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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026-reg

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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, NY 10004-1408

February, 18, 2015
9:00 AM

B E F O R E :
HON ROBERT E. GERBER
U.S. BANKRUPTCY JUDGE

ECRO: K. HARRIS

1 **Hearing re: Oral argument on Motion to Enforce**

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1 P R O C E E D I N G S

2 CLERK: All rise.

3 THE COURT: Good morning. Have seats everybody.

4 Okay, am I correct that we're up to your reply, Mr.
5 Steinberg?

6 MR. STEINBERG: Yes, your Honor.

7 THE COURT: Come on up please.

8 MR. STEINBERG: Good morning. Arthur Steinberg
9 from King & Spalding with my colleagues from yesterday.

10 Your Honor, yesterday when I was listening to the
11 plaintiff's arguments it seemed that they were trying to
12 make this case into something that it's not. This matter is
13 not about whether Old GM personnel could have done a better
14 investigation of the ignition switch issue or other parts
15 that have been recalled.

16 The issue of what Old GM knew is relevant in this
17 hearing for a singular purpose, that being did Old GM have
18 the requisite knowledge such that economic loss plaintiffs'
19 unasserted tort claims were reasonably ascertainable. If it
20 did, arguably the economic loss plaintiffs were entitled to
21 direct mail notice. If not, publication notice was
22 sufficient.

23 Your Honor asked yesterday what was the standard
24 for reasonably ascertainable and context in this case is
25 very important. Citing to you cases that talk about

1 contractual claims or where litigation has started is
2 interesting, but the real cases are how did the courts
3 approach the situation when you had an unasserted tort
4 claim. And there when you're in that circumstance here the
5 Court looks at the distinction between what is reasonably
6 ascertainable and what is reasonably foreseeable and
7 reasonably foreseeable does not make a creditor a known
8 creditor.

9 And what plaintiffs in the GUC Trust argued
10 yesterday was the reasonably foreseeable standard. And the
11 case that best highlights what the difference was between
12 reasonably ascertainable and reasonably foreseeable in the
13 unasserted tort claim area is the Third Circuit decision in
14 Chemetron 72 2F3d 341 and Chemetron was a claims bar date
15 case and you know from yesterday my opinion that the claims
16 bar date cases are different than the sale cases. The sale
17 cases are easier the bar date cases arguable sometimes
18 require greater notice.

19 But in the Chemetron case, the Third Circuit said
20 that reasonable diligence in identifying claims does not
21 require impracticable or extended searches in the name of
22 due process. A debtor does not have a duty to search out
23 every possible creditor and urge that entity to make a claim
24 against it. So what you heard yesterday were people saying
25 the notice should have said there is a safety defect so you

1 should consider what the ramifications are and here the
2 Third Circuit is saying that even in the bar date context,
3 the notice that goes out doesn't have to urge people to file
4 a claim.

5 THE COURT: Pause please if you would Mr.
6 Steinberg because Chemetron wasn't one of the cases that I
7 read in advance. Was Chemetron, I mean I heard the language
8 you read, was that a failure to notify in the claims context
9 or a failure to notify in the 363 context?

10 MR. STEINBERG: Claims context.

11 THE COURT: And you pointed out before that a
12 higher standard might at least arguably be imposed in claims
13 when you have more time to do it than you would in a 363?

14 MR. STEINBERG: That's correct, your Honor.

15 THE COURT: Okay.

16 MR. STEINBERG: And then it goes on what is
17 required is not a vast open-ended investigation. If a
18 creditor could have been discovered upon investigation, but
19 does not in the ordinary course of business come to the
20 attention of the debtor, the creditor is not a known
21 creditor which is I think the refutation to Mr. Weisfelner's
22 argument about it should have shown up in the TREAD sheets
23 and it should have then translated to the books and records
24 of the company.

25 Then the Chemetron case focuses where the

1 requisite search should come. It said the requisite search
2 comes from the debtor's own books and records. Efforts
3 beyond a careful examination of those documents are
4 generally not required. And then the Court goes on in
5 talking about the dangers of using the reasonable
6 foreseeable test. When a reasonably foreseeable standard is
7 used, you create an impossible burden on the debtors. Such
8 a requirement would completely vitiate the important goal of
9 a prompt and effectual administration and settlement of the
10 debtor's estates. Courts should not force debtors to
11 anticipate speculative suits based on lengthy chains of
12 causation.

