualified Bid. A Qualified Bid will be valued based upon factors such as: (a) the purported amount of the Qualified Bid, including any benefit to the Debtors' bankruptcy estates from any assumption of liabilities of the Debtors; (b) the fair value to be provided to the Debtors under the Qualified Bid; (c) the ability to close the proposed Sale Transaction without delay and within the timeframes contemplated by the Purchase Agreement; (d) the ability to obtain all necessary antitrust or other regulatory approvals for the proposed transaction; and (e) any other factors the Debtors may deem relevant. Within one business day after the Debtors determine that a bid is a Qualified Bid, the Debtors shall distribute a copy of such bid to counsel to the Purchaser by e-mail, hand delivery or overnight courier. The Debtors also shall provide copies of all Qualified Bids to each of the other Qualified Bidders.

The Debtors reserve the right, after consultation with the Creditors' Committee, the U.S. Treasury and the UAW, to reject any bid if such bid:

(i) is on terms that are materially more burdensome or conditional than the terms of the Purchase Agreement;

(ii) requires any indemnification of such Qualified Bidder on terms that are materially more burdensome or conditional than the terms of the Purchase Agreement; or

(iii) includes a non-cash instrument or similar consideration that is not freely marketable.

Any bid rejected pursuant to this paragraph shall not be deemed to be a Qualified Bid.

IX. Determination of Lead Bid

After consultation with the Creditors' Committee, the U.S. Treasury and the UAW, the Debtors will review and evaluate each Qualified Bid on the basis of financial and contractual terms, including any benefit to the Debtors' bankruptcy estates from any proposal to assume liabilities of the Debtors, and other factors relevant to the sale process, including those factors affecting the speed and certainty of consummating the Sale Transaction. The Debtors also may negotiate with Qualified Bidders to clarify or enhance their bids (the "Bid Negotiation Process"). Any such clarifications or enhancements shall be promptly provided by the Debtors to the other Qualified Bidders and to the Notice Parties.

After completing any Bid Negotiation Process, the Debtors, in their reasonable business judgment and after consultation with the Creditors' Committee, the U.S. Treasury and the UAW, shall designate the highest and best of the Qualified Bids received (including any improved bids obtained from Qualified Bidders as part of the Bid Negotiation Process) as the best offer, considering all of the factors mentioned above (collectively, the "Bid Determination Procedures"). That offer shall be designated as the "Lead Bid" and the Qualified Bidder making such bid, the "Lead Bidder." The Debtors also will identify the second best offer in accordance with the Bid Determination Procedures, which shall be designated as the "Secondary Bid" and the Qualified Bidder making such bid, the "Secondary Bidder." In no event shall the Purchaser be deemed the Secondary Bidder. The Debtors shall notify all Qualified Bidders and other Notice Parties, prior to the Sale Hearing, of the designation of the Lead Bid and Secondary Bid, and the amount and other material terms of such bids. The Debtors shall file a notice of the designation of the Lead Bid and the Secondary Bid with the Court, including a copy of such bids, no later than 12:00 p.m., Eastern Time, on May 26, 2009.

If no additional Qualified Bids are received by the Bid Deadline, then (a) no Lead Bid or Secondary Bid will be designated, (b) the Purchaser's Qualified Bid shall be designated as the Successful Bid consistent with Section XI below and (c) the Debtors shall file a notice of the foregoing promptly after the Bid Deadline.

X. The Potential Auction

If any additional Qualified Bids are received by the Bid Deadline, the Debtors shall identify the Lead Bid and Lead Bidder, and the Secondary Bid and Secondary Bidder, at the outset of the Sale Hearing. The Debtors shall offer other Qualified Bidders to state on the record whether they wish to enhance their bids to top the Lead Bid (a "Topping Bid"). If any other Qualified Bidder, including the Secondary Bidder, expresses an interest in bidding against the Lead Bid by submitting a Topping Bid, the Debtors shall conduct a court-supervised auction (the "Auction"). If no other Qualified Bids are received in the Bid Process or if no Qualified Bidders express an interest in providing a Topping Bid, no Auction will be conducted. In each

case, the designation of the Successful Bid and the Backup Bid (if any) will be made consistent with Section XI below.

Additional rules for the conduct of the Auction shall be determined by the Debtors in their business judgment, in consultation with the Creditors' Committee, the UAW and the U.S. Treasury, based on the number and nature of the Qualified Bidders participating in the Auction and the terms and conditions contained in their Qualified Bids. These additional auction rules will be announced on the record in the Bankruptcy Court at the outset of the Auction.

If the Purchase Agreement with the Purchaser and Fiat is the only Qualified Bid submitted by the Bid Deadline, the Debtors shall not hold an auction and instead shall request at the Sale Hearing that the Court approve the Purchase Agreement with the Purchaser and Fiat.

XI. The Successful Bid

At the conclusion of any Auction, the highest and best bid, as determined by the Debtors consistent with the Bidding Procedures, shall be designated as the "Successful Bid" and the second highest and best bid as the "Backup Bid." If additional Qualified Bids are received but no Auction is conducted, the Lead Bid shall be designated as the Successful Bid and the Secondary Bid shall be designated as the Backup Bid. If no Qualified Bids are received other than the Purchase Agreement, the Purchase Agreement shall be designated as the Successful Bid, and there shall be no Auction and no Backup Bid. The bidder making the Successful Bid is referred to as the "Successful Bidder" and the bidder making any Backup Bid is referred to as the "Backup Bidder." In no event shall the Purchaser be deemed the Backup Bidder.

XII. The Sale Hearing

The Successful Bid will be presented to the Bankruptcy Court for approval at the Sale Hearing. If no other Qualified Bid is received by the Debtors and the Purchaser's original Purchase Agreement is the Successful Bid, then the Debtors anticipate that they will seek entry of an order at the Sale Hearing substantially in the form of Exhibit C to the Motion, authorizing and approving the Sale Transaction, including the sale of the Purchased Assets to the Purchaser, pursuant to the terms and conditions set forth in the Purchase Agreement. If a different bid is the Successful Bid, then the Debtors anticipate that they will seek the entry of an order substantially in the form of Exhibit C to the Motion, modified as necessary to reflect the terms of the Successful Bid, authorizing and approving the sale of the applicable Purchased Assets to the Successful Bidder. The Sale Hearing may be adjourned or rescheduled without notice, other than by an announcement of such adjournment at the Sale Hearing.

Unless the Bankruptcy Court orders otherwise, the Sale Hearing shall be an evidentiary hearing on all matters relating to the proposed sale, and parties shall be prepared to present their evidence in support of or in opposition to the proposed sale at the Sale Hearing; *provided, however,* that issues relating to the assumption and assignment of executory contracts and unexpired leases shall be addressed on the schedule established by the Contract Procedures.

XIII. The Backup Bid

If, for any reason, the Successful Bidder fails to consummate the purchase of the Purchased Assets, the Backup Bid automatically will be deemed to be the highest and best bid and be treated as the Successful Bid. The Debtors shall be authorized to effect the sale, assignment and transfer of the applicable Purchased Assets to the Backup Bidder as soon as is commercially reasonable without further order of the Bankruptcy Court as if such bidder were deemed the Successful Bidder in accordance with Section XI above.

XIV. "As Is, Where Is"

The Sale Transaction shall be on an "as is, where is" basis and without representations or warranties of any kind, nature or description by the Debtors, their agents or their estates, except to the extent expressly set forth in the Purchase Agreement or the Marked Agreement corresponding to the Successful Bid, as the case may be. Except as otherwise provided in the Successful Bid or such other bid which may ultimately be consummated in the sale of the Purchased Assets or a substantial portion thereof, all of the Debtors' right, title and interest in and to the Purchased Assets shall be sold free and clear all liens, claims (as such term is defined by section 101(5) of the Bankruptcy Code), encumbrances, rights, remedies, restrictions, interests, liabilities, and contractual commitments of any kind or nature whatsoever, whether arising before or after the Petition Date, whether at law or in equity, including all rights or claims based on any successor or transferee liability, all environmental claims, all change in control provisions, all rights to object or consent to the effectiveness of the transfer of the Purchased Assets to the Purchaser or to be excused from accepting performance by the Purchaser or performing for the benefit of the Purchaser under any Assumed Agreement and all rights at law or in equity, excluding any Designated Agreement (as defined below), all as more specifically set forth and defined in the Sale Motion and the proposed order approving the Sale Transaction (as so defined therein, "Claims") as set forth in the Purchase Agreement and the Sale Order, with such Claims to attach to the proceeds of the sale.

XV. Modification of Procedures

If necessary to satisfy their fiduciary duties or address the facts and circumstances presented, the Debtors may, after consultation with the Creditors' Committee, the U.S. Treasury, the UAW, the Purchaser and Fiat and such other persons as the Debtors deem appropriate, amend these Bidding Procedures or the Bidding Process at any time in any manner that will best promote the goals of the Bidding Process, including extending or modifying any of the dates described herein.

XVI. Return of Good Faith Deposit

The Good Faith Deposits of all Qualified Bidders shall be held in escrow by the Deposit Agent and shall not become property of the Debtors' estates absent further order of the Bankruptcy Court. If a Successful Bidder and/or a Backup Bidder are chosen, the Good Faith Deposit of the Successful Bidder and the Backup Bidder will be retained by the Deposit Agent, notwithstanding the Bankruptcy Court's approval of the Sale Transaction, until the earlier of (a) the Closing of the Sale Transaction or (b) the termination of the applicable purchase

agreement and withdrawal of the Purchased Assets for sale by the Debtors. At the closing of the Sale Transaction contemplated by the Successful Bid, any Backup Bidder's Good Faith Deposit shall be returned to the Backup Bidder, and the Successful Bidder will be entitled to a credit for the amount of its Good Faith Deposit in accordance with the Successful Bid or to substitute the consideration called for by the applicable purchase agreement and receive the return of the Good Faith Deposit. Upon the return of the Good Faith Deposits, their respective owners shall receive any and all interest that may have accrued thereon.

EXHIBIT B

[Form of Sale Notice]

Hearing Date and Time: May 27, 2009 at 10:00 a.m. (Eastern Time)
Objection Deadline: May 19, 2009 at 4:00 p.m. (Eastern Time)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
Chrysler LLC, *et al.*,[1]	:	Case No. 09-50002 (AJG)
Debtors.	:	(Jointly Administered)

NOTICE OF PROPOSED SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS, FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES AND SCHEDULING FINAL SALE HEARING RELATED THERETO

PLEASE TAKE NOTICE OF THE FOLLOWING:

1. On April 30, 2009 (the "Petition Date"), the above-captioned debtors and debtors in possession (collectively, the "Debtors") filed voluntary petitions under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). On the May 3, 2009, the Debtors filed a motion with the Bankruptcy Court (the "Sale Motion") seeking, among other things, (a) authority to sell substantially all of the Debtors' assets free and clear of all liens, claims, interests and encumbrances (the "Sale Transaction"); (b) approval of certain procedures (the "Bidding Procedures") for the solicitation of bids with respect to the Sale Transaction (the "Bidding Procedures Relief"); (c) authority to assume and assign certain executory contracts and unexpired leases in connection with the Sale Transaction; (d) approval of that certain settlement agreement between the Purchaser and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW") to be executed at the closing of the Sale Transaction (the "UAW Retiree Settlement Agreement") and (e) scheduling

[1] The Debtors and their respective Tax ID numbers are as follows: Chrysler LLC, Tax ID No. 38-2673623; Chrysler Aviation Inc., Tax ID No. 38-3475417; Chrysler Dutch Holding LLC, Tax ID No. 26-1498515; Chrysler Dutch Investment LLC, Tax ID No. 26-1498838; Chrysler Dutch Operating Group LLC, Tax ID No. 26-1498787; Chrysler Institute of Engineering, Tax ID No. N/A; Chrysler International Corporation, Tax ID No. 38-2631697; Chrysler International Limited, L.L.C., Tax ID No. N/A; Chrysler International Services, S.A., Tax ID No. 38-0420030; Chrysler Motors LLC, Tax ID No. 38-3625541; Chrysler Realty Company LLC, Tax ID No. 38-1852134; Chrysler Service Contracts Inc., Tax ID No. 38-3382368; Chrysler Service Contracts Florida, Inc., Tax ID No. 26-0347220; Chrysler Technologies Middle East Ltd., Tax ID No. 75-2487766; Chrysler Transport Inc., Tax ID No. 38-2143117; Chrysler Vans LLC, Tax ID No. 31-1781705; DCC 929, Inc., Tax ID No. 38-2899837; Dealer Capital, Inc., Tax ID No. 38-3036138; Global Electric Motorcars, LLC, Tax ID No. 31-1738535; NEV Mobile Service, LLC, Tax ID No. 33-1024272; NEV Service, LLC, Tax ID No. 03-0501234; Peapod Mobility LLC, Tax ID No. 26-4086991; TPF Asset, LLC, Tax ID No. 74-3167035; TPF Note, LLC, Tax ID No. 74-3167038; and Utility Assets LLC, Tax ID No. 20-0874783.

of a final hearing with the Bankruptcy Court for approval of the Sale Transaction (the "Sale Hearing").

2. Chrysler LLC and its Debtor subsidiaries; Fiat S.p.A ("Fiat"); and New CarCo Acquisition LLC (the "Purchaser"), a Delaware limited liability company formed by Fiat, have entered into a Master Transaction Agreement, dated as of April 30, 2009 (the "Purchase Agreement"), which, together with certain ancillary agreements, contemplates a set of related transactions for the sale of sale of substantially all of the Debtors' tangible, intangible and operating assets, defined as the "Purchased Assets" in Section 2.06 of the Purchase Agreement, including the Designated Agreements (as defined in the Bidding Procedures Order), the assets related to the research, design, manufacturing, production, assembly and distribution of passenger cars, trucks and other vehicles (including prototypes) under brand names that include Chrysler, Jeep® and Dodge (the "CarCo Business"), certain of the facilities related thereto and all rights including intellectual property rights, trade secrets, customer lists, domain names, books and records, software and other assets used in or necessary to the operation of the CarCo Business or related thereto (collectively, as defined in the Purchase Agreement, the "Purchased Assets") to the Purchaser, subject to higher and better offers made pursuant to the Bidding Procedures.

3. A hearing on the Bidding Procedures Relief was held before the Bankruptcy Court on May 1, 4 and 5, 2009, after which the Bankruptcy Court entered an order, among other things, approving the Bidding Procedures Relief **[Docket No. ____]** (the "Bidding Procedures Order")

4. A copy of the Bidding Procedures Order and the Bidding Procedures (attached to the Bidding Procedures Order as Exhibit A) are attached hereto as Annex 1. The Bidding Procedures Order establishes the Bidding Procedures that govern the manner in which the Purchased Assets are to be sold. All bids must comply with the Bidding Procedures and be submitted so as to be received not later than 5:00 p.m., Eastern Time, on May 20, 2009.

5. The Sale Hearing currently is scheduled to be conducted on May 27, 2009 at 10:00 a.m. (Eastern Time) at the United States Bankruptcy Court for the Southern District of New York, Alexander Hamilton Custom House, Room 523, One Bowling Green, New York, New York 10004, before the Honorable Arthur J. Gonzalez, United States Bankruptcy Judge, to consider the approval of the UAW Retiree Settlement Agreement and the approval of the Purchase Agreement or any higher and better offer by a Successful Bidder (as defined in the Bidding Procedures), and may include the conduct of a court-supervised auction (the "Auction") in accordance with the Bidding Procedures. If the Purchaser is the Successful Bidder, the Debtors anticipate seeking entry of a Sale Order substantially in the form of the order attached to the Sale Motion as Exhibit C (the "Sale Order"). The Sale Hearing may be adjourned or rescheduled without notice by an announcement of the adjourned date at the Sale Hearing.

6. A copy of the Purchase Agreement (without certain commercially sensitive attachments) and the Sale Motion (including the proposed Sale Order) may be obtained by (a) sending a written request to counsel to the Debtors, Jones Day, 222 East 41st Street, New York, New York 10017, Facsimile: (212) 755-7306 (Attn: Nathan Lebioda, Esq.) or

(b) accessing the website of the Debtors' claims and noticing agent, Epiq Bankruptcy Solutions, LLC, at http://www.chryslerrestructuring.com/.

7. **OBJECTIONS TO ANY RELIEF REQUESTED IN THE SALE MOTION, INCLUDING THE DEBTORS' REQUEST TO APPROVE THE SALE OF THE PURCHASED ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES TO THE PURCHASER OR ANOTHER SUCCESSFUL BIDDER AND THE REQUEST FOR COURT APPROVAL OF THE UAW RETIREE SETTLEMENT (EACH, AN "OBJECTION"), MUST BE MADE IN WRITING, FILED WITH THE BANKRUPTCY COURT, AND SERVED SO AS TO BE ACTUALLY RECEIVED BY 4:00 P.M. (EASTERN TIME) ON MAY 19, 2009 FOR ALL PARTIES IN INTEREST; PROVIDED, HOWEVER, THAT IF A DETERMINATION IS MADE AT THE SALE HEARING THAT THE SUCCESSFUL BIDDER IS A BIDDER OTHER THAN THE PURCHASER, PARTIES IN INTEREST MAY OBJECT SOLELY TO SUCH DETERMINATION AT THE SALE HEARING.**

8. **ANY OBJECTION MUST BE SERVED IN ACCORDANCE WITH PARAGRAPH 7 ABOVE ON EACH OF THE FOLLOWING PARTIES:** (a) the Debtors, c/o Chrysler LLC, 1000 Chrysler Drive, CIMS# 485-14-96, Auburn Hills, Michigan 48326-2766 (Attn: Holly E. Leese, Esq.); (b) Jones Day, counsel to the Debtors, 222 East 41st Street, New York, New York 10017 (Attn: Corinne Ball, Esq. and Nathan Lebioda, Esq.) and 1420 Peachtree Street, N.E., Suite 800, Atlanta, Georgia 30309-3053 (Attn: Jeffrey B. Ellman, Esq.); (c) Capstone Advisory Group, LLC, Park 80 West, Plaza 1, Plaza Level, Saddle Brook, NJ 07663 (Attn: Robert Manzo); (d) Kramer Levin Naftalis & Frankel LLP, counsel to the Official Committee of Unsecured Creditors', 1177 Avenue of the Americas New York, New York 10036 (Attn: Thomas M. Mayer, Esq. and Kenneth H. Eckstein, Esq.); (e) Simpson Thacher & Bartlett LLP, counsel to the administrative agent for the Debtors' prepetition senior secured lenders, 425 Lexington Avenue, New York, New York 10017 (Attn: Peter Pantaleo, Esq. and David Eisenberg, Esq.); (f) the Office of the United States Trustee for the Southern District of New York (the "U.S. Trustee"), 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Brian S. Masumoto, Esq.); (g) the U.S. Department of Treasury (the "U.S. Treasury"), 1500 Pennsylvania Avenue NW, Room 2312 Washington, D.C. 20220 (Attn: Matthew Feldman, Esq.); (h) United States Attorney's Office, Southern District of New York, Civil Division, Tax & Bankruptcy Unit, 86 Chambers Street, 3rd Floor, New York, New York 10007 and Cadwalader, Wickersham & Taft LLP, Of counsel to the Presidential Task Force on the Auto Industry, One World Financial Center, New York, New York 10281 (Attn: John J. Rapisardi, Esq.); (j) the Purchaser and Fiat, c/o Fiat S.p.A, Via Nizza n. 250, 10125 Torino, Italy (Attn: Chief Executive Officer); (k) Sullivan & Cromwell LLP, counsel to the Purchaser and Fiat, 125 Broad Street, New York, New York 10004 (Attn: Scott D. Miller, Esq. and Andrew Dietderich, Esq.) and 1888 Century Park East, 21st Floor, Los Angeles, CA 90067 (Attn: Hydee R. Feldstein, Esq.); (l) International Union, UAW, 8000 East Jefferson Avenue, Detroit, Michigan 48214 (Attn: Daniel Sherrick, Esq.); (m) Cleary Gottlieb Steen & Hamilton LLP, counsel to the UAW, One Liberty Plaza, New York, New York 10006 (Attn: James L. Bromley, Esq.); (n) Cohen, Weiss and Simon LLP, counsel to the UAW, 330 W. 42nd St., New York, New York 10036 (Attn: Babette Ceccotti, Esq.); (o) Togut, Segal & Segal, LLP, conflicts counsel to the Debtors, One Penn Plaza, New York, New York 10119 (Attn: Albert Togut, Esq.); and (p) any other statutory committees appointed in these cases.

9. The Purchase Agreement contemplates, and the Sale Order, if approved, shall authorize the assumption and assignment of various executory contracts and unexpired leases that are the property of the Debtors (collectively, the "Assumed Agreements"). In accordance with the Bidding Procedures Order, additional individual notices setting forth the specific Assumed Agreements (or groups thereof) to be assumed by the Debtors and assigned to the Purchaser and the proposed cure amounts for such contracts will be given to all counterparties to Assumed Agreements.

10. Under the Purchase Agreement, the Purchaser will assume certain specified liabilities of the Debtors that fall within the definition of "Assumed Liabilities" under the Purchase Agreement, including (a) certain liabilities and obligations arising post-closing under Assumed Agreements; (b) certain trade and accounts payable other than those relating to excluded contracts; (c) certain environmental liabilities on owned and leased real property acquired by the Purchaser; (d) certain payroll obligations to transferred employees; (e) liabilities under certain assumed benefit plants, (f) certain liabilities for product warranties, product returns and rebates; and (g) transfer taxes. The foregoing summary of certain Assumed Liabilities is limited in all respects by the terms and conditions set forth in the Purchase Agreement.

11. The failure of any person or entity to file an Objection on or before the Objection Deadline shall be deemed a consent to the Sale Transaction contemplating the sale of the Purchased Assets to the Purchaser or another Successful Bidder and the other relief requested in the Sale Motion, and be a bar to the assertion, at the Sale Hearing or thereafter, of any objection to the Bidding Procedures Relief, the Sale Motion, the Auction, the sale of the Purchased Assets, the Debtors' consummation and performance of the Purchase Agreement or other agreement with a different Successful Bidder (including in any such case, without limitation, the transfer of the Purchased Assets free and clear of all liens, claims and encumbrances) or to the approval of the UAW Retiree Settlement Agreement.

12. This Notice is subject to the full terms and conditions of the Sale Motion, the Bidding Procedures Order and the Bidding Procedures, which shall control in the event of any conflict. The Debtors encourage parties in interest to review such documents in their entirety and consult an attorney if they have questions or want advice.

Dated: **[May__]**, 2009
New York, New York

BY ORDER OF THE COURT

ANNEX 1

[Bidding Procedures Order with Exhibits B through E thereto intentionally omitted]

EXHIBIT C

[Form of Publication Notice]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
Chrysler LLC, *et al.*,[1]	:	Case No. 09-50002 (AJG)
Debtors.	:	(Jointly Administered)

NOTICE OF PROPOSED SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS, FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES AND SCHEDULING FINAL SALE HEARING RELATED THERETO

PLEASE TAKE NOTICE OF THE FOLLOWING:

1. On April 30, 2009 (the "Petition Date"), the above-captioned debtors and debtors in possession (collectively, the "Debtors") filed voluntary petitions under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). On May 3, 2009, the Debtors filed a motion with the Bankruptcy Court (the "Sale Motion") seeking, among other things, (a) authority to sell substantially all of the Debtors' assets free and clear of all liens, claims, interests and encumbrances (the "Sale Transaction"); (b) approval of certain procedures (the "Bidding Procedures") for the solicitation of bids with respect to the Sale Transaction (the "Bidding Procedures Relief"); (c) authority to assume and assign certain executory contracts and unexpired leases in connection with the Sale Transaction; (d) approval of that certain settlement agreement between the Purchaser and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW") to be executed at the closing of the Sale Transaction (the "UAW Retiree Settlement Agreement") and (e) scheduling of a final hearing with the Bankruptcy Court for approval of the Sale Transaction (the "Sale Hearing").

[1] The Debtors and their respective Tax ID numbers are as follows: Chrysler LLC, Tax ID No. 38-2673623; Chrysler Aviation Inc., Tax ID No. 38-3475417; Chrysler Dutch Holding LLC, Tax ID No. 26-1498515; Chrysler Dutch Investment LLC, Tax ID No. 26-1498838; Chrysler Dutch Operating Group LLC, Tax ID No. 26-1498787; Chrysler Institute of Engineering, Tax ID No. N/A; Chrysler International Corporation, Tax ID No. 38-2631697; Chrysler International Limited, L.L.C., Tax ID No. N/A; Chrysler International Services, S.A., Tax ID No. 38-0420030; Chrysler Motors LLC, Tax ID No. 38-3625541; Chrysler Realty Company LLC, Tax ID No. 38-1852134; Chrysler Service Contracts Inc., Tax ID No. 38-3382368; Chrysler Service Contracts Florida, Inc., Tax ID No. 26-0347220; Chrysler Technologies Middle East Ltd., Tax ID No. 75-2487766; Chrysler Transport Inc., Tax ID No. 38-2143117; Chrysler Vans LLC, Tax ID No. 31-1781705; DCC 929, Inc., Tax ID No. 38-2899837; Dealer Capital, Inc., Tax ID No. 38-3036138; Global Electric Motorcars, LLC, Tax ID No. 31-1738535; NEV Mobile Service, LLC, Tax ID No. 33-1024272; NEV Service, LLC, Tax ID No. 03-0501234; Peapod Mobility LLC, Tax ID No. 26-4086991; TPF Asset, LLC, Tax ID No. 74-3167035; TPF Note, LLC, Tax ID No. 74-3167038; and Utility Assets LLC, Tax ID No. 20-0874783.

2. Chrysler LLC and its Debtor subsidiaries; Fiat S.p.A ("Fiat"); and New CarCo Acquisition LLC (the "Purchaser"), a Delaware limited liability company formed by Fiat, have entered into a Master Transaction Agreement, dated as of April 30, 2009 (the "Purchase Agreement"), which, together with certain ancillary agreements, contemplates a set of related transactions for the sale of sale of substantially all of the Debtors' tangible, intangible and operating assets, defined as the "Purchased Assets" in Section 2.06 of the Purchase Agreement, including the Designated Agreements (as defined in the Bidding Procedures Order), the assets related to the research, design, manufacturing, production, assembly and distribution of passenger cars, trucks and other vehicles (including prototypes) under brand names that include Chrysler, Jeep® and Dodge (the "CarCo Business"), certain of the facilities related thereto and all rights including intellectual property rights, trade secrets, customer lists, domain names, books and records, software and other assets used in or necessary to the operation of the CarCo Business or related thereto (collectively, as defined in the Purchase Agreement, the "Purchased Assets") to the Purchaser, subject to higher and better offers made pursuant to the Bidding Procedures.

3. A hearing on the Bidding Procedures Relief was held before the Bankruptcy Court on May 1, 4 and 5, 2009, after which the Bankruptcy Court entered an order, among other things, approving the Bidding Procedures Relief **[Docket No. ____]** (the "Bidding Procedures Order"). The Bidding Procedures Order establishes the Bidding Procedures that govern the manner in which the Purchased Assets are to be sold. All bids must comply with the Bidding Procedures and be submitted so as to be received not later than 5:00 p.m., Eastern Time, on May 20, 2009.

4. The Sale Hearing currently is scheduled to be conducted on May 27, 2009 at 10:00 a.m. (Eastern Time) at the United States Bankruptcy Court for the Southern District of New York, Alexander Hamilton Custom House, Room 523, One Bowling Green, New York, New York 10004, before the Honorable Arthur J. Gonzalez, United States Bankruptcy Judge, to consider the approval of the UAW Retiree Settlement Agreement and the approval of the Purchase Agreement or any higher and better offer by a Successful Bidder (as defined in the Bidding Procedures), and may include the conduct of a court-supervised auction (the "Auction") in accordance with the Bidding Procedures. If the Purchaser is the Successful Bidder, the Debtors anticipate seeking entry of a Sale Order substantially in the form of the order attached to the Sale Motion as Exhibit C (the "Sale Order"). The Sale Hearing may be adjourned or rescheduled without notice by an announcement of the adjourned date at the Sale Hearing.

5. A copy of the Bidding Procedures Order (including the Bidding Procedures), the Sale Motion, the Purchase Agreement (without certain commercially sensitive attachments) and the Sale Motion (including the proposed Sale Order) may be obtained by (a) sending a written request to counsel to the Debtors, Jones Day, 222 East 41st Street, New York, New York 10017, Facsimile: (212) 755-7306 (Attn: Nathan Lebioda, Esq.) or (b) accessing the website of the Debtors' claims and noticing agent, Epiq Bankruptcy Solutions, LLC, at http://www.chryslerrestructuring.com/.

6. **OBJECTIONS TO ANY RELIEF REQUESTED IN THE SALE MOTION, INCLUDING THE DEBTORS' REQUEST TO APPROVE THE SALE OF THE PURCHASED ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES TO THE PURCHASER OR ANOTHER SUCCESSFUL BIDDER AND THE REQUEST FOR COURT APPROVAL OF THE UAW RETIREE SETTLEMENT (EACH, AN "OBJECTION"), MUST BE MADE IN WRITING, FILED WITH THE**

BANKRUPTCY COURT, AND SERVED SO AS TO BE ACTUALLY RECEIVED BY 4:00 P.M. (EASTERN TIME) ON MAY 19, 2009 FOR ALL PARTIES IN INTEREST; PROVIDED, HOWEVER, THAT IF A DETERMINATION IS MADE AT THE SALE HEARING THAT THE SUCCESSFUL BIDDER IS A BIDDER OTHER THAN THE PURCHASER, PARTIES IN INTEREST MAY OBJECT SOLELY TO SUCH DETERMINATION AT THE SALE HEARING.

7. **ANY OBJECTION MUST BE SERVED IN ACCORDANCE WITH PARAGRAPH 6 ABOVE ON EACH OF THE FOLLOWING PARTIES:** (a) the Debtors, c/o Chrysler LLC, 1000 Chrysler Drive, CIMS# 485-14-96, Auburn Hills, Michigan 48326-2766 (Attn: Holly E. Leese, Esq.); (b) Jones Day, counsel to the Debtors, 222 East 41st Street, New York, New York 10017 (Attn: Corinne Ball, Esq. and Nathan Lebioda, Esq.) and 1420 Peachtree Street, N.E., Suite 800, Atlanta, Georgia 30309-3053 (Attn: Jeffrey B. Ellman, Esq.); (c) Capstone Advisory Group, LLC, Park 80 West, Plaza 1, Plaza Level, Saddle Brook, NJ 07663 (Attn: Robert Manzo); (d) Kramer Levin Naftalis & Frankel LLP, counsel to the Official Committee of Unsecured Creditors', 1177 Avenue of the Americas New York, New York 10036 (Attn: Thomas M. Mayer, Esq. and Kenneth H. Eckstein, Esq.); (e) Simpson Thacher & Bartlett LLP, counsel to the administrative agent for the Debtors' prepetition senior secured lenders, 425 Lexington Avenue, New York, New York 10017 (Attn: Peter Pantaleo, Esq. and David Eisenberg, Esq.); (f) the Office of the United States Trustee for the Southern District of New York (the "U.S. Trustee"), 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Brian S. Masumoto, Esq.); (g) the U.S. Department of Treasury (the "U.S. Treasury"), 1500 Pennsylvania Avenue NW, Room 2312 Washington, D.C. 20220 (Attn: Matthew Feldman, Esq.); (h) United States Attorney's Office, Southern District of New York, Civil Division, Tax & Bankruptcy Unit, 86 Chambers Street, 3rd Floor, New York, New York 10007 and Cadwalader, Wickersham & Taft LLP, Of counsel to the Presidential Task Force on the Auto Industry, One World Financial Center, New York, New York 10281 (Attn: John J. Rapisardi, Esq.); (i) Vedder Price, P.C., counsel to Export Development Canada, 1633 Broadway, 47th Floor New York, New York 10019 (Attn: Michael J. Edelman, Esq.); (j) the Purchaser and Fiat, c/o Fiat S.p.A, Via Nizza n. 250, 10125 Torino, Italy (Attn: Chief Executive Officer); (k) Sullivan & Cromwell LLP, counsel to the Purchaser and Fiat, 125 Broad Street, New York, New York 10004 (Attn: Scott D. Miller, Esq. and Andrew Dietderich, Esq.) and 1888 Century Park East, 21st Floor, Los Angeles, CA 90067 (Attn: Hydee R. Feldstein, Esq.); (l) International Union, UAW, 8000 East Jefferson Avenue, Detroit, Michigan 48214 (Attn: Daniel Sherrick, Esq.); (m) Cleary Gottlieb Steen & Hamilton LLP, counsel to the UAW, One Liberty Plaza, New York, New York 10006 (Attn: James L. Bromley, Esq.); (n) Cohen, Weiss and Simon LLP, counsel to the UAW, 330 W. 42nd St., New York, New York 10036 (Attn: Babette Ceccotti, Esq.); (o) Togut, Segal & Segal, LLP, conflicts counsel to the Debtors, One Penn Plaza, New York, New York 10119 (Attn: Albert Togut, Esq.); and (p) any other statutory committees appointed in these cases.

8. The Purchase Agreement contemplates, and the Sale Order, if approved, shall authorize the assumption and assignment of various executory contracts and unexpired leases that are the property of the Debtors (collectively, the "Assumed Agreements"). In accordance with the Bidding Procedures Order, additional individual notices setting forth the specific Assumed Agreements (or groups thereof) to be assumed by the Debtors and assigned to the Purchaser and the proposed cure amounts for such contracts will be given to all counterparties to Assumed Agreements.

9. Under the Purchase Agreement, the Purchaser will assume certain specified liabilities of the Debtors that fall within the definition of "Assumed Liabilities" under the Purchase Agreement, including (a) certain liabilities and obligations arising post-closing under Assumed Agreements; (b) certain trade and accounts payable other than those relating to excluded contracts; (c) certain environmental liabilities on owned and leased real property acquired by the Purchaser; (d) certain payroll obligations to transferred employees; (e) liabilities under certain assumed benefit plants, (f) certain liabilities for product warranties, product returns and rebates; and (g) transfer taxes. The foregoing summary of certain Assumed Liabilities is limited in all respects by the terms and conditions set forth in the Purchase Agreement.

10. The failure of any person or entity to file an Objection on or before the applicable Objection Deadline shall be deemed a consent to the Sale Transaction contemplating the sale of the Purchased Assets to the Purchaser or another Successful Bidder and the other relief requested in the Sale Motion, and be a bar to the assertion, at the Sale Hearing or thereafter, of any objection to the Bidding Procedures Relief, the Sale Motion, the Auction, the sale of the Purchased Assets, the Debtors' consummation and performance of the Purchase Agreement or other agreement with a different Successful Bidder (including in any such case, without limitation, the transfer of the Purchased Assets free and clear of all liens, claims and encumbrances) or to the approval of the UAW Retiree Settlement Agreement.

11. This Notice is subject to the full terms and conditions of the Sale Motion, the Bidding Procedures Order and the Bidding Procedures, which shall control in the event of any conflict. The Debtors encourage parties in interest to review such documents in their entirety and consult an attorney if they have questions or want advice.

Dated: **[May__]**, 2009
New York, New York

BY ORDER OF THE COURT

EXHIBIT D

[Form of Assignment Notice]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
Chrysler LLC, *et al.*,[1]	:	Case No. 09-50002 (AJG)
Debtors.	:	(Jointly Administered)

NOTICE OF (I) DEBTORS' INTENT TO ASSUME AND ASSIGN CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES AND (II) CURE COSTS RELATED THERETO

PLEASE TAKE NOTICE OF THE FOLLOWING:

1. On May 3, 2009, the above-captioned debtors and debtors in possession (collectively, the "Debtors") filed a motion (the "Sale Motion")[2] with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") seeking, among other things, (a) authority to sell substantially all of the Debtors' assets free and clear of all liens, claims and encumbrances; (b) approval of certain procedures (the "Bidding Procedures") for the solicitation of bids with respect to the Sale Transaction (the "Bidding Procedures Relief"); (c) authority to assume and assign certain executory contracts and unexpired leases in connection with the Sale Transaction; (d) approval of that certain settlement agreement between the Purchaser and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW") to be executed at the closing of

[1] The Debtors and their respective Tax ID numbers are as follows: Chrysler LLC, Tax ID No. 38-2673623; Chrysler Aviation Inc., Tax ID No. 38-3475417; Chrysler Dutch Holding LLC, Tax ID No. 26-1498515; Chrysler Dutch Investment LLC, Tax ID No. 26-1498838; Chrysler Dutch Operating Group LLC, Tax ID No. 26-1498787; Chrysler Institute of Engineering, Tax ID No. N/A; Chrysler International Corporation, Tax ID No. 38-2631697; Chrysler International Limited, L.L.C., Tax ID No. N/A; Chrysler International Services, S.A., Tax ID No. 38-0420030; Chrysler Motors LLC, Tax ID No. 38-3625541; Chrysler Realty Company LLC, Tax ID No. 38-1852134; Chrysler Service Contracts Inc., Tax ID No. 38-3382368; Chrysler Service Contracts Florida, Inc., Tax ID No. 26-0347220; Chrysler Technologies Middle East Ltd., Tax ID No. 75-2487766; Chrysler Transport Inc., Tax ID No. 38-2143117; Chrysler Vans LLC, Tax ID No. 31-1781705; DCC 929, Inc., Tax ID No. 38-2899837; Dealer Capital, Inc., Tax ID No. 38-3036138; Global Electric Motorcars, LLC, Tax ID No. 31-1738535; NEV Mobile Service, LLC, Tax ID No. 33-1024272; NEV Service, LLC, Tax ID No. 03-0501234; Peapod Mobility LLC, Tax ID No. 26-4086991; TPF Asset, LLC, Tax ID No. 74-3167035; TPF Note, LLC, Tax ID No. 74-3167038; and Utility Assets LLC, Tax ID No. 20-0874783.

[2] You may obtain a copy of the Sale Motion and the Purchase Agreement (without certain commercially sensitive attachments) by accessing the website established by the Debtors' claims and noticing agent, Epiq Bankruptcy Solutions, LLC at http://www.chryslerrestructuring.com/.

the Sale Transaction (the "UAW Retiree Settlement Agreement") and (e) scheduling of a final hearing with the Bankruptcy Court for approval of the Sale Transaction (the "Sale Hearing").

2. Chrysler LLC and its Debtor subsidiaries; Fiat S.p.A ("Fiat"); and New CarCo Acquisition LLC (the "Purchaser"), a Delaware limited liability company formed by Fiat, have entered into a Master Transaction Agreement, dated as of April 30, 2009 (the "Purchase Agreement"), which, together with certain ancillary agreements, contemplates a set of related transactions for the sale of substantially all of the Debtors' tangible, intangible and operating assets, defined as the "Purchased Assets" in Section 2.06 of the Purchase Agreement, including the Designated Agreements (as defined below) the assets related to the research, design, manufacturing, production, assembly and distribution of passenger cars, trucks and other vehicles (including prototypes) under brand names that include Chrysler, Jeep® and Dodge (the "CarCo Business"), certain of the facilities related thereto and all rights including intellectual property rights, trade secrets, customer lists, domain names, books and records, software and other assets used in or necessary to the operation of the CarCo Business or related thereto (collectively, as defined in the Purchase Agreement, the "Purchased Assets") to the Purchaser, subject to higher and better offers made pursuant to the Bidding Procedures.

3. This Notice is provided to inform you of the Debtors' intent to assume and assign to the Purchaser certain executory contracts and/or unexpired leases. The following procedures (the "Contract Procedures") govern the assumption and assignment of these agreements in connection with the sale of the Purchased Assets to the Purchaser:[3]

(a) Contract Designations. The Purchase Agreement contemplates, and the Sale Order, if approved, shall authorize the assumption and assignment to the Purchaser of certain executory contract(s) and unexpired lease(s). Attached hereto as **Exhibit A** is a list of certain executory contracts and unexpired leases that the Debtors intend to assume and assign to the Purchaser (collectively, the "Designated Agreements" and, each, a "Designated Agreement"), pursuant to section 365 of title 11 of the United States Code (the "Bankruptcy Code").

(b) Cure Costs. The Debtors have listed on **Exhibit A** annexed hereto the amounts that the Debtors believe must be paid to cure all prepetition defaults under the Designated Agreements as of April 30**,** 2009, in accordance with section 365(b) of the Bankruptcy Code (in each instance, the "Cure Costs"). Cure Costs may be listed on **Exhibit A** on an agreement-by-agreement basis or in the aggregate for multiple Designated Agreements.

(c) Agreement to Assumption and Assignment. If you agree with the Cure Costs indicated on **Exhibit A**, and otherwise do not object to the Debtors' assumption and assignment of your lease or contract, you are not required take any further action.

[3] This Notice is subject to the full terms and conditions of the Sale Motion, the Bidding Procedures Order and the Contract Procedures set forth in the Bidding Procedures Order, which shall control in the event of any conflict. The Debtors encourage parties in interest to review such documents in their entirety and consult an attorney if they have questions or want advice.

(d) Section 365 Objections. Objections, if any, to the proposed assumption and assignment of the Designated Agreements, including, but not limited to, objections related to adequate assurance of future performance, or objections relating to whether applicable law excuses the non-debtor counterparty to such Designated Agreement (the "Non-Debtor Counterparty") from accepting performance by, or rendering performance to, Purchaser for purposes of section 365(c)(1) of the Bankruptcy Code, or to the proposed Cure Costs (a "Section 365 Objection"), must be made in writing and filed with the Bankruptcy Court so as to be **received no later than ten days after the date of this Notice** (the "Section 365 Objection Deadline") by the Bankruptcy Court and the following parties: (i) the Debtors, c/o Chrysler LLC, 1000 Chrysler Drive, CIMS# 485-14-96, Auburn Hills, Michigan 48326-2766 (Attn: Holly E. Leese, Esq.); (ii) Jones Day, counsel to the Debtors, 222 East 41st Street, New York, New York 10017 (Attn: Corinne Ball, Esq. and Nathan Lebioda, Esq.) and 1420 Peachtree Street, N.E., Suite 800, Atlanta, Georgia 30309-3053 (Attn: Jeffrey B. Ellman, Esq.); (iii) Capstone Advisory Group, LLC, Park 80 West, Plaza 1, Plaza Level, Saddle Brook, NJ 07663 (Attn: Robert Manzo); (iv) Kramer Levin Naftalis & Frankel LLP, counsel to the Official Committee of Unsecured Creditors', 1177 Avenue of the Americas New York, New York 10036 (Attn: Thomas M. Mayer, Esq. and Kenneth H. Eckstein, Esq.); (v) Simpson Thacher & Bartlett LLP, counsel to the administrative agent for the Debtors' prepetition senior secured lenders, 425 Lexington Avenue, New York, New York 10017 (Attn: Peter Pantaleo, Esq. and David Eisenberg, Esq.); (vi) the Office of the United States Trustee for the Southern District of New York (the "U.S. Trustee"), 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Brian S. Masumoto, Esq.); (vii) the U.S. Department of Treasury (the "U.S. Treasury"), 1500 Pennsylvania Avenue NW, Room 2312 Washington, D.C. 20220 (Attn: Matthew Feldman, Esq.); (viii) United States Attorney's Office, Southern District of New York, Civil Division, Tax & Bankruptcy Unit, 86 Chambers Street, 3rd Floor, New York, New York 10007 and Cadwalader, Wickersham & Taft LLP, Of counsel to the Presidential Task Force on the Auto Industry, One World Financial Center, New York, New York 10281 (Attn: John J. Rapisardi, Esq.); (ix) Vedder Price, P.C., counsel to Export Development Canada, 1633 Broadway, 47th Floor New York, New York 10019 (Attn: Michael J. Edelman, Esq.); (x) the Purchaser and Fiat, c/o Fiat S.p.A, Via Nizza n. 250, 10125 Torino, Italy (Attn: Chief Executive Officer); (xi) Sullivan & Cromwell LLP, counsel to the Purchaser and Fiat, 125 Broad Street, New York, New York 10004 (Attn: Scott D. Miller, Esq. and Andrew Dietderich, Esq.) and 1888 Century Park East, 21st Floor, Los Angeles, CA 90067 (Attn: Hydee R. Feldstein, Esq.); (xii) International Union, UAW, 8000 East Jefferson Avenue, Detroit, Michigan 48214 (Attn: Daniel Sherrick, Esq.); (xiii) Cleary Gottlieb Steen & Hamilton LLP, counsel to the UAW, One Liberty Plaza, New York, New York 10006 (Attn: James L. Bromley, Esq.); (xiv) Cohen, Weiss and Simon LLP, counsel to the UAW, 330 W. 42nd St., New York, New York 10036 (Attn: Babette Ceccotti, Esq.); (xv) Togut, Segal & Segal, LLP, conflicts counsel to the Debtors, One Penn Plaza, New York, New York 10119 (Attn: Albert Togut, Esq.); and (xvi) any other statutory committees appointed in these cases.

(e) Resolution of Objections; Section 365 Hearing. Upon the filing of a Section 365 Objection (i) challenging the ability of the Debtors to assume or assign the Designated Agreement (a "Disputed Designation") or (ii) asserting a cure amount higher than the

proposed Cure Costs indicated on **Exhibit A** annexed hereto (the "Disputed Cure Costs"), the Debtors, the Purchaser and the objecting Non-Debtor Counterparty shall meet and confer in good faith to attempt to resolve any such objection without Bankruptcy Court intervention. If any of the Debtors, the Non-Debtor Counterparty or the Purchaser determine that the objection cannot be resolved without judicial intervention, then the determination of the assumption and assignment of the Disputed Designation and/or the amount to be paid under section 365 of the Bankruptcy Code with respect to the Disputed Cure Costs will be determined by the Bankruptcy Court at an omnibus hearing established for such purpose that is on a date not less than ten days after the service of such objection or such other date as determined by the Bankruptcy Court (the "Section 365 Hearing"), unless the Debtors, the Purchaser and the Non-Debtor Counterparty to the Designated Agreement in dispute agree otherwise. Unless otherwise agreed by the parties, the Section 365 Hearing to consider objection relating to the Designated Agreement shall be conducted on **June 4, 2009 at 10:00 a.m., Eastern Time** at the United States Bankruptcy Court for the Southern District of New York, Alexander Hamilton Custom House, Room 523, One Bowling Green, New York, New York 10004, before the Honorable Arthur J. Gonzalez, United States Bankruptcy Judge. If the Bankruptcy Court determines at a Section 365 Hearing that the Designated Agreement cannot be assumed and assigned, or establishes Cure Costs that the Purchaser is not willing to pay, then such executory contract or unexpired lease shall no longer be considered a Designated Agreement.

(f) Failure to Object; Consent to Assumption and Assignment. Unless a Section 365 Objection is filed and served before the Section 365 Objection Deadline, all parties shall be deemed to have consented to such Cure Costs and the assumption and assignment of such Designated Agreements, and such party shall be forever barred from objecting to the Cure Costs or such assumption and assignment and from asserting any additional cure or other amounts against the Debtors, their estates or the Purchaser.

(g) Resolution of Assumption/Assignment Issues. If the Non-Debtor Counterparty to a Designated Agreement fails to timely assert a Section 365 Objection as described in paragraph (d) above, or upon the resolution of any timely Section 365 Objection by agreement of the parties or order of the Bankruptcy Court approving an assumption and assignment, such Designated Agreement shall be deemed to be assumed by the Debtors and assigned to the Purchaser and the proposed Cure Cost related to such Designated Agreement shall be established and approved in all respects, subject to the conditions set forth in paragraph (j) below.

(h) Additional Contract Designations. In accordance with Section 2.10 of the Purchase Agreement, the Debtors may, at the Purchaser's request or with the Purchaser's consent, designate, up to the Agreement Designation Deadline, additional executory contracts and unexpired leases as agreements to be assumed by the Debtors and assigned to the Purchaser pursuant to the Purchase Agreement (the "Additional Designated Agreements"). As used herein the "Agreement Designation Deadline" means, as applicable, (i) 30 days after the Closing Date (as defined in the Purchase Agreement) with respect to the Dealer Agreements (as defined below), (ii) 60 days after the Closing Date for executory contracts and unexpired leases with the Debtors' production suppliers

and (iii) 90 days after the Closing Date for all other agreements. Upon determining that a specific executory contract or unexpired lease, or a group thereof, are Additional Designated Agreements, the Debtors, at the Purchaser's request, shall serve notice on each of the Non-Debtor Counterparties to such Additional Designated Agreements and their Counsel of Record, indicating (i) that the notice recipient is a Non-Debtor Counterparty to one or more executory contracts or unexpired leases with the Debtors that the Debtors intend to assume and assign to the Purchaser and (ii) the corresponding Cure Cost under the Additional Designated Agreements as of April 30, 2009; provided, that such Assignment Notice shall in no way limit such Non-Debtor Counterparty's entitlement to Cure Costs accruing during the period after April 30, 2009

(i) Purchaser Confirmation Notice. Prior to the Closing Date and no later than June 12, 2009 (the "Pre-Closing Deadline"), the Purchaser shall serve on all applicable Non-Debtor Counterparties a notice indicating those Designated Agreements (including Additional Designated Agreements) with respect to which the Purchaser has made a final determination to take assignment of a Designated Agreement (a "Confirmation Notice"), subject only to Cure Costs not being established in an amount greater than the amounts set forth in **Exhibit A** unless otherwise agreed upon in writing by the Purchaser. Designated Agreements (including Additional Designated Agreements) listed on a Confirmation Notice are referred to as "Confirmed Agreements." The Purchaser may serve additional Confirmation Notices at any time through the Agreement Designation Deadline. Until a Designated Agreement is listed on a Confirmation Notice, it shall not be considered to be either assumed or assigned and shall remain subject to assumption, rejection or redesignation hereunder.

(j) Conditions on Assumption and Assignment. Please read **Exhibit A** carefully. In some cases, **Exhibit A** identifies additional terms or conditions of assumption and assignment with respect to a particular Designated Agreement. The Debtors' decision to assume and assign the Designated Agreements is subject to Bankruptcy Court approval and consummation of the Sale Transaction. Accordingly, subject to the satisfaction of conditions in paragraph (g) above to address any cure or assignment disputes, the Debtors shall be deemed to have assumed and assigned to the Purchaser each of the Designated Agreements as of the date of and effective only upon the Closing Date, and absent such closing, each of the Designated Agreements shall neither be deemed assumed nor assigned and shall in all respects be subject to further administration under the Bankruptcy Code. Assumption and assignment of the Designated Agreements also is subject to the Purchaser's rights set forth in paragraphs (h) and (i) above. The Purchaser shall have no rights in and to a particular Designated Agreement until such time as the particular Designated Agreement has been identified by the Purchaser as a Confirmed Agreement and is assumed and assigned in accordance with the procedures set forth herein. Once assumed and assigned as a Confirmed Agreement under these Contract Procedures, a Designated Agreement is not subject to rejection under section 365 of the Bankruptcy Code.

(k) Pre-Closing Assurance Letters. From and after the Pre-Closing Deadline through the Closing Date, with respect to any Designated Agreement not listed in a Confirmation Notice that is a production supply contract or a dealer contract with respect to which the

Non-Debtor Counterparty has determined that it must incur costs after the Pre-Closing Deadline to remain in a position to perform in accordance with the Designated Agreement upon assumption by the Purchaser, the Non-Debtor Counterparty may send a letter to the Debtors and to the Purchaser describing such additional costs under such agreement and seeking assurance of the Purchaser's intentions with respect to such agreement (an "Assurance Letter"). In response to an Assurance Letter, the Purchaser may either (i) provide a Confirmation Notice to the Non-Debtor Counterparty; (ii) elect not to deliver a Confirmation Notice at such time but to provide the Non-Debtor Counterparty with assurances that the Purchaser will advance the costs of any ongoing performance by the Non-Debtor Counterparty pending a final determination to assume the underlying Designated Agreement (such advances to be reflected by an appropriate credit against future payments to the Non-Debtor Counterparty under the Designated Agreement only in the event that such Designated Agreement becomes a Confirmed Agreement); or (iii) elect not to deliver a Confirmation Notice at such time but to agree in writing that the Non-Debtor Counterparty may temporarily suspend performance during this period without penalty (and, if applicable, upon assumption and assignment to the Purchaser, toll or delay subsequent deliveries as may be reasonably required to reflect the suspension of performance during such period). If no response to an Assurance Letter is received within five business days, the Non-Debtor Counterparty may temporarily suspend performance of the agreement pursuant to clause (iii) above. Any disputes relating to the foregoing shall be heard by the Bankruptcy Court. For purposes of this paragraph, the Debtors and the Purchaser shall be contacted at the addresses identified in paragraph (d) above.

(l) Post-Closing Assurances. From and after the Closing Date through the applicable Agreement Designation Deadline, Non-Debtor Counterparties may serve a written request on the Debtors and the Purchaser for a final determination of the assumption or rejection of its executory contracts and unexpired leases. Absent a favorable response within ten days, the Non-Debtor Counterparty may file a motion to compel assumption or rejection of such agreement, which may be heard on ten days' notice, subject to the Court's availability; provided, however, that in the event that a Non-Debtor Counterparty believes that it requires a more expeditious decision regarding assumption or rejection of its executory contract or unexpired lease, such Non-Debtor Counterparty shall be free to seek expedited relief from the Court, without regard to the ten day periods referenced herein but subject to the legal standards and requirements applicable to requests for expedited consideration, provided further that in such event the counterparty shall give as much advance notice as reasonably practicable under the circumstances to the Debtors and the Purchaser. For purposes of this paragraph, the Debtors and the Purchaser shall be contacted at the addresses identified in paragraph (d) above.

(m) Cure Payments. Except as may otherwise be agreed to by the parties to a Designated Agreement, the defaults under the Designated Agreements that must be cured in accordance with section 365(b) of the Bankruptcy Code shall be cured as follows: the Purchaser shall pay all Cure Costs relating to an assumed executory contract or unexpired lease within ten days after the later of (i) the Closing Date or, (ii) the date on which such executory contract or unexpired lease is deemed assumed and assigned, in accordance

with subparagraph (j) of these Contract Procedures or (iii) with respect to Dispute Cure Costs, the date the amount thereof is finally determined.

(n) Rights Pending Assumption or Rejection. Nothing in these Contract Procedures limits, restricts or expands the rights of parties to executory contracts and unexpired leases pending assumption or rejection, including any rights to seek further relief from the Bankruptcy Court (including motions to compel a prompt final decision on assumption or rejection), or the rights of other parties in response to such requests.

(o) Filing of Final List of Confirmed Agreements. As soon as reasonably practicable after the Agreement Designation Deadline, the Debtors shall file with the Court a final schedule indicating all Confirmed Agreements and the proposed Cure Costs relating to each Confirmed Agreement scheduled therein.

(p) Direct Dealer Agreements. Certain executory dealer agreements will be identified as Designated Agreements to be assumed and assigned. Although most U.S. dealers have entered into standard uniform dealership agreements in the form of the Chrysler Corporation Sales and Service Agreement (the "Sales and Service Agreement"), some dealers are parties to older agreements in the form of the Chrysler Direct Dealer Agreement (each, a "Direct Dealer Agreement"). If a Direct Dealer Agreement is identified as a Designated Agreement in the attached **Exhibit A**, then such Direct Dealer Agreement will only be assumed and assigned to the Purchaser if the counterparty to the Direct Dealer Agreement first agrees to modify such Direct Dealer Agreement and restate it in the form of the Sales and Service Agreement (each such modified Direct Dealer Agreement and Sales and Service Agreement, a "Dealer Agreement"). If the counterparty and the Debtors do not so modify and restate such Direct Dealer Agreement in the form of the Sales and Service Agreement, then notwithstanding any other provisions in this Notice or on the Bid Procedures Order, such Direct Dealer Agreement will not be assumed and assigned as set forth herein.

4. The inclusion of any document on the list of Designated Agreements shall not constitute or be deemed to be a determination or admission by the Debtors or the Purchaser that such document is, in fact, an executory contract or unexpired lease within the meaning of the Bankruptcy Code, and all rights with respect thereto being expressly reserved.

5. Any Section 365 Objection shall not constitute an objection to the relief generally requested in the Sale Motion (e.g., the sale of the Purchased Assets by the Debtors to the Purchaser free and clear of claims, liens and encumbrances). Parties wishing to object to the other relief requested in the Sale Motion (excluding the Bidding Procedures Relief) must file and serve a separate objection, stating with particularity such party's grounds for objection, in accordance with the objection procedures approved and set forth in the Bidding Procedures Order.

6. If a party other than the Purchaser is the Successful Bidder for the Purchased Assets, you will receive a separate notice providing additional information regarding the treatment of your Designated Agreement; provided, however, that if the applicable Cure

Costs has been established pursuant to these procedures, it shall not be subject to further dispute if the new purchaser seeks to acquire such agreement.

7. **[Questions or inquiries relating to this Notice may be directed to: [_____].]**

Dated: **[May__]**, 2009
New York, New York

BY ORDER OF THE COURT

EXHIBIT A

[Schedule of Designated Agreements and Proposed Cure Costs]

EXHIBIT E

[Form of UAW Retiree Notices]

A Message to UAW Chrysler Retirees

Dear Brothers and Sisters,

As we all know, the Chrysler Corporation -- along with the entire U.S. auto industry -- is engulfed in a severe crisis. Chrysler lost $8 billion in 2008 and is projected to sustain unprecedented losses again in 2009. The difficulty of the situation was highlighted when Chrysler filed for Bankruptcy on April 30. In this environment, we are fighting every day to preserve and protect to the greatest extent possible our hard-won gains, particularly for the retirees who helped build this industry with your years of loyal service.

After a lengthy process that included congressional hearings and petitioning the White House, Chrysler was granted an initial $4 billion loan by the Bush administration on Dec. 19, 2008. As part of that loan, Chrysler was required to submit a restructuring plan to the Treasury Department on February 17, 2009. On March 30, President Obama announced that the company's February 17 plan didn't go far enough in reducing costs and laying the groundwork for sustainability. He said Chrysler must form a partnership with Fiat or another automaker within 30 days to receive $6 billion in additional loans. The Treasury Department's auto task force also required deeper concessions from UAW members, retirees and other company stakeholders.

On April 30, President Obama announced that Chrysler, Fiat, the UAW and the Treasury Department had reached agreement on a broad restructuring plan, including the terms of a business alliance between Chrysler and Fiat. That agreement includes a new schedule of contributions to the trust fund that will provide continued retiree medical benefits. It also includes modifications to the collective bargaining agreement for active employees. The UAW active workforce ratified that agreement last week. Based on these agreements, the United States government will provide the $6 billion of additional loans to allow Chrysler to complete its restructuring.

In order to complete its restructuring process, President Obama also announced that Chrysler filed a petition under Chapter 11 of the United States Bankruptcy Code. The goal of the bankruptcy filing is to allow Chrysler, Fiat, the UAW and the Treasury Department to obtain swift court approval of the restructuring so that the company can move forward to implement the agreements between the parties.

Proposed Sale

To complete the restructuring, a new company will be formed which will purchase the operating assets of Chrysler. If approved by the court, the new company will enter into the agreements with the UAW covering both active and retired workers. The new company will be funded with the new loans from the Treasury Department and will be owned by Fiat, the United States government and the retiree medical benefit Trust Fund.

Attached to this letter is a formal notice from the Bankruptcy Court regarding the proposed sale. As described in that notice, the Bankruptcy Court will soon hold a hearing to consider that

proposed sale. As part of the approval of the sale, the court will also be asked to approve the new agreement regarding the retiree medical benefits program, as described below.

Pension Plan Continues Without Change

The restructuring agreements provide that the new company will take over responsibility for the Chrysler UAW pension plan. That plan will continue operations and pension benefits will be continued at their current level.

Retiree Medical Benefits

Retiree medical benefits were one of the most significant issues addressed in 2007 bargaining. The 2007 National UAW-Chrysler Agreement established a new Trust Fund (called a "Voluntary Employee Beneficiary Association" or "VEBA"), which is responsible for retiree medical benefits starting on January 1, 2010. The 2007 Agreement established a series of cash contributions by the Company to the VEBA, beginning on January 1, 2010.

In order for Chrysler to receive the new $6 billion government loan, we were required to support a series of changes to the retiree medical and VEBA agreements.

In this difficult situation, we were able to preserve the core medical benefit program for retirees. These were hard fought issues and the changes described below are certainly painful. But if we had not agreed to support these changes, the U.S. Government would not have provided the additional loans to Chrysler, which would have lead to immediate liquidation of the company. In a liquidation, the VEBA funding would likely have been completely eliminated, which would have meant an immediate and permanent termination of all retiree medical coverage.

The following summarizes the principal features of the proposed agreement.

New $4.587 Billion Note. The VEBA will receive a new Note from the new company, payable in cash, with a Principal Amount of $4.587 billion. Annual cash payments under the new Note are $315 million in 2010; $300 million in 2011; $400 million in 2012; and $600 million in 2013. These payments then increase to $650 million per year for 2014 through 2017, and to $823 million per year for years 2018 through 2023. In compliance with the government loan agreement, the value of this new Note represents one-half of the value to be received by the VEBA.

VEBA to own Significant Stock. Another requirement of the Treasury Department loans was that half of the value received by the VEBA be in the form of stock. To meet that requirement, the VEBA will receive 55 percent of the stock in the new Chrysler. Fiat will eventually own 35 percent of the stock. The remaining 10 percent will be owned by the U.S. and Canadian Governments in return for their financial support.

Since the new Chrysler will not be a publicly-traded company, the new VEBA agreement includes mechanisms for the VEBA to sell the stock under certain conditions to other parties. Once the stock becomes publicly traded, the VEBA will be able to sell its stock to the public in accordance with a Registration Rights Agreement.

The VEBA will have the right to designate a member of the new company's Board of Directors, with UAW consent. The VEBA will be required to vote its shares in accordance with the direction of the Independent Directors on the board of the new company.

If the VEBA sells this stock for more than $4.25 billion (increasing at 9% each year starting on January 1, 2010), any further stock still held by the VEBA will be transferred to the U.S. Government, as part of its consideration for the $6 billion in new government loans.

Existing Internal VEBA Assets Transferred on January 1, 2010. Along with this new payment structure, on January 1, 2010 the VEBA will receive the assets of an internal trust fund maintained at Chrysler (called the "Internal VEBA"). The approximate current value of the assets in that fund is $1.5 billion. The management of these assets will be transferred to the new company, which will continue to invest them during the balance of 2009. These funds will be transferred to the new VEBA on January 1, 2010.

Pension Pass Through Eliminated. One funding mechanism under the 2007 Agreement was called the "Pension Pass Through." Under that arrangement, the new VEBA was scheduled to impose an additional monthly contribution requirement, and the Chrysler pension benefits were to increase in a corresponding amount. This mechanism has been eliminated and its value is instead reflected in the new Note described above.

VEBA Committee can adjust benefits beginning in 2010: As provided under the 2007 Agreement, the VEBA will be governed by an 11-member Committee, including 5 members appointed by the UAW and 6 Independent Members. Under the 2007 Agreement, that Committee had the authority, starting on January 1, 2012, to adjust benefits so that benefit levels could be kept consistent with the assets in the Trust. Under the new agreement, the Committee will be allowed to make necessary benefit adjustments beginning when the VEBA assumes responsibility on January 1, 2010.

Immediate Changes in Benefit Levels Required

Under the 2007 Agreement, Chrysler remained responsible for providing retiree medical benefits through the end of 2009, with the new VEBA taking over responsibility on January 1, 2010. In the discussions over the last several weeks, the company sought to pay these benefits out of the Internal VEBA assets discussed above. That approach would have depleted the assets in that trust, resulting in a much smaller contribution to the New VEBA on January 1, 2010.

We succeeded in avoiding this depletion of the Internal VEBA's assets during 2009. The new company will therefore provide retiree medical benefits for the balance of 2009 until the VEBA takes over responsibility. In exchange, however, the Treasury Department insisted that the benefits be immediately reduced to reflect Chrysler's difficult financial situation.

In order to maintain the support of the U.S. Government, therefore, we were required to agree to the changes in benefits described in the following chart. These changes will be effective on July 1, 2009 (or later if court approval is delayed beyond that date).

Prescription Drug Co-Pays	Retail (34 day supply) • $10 Generic • $25 Brand Mail Order (90 day supply) • $20 Generic • $50 Brand
Catastrophic Plan for retirees and surviving spouses who fail to pay required monthly contributions	No longer offered. Retirees and surviving spouses currently in Catastrophic Plan will be given opportunity to join regular plan.
Coverage for Erectile Dysfunction (ED) medications (*e.g.*, Viagra, Cialis, Levitra)	No longer offered, except in prior authorized cases of Pulmonary Arterial Hypertension
Coverage for the Proton Pump Inhibitor drug class (*e.g.*, omeprazole, Prilosec, Zegerid, Nexium, Achiphex, Prevacid, Protonix)	No longer offered, except in prior authorized cases of Barrett's Esophagitis and Zoellinger-Ellison Syndrome
Vision Program	No longer offered
Dental Program	No longer offered
Emergency Room Co-Pay	$100 (waived if admitted)
Medicare Part B Special Benefit ($76.20 per month for retirees enrolled in Medicare)	No longer offered by health plan. This modification is not applicable to approximately 8,800 retirees and surviving spouses who retired or began receiving surviving spouse benefits before October 1979, and whose benefit is provided through the pension trust. The payments will continue for these pre-1979 retirees and surviving spouses.
"Low Income Retirees" (less than $8,000 annual pension and monthly basic benefit rate of less than $33.33)	Monthly contribution requirement of $11 (flat rate regardless of family status) In all other respects, these retirees and surviving spouses will be included in the same plan as other retirees and surviving spouses.
Monthly Contribution Requirements (General Retirees)	No Change (currently $11/single and $23/ family)
Deductible and Co-Pay Requirements (General Retirees)	No Change (currently $164 annual deductible and $273 annual (single) out-of-pocket maximum)

The Future Outlook

In the early years of the VEBA's existence, it is unlikely that the VEBA will be able to sell the stock of the new Chrysler. The new VEBA will therefore be required to use the $1.5 billion in immediate contributions from the Internal VEBA, plus the annual cash contributions due in 2010 and 2011, to provide retiree medial benefits.

Because of the uncertainty regarding the long-term value of the stock, the Committee will likely be required to make further adjustments in the benefit levels for 2010 and 2011. The extent of those future adjustments will depend on many factors, including investment returns in the Internal VEBA during the remaining months of 2009.

If the stock can be sold in 2012 or thereafter for significant value, the Committee will be able to take that new value into account and restore some or all of the benefits that are being reduced under these arrangements.

In other words, if the current restructuring efforts are successful and the company returns to viability, UAW retirees will benefit from that recovery through the VEBA's significant stock ownership. If the restructuring succeeds, this mechanism will assure that UAW retirees are repaid for the sacrifices they are being forced to make today.

We urge your support for these proposed agreements. In these difficult circumstances, we believe they provide the best possible protection for your retiree benefits.

In solidarity,

Ron Gettelfinger	General Holiefield, *Vice*	Bill Payne
UAW President	*and Director, UAW Chrysler Department*	*Counsel to the Class*

Important Notes

For further information about the proposed agreement and the process for court review of the proposed agreements and the proposed sale, please refer to the enclosed legal notice. Full and complete copies of the proposed retiree health agreement can be found on the website referred to in that notice.

If you support the proposed agreement, you do not need to take any action at this time. Information about the modified medical plan will be sent to you following court approval. If you wish to object to the proposed agreements, you must file a written objection as described in the enclosed legal notice.

Counsel to the Class Representatives participated in negotiation of the 2007 retiree medical agreements which were approved by the District Court for the Eastern District of Michigan on July 31, 2008. Although the Class Representatives are not formal parties to the new agreements described above, Counsel to the Class Representatives has reviewed the proposed agreements and is in full support of the efforts to obtain Bankruptcy Court approval of the new agreements. Counsel for the Class has entered an appearance in the Bankruptcy case and will be supporting approval of the proposed agreements.

Hearing Date and Time: May 27, 2009 at 10:00 a.m. (Eastern Time)
Objection Deadline: May 19, 2009 at 4:00 p.m. (Eastern Time)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
Chrysler LLC, *et al.*,[1]	:	Case No. 09-50002 (AJG)
Debtors.	:	(Jointly Administered)

SPECIAL NOTICE TO DEBTORS' RETIREES REPRESENTED BY THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA OF SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS AND APPROVAL OF UAW RETIREE SETTLEMENT AGREEMENT

PLEASE TAKE NOTICE OF THE FOLLOWING:

1. On April 30, 2009 (the "Petition Date"), the above-captioned debtors and debtors in possession (collectively, the "Debtors") filed voluntary petitions under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). On May 3, 2009, the Debtors filed a motion with the Bankruptcy Court (the "Sale Motion") seeking, among other things, (a) authority to sell substantially all of the Debtors' assets free and clear of all liens, claims and encumbrances (the "Sale Transaction"); (b) approval of certain procedures (the "Bidding Procedures") for the solicitation of bids with respect to the Sale Transaction (the "Bidding Procedures Relief"); (c) authority to assume and assign certain executory contracts and unexpired leases in connection with the Sale Transaction; (d) approval of that certain settlement agreement between the Purchaser and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW") to be executed at the closing of the Sale Transaction (the "UAW Retiree Settlement Agreement") and (e) scheduling

[1] The Debtors and their respective Tax ID numbers are as follows: Chrysler LLC, Tax ID No. 38-2673623; Chrysler Aviation Inc., Tax ID No. 38-3475417; Chrysler Dutch Holding LLC, Tax ID No. 26-1498515; Chrysler Dutch Investment LLC, Tax ID No. 26-1498838; Chrysler Dutch Operating Group LLC, Tax ID No. 26-1498787; Chrysler Institute of Engineering, Tax ID No. N/A; Chrysler International Corporation, Tax ID No. 38-2631697; Chrysler International Limited, L.L.C., Tax ID No. N/A; Chrysler International Services, S.A., Tax ID No. 38-0420030; Chrysler Motors LLC, Tax ID No. 38-3625541; Chrysler Realty Company LLC, Tax ID No. 38-1852134; Chrysler Service Contracts Inc., Tax ID No. 38-3382368; Chrysler Service Contracts Florida, Inc., Tax ID No. 26-0347220; Chrysler Technologies Middle East Ltd., Tax ID No. 75-2487766; Chrysler Transport Inc., Tax ID No. 38-2143117; Chrysler Vans LLC, Tax ID No. 31-1781705; DCC 929, Inc., Tax ID No. 38-2899837; Dealer Capital, Inc., Tax ID No. 38-3036138; Global Electric Motorcars, LLC, Tax ID No. 31-1738535; NEV Mobile Service, LLC, Tax ID No. 33-1024272; NEV Service, LLC, Tax ID No. 03-0501234; Peapod Mobility LLC, Tax ID No. 26-4086991; TPF Asset, LLC, Tax ID No. 74-3167035; TPF Note, LLC, Tax ID No. 74-3167038; and Utility Assets LLC, Tax ID No. 20-0874783.

of a final hearing with the Bankruptcy Court for approval of the Sale Transaction (the "Sale Hearing").

2. Chrysler LLC and its Debtor subsidiaries; Fiat S.p.A ("Fiat"); and New CarCo Acquisition LLC (the "Purchaser"), a Delaware limited liability company formed by Fiat, have entered into a Master Transaction Agreement, dated as of April 30, 2009 (the "Purchase Agreement"), which, together with certain ancillary agreements, contemplates a set of related transactions for the sale of substantially all of the Debtors' tangible, intangible and operating assets, defined as the "Purchased Assets" in Section 2.06 of the Purchase Agreement, including the Designated Agreements (as defined in the Sale Motion), the assets related to the research, design, manufacturing, production, assembly and distribution of passenger cars, trucks and other vehicles (including prototypes) under brand names that include Chrysler, Jeep® and Dodge (the "CarCo Business"), certain of the facilities related thereto and all rights including intellectual property rights, trade secrets, customer lists, domain names, books and records, software and other assets used in or necessary to the operation of the CarCo Business or related thereto (collectively, as defined in the Purchase Agreement, the "Purchased Assets") to the Purchaser, subject to higher and better offers made pursuant to the Bidding Procedures.

3. A hearing on the Bidding Procedures Relief was held before the Bankruptcy Court on May 1, 4 and 5, 2009, after which the Bankruptcy Court entered an order, among other things, approving the Bidding Procedures Relief **[Docket No. ____]** (the "Bidding Procedures Order"). The Bidding Procedures Order establishes the Bidding Procedures that govern the manner in which the Purchased Assets are to be sold. All bids must comply with the Bidding Procedures and be submitted so as to be received not later than 5:00 p.m., Eastern Time, on May 20, 2009.

4. In addition, contingent upon the approval of the sale of the Purchased Assets to the Purchaser and concurrently with the sale of the Purchased Assets, the Debtors will assume and assign to the Purchaser any collective bargaining agreements entered into by and between the Debtors and the UAW (the "UAW CBA Assignment") with the exception of (a) the Debtors' agreement to provide certain retiree medical benefits specified in the Memorandum of Understanding Post-Retirement Medical Care, dated October 12, 2007, between Chrysler and the UAW, (b) the Memorandum of Understanding Post-Retirement Medical Care, dated April 29, 2009, between Chrysler and the UAW and (c) the 2008 Settlement Agreement (as defined below).

5. Furthermore, contingent upon the approval of the sale of the Purchased Assets to the Purchaser, the Purchaser has agreed, among other things, to enter into the UAW Retiree Settlement Agreement, pursuant to which the Purchaser will make contributions to a VEBA in respect of non-pension retiree benefits to the Debtors' retirees and surviving spouses represented by the UAW, including the members of the "Class" as defined in the UAW Retiree Settlement Agreement (collectively, the "UAW-Represented Retirees") on terms and conditions that differ from those established by that certain Settlement Agreement, dated March 30, 2008 (the "2008 Settlement Agreement"), in the class action of Int'l Union, UAW, et al. v. Chrysler, LLC, Case No. 07-CV-14310 (E.D. Mich.) (the "English Case"), including, among other things, the funding of such benefits with a combination of an equity interest in the Purchaser and a new

$4.587 billion note. Under the UAW Retiree Settlement Agreement, certain benefit reductions will take effect July 1, 2009, assuming consummation of the Sale Transaction.

6. The Sale Hearing currently is scheduled to be conducted on May 27, 2009 at 10:00 a.m. (Eastern Time) at the United States Bankruptcy Court for the Southern District of New York, Alexander Hamilton Custom House, Room 523, One Bowling Green, New York, New York 10004, before the Honorable Arthur J. Gonzalez, United States Bankruptcy Judge, to consider the approval of the Purchase Agreement or any higher and better offer by a Successful Bidder (as defined in the Bidding Procedures) and approval of the UAW Retiree Settlement Agreement, and may include the conduct of a court-supervised auction (the "Auction") in accordance with the Bidding Procedures. If the Purchaser is the Successful Bidder, the Debtors anticipate seeking entry of a Sale Order substantially in the form of the order attached to the Sale Motion as Exhibit C (the "Sale Order"). The Sale Hearing may be adjourned or rescheduled without notice by an announcement of the adjourned date at the Sale Hearing.

7. A copy of the Purchase Agreement (without certain commercially sensitive attachments) and the Sale Motion (including the proposed Sale Order), the Bidding Procedures Order as entered by the Bankruptcy Court (with the Bidding Procedures attached), the UAW Retiree Settlement Agreement, including all exhibits thereto and an Equity Recapture Agreement between the U.S. Treasury and the UAW Retiree Benefits Medical Trust executed in connection with the UAW Retiree Settlement Agreement may be obtained on the website of the Debtors' claims and noticing agent, Epiq Bankruptcy Solutions, LLC at http://www.chryslerrestructuring.com. Additionally, a copy of the Purchase Agreement (without certain commercially sensitive attachments) and the Sale Motion (including the proposed Sale Order) and the Bidding Procedures Order as entered by the Bankruptcy Court (with the Bidding Procedures attached) may be obtained by sending a written request to counsel to the Debtors, Jones Day, 222 East 41st Street, New York, NY 10017, Facsimile: (212) 755-7306 (Attn: Nathan Lebioda, Esq.).

8. **OBJECTIONS TO ANY RELIEF REQUESTED IN THE SALE MOTION, INCLUDING THE DEBTORS' REQUEST TO APPROVE THE SALE OF PURCHASED ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES TO THE PURCHASER OR ANOTHER SUCCESSFUL BIDDER AND THE REQUEST FOR COURT APPROVAL OF THE UAW RETIREE SETTLEMENT AGREEMENT (EACH, AN "OBJECTION"), MUST BE MADE IN WRITING, FILED WITH THE BANKRUPTCY COURT AT THE ADDRESS SET FORTH IN PARAGRAPH 6 ABOVE, AND SERVED SO AS TO BE ACTUALLY RECEIVED BY 4:00 P.M. (EASTERN TIME) ON MAY 19, 2009, PROVIDED, HOWEVER, THAT IF A DETERMINATION IS MADE AT THE SALE HEARING THAT THE SUCCESSFUL BIDDER IS A BIDDER OTHER THAN THE PURCHASER, PARTIES IN INTEREST MAY OBJECT SOLELY TO SUCH DETERMINATION AT THE SALE HEARING.**

9. **ANY OBJECTION MUST BE SERVED IN ACCORDANCE WITH PARAGRAPH 8 ABOVE ON EACH OF THE FOLLOWING PARTIES:** (a) the Debtors, c/o Chrysler LLC, 1000 Chrysler Drive, CIMS# 485-14-96, Auburn Hills, Michigan 48326-2766 (Attn: Holly E. Leese, Esq.); (b) Jones Day, counsel to the Debtors, 222 East 41st Street, New

York, New York 10017 (Attn: Corinne Ball, Esq. and Nathan Lebioda, Esq.) and 1420 Peachtree Street, N.E., Suite 800, Atlanta, Georgia 30309-3053 (Attn: Jeffrey B. Ellman, Esq.); (c) Capstone Advisory Group, LLC, Park 80 West, Plaza 1, Plaza Level, Saddle Brook, NJ 07663 (Attn: Robert Manzo); (d) Kramer Levin Naftalis & Frankel LLP, counsel to the Official Committee of Unsecured Creditors', 1177 Avenue of the Americas New York, New York 10036 (Attn: Thomas M. Mayer, Esq. and Kenneth H. Eckstein, Esq.); (e) Simpson Thacher & Bartlett LLP, counsel to the administrative agent for the Debtors' prepetition senior secured lenders, 425 Lexington Avenue, New York, New York 10017 (Attn: Peter Pantaleo, Esq. and David Eisenberg, Esq.); (f) the Office of the United States Trustee for the Southern District of New York (the "U.S. Trustee"), 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Brian S. Masumoto, Esq.); (g) the U.S. Department of Treasury (the "U.S. Treasury"), 1500 Pennsylvania Avenue NW, Room 2312 Washington, D.C. 20220 (Attn: Matthew Feldman, Esq.); (h) United States Attorney's Office, Southern District of New York, Civil Division, Tax & Bankruptcy Unit, 86 Chambers Street, 3rd Floor, New York, New York 10007 and Cadwalader, Wickersham & Taft LLP, Of counsel to the Presidential Task Force on the Auto Industry, One World Financial Center, New York, New York 10281 (Attn: John J. Rapisardi, Esq.); (i) Vedder Price, P.C., counsel to Export Development Canada, 1633 Broadway, 47th Floor New York, New York 10019 (Attn: Michael J. Edelman, Esq.); (j) the Purchaser and Fiat, c/o Fiat S.p.A, Via Nizza n. 250, 10125 Torino, Italy (Attn: Chief Executive Officer); (k) Sullivan & Cromwell LLP, counsel to the Purchaser and Fiat, 125 Broad Street, New York, New York 10004 (Attn: Scott D. Miller, Esq. and Andrew Dietderich, Esq.) and 1888 Century Park East, 21st Floor, Los Angeles, CA 90067 (Attn: Hydee R. Feldstein, Esq.); (l) International Union, UAW, 8000 East Jefferson Avenue, Detroit, Michigan 48214 (Attn: Daniel Sherrick, Esq.); (m) Cleary Gottlieb Steen & Hamilton LLP, counsel to the UAW, One Liberty Plaza, New York, New York 10006 (Attn: James L. Bromley, Esq.); (n) Cohen, Weiss and Simon LLP, counsel to the UAW, 330 W. 42nd St., New York, New York 10036 (Attn: Babette Ceccotti, Esq.); (o) Togut, Segal & Segal, LLP, conflicts counsel to the Debtors, One Penn Plaza, New York, New York 10119 (Attn: Albert Togut, Esq.); and (p) any other statutory committees appointed in these cases.

10. The failure of any person or entity to file an Objection on or before the applicable Objection Deadline shall be deemed a consent to the Sale Transaction contemplating the sale of the Purchased Assets to the Purchaser or another Successful Bidder and the other relief requested in the Sale Motion, including approval of the UAW Retiree Settlement Agreement, and be a bar to the assertion, at the Sale Hearing or thereafter, of any objection to the Bidding Procedures Relief, the Sale Motion, the Auction, the sale of the Purchased Assets, approval of the UAW Retiree Settlement Agreement, the Debtors' consummation and performance of the Purchase Agreement or other agreement with a different Successful Bidder (including in any such case, without limitation, the transfer of the Purchased Assets free and clear of all liens, claims and encumbrances) or to the approval of the UAW Retiree Settlement Agreement.

11. This Notice is subject to the full terms and conditions of the Purchase Agreement, the UAW Retiree Settlement Agreement, the Sale Motion, the Bidding Procedures Order and the Bidding Procedures, which shall control in the event of any conflict. The Debtors encourage parties in interest to review such documents in their entirety and consult an attorney if they have questions or want advice.

BY ORDER OF THE COURT

Dated: **[May___]**, 2009
New York, New York

Exhibit C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
OLD CARCO LLC, f/k/a CHRYSLER LLC, *et al.*,	:	Case No. 09-50002 (AJG)
Debtors.	:	(Jointly Administered)
BRADLEY E. WOLFF,	:	Adv. Proc. No. 10-05007 (AJG)
Plaintiff,	:	
-against-	:	
CHRYSLER GROUP LLC; and DOES 1-50, inclusive,	:	
Defendants.	:	

OPINION GRANTING DEFENDANT'S MOTION TO DISMISS

A P P E A R A N C E S

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By: Lilys D. McCoy, Esq.

ARTHUR J. GONZALEZ
CHIEF UNITED STATES BANKRUPTCY JUDGE

Before this Court is a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (the "Motion") by Chrysler Group LLC ("New Chrysler") against Bradley E. Wolff's First Amended Complaint For Damages Based on Breach of Contract and Promissory Estoppel (the "Complaint"). Mr. Wolff originated this proceeding in the Superior Court of Riverside, California on December 4, 2009 with a prior version of the Complaint. New Chrysler removed this proceeding to the United States District Court for the Central District of California pursuant to sections 1331, 1334, and 1452 of Title 28 of the United States Code. On New Chrysler's motion pursuant to section 1412 of Title 28 of the United States Code, the case was transferred to the Southern District of New York on March 4, 2010 for referral to this Court based on this Court's jurisdiction to interpret its own orders. Mr. Wolff filed the Complaint on April 6, 2010. New Chrysler filed the Motion on June 14, 2010. Mr. Wolff filed an Opposition to the Motion on July 8, 2010. New Chrysler filed a Reply in support of the Motion on July 13, 2010. This Court conducted a hearing on July 15, 2010. For the reasons outlined below, the Motion is granted in its entirety.

BACKGROUND

The following sets forth factual allegations found in the Complaint, which the Court must assume to be true on a Rule 12(b)(6) motion. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). Legal conclusions set forth in the Complaint have been excluded to the extent they are not intertwined with relevant facts, as they should not be presumed to be true or correct and do not bolster the factual sufficiency of a complaint on a motion to dismiss. *See Starr v. Sony BMG,* 592 F.3d 314, 317 n.1 (2d Cir. 2010) (noting that a court "'considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumptions of truth.'") (quoting *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949-50 (2009)).

On November 17, 2003, Chrysler LLC (now known as "Old Carco") manufactured a 2004 Dodge Ram, which Bradley E. Wolff ("Mr. Wolff") later purchased. After experiencing problems with the vehicle, Mr. Wolff filed a complaint against Old Carco in the Superior Court of Riverside County, California on April 16, 2006, alleging violations of the Song-Beverly Consumer Warranty Act and the Magnuson-Moss Warranty Act (the "Lemon Law(s)"). The parties negotiated a resolution of the suit and Old Carco sent Mr. Wolff a draft settlement agreement on April 21, 2009, under which Old Carco would agree to pay Mr. Wolff $16,000 in damages and reasonable costs, expenses, and attorney's fees[1] and Mr. Wolff would agree to dismiss his complaint (the "Settlement Agreement"). Mr. Wolff signed and returned this agreement to Old Carco, but neither party took any further action to settle the case at that time.

[1] Mr. Wolff claimed $124,894.02 regarding such amounts in the California state suit against Old Carco, but Old Carco's bankruptcy stayed the California suit before that court considered the request, and Mr. Wolff has dismissed that case. Mr. Wolff requests the same amount plus additional costs, fees, and expenses in an amount according to proof in the First Amended Complaint. Mr. Wolff also filed a Proof of Claim for $165,303.94 in the Old Carco Chapter 11 case.

Old Carco filed for Chapter 11 bankruptcy on April 30, 2009, before Old Carco or Mr. Wolff had performed any obligations under the Settlement Agreement. Old Carco entered the proceeding with an expectation that it would sell the bulk of its assets with court approval on an expedited schedule. All parties in interest received notice and an opportunity to be heard. The Ad Hoc Committee Seeking Fairness for Warranty and Lemon Law Claimants (the "Ad Hoc Committee") filed an objection to the Debtor's Motion for an Order Authorizing the Sale of Substantially All of Debtors' Assets Free and Clear of All Liens, Claim, Interests and Encumbrances and Certain Related Relief (the "Sale Motion" requesting the "Sale Order"). Mr. Wolff filed a proof of claim for his damages and expenses on May 14, 2009. The Ad Hoc Committee reached an agreement with Old Carco and New Chrysler (the "Agreement on Changes") regarding modifications to the proposed Sale Order and withdrew its objection.[2] Mr. Wolff did not file an objection to the Sale Order.

The Sale Order, entered on June 1, 2009, is an order of this Court authorizing New Chrysler and Old Carco to execute the Master Transaction Agreement. The Sale Order defines those terms of the sale that are relevant to the bankruptcy sale approval and refers to the Master Transaction Agreement for further details. The Sale Order directs that New Chrysler will assume only certain Lemon Law liabilities and executory contracts from Old Carco. Specifically, paragraph 19 states,

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[2] Complaint, ¶¶ 18-25, Ex. 2-3. *See also* Ad Hoc Committee's Withdrawal of Objection to the Sale Order, Dock. No. 2916, Case 09-50002 (AJG), May 29, 2009. The Agreement on Changes included a comma between "prepetition" and "or" that the Sale Order did not include. At the hearing of July 15, 2010, Mr. Hoddick began his statement for Mr. Wolff by alleging, "Chrysler Group, in its Reply Brief that's before the Court has removed a critical comma from the paragraph 19 language that's before the court. This case may hinge on the meaning of that single comma. They have submitted a Reply Brief to the court removing critical punctuation from the Sale Order." Mr. Hoddick was mistaken; in fact, both parties have cited the correct Sale Order punctuation in their pleadings (although Mr. Wolff's pleadings occasionally conflate the Agreement on Changes and the Sale Order) and the comma's presence or absence does not affect the meaning of the Sale Order as it relates to this proceeding. *See* Compl. ¶26, Def.'s Memo. ¶6, Def.'s Reply ¶7. Because the variant comma is not material to the Court's conclusions, the Court will not resolve the issue in this opinion, although Mr. Hoddick's argument concerning the significance of the variation is considered in the Discussion.

> Notwithstanding anything else contained herein or in the in the Purchase Agreement, in connection with the purchase of the Debtors' brands and related Assets, the Purchaser, from and after Closing, will recognize, honor and pay liabilities under Lemon Laws for additional repairs, refunds, partial refunds (monetary damages) or replacement of a defective vehicle (including reasonable attorney's fees, if any, required to be paid under such Lemon Laws and necessarily incurred in obtaining those remedies), and for any regulatory obligations under such Lemon Laws arising now, including but not limited to cases resolved prepetition or in the future, on vehicles manufactured by the Debtors in the five years prior to the Closing (without extending any statute of limitations provided under such Lemon Laws), but in any event not including punitive, exemplary, special, consequential or multiple damages or penalties and not including any claims for personal injury or other consequential damages that may be asserted in relationship to such vehicles under the Lemon Laws.

A corresponding amendment to the Master Transaction Agreement uses slightly different language to assume the same liabilities, but in the event of any conflict, the Sale Order's language controls. Additionally, regarding an issue not discussed specifically within the Sale Order, section 2.08(n)(1) of the Article II Company Disclosure Letter to the Master Transaction Agreement states that New Chrysler assumes certain "[l]iabilities under incentive programs offered to dealers and customers prior to closing." Other provisions of the Sale Order emphasize that New Chrysler assumes specific liabilities of Old Carco but does not become a successor to Old Carco; all non-assumed Old Carco claims are barred against New Chrysler. *See* Sale Order ¶¶ 12-17, 35, 38, 39, 42. The sale closed on June 10, 2009 and the Sale Order is now final.

On August 24, 2009, Matthew Proudfoot, counsel for New Chrysler, sent a letter to Larry Hoddick, counsel for Mr. Wolff (Pl.'s First Opp., Ex. E, the "Proudfoot Letter") serving court-approved Notice Regarding Treatment of Lemon Law Claims in Connection With Chrysler LLC Bankruptcy Cases and Sale of Assets to Chrysler Group with Exhibits (the "Lemon Law Notice"). The Lemon Law Notice generally directs those parties to whom New Chrysler assumed liabilities under paragraph 19 of the Sale Order to pursue their claim in one of the following ways:

> (a) filing the appropriate papers in a Lemon Law Action (consistent with applicable procedural requirements in such action) to indicate that New Chrysler is being substituted for the Debtors as the defendant in the proceeding, *provided that* such papers contain an affirmative statement that only Assumed Lemon Law Liabilities are being pursued against New Chrysler, solely to the extent permitted by the Lemon Law Provision of the Sale Order, and that any additional pre-Closing liabilities will be pursued (if at all) only by filing a proof of claim in these cases; (b) dismissing the Lemon Law Action and filing a new action solely against New Chrysler, which seeks only relief with respect to the Assumed Lemon Law Liabilities; or (c) any other similar arrangement acceptable to the Debtors and New Chrysler in their sole discretion that results in no claims being pursued against the Debtors in any nonbankruptcy forum and no Excluded Liabilities being pursued against New Chrysler.
> Compl. ¶37.

The Lemon Law Notice does not modify the Sale Order or any party's rights under the Sale Order; it only informs Lemon Law claimants of the effect of the Sale Order and New Chrysler's treatment of assumed liabilities. The Proudfoot Letter specifically states New Chrysler's opinion regarding Mr. Wolff's claim: "based on our review of the relevant materials we have determined that none of the claims asserted therein [by Mr. Wolff] have been assumed by [New Chrysler]. We therefore are unwilling to consent to the substitution of [New Chrysler] in place of Old Carco . . . ." This language most directly excludes options "(c)" of the Lemon Law Notice, but also expresses New Chrysler's belief that New Chrysler did not assume any liability to Mr. Wolff under the Sale Order, excluding options "(a)" and "(b)" unless Mr. Wolff can demonstrate that New Chrysler did assume the Settlement Agreement under the Sale Order. Mr. Wolff alleges that he relied on the Lemon Law Notice to pursue option "(b)"; he voluntarily dismissed his state proceeding against Old Carco with prejudice on December 3, 2009 and now pursues breach of contract and promissory estoppel claims against New Chrysler in this proceeding.

Mr. Wolff alleges that New Chrysler assumed or should have assumed the Settlement Agreement under the language of paragraph 19 of the Sale Order and has now breached that contract. Compl. ¶¶ 27-32, 46-47. Mr. Wolff further alleges that New Chrysler assumed Old

Carco's settlement with him under the language of section 2.08(n)(1) of the Master Transaction Agreement as integrated into the Sale Order and has now breached that contract. Compl. ¶¶ 33-36, 46-47. Mr. Wolff also pleads a promissory estoppel claim based on the same facts. Citing the legal deficiencies of Mr. Wolff's claims, New Chrysler has moved for dismissal of this proceeding under Federal Rule of Civil Procedure 12(b)(6).

JURISDICTION

The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334, under the July 10, 1984 "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York (Ward, Acting C.J.), and under paragraph 59 of the Sale Order. Because this proceeding is ancillary to the Sale Order, it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(N). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

DISCUSSION

Motion to Dismiss Standard

Federal Rule of Civil Procedure ("Rule") 12(b)(6) is incorporated into bankruptcy procedure by Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 7012(b). In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim for relief, the court "must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007). In addition, the court draws all reasonable inferences from the factual allegations in favor of the plaintiff.

Walker v. City of New York, 974 F.2d 293, 298 (2d Cir. 1992); *Myvett v. Williams*, 638 F. Supp. 2d 59, 64 (D.D.C. 2009).

In considering such a motion, although a court accepts all the factual allegations in the complaint as true, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944, 92 L. Ed. 2d 209 (1986). Bare assertions, "devoid of 'further factual enhancement'[,]" are not sufficient to withstand a motion to dismiss. *Ashcroft v. Iqbal*, ___ U.S. ___, ___, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citation omitted).

"Although bald assertions and conclusions of law are insufficient, the pleading standard is nonetheless a liberal one." *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998); *see also Erickson*, 551 U.S. at 94, 127 S. Ct. at 2200 (noting that Rule 8(a)(2) sets forth "liberal pleading standards"). Pursuant to Rule 8(a), which is made applicable to adversary proceedings by Bankruptcy Rule 7008, in asserting a claim, the pleader need only set forth a short and plain statement of the claim showing that the pleader is entitled to relief. The purpose of the statement is to provide "fair notice" of the claim and "the grounds upon which it rests." *Erickson*, 551 U.S. at 93, 127 S. Ct. at 2200 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (quoting, in turn, *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957). Thus, specific facts are not necessary. *Id*. 551 U.S. at 93, 127 S. Ct. at 2200.

While detailed factual allegations are not necessary, the need to provide the "grounds" for entitlement to relief requires "more than labels and conclusions" and more than "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1964-65. The allegations must show that the right to relief is more than speculative. *Id*. at 553, 127 S. Ct.

at 1965. There must be a "reasonably founded hope" that the discovery process will uncover relevant evidence. *Id*. at 559, 563 n.8, 127 S. Ct. 1967, 1969 n.8.

To adequately support the claim, there must be sufficient facts identified to suggest that the legally vulnerable conduct is plausible. *Id*. at 556, 127 S. Ct. at 1965. A complaint meets the plausibility standard when factual content is pled "that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, ___ U.S. at ___, 129 S. Ct. at 1949. Once the plausibility threshold is met, the complaint survives even if the identified facts seem improbable or recovery is thought to be remote or unlikely. *Twombly*, 550 U. S. at 556, 127 S. Ct. at 1965. Although *Twombly* was decided in the context of an antitrust litigation, the plausibility standard to test the sufficiency of a complaint applies in all civil actions. *Iqbal*, ___ U.S. at ___, 129 S. Ct. at 1953. The plausibility standard, however, does "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974. Thus, "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id*. at 563, 127 S. Ct. at 1969.

Rule 8(a)(2) "requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id.* at 555 n.3, 127 S. Ct. at 1965 n.3. However, once the claim is adequately supported, specific facts beyond those needed to state the claim are not necessary. *Id*. at 570, 127 S. Ct. at 1973-74. Indeed, other sections of the Federal Rules of Civil Procedure support a simplified notice pleading standard, including Rule 8(f), which provides that technical forms of pleading or motions are not required, and Rule 8(e)(1), which provides that pleadings are to construed in a way that does substantial justice. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513-14, 122 S. Ct. 992, 998, 152 L. Ed. 2d 1 (2002). The simplicity required by the rule, in forgoing additional

factual detail, recognizes the ample opportunity afforded for discovery and other pre-trial procedures, which permit the parties to obtain more detail as to the basis of the claim and as to the disputed facts and issues. *Id*. at 512-13, 122 S. Ct. at 998; *see also, Conley*, 355 U.S. at 47-48, 78 S. Ct. at 103. Based upon the liberal pleading standard established by Rule 8(a), even the failure to cite a statute, or to cite the correct statute, will not affect the merits of the claim. *Northrop v. Hoffman of Simsbury, Inc.*, 134 F.3d 41, 46 (2d Cir. 1997). In considering a motion to dismiss, it is not the legal theory but, rather, the factual allegations that matter. *Id*.