13 And that is, I think, the answer to your question
14 about the danger of doing what the plaintiffs and the GUC
15 Trust has urged you to do as the type of notice that should
16 be done in the 363 sale notice context. The fact of the
17 matter is they have never been able to show you anything
18 that approaches the type of notice that they're urging that
19 your Honor should have given and approved in this case.
20 There is no precedent like this. They're asking you to
21 break new ground.

22 Judge Lifland in the Spiegel case talked about the
23 same type of concepts. He said that the debtors not
24 required to employ a crystal ball when one complaint is
25 filed to determine whether any other similar claims exist.

1 Everyone who may conceivably have a claim is not entitled to
2 actual notice. Efforts beyond a careful examination of the
3 debtor's books and records are generally not required.

4 THE COURT: All right. Let me interrupt you with
5 this similar question. Is that in the 363 context or the
6 claims context?

7 MR. STEINBERG: That was a plan injunction
8 context.

9 THE COURT: Plan injunction which expunges claims.
10 Plans typically don't come early in the case, they come
11 after a while. All right, keep going.

12 MR. STEINBERG: Another example which is an In Re:
13 Agway, which is a bar date case. It was a Judge Gerling
14 case in the Northern District of New York. It was
15 interesting in that it cited three Bankruptcy Court
16 decisions from the Southern District of New York -- Brooks
17 Fashion, L.F. Rothschild and Best Products -- all for the
18 same proposition, that a debtor is not charged with the
19 knowledge or existence of a contingent claim absent a
20 claimant's express statement of its intent to lodge a claim
21 against the debtor.

22 And then, your Honor, in our briefing we cited was
23 we thought was an important case which I did not discuss
24 yesterday, but is on the same point, which is the New
25 Century case from the Bankruptcy Court in Delaware and that

1 was also a bar date case.

2 There a late file claimant asserted that she was a
3 known creditor and should have received direct mail notice
4 of the bar date because at the time of the bar date the
5 debtor had done internal investigations of the lending
6 practices that she was complaining about. There was a
7 pending examiner investigation at the time relating to those
8 lending practices and there were many, many lawsuits based
9 on such lending practices.

10 The court held that that claimant was an unknown
11 creditor and hat publication notice was proper. The
12 existence of litigation in one person does not make every
13 customer in the same category a known creditor.

14 We cited in our papers also the Enron decision,
15 also a bar date case. There a formal FERC investigation
16 commenced prior to the bar date and that did not transform a
17 contingent creditor, there the State of Montana, who
18 ultimately was determined to be a victim of Enron's market
19 manipulation, into being a known creditor.

20 And we also talked about the Burton case and the
21 Burton case we think is important on a number of different
22 grounds including this ground because in Burton, the Court
23 had to face the due process issue. The decision talks about
24 successor liability/due process and there the claimant was
25 arguing that they were future creditors, sort of like the

1 same argument that the GUC Trust made and Judge Bernstein
2 rejected that argument. And said if you weren't a future
3 creditor then you were an unknown creditor.

4 Many Burton plaintiffs were not subject to the
5 recall so the issue of whether there was a recall and that
6 distinguished Burton from our case is not relevant. Burton
7 there were two different vehicles at stake. One of them had
8 the recall, the others didn't. When Judge Bernstein ruled
9 in this matter he ruled across the board for the recalled
10 and unrecalled people and said that publication notice in
11 this case was sufficient.

12 Burton was also relevant because the judge was not
13 prepared to just accept what the parties did and he wanted
14 to enforce and protect the order that had been entered in
15 Chrysler. So when the economic loss plaintiffs asserted a
16 failure to disclose claim, he said that doesn't apply to you
17 as a matter of law because it only applies to accident
18 victims, not you, and I'm not letting you insert that claim
19 as a backdoor successor liability claim and he had that
20 claim stricken.

21 He also distinguished the Grumman case. He said
22 that Grumman is not applicable to an economic loss claim
23 situation here. And he also said that my ruling is
24 applicable not only to the original purchasers of the cars
25 before the sale, but also applicable to the people who

1 bought the cars on the used sale market after the sale. He
2 didn't draw the distinction that the plaintiffs have tried
3 to do in the pre-sale and the post-sale consolidate
4 complaint. He said across the board if you're involving an
5 old Chrysler vehicle you are barred.

6 Now against this backdrop you have three
7 dispositive facts that are not really controverted in this
8 case which I think address this issue. One is that the
9 named plaintiffs in the pre-sale consolidated complaint did
10 not file any court pleadings or otherwise commence
11 litigation against Old GM with respect to the ignition
12 switch in their vehicle so that the claimants didn't come
13 forward and assert a claim. The second --

14 THE COURT: Time out. Are you talking about in
15 Chrysler or here?

16 MR. STEINBERG: Here. Here. I've now switched to
17 the uncontroverted facts in this case that the named
18 plaintiffs in the economic loss complaints have never
19 asserted a litigation claim or asserted a claim against Old
20 GM at the time of the sale relating to the ignition switch
21 in their vehicle.