To survive a motion to dismiss, a plaintiff only has to allege sufficient facts, not prove them. *Koppel v. 4987 Corp.*, 167 F.3d 125, 133 (2d Cir. 1999). A court's role in ruling on a motion to dismiss is to evaluate the legal feasibility of the complaint, not to weigh the evidence which may be offered to support it. *Cooper*, 140 F.3d at 440. The determination is not whether a claimant will ultimately prevail, but whether the claimant should be allowed to offer evidence to support the claim. *Swierkiewicz*, 534 U.S. at 511, 122 S. Ct. at 997.

Distinction between Old Carco and New Chrysler

The Complaint pleads allegations against Old Carco and New Chrysler almost interchangeably, but for the purposes of this proceeding solely against New Chrysler, it is essential to distinguish the two entities. This Court's opinion approving the Sale Order and the Sale Order itself define with a high degree of specificity which liabilities New Chrysler assumed from Old Carco and which liabilities Old Carco retained. *See In re Chrysler LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009).[3]

[3] The Second Circuit affirmed the sale opinion by summary order. 2009 U.S. App LEXIS 12351, at *2 (2d Cir. 2009). The U.S. Supreme Court then denied objectors' motion for a stay of the Sale Order. *Ind. State Police Pension Trust v. Chrysler LLC (in re Chrysler LLC)*, 129 S. Ct. 2275 (2009). After the sale was consummated, the Second Circuit issued a full opinion affirming the sale opinion. *In re Chrysler LLC*, 576 F.3d 108 (2d Cir. 2009).

Mr. Wolff alleges in the Complaint, "THE DEBTORS refused to honor all of their warranty obligations, including those to PLAINTIFF. Rather THE DEBTORS began picking and choosing which obligations they would uphold and which ones they would ignore." Compl. ¶15. This allegation and others like it in the pleadings contradict the documents Mr. Wolff has cited and do not lead logically to Mr. Wolff's requested relief. Old Carco, Debtors referenced in this case, did not choose which obligations to uphold and which to ignore, nor is it a party to the Complaint. New Chrysler is not a related debtor, nor is it responsible for all of Old Carco's obligations. Old Carco and New Chrysler are distinct entities against which different claims may be asserted. Any claims against New Chrysler based upon the purchase of Old Carco's assets are limited to those liabilities assumed under the Sale Order.

After receiving the Lemon Law Notice and the Proudfoot Letter, Mr. Wolff chose to dismiss his suit against Old Carco and pursue this proceeding against New Chrysler alone. Even if the Court accepts Mr. Wolff's claims against Old Carco as alleged, those claims do not determine the outcome of his action against New Chrysler. Because New Chrysler is a separate company that paid Old Carco adequate consideration for assets under the Sale Order, New Chrysler is not liable for all claims against Old Carco. Under the authority of sections 105 and 363, the Sale Order explicitly bars claims against New Chrysler based solely on Old Carco's liability; New Chrysler's liabilities are limited to those assumed under the Sale Order. Sale Order ¶¶ 12, 35. As discussed below, the terms of the Sale Order indicate that New Chrysler did not assume Old Carco's liability as to Mr. Wolff. [4]

The Supreme Court granted objectors' petition for certiorari and vacated the Second Circuit judgment, remanding the case to the Second Circuit "with instructions to dismiss the appeal as moot." 130 S. Ct. 1015 (2009). Because the appeal has been dismissed as moot, the Sale Order is now final and unappealable.

[4] Mr. Wolff alleges that New Chrysler has paid other claims similar to his, pointing to *Gualtieri v. Chrysler*, a case which is not attached, cited, or summarized in any of the pleadings thus far and which the Court has not located.

Breach of Contract Claim

Mr. Wolff alleges that New Chrysler breached a contract with him. Under general principles of contract law, a contract typically requires a bargain, consisting of mutual manifestation of assent and mutual consideration**.** *Bowsher v. Merck & Co.*, 460 U.S. 824, 862 (1983) (citing Restatement (Second) of Contracts § 17 (1981)). Mr. Wolff alleges plausible facts indicating that he reached such a bargain with Old Carco through the Settlement Agreement.[5] In the absence of any alleged separate agreement between Mr. Wolff and New Chrysler, it is also necessary for him to allege that New Chrysler assumed the Settlement Agreement under the Sale Order and the Master Transaction Agreement.[6] Consequently, Mr. Wolff's breach of contract claim rises or falls not on interpretation of a private contract, but on interpretation of the Sale Order.

The Defendant's Opposition cites to the Declaration of Amy Benecoff to support the allegation, but the Declaration says nothing about *Gualtieri*. Regardless of whether Mr. Wolff could produce more factual support, the allegation is not material to the matter at hand: New Chrysler's assumption of certain liabilities and non-assumption of other liabilities under the Sale Order. New Chrysler may spend its financial and legal resources as it chooses; this Court only enforces those promises that New Chrysler made in connection with the Sale Order as part of the value it offered in exchange for Old Carco's assets. Classification of claims and equal treatment of claims within a class is only relevant when Mr. Wolff seeks repayment from Old Carco under the confirmed plan.

[5] Ordinarily the Court applies the choice of law standards of its forum state, New York, unless the protection of a federal policy or interest requires the application of federal common law. *See Bianco v. Erkins (In re Gaston & Snow)*, 243 F.3d 599, 606 (2d Cir. 2001). New York ordinarily applies the law of the jurisdiction having the greatest interest in the litigation. *Id.* at 607. The Settlement Agreement cites the California Civil Code and would resolve a California state court lawsuit. Mr. Wolff is a California resident. Interpretation of the Settlement Agreement would most logically be governed by California law. In any case, the Complaint does not allege any need to interpret the Settlement Agreement or any impact that choice of law would have on Mr. Wolff's claims. For the purposes of this Motion only, the Court assumes that the Settlement Agreement is a valid and enforceable contract between Old Carco and Mr. Wolff under any applicable law.

[6] *See* n. 5, *supra*. The Master Transaction Agreement is governed by New York law according to its terms, and the Sale Order was issued by this Court in a federal bankruptcy case in New York. New York law would most logically govern interpretation of those documents except to the extent that it is necessary to apply federal law to protect the consistency and finality of bankruptcy law. In any case, the Complaint does not allege any impact that choice of law would have on Mr. Wolff's claims related to the Sale Order and the Master Transaction Agreement. In the absence of any alternative claim in the pleadings, the Court will interpret the Sale Order and the Master Transaction Agreement based on New York law and federal law.

Interpretation of the Sale Order

A court has special expertise regarding the meaning of its own order, and therefore its interpretation is entitled to deference. *See Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2204, n. 4 (2009). Furthermore, "[i]f it is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent,…it is all the clearer that a court should enforce a court order, a public governmental act, according to its unambiguous terms." *Id.*

In a contract context, a court has the power to determine whether language is ambiguous as a matter of law. *See Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's, London*, 136 F.3d 82, 86 (2d Cir. 1998). The Second Circuit has summarized the ambiguity standard for purposes of contract interpretation:

> In the past, we have defined ambiguous language as that which is "capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." Conversely, language is not ambiguous when it has "a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference in opinion." The language of a contract is not made ambiguous simply because the parties urge different interpretations. Nor does ambiguity exist where one party's view "strain[s] the contract language beyond its reasonable and ordinary meaning." [citations omitted].
> *Seiden Assoc., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425 (2d Cir. 1992).

Although this ambiguity standard originates in the contract context, it draws on general interpretive conventions that apply with equal force to the interpretation of an order authorizing the parties to enter a contract. *See generally Seabury Constr. Corp. v. Jeffrey Chain Corp.*, 289 F.3d 63 (2d Cir. 2002). The Sale Order controls the major terms of the Master Transaction Agreement and is a prerequisite to the effectiveness of that contract. The ambiguity or clarity of

the Sale Order with respect to New Chrysler's assumption of Lemon Law liabilities is fundamental to Mr. Wolff's claims against New Chrysler.

If the Court finds as a matter of law that New Chrysler did not assume a contract with Mr. Wolff under the plain meaning of the Sale Order, Mr. Wolff's breach of contract claim must be dismissed, regardless of any factual allegations regarding the intent of the parties or New Chrysler's payment of other claims. The Court need not consider extrinsic evidence to interpret an unambiguous order. *See Alexander & Alexander*, 136 F.3d at 86. On the other hand, if the Sale Order were ambiguous with respect to New Chrysler's assumption of Lemon Law liabilities to Mr. Wolff, the Court might require further proceedings for the parties to present evidence in order for the Court to resolve their dispute. *See Colonial Auto Ctr. v. Tomlin (in re Tomlin)*, 105 F.3d 933, 940-41 (4th Cir. 1997), *First Union Nat'l Bank v. Pictet Overseas Trust Corp.*, 477 F.3d 616, 620 (8th Cir. 2007). For the reasons set forth below, the Court finds that the Sale Order unambiguously bars Mr. Wolff's claims.

Assumption of Lemon Law Liabilities under the Paragraph 19 of the Sale Order

Mr. Wolff interprets the Sale Order in light of the Agreement on Changes. This reliance is correct only to the extent that the Agreement on Changes directly affected the language of the final Sale Order, which has legal effect based on its plain meaning, regardless of the intention of the parties or course of negotiations. The Ad Hoc Committee achieved the consent of Old Carco and New Chrysler to three changes to the Sale Order: inclusion of partial refunds, inclusion of settled cases, and inclusion of Magnuson Moss claims in conjunction with state breach of warranty claims. These changes protected the rights of certain Lemon Law claimants and led the Ad Hoc Committee to withdraw its objection. The changes clearly show that New Chrysler

assumed certain liabilities under the Sale Order similar in some respects to Mr. Wolff's settlement. However, the changes did not modify or create an ambiguity about the phrase, "[comma] on vehicles manufactured by the Debtors in the five years prior to the closing." This time limit is one example of the discretion exercised by New Chrysler to assume certain liabilities and exclude others based on its business judgment, in accord with the limitations of the Bankruptcy Code.

Mr. Wolff focuses on the addition of the clause, "including but not limited to cases resolved prepetition," which he interprets as an inclusion of all resolved cases in the assumed liabilities without regard for the time limit. The inclusion clause must be interpreted in the context of the full sentence, not merely as a stand-alone provision. The clause removes any ambiguity about assumption of otherwise-qualified claims by individuals who had already agreed to settlements with Old Carco. However, the clause does not affect the later time limit, which existed before the Agreement on Changes, was not modified or rendered ambiguous, and remained intact in the Sale Order. The key sentence of paragraph 19 has only one object: "liabilities under Lemon Laws." All other clauses clarify *which* liabilities New Chrysler assumes. Grammatically and logically, the time limit must relate back to the sole object of the sentence and govern all assumption of liabilities.

The determinant of whether New Chrysler assumed a Lemon Law settlement with Mr. Wolff is the consistently punctuated time limit in paragraph 19 of the Sale Order. Perhaps because "or in the future" comes immediately before "[comma] on vehicles manufactured by the Debtors in the five years prior to the Closing," Mr. Wolff argues that the time limit only applies to obligations arising in the future and not already settled obligations. At first glance, it might appear that one could justify this reading by the "rule of the last antecedent, according to which a

limiting clause or phrase. . . should ordinarily be read as modifying only the noun or phrase which it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 27-28 (2003). However, the rule of last antecedent does not control interpretation of this clause; a frequently cited grammatical corollary to the rule of last antecedent is that "use of a comma to set off a modifying phrase from other clauses indicates that the qualifying language is to be applied to all of the previous phrases and not merely the immediately preceding phrase." *United States v. Weisser*, 417 F.3d 336, 348 (2d Cir. 2005) (quoting *Elliot Coal Mining Co. v. Director, Office of Workers' Comp. Programs*, 17 F.3d 616, 630 (3d Cir. 1994). The comma setting off "on vehicles manufactured by the Debtors in the five years prior to the Closing" unambiguously applies the time limit to all liabilities assumed earlier in the sentence.

A Sale Order with the effect Mr. Wolff seeks would use different language. For instance, if the Sale Order instead stated that New Chrysler would assume "liabilities for repairs, cases resolved prepetition[,] and [other] regulatory obligations arising in the future on vehicles manufactured by the Debtor in five years prior to the Closing,"[7] Mr. Wolff would have at least a plausible argument under *Barnhart* and similar cases. 540 U.S. at 27-28, s*ee also In re Enron Creditors Recovery Corp.*, 380 B.R. 307, 319 (S.D.N.Y. 2008) (interpreting the phrase "all indebtedness of [Enron] . . . evidenced by debentures, notes, bonds or other securities sold by [Enron]" to mean that "sold by Enron" only modified "other securities"). The District Court found that a condition included in the last item in a list, without additional punctuation, applied only to limit that item, and not the earlier list items. However, the District Court also noted that the rule of last antecedent only applies "where no contrary intention appears." *Id*. Regarding the Sale Order, paragraph 19 clearly expresses a contrary intention, according to the grammatical

[7] The bracketed words in the hypothetical are optional and might give rise to unrelated interpretive issues. The point of emphasis is the list structure and the scope of the final phrase.

corollary to the rule of last antecedent. *Weisser*, 417 F.3d at 348. Paragraph 19 always concluded its list of assumed liabilities with the separate phrase, "[comma] on vehicles manufactured by the Debtors in the five years prior to the Closing," which applies a time limit to the assumption of Lemon Law liabilities. According to Mr. Wolff's allegations, no one ever sought or agreed to different language or punctuation in *this* portion of paragraph 19. The insertion of additional language earlier in the sentence ought not to cloud a clear condition that pre-dated that addition and was not modified by it.

Mr. Wolff's factual allegations, including those raised subsequent to the Complaint, are insufficient to overcome the plain meaning of paragraph 19 of the Sale Order. At the hearing on the Motion, Mr. Wolff asked the Court to add the comma between "prepetition" and "or in the future," which was included in the Agreement on Changes but not contained in the Sale Order. Mr. Wolff argues that the Ad Hoc Committee's withdrawal of its objection required the exact language of the Agreement on Changes, including the comma. Mr. Wolff further argues that the comma separation could narrow the five-year limit to "[regulatory obligations under such Lemon Laws arising] in the future," distinguishing those obligations from "regulatory obligations under such Lemon Laws arising now, including . . . cases resolved prepetition," which would have no time limit. The absence of the comma before "or in the future" may be a clerical error, but it is unnecessary to determine whether a clerical error correction is warranted, because the comma is not material to the Complaint's allegations. Additional commas in the sentence would not create the distinction that Mr. Wolff asks the Court to find in the Sale Order, because commas do not have the effect of periods or semicolons. The structure of the sentence unambiguously applies the time limit to the assumption of any Lemon Law liability, regardless of the inclusion of the variant comma.

In further support of an interpretation of paragraph 19 under which New Chrysler assumed a Lemon Law liability to him, Mr. Wolff has supplied a declaration from Amy Benecoff, counsel for the Ad Hoc Committee. She understands that counsels for the Ad Hoc Committee, Old Carco, and New Chrysler "intended . . . that New Chrysler . . . would recognize, honor any [sic] pay all cases resolved prepetition regardless of the age of the vehicle, and that the five-year cut-off applied only to new lemon law claims brought after the petition date and cases that were unresolved prior to the petition date." Pl.'s Opp., Ex. C, ¶4. This declaration aligns with the Complaint's assertion that "it is clear from the exchange among the attorneys attached hereto as Exhibit 3 that the parties intended that THE DEBTORS assume and honor all the settlements in all cases resolved prepetition." Compl. ¶ 21. While the Complaint mistakenly refers to "THE DEBTORS" rather than New Chrysler, the Court understands from the context of the pleadings that Mr. Wolff alleges that the parties intended for New Chrysler to assume such settlements. However, the alleged intent of the parties is not material to interpretation of this unambiguous court order.

Even if the Court were to consider extrinsic evidence as alleged in search of ambiguity, none of Mr. Wolff's allegations would result in the Court finding any ambiguity in the Sale Order. In contrast to the detailed Sale Order, the emails among the Ad Hoc Committee, Old Carco, and New Chrysler are brief and simply demonstrate intent to agree to the language that became part of the Sale Order, while the Declaration of Amy Benecoff expresses a conclusory legal opinion unsupported by specific reference to the language of the Sale Order. One way to achieve the Ad Hoc Committee's alleged intention would have been to write separate sentences about the treatment of settled claims and unsettled claims. Another choice would have been to add language within the sentence explicitly stating that New Chrysler's obligations included

settled cases regardless of date of manufacture, but excluded unsettled obligations on vehicles manufactured in the last five years. The Sale Order did not include these terms, yet now counsel for the Ad Hoc Committee, who had the opportunity to suggest different language, and Mr. Wolff, who did not participate in the negotiations although he was on notice that Old Carco had filed a bankruptcy petition, assert that all parties intended for a time limit to apply to the assumption of some liabilities but not others. Such assertion is made without any grammatical theory regarding the structure of the sentence at issue and does not render the Sale Order ambiguous.

New Chrysler assumed only specific Lemon Law liabilities from Old Carco under the Sale Order, and Mr. Wolff's claim falls outside the specified time limit. A ruling that the time limit only related to some preceding clauses in the same sentence would upset standard commercial expectations based on standard English grammar. The length of the sentence, the variant comma before "or in the future," and the intention of certain parties to the negotiation do not create ambiguity or override the plain meaning of the Sale Order. New Chrysler did not assume a contract with Mr. Wolff under paragraph 19 of the Sale Order and, therefore, could not have breached such a contract.

Assumption of Incentive Programs under the Master Transaction Agreement

Mr. Wolff further alleges that the settlement agreement was an incentive program that New Chrysler assumed as an executory contract under the Master Transaction Agreement as authorized by the Sale Order. Even within the Master Transaction Agreement, this allegation is incompatible with the plain meaning of "incentive program." The phrase Mr. Wolff relies on from the Master Transaction Agreement, "incentive programs offered to dealers and consumers,"

clearly describes car manufacturer programs that encourage transactions between dealers and customers by offering cash bonuses or attractive financing terms on car purchases. *See generally Chrysler Credit Corp. v. J. Truett Payne, Inc.*, 607 F.2d 1133 (5th Cir. 1979) (discussing such a program in an unrelated matter). Incentive programs are designed to incentivize new sales, not to resolve issues that arise based on past sales. The plain meaning of the language opposes Mr. Wolff's interpretation, which is a bare assertion of a legal conclusion unsupported by plausible factual allegations.

Additionally, there is no need to define New Chrysler's assumption of Lemon Law liabilities based on the Master Transaction Agreement's incentive program provision when the Sale Order treats Lemon Law liabilities. The Supreme Court has stated, "a document should be read to give effect to all its provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 63 (1995). The Sale Order incorporates the Master Transaction Agreement, "subject to the terms and conditions of this Sale Order to the extent of any express conflict herewith." Sale Order ¶4. The Sale Order provides specifically for Lemon Law liabilities, with a limit based on date of manufacture. The Master Transaction Agreement provides generally for incentive program liabilities, without a limit based on date of manufacture. "[I]t is a fundamental rule of contract construction that 'specific terms and exact terms are given greater weight than general language.'" *Aramony v. United Way of Am.*, 254 F.3d 403, 413 (2d Cir. 2001) (quoting Restatement (Second) of Contracts § 203(c) (1981)). No reasonable interpreter of the Sale Order and Master Transaction Agreement would stretch the definition of "incentive program" to describe Lemon Law settlements already addressed more specifically in the Sale Order and render irrelevant the time limit in the more specific and authoritative provision. The provisions have independent and non-contradictory effects only if

one separates incentive programs from Lemon Law liabilities; the language of the Sale Order unambiguously provides these distinct treatments, and this Court must enforce them.

Due Process and Challenges to the Sale Order

Mr. Wolff alleges in the alternative, if the Court does not find that New Chrysler assumed an obligation to him under the Sale Order, that New Chrysler *should have* assumed an obligation to him.[8] He bases his request on the Bankruptcy Code (Compl. ¶ 30) and due process (Compl. ¶ 28), arguing that New Chrysler "is required to assume" a liability to him or that a Sale Order under which New Chrysler does not assume a liability to him is fundamentally unfair. Putting aside the issue of the timeliness of such assertions, these arguments are without merit; the Complaint's factual allegations do not support a legal claim that the Sale Order was unfair or otherwise must be modified. Instead, the Complaint asserts objections to the Sale Order that are similar to those that this Court overruled in the opinion accompanying the Sale Order. *See Chrysler*, 405 B.R. at 111. For purposes of clarity and completeness, the Court will summarize the reasons that such objections were overruled at that time and still must be overruled on this Complaint.

Mr. Wolff requests modification of the Sale Order based on due process concerns possibly related to the speed of the sale, but his legal argument would not have prevailed even had he made a timely objection before entry of the Sale Order. Other parties filed conceptually similar objections to the Sale Order, many of which Old Carco and New Chrysler resolved through negotiations, including the Ad Hoc Committee's Objection. This Court overruled all other objections because the sale complied with applicable law and provided the best available

[8]Mr. Wolff's initial complaint emphasized this allegation, while the amended Complaint places less emphasis on it but still makes related allegations. *See* Compl. ¶ 19, 28-31, 46-47, 55.

prospect of recoveries for creditors of Old Carco. *See generally Chrysler*, 405 B.R. 84. Adequate notice of the bankruptcy and the sale and opportunity to be heard were provided to claimants. *Id.* at 109-12. The circumstances of the bankruptcy necessitated the form of the sale; Old Carco could not meet all of its obligations and was rapidly losing value, New Chrysler was the only bidder for Old Carco's assets, and New Chrysler would not make its value-adding bid if it was required to assume all of Old Carco's liabilities. *Id.* at 96-98. The sale was a justifiable business decision by the Debtors with authorization from the Court. *Id.* at 96. The sale was not a plan of reorganization, did not implicate plan requirements such as section 1123, and complied with bankruptcy sale requirements including section 363. *Id.* at 94-96. The purpose of the sale was not to effect a plan of reorganization and set distributions to classes of claimants, but to maximize the value of the estate and support the best possible recoveries under a separately confirmed plan. *Id.* The sale did not discharge any liabilities; instead, it left some liabilities as obligations of Old Carco for resolution under a plan.

Although Mr. Wolff has not specified which sections of the Bankruptcy Code he believes the Sale Order or New Chrysler's actions violated, his counsel argued at the hearing on the Motion, "these claimants that are in the same class cannot be treated differently for the bankruptcy to be fair and reasonable under the Bankruptcy Code." This argument does not apply correct legal principles. Mr. Wolff is not seeking relief as a claimant or a class member against Debtor Old Carco in this proceeding; the Complaint seeks payment in satisfaction of a contract that New Chrysler allegedly should have assumed under the Sale Order. This allegation must be dismissed because Mr. Wolff has not formed a legal argument that New Chrysler was obliged to assume *any* Lemon Law liabilities, that any correction to the Sale Order is necessary under

Federal Rule of Civil Procedure 60(a), or that he has grounds for relief from the Sale Order under Federal Rule of Civil Procedure 60(b).

The history of this bankruptcy and the pleadings indicate no legal theory under which New Chrysler could be a successor to Old Carco or be bound to assume all of Old Carco's liabilities. Mr. Wolff challenges the sale process on a general level, but absent New Chrysler's involvement in this case, Old Carco would have been in no better position to pay Mr. Wolff's claim than it is now. *See Chrysler*, 405 B.R. at 97 (noting that a liquidation of Old Carco rather than a sale would have generated less value and there were no competing offers for Old Carco's assets). Within certain limitations not relevant to this case, New Chrysler was free to apply its business judgment to assume certain liabilities and not others. *See id.* at 99, n. 18 ("New Chrysler has determined that, to effectively carry on its business, it should take over certain other of the Debtors' obligations. Any such assumption of liability reflects the purchaser's business judgment, the effect of which does not constitute a *sub rosa* plan because the obligation is negotiated directly with the counterparty."). On notice and hearing, after extensive negotiations, the Sale Order provided for a sale free and clear of liabilities other than those New Chrysler had agreed to assume. New Chrysler paid fair consideration for Old Carco assets and assumed certain liabilities, including Lemon Law liabilities only on vehicles manufactured by Old Carco within five years of the Closing. There exists no legal basis for this Court to compel New Chrysler to assume liability to Mr. Wolff.

Promissory Estoppel Claim

New York law applies the promissory estoppel standard of section 90 of the Restatement of Contracts: "[t]he elements of a claim for promissory estoppel are 'a clear and unambiguous

promise; a reasonable and foreseeable reliance by the party to whom the promise is made; and an injury sustained by the party asserting the estoppel by reason of his reliance.'" *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 264 (2d Cir. 1984) (citing *Ripple's of Clearview, Inc. v. LeHavre Assoc.*, 452 N.Y.S.2d 447, 449 (N.Y. App. Div. 1982).[9] Promissory estoppel creates a binding promise under circumstances in which the parties did not agree to a standard contract with a bargained exchange of consideration, but justice still demands the enforcement of a promise. *See Merex A.G. v. Fairchild Weston Sys.*, 29 F.3d 821, 824 (2d Cir. 1994).

Mr. Wolff's promissory estoppel claim is functionally identical to his breach of contract claim; the performance he rendered and the performance he seeks are the same that the Settlement Agreement requires and he does not allege any independent promises by New Chrysler. As a result, promissory estoppel does not apply and the proper treatment of this case is under the standard contract theory discussed above. *See Merex*, 29 F.3d at 824. If New Chrysler had promised to pay Mr. Wolff, New Chrysler's promise would have been given in exchange for Mr. Wolff's promise to dismiss his lawsuit, creating a standard contract.

Even if the Court were to treat Mr. Wolff's factual allegations under a promissory estoppel theory, those allegations are legally insufficient for the same reasons that they were legally insufficient under a breach of contract theory. Prior to Mr. Wolff's withdrawal of his California lawsuit, New Chrysler declined on multiple occasions to assume or create any obligation to Mr. Wolff because his vehicle was manufactured more than five years prior to the Closing. Since New Chrysler did not assume Old Carco's contract with Mr. Wolff under the Sale

[9] The Court does not make a determination of choice of law at this time because there is no request in the pleadings for a particular choice of law and the deficiencies of Mr. Wolff's promissory estoppel claim are fundamental under the law of any state. The standard does not differ significantly under California law. *See Rosal v. First Federal Bank of California*, 671 F. Supp. 2d 1111, 1130 (N.D. Cal. 2009) (stating the same set of factors, but treating reliance as a separate factor from reasonability and foreseeability).

Order and Mr. Wolff makes no further allegations of a New Chrysler promise to him, it is clear that New Chrysler did not promise to pay Mr. Wolff to settle his case against Old Carco.

Furthermore, after New Chrysler clearly had not promised to pay Mr. Wolff, his alleged reliance on the existence of such a promise was not reasonable and foreseeable. The Proudfoot Letter and the Lemon Law Notice correctly quote and apply the Sale Order to state that the option to assert his Old Carco claim against New Chrysler is not available to Mr. Wolff. After receipt of this information, there was no reason for Mr. Wolff to dismiss his suit against Old Carco with the expectation that New Chrysler would pay him. Regardless of Mr. Wolff's view as to New Chrysler's contractual obligation to him under the Sale Order and the Settlement Agreement, he was notified that New Chrysler did not promise to pay him. Mr. Wolff has acted according to a different interpretation of the Sale Order from New Chrysler's interpretation, not in reasonable and foreseeable reliance on a clear promise by New Chrysler. If he had any remedy, it would be in breach of contract, not promissory estoppel.

CONCLUSION

The Court finds that Mr. Wolff's Complaint fails to state a claim upon which relief can be granted. The Court has no alternative but to enforce the Sale Order as unambiguously written to exclude any liability from New Chrysler to Mr. Wolff. Mr. Wolff's allegations concerning the intent of the parties and promises Old Carco made to him do not suffice to state claims against New Chrysler. The breach of contract claim must be dismissed because Mr. Wolff's allegation that New Chrysler assumed a contract with him is a legal conclusion unsupported by his factual allegations and the unambiguous plain meaning of the Sale Order. The promissory estoppel claim must be dismissed because Mr. Wolff's allegation that New Chrysler promised to pay him

and he reasonably relied on such a promise is a legal conclusion unsupported by his factual allegations and the unambiguous plain meaning of the Sale Order.

For the reasons stated above, the motion to dismiss filed by New Chrysler is granted in its entirety. New Chrysler is directed to settle an order consistent with this opinion.

Dated: New York, New York
July 30, 2010

s/Arthur J. Gonzalez
CHIEF UNITED STATES BANKRUPTCY JUDGE

Exhibit D

HEARING DATE AND TIME: February 3, 2011 at 9:45 a.m. (Eastern Time)
RESPONSE DEADLINE: January 27, 2011 at 4:00 p.m. (Eastern Time)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11 Case No.**
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*	:	**09-50026 (REG)**
Debtors.	:	**(Jointly Administered)**

NOTICE OF HEARING ON DEBTORS' OBJECTION TO PROOFS OF CLAIM NOS. 16440 AND 16441 FILED BY MICHAEL A. SCHWARTZ

PLEASE TAKE NOTICE that upon the annexed Objection, dated December 17, 2010, of Motors Liquidation Company (f/k/a General Motors Corporation) and its affiliated debtors, as debtors in possession (collectively, the "**Debtors**"), to the allowance of Proofs of Claim Nos. 16440 and 16441 filed by Michael A. Schwartz (collectively, the "**Saturn Putative Class Claim**"), as more fully set forth in the Objection, a hearing will be held before the Honorable Robert E. Gerber, United States Bankruptcy Judge, in Room 621 of the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, New York 10004, on **February 3, 2011 at 9:45 a.m. (Eastern Time),** or as soon thereafter as counsel may be heard.

PLEASE TAKE FURTHER NOTICE that any responses or objections to this Objection must be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court, and shall be filed with the Bankruptcy Court (a) electronically in accordance with General Order M-399 (which can be found at www.nysb.uscourts.gov) by registered users of the Bankruptcy Court's filing system, and (b) by all other parties in interest, on a CD-ROM or 3.5 inch disk, in text-searchable portable document format (PDF) (with a hard copy delivered directly to Chambers), in accordance with the customary practices of the Bankruptcy Court and General Order M-399, to the extent applicable, and served in accordance with General Order M-399 and on (i) Weil, Gotshal & Manges LLP, attorneys for the Debtors, 767 Fifth Avenue, New York, New York 10153 (Attn: Harvey R. Miller, Esq., Stephen Karotkin, Esq., and Joseph H. Smolinsky, Esq.); (ii) the Debtors, c/o Motors Liquidation Company, 401 South Old Woodward Avenue, Suite 370, Birmingham, Michigan 48009 (Attn: Ted Stenger); (iii) General Motors, LLC, 400 Renaissance Center, Detroit, Michigan 48265 (Attn: Lawrence S. Buonomo, Esq.); (iv) Cadwalader, Wickersham & Taft LLP, attorneys for the United States Department of the Treasury, One World Financial Center, New York, New York 10281 (Attn: John J. Rapisardi, Esq.); (v) the United States Department of the Treasury, 1500 Pennsylvania Avenue NW, Room 2312, Washington, D.C. 20220 (Attn: Joseph Samarias, Esq.); (vi) Vedder Price, P.C., attorneys for Export Development Canada, 1633 Broadway, 47th Floor, New York, New York 10019 (Attn: Michael J. Edelman, Esq. and Michael L. Schein, Esq.); (vii) Kramer Levin Naftalis & Frankel LLP, attorneys for the statutory committee of unsecured creditors, 1177 Avenue of the Americas, New York, New York 10036 (Attn: Thomas Moers Mayer, Esq., Robert Schmidt, Esq., Lauren Macksoud, Esq., and Jennifer Sharret, Esq.); (viii) the Office of the United States Trustee for the Southern District of

New York, 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Tracy Hope Davis, Esq.); (ix) the U.S. Attorney's Office, S.D.N.Y., 86 Chambers Street, Third Floor, New York, New York 10007 (Attn: David S. Jones, Esq. and Natalie Kuehler, Esq.); (x) Caplin & Drysdale, Chartered, attorneys for the official committee of unsecured creditors holding asbestos-related claims, 375 Park Avenue, 35th Floor, New York, New York 10152-3500 (Attn: Elihu Inselbuch, Esq. and Rita C. Tobin, Esq.) and One Thomas Circle, N.W., Suite 1100, Washington, DC 20005 (Attn: Trevor W. Swett III, Esq. and Kevin C. Maclay, Esq.); (xi) Stutzman, Bromberg, Esserman & Plifka, A Professional Corporation, attorneys for Dean M. Trafelet in his capacity as the legal representative for future asbestos personal injury claimants, 2323 Bryan Street, Suite 2200, Dallas, Texas 75201 (Attn: Sander L. Esserman, Esq. and Robert T. Brousseau, Esq.); and (xii) Michael A. Schwartz, Esq., Horwitz, Horwitz & Paradis, 405 Lexington Avenue, 61st Floor, New York, New York, 10174 so as to be received no later than **January 27, 2011 at 4:00 p.m. (Eastern Time)** (the "**Response Deadline**").

PLEASE TAKE FURTHER NOTICE that if no response is timely filed and served with respect to the Objection to the Saturn Putative Class Claim, the Debtors may, on or after the Response Deadline, submit to the Bankruptcy Court an order substantially in the form of the proposed order annexed to the Objection, which order may be entered with no further notice or opportunity to be heard offered to any party.

Dated: New York, New York
December 17, 2010

/s/ Joseph H. Smolinsky
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11 Case No.**
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*	:	**09-50026 (REG)**
Debtors.	:	**(Jointly Administered)**

DEBTORS' OBJECTION TO PROOFS OF CLAIM NOS. 16440 AND 16441 FILED BY MICHAEL A. SCHWARTZ

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TO THE HONORABLE ROBERT E. GERBER,
UNITED STATES BANKRUPTCY JUDGE:

Motors Liquidation Company (f/k/a General Motors Corporation) ("**MLC**") and its affiliated debtors, as debtors in possession (collectively, the "**Debtors**") respectfully represent:

Relief Requested

1. The Debtors file this objection (the "**Objection**"), pursuant to section 502 of title 11 of the United States Code (the "**Bankruptcy Code**"), Rule 3007(d) of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), and this Court's Order Pursuant to Section 502(b)(9) of the Bankruptcy Code and Bankruptcy Rule 3003(c)(3) Establishing the Deadline for Filing Proofs of Claim (Including Claims Under Bankruptcy Code Section 503(b)(9)) and Procedures Relating Thereto and Approving the Form and Manner of Notice Thereof (the "**Bar Date Order**") [ECF No. 4079], establishing November 30, 2009 as the bar date (the "**Bar Date**"). Through this Objection, the Debtors seek entry of an order disallowing and expunging Proofs of Claim Nos. 16440 and 16441 (collectively, the "**Saturn Putative Class Claim**") brought on behalf of a putative class, for $334,847,925. Proofs of Claim Nos. 16440 and 16441 were filed against MLCS, LLC (formerly Saturn, LLC) and MLC, respectively, but are otherwise substantively identical. Both Proofs of Claim were filed by Michael A. Schwartz as a "co-lead counsel for the class." (*See* Saturn Putative Class Claim.) The Proofs of Claim are annexed hereto as **Exhibits "A" and "B."** Annexed to each Proof of Claim is a "**Proof of Claim Attachment**," which includes a summary of the claim and attaches various documents purportedly in support of the claim.

2. Attached to the Saturn Putative Class Claim is a purported class action complaint (the "**Consolidated Amended Complaint**"), brought by certain plaintiffs (the "**Saturn Plaintiffs**") on behalf of a putative class consisting of any person who owned vehicles in forty-five (45) states and the District of Columbia, which alleges twenty-six (26) causes of action against General Motor Corporation and Saturn Corporation for, among other things, unjust enrichment, breach of the implied warranty of merchantability, and violations of various states' consumer protection statues. These claims purportedly arise from timing chains used in certain Saturn vehicles (the "**Debtors' Products**"), which the Saturn Plaintiffs allege were defective in that such timing chains were weak and insufficiently chromized, and had oiling nozzles that were insufficiently lubricating. (*See* Consol. Am. Compl. ¶¶ 76, 78; Proof of Claim Attachment at 3-4.) These alleged defects purportedly caused the timing chains to overheat, bend, stretch, and become brittle, and eventually break and damage the vehicles. (*See* Proof of Claim Attachment at 5.) The Saturn Plaintiffs seek, through the Consolidated Amended Complaint, *inter alia*, (1) to certify the putative class (Consol. Am. Compl. at 106), (2) monetary damages (*id.* at 106-07), (3) injunctive relief preventing the Debtors from manufacturing and selling the allegedly defective vehicles (*id.* at 107), and (4) costs and attorneys' fees. (*Id.*) The Putative Classes Saturn Putative Class Claim was not certified before June 1, 2009 (the "**Commencement Date**"), when each of the Debtors commenced a case under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**"), and the Saturn Plaintiffs have not sought class certification from this Court.

3. As discussed below, while some courts have allowed the filing of class proofs of claims in bankruptcy cases, whether to permit a class claim to proceed lies within the sound discretion of the court. In exercising their discretion, courts consider, among other things:

(i) whether the class claimant moved to extend the application of Rule 23 of the Federal Rules of Civil Procedure ("**Rule 23**") to its proof of claim, (ii) whether the claim satisfies the strict requirements of Rule 23, and (iii) whether the benefits that generally support class certification in civil litigation are realizable in the bankruptcy case.

4. The Saturn Putative Class Claim should be disallowed in its entirety because, *inter alia*, (i) the Saturn Plaintiffs have failed to satisfy the basic procedural requirements of Bankruptcy Rules 9014, (ii) the benefits that generally support class certification in civil litigation are not realizable in these chapter 11 cases, and (iii) the putative class does not satisfy Rule 23. The Saturn Putative Class Claim does not satisfy Rule 23 because of the numerous issues of fact that would predominate over any common questions and because the Saturn Plaintiffs are neither typical of the putative classes nor adequate class representatives. Further, the proposed definition of the putative class is overbroad since it includes many persons who have no valid claim, and it is not administratively possible to identify proposed class numbers. In addition, the need for injunctive relief has been mooted and would provide no deterrent effect, as the Debtors no longer operate a business and are liquidating.

5. Moreover, because the Debtors have provided publication notice to the putative class members encompassed by the Saturn Putative Class Claim, it would be unfair and unnecessary to burden the Debtors' estates with the additional cost and associated delay of providing these potential claimants with a second opportunity to assert claims as class claimants. Requiring additional notice to be given by the Debtors would unnecessarily drain the Debtors' estates. Further, litigation of the Saturn Putative Class Claim would further deplete the pool of assets available for distribution to the Debtors' creditors. As a result, the Court should disallow

the Saturn Putative Class Claim in its entirety, or in the alternative, not allow the Saturn Putative Class Claim to proceed as a class claim.

Jurisdiction

6. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

Relevant Facts to the Saturn Putative Class Claim

A. The Bar Date Order

7. On September 16, 2009, this Court entered the Bar Date Order which, among other things, established November 30, 2009 as the Bar Date and set forth procedures for filing proofs of claims. The Bar Date Order requires, among other things, that a proof of claim must *"set forth with specificity"* the legal and factual basis for the alleged claim and include supporting documentation or an explanation as to why such documentation is not available. (Bar Date Order at 2.)

B. The Putative Class Claims

8. On October 26, 2009, the Saturn Putative Class Claim was filed by Michael A. Schwartz as "co-lead counsel for [the] class." (*See* Saturn Putative Class Claim at 1.) The Saturn Putative Class Claim was not certified before the Commencement Date, and the Saturn Plaintiffs have not sought class certification from this Court.

9. The Saturn Putative Class Claim attaches a Consolidated Amended Complaint, originally filed in the United States District Court of the District of Nebraska, Case No. 8 07CV298, which sets forth various causes of action, on behalf of a putative class, defined as:

> [S]imilarly situated persons and entities who (purchased and leased) a (i) model year 2000-2003 Saturn L-Series, (ii) model year

> 2002-2003 Saturn Vue, or (iii) model year 2003 Saturn Ion, each equipped with a 2.2 Liter, 4-cylinder, 137-horsepower dual-overhead-cam, Ecotec L61 Engine (the "2.2L, Ecotec L61 Engine") and a GM production part number 90537338 steel timing chain (the "**Timing Chain**") and a GM production part number 90537476 timing chain oiling nozzle (the "**Oiling Nozzle**") (collectively, the "**Class Vehicles**") in the states of Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming and the District of Columbia (collectively, the "**Class States**"), and whose Timing Chain has failed.

(the "**Putative Class**"). (*See* Consol. Am. Compl. ¶ 1.) The Consolidated Amended Complaint alleges twenty-six causes of action, including, *inter alia*, (i) unjust enrichment, (ii) breaches of the implied warranty of merchantability, (iii) violations of various deceptive trade practices acts, and (iv) violations of various consumer protection statutes. (*See id*. ¶¶ 140-390.)

10. The Consolidated Amended Complaint seeks, *inter alia*, (1) to certify the putative class (*id.* at 106), (2) monetary damages (*id.* at 106-7), (3) injunctive relief preventing the Debtors from manufacturing and selling the allegedly defective vehicles (*id.* at 107), and (4) costs and attorneys' fees. (*Id.*)

C. The Alleged Defects

11. The Saturn Plaintiffs' claims purportedly arise from Debtors' Products, which the Saturn Plaintiffs allege had defectively designed Timing Chains and Oiling Nozzles that were allegedly not capable of withstanding normal operation. (*See id.* ¶ 2.) The Saturn Plaintiffs allege the Timing Chains are defective because (1) they are not sufficiently robust, and (2) the pins holding the chain links together were not properly "chromised." (Consol. Am.

Compl. ¶ 76.) They further allege the oil nozzle does not sufficiently lubricate the timing chain at low and idle speeds. (*Id.* ¶ 78.) The lack of oil allegedly causes "excessive heat in the Timing Chain, which caused the metal on the timing chain to bend, stretch, and become brittle, thereby causing the Timing Chain to break." (*Id.*) According to Plaintiffs, these deficiencies result in the "the inability of the timing chain to withstand normal wear and tear" (*id.* ¶ 76), although the crux of the Saturn Putative Class Claim is that the Timing Chains will not last for the "life of the vehicles."

D. Alleged "Representations" Regarding Timing Chains

1. Maintenance Schedules and Marketing Materials

12. The Saturn Plaintiffs allege that maintenance schedules in the owner's handbooks they received do not address maintenance or inspection of the timing chain "during the life" of the vehicles. (*See* Consol. Am. Compl. ¶¶ 6-16.) They also allege the marketing materials for model-year 1998 and 1999 Saturn vehicles emphasized steel timing chains as a "selling point."[1] (*Id.* ¶ 52.) According to the Saturn Plaintiffs, the "advantage of a timing chain over a timing belt is clear" because (1) timing belts require scheduled replacement at 60,000 and 90,000 miles; (2) replacement is usually costly and complicated; and (3) in "interference engines," like the engines in the putative class vehicles, "failure of the timing belt will likely cause parts such as pistons and valves to collide with costly consequences." (*Id.* ¶ 53.)

13. The Saturn Plaintiffs allege marketing materials, albeit for model years other than those at issue, highlighted the fact the vehicles were equipped with steel timing chains as opposed to timing belts. (*See id.* ¶ 54.) Model-year 1998 brochures noted steel timing chains

[1] Notably, these vehicles are not within the Putative Class, which only includes 2000-2003 model year Saturns. (*See* Consol. Am. Compl. ¶ 1.) Nor do any of the Saturn Plaintiffs allege they saw, let alone relied on, marketing materials for other vehicles.

were "tough," "long-lasting," and used because "rubber timing belts break more easily" and "can cause bent valves and costly engine work." (*Id.* ¶ 54.) Model-year 1999 brochures stated "[o]ur steel timing chain is more durable than the rubber timing belt you'll find in other cars…" and that it "requires virtually no maintenance." (*Id.* ¶ 55-56.)

14. The Saturn Plaintiffs further allege unspecified Saturn dealers[2] "proclaimed the virtues" of steel timing chains, and one owner said her Saturn salesperson told her the timing chain was "maintenance free" and would "never break" while another owner said a dealership "was bragging about the timing chain." (*Id.* ¶ 57.) Finally, the Saturn Plaintiffs allege that the brochure specifications page for each of the vehicles "prominently stated" L61 engines contained a "steel timing chain."

15. Based on the above, the Saturn Plaintiffs claim "[t]here can be no doubt that the steel Timing Chains in the Class Vehicles were proclaimed and (and intended) by Defendants to last the life of the Vehicles." (*See id.* ¶ 59.) The Saturn Plaintiffs also allege that manuals for vehicles equipped with an optional 3.0-liter V6 engine, which has a timing belt instead of a steel chain, state "replace timing belt" at 100,000 miles, but timing chains "are not mentioned anywhere in the Maintenance Schedules." (*Id.* ¶¶ 62-63.) The Saturn Plaintiffs contend that "[t]here is no indication that the Timing Chains need inspection or replacement – *ever* – leading to only one intended conclusion, that the Timing Chains were to last the life of the Class Vehicles." (*Id.* ¶ 63.) Finally, the Saturn Plaintiffs noted the brochure announcing the

[2] Debtors are not responsible for any statements allegedly made by Saturn dealerships, as they are separate, independent entities. Nor is there (and the Saturn Plaintiffs have not alleged) any agency relationship between Debtors and dealerships. Accordingly, statements made by Saturn dealerships cannot be imputed to Debtors. Further, statements made by a specific dealer to its customer is something, by definition, to which not all putative class members were exposed.

introduction of the Saturn L-Series "assured customers" that "test drivers had logged more than one million miles." (*Id.* ¶ 64.)

2. Debtors' Statements to NHTSA and the Limited Recall

16. The Saturn Plaintiffs allege that, in response to National Highway Traffic Safety Administration ("**NHTSA**") inquiry, the Debtors advised they received 1,020 consumer or field reports of broken or replaced timing chains and 2,203 warranty claims for broken timing chains in the 2000-2003 model year Saturn L-Series vehicles, which number over 412,000. (Consol. Am. Compl. ¶¶ 102, 127.) They assert that the Debtors "deceptively indicated" to NHTSA that the alleged timing chain problem was isolated within 2001 L-Series vehicles manufactured from November 2000 to February 2001. (*Id.* ¶¶ 110-111.) The Saturn Plaintiffs allege that the Debtors voluntarily recalled vehicles built within a 4-month period,[3] leaving owners of 391,635 putative class vehicles to (1) bear the $600-$900 cost of replacing the timing chain before it breaks or (3) bear the cost of repairs to the vehicles after timing chains break, costing "thousands of dollars." (*Id.* ¶ 120.)

I. Application of Bankruptcy Rule 7023 to a Class Proof of Claim Is Discretionary and Should be Denied in this Case

17. There is no absolute right to file a class proof of claim under the Bankruptcy Code. *See In re Bally Total Fitness of Greater N.Y., Inc.*, 402 B.R. 616, 619 (Bankr. S.D.N.Y.), *aff'd*, 411 B.R. 142 (S.D.N.Y. 2009); *In re Sacred Heart Hosp. of Norristown*, 177 B.R. 16, 22 (Bankr. E.D. Pa. 1995) (noting that class action device may be utilized in appropriate

[3] The Saturn Plaintiffs later acknowledge the NHTSA's finding that there were in fact "elevated failure rates" in those 20,500 vehicles, which NHTSA found accounted for 34.3% of GM's total timing chain complaints and field reports and 38.2% of all warranty repairs despite comprising only 5% of the vehicle populations. (*Id.* ¶ 114.) NHTSA therefore only upgraded its investigation to an "engineering analysis" with respect to vehicles produced during the 4-month period. (*Id.* ¶ 114.)

contexts, but should be used sparingly). Application of Bankruptcy Rule 7023 to class proofs of claim[4] lies within the ***sound discretion*** of the court.[5] In determining whether to exercise discretion and permit a class proof of claim, courts primarily look at (i) whether the class claimant moved to extend the application of Rule 23 to its proof of claim; (ii) whether the benefits derived from the use of the class claim device are consistent with the goals of bankruptcy; and (iii) whether the claims which the proponent seeks to certify fulfill the requirements of Rule 23. *See In re Bally Total Fitness*, 402 B.R. at 620; *In re Woodward*, 205 B.R. at 369; *see also In re Ephedra Prods. Liab. Litig.*, 329 B.R. 1, 5 (S.D.N.Y. 2005) ("In exercising that discretion, the bankruptcy court first decides under Rule 9014 whether or not to apply Rule 23, Fed. R. Civ. P., to a 'contested matter,' *i.e.*, the purported class claim; if and only if the court decides to apply Rule 23, does it then determine whether the requirements of Rule 23 are satisfied.").

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[4] Part VII of the Bankruptcy Rules, which includes Bankruptcy Rule 7023, only applies to adversary proceedings. *See* Fed. R. Bankr. P. 7001. Bankruptcy Rule 9014, however, adopts certain of the rules from Part VII for application in contested matters. Bankruptcy Rule 7023 is not among them. *See* Fed. R. Bankr. P. 9014. Thus, plaintiffs seeking the application of Bankruptcy Rule 7023 (and by implication, Rule 23) to a class proof of claim are required to *move* under Bankruptcy Rule 9014 for a court to apply "the rules in Part VII." Fed. R. Bankr. P. 9014; *accord In re Woodward & Lothrop Holdings, Inc.*, 205 B.R. 365, 369 (Bankr. S.D.N.Y. 1997) (stating that "[f]or a Class Claim to proceed . . . the bankruptcy court must direct Rule 23 to apply"). *See, e.g.*, *Reid v. White Motor Corp.*, 886 F.2d 1462, 1470 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990); *In re Charter Co.*, 876 F.2d 866, 876 (11th Cir. 1989), *cert. dismissed*, 496 U.S. 944 (1990) (holding that proof of claim filed on behalf of class of claimants is valid, but that "does not mean that the appellants may proceed, without more, to represent a class in their bankruptcy action. Under the bankruptcy posture of this case, Bankruptcy Rule 7023 and class action procedures are applied at the discretion of the bankruptcy judge.").

[5] *See, e.g.*, *In re Bally Total Fitness*, 402 B.R. at 620 ("[C]ourts may exercise their discretion to extend Rule 23 to allow the filing of a class proof of claim."); *In re Thomson McKinnon Sec. Inc.*, 133 B.R. 39, 40 (Bankr. S.D.N.Y. 1991) (Bankruptcy Rule 7023 and Rule 23 "give the court substantial discretion to consider the benefits and costs of class litigation") (citing *In re Am. Reserve Corp.*, 840 F.2d 487, 488 (7th Cir. 1988)), *aff'd*, 141 B.R. 31 (S.D.N.Y. 1992); *accord In re United Cos. Fin. Corp.*, 277 B.R. 596, 601 (Bankr. D. Del. 2002) ("Whether to certify a class claim is within the discretion of the bankruptcy court."); *In re Kaiser Group Int'l, Inc.*, 278 B.R. 58, 62 (Bankr. D. Del. 2002) (same); *Reid*, 886 F.2d at 1469-70 (stating that "Rule 9014 authorizes bankruptcy judges, within their discretion, to invoke Rule 7023, and thereby Fed. R. Civ. P. 23, the class action rule, to 'any stage' in contested matters, including, class proofs of claim."); *In re Charter Co.*, 876 F.2d at 876 ("[u]nder the bankruptcy posture of this case Bankruptcy Rule 7023 and class action procedures are applied at the discretion of the bankruptcy judge.").

18. When evaluating these requirements, courts have considered a variety of factors, including, *inter alia*:

- ***whether claimants are in "compliance with the Bankruptcy procedures regulating the filing of class proofs of claim in a bankruptcy case,"*** *see, e.g.*, *In re Thomson*, 133 B.R. at 41 (disallowing class proof of claim where named plaintiff failed to file a Rule 9014 motion requesting that Rule 7023 apply);

- ***whether the debtor intends to liquidate***, *see In re Thomson*, 133 B.R. at 41 (noting that context of liquidating chapter 11 plan supports rejection of class proofs of claim);

- ***whether or not a purported class was previously certified***, *see, e.g.*, *In re Bally Total Fitness*, 402 B.R. at 620 (refusing to allow class proof of claim where class was not certified pre-petition); *In re Sacred Heart Hosp.*, 177 B.R. at 23 (classes certified pre-petition are the "best candidates" for a class proof of claim);

- ***whether the class claim device will result in "increased efficiency, compensation to injured parties, and deterrence of future wrongdoing by the debtor,"*** *see In re Woodward*, 205 B.R. at 376 (emphasis added and internal citations omitted); *accord In re Thomson*, 133 B.R. at 40 ("Manifestly, the bankruptcy court's control of the debtor's affairs might make class certification unnecessary.");

- ***whether the entertainment of class claims would subject the administration of the bankruptcy case to undue delay***, *see, e.g.*, *In re Ephedra Prods. Liab. Litig.*, 329 B.R. at 5 ("[A] court sitting in bankruptcy may decline to apply Rule 23 if doing so would . . . 'gum up the works' of distributing the estate."); and

- ***whether or not adequate notice of the bar date was afforded to potential class members***, *see In re Jamesway Corp.*, No. 95 B 44821 (JLG), 1997 WL 327105, at *10 (Bankr. S.D.N.Y. June 12, 1997) (refusing to certify class where adequate notice of bar date was afforded to potential class members, and thus to certify class would be "unwarranted, unfair, and possibly violate the due process rights of other creditors") (internal quotations omitted).

"If application of Bankruptcy Rule 7023 is rejected by the bankruptcy court in an exercise of discretion . . . the result will be that class claims will be denied and expunged." *In re Thomson*,

133 B.R. at 40-41. As set forth below, the Court should exercise its discretion to reject the application of Bankruptcy Rule 7023 and to disallow the Saturn Putative Class Claim.[6]

A. The Saturn Plaintiffs Failed to Comply with Bankruptcy Rule 9014

19. A plaintiff who seeks to bring a class proof of claim must comply with the applicable procedural requirements. *See, e.g., In re Am. Reserve Corp.*, 840 F.2d at 494 (noting the applicability of Bankruptcy Rule 9014 and its procedural requirements); *see In re Ephedra Prods. Liab. Litig.*, 329 B.R. at 6-7 (same). These procedural requirements are not complicated. Because a claim "cannot be allowed as a class claim until the bankruptcy court directs that Rule 23 apply," the putative class representative must file a motion with the bankruptcy court requesting the application of Rule 23. *In re Woodward*, 205 B.R. at 368, 370. ("Rule 23 does not say who must make a timely motion, but the duty ordinarily falls on the proponent of the class action.").

20. The requirement that a class claimant timely move under Bankruptcy Rule 9014 to incorporate Rule 23 is intended to protect a debtors' estate from undue delay of the debtors' plan process. *See In re Thomson McKinnon Sec., Inc.*, 150 B.R. 98, 101 (Bankr. S.D.N.Y. 1992) In *In re Woodward*, another case in which there was no pre-bankruptcy class certification, the court stated that the class claim should be disallowed if the putative class representative did not expeditiously move in the bankruptcy case for certification of its class claim, as a lengthy certification battle could delay the administration and distribution of the bankruptcy estate. *See In re Woodward*, 205 B.R. at 370; *see also In re Ephedra Prods. Liab. Litig.*, 329 B.R. at 5 (disallowing class products liability claim because "it is simply too late in

[6] In the event this Court determines to apply Rule 23 to the Saturn Putative Class Claim, the Debtors reserve any and all rights to seek class-certification discovery to test the Saturn Plaintiffs' sweeping, unsubstantiated representations about the nature of the class members' allegations.

the administration of this Chapter 11 case to ask the Court to apply Rule 23 to class proofs of claim."). As of the date hereof, over a year after and a half after the Commencement Date and almost a year after the Bar Date, the Saturn Plaintiffs have not sought permission of the Court to file a class proof of claim, or moved for certification of the class. The Debtors have already filed their proposed plan, the disclosure statement has been approved, and a confirmation hearing is planned to occur shortly. As a result, if allowed to proceed, the Saturn Putative Class Claim will unduly delay the administration of the Debtors' estates and their ability to consummate a plan of liquidation ("**Plan**"), because the adjudication of the claim and its attendant class-certification issues could take months. *See In re Sacred Heart Hosp. of Norristown*, 177 B.R. at 24 (disallowing class claim where allowance would cause "very substantial and apparently unwarranted disruption to the administration of the Debtor's bankruptcy case, in which there is presently a plan before us for imminent confirmation"); *In re Musicland Holding Corp.*, 362 B.R. 644, 656 (Bankr. S.D.N.Y. 2007) (Bernstein, J.) (refusing to allow class claim where it would "seriously delay the administration of the case" because debtors had already filed confirmation motion and court had approved disclosure statement); *In re Ephedra Prods. Liab. Litig.*, 329 B.R. at 5 (disallowing class claim where liquidating plan was already submitted and "[a]pplying Rule 23 to class claims now would initiate protracted litigation that might delay distribution of the estate for years"); *see also In re Tronox Inc.*, No. 09-10156 (ALG), 2010 WL 1849394, at *3 (Bankr. S.D.N.Y. Mar. 6, 2010) (Gropper, J.) (refusing to enlarge time to file class proof of claim where such claim could "likely result in substantial delay and expense and compromise the parties' efforts to formulate a plan on the present timeline" where proposed plan and been filed and disclosure statement was to be filed within two months). Accordingly, this Court should enforce these procedural requirements and disallow the Saturn Putative Class

Claim. *See, e.g.*, *In re Woodward*, 205 B.R. at 369-71; *In re Thomson*, 150 B.R. at 100-01; *In re Thomson*, 133 B.R. at 41; *In re Zenith Labs., Inc.*, 104 B.R. 659, 664 (D.N.J. 1989); *In re Ephedra Prods. Liab. Litig.*, 329 B.R. at 6-7.

B. Allowing the Saturn Putative Class Claim to Proceed as a Class Action Will Not Be Effective or Efficient

21. For a class action to proceed, "the benefits that generally support class certification in civil litigation must be realizable in the bankruptcy case." *In re Woodward*, 205 B.R. at 369 (citing *In re Mortg. & Realty Trust*, 125 B.R. 575, 580 (Bankr. C.D. Cal. 1991)). In this case, neither the purported class nor the Court would benefit from recognizing a class proof of claim and allowing a class action to proceed.

22. The Saturn Putative Class Claim does not provide for the most effective or efficient means of determining the rights of the members of the putative class. First, a class proof of claim is not appropriate if individual issues of fact would predominate over any questions common to the members of the purported class. For that reason, the court in *In re Woodward*, in considering putative class claims for false advertising and misrepresentation, found that a class action is "generally not appropriate to resolve claims based upon common law fraud." 205 B.R. at 371.

23. Second, in general, the Bankruptcy Code and Bankruptcy Rules can provide the same benefits and serve the same purposes as class action procedures in normal civil litigation. *See id.* at 376 ("a bankruptcy proceeding offers the same procedural advantages as the class action because it concentrates all the disputes in one forum"); 6 Herbert Newberg & Alba Conte, Newberg on Class Actions Ch. 20 (Class Actions Under the Bankruptcy Laws) § 20:1 at 265 (4th ed. 2002) (commenting that "bankruptcy proceedings are already capable of handling

group claims, which operate essentially as statutory class actions"); *see also In re Standard Metals Corp.*, 817 F.2d 625, 632 (10th Cir.), *reh'g granted*, 839 F.2d 1383 (10th Cir. 1987), *cert. dismissed*, 488 U.S. 881 (1988). Although members of the Putative Class can no longer file their claims because the Bar Date has passed, they had ample notice of the Bar Date and opportunity to take advantage of these bankruptcy procedures.

24. Third, the bankruptcy claims process is, in some respects, *superior* to class action procedures. As the court observed in *In re Woodward*:

> [W]hile the class action ordinarily provides compensation that cannot otherwise be achieved by aggregating small claims, the bankruptcy creditor can, with a minimum of effort, file a proof of claim and participate in distributions. In addition, there may be little economic justification to object to a modest claim, even where grounds exist. Hence, a creditor holding such a claim may not have to do anything more to prove his case or vindicate his rights.

205 B.R. at 376 (citations omitted). Here, notwithstanding the chance to do so, none of the members of the putative class filed a claim against the Debtors.

25. The fact that the Debtors intend to file a chapter 11 plan of liquidation lends further support for denying allowance of a class proof of claim in these cases. *See In re Thomson*, 133 B.R. at 41. "The costs and delay associated with class actions are not compatible with liquidation cases where the need for expeditious administration of assets is paramount so that all creditors, including those not within the class, may receive a distribution as soon as possible." *Id.* "Creditors who are not involved in class litigation should not have to wait for the payment of their distributive liquidated share while the class action grinds on." *Id.* Due to the limited assets of the Debtors, the magnitude of the Saturn Putative Class Claim, and without knowing the identity or merit of the claims held by the members of the Putative Class, a plan

could not be confirmed as long as the Saturn Putative Class Claim is extant and unliquidated absent estimation proceedings. All the Debtors' creditors should not be forced to wait for payment of their distribution while the Saturn Class Claim is litigated and the estates' remaining assets are depleted.

26. The facts of the instant case are similar to the facts of *In re Woodward*, where the court exercised its discretion to deny the class claim, finding that "the class claim will not deter an insolvent, non-operating debtor's management or shareholders, or induce them to police future conduct [where] . . . the debtor has . . . a liquidating plan that wipes out equity. The managers have moved on to other jobs – the debtor has closed its doors – and the prosecution of the class action will [ ] not affect how they act in the future." 205 B.R. at 376. Here, the Debtors have discontinued the sale of the Debtors' Products and have subsequently sold substantially all their assets. The Debtors are no longer operating a business.

C. The Saturn Putative Class Claim Was Not Certified Prior to the Commencement Date

27. A number of courts have held that class proofs of claim may be inappropriate where a class representative was not certified prepetition in a non-bankruptcy forum. *See, e.g.*, *In re Trebol Motors Distrib. Corp.*, 220 B.R. 500, 502 (B.A.P. 1st Cir. 1998); *In re Sacred Heart Hosp.*, 177 B.R. at 23; *In re Ret. Builders, Inc.*, 96 B.R. 390, 391 (Bankr. S.D. Fla. 1988); *In re Ephedra Prods. Liab. Litig.*, 329 B.R. at 5. The court in *Sacred Heart Hospital* held that use of the class proof of claim device in bankruptcy cases may be appropriate in certain contexts, but "such contexts should be chosen most sparingly." *In re Sacred Heart Hosp.*, 177 B.R. at 22. Specifically, the *Sacred Heart Hospital* court noted that cases where (i) a class has been certified prepetition by a nonbankruptcy court, or (ii) a class action has been filed

and allowed to proceed as a class action in a nonbankruptcy forum for a considerable time prepetition, may present appropriate contexts for recognizing a class proof of claim. *See id.* ***However, the Debtors have been unable to find a single bankruptcy case within the Second Circuit in which a pre-certification class claim was allowed.***

28. The Putative Class was not certified at the time of the Debtors' chapter 11 filing, and it remains uncertified today. For this reason alone, the Saturn Putative Class Claim should be disallowed and expunged.

D. Adequate Notice of the Bankruptcy Case and the Bar Date Was Provided to the Putative Class

29. One of the principal goals of the Bankruptcy Code is to ensure that creditors of equal rank receive equal treatment in the distribution of a debtor's assets. The Bankruptcy Code and Bankruptcy Rules, therefore, require creditors to file proofs of claim before a bar date. *See* 11 U.S.C. § 502(b)(9); Fed. R. Bankr. P. 3003(c)(3). Regardless of how worthy their claims may be, claimants who fail to file before an applicable bar date "shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution." Fed. R. Bankr. P. 3003(c)(2). These same procedural hurdles must be met by all creditors.

30. In determining whether a class proof of claim should be allowed, courts consider whether adequate notice of the bar date was afforded to potential class members. *See In re Jamesway Corp.*, 1997 WL 327105, at *8. As that court stated:

> The proper inquiry is whether [the debtor] acted reasonably in selecting means likely to inform persons affected by the Bar Date and these chapter 11 proceedings, not whether each claimant actually received notice . . . [a]s to those plaintiffs who might not have received actual notice of the Bar Date, we find that by complying with the terms of the Bar Date Order, mailing a Claim Package to every known creditor and publishing notice of the Bar Date, [the Debtor's] actions satisfy due process."

Id. (internal citations omitted).

31. In this case, the putative members in the Saturn Plaintiffs' proposed class received proper notice of the Debtors' chapter 11 cases and the Bar Date in accordance with the provisions of the Bar Date Order. At great expense to their estates, the Debtors published notice of the Bar Date nationwide in *The Wall Street Journal* (Global Edition – North America, Europe, and Asia), *The New York Times* (National), *USA Today* (Monday through Thursday, National), *Detroit Free Press*, *Detroit News*, *LeJournal de Montreal* (French), *Montreal Gazette* (English), *The Globe and Mail* (Canada), and *The National Post*. (*See* Bar Date Order at 7.) Providing individual notice to all owners of the Debtors' Products would be impossible or, at minimum, prohibitively expensive, as persons resell their vehicles and the Debtors would have no way to know the identities of the current owners of their products. Providing notice of the Debtors' bankruptcy cases and the Bar Date by publication, however, constituted a viable alternative to the impracticability, or perhaps even impossibility, of tracking down and providing individual notice to each of the consumer purchasers of the Debtors' Products. Additionally, in this case, in particular, the Debtors would be hard-pressed to find a handful of Americans who were not aware of the chapter 11 filing of General Motors Corporation.

32. Absent the Saturn Plaintiffs' Claim, no member of the Putative Class has filed a claim. Further, members of the Putative Class who failed to file proofs of claim could not be said to have relied on the filing of the Saturn Putative Class Claim because the Putative Class was not certified as of the Commencement Date. *See In re Jamesway Corp.*, 1997 WL 327105, at *10 (denying motion for class certification of class claim where "[n]o class was pre-certified such that purported class members who did not chose to file a proof of claim should or could have had any reasonable expectation that they need not comply with the Bar Date Order").

Because the Debtors have provided notice by publication to the putative class members encompassed by the Saturn Putative Class Claim, it would be unfair and unnecessary to burden the Debtors' estates with the additional cost and associated delay of providing these potential claimants with a second notice. Further, the only type of notice the Debtors could reasonably provide these persons today would be another publication notice, effectively duplicating the notice they have already been provided and extending the Bar Date for a particular sub-group of general unsecured creditors who are not entitled to special treatment under the Bankruptcy Code. Since not a single such member of the Putative Class filed an individual claim prior to the Bar Date, it is highly unlikely that many, if any at all, would file claims if given a second opportunity, but the estate would suffer the unnecessary costs of notice.

II. The Saturn Putative Class Claim Cannot Satisfy the Requirements of Rule 23

33. Even if this Court were to permit the Saturn Plaintiffs to file a class claim, the Saturn Putative Class Claim would not satisfy Rule 23. To proceed as a class claim, the Saturn Putative Class Claim must meet all four requirements of subsection (a) of Rule 23, as made applicable to bankruptcy cases by Bankruptcy Rule 7023. *See Moore v. PaineWebber, Inc*., 306 F.3d 1247, 1252 (2d Cir. 2002); s*ee also In re Woodward*, 205 B.R. at 371. Rule 23(a) provides:

> Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

34. In addition, to proceed as a class claim, the Saturn Putative Class Claim must satisfy subsections (b)(2) and (b)(3) of Rule 23, as the Saturn Putative Class Claim seeks injunctive relief and monetary damages. *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 290 (2d Cir. 1992), *cert. dismissed*, 506 U.S. 1088 (1993). (*See* Consol. Am. Compl. at 106-7.) For purposes of this objection, Rule 23(b)(2) provides in relevant part:

> the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

Fed. R. Civ. P. 23(b)(2). In addition, Rule 23(b)(3) provides in relevant part:

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b)(3).

35. As set forth below, numerous individual issues of fact would predominate over any common questions in the Saturn Putative Class Claim because the Saturn Plaintiffs are neither typical of the members of the Putative Class nor adequate class representatives. Further, the proposed definition of the Putative Class is overbroad because it includes many persons who have no valid claim, and it is not administratively feasible to identify members of the Putative Class. Moreover, class treatment is simply not efficient or superior in these circumstances. As discussed below, the Saturn Plaintiffs' claim raises a host of individual issues of fact regarding each putative class member's right to recovery. These individual issues would require mini trials

as to each class member's right to relief, a result that courts have repeatedly found requires denial of class certification.

A. The Injunctive Relief Sought by the Saturn Putative Class Claim Under Rule 23(b)(2) Is Mooted by the Debtors' Liquidation

36. The Saturn Putative Class Claim cannot meet the requirements of Rule 23(b)(2), as any claim for injunctive relief is mooted because the Debtors do not presently operate a business and are liquidating. *See In re Ephedra Prods. Liab. Litig.*, 329 at 9 n.5 ("Insofar as the class claims seek injunctive relief against Twinlabs under Rule 23(b)(2), they are moot now that Twinlabs has gone out of business and existence"). As a result, the Saturn Plaintiff's request for the Debtors to be prevented from manufacturing and selling the allegedly defective vehicles is moot. (*See* Consol. Am. Compl. at 107.)

B. Numerous Individual Issues Predominate Over Any Common Questions

1. Variations in the Law of 46 Jurisdictions Defeat Predominance

37. Federal courts have made it clear time and again that before a court can analyze whether the factors under Federal Rule 23 are satisfied, the court must determine which state's or states' substantive law governs the underlying claims. *See, e.g.*, *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 561 (E.D. Ark. 2005) ("Not only must the choice-of-law issue be addressed at the class certification stage – it must be tackled at the front end since it pervades every element of [Federal Rule] 23."); *Chin v. Chrysler Corp*., 182 F.R.D. 448, 457 (D.N.J. 1998). This is logical because it would be impossible to determine whether there are questions of law common to the class, for example, without first determining what the substance of the applicable laws is. Both federal case law and the Constitution mandate that this Court perform a choice of law analysis before determining whether this case is properly certified as a class action.

See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821 (1985), *remanded to*, 732 P.2d 1286 (Kan. 1987), *cert. denied*, 487 U.S. 1223 (1988).

38. This requirement begets the question of which state's or states' law should apply to the class claims when a class is comprised of individuals living, and allegedly injured by the defendant's conduct, in forty-five (45) states and the District of Columbia. Federal courts in this jurisdiction and across the country have uniformly answered this question by holding that where a purported class action would involve class members from more than one state "the court will apply the law of each of the states from which plaintiffs hail." *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 348 (D.N.J. 1997); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 70-71 (S.D.N.Y. 2002), *reconsideration denied*, 224 F.R.D. 346 (S.D.N.Y. 2004); *Kaczmarek v. Int'l Bus. Machs. Corp.*, 186 F.R.D. 307, 312-13 (S.D.N.Y. 1999); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 605 (S.D.N.Y. 1982). To hold otherwise and apply only the forum state's substantive law to the class certification analysis would violate Constitutional principles of Due Process and federalism. As the Supreme Court has noted, "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creati*ng* state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981), *reh'g denied*, 450 U.S. 971 (1981).[7] The Due Process Clause prohibits the application of law which is only casually or slightly related to the

[7] The Supreme Court expressly admonished a state court for applying its state's substantive law to a nationwide class action filed within its borders, noting that the state "may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a 'common question of law.'" *Phillips Petroleum Co.*, 472 U.S. at 821. The *Phillips Petroleum* Court concluded that the forum state's "lack of 'interest' in claims unrelated to that State and the substantive conflict with" other jurisdictions rendered the application of the forum state's law to every claim in the nationwide class action "sufficiently arbitrary and unfair as to exceed constitutional limits." *Id.* at 822.

litigation and the Full Faith and Credit Clause requires a forum state to respect the laws of other states. *Id.* at 335-36.

39. Compliance with the Constitutional requirement of applying every state's law to the claims in a nationwide class action is fatal to class certification when the applicable laws differ from state to state. Courts in this jurisdiction and throughout the country have repeatedly held that "the need of a court to apply diverse laws and varied burdens of proof to the individual class members' claims defeats the predominance requirement of Federal Rule 23(b)(3)." *In re Worldcom, Inc.*, 343 B.R. 412, 427 (Bankr. S.D.N.Y. 2006); *In re Laser Arms Corp. Sec. Litig.*, 794 F. Supp. 475, 495 (S.D.N.Y. 1989), *aff'd*, 969 F.2d 15 (2d Cir. 1992) ("In the absence of a single state law governing each entire common law claim, common questions of law would not predominate over individual questions."); *In re Bridgestone/Firestone, Inc*., 288 F.3d 1012, 1015 (7th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003) ("No class action is proper unless all litigants are governed by the same legal rules."); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 698-99 (Tex. 2002) (citing dozens of federal and state cases that have "rejected class certification when multiple states' laws must be applied.").

40. The Saturn Plaintiffs have the burden of establishing that variations in the laws of the jurisdictions do not "swamp any common issues and defeat predominance." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996). Here, the Saturn Plaintiffs cannot meet this burden as courts have repeatedly determined that variations in the causes of action at issue in this case – *inter alia*, violations of state consumer protection laws, unjust enrichment, and breach of implied warranty – have made certification of nationwide class actions impermissible.

41. **Violations of States' Consumer Protection Laws:** Courts have denied certification of a nationwide class based on consumer protection statutes because the necessity to

apply the laws of many states defeats the predominance requirement. *See, e.g., In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005) (reversing certification of class involving members hailing from several states because "[s]tate consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules."), *remanded to*, No. 01-1396 JRT/FLN, 2006 WL 2943154 (D. Minn. Oct. 13, 2006), *rev'd and remanded by*, 522 F.3d 836 (8th Cir. 2008); *In re Bridgestone/Firestone, Inc.*, 288 F.3d at 1018 ("Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable."); *In re Woodward*, 205 B.R. at 371 (refusing to certify class action consumer protection claims because application of many state's consumer protection laws would swamp predominance).

42. **Unjust enrichment:** Courts have refused to certify class actions alleging claims for unjust enrichment because the definition of "unjust enrichment" varies from state to state. *See In re Currency Conversion Fee Antitrust Litig.*, 230 F.R.D. 303, 311-12 (S.D.N.Y. 2004) (holding unjust enrichment claim not amenable to national class certification where variations in laws of fifty different states eviscerated any common issues that may exist); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 501 (S.D. Ill. 1999) ("[V]ariances exist in state common laws of unjust enrichment. The actual definition of 'unjust enrichment' varies from state to state. Some states do not specify the misconduct necessary to proceed, while others require that the misconduct include dishonesty or fraud."); *Wyeth, Inc. v. Blue Cross & Blue Shield of Ala.*, No. 1050926, 2010 WL 152123 (Ala. Jan. 15, 2010) (refusing to certify nationwide class action because definition of unjust enrichment among states varies); *Lilly v. Ford Motor Co.*, No. 00 C 7372, 2002 WL 507126, at *2 (N.D. Ill. Apr. 3, 2002) (denying class certification where

plaintiff's claims of unjust enrichment would require application of the substantive law of many states varies).

43. **Breach of Implied Warranty:**[8] Courts in this jurisdiction and others have denied class certification upon finding that common questions of law do not predominate where the plaintiff alleges breach of warranty, whether those warranty claims involve common law, state statutes, or the federal Magnuson-Moss Warranty Act:

> [T]he states have diverse bodies of law on warranty . . . . The state laws on these claims present different procedural and substantive elements, including differing requirements of privity, demand, scienter and reliance. In addition, bringing the case under the Magnuson-Moss Act does not make uniform the plaintiffs' warranty claims because liability under that Act depends on state law which differs on issues of express and implied warranties. . . . Defendant's counsel presents a lengthy analysis of the diverse laws of the various states and has shown sufficiently that many of the jurisdictions have different standards and elements of proof for the claims of breach of express and implied warranty . . .

Kaczmarek, 186 F.R.D. at 313; s*ee also In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 194 F.R.D. 484, 489-90 (D.N.J. 2000), *reconsideration denied*, No. Civ. A. 96-1814 (JBS), 2001 WL 1869820 (D.N.J. Feb. 8, 2001) (warranty "claims [arising from a recall] vary significantly from state to state"); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 369 (E.D. La.), *reconsideration denied*, No. Civ. A. MDL 991, 1997 WL 191488 (E.D. La. Apr. 17, 1997) ("with respect to contract and warranty claims, the various states have different" laws); *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 271 (D.D.C.), *reconsideration denied*, 130 F.R.D.

[8] The Saturn Plaintiffs' Consolidated Amended Complaint contains several causes of action for breach of implied warranty under various states' laws. The Debtors do not take a position at this time which, if any, of these causes of action were assumed by the Purchaser under the terms of the Purchase Agreement, as such a determination is irrelevant for purposes of whether the class certification is appropriate.

514 (D.D.C. 1990), *appeal dismissed*, 945 F.2d 1188 (D.C. Cir. 1991) ("numerous variations exist among states' laws concerning the scope and application of implied warranty claims").

44. Because the Court must apply the substantive laws of all jurisdictions from which the members of the putative class hail, and such application results in conflicting laws, the Putative Class cannot be certified.

2. Necessity of Individual Fact Determinations Destroys Predominance

45. Courts also deny certification where "individualized issues of fact abound." *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 209 F.R.D. 323, 349 (S.D.N.Y. 2002); *see also In re Worldcom, Inc.*, 343 B.R. at 427, n.26 ("the need to evaluate factual differences along with divergent legal issues defeats the predominance requirement under Rule 23(b)(3)") (internal quotes and citations omitted). Courts have specifically held that class actions alleging motor vehicle product liability claims and seeking economic loss damages should not be certified because individual questions of fact will predominate:

> [T]he need to establish injury and causation with respect to each class member will necessarily require a detailed factual inquiry including physical examination of each vehicle, an [sic] mind-boggling concept that is preclusively costly in both time and money. We will not certify a class that will result in an administrative process lasting for untold years, where individual threshold questions will overshadow common issues regarding Defendant's alleged conduct . . .. *Courts are hesitant to certify classes in litigation where individual use factors present themselves, such as cases involving allegedly defective motor vehicles and parts.* The administrative burdens are frequently too unmanageable for a class action to make sense in such cases.

Sanneman v. Chrysler Corp., 191 F.R.D. 441, 449 (E.D. Pa. 2000) (emphasis added).

46. The "preclusively costly" "administrative burdens" warned about in the *Sanneman* case would certainly be present in this action involving "391,635 Class Vehicles."

(*See* Proof of Claim Attachment at 8.) Here, the issue of whether a particular plaintiff's timing chain problems were caused by the alleged defects in the Debtors' Products would alone lead to a sharp divergence in the factual underpinnings of each claim. Such an individualized analysis is crucial in this case because a class member cannot succeed on a product liability-based claim unless that specific class member's product has had an actual malfunction. *See Wallis v. Ford Motor Co.*, 208 S.W.3d 153, 159 (Ark. 2005) (plaintiff must "allege that the vehicle has actually malfunctioned").

47. Additionally, individualized factual inquiries would need to be performed to address the issues of if, or when, "timing chain failure occurs; the causation of any such timing chain failure; whether the allegedly defective timing chain is covered by warranty; whether the allegedly defective timing chain was already repaired by MLC; whether the class member provided proper notice of the alleged breach of warranty to MLC; whether MLC and/or the consumer had knowledge of the alleged timing chain defect; whether the class member relied on MLC's alleged misrepresentations regarding the timing chain; whether such alleged misrepresentations were material; whether a class member's claims are barred by the statue of limitations or other affirmative defenses such as comparative negligence (caused by, *inter alia*, the plaintiff's failure to properly maintain the vehicle or improper use of the vehicle); and what the appropriate remedy should be for any particular class member. This nonexclusive list provides a mere sampling of the myriad of factual differences that will "overshadow common issues." *See Sanneman*, 191 F.R.D. at 449. When coupled with the variations in law relevant to determining the foregoing facts, the Saturn Plaintiffs cannot meet their burden of satisfying the predominance requirement and, thus, the class fails to meet the requirements of Rule 23.

48. Further individualized issues predominate because the Saturn Putative Class Claim is based, in part, on misrepresentation allegations in connection with the consumer protection claims, which raise a host of individual issues of fact that render class treatment wholly unmanageable, including individual questions as to: the fact of product purchase or ownership; the differing statements; whether each class member was exposed to allegedly deceptive statements; whether each class member purchased products as a result of such statements; and other issues.

49. Further, given the absence of any objective evidence of who purchased such products or relied upon any of the Debtors' alleged misrepresentations, the Court would be required, at the threshold, to make a series of individual credibility determinations as to who is and is not a member of the Putative Class. *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 618 (W.D. Wash. 2003) (motion to certify class asserting consumer fraud claims on behalf of non-injured consumers of PPA products denied primarily because of difficulty in determining who had even purchased products at issue).

50. Numerous individual issues also exist as to whether any alleged misrepresentation caused each particular class member to purchase any product, precluding class certification. For this reason, courts routinely reject class certification of cases claiming violations of consumer protections statutes, breach of implied warranty, unjust enrichment and other claims similar to those alleged here – including in cases in which plaintiffs allege a common, class-wide product defect – because of the overwhelming number of individual issues relating to reliance, causation, and materiality.[9]

[9] *See, e.g.*, *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1362-66 (11th Cir.) (certification of fraud class action vacated because individual issues of reliance and causation predominated); *reh'g denied*, 35 F. App'x 859 (11th Cir.), *cert. denied*, 537 U.S. 884 (2002); *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1024-25 (11th Cir.), *reh'g denied*, 104

51. Finally, determination of whether each class member suffered "actual injury," would require an individualized inquiry as to whether the timing chain in each particular class member's vehicle had been broken, fixed, or replaced – an inquiry that would, once again, swamp any common issues and render class treatment wholly unmanageable.

C. The Saturn Plaintiffs Cannot Establish that a Class Action Is Superior to Other Available Methods for Fairly and Efficiently Adjudicating this Controversy

52. In addition to the requirement that common questions of law or fact must predominate over individual issues, the Saturn Plaintiffs must also establish "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Given the vast number of individual variations of law and fact that would be involved with allowing this case to proceed as a nationwide class action, the action would be unmanageable as a single trial. The issue of the Debtors' liability would have to be litigated in thousands of trials which, even if logistically feasible, would violate the constitutional mandate that "entitles parties to have fact issues decided by one jury, and prohibits a second jury from

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F.3d 373 (11th Cir. 1996) (same); *Castano*, 84 F.3d at 737, 745 (denying certification in action where claims included "violation of state consumer protection statutes" and "disgorge[ment]" of profits, holding that class action "cannot be certified when individual reliance will be an issue"); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. at 68-69 (individual issues would predominate on a claim for restitution of purchase price arising from alleged undisclosed product dangers); *Chin*, 182 F.R.D. at 455-57 (denying class certification in case asserting latent product defect in light of many individual issues of fact, including ascertainable injury, causation, reliance and privity); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. at 372-75 (same); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. at 342-44 (same); *Truckway, Inc. v. Gen. Elec.*, No. Civ. A. 91-0122, 1992 WL 70575, at *5, *7 (E.D. Pa. Mar. 30, 1992) (individual issues predominated in state consumer fraud action "[b]ecause not all members of the class would have relied on the alleged fraudulent material omissions and misrepresentation . . . and because a determination of whether each member of the class was defrauded . . . would require each class member to individually prove the issue of reliance and fraud on a case by case basis"). *See also Hurd v. Monsanto Co.*, 164 F.R.D. 234, 240 n.3 (S.D. Ind. 1995) ("The necessity of proving reliance by each class member upon the alleged fraudulent misrepresentations causes individual issues to predominate."); *Sunbird Air Servs., Inc. v. Beech Aircraft Corp.*, No. Civ. A. 89-2181-V, 1992 WL 193661, at *5 (D. Kan. July 15, 1992) ("individual issues of causation and reliance as to each class member would predominate over the common issues of liability"); *Strain v. Nutri/System, Inc.*, No. Civ. A 90-2772, 1990 WL 209325, at *6 (E.D. Pa. Dec. 12, 1990) (class certification denied where "each class member [would have] to narrate a story which includes individualized proof of which advertisements he saw and whether they indeed enrolled in reliance of those advertisements").

reexamining those facts and issues." *Castano*, 84 F.3d at 750 (denying certification for lack of superiority); *see also In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995) (same); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 427 (E.D. La. 1997) (same). Given that a class action is not manageable in this case, it is not superior to other available methods for fairly and efficiently adjudicating the controversy, and thus the Putative Class cannot meet the requirements of Rule 23.

D. Neither "Commonality" nor "Typicality" Can Be Established by the Saturn Plaintiffs

53. To proceed as a class claim, Rule 23(a)(2) and Rule 23(a)(3) require that the putative class representative also demonstrate commonality and typicality. To establish typicality, plaintiffs must show that they are situated similarly to class members.[10] The Court cannot "presume" that plaintiffs' claims are typical of other claims. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158, 160 (1982) ("actual, not presumed, conformance with Rule 23(a) remains, however, indispensable").

54. The Saturn Plaintiffs' claims are not typical of those alleged on behalf of any of their respective putative classes. Each Saturn Plaintiff's claim allegedly arises from certain of the Debtors' Products that the Saturn Plaintiffs claim to have purchased and operated, allegedly in reliance upon defendants alleged misrepresentations as to the standard and quality of the timing chains and oiling nozzles in such vehicles. Yet, the putative class would include plaintiffs who followed differing maintenance programs, operated their vehicles differently, and

[10] *See Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (typicality "requires that the claims of the class representative be typical of those of the class, and 'is satisfied when each class member's claim arises from the same course of events, and each member makes similar arguments to prove the defendant's liability'") (quoting *In re Drexel*, 960 F.2d at 291); *see, e.g.*, *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 341 (7th Cir. 1997) ("The typicality and commonality requirements of the Federal Rules ensure that only those plaintiffs or defendants who can advance the same factual and legal arguments may be grouped together as a class").

purchased vehicles under a variety of factual circumstances. *See, e.g.*, *Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp.*, 993 F.2d 11, 14 (2d Cir.) (typicality defeated by plaintiff's broad definition of class as all individuals who signed similar automobile lease agreements), *cert. denied*, 510 U.S. 959 (1993).

E. The Saturn Plaintiffs Are Not Adequate Representatives

55. To establish that it will adequately represent the proposed class, the Saturn Plaintiffs must have common interests with the unnamed members of the class, and it must appear that the Saturn Plaintiffs will vigorously prosecute the interests of the class through qualified counsel. *See, e.g.*, *Edwards v. McCormick*, 196 F.R.D. 487, 495 (S.D. Ohio 2000). However, without evidence of who actually would comprise the class, a court cannot evaluate whether the Saturn Plaintiffs have a common interest with the unnamed class members, and any determination of adequate representation would be purely speculative. *Edwards*, 196 F.R.D. at 495. Furthermore, the required elements that the plaintiffs have "claims or defenses typical of the class" and that they can "adequately represent and protect the interests of other members of the class" are intertwined: "to be an adequate representative, plaintiff must show that his claims are typical of the claims of the class." *See, e.g.*, *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 669 (1993) ("[T]o be an adequate representative, plaintiff must show that his claims are typical of the claims of the class.") (quoting *Stephens v. Montgomery Ward*, 193 Cal. App. 3d 411, 422 (1987)). As described above, there can be no "typical" plaintiff and thus no adequate representative for any of the Putative Class.

56. Moreover, the burden to move expeditiously for class certification and recognition within a bankruptcy proceeding, in compliance with Rule 23(c)(1), falls on the class representative and "the class representative's failure to move for class certification is a strong

indication that he will not fairly and adequately represent the interests of the class." *In re Woodward*, 205 B.R. at 370. As the Saturn Putative Class Claim fails to meet the requirements of Rule 23, the Court should not allow it to proceed as a class claim and it should be disallowed.

F. The Putative Class Is Not Sufficiently Ascertainable

57. The Saturn Plaintiffs propose in the Consolidated Amended Complaint to certify the following class: "all persons who purchased the Class Vehicles in the Class States whose timing chain has failed (the Class)." Excluded from the Putative Class are the recalled vehicles, defendants, any entity that has a controlling interest in defendants, and defendants' current or former directors or officers."[11] (Consol. Am. Compl. ¶¶ 1, 137.)

As explained by one court:

> The class description must be sufficiently definite to permit the ascertainment of class members, and the description must not be so broad as to include individuals who are without standing to maintain the action on their own behalf. Proper identification of the proposed class serves two purposes. First, it alerts the court and parties to the potential burdens class certification may entail. In this way the court can decide whether the class device simply would be an inefficient way of trying the lawsuit for the parties as well as for its own congested docket. Second, proper class identification insures that those individuals actually harmed by the defendant's wrongful conduct will be the recipients of the awarded relief.

See Oshana v. Coca Cola Bottling Co., 225 F.R.D. 575, 580 (N.D. Ill. 2005) (citations omitted) *aff'd*, 472 F.3d 506 (7th Cir. 2006), *cert. denied*, 551 U.S. 1115 (2007). The ascertainability requirement is not satisfied when the class is defined simply as consisting of all persons who may have been injured by some generically described wrongful conduct allegedly engaged in by a defendant. *Van W. v. Midland Nat'l Life Ins. Co.*, 199 F.R.D. 448, 451 (D.R.I. 2001). Further,

[11] The "Class States" include 45 of the 50 states plus the District of Columbia. (Consol. Am. Compl. ¶ 1.)

"if a court must come to numerous conclusions regarding class membership or adjudicate the underlying issues on behalf of each class member, then a proper class cannot be defined concisely." *Edwards*, 196 F.R.D. at 493. In other words, a class definition fails if (1) it is overinclusive by including many persons without claims, or (2) it is not administratively feasible to identify the putative class members. *Id.*; *see also Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513-14 (7th Cir. 2006), *cert. denied*, 551 U.S. 1115 (2007); *Bachrach v. Chase Inv. Servs. Corp.*, No. 06-2785 (WJM), 2007 WL 3244186, at *2 (D.N.J. Nov. 1, 2007) ("Courts may deny certification where the proposed class includes many members without claims."); *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 404-05 (E.D. Pa. 1995); *Commander Props. Corp. v. Beach Aircraft Corp.*, 164 F.R.D. 529, 539 (D. Kan. 1995).

1. The Class Definition Is Overinclusive

58. The class definition here is overinclusive because it includes numerous persons without a viable claim against the Debtors. The Consolidated Amended Complaint specifically alleges that the Debtors repaired (under warranty are free of charge) over 2,000 class vehicles that experienced a broken timing chain. (*See* Consol. Am. Compl. ¶ 127.) The Saturn Plaintiffs' proposed class definition nonetheless includes such individuals in the Putative Class. However, owners of these vehicles have no claim against the Debtors' since the timing chain was already repaired free of charge for those owners.[12] In the warranty manual, the remedy for breach of any implied warranty was limited to repair or replacement of the defective part, and the Saturn Plaintiffs' allegations confirm this remedy was provided. *See, e.g., Hornberger v. Gen. Motors Corp.*, 929 F. Supp. 884, 892 (E.D. Pa. 1996) (limitation of remedy to performance of

[12] Even if such persons had a claim, which Debtors deny, any claim they might assert is certainly different than the claims of a person whose vehicle experienced a broken timing chain that was not repaired under warranty.

repairs and needed adjustments is enforceable); *Lara v. Hyundai Motor Am.*, 770 N.E.2d 721, 728-29 (Ill. App. Ct. 2002) (same); *see also* U.C.C. § 2.719(a)(1) (buyer's remedy can be limited to "repair and replacement of non-conforming goods or parts"). Accordingly, these putative class members suffered no loss or damage with respect to a timing chain repair, and therefore, have no claim under any consumer protection act. *See, e.g., Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 796 (N.J. 2005) (holding that there is no loss to consumer when defect "is addressed by the manufacturer or dealer at no cost to the purchaser pursuant to a warranty program"). Since the proposed class definition includes numerous class members who could not state a viable claim, the definition is overbroad and the class allegations should be dismissed. *See Bachrach*, 2007 WL 3244186, at *2 ("Courts may deny certification where the proposed class includes many members without claims.").

2. It Is Not Administratively Feasible to Identify Class Members

59. Inherent in Rule 23 is the requirement that a proposed class be identifiable or ascertainable. *See In re MTBE Prods. Liab. Litig.*, 209 F.R.D. at 336-37. In other words, if class members cannot be identified in a reasonable and administratively feasible manner, then the class definition fails. *See, e.g., id.*; *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980); *Commander Props.*, 164 F.R.D. at 541 (identification of class members presented serious management problems precluding certification); *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 455 (Tex. 2000) (individual inquiry to determine membership in the class defeats any benefit of a class action). Here, there is no reasonable process to identify persons who, at the time they owned a class vehicle (which number over 391,000), experienced a timing chain failure, and therefore, the Saturn Putative Class Claim should be disallowed. *See In re Vioxx Prods. Liab. Litig.*, No. 05-1657, 2008 WL 4681368, at *9-10 (E.D. La. Oct. 21, 2008), *aff'd*, 300 F. App'x

261 (5th Cir. 2008); *Brazil v. Dell Inc.*, 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008); *Barasich v. Shell Pipeline Co.*, No. Civ. A. 05-4180, 2008 WL 6468611 at *4 (E.D. La. June 19, 2008).

60. The allegations of the Consolidated Amended Complaint make clear that only potential class members who can reasonable be identified are persons who either (i) complained to the Debtors or NHTSA about a timing chain problem, or (ii) obtained a warranty repair for a timing chain issue.[13] (*See* Consol. Am. Compl. ¶¶ 126-131.) The Saturn Plaintiffs pled that numerous repairs were made after the expiration of the three year, 36,000 mile warranty, or were made at independent service facilities. (*See id.* ¶ 128 ("[T]he foregoing 2,203 class vehicles which suffered broken timing chains do not include class vehicles in which timing chains broke either after the warranty expired and/or the repair work was done at a dealership or facility other than a Saturn dealership").) No data base exists anywhere that has information with respect to all 391,000 vehicles concerning these repairs, such as when they were made, which vehicles where involved, what was the claimed cost, and certainly the identity of the owners of such vehicles at the time of any repair.

61. Given the above, there is no administratively feasible method to identify, out of the 391,635 putative class vehicles,[14] (1) which particular vehicle had a timing chain repair and (2) who owned the vehicle at the time of repair. For example, even if inquiry was made of all current owners of the 391,000 vehicles involved (which in of itself is not reasonable), individualized proof would be required to establish that the timing chain failed and/or that a repair was made. Moreover, current owners who purchased the vehicle "used" would likely have

[13] Of course, for the reasons set forth above, persons who obtained warranty repairs cannot properly be included in the class in any case since they have no viable claims.

[14] The Saturn Plaintiffs allege there are 412,149 Class Vehicles, but exclude owners of the 20,514 vehicles subject to recall from the class. (*See* Consol. Am. Compl. ¶¶ 118, 126, 137.)

no knowledge of repairs performed prior to their ownership. Further complicating the issue, some undetermined number of vehicles that were purchased in states not included in the "Class States" would have to be identified and excluded. As a result, there is no administratively feasible method to identify putative class members since determining whether an individual is in the putative class would require extensive individual fact findings. Therefore, the proposed class definition is unworkable.

62. As noted in *Marlow v. American Suzuki Motor Corp.*:

> We can understand that discovery procedures might ascertain the existence of those who had filed suit or had made claims against American Suzuki, but the identification of those who had suffered injury but have not yet made claims is quite another matter. Obviously, notice to all class members 'who were injured during the operation of or while a passenger in a Suzuki Samurai automobile . . . due to manufacturing or design defects' in the Samurai would be, to understate, a monumental task.

584 N.E.2d 345, 352-53 (Ill. App. Ct. 1991). The same "monumental task" would be involved in this case based on the proposed class definition, and therefore, the Saturn Putative Class Claim should be expunged.

III. Notice

63. Notice of this Motion has been provided to the Saturn Plaintiffs and to the parties in interest in accordance with the Fourth Amended Order Pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 1015(c) and 9007 Establishing Notice and Case Management Procedures, dated August 24, 2010 [ECF No. 6750]. The Debtors submit that such notice is sufficient and no other or further notice need be provided.

64. No previous request for the relief sought herein has been made by the Debtors to this or any other Court.

WHEREFORE the Debtors respectfully request entry of an order granting the relief requested herein and such other and further relief as is just.[15]

Dated: New York, New York
December 17, 2010

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[15] Should the Court find it appropriate to permit the Saturn Putative Class Claim to proceed as a class claim in whole or in part, the Debtors reserve their rights to request that an expedited procedure be established in this Court to quickly liquidate such claim and an expedited hearing to estimate the Saturn Putative Class Claim pursuant to section 502(c) of the Bankruptcy Code. *See* 11 U.S.C. § 502(c) ("There ***shall*** be estimated for purposes of allowance under this section – (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case…") (emphasis added); *see also In re Chateaugay Corp.*, 10 F.3d 944, 957 (2d Cir. 1993); *In re Thomson McKinnon Sec., Inc.*, 143 B.R. 612, 619 (Bankr. S.D.N.Y. 1992). Further, should an estimation proceeding go forward, the Saturn Plaintiffs should be required to provide substantial documentation in support of the alleged nature of their $334,847,925 claim.