22 THE COURT: Okay. So, your point is they weren't
23 done with litigation docket. Of course, Mr. Weisfelner is
24 going to say in eight seconds in surrebuttal that's because
25 they didn't know they had a claim.

1 MR. STEINBERG: Well, that's true. That's true.
2 They could say that, but then they get to the second factor.

3 THE COURT: Okay, keep going.

4 MR. STEINBERG: The second factor is that, and you
5 heard it yesterday, that some of these people had this car
6 for five years before the sale was actually approved and
7 they never asserted a claim. So, it wasn't like they didn't
8 know that they had a claim for the month before the sale.
9 This was a situation where they were actually driving their
10 cars for five years and they didn't assert a claim and
11 that's relevant for the reasonably ascertainable, reasonably
12 foreseeable standard. So the length of time that someone
13 doesn't assert a claim becomes a relevant factor for seeing
14 whether something is reasonably ascertainable or not.

15 And then the third thing is that the Old GM books
16 and records did not show any of these liabilities to the
17 named plaintiffs. So those three factors you have right
18 here. A known creditor status for section 363 notice
19 purposes cannot depend on events that took place years
20 before the sale when there was no pending litigation as of
21 the sale.

22 Known creditor status for a Section 363 sale
23 notice purposes cannot be determined by piecing together
24 separate items of information oftentimes related to
25 different events acquired over many years by different

1 personnel and then concluding that something should have
2 been included in the books and records even though it wasn't
3 there. That is the reasonably foreseeable standard. That
4 is not what the cases say is the reasonably ascertainable
5 standards.

6 Borrowing the imputation cases, those concepts
7 that are used to show corporate liability is just not
8 germane to determining whether a claim was reasonably
9 ascertainable for Section 363 notice purposes. In a mega
10 bankruptcy case like Old GM was, with hundreds of thousands
11 of employees working for a debtor, that could never be the
12 standard for a Section 363 sale notice purposes. To impose
13 something like that would be unprecedented, would wreak
14 havoc for Section 363 sales which is a fundamental part of
15 today's Chapter 11 process.

16 I'd like to now turn to a discussion on some of
17 the cases that were highlighted by my opponents. In our
18 briefing we distinguish them and we discuss them, but I
19 think that there are five or six cases that require some
20 further noting because I think they were used for a purpose
21 that doesn't necessarily support their proposition.

22 The first was the DPWN case, which the GUC Trust
23 talked about in their presentation and this --

24 THE COURT: Are you talking about the circuit one
25 of the Gleeson one?

1 MR. STEINBERG: Well, I was going to talk about
2 the fact that Ms. Rubin was referring to the Gleeson one
3 which was the District Court opinion which was reversed by
4 the Second Circuit.

5 THE COURT: Right, so we have to slice and dice
6 John Gleeson's decision to see what parts remain after the
7 reversal and what don't.

8 MR. STEINBERG: That's right.

9 THE COURT: Okay.

10 MR. STEINBERG: And I just wanted to point out
11 that that discussion where you were referring to Judge
12 Gleeson's opinion was a decision that was ultimately
13 reversed. And when you read the opinion in the Second
14 Circuit, the Second Circuit was critical of the lower court
15 opinion, remanded it and gave him instructions of how the
16 opinion should be approached. And DPWN was a plan discharge
17 case, it wasn't a 363 case and involved a claim
18 extinguishment circumstance. And when you deal with the
19 plan discharge and the bar date case there's something
20 that's fundamental which is that the person who allegedly
21 didn't do what was correct from a due process viewpoint is
22 trying to take advantage of that and say that that claim is
23 otherwise barred. So the person who's being accused of
24 doing something wrong is now trying to hide behind the fact
25 that they did something wrong.

1 In the 363 context when someone is going against
2 the good faith purchaser for value, that construct doesn't
3 hold anymore. The purchaser didn't do anything wrong. The
4 purchaser was the good faith person who actually paid money,
5 is the bona fide purchaser and that's why those cases are
6 not necessarily matching up to the 363 context. It really
7 is essentially saying that a debtor shouldn't profit from
8 hiding its role in an antitrust conspiracy.