Exhibit E

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11 Case No.**
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*	:	**09-50026 (REG)**
Debtors.	:	**(Jointly Administered)**

DEBTORS' REPLY IN SUPPORT OF OBJECTION TO PROOFS OF CLAIM NOS. 16440 AND 16441 FILED BY MICHAEL A. SCHWARTZ

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TO THE HONORABLE ROBERT E. GERBER,
UNITED STATES BANKRUPTCY JUDGE:

Motors Liquidation Company (f/k/a General Motors Corporation) ("**MLC**") and its affiliated debtors, as debtors in possession (collectively, the "**Debtors**") file this reply (the "**Reply**") to the response (ECF 8893-95) (the "**Response**") interposed to their objection dated December 17, 2010 (ECF 8179-82) (the "**Objection**"), for an order disallowing and expunging Proofs of Claim Nos. 16440 and 16441 (collectively, the "**Saturn Putative Class Claim**") brought on behalf of a putative class (the "**Putative Class**") and respectfully represent:

Preliminary Statement

1. The Saturn Plaintiffs[1] provide no viable grounds – and cite to no applicable authority – to defeat the Debtors' request that this Court exercise its discretion to disallow and expunge the Saturn Putative Class Claim. The Saturn Plaintiffs' arguments are defective in three main respects.[2]

2. First, application of Bankruptcy Rule 7023 to a class proof of claim is discretionary and should be denied here because allowing the Saturn Putative Class Claim to proceed would result in prejudice to the Debtors' estates and be unfair to other creditors. Distributions on account of the asserted Saturn Putative Class Claim for over $300 million would have to be set aside while the litigation of the Saturn Putative Class Claim grinds on. Such a reservation of the Debtors' estates is particularly inappropriate where, as here, the Saturn Plaintiffs waited *over a year after the Bar Date* to move for the application of Rule 7023, and the

[1] Capitalized terms not defined herein shall have the meaning ascribed to them in the Objection.

[2] The Saturn Plaintiffs' arguments are defective in other respects as well, but in the interest of brevity and in respect of this Court's time, the Debtors will not refute all of the numerous misstatements of law and fact in Plaintiffs' Response.

Putative Class was not certified as a class action by any court prepetition. ***Indeed, the Saturn Plaintiffs are unable to cite any bankruptcy case within the Second Circuit in which a pre-certification class claim was allowed.*** Without any support, the Saturn Plaintiffs request this Bankruptcy Court to take the extraordinary and unprecedented action of permitting class treatment in these circumstances. Their request should be denied.

3. Second, the notice of these bankruptcy cases and the Bar Date provided to the Putative Class satisfies the requirements of Due Process. Notice of the chapter 11 filing of General Motors Corporation and the Bar Date was published throughout the United States, and the Bar Date notice and the claim form were, and remain, posted internationally on the MLC website. (*See* Bar Date Order at 7.) Courts routinely hold that publication notice to unknown claimants – even pursuant to less extensive notice programs and in lower-profile bankruptcies – is constitutional, "however great the odds that publication will never reach the eyes of such unknown parties." *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S 306, 317 (1950). Moreover, even if the law required a notice to provide information about each claimant's specific, potential claims against the bankruptcy estate – *and it does not* – the Saturn Plaintiffs argue that each member of the Putative Class has already sustained expensive engine damage caused by the allegedly defective timing chains, (*see* Resp. at 1-2), and thus, individual class members had more than adequate personal knowledge of a potential claim against the Debtors. Further, the Debtors would be hard-pressed to find a handful of Americans who were not aware of the chapter 11 filing of General Motors Corporation, including its subsidiary, Saturn, LLC. Finally, notwithstanding the chance to do so, none of the members of the Saturn Putative Class (save for counsel for the named plaintiffs) filed a claim against the Debtors. For these reasons,

the notice program satisfies the requirements of Due Process and the Saturn Putative Class Claim should be expunged.

4. Third, the Putative Class cannot meet the requirements of Rule 23 of the Federal Rules of Civil Procedure ("**Rule 23**"). The cases cited by the Saturn Plaintiffs fail to support allowance of the Saturn Putative Class Claim here, given the need for individualized proofs in their case regarding causation, notice, and damages. Moreover, the Saturn Putative Class Claim should be disallowed because a class action is not a superior method of adjudicating this controversy, as the Bankruptcy Rules or National Highway Traffic Safety Administration ("**NHTSA**") procedures both provide more efficient and effective procedures than a class action device in these circumstances. For all of these reasons, and those set forth in the Objection, the Saturn Putative Class Claim should be expunged.

Reply Argument and Authorities

A. This Court Should Refuse to Apply Bankruptcy Rule 7023 to the Saturn Putative Class Claims

5. Application of Rule 7023 to class proofs of claim lies within the sound discretion of the court. *See In re Ephedra Prods. Liab. Litig.*, 329 B.R. 1, 5 (S.D.N.Y. 2005). The Saturn Plaintiffs concede that class treatment of a proof of claim is appropriate only where the plaintiffs have moved for application of Bankruptcy Rule 7023, and in only two principal situations: (i) where a class has been certified prepetition by a non-bankruptcy court; or (ii) where there has no actual or constructive notice to the class members of the bankruptcy case and the bar date. (*See* Resp. at 13-14 (citing *In re Bally Total Fitness of Greater N. Y., Inc.*, 402 B.R. 616, 620 (Bankr. S.D.N.Y.), *aff'd*, 411 B.R. 142 (S.D.N.Y. 2009).) *See In re Blockbuster Inc.*, ---- B.R. ---, No. 10-14997, 2011 WL 180035, at *3 (Bankr. S.D.N.Y. Jan. 20, 2011) (Lifland, J.). Here, the Saturn Putative Class Claim should be expunged because: (1) the Saturn Plaintiffs

failed to timely file their motion for class treatment; (2) the Putative Class was not certified prepetition; and (3) actual or constructive notice has been provided to the Putative Class of these bankruptcy cases and the Bar Date.

1. The Saturn Plaintiffs Failed to Timely Move Under Bankruptcy Rule 9014

6. Initially, the Saturn Plaintiffs try to shoehorn into their Response an alleged "cross-motion" under Bankruptcy Rule 9014 for application of Bankruptcy Rule 7023.[3] This belated, reactive "cross-motion" should not save their claim from expunction.

7. The Bar Date elapsed a year and two months ago, the Saturn Plaintiffs filed their proofs of claim a year and three months ago, and these chapter 11 cases have been pending for over a year and a half. During this entire period of time, the Saturn Plaintiffs did nothing to seek class treatment. Only when the Debtors objected to their proof of claim did they seek application of Bankruptcy Rule 7023.

8. The Saturn Plaintiffs' answer to this inexcusable delay is to rely on a few outdated cases that do not represent the law in this District. (*See* Resp. at 10-12 (arguing holding of *In re Charter Co.*, 876 F.2d 866 (11th Cir. 1989), *cert. dismissed*, 496 U.S. 944 (1990) was adopted by *In re Chateaugay Corp.*, 104 B.R. 626 (S.D.N.Y. 1989), *appeal dismissed*, 930 F.2d 245 (2d Cir. 1991).) As this Court recently recognized, a putative class claimant is *not* required

[3] As an initial matter, the Saturn Plaintiffs' attempt to have their cross-motion considered out of time is wholly improper, and the Debtors reserve their rights to respond to the alleged cross-motion at a later time in accordance with the Bankruptcy Rules, the local rules of this Court, and the Fifth Amended Order Pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 1015(c) and 9007 Establishing Notice and Case Management Procedures, dated January 3, 2011 (ECF 8360). Contrary to the Saturn Plaintiffs' assertion otherwise, the issue of class certification is *not* "now fully briefed and before this Court." (*See* Resp. at 12.) As of the date of the filing of this Reply, the Saturn Plaintiffs have not issued a notice of hearing for their alleged cross-motion. Further, the Saturn Plaintiffs have attached evidence to their alleged cross-motion that the Debtors have not had the opportunity to test, including nine (9) sworn declarations submitted by a purported expert and the Saturn Plaintiffs. As requested in the Objection (*see* Obj. at 11 n.6), in the event this Court determines to apply Rule 23 to the Saturn Putative Class Claim, the Debtors should have the opportunity to engage in class-certification discovery to test the Saturn Plaintiffs' sweeping, unsubstantiated representations about the nature of the class members' allegations and file an appropriate response to the Saturn Plaintiffs' motion.

to wait until an objection is made to the claim before requesting class treatment in the Southern District of New York. (*See* Bench Decision on Apartheid Claimants' Motion for Class Certification, and on Debtors' Objection to Apartheid Claimants' Underlying Claims at 21-22 (Jan. 28, 2011) (ECF 9026) (the "**Bench Order**"), attached hereto as **Exhibit "A."**) Specifically, courts in the Southern District of New York have ***rejected*** the holding of *In re Charter Co.*[4]

9. Although in the past there has been debate among courts as to when a claim becomes a "contested matter" such that a claimant must seek class treatment, (*see* Bench Order at 21-22), the issue was squarely addressed by Judge Rakoff five years ago in *In re Ephedra Prods. Liability Litigation*, 329 B.R. at 7. In that case, Judge Rakoff rejected *In re Charter Co.* and held that claimants had the right to move for class certification from the moment debtors' chapter 11 petition was filed, and that, in any event, the filing of a proof of claim constitutes a "contested matter" triggering the court's discretion to apply Bankruptcy Rule 7023 under Bankruptcy Rule 9014. *In re Ephedra Prods. Liab. Litig.*, 329 B.R. at 7.

10. Judge Rakoff squarely rejected the view that a claimant was required to wait to move under Bankruptcy Rule 9014 until the debtor objected to the claim. He reasoned that if that were the law, a debtor could "prevent the claimant from asking the bankruptcy court to apply Rule 23 simply by withholding their objection until the eve of confirmation and then moving to expunge the class claim on the grounds that applying Rule 23 would unduly delay

[4] In *In re Chateaugay Corp.*, the court refused to determine whether an objection was necessary to trigger the claimant's obligation to file a motion under Bankruptcy Rule 9014, although it "seriously question[ed]" whether *In re Charter Co.* was correct. 104 B.R. at 632-33.

administration." *Id.* at 6. Bankruptcy courts in the Southern District – including this Court (*see* Bench Order at 21-22) – have recognized the *Ephedra* decision as binding on this point.[5]

11. Indeed, a Bankruptcy Rule 7023 motion "should be filed as soon as practicable" and should be denied if it comes so late as to prejudice any party. *See In re Musicland Holding Corp.*, 362 B.R. at 654 (citing *In re Computer Learning Ctrs., Inc.*, 344 B.R. 79 (Bankr. E.D. Va. 2006)). In fact, the United States Bankruptcy Court for the Southern District of New York has disallowed class claims where claimants disregarded compliance with Bankruptcy Rule 9014, specifically recognizing that such claims should not be allowed to "grind on" while other creditors wait for their anticipated distributions pursuant to a plan of liquidation.[6] And this Bankruptcy Court recently disallowed class claims because the claimants failed to file their motion for class certification "at the earliest possible time," when they moved approximately a year after the Commencement Date and ten months after the filing of their proofs of claim, and where adjudication of their claims would materially delay distributions to

[5] *See, e.g., In re Musicland Holding Corp.*, 362 B.R. 644, 652 (Bankr. S.D.N.Y. 2007) (Bernstein, J.) (where claimants moved for certification before debtor filed claim objection, court noted that claimants "could have made the motion sooner," and "[a]lthough the delay does not automatically disqualify the class claim, it bears on the exercise of the discretion whether to apply Rule 23"); *In re Nw. Airlines Corp.*, No. 05-17930 (ALG), 2007 WL 2815917, at *4 (Bankr. S.D.N.Y. Sept. 26, 2007) (Gropper, J.) ("[T]he reasoning of *Charter* with respect to the procedural issues has been rejected in this district."); *see also id.* (holding "the putative class here bears full responsibility for failing to bring an earlier motion to seek application of Bankruptcy Rule 7023" and further distinguishing *In re Charter Co.* because, in that case, "the putative class had been granted class certification by the court of original instance, and the Court did not consider whether there would have been adverse consequences to the debtors' other creditors from the delay in raising the issue in the bankruptcy court"). The reasoning by this Court, as well as Judges Rakoff, Berstein, and Gropper, is squarely in line with the plain language of the governing rules. Bankruptcy Rule 7023, by incorporating Rule 23, requires that the class certification decision be made "at an early practicable time." *See* Fed. R. Bankr. P. 7023; Fed. R. Civ. P. 23(c)(1)(A).

[6] *See In re Thomson McKinnon Secs Inc.*, 133 B.R. 39, 40 (Bankr. S.D.N.Y. 1991) (disallowing class claim for failure to file motion under Rule 9014 because "the costs and delay associated with class actions are not compatible with liquidation cases where the need for expeditious administration of assets is paramount so that all creditors, including those not within the class, may receive a distribution as soon as possible"), *aff'd*, 141 B.R. 31 (S.D.N.Y. 1992).

creditors and materially increase the administrative costs of these chapter 11 cases. (*See* Bench Order at 3, 22.)

12. Here, the Saturn Plaintiffs waited even longer: the Saturn Plaintiffs filed their proofs of claim a year and three months ago, and these chapter 11 cases have been pending for over a year and a half. Indeed, permitting the Saturn Putative Class Claim to proceed as a class claim on the eve of the March 3rd confirmation hearing would delay the distribution of over $300 million the Debtors' estates and prejudice other creditors. *See In re Craft*, 321 B.R. 189, 198-199 (Bankr. N.D. Tex. 2005) (refusing to apply Bankruptcy Rule 7023 where the "putative class representatives . . . waited too long to seek invocation of Rule 23"); *In re Circuit City Stores, Inc.*, No. 08-35653, 2010 WL 2208014, at *5 (Bankr. E.D. Va. 2010) (holding request to apply Bankruptcy Rule 7023 thirteen months after filing claim is "far too late"), *aff'd*, 439 B.R. 652 (E.D. Va. 2010).

13. In an attempt to minimize their failure to timely move for application of Bankruptcy Rule 7023, the Saturn Plaintiffs argue that the Saturn Putative Class Claim is "ripe for Alternative Dispute Procedures, including Mandatory Mediation," (*see* Resp. at 12), that their counsel has been in "repeated" contact with Debtors' counsel "in order to prepare for mediation,"[7] and that because Debtors did not indicate that they intended to object to the Saturn Putative Class Claim, any delay is the Debtors' fault. (*See* Resp. at 12 n.6.) These arguments

[7] The only evidence of this alleged "repeated" contact submitted by the Saturn Plaintiffs is their claim capping letters, which were submitted on March 1, 2010, over nine months after the Commencement Date and three months after the Bar Date. (*See* Resp. at Ex. B.) Regardless, the Saturn Plaintiffs' failure to properly prosecute their claims in these chapter 11 cases because they thought they might engage in alternative dispute resolution procedures does not excuse them from complying with the Bankruptcy Rules, particularly since no indication was given that mediation was appropriate under the circumstances. *Cf. In re Tronox Inc.*, No. 09-10156, 2010 WL 1849394, at *2 (Bankr. S.D.N.Y. May 6, 2010) (denying putative class counsel's request to extend bar date based on plaintiffs' excuse that they thought it better to wait to file proof of claim on behalf of the putative class until after their appointment as lead putative class counsel in the underlying lawsuit).

miss the mark. The Debtors never designated the Saturn Putative Class Claim for application of the alternative dispute resolution procedures, and do not intend to do so, as the Debtors believe the claim has no value as a matter of law and do not want to waste assets of the estates with mediation expenses. More importantly, whether culpability for the Saturn Plaintiffs' failure to timely move for class certification lies with the Saturn Plaintiffs or not, who is at "fault" does not matter. At this point in time, it would be unfair to the Debtors' other creditors to set aside of $300 million of the Debtors' estates and incur increased administrative costs so that the Saturn Putative Class Claim could proceed.

14. Accordingly, because the Saturn Plaintiffs failed to timely comply with Rule 9014, the Saturn Putative Class Claim should be expunged.

2. The Saturn Putative Class Claim Was Not Certified Prior to the Commencement Date

15. The Putative Class was not certified at the time of the Debtors' chapter 11 filing, and it remains uncertified today. Courts overwhelmingly refuse to allow class claims where the putative class was not certified prepetition because of the threat of undue delay and prejudice to the Debtors' estates and other claimants. *See In re Ephedra Prods. Liab. Litig.*, 329 B.R. at 5; *In re Sacred Heart Hosp. of Norristown*, 177 B.R. 16, 22 (Bankr. E.D. Pa. 1995). ***The Saturn Plaintiffs are unable to proffer any case within the Second Circuit in which a class claim that was not certified prepetition was allowed,*** and the Debtors have been unable to find a single case in the Second Circuit granting the unprecedented relief sought by the Saturn Plaintiffs here. Lack of prepetition certification of the Putative Class is fatal, and the Saturn Putative Class Claim should be expunged.[8]

[8] Indeed, courts have even refused to permit claims on behalf of classes certified prepetition to proceed in bankruptcy. *See, e.g., In re Ephedra Prods. Liab. Litig.*, 329 B.R. at 9.

3. Adequate Notice of the Chapter 11 Cases and the Bar Date Was Provided to All Members of the Putative Class

16. In a desperate attempt to avoid expunction, the Saturn Plaintiffs argue that the Bankruptcy Court should permit them to prosecute a class claim because the Debtors purportedly failed to provide adequate notice to the members of the Putative Class. The sole basis for their argument that notice was insufficient is that the Debtors "failed to inform putative Saturn Class members about the existence of their claims regarding the defective Class Vehicles." (*See* Resp. at 14; *see also id.* at 15.) But the Saturn Plaintiffs fail to cite a single case where a bankruptcy court has permitted class treatment of a proof of claim because the absent class members did not receive actual or constructive notice of the bar date[9], let alone a case where a bankruptcy court permitted class treatment of a proof of claim because the absent, unknown class members did not receive *actual notice about the existence of their specific claims*.

17. The reason for their failure is simple: the notice was adequate and the Debtors are not obligated to provide every unknown claimant with a notice that sets forth the bases for every potential claim they could have against the estates. Indeed, "the debtor is not required to search out each conceivable or possible creditor and urge the creditor to file a proof of claim." *In re Waterman S.S. Corp.*, 157 B.R. 220, 221 (S.D.N.Y. 1993). On the contrary, the law is clear that the proper inquiry in evaluating the adequacy of notice is whether a party "acted reasonably in selecting means to inform persons affected . . ., not whether each claimant actually

[9] The Saturn Plaintiffs cite *In re Sacred Heart* in support of the proposition that "the class device may provide the only form of notice to [putative class members] and are advisable to utilize" where the notice of a debtors' bankruptcy and bar date are inadequate. (*See* Resp. at 14.) But the court *In re Sacred Heart* refused to grant class treatment of the putative class claim and denied class certification because, as here, the putative class was not certified prepetition, and because all members of the putative class either received notice of the bankruptcy proceedings through actual or constructive means. *See In re Sacred Heart Hosp. of Norristown*, 177 B.R. at * 20 (denying motion for class certification when class not certified pre-bankruptcy and finding no evidence that debtor excluded or failed to provide proper notice to putative class members).

received notice." *In re Jamesway Corp.*, No. 95 B 44821 (JLG), 1997 WL 327105, at *1 (Bankr. S.D.N.Y. June 12, 1997) (quoting *Weigner v. City of N.Y.*, 852 F.2d 646, 649 (2d Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989)); *In re Waterman S.S. Corp.*, 157 B.R. at 221.

18. Here, the Saturn Plaintiffs concede that the identities and addresses of the approximately 391,635 members of the Putative Class are currently unknown, but that they each were aware that their timing chains had failed, resulting in costly repairs. (*See* Resp. at 9, 16.) Actual notice to putative members of all the various class claims asserted against the Debtors could have lead to the actual service upon every person in the United States, as General Motors Corporation vehicles have been sold and resold to tens of millions of unknown persons around the world. The Debtors have already published notice internationally and mailed over 1.7 million individual notices, at a cost of over $1.3 million to the Debtors' estates. Notice of the Bar Date was published internationally, in over 90 countries, in *The Financial Times* (Worldwide Edition), *The Wall Street Journal* (Global Edition), *USA Today* (Monday through Thursday), *The New York Times* (National), *Detroit Free Press*, *Detroit News*, *LeJournal de Montreal* (French), *Montreal Gazette* (English), *The Globe and Mail*, (Canada), and *The National Post*. (*See* Bar Date Order at 7.) The claim form and Bar Date notice were also published on the MLC website (www.motorsliquidationdocket.com and www.motorsliquidation.com). Courts in the Southern District of New York have repeatedly refused to permit class proofs of claim to proceed on a class basis when members of the class received notice by publication.[10] Further, this Court has

[10] *See In re Bally Total Fitness of Greater N.Y., Inc.*, 411 B.R. 142, 146 (S.D.N.Y. 2009) (affirming denial of motion for leave to file class claim where part of putative class received only publication notice and holding such notice "was still legally adequate"); *see also In re Jamesway Corp.*, 1997 WL 327105, at *8 (denying class certification in adversary proceeding even though putative class members alleged they failed to receive notice because "the fact that these plaintiffs or other Proposed Class members may not have received a Claim Package that was mailed to them or read published notice of the Bar Date is irrelevant as a matter of due process"); *Mullane*, 339 U.S. at 317 ("[I]n the case of persons missing or unknown, employment of an indirect ***and even a probably futile means of notification*** is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.") (emphasis

already noted that the bankruptcy filing of General Motors Corporation "got worldwide attention," and that this Court would "have great difficulty seeing how the notice provided here could be criticized in any way in an ordinary commercial bankruptcy situation." (Bench Order at 28, 28 n.78.) Class counsel neither objected to the proposed notice nor provided a list of additional persons to be served.

19. Because the notice of the bankruptcy and the Bar Date was adequate, the Saturn Putative Class Claim should be disallowed.

B. The Putative Class Cannot Satisfy the Requirements of Rule 23[11]

1. Numerous Individual Issues Predominate Over Any Common Questions[12]

20. Even if the Saturn Plaintiffs could convince this Court to overlook their delayed request for class treatment and the lack of precedent to support their request for certification, the Putative Class could not be certified under Rule 23(b)(3) because common

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added); *In re XO Commcn's, Inc.*, 301 B.R. 782, 792-93 (Bankr. S.D.N.Y. 2003) (concluding publication of bar date satisfies requirements of Due Process with respect to providing notice to unknown creditors), *aff'd*, No. 04 CIV. 01489 LAK, 2004 WL 2414815 (S.D.N.Y. June 14, 2004).

[11] The Saturn Plaintiffs cite an unpublished district court opinion in support of the proposition that a court determining whether to grant class certification "should refrain from deciding any material factual disputes between the parties concerning the merits of the claims, and should accept the underlying allegations as true." (*See* Resp. at 17 (citing *Katz v. Image Innovations Holdings, Inc.*, No. 06 CIV 3707 (JGK), 2010 U.S. Dist. LEXIS 73929 (S.D.N.Y. July 22, 2010).) This is not the law in the Second Circuit. Instead, it is well established that a district judge may certify a class *only after* making determinations that each Rule 23 requirement has been met, and such determination "can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement . . . even a merits issue that is identical with a Rule 23 requirement." *See In re Initial Public Offerings Secs. Litig.*, 471 F.3d 24, 34, 41 (2d Cir. 2006) ("There is no reason to lessen a district court's obligation to make a determination that every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue."). Accordingly, in determining whether Rule 23 has been satisfied, this Court should not accept the Saturn Plaintiffs' factual allegations as true absent evidentiary proof that the Debtors have had the opportunity to test through discovery.

[12] In their Response, the Saturn Plaintiffs clarify that they seek certification solely under Rule 23(b)(3), not Rule 23(b)(2). Despite the Saturn Plaintiffs' claim to the contrary, the Consolidated Amended Complaint also seeks injunctive relief and made class allegations pursuant to Rule 23(b)(2). (*See* Consolidated Am. Compl. at 107 (seeking injunctive relief); *id.* ¶ 139 (alleging "Defendants acted or refused to act on grounds generally applicable to the Class").) *See also* Fed. R. Civ. P. 23(b)(2) (class certification appropriate where "the party opposing the class has acted or refused to act on grounds that apply generally to the class").

questions of law or fact do not predominate over individualized issues with regard to the Putative Class. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982) (reversing class certification when plaintiffs failed to conduct rigorous analysis of differences in law and fact); *In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d at 33 (analysis must be "rigorous"). Accordingly, the Saturn Putative Class Claim should be expunged.

a) ***Individual Factual Issues Predominate with Regard to the Saturn Plaintiffs' State-Only Consumer Fraud Sub-Classes***

21. Numerous individual issues exist concerning reliance, causation, materiality, and damages based on the alleged misrepresentations or omissions that form the basis of the Saturn Plaintiffs' state consumer fraud claims. Indeed, "for these reasons, generally, claims involving allegations of fraud may not proceed as a class." *Black Diamond Props., Inc. v. Haines*, 940 So. 2d 1176, 1178 (Fla. Ct. App. 2006) (reversing certification of class action because consumer fraud claims required individual testimony to prove misrepresentation and damages); *see also Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1362-66 (11th Cir.) (certification of fraud class action vacated because individual issues of reliance and causation predominated); *reh'g denied,* 35 F. App'x 859 (11th Cir.), *cert. denied*, 537 U.S. 884 (2002); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) (class action based on state consumer protection statutes "cannot be certified when individual reliance will be an issue"); *Kitzes v. Home Depot U.S.A., Inc.*, 872 N.E.2d 53, 62 (Ill. App. Ct. 2007) (individual questions concerning representations, whether each customer was deceived, and damages predominated in state consumer fraud action). In fact, individual fact issues pervade the Saturn Plaintiffs' consumer fraud claims regardless of whether the claims are based solely on alleged omissions, and not

misrepresentations, as the Saturn Plaintiffs now argue.[13] *See, e.g.*, *Marino v. Home Depot U.S.A., Inc.*, 245 F.R.D. 729, 737 (S.D. Fla. 2007) (proposed class of Florida consumers not certified in action under Florida Deceptive and Unfair Trade Practices Act because plaintiff could not establish that same omission occurred for every putative class member, necessitating inquiry into individual circumstances of each class member); *Truckway, Inc. v. Gen. Elec.*, No. Civ. A. 91-0122, 1992 WL 70575, at *5, *7 (E.D. Pa. Mar. 30, 1992) (individual issues predominated in state consumer fraud action "[b]ecause not all members of the class would have relied on the alleged fraudulent material omissions and misrepresentation . . . and because a determination of whether each member of the class was defrauded . . . would require each class member to individually prove the issue of reliance and fraud on a case by case basis").

22. The Saturn Plaintiffs' state consumer fraud claims present a multitude of individual issues concerning, among other things: whether a misrepresentation or omission occurred; whether each misrepresentation or omission was material; whether each class member purchased a vehicle as a result of such statements or omissions; whether each class member was damaged by the alleged misrepresentation or omission, and if so, how much.[14] These individual

[13] In an attempt to save the Saturn Putative Class Claim from disallowance under Rule 23(b)(3), the Saturn Plaintiffs argue that their fraud claims are not based on misrepresentations, but rather omissions. (Resp. at 43.) But the Consolidated Amended Complaint makes numerous, class-wide allegations regarding alleged misrepresentations of fact to the members of the Putative Class that are not suitable for class certification, including, *inter alia*:

- the maintenance schedules state that the Timing Chain on the Class Vehicles required neither inspection nor replacement during the life of the Class Vehicle, (Consolidated Am. Compl. ¶¶ 6-16);
- General Motors Corporation "highlighted the inclusion of a steel timing chain, as opposed to a rubber timing belt, in Saturn vehicles as a selling point in the marketing materials," (*id.* ¶ 52);
- "Saturn dealers routinely proclaimed the virtues of a steel timing chain in the Class Vehicles," (*id.* ¶ 52); and
- the dealership informed a member of the Putative Class that "the timing chain was supposed to be no maintenance and didn't even need to be checked until 100,000 miles," (*id.* at 42).

[14] Even the bare-bones declarations of the Saturn Plaintiffs demonstrate the divergent factual issues underpinning each claim with respect to damages, including whether the Class Vehicle had been repaired or rendered inoperable, the amount of damages, and whether there are consequential damages aside from repair or the cost of the vehicle.

issues defeat the factual predominance requirement for class certification of the Saturn Plaintiffs' fraud claims. *See Black Diamond Props.*, 940 So. 2d at 1178; *Sikes*, 281 F.3d at 1362-66; *Castano*, 84 F.3d at 745; *Marino*, 245 F.R.D. at 737.

b) ***Individual Factual Issues Predominate with Regard to the Multi-State and State-Only Breach of Implied Warranty Sub-Classes***

23. The Saturn Plaintiffs' multi-state and state-only implied warranty sub-classes also fail the predominance requirement of Rule 23(b)(3). Individualized factual inquiries would need to be performed to address the issues of if, or when, timing chain failure occurs; the causation of any such timing chain failure; whether the allegedly defective timing chain is covered by warranty; whether the allegedly defective timing chain was already repaired by MLC; whether the class member provided proper notice of the alleged breach of warranty to MLC; whether a class member's claims are barred by the statue of limitations or other affirmative defenses such as comparative negligence (caused by, *inter alia*, the plaintiff's failure to properly maintain the vehicle or improper use of the vehicle); and what the appropriate remedy should be for any particular class member. *See Sanneman v. Chrysler Corp*., 191 F.R.D. 441, 449 (E.D. Pa. 2000) (individualized issues regarding putative class members' usage and maintenance of vehicles precluded certification and noting "[c]ourts are hesitant to certify classes in litigation where individual use factors present themselves, such as cases involving allegedly defective motor vehicles and parts.").

(*See* Resp. at Ex. D (William Anderson testifying that cost of repair was $3,700), Ex. E (Antonio Burgos testifying that his car has not been repaired because cost would be between $3,000 and $4,000), Ex. F (Jennifer Caldwell testifying that cost of repair was over $2,700), Ex. G (Amy Faust testifying that her vehicle would cost between $2,800 and $6,000 to repair, and that she further owed $1,500 on her car loan and paid mechanic nearly $1,000 to diagnose the problem), Ex. H (Jesus Leal testifying that cost of repair was over $2,400), Ex. I (Jeanne Menzer testifying that cost of repair was over $1,900), Ex. J (Charles Reid testifying that cost of repair was over $900); Ex. K (Cynthia Scott testifying that cost of repair would be $2,200 and car had been rendered inoperable).

24. Although the Saturn Plaintiffs, in a cursory manner, set forth the rudimentary law of implied warranty in each jurisdiction, this does not change the fact that individualized factual issues would predominate over common ones with respect to establishing liability for breach of implied warranty as to each sub-class. For instance, Missouri law requires each member of the Putative Class to have provided "notice to the seller of the injury." *Ragland Mills, Inc. v. Gen. Motors Corp.*, 763 S.W.2d 357, 360 (Mo. Ct. App. 1989). This notice requirement is important, as it serves "to afford the seller an opportunity to arm himself for negotiation and litigation." *Id.* at 361. Individualized inquiries would be required to determine which, if any, of the members of the Missouri sub-class provided the Debtors with this statutorily required notice. Further, as for Nebraska, Michigan, Iowa, and Pennsylvania, the Saturn Plaintiffs failed to provide any authority shedding light on whether and how common factual issues predominate over individualized issues with regard to the states' laws of implied warranty. (*See* Resp. at 29 (citing *Barden v. Hurd Millwork Co., Inc.*, No. 06-C-46, 2006 U.S. Dist. LEXIS 63926 (E.D. Wis. Mar. 28, 2008) (applying Wisconsin, *not* Nebraska, law)); *id.* at 29 (citing *Lackowski v. Twinlabs Corp.*, No. 00-75058, 2001 U.S. Dist. LEXIS 25634, at *28-29 (E.D. Mich. Dec. 28, 2001)); *id.* at 28 (citing *Martin v. Amana Refrigeration, Inc.*, 435 N.W.2d 364 (Iowa 1989).)[15]

25. Accordingly, factual issues would predominate with respect to the Saturn Plaintiffs' multi-state and state-only implied warranty sub-classes, and the Saturn Putative Class Claim should be disallowed.

[15] Further, the cases cited by the Saturn Plaintiffs under Pennsylvania law have either been appealed or reversed. *See Samuel-Bassett v. Kia Motors Am., Inc*., No. 2199 Jan. Term 2001, 2004 Phila. Ct. Com. Pl. LEXIS 149 (Sept. 17, 2004); *Bassett v. Kia Motors Am., Inc*., 212 F.R.D. 271 (E.D. Pa. 2002), *vacated and remanded by*, 357 F.3d 392, 403 (3d Cir. 2004).

c) ***Individual Legal Issues Predominate with regard to the Saturn Plaintiffs' Multi-State Implied Warranty Sub-Classes***

26. Plaintiffs have lumped together the implied warranty laws of twenty-eight different states and seek class certification based upon those twenty-eight states' supposed "similar treatment" of the laws of implied warranty.[16] (*See* Resp. at 36.) When, as here, a class action would be governed by the laws of multiple states, "variations in state law may swamp any common issues and defeat predominance." *Castano*, 84 F.3d at 741; *accord Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir.) (predominance defeated, in part, by number of applicable, differing state legal standards), *cert. granted by*, 519 U.S. 957 (1996), *aff'd*, 521 U.S. 591, 624 (1997). The party seeking class certification must therefore "provide an 'extensive analysis' of state law variations to reveal whether the[y] pose 'insuperable obstacles.'" *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 724 (5th Cir. 2007). For example, in *Cole*, plaintiffs seeking certification of a class action containing breach of implied warranty claims provided the district court with:

(i) an extensive catalog of the statutory text of the state warranty laws implicated;

(ii) the text of the relevant provisions of the Uniform Commercial Code ("UCC") of each state;

(iii) an overview of textual variations in the relevant UCC provisions adopted in each jurisdiction; and

(iv) a report from an expert on contract law who opined, after analyzing the variations, that "the few variations in the provisions of UCC Article 2 relevant to this case are such that they do not affect the result."

[16] In their Response, the Saturn Plaintiffs clarify for the first time that they seek certification of not one class, (*see* Consolidated Am. Compl. ¶139), but rather ***eleven*** state-by-state sub-classes and ***two*** multi-state sub-classes. (*See* Resp. at 36.)

Id. at 725. Despite that analysis and expert testimony, the court nevertheless concluded that the plaintiffs still "did not sufficiently demonstrate the predominance requirement because they failed both to undertake the required 'extensive analysis' of variations in state law concerning their claims and to consider how those variations impact predominance." *Id.*

27. Here, there has been no such rigorous analysis of each state's implied liability laws and the differences among them. Regardless of the fact that each of the twenty-eight states has adopted the UCC, the possibilities for differences in state law abound because the UCC looks to the laws of implied warranty in each individual state. *See, e.g., Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016-17 (D.C. Cir. 1986) (rejecting notion that no variations in state implied warranty laws relevant to class action exist, and noting that "court[s] cannot accept such an assertion 'on faith'. . . [t]he Uniform Commercial Code is not uniform.") (internal citations omitted), *cert. denied*, 482 U.S. 915 (1987). Indeed, there are variances in the laws of the twenty-eight jurisdictions with regard to (i) individual plaintiff's requirements for providing notice of breach,[17] (ii) whether merchantability may be presumed by the laws of the state,[18] (iii) variations in how each state defines "merchantability,"[19] (iv) whether warranty protections in

[17] State law varies on what constitutes reasonable notice and to whom notice should be given, and other courts considering the issue in the class certification context have noted that these variations impact predominance. *See, e.g., Compaq Computer v. Lapray*, 135 S.W.3d 657, 673-75 (Tex. 2004) (collecting cases and noting variation in state law regarding notice among factors defeating predominance); *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 276 (D.D.C.) (notice requirements vary by state), *reconsideration denied*, 130 F.R.D. 514 (D.D.C. 1990), *appeal dismissed*, 945 F.2d 1188 (D.C. Cir. 1991).

[18] In some jurisdictions, use of a vehicle for a certain period of time without experiencing a defect gives rise to a presumption that the vehicle is merchantable. *See, e.g., Walsh*, 130 F.R.D. at 273 (prolonged use of product raises presumption of merchantability in certain states and would require individualized inquiry into each state's requirements and each plaintiff's circumstances).

[19] *See In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 194 F.R.D. 484, 489 (D.N.J. 2000), *reconsideration denied*, No. Civ. A. 96-1814 (JBS), 2001 WL 1869820 (D.N.J. Feb. 8, 2001); *compare Nacci v. Volkswagen of Am., Inc.*, 325 A.2d 617, 620 (Del. Super. Ct. 1974) (under Delaware law, merchantability standard is whether ordinary manufacturer would pursue different design), *with Venezia v. Miller Brewing Co.*, 626 F.2d 188, 190 (1st Cir. 1980) (under Massachusetts law, merchantability examines reasonable consumer expectations).

each state extend to used vehicles,[20] and (v) whether each state permits waiver of implied warranty, and, if so, the requisite circumstances.[21] Such variations in state law would not only create multiple and diverse legal standards, but also multiply the individualized factual determinations that the Court would be required to undertake via individualized hearings. *See Cole*, 484 F.3d at 726 (court abused its discretion in determining predominance requirement was satisfied in implied warranty action where variations in state law necessitated multiple legal standards and individual fact determinations).

28. Because of the potential for significant differences between the implied warranty laws of the twenty-eight states, that common questions of law *do not* predominate with regard to the two multi-state implied warranty sub-classes.

2. A Class Action Is Not Superior to Other Available Methods for Fairly and Efficiently Adjudicating this Controversy

29. Further, class treatment of the Saturn Putative Class Claim is not superior to other available methods for fairly and efficiently adjudicating the claims of the members of the Putative Class. *See* Fed. R. Civ. P. 23(b)(3)(D). Courts in this jurisdiction have repeatedly held that the right to file an individual claim in bankruptcy proceedings obviates the need for class treatment, as the bankruptcy procedures can provide a superior method of protecting claimants' rights and administrating large numbers of claims. As *In re Woodward & Lothrop Holdings, Inc.* observed:

[20] The Putative Class is composed of purchasers of both new and used cars. These variations in state law would impact the legal standards class members would be held to and, among other things, how trial would be affected by the need to conduct individualized inquiries into whether class members bought new or used cars). *See, e.g.*, *Cole*, 484 F.3d at 730 (noting substantial variations in state law concerning warranty protection for purchasers of new versus used cars).

[21] *Compare Settlemires v. Jones*, 736 So.2d 471, 474 (Miss. Ct. App. 1999) ("implied warranty of merchantability may not be waived or disclaimed") *with Graham Hydraulic Power, Inc. v. Stewart & Stevenson Power, Inc.*, 797 P.2d 835, 838 (Colo. Ct. App. 1990) (conspicuous written disclaimer waives implied warranties).

> [W]hile the class action ordinarily provides compensation that cannot otherwise be achieved by aggregating small claims, the bankruptcy creditor can, with a minimum of effort, file a proof of claim and participate in distributions. In addition, there may be little economic justification to object to a modest claim, even where grounds exist. Hence, a creditor holding such a claim may not have to do anything more to prove his case or vindicate his rights.

205 B.R. 365, 376 (Bankr. S.D.N.Y. 1997) (citations omitted); *see also In re Musicland Corp.*, 362 B.R. at 650-51 ("Bankruptcy provides the same procedural advantages as a class action. In fact, it provides more advantages. Creditors . . . don't have to hire a lawyer, and can participate in the distribution for the price of a stamp."); *In re Am. Reserve Corp.*, 840 F.2d 487, 490 (7th Cir. 1988) (discussing whether class device should be applicable in bankruptcy proceedings as bankruptcy achieves benefits of consolidation of claims "without the need for class suits – class actions are a headache for judges"). Further, this Court recently noted that the class action treatment is not superior to the bankruptcy process:

> [T]he inherent simplicity of the bankruptcy process tends to make class action treatment *not* superior, as a general matter and in this case, because an individual claimant would need only to fill out and return a proof of claim form. And the deterrence class actions often provide would be of little utility in a case like this one, where Old GM is liquidating, and any punishment for any wrongful Old GM conduct would be borne by Old GM's innocent creditors.

(Bench Order at 19 (emphasis in original).) Here, despite ample notice of the Bar Date and opportunity to file a claim against the Debtors, no member of the Putative Class (each of whom, as alleged by the Saturn Plaintiffs, have already sustained alleged failure of their timing chains causing expensive damage to their vehicles) filed an individual claim in these bankruptcy cases, aside from counsel on behalf of the Saturn Plaintiffs. Accordingly, the Saturn Putative Class Claim should be disallowed.

30. Further, while the Debtors dispute that any remedy is necessary or appropriate, it is clear that NHTSA, a federal agency with the administrative and technical expertise to address national automotive safety issues, is a superior forum to deal with the issues raised by the Saturn Plaintiffs. In *American Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291 (1995), the court noted:

> We, too, believe an impartial determination as to whether the Samurai is defectively designed should be made, and, to the extent the flaw is found to exist, Suzuki should be required to make necessary repairs. It is our opinion, however, that under the circumstances of this case it is a perversion of both the class action device and warranty law to allow a ruling on the "defect issue" to be secured in connection with an implied warranty action. The remedy which will best promote consumer safety, and which will address real parties concern that "tragic consequences" will result if the defect is not remedied, is to petition NHTSA for a defect investigation.

Id. at 1299-1300; *see also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1019 (7th Cir. 2002) (Easterbrook, J.) (regulation by NHTSA is superior to class action lawsuit), *cert. denied*, 537 U.S. 1105 (2003); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 464 (D. N.J. 1998) ("the administrative remedy provided by NHTSA . . . is more appropriate than civil litigation"); *In re Ford Motor Co. Ignition Switch Prod. Liab. Litig.*, 174 F.R.D. 332, 353 (D.N.J. 1997) ("there is insufficient justification to burden the judicial system with plaintiffs' claims while there exists an administrative remedy . . . that can handle those claims in a more efficient manner"); *Ziegelmann v. DaimlerChrysler Corp.*, 649 N.W.2d 556, 562 (N.D. 2002) ("the proper remedy is to petition [NHTSA] for a defect investigation"); *Ford Motor Co. v. Rice*, 726 So. 2d 626, 631 (Ala. 1998) (persons claiming defect are not without a remedy since "if the NHTSA determines that a vehicle contains a defect, then it may issue an order directing . . . a recall"). Accordingly, class action

procedures are not superior to the other methods available to the members of the Putative Class to seek redress for their claims, and the Saturn Putative Class Claim should be disallowed.

3. The Putative Class Is Overinclusive and Not Ascertainable

31. The Saturn Plaintiffs' argument that the Putative Class is not overinclusive and is therefore ascertainable (*see* Resp. at 15-16), is also without merit. While the Saturn Plaintiffs correctly note that the class definition excludes vehicles that were recalled whose timing chain had failed—a fact that Debtors acknowledge in the Objection— the Saturn Plaintiffs confuse the recalled vehicles with vehicles that were repaired by the Debtors, free of charge, *under warranty*. (*See* Obj. at 31; Resp. at 16.) Indeed, the Consolidated Amended Complaint alleges that the Debtors repaired, under warranty and free of charge, over 2,000 class vehicles with broken timing chains. (Consol. Am. Compl. ¶ 127.) Here, while the class definition includes "all persons who purchased the Class Vehicles in the Class States whose timing chain has failed (the Class)," it *does not* exclude vehicles that were repaired under warranty (rather than recall). Thus, the Putative Class includes many members who do not have viable claims because, by Plaintiffs own admission, those members have already been compensated when their vehicles were repaired under warranty. (*Id.* ¶¶ 1, 137.) Accordingly, because the proposed class definition includes class members without viable claims, the definition is overinclusive. *See, e.g.*, *Bachrach v. Chase Inv. Servs. Corp.*, No. 06-2785 (WJM), 2007 WL 3244186, at *2 (D.N.J. Nov. 1, 2007) ("Courts may deny certification where the proposed class includes many members without claims."); *see also Charron v. Pinnacle Group N.Y. LLC*, 269 F.R.D. 221, 228 (S.D.N.Y. 2010) ("The Second Circuit has cautioned against certifying overbroad classes.").

4. "Typicality" Cannot Be Established by the Saturn Plaintiffs

32. The Saturn Putative Class Claim also fail to meet the typicality element of Rule 23(a). Indeed, the Saturn Plaintiffs rely heavily on *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176 (2d Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991), to support their argument that the typicality requirement has been met. (*See* Resp. at 19, 22.) But in that case, the Second Circuit affirmed the district court's refusal to certify the class because the representative plaintiff was subject to several unique defenses, calling into question whether typicality and adequacy requirements of Rule 23 were satisfied. *Gary Plastic Packaging Corp.*, 903 F.2d at 180. Similarly, here, while each Saturn Plaintiff's claim allegedly arises from certain of the Debtors' Products that the Saturn Plaintiffs claim to have purchased and operated, allegedly in reliance upon defendants' alleged misrepresentations as to the standard and quality of the timing chains and oiling nozzles in such vehicles, the Putative Class would include persons who followed differing maintenance programs, operated their vehicles differently, and purchased vehicles under a variety of factual circumstances, resulting in a divergent of factual issues regarding causation, damages, reliance, and notice.[22] For these reason, the Saturn Putative Class Claim also does not satisfy Rule 23(a).

[22] At a minimum, prior to certification, the Debtors would need to take discovery related to the Saturn Plaintiffs' bald assertions that "[n]one of the Saturn Plaintiffs are subject to unique defenses," that "[n]one of the Saturn Plaintiffs have antagonistic or conflicting claims with the Class members that they seek to represent," and that the Saturn Plaintiffs subjected their Class Vehicles to "normal use." (*See* Resp. at 5, 19, 21, 22, 23.)

Conclusion and Requested Relief

WHEREFORE, for the reasons set forth above and in the Objection, the Debtors respectfully request that the Court (i) disallow and expunge the Saturn Putative Class Claim in its entirety; and (ii) grant the Debtors such other and further relief as is just.[23]

Dated: New York, New York
January 31, 2011

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[23] Should the Court find it appropriate to permit the Saturn Putative Class Claim to proceed as a class claim in whole or in part, the Debtors reserve their rights to request that an expedited procedure be established in this Court to quickly liquidate such claim.

Exhibit A

Bench Decision on Apartheid Claimants' Motion for Class Certification, and on Debtors' Objection to Apartheid Claimants' Underlying Claims, dated January 28, 2011 (ECF 9026)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
Motors Liquidation Company., *et al.*, f/k/a General Motors Corp., *et al.*	)	Case No. 09-50026(REG)
Debtors.	)	Jointly Administered

BENCH DECISION[1] ON APARTHEID CLAIMANTS' MOTION FOR CLASS CERTIFICATION, AND ON DEBTORS' OBJECTION TO APARTHEID CLAIMANTS' UNDERLYING CLAIMS

APPEARANCES:

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Michael Hausfeld, Esq.

[1] I use bench decisions to lay out in writing decisions that are too long, or too important, to dictate in open court, but where the circumstances do not permit more leisurely drafting or more extensive or polished discussion. Because they often start as scripts for decisions to be dictated in open court, they typically have a more conversational tone

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By: Diane Sammons, Esq. (argued)

ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE:

In the jointly administered chapter 11 cases of Debtor Motors Liquidation Company, formerly General Motors Corporation ("**Old GM**," and with its debtor affiliates, the "**Debtors**"), I have two contested matters evolving from lawsuits brought against Old GM, prepetition, which, after the filing of proofs of claim by the plaintiffs, now are before me in the form of claims against the Old GM estate.

The lawsuits were brought by residents of South Africa under the Alien Tort Statute,[2] which allows foreign nationals to bring actions in the federal courts of the United States against those alleged to have committed torts in violation of the "law of nations"—*i.e.*, international law. As described more fully below, the former plaintiffs (now claimants) (the "**Apartheid Claimants**") allege, in general terms, that they were victims of the infamous system of apartheid in South Africa, and that Old GM aided and abetted the perpetrators of the apartheid system, to the Apartheid Claimants' injury.

In the first of the two contested matters now before me, the Apartheid Claimants move for certification of their claims as class proofs of claim, on behalf of themselves and other victims of apartheid. In the second of two contested matters before me, the Debtors seek to disallow the claims, on a class basis or otherwise.

For the reasons that follow, I conclude, notwithstanding my abhorrence of apartheid, that:

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[2] 28 U.S.C. § 1350. It provides, in full:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

(1) class certification, which is discretionary in bankruptcy cases and appropriate less frequently than in plenary litigation, must be denied under the facts presented here; and that

(2) under controlling Second Circuit authority,[3] binding on me and every other lower court in the Second Circuit, the underlying claims must now be disallowed.

My Findings of Fact, Conclusions of Law, and bases for the exercise of my discretion in connection with these determinations follow.

Findings of Fact

1. Procedural History

The claims pending before this Court were first raised in plenary non-bankruptcy litigation—in two related lawsuits brought by 26 named plaintiffs in two separate groups (the "**Botha Plaintiffs**" and the "**Balintulo Plaintiffs**"),[4] alleging that Old GM and other multinational corporations aided and abetted South Africa's apartheid regime. The lawsuits were initially filed in 2002 and 2003. In their current form, the two claimant groups seek allowed claims on the part of Old GM for damages of the type originally sought in the earlier lawsuits.

The earlier lawsuits had a lengthy and somewhat convoluted history, the specifics of which need not be laid out at length in this Decision. It is sufficient for present purposes to say that until recently, it was held in the course of that litigation and related litigation that claims under the Alien Tort Statute for corporate aiding and abetting

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[3] *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) ("***Kiobel***").

[4] Or the "**Botha Claimants**" and "**Balintulo Claimants**," when dealing with their claims as they were thereafter asserted in this Court.

violations of international law were legally cognizable, and could be heard in the U.S. federal courts. That changed, at least in the Second Circuit, after the Circuit's *Kiobel* decision, discussed above and below.

On June 1, 2009, when those lawsuits were ongoing, the Debtors filed their chapter 11 cases. On September 16, 2009, I signed an order establishing November 30, 2009 as the "Bar Date"—the deadline for filing claims—in these chapter 11 cases, and setting forth procedures for filing proofs of claim against the Debtors.

On August 29, 2009, the Botha Plaintiffs filed a proof of claim against Old GM, and on October 9, 2009, the Botha Plaintiffs filed a second, largely similar, proof of claim. The Botha Plaintiffs' action had not been certified as a class action as of the time that the Debtors filed their chapter 11 cases. They first moved for class treatment of their claims in these chapter 11 cases on June 22, 2010, about a year after Old GM's chapter 11 filing, and about 10 months after the filing of their proofs of claim.

Similarly, the Balintulo Plaintiffs' action had not been certified as a class action as of the time that these chapter 11 cases were commenced. The Balintulo Plaintiffs filed their proof of claim on October 14, 2009, and first moved for class treatment on the same day that the Botha Claimants did, June 22, 2010.

2. Botha Claimants' Claims

The Botha Plaintiffs' claims in this Court, as in their complaint in the district court, allege causes of action for (i) "apartheid as a crime against humanity"; (ii) "extrajudicial killing"; (iii) "torture"; and (iv) "cruel, inhuman or degrading treatment."

As set forth in greater detail in their earlier complaint and proof of claim, the Botha Claimants seek recovery from Old GM based on Old GM's participation in South African apartheid, and/or aiding and abetting South Africa's apartheid system. It is alleged, for example, that Old GM produced military vehicles that were used by South African security forces in their efforts to maintain the apartheid regime,[5] and that Old GM engaged in workplace segregation and retaliation against Old GM employees who engaged in union and/or anti-apartheid activity.[6]

The Botha Claimants seek compensatory damages, "including general and special damages"; punitive damages; disgorgement of profits, and costs of suit, including attorneys' fees. The Botha claim describes the amount of the claim as "TBD," since "[t]he amount of this claim is contingent based upon pending litigation."[7]

The Botha Claimants seek that relief on their own behalf and on behalf of a putative class of:

> [A]ll black South African citizens (and their heirs and beneficiaries) who during the period from 1973 to 1994 suffered injuries as a result of Defendants' violations of the law of nations by their complicity in such violations caused by South African state officials, employees or agents or by their actions in replicating the apartheid system in their own internal operations.[8]

3. Balintulo Plaintiffs' Claim

The Balintulo Claimants' claim alleges two "counts" against the Debtors. The first, on behalf of four putative classes, described momentarily, is "for the crime of

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5 Botha Putative Class Claim, Botha Cmplt., ¶¶ 85-88.

6 *Id.* at ¶¶ 89-94.

7 Botha Putative Class Claim.

8 Botha Putative Class Claim, Botha Cmplt., ¶ 149.

apartheid." It alleges that Old GM provided substantial assistance to the South African security forces knowing that the security forces were violating international law;[9] that this assistance had a substantial effect on the perpetration of its criminal and tortious activities against the purported classes; and that Old GM "aided and abetted" and/or ratified the actions of the apartheid regime.[10]

The second, on behalf of one of those four classes only, is for "the crime of extrajudicial killing," and makes aiding and abetting allegations substantially similar to those in the first count.[11]

The Balintulo Claimants seek, among other things, a declaration that "Defendants knowingly and intentionally aided and abetted the commission of a tort in violation of international law enforceable in this court as federal common law and the law of nations," compensatory damages, punitive damages, and costs.[12] Like the Botha Claimants' claim, the amount of the Balintulo Claimants' claim is "TBD," as "[t]he amount of this claim is contingent based upon pending litigation as outlined in the attached Complaint."[13]

The Balintulo Claimants' claim proposes four distinct classes:

> The "Extrajudicial Killing Class," defined as "[a]ll persons who are the surviving personal representatives—including parents, spouses, children, siblings, and dependents—of persons who were subject to *extrajudicial killing* by South African security forces during the period from 1960 to 1994."

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9 Balintulo Putative Class Claim, Balintulo Cmplt., ¶ 316.

10 *Id.* ¶¶ 317, 320.

11 *Id.* ¶¶ 331-39.

12 *Id*. at 87-88.

13 Balintulo Putative Class Claim, Rider.

> The "Torture Class," defined as "[a]ll persons who were themselves subject to *torture and rape* by South African security forces during the period from 1960 to 1994."
>
> The "Detention Class," defined as "[a]ll persons who were themselves subject to *prolonged unlawful detention* by South African security forces during the period from 1960 to 1994."
>
> The "Cruel Treatment Class," defined as "[a]ll persons who were themselves subject to *cruel, inhuman, and degrading treatment* by South African security forces during the period from 1960 to 1994." [14]

Discussion

I consider the two separate contested matters in turn.

I.

Class Certification

A. Class Certification of Claims in Bankruptcy Cases

While I normally start with textual analysis in any dispute where such is relevant, textual analysis is of only limited utility here. The Bankruptcy Code is silent on the extent to which a claim may be filed on behalf of persons other than the claimant, or the standards under which a court might find that to be appropriate.[15] And as relevant here,[16]

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[14] Balintulo Putative Class Claim, Balintulo Cmplt. ¶ 36 (emphasis added in each case).

[15] The closest potentially applicable section, Bankruptcy Code section 501, provides, in relevant part:

> (a) A creditor or an indenture trustee may file a proof of claim . . .
>
> (b) If a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor, or that has secured such creditor, may file a proof of such claim.
>
> (c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.

the Bankruptcy Rules are as well. Class certification in cases under the Bankruptcy Code is expressly addressed in Fed. R. Bankr. P. 7023, which provides that "Rule 23 F.R.Civ.P. applies in adversary proceedings." But claims allowance matters, when objected to, are contested matters, not adversary proceedings, and instead are governed by Bankruptcy Rule 9014, which is silent as to class action treatment, or incorporation of Civil Rule 23.

Bankruptcy Rule 9014(c), captioned "Application of Part VII rules," provides that "[e]xcept as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply. . . ." Rules 9014(c) continues with a fairly long listing of Part VII Rules that (unless the court directs otherwise) apply to contested matters, but Rule 7023 is not one of them. Thus Rule 7023 doesn't apply in contested matters, "unless the court directs otherwise." But while at least implying that a bankruptcy court has the power to "direct[] otherwise," and thus to apply Rule 7023 (and hence Fed.R.Civ.P. 23) in claims allowance contested matters, Rule 9014 is silent as to standards under which courts should do so.

Thus, as in so many areas where the Code and Rules are silent, bankruptcy courts look to caselaw to fill the gaps. That caselaw is extensive, with much of it from

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Prior to 1988, many courts had held that section 501 of the Code provides an exclusive list of those who may file a representative claim and that class proofs of claims are invalid as a matter of law because class representatives are not listed in section 501. However, in *In re American Reserve Corp.*, 840 F.2d 487 (7th Cir.1988) ("***American Reserve***"), the Seventh Circuit held that class proofs of claim are not barred by section 501, but may be allowed in the discretion of the bankruptcy court. *See In re Ephedra Prods. Liab. Litig.*, 329 B.R. 1, 4 (S.D.N.Y. 2005) (Rakoff, D.J., sitting as bankruptcy court after withdrawal of reference) ("***Ephedra***") (explaining the history and so holding). Though the Second Circuit hasn't addressed the issue, *id.*, lower court decisions in this district since that time have held similarly.

[16] Fed. R. Bankr. P. 3001(b) provides that except where proofs of claim may be filed by debtors or co-obligors, *see* Fed. R. Bankr. P. 3004 and 3005, "[a] proof of claim shall be executed by the creditor or the creditor's authorized agent." But Bankruptcy Rule 3001 does not speak to the permissibility of class action treatment for claims either.

bankruptcy courts in this district—which, while not, strictly speaking, binding upon me, I am on record as following in the absence of clear error.[17]

In this district, it has been held that while class proofs of claim in bankruptcy are not prohibited, the right to file one is not absolute.[18] The decision to extend Civil Rule 23's application is committed to the Court's discretion.[19] The exercise of that discretion is informed by special considerations applicable in bankruptcy cases that are superimposed on those that apply in any determination under Civil Rule 23. "Although the Bankruptcy Code and Rules give no express guidance for the court's exercise of this discretion, a pervasive theme is avoiding undue delay in the administration of the case."[20] And Judge Gropper of this Court has observed, "[t]he effect of a class claim on other creditors is an important factor in a court's decision whether to exercise its discretion and grant Rule 23 certification."[21]

Accordingly, the proponent of a class claim must (1) make a motion to extend the application of Rule 23 to some contested matter; (2) satisfy the requirements of Rule 23; and (3) show that the benefits derived from the use of the class claim device are

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17 *See, e.g., In re Adelphia Communications Corp.*, 359 B.R. 65, 72 n.13 (Bankr.S.D.N.Y. 2007) ("This Court has been on record for many years as having held that the interests of predictability in this District are of great importance, and that where there is no controlling Second Circuit authority, it follows the decisions of other bankruptcy judges in this district in the absence of clear error.").

18 *In re Musicland Holding Corp*., 362 B.R. 644, 650 (Bankr.S.D.N.Y. 2007) (Bernstein, C.J.) ("***Musicland***"); *In re Bally Total Fitness of Greater New York, Inc.*, 402 B.R. 616, 619 (Bankr.S.D.N.Y. 2009) (Lifland, C.J.) ("***Bally***"); *Ephedra*, 329 B.R. at 5. *See also In re Sacred Heart Hospital of Norristown*, 177 B.R. 16, 22 (Bankr. E.D. Pa. 1995) (noting that the class action device may be utilized in appropriate contexts, but should be used sparingly).

19 *Musicland*, 362 B.R. at 650; *Bally*, 402 B.R. at 619 (same, citing *Musicland*); *accord Ephedra*, 329 B.R. at 4-5; *In re* Blockbuster, Inc., --- B.R. ---, 2011 Bankr. LEXIS 143, *4, 2011 WL 180035, *1 (Bankr.S.D.N.Y. Jan 20, 2011) (Lifland, C.J.) ("***Blockbuster***").

20 *Ephedra*, 329 B.R. at 5.

21 *In re Northwest Airlines Corp.*, 2007 WL 2815917, *3 (Bankr.S.D.N.Y. Sept. 26, 2007) (Gropper, J.) ("***Northwest Airlines***") (denying class certification, for that reason and others) (not available on Lexis).

consistent with the goals of bankruptcy.[22] Thus where, as here, a motion has been duly made, the claim can be asserted as a class claim if, but only if, (1) the class claim proponent has shown compliance with the requirements of Civil Rule 23, and (2) after consideration of consistency with bankruptcy needs and concerns, the bankruptcy court directs that Rule 23 should apply.

B. Class Certification Here

1. Traditional Fed. R. Civ. P. 23 Considerations

Here I assume, without deciding, that the requested class certification satisfies the requirements of Fed.R.Civ.P. 23(a), which requires that the class be so numerous that joinder of all members is impracticable, that at least some questions of law or fact exist that are common to the class; that claims of the representative parties be typical of claims of members of the class, and that the representative parties will fairly and adequately protect the interests of the class. But more difficult issues exist with respect to requirements of Rule 23(b)—and in particular, Rule 23(b)(3), which in this case, where species of torts are alleged, would provide the basis, if any, for asserting claims of this character as a class action in the Bankruptcy Court.[23]

Rule 23(b)(3) provides:

> (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
>
> . . .
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting

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[22] *Musicland*, 362 B.R. at 651; *In re Woodward & Lothrop Holdings, Inc.*, 205 B.R. 365, 369 (Bankr.S.D.N.Y. 1997) (Bernstein, C.J.) ("***Woodward***"); *Blockbuster*, 2011 Bankr. LEXIS 143 at *4, 2011 WL 180035 at *1.

[23] *See* n.53 below.

> only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> > (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> >
> > (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> >
> > (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> >
> > (D) the likely difficulties in managing a class action.

Courts considering whether Civil Rule 23(b) has been satisfied thus consider two separate requirements: (1) predominance of common issues, and (2) superiority of class action treatment in considering the underlying issues.[24] Here I necessarily must find that common issues, while some plainly exist, don't predominate over individual issues, and that class action treatment isn't the superior mechanism for dealing with the underlying claims.

(a) Predominance of Common Issues

As the Supreme Court observed in *Amchem*, Fed.R.Civ.P. 23(b)(3)'s predominance requirement is "far more demanding" than the commonality requirement

[24] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (**"Amchem"**) ("a class must meet two requirements beyond the Rule 23(a) prerequisites: Common questions must 'predominate over any questions affecting only individual members'; and class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy'").

of Rule 23(a)(2).[25] For example, the *Amchem* court observed, in the context of an asbestos class certification, that:

> Given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard.[26]

The *Amchem* court went on to highlight the many differences between the members of the proposed class:

> Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.[27]

These numerous individual issues ultimately defeated class certification.[28]

When resolution of class questions will still require case-by-case analysis of facts with respect to each member of the class, class certification may not be appropriate.[29] The Eleventh Circuit has stated that if "plaintiffs must still introduce a great deal of

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25 *Id.* at 623-24.

26 *Id*. at 624.

27 *Id*. (citations omitted).

28 *Id*. at 624-25.

29 *See Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004) ("***Klay***"); *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1235 (11th Cir. 2000), ("Whether Avis maintains a policy or practice of discrimination may be relevant in a given case, but it certainly cannot establish that the company intentionally discriminated against every member of the putative class"); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1006 (11th Cir. 1997) (holding that plaintiffs alleging racial discrimination had failed to show "predominance" because proof concerning existence of a general policy of racial discrimination could not establish discrimination as to any individual plaintiff).

individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification." [30]

Here I think that while some common issues would plainly exist, individual issues would predominate. As the claims before me make clear, what people refer to under the general umbrella of "apartheid" hurt people in many different ways. While one of the two claimant groups here (the Balintulo Claimants) tried to address that by identifying subclasses of types of claims—extrajudicial killing, torture and rape, detention, and cruel, inhuman and degrading treatment—the most actionable wrongful acts were in substance wrongful acts by themselves—apart from being concrete examples of ways by which apartheid was a "crime against humanity." And the latter, while I can see it as being actionable in many individual cases, would raise many individual issues when coming up with "injury-action-purpose" combinations. For both the more general claim of "crime against humanity," on the one hand, and the more specific ways by which people were injured, on the other, I just see too many individual issues.

The complication (and in my view it's a major one) is the difficulty in establishing, for so many people's unique injuries, causation and the requisite purpose on the part of Old GM personnel with respect to whatever was being done to cause or facilitate the particular injury alleged by the claimant (or class member) involved—which in my view is not just a matter of damages but a matter necessary to fix liability in the first place.[31] Taking allegations as true, for example, that Old GM made motor vehicles

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30 *Klay*, 382 F.3d at 1255.

31 Reflecting somewhat similar concerns, even though Judge Leval, in *Kiobel*, disagreed with the majority of the *Kiobel* panel as to whether corporations are subject to claims in U.S. federal courts

that were used by South African security forces, I think many individual issues would arise concerning how those vehicles were used, and what people at Old GM intended as to how they'd be used. Similarly, taking allegations as true, for purposes of this analysis, that Old GM personnel retaliated against Old GM employees who engaged in union and/or anti-apartheid activity, I think there are simply too many different ways by which any wrongful conduct might have been conducted and caused a resulting injury or effect on the employee involved, and what its purpose was.[32]

Civil actions involving mass torts are often not certified for class action treatment, even in non-bankruptcy plenary litigation, because so many individualized legal and individualized damages inquires are ultimately required.[33] In *Talisman Energy,* Judge Cote noted the similarities between Alien Tort Statute litigation and mass tort litigation, and observed that the two are analogous for class certification purposes.[34] In *Talisman Energy*, current and former residents of southern Sudan brought suit under the Alien Tort

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under the Alien Tort Statute, he concurred with the Circuit's judgment dismissing the claims because of failures to make satisfactory allegations as to Shell's "*purpose to advance or facilitate* the Nigerian government's violations of the human rights of the Ogoni people." 621 F.3d at 192 (emphasis in original). I make no determination here as to whether the allegations in this case would satisfy the analogous knowledge requirement, but note that, assuming they did, I would have to determine issues of a similar nature with respect to the various class members' claims.

[32] For instance, while I hardly condone anti-union activity, it's not clear to me that it's a violation of international law. It would take individualized analysis to ascertain the purpose of any action taken against Old GM employees.

[33] *See In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir.1990) ("Commonality among class members on issues of causation and damages can be achieved only by lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury"); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1084 (6th Cir. 1996) (Explaining that since there was "[n]o single happening or accident . . . [n]o one set of operative facts establishes liability"); *In re MTBE Prods. Liab. Litig.*, 209 F.R.D. 323, 348-49 (S.D.N.Y. 2002) (denying certification of a class of residential well owners whose wells were contaminated by MTBE); *In re Three Mile Island Litig.*, 87 F.R.D. 433, 441-42 (M.D.Pa.1980) ("the causation element of plaintiffs' physical injury/emotional distress claims will require individual proof. In effect, the class action would break up into separate suits").

[34] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 474 (S.D.N.Y. 2005) ("***Talisman Energy***").

Statute against a Canadian energy company and the government of Sudan, alleging that they were victims of extrajudicial killing, genocide, and other violations of international law.[35] The plaintiffs sought certification of a putative class of:

> All non-Muslim, African Sudanese inhabitants of blocks 1, 2 or 4 or Unity State as far south as Leer and areas within ten miles thereof at any time during the period January 1, 1997 to June 15, 2003, who were injured during that period by acts of the Sudanese military or allied militia constituting genocide, extra-judicial killing, enslavement, forced displacement, attacks on civilians constituting war crimes, confiscation and destruction of property, torture or rape.[36]

In *Talisman Energy*, Judge Cote denied class certification because the plaintiffs would have to show with respect to each individual class member that the injuries for which they were claiming damages were actually caused by the campaign of genocide and crimes against humanity targeting non-Muslim African Sudanese. To conduct this inquiry, factual questions that were individual to each attack would have to be determined.[37] Given the need for evidence of causation, and the allegations involving hundreds of thousands of class members, hundreds of individual attacks, the massive geographic area involved, and the six-and-a-half year time period, she found that "[t]he challenge of presenting that individualized proof on behalf of thousands of class members, even if it were logically feasible, will quickly dominate the proof regarding the common issues."[38]

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35 *Id*. at 457.

36 *Id*. at 458.

37 *Id*.

38 *Id*. at 482-83.

Here analogous factors cause me to conclude that with respect to individuals' claims against Old GM, individual issues would predominate. While I assume, without finding, that hundreds of thousands or millions of individuals were injured, in many cases grievously, by the apartheid system as a whole, or by specific means by which it was implemented, their rights to recover against *Old GM* for such injuries would depend not just on their individual damages (which, if that were all, would likely not defeat class certification),[39] but also on the numerous combinations of injury involved, action causing it, assistance of that action, and purpose on the part of Old GM personnel to facilitate the commission of the primary violations of international law and resulting injury on which the aiding and abetting claims would be based.[40]

The Botha Claimants and Balintulo Claimants cite authority going the other way or implying a contrary conclusion, *Does I v. The Gap, Inc.*,[41] *Does I v. Karadzic*,[42] and *Hilao v. Estate of Ferdinand Marcos*.[43] But in *Talisman Energy* Judge Cote considered and rejected the application of each of those cases, and I think she was right to do so.

First, Judge Cote found *Gap* distinguishable, and I think she was plainly right in that respect. In *Gap*, the court granted a motion for class certification under Rule 23(b)(3) for approximately 30,000 factory garment workers in Saipan, Northern Mariana Islands, who alleged that they were held in a system of peonage and involuntary servitude

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39 *See, e.g., Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977) (although calculation of damages in an antitrust action would involve some individualized issues, "it has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate").

40 *See Presbyterian Church of Sudan v. Talisman Energy, Inc*., 582 F.3d 244, 253, 258, 259 (2d Cir. 2009) (defining elements of cause of action for aiding and abetting violation of international law).

41 *Does I v. The Gap, Inc.*, 2002 WL 1000073 (D. N. Mariana Islands May 10, 2002) ("***Gap***") (not available on Lexis).

42 176 F.R.D. 458 (S.D.N.Y. 1997) (Leisure, J.) ("***Karadzic***").

43 103 F.3d 767 (9th Cir. 1996) ("***Hilao***").

created through a conspiracy among garment manufacturers in the district.[44] The *Gap* court rejected the defendants' argument that "at least one element of each of the plaintiffs' claims requires individualized proof and inquiry into the plaintiffs' mental states, alleged injuries, and causes of the alleged injuries."[45] Rather, the *Gap* court held that "this is a lawsuit challenging the garment production system on Saipan based upon allegations of peonage, not a case involving 30,000 individual tort actions."[46] Consequently, the *Gap* court found that common issues would predominate over individual issues because it would be unnecessary to engage in "the separate adjudication of each class members' individual claim or defense."[47]

But *Gap* was distinguished by Judge Cote in *Talisman Energy*, since "the class [in *Gap*] suffered an identical injury—peonage—from a common source, the garment production system on one island . . . . If the plaintiffs succeeded . . . all that remained to be shown would be the amount of an individual's damages."[48] That was very different than the situation with which she was presented there. And it is likewise very different, in my view, from the situation here. As relevant here, apartheid was implemented in many different ways, injuring people in many different ways, and Old GM's alleged wrongful acts and purpose, if any, would have a nexus to the affected people in too many different ways.

In *Hilao*, in which claims were brought for torture, extrajudicial killing and disappearance against the Estate of Philippine strongman Ferdinand Marcos, the Ninth

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44 *Gap*, 2002 WL 1000073, at *2.

45 *Id*. at *7.

46 *Id*.

47 *Id*.

48 *See Talisman Energy, Inc.*, 226 F.R.D. at 483.

Circuit reviewed a lower court order which had certified claims under Rule 23(b)(3) and established phased proceedings and sampling methods to quantify the damages the Marcos Estate owed to the almost 10,000 Filipinos he had injured. The panel, by a 2-1 vote as to this issue, affirmed a class judgment premised on statistical analysis as a kind of proxy for individualized proof of injury and causation—rejecting arguments, among others, that the typicality requirement wasn't satisfied. But Judge Cote observed in Talisman Energy that *Hilao* "preceded *Amchem*, and would be unlikely to survive today."[49] And she regarded the dissent in *Hilao* as "the better reasoned decision," which identified the very problems that "infected" the application for class certification before her:[50]

> To paraphrase that dissent, there may be little question that the Government of Sudan caused tremendous harm to the people of southern Sudan, but the question is which people and how much.[51]

Also, of course, the *Hilao* claims were brought against the Estate of Ferdinand Marcos himself, who was charged with authorizing the killing, torture and disappearances *personally*, and the *Hilao* action did not involve the additional issues incident to claims of secondary liability for aiding and abetting, which at least normally requires showings not just of the primary violation, but of additional matters applicable to the alleged aider-and-abettor, such as substantial assistance, and a purpose or intent to advance the primary violation.

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49 *Id*.

50 *Id.* (citing *Hilao*, 103 F.3d at 787).

51 *Id.*

Similarly here, there is little question that that apartheid caused tremendous harm to people in South Africa, but the question —even apart from "how much," which might be regarded as more relevant to damages, which by itself might not defeat class certification—is which people, in what way, by what Old GM acts, and with what purpose on the part of any Old GM personnel involved.

Finally, *Karadzic* involved a failure to defend and a limited fund that made it an unusual case under the Alien Tort Statute. The claims were brought by victims (and/or survivors of victims) of genocide against Radovan Karadzic, who had declared himself president of a self-proclaimed republic within Bosnia-Herzegovina, and allegedly directed a campaign of ethnic cleansing against Bosnian Croats and Muslims. But Karadzic did not defend, on either class action treatment or the merits. He wrote a letter to the court informing it of his intention not to contest the action,[52] describing his limited financial resources. Thus, while the plaintiffs had originally moved for class certification under Rule 23(b)(3), "limited fund" class action treatment was certified instead, under Rule 23(b)(1), for the class members to allocate amongst themselves whatever Karadzic had.[53] Significantly, though he did not decide the issues, Judge Leisure observed in *Karadzic* that "[t]he Court has grave doubts about plaintiffs' ability to satisfy their burden under Rule 23(b)(3) of demonstrating that common questions of law and fact will predominate and that the proposed class action will be manageable."[54]

(b) Class Action Superiority

Additionally, Civil Rule 23(b)(3)(D) requires me to consider the superiority of the class action mechanism when determining whether or not to certify a class.[55] Here—

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52 *Karadzic*, 176 F.R.D. at 463.

53 I don't think that a limited fund rationale would justify certification under Rule 23(b)(1) here. Old GM's available value is, of course, limited, but the claim to that "limited fund" isn't limited to the putative class action claimants. Old GM has a large number of other creditors who likewise have claims against Old GM's assets. The "limited fund" thus isn't to be shared solely amongst class action claimants, but instead must be shared by all of Old GM's creditors. And of course the issues here don't involve prospective relief or standards of conduct for Old GM going forward, under which Rules 23(b)(1)(A) or (b)(2) might otherwise be applicable.

54 *Id.*

55 Fed.R.Civ.P. 23(b)(3)(D) provides:

once again before considering matters unique to bankruptcy—I don't think I can make such a finding.

For *individual claimants* who were victims of acts in furtherance of apartheid, it wouldn't be that hard, if Old GM objected to their individual claims, for each individual claimant to tell his or her story, and to then ascertain whatever Old GM did and intended as relevant to that claim. But to proceed on a class action basis, I'd have to choose between holding one or more trials of extraordinary complexity, on the one hand, or taking inappropriate shortcuts as to individual issues of wrongful conduct, causation and requisite purpose and assistance, on the other. Like Judge Cote, I think the dissent in *Hilao* was better reasoned, and I think any shortcuts that would have to be taken to make class action treatment superior as an administrative matter would have to come at the expense of due process concerns.

Also, the inherent simplicity of the bankruptcy process tends to make class action treatment *not* superior, as a general matter and in this case, because an individual claimant would need only to fill out and return a proof of claim form. And the deterrence class actions often provide would be of little utility in a case like this one, where Old GM is liquidating, and any punishment for any wrongful Old GM conduct would be borne by Old GM's innocent creditors.[56]

> . . . (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that *a class action is superior to other available methods* for fairly and efficiently adjudicating the controversy.

(emphasis added).

[56] *See Musicland*, 362 B.R. at 650-51. As Judge Bernstein there observed:

Thus I cannot find that the requirements of 23(b)(3) have been satisfied here.

2. Consistency With Bankruptcy Needs and Concerns

Even more clearly, I here must find that entertaining these claims on a class action basis would significantly complicate the Debtors' chapter 11 case, making this huge case even more difficult to manage—with the likelihood, if not certainty, that consideration of these claims on a class basis would materially delay the distributions to the Debtors' thousands of other creditors. Thus, on a matter where bankruptcy judges have unquestioned discretion to determine whether class certification would inappropriately clash with bankruptcy needs and concerns, I can't authorize class action treatment here.

As Judge Rakoff observed in *Ephedra*, "bankruptcy significantly changes the balance of factors to be considered in determining whether to allow a class action and . . . class certification may be 'less desirable in bankruptcy than in ordinary civil litigation.'"[57] He further observed, quoting earlier analysis by Judge Bernstein:

> It follows that a court sitting in bankruptcy may decline to apply Rule 23 if doing so would in Judge Bernstein's words, "gum up the works" of distributing the estate.[58]

> Bankruptcy provides the same procedural advantages as a class action. In fact, it provides more advantages. Creditors, even corporate creditors, don't have to hire a lawyer, and can participate in the distribution for the price of a stamp. They need only fill out and return the proof of claim sent with the Bar Date Notice. Furthermore, claims are "deemed allowed" under § 502(a) in the absence of an objection, in which case discovery and fact-finding are avoided altogether. Finally, where the debtor is liquidating and its managers have moved on to other jobs, the class action does not serve a deterrent effect.

Id. at n.8 (citations omitted).

[57] 329 B.R. at 5 (quoting *American Reserve*, 840 F.2d at 493).

[58] 329 B.R. at 5 (citing *Woodward*, 205 B.R. at 376 (in turning, citing the Seventh Circuit, speaking through Judge Easterbrook, in *American Reserve*, 840 F.2d at 491)).

Similarly, as Judge Lifland very recently explained, in *Blockbuster*:

> "[C]lass certification is often less desirable in bankruptcy than in ordinary civil litigation,' as class-based claims have the potential to adversely affect the administration of a case by "adding layers of procedural and factual complexity . . . siphoning the Debtors' resources and interfering with the orderly progression of the reorganization."[59]

Here I have material concerns as to the adverse effect that consideration of these claims would have on the Debtors' other creditors, by reason of the delay in seeking class certification and the further delay (even if the Apartheid Claimants were blameless) and the burdens on the bankruptcy system that would be occasioned by the need to consider and/or estimate their claims.

First, the Apartheid Claimants failed to file a motion for class treatment until 12 months after the Commencement Date and 8 months after the Bar Date. Given the substantial impact that these claims could have on the Old GM estate, the Apartheid Claimants should have sought class certification far sooner than they did. Since *Ephedra*, five years ago, the importance of filing a prompt motion for class certification (and without waiting for an objection to the claim) has been clear, and the cases requiring prompt filing have been uniform. And while there is law outside this district, somewhat dated, holding otherwise,[60] and upon which the Apartheid Claimants rely, the *Charter* view was rejected in *Ephedra*,[61] and as Judge Gropper stated in his later decision in

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59 *Blockbuster*, 2011 Bankr. LEXIS at *3, 2011 WL 180035 at *1 (quoting *Bally*, 402 B.R. at 621).

60 *See In re Charter Co.*, 876 F.2d 866 (11th Cir. 1989) ("***Charter***").

61 *See* 329 B.R. at 6-7 ("The Court disagrees with *Charter*'s view that an objection was necessary in order to have a "contested matter" triggering the court's discretion under Rule 9014. . . . Objection to the class proofs of claim was not a necessary prerequisite to a motion for class certification.").

Northwest Airlines, "the reasoning of *Charter* with respect to the procedural issues has been rejected in this district."[62]

It is true, as observed by Judge Rakoff in *Ephedra*, that the "Code and Rules are so opaque as to the procedure governing class claims" that expungement may not be appropriate if it were based solely on procedural default.[63] And the argument on the Apartheid Claimants' class certification motion was deferred for a time (in part to address even more urgent matters, in this case and others), and the importance of this matter made it inappropriate to decide with an immediate dictated decision from the bench. Thus, I don't see the late filing of the Apartheid Claimants' request for class certification as dispositive in and of itself. But as Judge Rakoff observed in *Ephedra*, after noting that bankruptcy courts have the power to decide whether Rule 23 should apply when doing so could "gum up the works,"[64]

> For example, since class litigation is inherently more time-consuming than the expedited bankruptcy procedure for resolving contested matters, class litigation would have to be commenced at the earliest possible time to have a chance of being completed in the same time frame as the other matters that must be resolved before distributing the estate.[65]

Here the class certification motion was most decidedly not filed "at the earliest possible time." And a class claim allowance determination, or even estimation, could not be achieved without materially delaying distributions to creditors, and materially increasing the administrative costs of this already very expensive case.

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62 *Northwest Airlines*, 2007 WL 2815917 at *4.

63 *Ephedra*, 329 B.R. at 6.

64 *See* page 20 and n.58 *supra*.

65 *Ephedra*, 329 B.R. at 5.

Here the Debtors' plan, which has now been filed with acceptances being solicited, will be a liquidating plan, with the Debtors distributing to the value they have available (principally in the form of New GM stock), *pari passu* to their creditors. While in a fair number of liquidating plan cases, we can deal with contested claims requiring substantial litigation by establishing plan reserves (holding back distributions to creditors of the sum put in reserve to await liquidation of the disputed claim), here we'd have to estimate the claim, under section 502(c) of the Code,[66] for either allowance or, more likely, creation of reserves. A full claims allowance process would hugely "delay the administration of the case." And here, even a claims estimation procedure would do likewise.

The Apartheid Claimants' claims in this case can be contrasted to the asbestos injury claims in it, which, until a recent settlement, were to be estimated under section 502(c). There the estimation hearing was to be conducted with the testimony of three or four experts, basing their opinions as to the Debtors' likely liability for asbestos injuries based in material part on statistical analysis of the costs of settling earlier asbestos claims. The asbestos claims exposure was well suited to a kind of "macroeconomic" analysis that could estimate overall asbestos claim exposure without considering, in any material way, the strengths and weaknesses of any individual asbestos claimant's claims. But here, by contrast, there is no prior history to work from, and an estimation of the Debtors' liability, if any, for aiding and abetting apartheid couldn't be considered without

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[66] That section provides, in relevant part:

> (c) There shall be estimated for purpose of allowance under this section—
>
> > (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case . . .

extensive consideration of the diverse injuries to apartheid claimants, and whatever Old GM personnel did and intended to cause them.

It is conceivable, I suppose, that if Old GM had *primary* liability for apartheid (as Ferdinand Marcos did for the injuries he caused in *Hilao*), a section 502(c) estimation procedure might be simpler, as then potentially subject to some kind of statistical analysis. But fairness to Old GM's other creditors prohibits disregard of what Old GM personnel actually did, and intended, with respect to apartheid, and this would make any estimation process a very lengthy and complex one, if not also wholly unwieldy. And the management difficulties would be particularly severe since so much of the evidence would be coming from a foreign country.

Three factors have traditionally been most influential in determining whether or not Civil Rule 23 should be applied in bankruptcy cases: (1) whether the class was certified pre-petition; (2) whether the members of the putative class received notice of the bar date; and (3) whether class certification will adversely affect the administration of the case.[67] I've already discussed the third factor, finding that class certification would materially and adversely affect the administration of the case—materially complicating it, and materially delaying distributions to other Old GM creditors. I now turn to the others.

The first of the other two factors also weighs against the Apartheid Claimants. There was no prepetition class certification here.[68]

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[67] *See Musicland*, 362 B.R. at 654-55.

[68] From time to time, as in a recent episode in the *Chemtura* case before me, debtors recognize the propriety of class claims, and find it to be in the interests of their stakeholders to stipulate to class action treatment, even though no prepetition class was certified. I recently approved such a stipulation, but situations of that character present facts very different from those here.

The last of the remaining matters presents closer issues. The Apartheid Claimants argue that the notice of the Bar Date to their class members was deficient, denying them due process, and that as a result, members of the putative class largely didn't get notice of the Bar Date. Implicit in that argument, of course, is that putative class members, while residents of South Africa, were entitled to the protections of the United States Constitution, from which the due process requirement emanates. The Debtors dispute both matters.

To put those issues in context, I note that the Debtors published extensive notice of the Bar Date internationally—in The Financial Times (Worldwide Edition), The Wall Street Journal (Global Edition), USA Today (Monday through Thursday), The New York Times (National), Detroit Free Press, Detroit News, Le Journal de Montreal (French), Montreal Gazette (English), The Globe and Mail, (National), and The National Post. It is undisputed that the first three of these, at least, were distributed in South Africa.

The publication was by the traditional means, and was well suited to providing notice to creditors of all of the usual types throughout the world, including in South Africa. But the Apartheid Claimants argue, with some force, that if one were more conscientiously trying to get notice to the victims of apartheid (most or at least many of whom, one would suppose, would be poor and uneducated), one would not choose these publications. And the Apartheid Claimants suggested two publications that would have been significantly more effective in targeting additional apartheid claimants without tremendous burden on the estate. I think it's true that for the purpose of reaching apartheid victims, a more targeted notice would have been preferable, as potentially being

more effective in reaching the poor, and largely uneducated, putative class members living in South Africa.

Yet the people as to whom notice was arguably deficient were resident in a foreign country, and were not U.S. citizens or residents; did not have property in the U.S.; were not holders of Old GM funded debt; and with limited exceptions (such as any who might have worked in a GM plant), had no contractual dealings or direct contact with GM.

Thus, dealing first with the assumption upon which the notice arguments were made—the existence of constitutional due process rights—the Debtors dispute the underlying premise. Citing one of the decisions in the *A.H. Robins* bankruptcy case,[69] they observe that, when speaking of the foreign notice program set up for victims of allegedly dangerous Dalkon Shields in foreign countries, the Fourth Circuit flatly stated:

> Appellant argues that the foreign notice program was unconstitutional. The Constitution does not extend its guarantees to nonresident aliens living outside the United States. Because foreign claimants are not protected by the Constitution, there is no merit to the constitutional claim.[70]

The *A.H. Robins* court relied on four Supreme Court decisions to come to that conclusion,[71] though none voiced the rule as expressly as the *A.H. Robins* court did.

The Apartheid Claimants respond by saying that since that *A.H. Robins* decision came down, "no . . . court has ever relied on that statement,"[72] but they cite no authority

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69 *Vancouver Women's Health Collective Society v. A.H. Robins Co. (In re A.H. Robins Co.)*, 820 F.2d 1360 (4th Cir. 1987) ("***A.H. Robins***").

70 *Id.* at 1363.

71 *See id.*

72 *See* Apartheid Claimants' Supp. Reply at 5. They also say, correctly, that the *A.H. Robins* court nevertheless thereafter examined the quality of the notice. *Id.*

to the contrary, nor any argument, even without support, as to why that ruling, or some variant of it,[73] wouldn't be correct. I have no reason to doubt the correctness of the *A.H. Robins* court's ruling; even without other cases on point, it would seem obvious that the reach of the United States Constitution to people throughout the world is not limitless, and that if and when the U.S. Constitution is to apply, the person so affected must have some kind of nexus to the United States—such as U.S. citizen status, residence in the United States, or property here.[74] Thus I think the Debtors' quarrel with the Apartheid Claimants' premise is well taken.

The Debtors argue further that even if constitutional due process obligations were owed to the South African putative class members here, they were satisfied. Though this aspect of the matter is closer than the remainder of the issues, I agree.

When constitutional rights to due process are applicable, due process requires that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[75] And notice must be more than a "mere gesture" and the debtor must use "means . . . such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[76]

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73 Though I don't have to decide what all of them might be, there might be some qualifications or exceptions to the broad rule as stated. For example, if a nonresident alien had property in the United States, I would think that he or she would be entitled to U.S. constitutional protections, including due process, before that property could be taken away.

74 With that said, I don't think that it would necessarily follow that because the U.S. Constitution is inapplicable and all of the requirements of constitutional due process don't apply, other fairness obligations wouldn't remain. After all, we still have an *in rem* proceeding within the United States, and bankruptcy judges still strive for fairness. Where a creditor, wherever located, is known, for example, we still expect actual notice of the Bar Date to that creditor, with steps (like first class mail) reasonably calculated to give that creditor actual notice.

75 *Mullane v. Cen. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("***Mullane***").

76 *Id*. at 315.

But notice here was provided in the fashion that is customarily provided in large chapter 11 cases, and in plenary litigation generally. The notice here likely did not reach many potential claimants, but that does not make it deficient. For persons who are missing or unknown, "employment of an indirect and *even a probably futile* means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights."[77]

Here the GM bankruptcy was an event that got worldwide attention. Actual notice was given to the Apartheid Claimants. While a more targeted publication notice for other potential claimants would have been better, I can't find that notice wasn't given, or that the notice that was provided failed constitutional muster, even assuming that U.S. constitutional requirements would apply.[78]

While the notice in this situation was less than ideal, it was not wholly unsatisfactory. As the Debtors properly observe, no class has ever been certified in a bankruptcy court by reason of deficiencies in notice to prospective members of the putative class. And the factors as a whole—particularly the burdens on this estate and the delay that would result from a class certification here—weigh heavily in favor of denying the request to make Civil Rule 23 applicable. In an exercise of discretion, I cannot, consistent with the needs and concerns of the bankruptcy system and Old GM's creditors, make Civil Rule 23 applicable to apartheid claims in these chapter 11 cases.

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77 *Id.* at 317 (emphasis added).

78 Obviously, it is only because of the unique nature of apartheid claims and the potential claimants that the quality of notice as these claims is debatable. I have great difficulty seeing how the notice provided here could be criticized in any way in an ordinary commercial bankruptcy situation.

II.

Claims Disallowance

Apart from the matter of class certification, the Debtors ask me to disallow the Apartheid Claims, whether on a class basis or insofar as Apartheid Claims might still be asserted by individual claimants. Under controlling Second Circuit authority, I must do so, and the claims must be disallowed.

On September 17, 2010, the Second Circuit held in *Kiobel* that U.S. courts do not have subject matter jurisdiction to adjudicate cases brought under the Alien Tort Statute when the allegations are against a corporation. The Circuit, speaking through Judge Cabranes, concluded that:

> No corporation has ever been subject to any form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights. Rather, sources of customary international law have, on several occasions, explicitly rejected the idea of corporate liability. Thus, corporate liability has not attained a discernable, much less universal, acceptance among nations of the world in their relations *inter se*, and it cannot not, as a result, form the basis of a suit under the Alien Tort Statute.[79]

As discussed earlier, the claims of the Apartheid Claimants are based on the premise that Old GM, a corporation charged with aiding and abetting the violations of international law, may be found to be liable in the United States courts under the Alien Tort Statute. But *Kiobel*, binding authority from the Circuit, holds otherwise.

In oral argument here, the Apartheid Claimants pointed to the vigorous dissent by Judge Leval in *Kiobel* on the issue of amenability of a corporation to suit. They also

[79] *Kiobel*, 621 F.3d at 148-49 (emphasis in original).

stated that the issue was raised *sua sponte* by the *Kiobel* panel, not having been briefed by any party; that a petition for rehearing *en banc* in *Kiobel* had been filed, which is now pending before the Second Circuit; and that another Second Circuit panel—the one hearing the appeal involving the non-GM corporate defendants in the original apartheid lawsuits—had failed to issue the very quick similar decision that adherence to *Kiobel* might otherwise warrant.[80] Nevertheless, those are points for the Circuit to consider, not me; I'm bound as a lower court in the Second Circuit to abide by any Second Circuit holding. As "corporate liability . . . cannot . . . form the basis of a suit under the ATS,"[81] and each of the claims submitted by the Apartheid Claimants is alleged against a corporation, I must disallow the remaining claims.[82]

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[80] *See*, Arg. Tr. 81-82, 87-88.

[81] *Id.*

[82] Section 502(j) of the Code provides:

> A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

Thus, section 502(j) permits bankruptcy courts to reconsider the disallowance of claims. If, after consideration of the pending motion for reconsideration *en banc*, the Circuit rules in a fashion that would change the rule of law now binding on me, the Apartheid Claimants may have rights to seek reconsideration of this aspect of my ruling, under section 502(j) and Bankruptcy Rule 3008, or, perhaps, other applicable law or rules. In that event, all parties' rights as to any such request are reserved. Of course, by reason of my earlier rulings in Part I of this Decision, any such opportunity would necessarily apply only to the named claimants here.

Finally, in oral argument here the Apartheid Claimants recognized my inability, as a lower court judge, to hold inconsistently with binding Circuit authority, but urged that I defer deciding the Debtors' *Kiobel*-based objection to their claims, pending a decision by the Circuit on the *Kiobel* plaintiffs' motion for rehearing *en banc*.[83] But with these claims having been asserted on a class action basis, I don't have the luxury of doing so. As the Debtors fairly observed, the Apartheid Claimants' class claims have a huge overhang in these chapter 11 cases.[84] I must agree with the Debtors' contention that it wouldn't be prudent for me to delay deciding the claims allowance issue,[85] in light of the uncertainties as to whether reconsideration *en banc* would be granted—and, if so, when any *en banc* decision might be forthcoming—and in light of these claims' major effect on the ability to bring these chapter 11 cases to a conclusion.[86]

Conclusion

While I share the abhorrence by most of the civilized world of apartheid, this decision cannot, of course, be premised on my personal feelings about that practice. It must instead be pegged to the principles of plenary and bankruptcy litigation jurisprudence that govern issues as to whether class certification should be granted, and substantive rules of law articulated for the lower courts to follow by the Second Circuit.

---

83 *See, e.g.*, Arg. Tr. 85, 88.

84 *See*, Arg. Tr. 143-44.

85 *Id.* at 143.

86 I think it's possible, though the Debtors would be entitled to be heard on the matter, that if there were no longer an effort to proceed with the Apartheid Claimants' claims here on a class action basis, the requested deferral of a decision on my part to await any *en banc* determination in *Kiobel* wouldn't present the same practical problems, since the remaining individual apartheid claims might not have the same effect on other Old GM creditor recoveries. But such a scenario isn't now before me.

For the reasons set forth above, class certification must be denied, and the claims remaining before me must be disallowed.

Dated: New York, New York
January ***28***, 2011

s/Robert E. Gerber
United States Bankruptcy Judge

Exhibit F

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026-reg

- -x

In the Matter of:

MOTORS LIQUIDATION COMPANY, ET AL.,

F/K/A GENERAL MOTORS CORP., ET AL.,

Debtors.

- -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

February 10, 2011

9:47 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

HEARING re Debtors' Objection to Proofs of Claim Nos. 16440 and 16441

Transcribed by: Sharona Shapiro

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factors require me to deny class action certification in this Chapter 11 case, just a few weeks before the scheduled confirmation hearing, in any event.

I'm not now going to repeat all of the underlying law applicable to matters of this character. I discussed them in depth just a few weeks ago in the apartheid decision. And for understandable reasons, class counsel doesn't dispute the underlying law or legal standards or otherwise debate either the holding of my recent apartheid decision or the legal principles or reasoning it contained.

Turning first to class action superiority, the second of the two requirements that Rule 23(b)(3) imposes, and which, at the risk of stating the obvious, is in addition to the requirement for the predominance of common issues. The points I made in the apartheid decision about class action treatment not being superior are equally applicable here. Assuming, arguendo, that we could conquer the class action predominance issues by setting up enough subclasses and plow through the individual law of twenty-six states as applicable to the claims of members of those various classes, that would place tremendous strain on the bankruptcy system and the resources of this Court in particular.

And class action treatment wouldn't be superior to the mechanisms that are available in a bankruptcy court, for the reasons I noted in the apartheid decision, based in material

part on Chief Judge Bernstein's decision in Musicland, as he had there pointed out, the inherent simplicity of the bankruptcy process tends to make class action treatment not superior, as a general matter, and in this case, because an individual claimant would need only to fill out and return a proof of claim form. Further, the deterrence that class actions often provide would be of little utility in a case like this one, where Old GM is liquidating and the punishment for any wrongful Old GM conduct would be borne by Old GM's innocent creditors. See Musicland 362 B.R. at pages 650 to 651.

Turning now to unique bankruptcy concerns. First, I noted in the apartheid decision that the motion for class certification should have been made much earlier in that case, citing the Ephedra cases and Northwest Airlines; and that late motions of this character raise concerns when they would have a material effect on distributions to other creditors, as the 100 million dollars in claims asserted here so obviously would.

I ruled there that late filing would not, by itself, bar class certification, but that it was an important factor. My thinking in that respect hasn't changed in the three weeks since I ruled on that issue before. It's not relevant for purposes of placing blame, but it's relevant because late motions of this type have a major effect on the administration of the Chapter 11 case and on potential prejudice to creditors.

Here, the Saturn plaintiffs failed to file a motion

for class action treatment until fourteen months after Old GM's bar date and twenty months after the commencement of Old GM's bankruptcy. Given the substantial impact that almost 100 million dollars in claims could have on the Old GM estate, the Saturn claimants should have sought class certification here, just as in the apartheid litigation, far sooner than they did. And that concern is particularly significant and perhaps obvious, when we have a confirmation hearing set for March 3, only three and a half weeks away. The issues presented here would take extraordinary court resources to hear in an allowance hearing or even to estimate under Section 502, and where until and unless the claims were fixed or estimated, we'd have to set up a 100 million dollar reserve.

Secondly, we here have a variant of the point I made before, which is relevant in this different context. Once again, assuming that I could deal with the predominance issues by setting up enough subclasses, the issues dealing with the twenty-six states' separate laws and the particular issues as amongst the various subclasses and other aspects of the individual nature of consumers' claims, dealing with this, would just place too much strain on the bankruptcy system and on this Court.

As Judge Rakoff observed in the Ephedra litigation, bankruptcy significantly changes the balance of factors to be considered in determining whether to allow a class action. And

class certification may be less desirable in bankruptcy than in ordinary civil litigation. See his Ephedra decision at 329 B.R. at page 5. See also Judge Lifland's analysis very recently in Blockbuster. Class-based claims have the potential to adversely affect the administration of a case by adding layers of procedural and factual complexity, siphoning the debtor's resources and interfering with the orderly progression of the reorganization.

For those reasons, among others, I must find that entertaining these claims on a class action basis would significantly complicate the GM debtors' Chapter 11 case here. Thus, on a matter where bankruptcy judges have unquestioned discretion to determine whether class action certification would inappropriately clash with bankruptcy needs and concerns, I can't authorize class action treatment here.

Finally, unlike the apartheid case, the quality of the notice here is not even debatable. The notice within the United States was unquestionably satisfactory. And as I noted before, that is, in the apartheid litigation, the filing of the GM Chapter 11 case was well known. Paraphrasing Judge Kaplan's observation back in July 2009, on a stay application from my 363 decision, the filing of the GM Chapter 11 case was an event of which no sentient American was unaware.

Here, the class is made up of U.S. citizens who are car owners and who, it may reasonably be inferred, watch

television, listen to the radio, read newspapers and knew any problems that had infected GM and had resulted in GM's bankruptcy. It would be incorrect to argue that they did not have notice. I'm not persuaded by the distinction that I heard in oral argument that I should consider notice of GM's bankruptcy to be an unsatisfactory substitute for telling people that they have problems in their vehicles with respect to their bad timing chains. If anyone had a problem with a failed timing chain, he or she would know that and could easily file a regular proof of claim in this case.

The debtors point out, without dispute, that there is no decision in this district in which the Court has ever exercised its discretion to make civil rule applicable in a Chapter 11 case, where the class was not certified pre-petition or the estate didn't consent. In this case, with confirmation just three and a half weeks away, I'm not going to be the first.

For the reasons I just summarized, I'm denying the cross motion for class certification and I'm granting the motion to disallow the claims insofar as they're asserted on behalf of absent class members. However, I will authorize the individual class representatives to file individual proofs of claim for their personal damages underlying these claims, within the later of the time agreed upon between class action plaintiffs' counsel and the debtors, or thirty days from the

entry of the order denying class certification here.

If the individual class representatives elect to avail themselves of the right I'm giving them to file individual proofs of claim, I'm ruling that their doing so will be without prejudice to any rights they have to appeal or leave to appeal.

The debtors are to settle an order in accordance with the foregoing, but they're first to consult with Mr. Schwartz and to find out from him, whether he'd like to appeal or seek leave to appeal or otherwise wants me to make full findings of fact, conclusions of law and bases for the exercise of my discretion. I have many things on my plate, and obviously I think this capsulizes the bases for my ruling. But if it's desired, I will make more extensive full findings, as I did on the apartheid decision. Mr. Schwartz is entitled to that, and if he's of a mind to, he's entitled to that before or at the time that I enter the order.

I appreciate your indulgence. We've now gone through the whole morning, and I made you wait a while for this decision. We're now adjourned. Have a good day.

(Whereupon these proceedings were concluded at 12:07 p.m.)

I N D E X

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Claims of absent class members are disallowed	36	20
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Objection Deadline: June __, 2009
Hearing Date: June __, 2009

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
CHEMTURA CORPORATION, *et al.*,[1]	)	Case No. 09-11233 (REG)
Debtors.	)	Jointly Administered

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal taxpayer-identification number, are: Chemtura Corporation (3153); A&M Cleaning Products, LLC (4712); Aqua Clear Industries, LLC (1394); ASCK, Inc. (4489); ASEPSIS, Inc. (6270); BioLab Company Store, LLC (0131); BioLab Franchise Company, LLC (6709); Bio-Lab, Inc. (8754); BioLab Textile Additives, LLC (4348); CNK Chemical Realty Corporation (5340); Crompton Colors Incorporated (3341); Crompton Holding Corporation (3342); Crompton Monochem, Inc. (3574); GLCC Laurel, LLC (5687); Great Lakes Chemical Corporation (5035); Great Lakes Chemical Global, Inc. (4486); GT Seed Treatment, Inc. (5292); HomeCare Labs, Inc. (5038); ISCI, Inc. (7696); Kem Manufacturing Corporation (0603); Laurel Industries Holdings, Inc. (3635); Monochem, Inc. (5612); Naugatuck Treatment Company (2035); Recreational Water Products, Inc. (8754); Uniroyal Chemical Company Limited (Delaware) (9910); Weber City Road LLC (4381); and WRL of Indiana, Inc. (9136).

CHEMTURA CORPORATION, Plaintiff, -against- Karen Smith, *et al.*, and John Does 1-1000, Defendants.	)	Adversary No. _____

MEMORANDUM OF LAW IN SUPPORT OF CHEMTURA CORPORATION'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION STAYING THE DIACETYL LITIGATION AND FUTURE DIACETYL ACTIONS AGAINST CHEMTURA CANADA CORPORATION AND CITRUS & ALLIED ESSENCES, LTD. AND IN OPPOSITION TO MOTIONS FOR RELIEF FROM THE STAY

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Title 11: § 362(a) 14

Chemtura Corporation ("**Chemtura**") submits this memorandum of law in support of its motion for a temporary restraining order and preliminary injunction staying the commencement and continuation of the Diacetyl Litigation and Future Diacetyl Actions against Chemtura Canada Corporation[1] ("**Chemtura Canada**") and Citrus & Allied Essences, Ltd. ("**Citrus**") and in opposition to the motions of Citrus, dated May 19, 2009, and Irma Rose Ortiz, *et al.*, dated May 28, 2009, seeking relief from the automatic stay [Docket Nos. 424 & 456]. Neither Citrus nor Chemtura Canada oppose Chemtura's motion to extend the stay, and Citrus has conceded to Chemtura's counsel that the requested extension would obviate Citrus's need to lift the stay.

INTRODUCTION

Chemtura seeks a temporary restraining order and preliminary injunction extending the automatic stay for diacetyl-related claims to Chemtura's wholly owned subsidiary, Chemtura Canada, and their exclusive reseller, Citrus. The diacetyl-related claims are potentially among the largest unsecured claims pending against the estate. Absent an immediate extension of the stay, Chemtura will be immediately forced to respond to pending third-party discovery requests from Citrus and from certain Defendants, as well as participate in the defense of both Citrus and Chemtura Canada at trials beginning this summer to protect itself from the risk of depleted insurance policies, indemnification obligations, collateral estoppel, evidentiary prejudice and/or stare decisis. Additionally, Chemtura will likely be faced with a growing number of diacetyl-related lift-stay motions in the wake of the two pending lift-stay requests. Forced to turn its efforts to defending the diacetyl litigation, key Chemtura employees—including Chemtura's General Counsel Billie Flaherty who is integral to both the Diacetyl Litigation and

[1] Chemtura Canada is not a debtor in the United States and has not filed a petition for reorganization under the applicable laws of Canada.

reorganization—will be diverted from the reorganization effort in these critical early months of its bankruptcy.

This motion and objections arise out of series of product liability lawsuits against the debtor Chemtura, its non-debtor foreign subsidiary Chemtura Canada, and third-party Citrus. The lawsuits allege that exposure to a butter flavoring ingredient ("**diacetyl**") manufactured by Chemtura Canada and resold by Citrus caused respiratory illnesses in food industry factory workers ("**Diacetyl Litigation**").

Since Chemtura and its affiliated debtors (collectively, the "**Debtors**") filed for bankruptcy on March 18, 2009, plaintiffs in the Diacetyl Litigation (together with future John Doe litigants, Citrus (as third-party plaintiff) and Ungerer & Co.,[2] the "**Diacetyl Claimants**") have ceased the prosecution of their claims directly against Chemtura. However, the Diacetyl Claimants continue to litigate against Chemtura Canada and Citrus. This continued litigation against Chemtura Canada and Citrus is adversely impacting the Debtors' estates and threatens the Debtors with irreparable harm. As will be explained in more detail below, litigation against Chemtura Canada risks the depletion of Chemtura's insurance policies and litigation against Citrus risks subjecting Chemtura to indemnification obligations. Additionally, litigation against both Chemtura Canada and Citrus is diverting key personnel from the Debtors' reorganization efforts and threatens the Debtors with potential collateral estoppel, evidentiary prejudice, and stare decisis. The harm to Chemtura is imminent because the Diacetyl Claimants are ***currently*** seeking discovery from Chemtura and preparing for trial, thereby distracting Chemtura General

[2] Ungerer & Co. is a defendant in the *Robinson* action and has brought a third-party complaint for indemnification against Citrus and Chemtura. This Motion also seeks to stay Ungerer & Co.'s claims against Citrus, which involve the same legal issues and factual allegations as Citrus's claims for indemnification against Chemtura in other suits.

Counsel Billie Flaherty and others from focusing on the reorganization during its critical, early months.

The requested stay will grant the Debtors much needed respite from the Diacetyl Litigation. This respite will allow them to focus on reorganization—thereby fulfilling the fundamental purpose of the automatic stay. The temporary stay will also afford Chemtura's counsel the opportunity to implement a consolidated strategy for resolving the Diacetyl Litigation. Using section 157(b)(5) of title 28, as well as the "related to" jurisdiction of 28 U.S.C. § 1334(b), counsel for Chemtura intends to use the stay to remove and transfer the Diacetyl Litigation to the District Court for the Southern District of New York.[3] This would permit all diacetyl-related claims against Chemtura, Chemtura Canada, and Citrus to be managed and resolved on a consolidated basis, thereby lessening the Debtors' litigation burdens, relieving costs to the estates, and saving judicial resources, with the ultimate goal of resolving the Diacetyl Litigation as effectively and expeditiously as possible. *See, e.g., Murray v. Pan American World Airlines, Inc. (In re Pan Am Corp.),* 16 F.3d 513 (2d Cir. 1994) (transferring personal injury claims from Florida state court to the Southern District of New York); *A.H. Robins Co. v. Piccinin,* 788 F.2d 994, 1011 (4th Cir.) (the purpose of § 157(b)(5) is "to centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case.'"), *cert. denied,* 479 U.S. 876 (1986).

Consolidation under this process will confer on the far-flung claims associated with the Diacetyl Litigation similar benefits to an MDL proceeding, including common resolution of key

[3] Chemtura has already initiated removal in one case, *Ortiz, et al. v. FEMA, et al.*, No. BC364831, pending in the Superior Court of California, Los Angeles County, California in order to obviate the plaintiffs' threatened objection to a motion to extend the removal deadline.

legal and factual issues that are otherwise subject to multiple and varying determinations; avoidance of the costs to the Debtors and to the judicial system associated with multiple proceedings in multiple jurisdictions; and an increased likelihood of global resolution through consolidation. Extension of the stay will create breathing room to effectuate the consolidation in an orderly fashion.

Accordingly, Chemtura respectfully requests that this Court issue an order (1) declaring that section 362(a)'s automatic stay prohibits the commencement or continuation of the Diacetyl Litigation and Future Diacetyl Actions against Chemtura Canada and Citrus or, alternatively, enjoining the Diacetyl Claimants pursuant to section 105(a) from the commencement or continuation of Diacetyl Litigation and Future Diacetyl Actions against Chemtura Canada and Citrus; (2) declaring that the stay does not apply to Chemtura's efforts to remove and transfer the Diacetyl Litigation, including Diacetyl Litigation against Chemtura Canada and Citrus;[4] and (3) denying the motions of Citrus and the Ortiz plaintiffs to lift the automatic stay.

STATEMENT OF FACTS

Diacetyl is a butter flavoring ingredient that was widely used in the food industry prior to 2005. (Compl. ¶ 8.) Chemtura Canada manufactured and sold diacetyl in the United States from 1982 through 2005. (*Id.*) Citrus was Chemtura Canada's primary customer and exclusive reseller in the United States. (*Id.* ¶ 10.) From 1982 to 1998, Chemtura Canada sold diacetyl directly to Citrus. (*See id.* ¶ 11.) After 1998, Chemtura, a debtor, acted as a "paper" intermediary. (*Id.*) Chemtura purchased from Chemtura Canada and sold to Citrus, but never

[4] Chemtura believes that removal and transfer under 28 U.S.C. § 157(b)(2)(5) is a ministerial act not subject to the stay. Chemtura requests this declaration only out of an abundance of caution, and not because such a declaration is required prior to removal and transfer.

took possession or control of the diacetyl. (*Id.*) Instead, Chemtura's involvement was primarily for invoicing purposes. (*Id.*)

Beginning in 2004, food industry factory workers began alleging that exposure to diacetyl caused respiratory illness. Products liability actions were filed across the country, alleging that diacetyl was defectively designed and manufactured, and that diacetyl manufacturers and distributors had failed to properly warn the end-users of diacetyl's dangers. Currently, there are approximately 300 such suits pending nationally, thirteen of which involve Chemtura and twelve Chemtura Canada (for a total of fourteen cases that involve either Chemtura or Chemtura Canada). (*Id.* ¶¶ 12-25, 29.) Chemtura and Chemtura Canada were also named as defendants or third-party defendants in seven actions that have since been resolved. (*Id.* ¶ 29.)

A. Nature of Claims

The fourteen diacetyl actions pending against Chemtura and Chemtura Canada can be divided into two general categories: (i) direct claims against Chemtura, Chemtura Canada, or Citrus, as well as other companies involved in the manufacture, distribution, sale or use of diacetyl, for injury arising from exposure to diacetyl; and (ii) indirect claims against Chemtura or Chemtura Canada brought by Citrus (and in one instance Ungerer) seeking indemnification or contribution. (*Id.* ¶ 30.) (Attached as Exhibit A to the Complaint is a chart summarizing the litigation against Chemtura, Chemtura Canada, and Citrus.)

In the first category—direct claims—Chemtura has been named a direct defendant in ten of the pending actions, and Chemtura Canada has been named a direct defendant in five of the pending actions. (*Id.* ¶ 31.) Citrus has also been named as a direct defendant in all of the actions in which Chemtura or Chemtura Canada are named as a direct defendant. (*Id.*)

The Diacetyl Claimants' direct claims against Chemtura, Chemtura Canada, and Citrus turn on identical legal theories, factual allegations, and defenses, including:

- ***Causation.*** Whether diacetyl was the proximate cause of the alleged injury to the Diacetyl Claimants;
- ***Design Defect.*** Whether the diacetyl was defective as designed and when manufactured;
- ***Failure to Test.*** Whether Chemtura, Chemtura Canada, and Citrus had a duty to test diacetyl before selling it;
- ***Daubert Challenges***. Whether the Diacetyl Claimants' experts on product defect, causation, and damages are qualified and/or basing their opinions on relevant and reliable methods and data; and
- ***Bulk-Supplier/Sophisticated User Defense.*** Whether the Diacetyl Claimants were sophisticated buyers and/or users of diacetyl thus relieving Citrus, Chemtura, and Chemtura Canada of any liability.

(*Id.* ¶ 32.)

In the second category—indirect claims—Citrus (and in one instance Ungerer) has brought indemnification and contribution claims, as a third- or fourth-party plaintiff, against Chemtura in three actions and against Chemtura Canada in seven actions. (*Id.* ¶ 33.) In these actions—where Chemtura and Chemtura Canada are alleged to share Citrus's liability for the Diacetyl Claimants' alleged harm caused by exposure to diacetyl—Citrus's potential liability turns on the same factors identified above. (*Id.*)

B. Current Status of Diacetyl Litigation And Burden on Chemtura

Of the fourteen suits pending against Chemtura and Chemtura Canada, only three have trial dates. (*Id.* ¶ 37.) *Campbell* is set for trial on August 31, 2009; *Millar* is set for trial on September 20, 2010; and *Solis* is set for trial on November 16, 2009. (*Id.*) The remaining eleven actions are all in various stages of discovery, and most of these are in the early stages of discovery. (*Id.* ¶ 38.) To date, Chemtura has produced documents in five of the thirteen cases

and, as of the date the automatic stay was entered, was awaiting requests in all others. (*Id.*) Chemtura Canada has produced documents in three cases. (*Id.* ¶ 40.) Neither Chemtura nor Chemtura Canada has produced witnesses for deposition in any of the fourteen cases. Chemtura Canada has not yet produced merits-related discovery, but only jurisdictional discovery. (*Id.*)

Nonetheless, the impending trials in the small minority of diacetyl-actions—*Campbell, Solis,* and *Millar*—threaten Chemtura with imminent, irreparable harm. (*Id.* ¶ 39.) Both Citrus and the plaintiffs in these actions are seeking third-party discovery from Chemtura in order to prepare for trial. (*Id.*) For example, on May 27, 2009, Citrus served a series of insurance interrogatories on Chemtura and requested that a number of depositions of Chemtura employees proceed despite the stay. (*Id.*) Citrus takes the position that it needs this discovery immediately in order to prepare for an August 2009 trial date. (Citrus Mtn. For Relief From Stay at 5-6.)

Furthermore, Chemtura anticipates that full merits discovery of Chemtura Canada in some suits remains likely, if not imminent, because several of Chemtura Canada's motions addressing these jurisdictional questions are close to resolution. (*Id.* ¶ 41.) For example, Chemtura Canada's motion in the *Campbell* case is fully-briefed and currently scheduled to be heard on June 23, 2009. (*Id.*) The parties intend to seek to postpone the hearing (and corresponding deposition discovery) until after the resolution of this motion. (*Id.*) If this motion is denied, the hearing will be rescheduled as quickly as possible, and merits discovery could commence shortly thereafter. (*Id.*) Indeed, given the August 31, 2009 trial date in the *Campbell* action, Citrus is likely to seek a fast-track discovery schedule. (*Id.*)

Counsel for Chemtura anticipates that such discovery could be extensive and would necessarily implicate the time and resources of Chemtura because, as explained below,

Chemtura's legal department oversees and coordinates Chemtura Canada's responses to discovery but is currently focused on Chemtura's reorganization efforts. *See infra* at 8-12.

C. Potential For Future Suits

In addition to the fourteen pending suits, there is a likelihood of new filings. Chemtura Canada stopped manufacturing diacetyl in 2005. (*Id.* ¶ 44.) Nonetheless, future litigants may argue that, although they were exposed to diacetyl prior to 2005, they did not learn of their injuries until later (the "**Future Diacetyl Actions**"). (*Id.*) The number of such claims is sure to increase as soon as a notice of bar date issues. (*Id*.)

D. Potential Impact of Litigation On Estates

The claims of the Diacetyl Claimants and Citrus's indemnification and contribution claims present a substantial threat to the Debtors' estates. (*Id.* ¶¶ 47-64.)

1. High Potential Dollar Value of Diacetyl Judgments and Settlements

To date, no actions against Chemtura, Chemtura Canada, or Citrus have proceeded to verdict. (*Id.* ¶ 35.) However, recovery in actions against other diacetyl manufacturers and distributors have been substantial, ranging from $2.7 to $20 million for a single claimant. (*Id.*) Settlements have also had a high dollar value. (*Id.* ¶ 36.) Upon information and belief, defendants of direct diacetyl-related claims have paid an average of $2 million per claimant. (*Id.*) The claims against Chemtura and Chemtura Canada represent forty-six individual claimants. (*Id.* ¶¶ 12-25; 29.) The claims of the Diacetyl Claimants and Citrus could be among the largest unsecured claims asserted against Chemtura's estate, and thus could have a substantial impact on Chemtura's estate and reorganization. (*Id.* ¶ 34.)

2. Diversion of Key Employees

The defense of the Diacetyl Litigation will also divert employees who are key to Chemtura's reorganization efforts. (*Id.* ¶¶ 48-59.) The same managers who are overseeing the

bankruptcy proceedings and Chemtura's reorganization have responsibility for the Diacetyl Litigation and will likely testify in Chemtura Canada's defense. (*Id.* ¶¶ 48-49.)

For example, Chemtura's General Counsel, Billie Flaherty, has been overseeing the Diacetyl Litigation for both Chemtura and Chemtura Canada since its inception and has remained responsible for the Diacetyl Litigation since her promotion to General Counsel. (*Id.* ¶ 49.) Ms. Flaherty is integral to developing the factual and legal defenses to the litigation; the preparation of Chemtura and Chemtura Canada's responses to interrogatories relating to the Diacetyl Litigation; the coordination of document collections from archives and numerous sites; and the identification and preparation of fact witnesses and designees to testify as witnesses under Federal Rule of Civil Procedure 30(b)(6) or state equivalents. (*Id.*) It is likely that plaintiffs will seek to depose Ms. Flaherty. (*Id.*)

But Ms. Flaherty's time and attention are essential to Chemtura's reorganization efforts. (*Id.* ¶ 50.) As General Counsel, Ms. Flaherty is overseeing the reorganization of Chemtura and the other Debtors. (*Id.*) Among other things Ms. Flaherty is responsible for directing the resolution of Chemtura's liabilities through the reorganization process. (*Id.*) These liabilities may be divided into six general categories:

- ***Real Property***. Ms. Flaherty runs a team of Chemtura personnel who are reviewing over 350 of the Debtors' current leases for real property and determining whether to assume or reject those leases.

- ***Environmental Litigation***. Approximately 73 properties that are currently, or were formerly, owned by various Debtors are subject to environmental remediation. Ms Flaherty has been coordinating these remediation efforts, including negotiations with numerous state governments and enforcement agencies.

- ***Pensions and Employee Benefits.*** Ms. Flaherty manages a team of Chemtura personnel who are reviewing the Debtors' pension and employee benefits programs.

- ***Utilities***. Ms. Flaherty oversees a team that is reviewing the Debtors' utility contracts for purposes of determining whether to assume or reject those contracts. Ms. Flaherty has also been involved in negotiations of adequate assurance payments to Debtors' utility providers.

- ***Executory Contracts***. Ms. Flaherty runs a team of Chemtura in-house counsel and business persons who are resolving the status of over 12,000 executory contracts.

- ***General Litigation***. In addition to the Diacetyl Litigation, over 11,000 individual litigants have claims against various Debtors.

(*Id.*)

Ms. Flaherty has primary and direct responsibility for each of these six areas of Chemtura's reorganization efforts. (*Id.* ¶ 51.) For the Debtors to have their best chances at a successful reorganization, Ms. Flaherty, the other attorneys in Chemtura's legal department, and its support personnel must remain focused on the reorganization. (*Id.*)

If the litigation against Chemtura Canada and/or Citrus were to proceed, other employees of Chemtura would also be diverted from critical reorganization efforts. (*Id.* ¶ 52.) For example, the Diacetyl Claimants and Citrus noticed the depositions of Mr. Sean O'Connor and Dr. Mark Thomson, two employees of Chemtura. (*Id.*) Additionally, Mr. O'Connor and Dr. Thomson have been identified by Chemtura as potential Rule 30(b)(6) witnesses for Chemtura Canada on particular issues. (*Id.*) In order to prepare, they will be required to read numerous documents and interview a variety of people (including both counsel and other Chemtura employees). (*Id.*)

The task of preparing Mr. O'Connor and Dr. Thomson to testify is complicated by the fact that Chemtura Canada ceased manufacturing diacetyl in 2005. (*Id.* ¶ 53.) Since then, several personnel with firsthand knowledge of these claims have left the company. (*Id.*) Thus, Mr. O'Connor's and Dr. Thomson's preparation to testify as 30(b)(6) witnesses will require significant time and attention. (*Id.*)

Both Mr. O'Connor and Dr. Thomson, however, are currently focused on Chemtura's reorganization efforts. (*Id.* ¶ 54.) Mr. O'Connor is one of Chemtura's most senior business leaders. (*Id.*) He oversees the Petroleum Additives business segment of the Performance Products Group, an important, profitable business segment. (*Id.*) Maintaining the profitability of this business segment is essential to Chemtura's emergence from bankruptcy. (*Id.*) Mr. O'Connor is also integral to the development and implementation of a five-year post-emergence business plan for the Petroleum Additives segment. (*Id.*)

Dr. Thomson is the senior toxicologist in Chemtura's Environmental Health, Safety and Regulatory Affairs department. (*Id.* ¶ 55.) He is currently overseeing Chemtura's efforts to comply with the European Union's directive on the Registration, Evaluation, Authorization and Restriction of Chemical substances ("REACH"). (*Id.*) Chemtura must comply with REACH in order to sell its product in the EU. Without the ability to sell product in the EU, Chemtura's reorganization will not be successful. (*Id.*)

Overseeing the REACH efforts is time-consuming, and Dr. Thomson's attention should not be diverted. (*Id.* ¶ 56.) REACH requires chemical manufacturers, like Chemtura, to pre-register their products for sale in the European Union before the end of 2010. (*Id.* ¶ 57.) This pre-registration process requires extensive data compilation and testing. (*Id.*) Dr. Thomson is coordinating dossier development and toxicological review of nearly 200 different chemical substances (*Id.*) He is also participates on a regular basis in a number of EU-based industry consortia and REACH-required "Substance Information and Exchange Fora," which are important activities in Chemtura's REACH compliance program. (*Id.*) Finally, Dr. Thomson is involved in performing the cost-benefit analysis as to which substances to Register under REACH, a key factor in Chemtura's business strategy for Europe. (*Id.*)

Finally, the Diacetyl Litigation raises issues that can only be addressed by Chemtura's finance department, such as historical financial information on sales and production. (*Id.* ¶ 58.) Chemtura's finance department, however, is directly engaged in reorganization efforts, such as preparing financial projections, financial analysis, and supporting efforts to develop business plans for the Debtors' product segments. (*Id.*)

In sum, the prosecution of the Diacetyl Litigation will divide the attention of those witnesses and Chemtura's managers with responsibility for litigation, thus compromising their availability to the Debtors and impeding the Debtors' reorganization efforts.[5] (*Id.* ¶ 59.)

3. Risk of Depleting Chemtura's Shared Insurance

Chemtura shares insurance with Chemtura Canada. Prior to the Petition Date, Chemtura secured general liability insurance that provides both Chemtura and Chemtura Canada coverage for diacetyl-related claims. (*Id.* ¶ 45.) These policies are underwritten by several different carriers, have varying limits and deductibles (or self insurance retentions) and have distinct terms of coverage. (*Id.*) Additionally, some policies are occurrence-based while others are claims-based. (*Id.*)

The insurance is property of the Debtors' estates. Chemtura intends to rely on the proceeds of these policies to fund its potential liabilities with regard to the diacetyl-related claims allowed pursuant to a chapter 11 plan of reorganization. (*Id.* ¶¶ 45-46.) Continued litigation against Chemtura Canada (and Citrus too because it seeks contribution and indemnification from

[5] By contrast, Chemtura's plan to transfer the claims pursuant to § 157(b)(5) will allow the District Court to manage the litigation on a consolidated basis and thereby avoid the harm to Chemtura's reorganization that will occur if the Diacetyl Litigation goes forward in an uncontrolled manner in numerous courts around the country.

Chemtura and Chemtura Canada) will deplete property of Chemtura's estate and impair Chemtura's efforts to reorganize. (*Id.*)

4. Risk of Collateral Estoppel, Evidentiary Prejudice, and Stare Decisis.

Continued prosecution of the Diacetyl Litigation against Chemtura Canada and Citrus will threaten Chemtura with the risk of collateral estoppel, evidentiary stare decisis, and evidentiary prejudice. (*Id.* ¶¶ 62-63.) The Diacetyl Claimants allege identical claims against Chemtura, Chemtura Canada, and Citrus, and intend to use the same experts against each entity as well. (*Id.* ¶ 62.) Rulings with respect to key issues in one jurisdiction therefore may be shopped to other jurisdictions.[6] (*Id.*) Even if Chemtura is not collaterally estopped, a finding that other defendants were liable on identical claims and facts could only severely prejudice the (currently stayed) litigation against Chemtura on those identical claims based on identical evidence. (*Id.* ¶ 63.)

ARGUMENT

I. THIS COURT HAS JURISDICTION TO STAY THE DIACETYL LITIGATION AS TO NON-DEBTORS.

It is beyond dispute that this Court has subject-matter jurisdiction to stay the Diacetyl Litigation as to non-debtors. The relevant subject matter jurisdiction statute—Section 1334 of Title 28—"is very broad." *Betty Owen Schools, Inc. v. United States Dep't of Educ. (In re Betty Owen Schools, Inc.)*, 195 B.R. 23, 28 (Bankr. S.D.N.Y. 1996) (citing *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995)), *aff'd in part*, 213 B.R. 633 (S.D.N.Y 1997). It provides in part: "the district courts shall have original but not exclusive jurisdiction of all civil proceedings ***arising under title 11***, or arising in ***or related to cases under title 11***." *Lyondell Chem. Co. v.*

[6] While Chemtura and Chemtura Canada intend to vigorously contest such claims, plaintiffs and other parties are likely to raise them.

CenterPoint Energy Gas Servs. Inc. (In re Lydondell Chem. Co.), 402 B.R. 571, 586 (Bankr. S.D.N.Y. 2009) (quoting 28 U.S.C. § 1334(b)) (emphasis added). In this case, the Debtors' request for injunctive relief both "arises under" title 11 and is "related to" cases under title 11.

First, the Debtors' request for injunctive relief "arises under title 11." The Debtors are seeking relief pursuant to two separate sections of Title 11: § 362(a) and § 105(a). *Lyondell*, 402 B.R. at 586 (holding that an injunction request pursuant to section 105(a) invoked the bankruptcy court's arising under jurisdiction).

Second, the Debtors request for injunctive relief is "related to cases under title 11." In this Circuit, a request is "related to" a case under title 11 where "its outcome might have any 'conceivable effect' on the bankrupt estate." *Id.* at 586-87 (quoting *Publicker Indus., Inc. v. Untied States (In re Cuyahoga Equip. Corp.)*, 980 F.2d 110, 114 (2d Cir. 1992)); *Betty Owen Schools, Inc.*, 195 B.R. at 28. Where a debtor can show that actions sought to be enjoined would either affect their ability to reorganize or the value of their estate, the debtor's request for an injunction is "related to" a chapter 11 case. *Id.* The requested injunction will both assist the Debtors in reorganizing and protect the value of their estates.

II. THE DIACETYL LITIGATION AND FUTURE DIACETYL ACTIONS SHOULD BE ENJOINED UNDER SECTIONS 362(a)(1) AND 362(a)(3) OR, ALTERNATIVELY, UNDER SECTION 105(a) OF THE BANKRUPTCY CODE.

A. The Continuation Or Commencement Of Diacetyl Litigation Against Chemtura Canada And Citrus Should Be Stayed Under Section 362(a)(1) And (3) Of The Bankruptcy Code.

The automatic stay provided by section 362 of the Bankruptcy Code is "'one of the fundamental debtor protections provided by the bankruptcy laws.'" *Midlantic Nat'l Bank. v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (quoting S.Rep. No. 95-989, p. 54 (1978)), *reh'g denied*, 475 U.S. 1090 (1986). Its purpose is "to grant complete, immediate, albeit temporary relief to the debtor from creditors," "to prevent dissipation of the debtor's assets

before orderly distribution to creditors can be effected," and "to allow the bankruptcy court to centralize all disputes covering property of the debtor's estate so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas." *Securities and Exchange Commission v. Brennan*, 230 F.3d 65, 70 (2d Cir. 2000) (internal quotations omitted).

Recognizing the stay's purpose, courts in this District and around the country will not permit creditors to end-run the stay by seeking relief against a debtor through a non-debtor entity. *North Star Contracting Corp. v. McSpedon (In re North Star Contracting Corp.),* 125 B.R. 368, 371 (S.D.N.Y. 1991). Section 362(a)'s protection extends to non-debtor third parties "when a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate" or "there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant." *Queenie, Ltd. v. Nygard Int'l*, 321 F.3d 282, 287-288 (2d Cir. 2003); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1002-08 (4th Cir.) (citing *In re Johns-Manville Corp*., 26 B.R. 405, 410 (S.D.N.Y. 1983); *see also 48th St. Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th St. Steakhouse, Inc.),* 835 F.2d 427 (2d Cir. 1987), *cert. denied*, 485 U.S. 1035 (1988); *Lyondell Chem. Co. v. CenterPoint Energy & Gas Servs., Inc. (In re Lydondell Chem. Co.)*, 402 B.R. 571, 588 n.35 (Bankr. S.D.N.Y. 2009); *Adelphia Comm'n Corp. v. The America Channel, LLC (In re Adelphia Comm'n Corp.),* 345 B.R. 69, 76 (Bankr. S.D.N.Y. 2006) ("Bankruptcy Code section 362(a)(3) protects the *in rem* jurisdiction of the Court, and prohibits interference with the disposition of the assets that are under the Court's wing—whether or not the Debtor is named as a defendant as part of the effort.").

In this case, the continued litigation against Chemtura Canada and Citrus will have an immediate, adverse impact on the Debtors' estates and the Debtors have an identity of interest

with Chemtura Canada and Citrus. Thus, section 362(a)'s stay should extend to both Chemtura Canada and Citrus.

1. The continuation of litigation against Chemtura Canada and Citrus will have an immediate, adverse impact on the Debtors' estates.

An adverse judgment against Chemtura Canada will deplete the assets of the Debtors' estates. Chemtura Canada is a wholly-owned subsidiary of Chemtura, a debtor in this action. *Queenie, Ltd.*, 321 F.3d at 288 (holding that 362(a) applied to wholly-owned subsidiary of debtor). Chemtura Canada and the Debtors also share a number of insurance policies that it intends to use to cover the costs of, or liability resulting from, the Diacetyl Litigation. These policies are an asset of the estates. *See, e.g.*, *MacArthur v. Johns-Manville Corp*., 837 F.2d 89, 91-92 (2d Cir.) (holding that an insurance policy is property of the estate), *cert. denied*, 488 U.S. 868 (1988). Under the policies, joint liability coverage of the Debtors and Chemtura Canada share a fixed amount of liability coverage. Thus, an adverse judgment against, or settlement on behalf of, Chemtura Canada would deplete estate assets. *A.H. Robins Co.*, 788 F.2d at 1008 (holding that extension of the automatic stay to non-debtor codefendants was appropriate because any suit "against [the] co-defendants, if successful, would reduce and diminish the insurance fund or pool . . . and thereby affect the property of the debtor to the detriment of the debtor's creditors as a whole."); *In re Midway Airlines Corp.*, 283 B.R. 846, 852 (E.D.N.C. 2002) (holding that extension of the automatic stay to non-debtor codefendants was appropriate since the non-debtor codefendants were "covered by Debtor's corporate liability insurance policy").

Similarly, a judgment against Citrus threatens an immediate, adverse economic impact on the Debtors' estates. Citrus claims that Chemtura is obligated to indemnify it for any diacetyl-related liability. In such cases, courts routinely hold that section 362(a)'s stay extends

to the third-parties. *In re Midway Airlines Corp.*, 283 B.R. at 852 (holding that extension of the automatic stay to non-debtor codefendants was appropriate where non-debtor codefendants could require debtor to indemnify them for their liability to plaintiff); *Smith v. Dominion Bridge Corp.*, No. Civ. A. 96-7580, 1999 WL 111465, at *5 (E.D. Pa. Mar. 2, 1999) (same); *North Star Contracting Corp.*, 125 B.R. at 371 (same); *Lomas Fin. Corp. v. The N. Trust Co. (In re Lomas Fin. Corp.)*, 117 B.R. 64, 68 (S.D.N.Y. 1990), *remanded to bankruptcy court for clarification on finality of order*, 932 F.2d 147 (2d Cir. 1991)

2. There is an identity of interest between Chemtura, Chemtura Canada, and Citrus.

There is also a close identity of interest between Chemtura, Chemtura Canada, and Citrus such that a judgment against either Chemtura Canada or Citrus would, in effect, be a judgment against the Debtors. *A.H. Robins Co.*, 788 F.2d at 1002-08 (holding that 362(a) extends to third-parties where there is a close identity of interest). ***First***, Chemtura and Chemtura Canada share insurance policies, which will be depleted if continued litigation against Chemtura Canada results in settlements or adverse judgments against Chemtura Canada (and Citrus too because it seeks recovery from Chemtura and Chemtura Canada). ***Second***, Chemtura risks being forced to provide contribution to or indemnify Citrus if litigation continues against Citrus. ***Third***, Chemtura risks collateral estoppel, evidentiary prejudice, and stare decisis if litigation continues against Chemtura Canada or Citrus. ***Fourth,*** Chemtura will be forced to divert senior management time and resources, and to participate in discovery, if litigation continues against Chemtura Canada and/or Citrus, thereby sapping the Debtors' resources and impeding the reorganization process.

B. Alternatively, This Court Should Enjoin The Continuation Or Commencement Of Diacetyl Litigation Against Chemtura Canada And Citrus Under Section 105(a) Of The Bankruptcy Code.

Apart from the automatic stay, the Diacetyl Litigation against Chemtura Canada and Citrus should be enjoined pursuant to section 105(a). "[T]he Bankruptcy Court has authority under section 105 broader than the automatic stay provisions of section 362 and may use its equitable powers to assure the orderly conduct of the reorganization." *Lydonell Chem. Co.*, 402 B.R. at 587 n.33; *see also Erti v. Paine Webber Jackson & Curtis, Inc. (In re Baldwin-United Corp. Litigation)*, 765 F.2d 343, 348 (2d Cir. 1985). In particular, "the Second Circuit, courts in this District, and courts in other circuits have 'construed [section 105] liberally to enjoin suits that might impede the reorganization process,'" *In re Adelphia Communications Corp.*, 298 B.R. 49, 54 (S.D.N.Y. 2003) (quoting *Garrity v. Leffler (In re Neuman)*, 71 B.R. 567, 571 (S.D.N.Y. 1987)), including "suits by third parties against third parties," *Calpine Corp. v. Nevada Power Co. (In re Calpine Corp.)*, 354 B.R. 45, 48 (Bankr. S.D.N.Y. 2006) (collecting cases), *aff'd*, 365 B.R. 401 (S.D.N.Y. 2007).

In determining to grant a stay under section 105(a), courts in this district apply a modified version of the preliminary injunction standard: (1) whether there is a likelihood of successful reorganization; (2) whether the action sought to be enjoined would embarrass, burden, delay, or otherwise impede the reorganization proceedings or deplete estate property;[7] (3) whether the balance of harms favors the moving party; and (4) whether the public interest weighs in favor of an injunction. *Lyondell Chem. Co.*, 402 B.R. at 588-89; *Nevada Power Co. v. Calpine Corp. (In*

[7] "Courts in the Second Circuit have recognized a limited exception to the irreparable harm requirement for issuance of a preliminary injunction in the bankruptcy context where the action to be enjoined is one that threatens the reorganization process or which would impair the court's jurisdiction with respect to the case before it." *Lyondell Chem. Co.*, 402 B.R. at 590. "Thus, where the movant shows 'that the action sought to be enjoined would embarrass, burden, delay or otherwise impede the reorganization proceedings or if the stay is necessary to preserve or protect the debtor's estate or reorganization prospects, the Bankruptcy Court may issue injunctive relief.'" *Id.* (internal citation omitted); *see also Rosetta Resources v. Pogo Producing Co. (In re Calpine Corp.)*, Bankr. No.05-60200, Adversary No. 06-1757, 2007 WL 1302604, at *3 (Bankr. S.D.N.Y.); *Calpine Corp.*, 354 B.R. at 48.

re Calpine Corp.), 365 B.R. 401, 409 (S.D.N.Y. 2007); *Hawaii Structural Ironworkers Pension Trust Fund v. Calpine Corp.)*, No. 06 Civ. 5358, 2006 WL 3755175, at *4 (S.D.N.Y. Dec. 20 2006). "In evaluating these factors, the court takes a 'flexible approach and no one factor is determinative.'" *Nevada Power Co.*, 365 B.R. at 409; *Hawaii Structural Ironworkers Pension Trust Fund*, 2006 WL 3755175, at *4. Here, all four factors weigh heavily in favor of granting the requested temporary restraining order and preliminary injunction.

First, the Debtors are reasonably likely to successfully reorganize. *Lyondell Chemical Co.*, 402 B.R. at 589 (inquiry is whether the debtor has a "reasonable likelihood of a successful reorganization'"). As this Court explained in *Lyondell*, debtors in the early states of bankruptcy need not show "detailed projections of the terms or anticipated feasibility of [a] plan of reorganization," *id.* at 590 n.44 (quoting *Steven P. Nelson, D.C. P.A. v. G.E. Capital Corp.*, 140 B.R. 814, 816-17 (Bankr. M.D. Fla. 1992)), but only that they are "'on track' and they have met the challenges that have faced so far." *id*. at 590. Here, the Debtors are in the early stages of bankruptcy and are undeniably "on track." After less than three months in bankruptcy, the Debtors have obtained final approval for $400 million in DIP financing, successfully stabilized their business, and substantially restored their supply chains. A committee of unsecured creditors has been established. And, most importantly, the Debtors are currently in the process of preparing a business plan that will form the foundation for a chapter 11 plan of reorganization. "[T]here is no reason to believe or suspect that their reorganization will fail—unless, of course, the acts sought to be enjoined *cause* it to fail." *Id.* (emphasis in original).

Second, the continuation of litigation against Chemtura Canada and Citrus will impede the Debtors' reorganization efforts, thereby causing the Debtors irreparable harm. Specifically, the continuation of the Diacetyl Litigation against Chemtura Canada and Citrus will (1) deplete

estate assets; (2) divert key personnel from assisting reorganization efforts; and (3) result in collateral estoppel, evidentiary prejudice, and/or stare decisis.

Depletion of Estate Assets

As explained above, the continuation of litigation against Chemtura Canada and Citrus will deplete estate assets. Chemtura Canada and the Debtors share insurance policies that cover defense costs and liability for the Diacetyl Litigation. The policies are assets of the estate. *See, e.g., MacArthur*, 837 F.2d at 91-92. Under these policies, joint recovery of Chemtura and Chemtura Canada is capped. Continued litigation against Chemtura Canada, therefore, will deplete the estate assets through recoveries via settlement or judgment. *Hawaii Structural Ironworkers Pension Trust Fund*, 2006 WL 3755175, at *6 (granting stay under section 105(a) where non-debtor co-defendant entity shared insurance policy with debtor).

Similarly, continuation of litigation against Citrus risks the depletion of estate assets. As explained above, Citrus claims that as a mere distributor of diacetyl its liability is derivative of Chemtura and Chemtura Canada. Citrus asserts the right to indemnification by operation of law under various state law theories. Although the Debtors contest Citrus's right to indemnification, there is nonetheless a risk Citrus will prevail on its indemnification claim. Because of this risk, Chemtura must spend resources defending its interests in the diacetyl litigation. *Sudbury, Inc. v. Escott (In re Sudbury, Inc.)*, 140 B.R. 461, 464 (N.D. Ohio 1992) (granting stay under section 105 based on debtor's obligation to indemnify certain co-defendants even though "indemnities may be unenforceable" because the risk of indemnification would force the debtor to litigate regardless of whether the debtor would later prevail on the indemnification issue); *American Film Techs., Inc. v. Taritero (In re American Film Techs., Inc.)*, 175 B.R. 847, 855 (D. Del. 1994) (same).

Risk of Collateral Estoppel, Evidentiary Prejudice, and Stare Decisis

In addition to depleting of estate assets, the continued litigation against Chemtura Canada and Citrus will subject the Debtors to claims of collateral estoppel, evidentiary prejudice, and/or stare decisis. This is because the liability of Chemtura, Chemtura Canada, and Citrus to Diacetyl Claimants turns on identical legal theories, factual allegations, and defenses, including:

- ***Causation.*** Whether diacetyl was the proximate cause of the alleged injury to the Diacetyl Claimants;
- ***Design Defect.*** Whether the diacetyl was defective as designed and when manufactured;
- ***Failure to Test.*** Whether Chemtura, Chemtura Canada and Citrus had a duty to test diacetyl before selling it;
- ***Daubert Challenges***. Whether the Diacetyl Claimants' experts on product defect, causation, and damages are qualified and/or basing their opinions on relevant and reliable methods and data; and
- ***Bulk-Supplier/Sophisticated User Defense.*** Whether the Diacetyl Claimants were sophisticated buyers and/or users of diacetyl thus relieving Citrus, Chemtura, and Chemtura Canada of any liability.

Rosetta Resources v. Pogo Producing Co. (In re Calpine Corp.), Bankr. No. 05-60200, Adversary No. 06-1757, 2007 WL 1302604, at *3 (Bankr. S.D.N.Y. 2007) (holding that debtors had demonstrated a risk of irreparable harm where debtors' liability rested on same facts as co-defendant's liability, causing risk of collateral estoppel, and evidentiary prejudice); *Calpine Corp.*, 354 B.R. at 49-50 (same and collecting cases); *American Film Techs., Inc.*, 175 B.R. at 855 (same).

Diversion of Key Personnel

Continued litigation against Chemtura Canada and Citrus will also sap the Debtors' resources by forcing personnel integral to the reorganization process to devote their time and energy to the Diacetyl Litigation.

Chemtura Canada and the Debtors share key personnel. Billie Flaherty, Chemtura's General Counsel, runs the Diacetyl Litigation for both Chemtura and Chemtura Canada. Ms. Flaherty has been running the Diacetyl Litigation for years and is the Chemtura employee with the most knowledge about the Diacetyl Litigation. If the litigation is not stayed as to Chemtura Canada, Ms. Flaherty will be forced to focus her efforts on the Diacetyl Litigation. As the Debtors' chief legal officer, Ms. Flaherty is also essential to the Debtors' reorganization effort. The Diacetyl Litigation is an unnecessary and time-consuming diversion, forcing Ms. Flaherty to focus on a multiplicity of suits pending all over the country. Ms. Flaherty is ultimately responsible for all aspects of the reorganization, including overseeing the resolution of all Chemtura's real property, environmental litigation, pension and employee benefit, utility, executory contract, and general litigation liabilities. *See supra* at 9-10.

The Debtors will also be forced to assist in Chemtura Canada's fact development and document discovery. Chemtura is in possession of some of Chemtura Canada's responsive documents—in particular, certain of Chemtura Canada's financial documents and invoices sent to Citrus—and will be forced to search for, and produce those documents if the stay is not extended to Chemtura Canada. *Hawaii Structural Ironworkers Pension Turst Fund*, 2006 WL 3755175, at *5 (granting stay where onus of discovery naturally fell on the debtors who had access to facts). Chemtura Canada's document discovery is in its early stages; there has been no merits discovery but only jurisdictional discovery. When merits discovery begins, Chemtura will almost certainly be forced to produce the financial and invoicing documents, regardless of whether the litigation is stayed as to Chemtura itself.

The Debtors will also be forced to assist in Chemtura Canada's defense through fact development, depositions, and testimony. Sean O'Connor and Mark Thomson, Chemtura

employees, have been identified as deponents by the Diacetyl Claimants. Preparing them to testify as a 30(b)(6) witness, as opposed to testifying to their personal knowledge, will require extensive preparation, speaking with numerous employees, and reviewing voluminous documents. At the same time, both Mr. O'Connor and Dr. Thomson are essential to the reorganization process. Mr. O'Connor is integral to the preparation of Chemtura's five-year reemergence plan. He also oversees the Petroleum Additives business segment, an important, profitable business segment. Its continued success is vital to fund the reorganization. Dr. Thomson is the senior toxicologist in Chemtura's Environmental Health, Safety and Regulatory Affairs department. He is currently overseeing Chemtura's efforts to comply with REACH, and to register over 200 substances for sale in the EU. The registration process must be accomplished by 2010 or Chemtura will be unable to sell its product in the EU.

Additionally, Citrus has served third-party document requests directly on the Debtors. Complying with Citrus's discovery requests—and in all likelihood requests from other parties—will unduly burden the Debtors. *Calpine Corp.*, 354 B.R. at 50 (granting stay where plaintiff sought third-party discovery from debtors); *Rosetta Resources*, 2007 WL 1302604, at *3-4 (same).

Even were the Debtors not subject to discovery obligations, a "prudent debtor" would most certainly assist in litigation that, as explained above, could result in collateral estoppel, evidentiary prejudice, or stare decisis. *Nevada Power Co.*, 365 B.R. at 412 (noting that a prudent debtor would assist in litigation regardless of whether it was forcibly required to participate through discovery requests); *Rosetta Resources*, 2007 WL 1302604, at *4 (same); *Hawaii Structural Ironworkers Pension Trust Fund*, 2006 WL 3755175, at *5 (recognizing "a prudent

debtor would devote managerial and financial resources to assisting in the defense against [such an action] because of the potential impact upon a claim or suit against the debtor").

The diversion of key personnel is irreparable harm, and is, by itself, grounds for granting the stay. *See, e.g., Nevada Power Co.*, 365 B.R. at 411-12 (holding that diversion of key personnel is grounds for injunction under section 105); *Rosetta Resources*, 2007 WL 1302604, at *3-4 (same); *Hawaii Structural Ironworkers Pension Trust Fund*, 2006 WL 3755175, at *5 (same); *Lazarus Burman Assoc., L.B. v. Nat'l Westminster Bank USA (In re Lazarus Burman Assoc., L.B.)*, 161 B.R. 891, 901 (Bankr. E.D.N.Y. 1993) (holding that diversion of key employees is irreparable harm).

Third, the balance of harms weighs decisively in favor of extending the stay. In balancing harms on a stay motion, courts weigh the harm to the Debtors against the harm (or lack thereof) to the plaintiffs whose suits would be subject to stay. *Rosetta Resources*, 2007 WL 1302604, at *4. As noted above, the Debtors risk diversion of key employees, depletion of estate assets, collateral estoppel, and evidentiary prejudice. In contrast, the Diacetyl Claimants would experience only a temporary stay in their ability to prosecute their lawsuits against Chemtura Canada and Citrus—of which only three have set trial dates. *Lazarus Burman Assoc., L.B.*, 161 B.R. at 901 (relevant harm is the delay in ability to enforce rights). Moreover, Chemtura's motion is part of a coordinated strategy to consolidate all Diacetyl Litigation pending against Chemtura, Chemtura Canada, and Citrus in this District for resolution. Therefore, extending the stay to Chemtura Canada and Citrus may well ***advance*** the global resolution of this litigation, not ***delay*** it. *See, e.g., Lindsey v. O'Brien (In re Dow Corning, Inc.)*, 86 F.3d 483, 497 (6th Cir. 1996) (Consolidation pursuant to § 157(b)(5) "will further the prompt, fair and complete resolution of all claims 'related to' bankruptcy proceedings, and harmonize Section 1334(b)'s

broad jurisdictional grant with the oft-stated goal of centralizing the administration of a bankruptcy case."), *cert. denied, Official Comm. of Tort Claimants v. Dow Corning Corp.,* 519 U.S. 1071 (1997) . In any event, the Diacetyl Claimants remain free to prosecute their claims against the multiple remaining defendants in each case. *Hawaii Structural Ironworkers Pension Trust Fund*, 2006 WL 3755175, at *6 (considering plaintiffs' ability to proceed against other defendants).

Fourth, the public interest weighs in favor of extending the stay. Courts recognize that there is an overriding public interest in successful reorganization. *Hawaii Structural Ironworkers Pension Trust Fund*, 2006 WL 3755175, at *6; *Lazarus Burman Assoc., L.B.*, 161 B.R. at 901. Thus, "[e]valuation of the public interest factor of the analysis requires a balancing of the public interest in successful bankruptcy reorganizations with other competing societal interests." *Nevada Power Co.*, 365 B.R. at 413 (internal citation omitted). Here, the only competing societal interest is the immediate resolution of the Diacetyl Claimants' claims. However, given that counsel for the Debtors in the Diacetyl Litigation will use the time afforded by this stay to implement a coordinated strategy to consolidate and seek expedited resolution of the Diacetyl Litigation, this factor also weighs in favor of, and not against, granting the stay. *In re United Health Care Org.*, 210 B.R. 228 (S.D.N.Y. 1997) (holding that the conservation of judicial resources was in the public interest and weighed in favor of granting a stay under section 105), *appeal dismissed as moot*, 147 F.3d 179 (2d Cir. 1998).

III. NEITHER CITRUS NOR THE ORTIZ PLAINTIFFS HAVE DEMONSTRATED THE REQUISITE "CAUSE" FOR LIFTING THE STAY AS TO CHEMTURA.[8]

[8] The Debtors will also file this memorandum in the bankruptcy court in the form of a formal opposition to both the Citrus and Ortiz plaintiffs' motions.

Section 362(a)'s automatic say is "one of the most critical elements of bankruptcy law since the enactment in 1987 of the modern Bankruptcy Code-and indeed, going back even further, to the days of the former Bankruptcy Act." *Adelphia Comm'n Corp.*, 345 B.R. at 75. In moving to lift the automatic stay, Citrus and the Ortiz plaintiffs ignore its very purpose—"to grant complete, immediate, albeit temporary relief to the debtor from creditors." *Brennan*, 230 F.3d at 70. The Debtors are only three months into their bankruptcy; they need to focus their attention on reorganization, not the over 2,400 suits currently pending against the Debtors in this and other litigation.

Section 362(d) permits a bankruptcy court to lift the automatic stay only upon a showing of "cause." And, "[i]f the movant fails to make an initial showing of cause . . . the court should deny relief without requiring any showing from the debtor that it is entitled to continued protection." *Sonnax Indus., Inc. v. Tri Component Prods. Corp. (In re Sonnax Indus., Inc.)*, 907 F.2d 1280, 1284 (2d Cir. 1990); *see also Capital Comm'n Fed. Credit Union v. Boodrow (In re Boodrow)*, 126 F.3d 43, 48 (2d Cir. 1997) ("We have emphasized that a bankruptcy court should deny relief from the stay if the movant fails to make an initial showing of cause."), *cert. denied*, 522 U.S. 1117 (1998).

The Second Circuit has outlined a 12-factor test to determine whether good cause exists to lift the stay to allow the litigation to proceed (the "*Sonnax* factors"):

> (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for defending [the action]; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to

> equitable subordination; (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) the impact of the stay on the parties and the balance of harms.

Sonnax, 907 F.2d at 1286. In a given case, however, not all of the factors will be relevant, and the court may disregard irrelevant factors. *See Mazzeo v. Lenhart (In re Mazzeo)*, 167 F.3d 139, 143 (2d Cir. 1999). For the reasons state above, the stay should be ***extended*** to Chemtura Canada and Citrus, and not ***lifted*** as to Chemtura. If the stay is extended to Citrus, it will withdraw or adjourn indefinitely its stay relief motion, leaving only the Ortiz-plaintiffs stay motion. In addition, the relevant *Sonnax* factors weigh heavily against lifting the stay for the Ortiz action.

First, lifting the stay would not result in complete resolution of the issues. The pending motions to lift the stay relate to only two of thirteen diacetyl lawsuits pending against Chemtura. Twelve other actions remain stayed and unresolved, and more related litigation is a virtual certainty.

Second, lifting the stay would interfere with the Debtors' reorganization efforts, diverting key management from the paramount task of reorganizing during these early critical months. If the Motion is granted, other litigants asserting claims against the Debtors will similarly seek to lift the automatic stay, opening the "floodgates"; these lawsuits are two of over 2,400 lawsuits against the Debtors. *See, e.g.*, *In re Northwest Airlines Corp.*, No. 05-17930, 2006 WL 2583647 at *2 (Bankr. S.D.N.Y. Aug. 28, 2006) (denying a motion for relief from stay under the Sonnax factors where lifting the automatic stay would open the floodgates for similar motions and cause the Debtors to refocus their energies on litigation rather than emergence from chapter 11).

Third, no specialized tribunal has been established to hear this cause of action. Courts in the District are well equipped to apply state law and adjudicate complex, products matters.

Fourth, the Debtors insurers have not assumed responsibility for litigating the Diacetyl Litigation.[9] Instead, the burden and risks of this litigation falls on the Debtors themselves. The Ortiz plaintiffs' argument that the stay should be lifted because they will only seek recovery from Chemtura's insurers does nothing to relieve Chemtura of that burden. Debtors would still be forced to focus their energies on defending the litigation, divert their personnel and resources, and risk collateral estoppel and evidentiary prejudice from an adverse judgment. Moreover, it is far from clear that the Ortiz plaintiffs will be able to collect only from the insurers. There are significant self-insured retentions attached to Chemtura's policies that must be satisfied before any coverage is available.[10] For example, the lowest self-insured retention asserted by any of Chemtura's insurers is $2.5 million per occurrence (which Chemtura contests) while the other potentially applicable policies have self-insured retention amounts as high as $10 million. The insurers will only be liable for amounts above the self-insured retentions, and then, potentially only after Chemtura pays the self-insured retentions. Thus, the Ortiz plaintiffs cannot pursue Chemtura's insurers without effectively pursuing Chemtura.

Fifth, the interests of judicial economy weigh against lifting the stay. The extended stay is the first step in consolidating Diacetyl Litigation in this District for coordinated and expedited resolution. Allowing the state courts to proceed piecemeal would waste judicial and party

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9 Although an insurer has being paying the defense costs of a number of the diacetyl actions, it is unclear whether the insurer will continue to do so.

10 The Debtors reserve their rights as to the effect of Chemtura's chapter 11 filing on its obligation to satisfy the self-insured retention amounts and the insurers' respective obligations under the policies.

resources, defeat any prospect of global resolution, and undermine the core purpose of the automatic stay.

Importantly, neither Citrus's claim (based on section 157(b)(5)) nor the Ortiz plaintiffs' claims (based on mandatory abstention)[11] that state courts should hear their claims has any relevance to this stay motion. Section 157(b)(5) mandates that the District Court "shall order" where the Citrus's and Ortiz plaintiffs' claims "shall be tried." By asking this Court to permit the litigation to go forward in state court, Citrus and the Ortiz plaintiffs are attempting improperly to evade the District Court's exclusive responsibility to determine trial venue. By contrast, Chemtura's proposal to consolidate the litigation in the District Court gives full effect to § 157(b)(5)'s mandate.

Sixth, the Diacetyl Litigation as a whole is in its procedural infancy. Only three cases have trial dates, and those dates are unrealistic.

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[11] Similarly, The Ortiz plaintiffs' claim that mandatory abstention applies is both incorrect and irrelevant to their motion to lift the stay. First, mandatory abstention does not apply to the liquidation of personal injury claims, like the plaintiffs' claims. 28 U.S.C. § 157(b)(4); *Coker v. Pan American World Airways, Inc. (In re Pan American Corp.)*, 950 F.2d 839 (2d Cir. 1991) ; *Lindsey v. O'Brien (In re Dow Corning Corp.)*, 86 F.3d 482, 497 (6th Cir. 1996); *Podkolzin v. Amboy Bus Co., Inc.*, 402 B.R. 539 (E.D.N.Y. 2009); *Beck v. Victor Equipment Co., Inc.*, 277 B.R. 179 (S.D.N.Y. 2002) (noting that mandatory abstention does not apply to personal injury tort claims as many result in "unpredictable and substantial verdicts that are often produced in personal injury tort and wrongful death claims . . . [which] could have potentially deleterious effects on a debtor's estate"). Second, mandatory abstention does not apply unless a movant can show that the state court action is capable of "timely adjudication." 28 U.S.C. § 1334(c)(2); *Tow v. Credit Suisse First Boston Corp.*, No. IIVA3:04CV560, 2004 WL 1660576, *83-4 (D. Conn. July 20, 2004)No. CIVA3:04CV560, (citing *In re Worldcom, Inc. Sec. Litig.*, 293 B.R. 308, 471 (S.D.N.Y. 2003)) (holding that a "naked assertion [of the likelihood of timely adjudication] is inadequate to carry the point"). In its motion, the Ortiz plaintiffs have done nothing to show that the state court will timely adjudicate their claims. (Ortiz Br. ¶ 22, Docket No. 456.) The case is a large, complex products case; there is no set trial date; expert discovery has not occurred; and it would be inefficient to adjudicate the Ortiz plaintiffs' claims separately from other claims against the Debtor. *Conn. Res. Recovery Auth. v. Lay*, 292 B.R. 464, 471-72 (D. Conn. 2003) (noting that federal courts consider "the ramifications of the size and complexity of the litigation, and the judicial inefficiency of litigating common issues in courts across the country"); *T.A. Title Ins. Co. v. Lampl, Sable & Makoroff (In re Marcus Hook Dev't Park, Inc.*, 153 B.R. 693, 702 (W.D. Pa. 1993) (finding no timely adjudication where trial date not set). Third, whether this court should abstain from hearing the merits of the Ortiz action is not determinative of whether the Court should lift (as opposed to extend) the stay. Mandatory abstention is not one of the *Sonnex* factors. This is because, regardless of which court adjudicates the Ortiz claims, adjudication of the claims at this time will interfere with the Debtors' reorganization efforts for all the reasons set forth above.

Seventh, the impact of the stay on the parties and the balance of the harms weigh against lifting the stay. The movants have demonstrated no real harm from the stay. At most, the stay would temporarily delay their ability to prosecute claims against the Debtors. While the Ortiz plaintiffs claim that they need the judgment proceeds for medical care, they are free to assert their claims against the remaining thirteen solvent defendants. Additionally, even were they permitted to pursue Chemtura, the Ortiz plaintiffs would not quickly recover a monetary judgment they could use for medical care; they are not near trial and it is unclear whether they will have anything more than an unsecured claim against the estate (which would be paid only after confirmation of a chapter 11 plan).

In contrast, the Debtors will be irreparably harmed by the stay. As explained above, requiring the Debtors to defend the Diacetyl Litigation will deplete the estates' assets, impair their reorganization, and potentially open the floodgates to hundreds or thousands of indistinguishable lawsuits. Put simply, the stay should be extended to Chemtura Canada and Citrus, not lifted.

Finally, Citrus does not object to the extension. If this Court extends the stay to Citrus then there is no need to grant Citrus's request for relief from the stay.

CONCLUSION

For the reasons set forth above, the Debtors respectfully request that this Court extend the stay to Chemtura Canada and Citrus, declare the stay inapplicable and/or lifted as to Chemtura's efforts to remove and transfer the Diacetyl Litigation against Chemtura, Chemtura Canada and Citrus, and deny the motions of Citrus and the Ortiz plaintiffs to lift the automatic stay.

Dated: June 17, 2009

/s/ David J. Zott, P.C.

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Exhibit H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:

GENERAL MOTORS LLC IGNITION SWITCH LITIGATION

This Document Relates to All Actions

14-MD-2543 (JMF)
14-MC-2543 (JMF)

ORDER NO. 29

JESSE M. FURMAN, United States District Judge:

[Order Regarding the Effect of the Consolidated Complaints]

This matter is before the Court to address the effect of the two Consolidated Complaints filed by Lead Counsel on October 14, 2014 (14-MD-2543, Docket Nos. 345, 347) on the claims of plaintiffs in economic loss complaints who are not named as plaintiffs in those consolidated pleadings. In Order No. 7, the Court observed that Lead Counsel should review all the existing complaints and "file a consolidated or master complaint with claims on behalf of the class or classes, as appropriate. After doing so, any counsel who believed that their claims should have been included, but were not, would have an opportunity to object." (14-MD-2543, Docket No. 215 at 2-3). In Order No. 8, the Court confirmed and refined this view, ordering Lead Counsel to draft and circulate a "Consolidated Complaint with respect to all claims alleging economic loss." (14-MD-2543, Docket No. 249 at 5). Order No. 8 further provided for a period of time for plaintiffs who objected to the Consolidated Complaints to do so. (*Id.*).

On October 14, 2014, Lead Counsel filed two Consolidated Complaints. (14-MD-2543, Docket Nos. 345, 347). The first Consolidated Complaint was with respect to economic loss claims concerning GM-branded vehicles (manufactured by either General Motors Corporation ("Old GM") or General Motors LLC ("New GM")) that were acquired July 11, 2009 or later. The second Consolidated Complaint was for vehicles manufactured by Old GM and purchased

before July 11, 2009. In each, New GM was the sole defendant. Each of the Consolidated Complaints included the following caveat:

> This pleading neither waives nor dismisses any claims for relief against any defendant not included in this pleading that are asserted by any other plaintiffs in actions that have been or will be made part of this MDL proceeding, except by operation of the class notice and (with respect to any 23(b)(3) class) any opt-out provisions on claims or common questions asserted in this Complaint and certified by this Court. (14-MD-2543, Docket No. 345 at 1; 14-MD-2543, Docket No. 347 at 2).

The Consolidated Complaint as to vehicles manufactured by Old GM and purchased before July 11, 2009, further alleges that "[c]ertain claims for certain parties may, consistent with 28 U.S.C. § 1407 and the caselaw thereunder, be matters for determination on remand by transferor courts." (14-MD-2543, Docket No. 347 at 2).

The Court and certain of the parties are concerned that the above language in the Consolidated Complaints may create an ambiguity as to status of the claims made by plaintiffs who are not named as plaintiffs in the Consolidated Complaints, some of whom asserted different economic loss claims and/or named other defendants.

As is clear from the Court's orders, the Court's intent was that the consolidated complaints "would streamline and clarify the [economic loss] claims and help eliminate those that are duplicative, obsolete, or unreflective of developing facts or current law." (Order No. 7, 14-MD-2543, Docket No. 215 at 3). Having both the Consolidated Complaints and those remaining claims pending would frustrate that purpose. In order to avoid any ambiguity, by this order the Court confirms the status of any economic loss claims not included in the Consolidated Complaints.

It is therefore ordered that any economic loss allegations, claims, and defendant(s) not included in the Consolidated Complaints are hereby dismissed without prejudice (1) upon the

effective date of this Order for complaints already transferred to or filed in MDL 2543, and (2) 60 days following the date of transfer or filing for complaints that are transferred to or filed in MDL 2543 after the date of this Order but prior to June 4, 2015. For any claims dismissed pursuant to the preceding sentence, the statute of limitations shall be tolled from the date of dismissal to June 4, 2015. If any plaintiff whose claims are dismissed pursuant to this paragraph objects to dismissal of his or her allegations, claims, or any defendant(s) not named in the Consolidated Complaints, then such plaintiff may seek leave with the Court to reinstate his or her allegations or claims or the addition of such dismissed defendant(s) upon a showing of good cause within 14 days of the dismissal without prejudice. No motion or responsive pleading to any claims reinstated by the Court shall be due unless and until ordered by the Court.

Lead Counsel shall have until June 4, 2015 (*i.e.*, 30 days after May 5, 2015, the expected date for substantial completion of Phase One discovery pursuant to Order No. 20) to seek leave of Court to amend the Consolidated Complaints based upon discovery or other developments in the case after the date of this Order, including any rulings by the United States Bankruptcy Court for the Southern District of New York. Thereafter, it shall be presumed that no further amendment will be permitted, except as to factual matters and claims that are alleged for the first time in cases that are transferred to or filed in the MDL after June 4, 2015. Any claims and defendant(s) that are dismissed without prejudice and reinstated pursuant to the preceding paragraph, but which are not included in any amendment of the Consolidated Complaints filed by June 4, 2015, shall be deemed dismissed with prejudice as of the later of (a) June 4, 2015 or (b) 90 days following the date the complaint is transferred to or filed in MDL 2543.

For any complaint transferred to or filed in MDL 2543 after June 4, 2015 (a "Post-June 4, 2015 Complaint"), Lead Counsel shall have 60 days following transfer or filing to seek leave to

amend the Consolidated Complaints, for good cause shown, to address any factual matter, claims and/or defendant(s) raised for the first time in such Post-June 4, 2015 Complaint. If Lead Counsel do not seek leave to amend the Consolidated Complaints within the 60-day period, or if the requested amendment is denied by the Court, then any allegations, claims, and/or defendant(s) in the Post-June 4, 2015 Complaint not included in the Consolidated Complaints shall be dismissed with prejudice at the expiration of the 60-day period or the Court's order denying the amendment, whichever occurs first.

A list of the complaints to be dismissed without prejudice by the terms of this Order is attached hereto as Exhibit A.

SO ORDERED.

Date: December 18, 2014
New York, New York

JESSE M. FURMAN
United States District Judge

EXHIBIT A

MDL 2543 Cases With Economic Loss Allegations and/or Claims

I. Economic Loss Cases To Be Dismissed

Alers v. General Motors LLC, No. 2:14-cv-07258-JVS-AN (C.D. Cal.)

Andrews v. General Motors LLC, No. 5:14-cv-01239-ODW-AJW (C.D. Cal.)

Arnold, et al. v. General Motors LLC, et al., No. 1:14-cv-02882-RMD (N.D. Ill.)

Ashbridge v. General Motors LLC, et al., No. 2:14-cv-00463-RCM (W.D. Pa.)

Ashworth, et al. v. General Motors LLC, No. 2:14-cv-00607-JHE (N.D. Ala.)

Balls, et al. v. General Motors LLC, No. 2:14-cv-02475-JVS-AN (C.D. Cal.)

Bedford Auto v. General Motors LLC, No. 2:14-cv-11544-GCS-DRG (E.D. Mich.)

Belt v. General Motors LLC, et al, No. 1:14-cv-26520 (S.D. W.Va.)

Bender v. General Motors LLC, No. 1:14-cv-00134-TLS-RBC (N.D. Ind.)

Benton v. General Motors LLC, No. 5:14-cv-00590-JVS-AN (C.D. Cal.)

Biggs v. General Motors LLC, et al., No. 2:14-cv-11912-PDB-MKM (E.D. Mich.)

Brandt, et al. v. General Motors LLC, No. 2:14-cv-00079 (S.D. Tex.)

Brown, et al. v. General Motors LLC, No. 2:14-cv-02828-JVS-AN (C.D. Cal.)

Burton v. General Motors LLC, et al., No. 5:14-cv-00396-R (W.D. Okla.)

Camlan, Inc., et al. v. General Motors LLC, No. 8:14-cv-00535-JVS-AN (C.D. Cal.)

Childre v. General Motors LLC, et al., No. 2:14-cv-01320-KDE-MBN (E.D. La.)

Coleman v. General Motors LLC, No. 3:14-cv-00220-BAJ-SCR (M.D. La.)

Corbett, et al. v. General Motors LLC, No. 7:14-cv-00139-D (E.D.N.C.)

Cox v. General Motors LLC, et al., No. 2:14-cv-02608-JVS-AN (C.D. Cal.)

Darby v. General Motors LLC, et al., No. 5:14-cv-00676-JVS-AN (C.D. Cal.)

Deighan v. General Motors LLC, et al., No. 2:14-cv-00458-RCM (W.D. Pa.)

DeLuco v. General Motors LLC, No. 1:14-cv-02713-JMF (S.D.N.Y.)

DePalma, et al. v. General Motors LLC, et al., No. 1:14-cv-00681-YK (M.D. Pa.)

DeSutter, et al. v. General Motors LLC, No. 9:14-cv-80497-DMM (S.D. Fla.)

Detton, et al. v. General Motors LLC, et al., No. 3:14-cv-00500-MJR-PMF (S.D. Ill.)

Deushane v. General Motors LLC, et al., No. 8:14-cv-00476-JVS-AN (C.D. Cal.)

Dinco, et al. v. General Motors LLC, No. 2:14-cv-03638-JVS-AN (C.D. Cal.)

Duarte v. General Motors LLC, et al., No. 1:14-cv-21815-JAL (S.D. Fla.)

C. Edwards, et al. v. General Motors LLC, et al., No. 1:14-cv-21949-MGC (S.D. Fla.)

C. Elliott v. General Motors LLC, et al., No. 1:14-cv-11982-WGY (D. Mass.)

L. Elliott, et al. v. General Motors LLC, No. 1:14-cv-00691-KBJ (D.D.C.)

Emerson, et al. v. General Motors LLC, et al., No. 1:14-cv-21713-UU (S.D. Fla.)

Espineira v. General Motors LLC, et. al., No. 1:14-cv-21417-FAM (S.D. Fla.)

Favro v. General Motors LLC, No. 8:14-cv-00690-JVS-AN (C.D. Cal.)

Forbes v. General Motors LLC, No. 2:14-cv-02018-GP (E.D. Pa.)

Foster v. General Motors LLC, et al., No. 1:14-cv-00844-SO (N.D. Ohio)

Fugate v. General Motors LLC, No. 7:14-cv-00071-ART (E.D. Ky.)

Gebremariam v. General Motors LLC, No. 8:14-cv-00627-JVS-AN (C.D. Cal.)

Groman v. General Motors LLC, No. 1:14-cv-02458-JMF (S.D.N.Y.)

Grumet, et al. v. General Motors LLC, No. 3:14-cv-00713-JM-BGS (S.D. Cal.)

Harris, et al. v. General Motors LLC et al., No. 1:14-cv-21919-JAL (S.D. Fla.)

Henry, et al. v. General Motors LLC, et al., No. 4:14-cv-00218-DDB (E.D. Tex.)

Heuler v. General Motors LLC, No. 8:14-cv-00492-JVS-AN (C.D. Cal.)

Higginbotham v. General Motors LLC, et al., No. 4:14-cv-00306-JM (E.D. Ark.)

Holliday, et al. v. General Motors LLC, et al., No. 1:14-cv-00271-ZJH (E.D. Tex.)

Hurst v. General Motors Co., No. 2:14-cv-02619-JVS-AN (C.D. Cal.)

Ibanez, et al. v. General Motors LLC, No. 2:14-cv-05238-JVS-AN (C.D. Cal.)

Jawad v. General Motors LLC, No. 4:14-cv-11151-MAG-DRG (E.D. Mich.)

Johnson v. General Motors LLC, No. 3:14-cv-477 HTW-LRA (S.D. Miss.)

D. Jones v. General Motors LLC, No. 1:14-cv-05850-JMF (S.D.N.Y.)

P. Jones v. General Motors LLC, No. 4:14-cv-11197-MAG-DRG (E.D. Mich.)

Kandziora v. General Motors LLC, et al., No. 2:14-cv-00801-WED (E.D. Wis.)

Kelley, et al. v. General Motors Co., et al., No. 8:14-cv-00465-JVS-AN (C.D. Cal.)

Kluessendorf v. General Motors LLC, et al., No. 1:14-cv-05035 (S.D.N.Y.)

Knetzke v. General Motors LLC, et al., No. 1:14-cv-21673-JAL (S.D. Fla.)

Kosovec v. General Motors LLC, et al., No. 3:14-cv-00354-RS-EMT (N.D. Fla.)

Krause v. General Motors LLC, No. 2:14-cv-13412-DPH-DRG (E.D. Mich.)

Lannon, et al. v. General Motors LLC, et al., No. 1:14-cv-21933-KMM (S.D. Fla.)

LaReine, et al. v. General Motors LLC, et al., No. 2:14-cv-03112-JVS-AN (C.D. Cal.)

Letterio v. General Motors LLC, et al., No. 2:14-cv-00488-RCM (W.D. Pa.)

Leval v. General Motors LLC, No. 2:14-cv-00901-KDE-DEK (E.D. La.)

Levine v. General Motors LLC, No. 1:14-cv-21752-JAL (S.D. Fla.)

Lewis v. General Motors LLC, et al., No. 1:14-cv-00573-WTL-DKL (S.D. Ind.)

Maciel, et al. v. General Motors LLC, No. 4:14-cv-01339-JSW (N.D. Cal.)

Malaga et al. v. General Motors LLC, No. 8:14-cv-00533-JVS-AN (C.D. Cal.)

Markle v. General Motors LLC, et al., No. 1:14-cv-21788-FAM (S.D. Fla.)

Mazzocchi v. General Motors LLC, et al., No. 7:14-cv-02714-NSR (S.D.N.Y.)

McCarthy v. General Motors LLC, et al., No. 2:14-cv-00895-MLCF-KWR (E.D. La.)

McConnell v. General Motors LLC, No. 8:14-cv-00424-JVS-AN (C.D. Cal.)

Mullins v. General Motors LLC, No. 1:14-cv-26740 (S.D. W.Va.)

Nava v. General Motors LLC, et al., No. 8:14-cv-00755-JVS-AN (C.D. Cal.)

Nettleton v. General Motors LLC, et al., No. 4:14-cv-00318-DPM (E.D. Ark.)

Phaneuf, et al. v. General Motors LLC, No. 1:14-cv-03298-JMF (S.D.N.Y.)

Phillip, et al. v. General Motors LLC, No. 3:14-cv-08053-DGC (D. Ariz.)

Ponce v. General Motors LLC, No. 2:14-cv-02161-JVS-AN (C.D. Cal.)

Powell v. General Motors LLC, No. 1:14-cv-00963-DAP (N.D. Ohio)

Ramirez, et al. v. General Motors LLC, et al., No. 2:14-cv-02344-JVS-AN (C.D. Cal.)

Ratzlaff, et al. v. General Motors LLC, No. 2:14-cv-02424-JVS-AN (C.D. Cal.)

Roach v. General Motors LLC, et al., No. 3:14-cv-00443-DRH-DGW (S.D. Ill.)

Robinson, et al. v. General Motors LLC, et al., No. 2:14-cv-02510-JVS-AN (C.D. Cal.)

Rollins, et al. v. General Motors LLC, et al., No. 2:14-cv-13051-RHC-RSW (E.D. Mich.)

J. Ross, et al. v. General Motors LLC, et al., No. 1:14-cv-02148-KAM-JO (E.D.N.Y.)

Roush, et al. v. General Motors LLC, No. 2:14-cv-04095-NKL (W.D. Mo.)

Ruff, et al. v. General Motors LLC, et al., No. 3:14-cv-02375-PGS-DEA (D.N.J.)

Rukeyser v. General Motors LLC, No. 1:14-cv-05715-JMF (S.D.N.Y.)

Saclo et al. v. General Motors LLC, et al., No. 8:14-cv-00604-JVS-AN (C.D. Cal.)

Salazar v. General Motors LLC, et al., No. 5:14-cv-00362-FB (W.D. Tex.)

Salerno v. General Motors LLC, et al., No. 2:14-cv-02132-JD (E.D. Pa.)

Santiago v. General Motors LLC, No. 1:14-cv-21147-KMW (S.D. Fla.)

Satele, et al. v. General Motors LLC, No. 8:14-cv-00485-JVS-AN (C.D. Cal.)

Sauer, et al. v. General Motors, et al., No. 2:14-cv-04080-SDW-MCA (D.N.J.)

Sesay, et al. v. General Motors LLC, et al., No.1:14-cv-06018-JMF (S.D.N.Y.)

Shollenberger v. General Motors LLC, No. 1:14-cv-00582-YK (M.D. Pa.)

Silvas v. General Motors LLC, No. 2:14-cv-00089 (S.D. Tex.)

Skillman v. General Motors LLC, et al., No. 1:14-cv-03326-UA (S.D.N.Y.)

Smith v. General Motors LLC, et al., No. 3:14-cv-00120-SA-SAA (N.D. Miss.)

Spangler v. General Motors LLC, No. 8:14-cv-00816-PSG-RNB (C.D. Cal.)

Stafford v. General Motors LLC, No. 3:14-cv-01702-THE (N.D. Cal.)

Stafford-Chapman v. General Motors LLC, et al., No. 1:14-cv-00474-MRB (S.D. Ohio)

Stevenson v. General Motors LLC, No. 1:14-cv-05137-UA (S.D.N.Y.)

Taylor v. General Motors Company, No. 9:14-cv-80618-DMM (S.D. Fla.)

Turpyn, et al. v. General Motors LLC, et al., No. 1:14-cv-5328-JMF (S.D.N.Y.)

Villa, et al. v. General Motors LLC, et al., No. 2:14-cv-02548-JCJ (E.D. Pa.)

Williams v. General Motors LLC, et al. No. 2:14-cv-02069-JCZ-KWR (E.D. La.)

Witherspoon v. General Motors LLC, et al., No. 4:14-cv-00425-HFS (W.D. Mo.)

Woodward v. General Motors LLC, et al., No. 1:14-cv-01877 (N.D. Ill.)

Yagman v. General Motors Company, et al., No. 2:14-cv-04696-MWF-AGR (C.D. Cal.)

II. Cases With Economic Loss Allegations and/or Claims To Be Dismissed

Boyd, et al. v. General Motors LLC, No. 4:14-cv-01205-HEA (E.D. Mo.)

Bledsoe, et al. v. General Motors LLC, No. 1:14-cv-07631-JMF (S.D.N.Y.)

Carroll v. General Motors LLC, No. 1:14-cv-01869-TSC (D.D.C.)

Dawson v. General Motors LLC, No. 1:14-cv-01459-DCN (N.D. Ohio)

Duncan v. General Motors LLC, No. 4:14-cv-00597-ODS (W.D. Mo.)

Green, et al. v. General Motors LLC, et al., No. 1:14-cv-00107 (M.D. Tenn.)

Hair, et al. v. General Motors LLC, No. 8:14-cv-00792-JLS-RNB (C.D. Cal.)

Irvin v. General Motors LLC, et al., No. 1:14-cv-00090-JAR (E.D. Mo.)

S. Jones v. General Motors LLC, No. 1:14-cv-01052-CRC (D.D.C.)

Lambeth v. General Motors LLC, No. 1:14-cv-00546-WO-LPA (M.D.N.C.)

Lowe v. General Motors LLC, No. 2:14-cv-00330-RLJ (E.D. Tenn.)

O'Neill, et al. v. General Motors LLC, No. 4:14-cv-01611-AGF (E.D. Mo.)

Proctor v. General Motors LLC, No. 8:14-cv-02403 (M.D. Fla.)

W. Ross v. General Motors LLC, et al., No. 2:14-cv-03670-ADS-ARL (E.D.N.Y.)

Seiderer, et al. v. General Motors LLC, No. 1:14-cv-09431-JMF (S.D.N.Y.)

Stidham v. Stidham, et al., No. 6:14-cv-00226-GFVT (E.D. Ky.)

Vest v. General Motors LLC, et al., No. 1:14-cv-24995-DAF (S.D. W.Va.)

Ward v. General Motors LLC, No. 1:14-cv-08317 (S.D.N.Y.)

Exhibit I

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
Chrysler LLC, *et al.*,	:	Case No. 09-50002 (AJG)
Debtors.	:	(Jointly Administered)

ORDER (I) AUTHORIZING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES, (II) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONNECTION THEREWITH AND RELATED PROCEDURES AND (III) GRANTING RELATED RELIEF

This matter coming before the Court on the motions, dated May 3, 2009 and May 22, 2009 (Docket Nos. 190 and 1742) (collectively, the "Sale Motion")[1] filed by the above-captioned debtors and debtors in possession (collectively, the "Debtors") for entry of an order (the "Sale Order"), pursuant to sections 105, 363 and 365 of the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.* (the "Bankruptcy Code"), Rules 2002, 6004, 6006, 9008 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rules 2002-1, 6004-1, 6006-1 and 9006-1(b) of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Southern District of New York: (i) authorizing and approving the entry into, performance under and terms and conditions of the Master Transaction Agreement, dated as of April 30, 2009 (collectively with all related agreements, documents or instruments and all exhibits, schedules and addenda to any of the foregoing, and as amended, the "Purchase Agreement"), substantially

[1] Unless otherwise stated, all capitalized terms not defined herein shall have the meanings given to them in the Sale Motion and the Bidding Procedures Order (as defined below).

in the form attached hereto as Exhibit A (without all of its voluminous exhibits), between and among Fiat S.p.A. ("Fiat"), New CarCo Acquisition, LLC (the "Purchaser"), a Delaware limited liability company formed by Fiat, and the Debtors,[2] whereby the Debtors have agreed to sell, and the Purchaser has agreed to purchase the "Purchased Assets" (as such term is defined in Section 2.06 of the Purchase Agreement), which Purchased Assets include, without limitation, the Assumed Agreements (as defined below), substantially all of the Debtors' tangible, intangible and operating assets related to the research, design, manufacturing, production, assembly and distribution of passenger cars, trucks and other vehicles (including prototypes) under brand names that include Chrysler, Jeep® or Dodge (the "Business"), certain of the facilities related thereto and all rights, intellectual property, trade secrets, customer lists, domain names, books and records, software and other assets used in or necessary to the operation of the Business or related thereto to the Purchaser (collectively, and including all actions taken or required to be taken in connection with the implementation and consummation of the Purchase Agreement, the "Sale Transaction"); (ii) authorizing and approving the sale by the Debtors of the Purchased Assets, free and clear of liens, claims (as such term is defined by section 101(5) of the Bankruptcy Code), liabilities, encumbrances, rights, remedies, restrictions and interests and encumbrances of any kind or nature whatsoever whether arising before or after the Petition

[2] The following Debtors are "Sellers" under the Purchase Agreement: Alpha Holding, LP ("Alpha"), Chrysler, LLC; Chrysler Aviation Inc.; Chrysler Dutch Holding LLC; Chrysler Dutch Investment LLC; Chrysler Dutch Operating Group LLC; Chrysler Institute of Engineering; Chrysler International Corporation; Chrysler International Limited, L.L.C.; Chrysler International Services, S.A.; Chrysler Motors LLC; Chrysler Realty Company LLC; Chrysler Service Contracts Florida, Inc.; Chrysler Service Contracts Inc.; Chrysler Technologies Middle East Ltd.; Chrysler Transport Inc.; Chrysler Vans LLC; DCC 929, Inc.; Dealer Capital, Inc.; Global Electric Motorcars, LLC; NEV Mobile Service, LLC; NEV Service, LLC; Peapod Mobility LLC; TPF Asset, LLC; TPF Note, LLC; and Utility Assets LLC.

any of their respective assets (including the Purchased Assets), and the transfer of the Purchased Assets to the Purchaser does not and will not subject the Purchaser or its affiliates, successors or assigns or any of their respective assets (including the Purchased Assets), to any liability for any Claims, including, without limitation, for any successor liability or any products liability for the sale of any vehicles by the Debtors or their predecessors or affiliates, except as expressly identified as an Assumed Liability.

ASSUMPTION AND ASSIGNMENT OF THE ASSUMED AGREEMENTS

CC. The assumption and assignment of the Assumed Agreements are integral to the Purchase Agreement, are in the best interests of the Debtors and their estates and represent the reasonable exercise of the Debtors' sound business judgment. (See May 27, 2009 Hearing Tr. (Testimony of Alfredo Altavilla); May 28, 2009 Hearing Tr. (Testimony of David Curson); May 28, 2009 Hearing Tr. (Testimony of Peter Grady); May 27, 2009 Hearing Tr. (Testimony of Thomas Lasorda); May 28, 2009 Hearing Tr. (Testimony of Robert Nardelli); May 28, 2009 Hearing Tr. (Testimony of James Chapman)).

DD. With respect to each of the Assumed Agreements, the Debtors have met all requirements of section 365(b) of the Bankruptcy Code. Further, the Purchaser has provided all necessary adequate assurance of future performance under the Assumed Agreements in satisfaction of sections 365(b) and 365(f) of the Bankruptcy Code. (See May 27, 2009 Hearing Tr. (Testimony of Alfredo Altavilla)). Accordingly, the Assumed Agreements can be assumed by the Debtors and assigned to the Purchaser, as provided for in the Contract Procedures set forth in the Bidding Procedures Order, the Sale Motion and the Purchase Agreement. The Contract Procedures are fair, appropriate and effective and, upon the payment by the Purchaser of all Cure Costs (which costs are the sole obligation of the Purchaser under the Purchase Agreement) and the payment of such other obligations assumed pursuant to this Sale Order and approval of the

assumption and assignment for a particular Assumed Agreement thereunder, the Debtors shall be forever released from any and all liability under the Assumed Agreement.

EE. The Purchaser has acknowledged that it will be required to comply with the National Traffic and Motor Vehicle Safety Act, as amended and recodified ("NTMVSA"), as applicable to the business of the Purchaser after the Closing Date. In addition, the Purchaser has agreed to assume as Assumed Liabilities under the Purchase Agreement and this Sale Order the Debtors' notification, remedy and other obligations under 49 U.S.C. §§ 30116 through 30120 of the NTMVSA relating to vehicles manufactured by the Debtors prior to the Closing Date that have a defect related to motor vehicle safety or do not to comply with applicable motor vehicle safety standards prescribed under the NTMVSA. The Purchaser shall not otherwise be liable for any failure by the Debtors to comply with the provisions of the NTMVSA.

FF. For the avoidance of doubt, and notwithstanding anything else in this Sale Order to the contrary:

- the Debtors are neither assuming nor assigning to the Purchaser the settlement agreement (the "2008 Settlement Agreement") between the Debtors, the UAW and certain of the Debtors' retirees, dated March 31, 2008, which was approved by the United States District Court for the Eastern District of Michigan on July 31, 2008, in the class action of *Int'l Union, UAW, et al. v. Chrysler, LLC*, Case No. 07-CV-14310 (E.D. Mich. filed Oct. 11, 2007) and established, among other things, an independent Voluntary Employee Beneficiary Association (the "VEBA") that would become responsible for retiree health care on behalf of current and future UAW retirees of the Debtors and their surviving spouses and eligible dependents (the "*English* Case VEBA") (DX 4; May 28, 2009 Hearing Tr. (Testimony of David Curson));

- the 2007 Chrysler-UAW National Agreement, including (1) the Production, Maintenance and Parts National Agreement, (2) the Engineering Office & Clerical National Agreement, (3) the Toledo Assembly Plant/Jeep Unit, Local 12 Agreement, (4) Daimler Chrysler Financial Services North America, LLC (Farmington) and (5) Daimler Chrysler Financial Services North America, LLC (Detroit), and all appendices, memoranda of understanding, supplemental agreements, local agreements and benefit plans, as modified effective April 30, 2009 (the "UAW CBA"), shall be assumed by the Debtors and assigned to the Purchaser pursuant to this Sale Order and section 365 of the Bankruptcy

Code. Assumption and assignment of the UAW CBA is integral to the Sale Transaction and the Purchase Agreement, is in the best interests of the Debtors and their estates, creditors, employees and retirees and represent the reasonable exercise of the Debtors' sound business judgment (See May 28, 2009 Hearing Tr. (Testimony of David Curson));

- the UAW, as the exclusive collective bargaining representative of employees of the Purchaser and the "authorized representative" of UAW-represented retirees of the Debtors under section 1114(c) of the Bankruptcy Code, and the Purchaser engaged in good faith negotiations in conjunction with the Sale Transaction regarding the funding of retiree health benefits within the meaning of section 1114(a) of the Bankruptcy Code. Conditioned upon the consummation of the Sale Transaction and the assumption and assignment of the UAW CBA, the UAW and the Purchaser have entered into a Retiree Settlement Agreement (the "UAW Retiree Settlement Agreement"), which, among other things, provides for the financing by the Purchaser of modified retiree health care obligations for the Class and Covered Group (as defined in the UAW Retiree Settlement Agreement) through contributions by the Purchaser to the *English* Case VEBA. The Debtors, the Purchaser and the UAW specifically intend that their actions in connection with the UAW Retiree Settlement Agreement and related undertakings incorporate the compromise of certain claims and rights and shall be deemed to satisfy the requirements of 29 U.S.C. § 186(c)(2) (See DX 4; May 28, 2009 Hearing Tr. (Testimony of David Curson)); and

- the Debtors' sponsorship of the Internal Existing VEBA (as defined in the UAW Retiree Settlement Agreement) shall be transferred to the Purchaser under the Purchase Agreement (See DX 64, at § 6.08).

VALIDITY OF THE TRANSFER

GG. As of the closing of the Sale Transaction (the "Closing"), the transfer of the Purchased Assets to the Purchaser will be a legal, valid and effective transfer of the Purchased Assets, and will vest the Purchaser with all right, title and interest of the Debtors in and to the Purchased Assets, free and clear of all Claims other than Assumed Liabilities.

HH. With the entry of this Sale Order, the Debtors (1) have full corporate power and authority to execute the Purchase Agreement and all other documents contemplated thereby, and the Sale Transaction has been duly and validly authorized by all necessary corporate action of the Debtors; (2) have all of the corporate power and authority necessary to consummate the transactions contemplated by the Purchase Agreement; (3) have taken all actions necessary to

Transaction on or after 12:00 noon, Eastern Time, on Friday June 5, 2009.[4] Any party objecting to this Sale Order must exercise due diligence in filing an appeal and pursuing a stay or risk its appeal being foreclosed as moot in the event Purchaser and the Debtors elect to close prior to this Sale Order becoming a Final Order.

58. Any amounts payable to the Purchaser shall be paid by the Debtors in the manner provided in the Purchase Agreement without further order of this Court, shall be an allowed administrative claim under sections 503(b) and 507(a)(2) of the Bankruptcy Code, shall be protected as provided in the Bidding Procedures Order and shall not be altered, amended, discharged or affected by any plan proposed or confirmed in these cases without the prior written consent of the Purchaser.

59. This Court retains jurisdiction to interpret, implement and enforce the terms and provisions of this Sale Order including to compel delivery of the Purchased Assets, to protect the Purchaser against any Claims and to enter any orders under sections 105, 363 or 365 (or other applicable provisions) of the Bankruptcy Code to transfer the Purchased Assets and the Assumed Agreements to the Purchaser.

Dated: New York, New York
June 1, 2009

s/Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE

[4] The Court considered the Debtor's request for a waiver of the stay imposed, pursuant to Bankruptcy Rules 6004(h) and 6006(d), objections filed to that request, and Debtors' modified request as of June 1, 2009, whereby Debtors' sought a waiver of the stay imposed to permit a closing to take place on Thursday, June 4, 2009 at 9:00 a.m. In their modified request, the Debtors reference the deposition testimony of Matthew Feldman, an advisor to the President's Auto Task Force, indicating that the Debtors are losing $100 million a day, and the other exigent circumstances facing Chrysler, including the continuing deterioration of its asset value, its supply chain, and its going-concern value. The Court determines that a partial waiver of the stay is justified. Any request to further modify the stay should be made to the appellate court.

Exhibit J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE:

GENERAL MOTORS LLC IGNITION SWITCH LITIGATION

This Document Relates to All Actions

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14-MD-2543 (JMF)
14-MC-2543 (JMF)

ORDER NO. 28

JESSE M. FURMAN, United States District Judge:

[Regarding Whether To Defer Briefing on Plaintiffs' Post-Sale Consolidated Complaint Until After the Bankruptcy Court Decides the Pending Motions To Enforce]

In Section IV of Order No. 22 (14-MD-2543 Docket No. 399), the Court directed the parties to brief "the threshold issue of whether and to what extent motion practice should be deferred until after Judge Gerber decides New GM's Motions to Enforce with respect to Plaintiffs' Consolidated Complaint Concerning All GM-Branded Vehicles That Were Acquired July 11, 2009 Or Later." Upon review of the parties' briefs (14-MD-2543 Docket Nos. 439-40 and 467-68), the Court concludes, with one possible exception, that all such briefing should be deferred until after Judge Gerber's decisions, substantially for the reasons provided by New GM in its memoranda of law. Plaintiffs may ultimately be proved right that the Sale Order "does not enjoin any of the claims in the Post-Sale Complaint" (14-MD-2543 Docket No. 440, at 1), but the Bankruptcy Court is tasked with deciding that question in the first instance — and Judge Gerber is in the process of doing just that with all deliberate speed.

The one possible exception is whether the Court should order briefing now on choice-of-law issues relating solely to claims brought by the nine sets of plaintiffs from seven states that — by New GM's own admission — "allege vehicles that were definitely manufactured by New GM." (14-MD-2543 Docket No. 439, at 5). If such briefing is practicable, the Court is

inclined to think it makes sense to proceed now, on the theory that (1) some or all of those claims are the most likely to survive, in some form, any Bankruptcy Court ruling; and (2) to the extent that any other claims survive the Bankruptcy Court's ruling, this Court's choice-of-law rulings with respect to those claims may expedite and narrow motion practice thereafter. The parties should confer on whether such limited briefing should proceed now (and on a proposed schedule for any such briefing, unless the schedule proposed by the parties in their joint letter of December 2, 2014 (14-MD-2543 Docket No. 445) would suffice) and be prepared to address the issue at the December 15, 2014 status conference.

SO ORDERED.

Date: December 12, 2014
New York, New York

JESSE M. FURMAN
United States District Judge