9 But when you slice and dice the Second Circuit
10 opinion from the District Court opinion, there are two
11 things that I think are relevant. One was the Second
12 Circuit saying a debtor will normally be less likely to be
13 charged with knowledge that it has violated the law than it
14 has when it owes money unrelated to a law violation. There
15 the letter Second Circuit is saying that it's easy to figure
16 out whether you were reasonably ascertainable in the
17 contract context where you actually have books and records
18 showing the liability. It becomes much more difficult when
19 you're dealing with violations of law which are in the
20 nature of a tort.

21 And then, which I think is highly relevant, the
22 Second Circuit also said, and this is why I think you can
23 read in that they were being critical of the lower court,
24 whether due process required United to give DHL explicit
25 notice of an antitrust claim should not be decided that the

1 appellate level before the District Court has considered
2 these matters under appropriate standards. So there the
3 Second Circuit was saying I know you looked at this as a
4 focus as to whether United should have told the claimant
5 something. I'm not sure whether that's right. I'm not
6 ruling on that issue. I've given you my guidelines of how
7 you should approach this issue. Go back and figure out
8 whether there is a cause of action that exists and there it
9 was done in the context where the Second Circuit said they
10 filed an inconsistent pleading and your Honor you should
11 have taken into account that they may not have stated a
12 cause of action.

13 So that I think is the relevant part of the DPWN
14 case that I wanted to point out to your Honor.

15 In the Excel Concrete case, there a known secured
16 creditor did not get notice of the sale. They actually sent
17 it to the wrong attorney and it was determined that the
18 proceeds were not sufficient to cover the lien. The trustee
19 who was presenting the case to the Court misrepresented to
20 the Court that the sale proceeds were sufficient to pay the
21 lien and that the purchaser -- and that he and the purchaser
22 found out that that was not the case before the sale closed.
23 So the title company closed the situation even though the
24 lien wasn't sufficient -- the proceeds weren't sufficient to
25 satisfy the lien and even though they had told the Court

1 that that was wrong, they told them an opposite thing and
2 nevertheless the title company closed and the purchaser in
3 that case was deemed not to be a bona fide purchaser. And
4 that's why the Court said this is not Edwards. Edwards
5 dealt with a bona fide purchaser situation here. Here the
6 purchaser was not a bona fide purchaser. I don't have to
7 protect that person in the context of an appeal.

8 The Folger case. The Folger case was a situation
9 where the purchaser bought accounts receivable and sued a
10 prepetition account debtor. The account debtor wanted to
11 defend by saying he had a recoupment, an affirmative defense
12 to the claim that was being asserted. The purchaser said I
13 bought this free and clear of liens and claims, I strip you
14 of your recruitment defense and there the Court said that's
15 not true. The notice of sale didn't say that affirmative
16 defenses were being extinguished by the sale, it only said
17 interests and therefore no relief like that was ever
18 authorized.

19 This was a case where the Court was basically
20 saying that account debtor can assert its defense because I
21 didn't strip them of that right in the 360(f) sale.

22 Koepf, that's the recent Second Circuit case.
23 That's not a Bankruptcy Code case. That's a railroad
24 reorganization case under Section 77 of the Bankruptcy Act.
25 There the creditor held an easement of record, but got no

1 notice of the plan which attempted to extinguish the
2 easement. The Court said that the relevant order that dealt
3 with this was the consummation order and the consummation
4 order could not extinguish this encumbrance since the
5 easement holder was not a claimant or a stockholder and the
6 consummation order only applied to holders of such rights.
7 So there the court was saying that the order that I entered
8 didn't extinguish something. It didn't have to delve into a
9 due process type right.

10 Metzger --

11 THE COURT: Stop on Koepp for a second because
12 Koepp is cited by your opponents at two levels and you dealt
13 with one of them. But they also cite it for the proposition
14 that to relieve somebody from an order of that character you
15 don't have to seek 9024 and 60(b) relief. Do you have
16 anything to tell me on that other prong that they're
17 arguing?

18 MR. STEINBERG: Yeah. I think that that's true in
19 Koepp because they didn't have to do it because the order
20 didn't authorize the relief so you didn't have to set aside
21 the relief.

22 THE COURT: So your point is that because the
23 order didn't cover it you didn't have to blow away the
24 order.

25 MR. STEINBERG: That's correct.

1 THE COURT: Okay.

2 MR. STEINBERG: Metzger. There a county with a
3 covenant that ran with the land as to a land development was
4 a known creditor entitled to direct mail notice which was
5 not provided. There was nothing in the case indicating that
6 there was publication notice. The purchaser was arguing
7 that the covenant was wiped out by the sale. The sale
8 proceeds couldn't address the issue about whether the land
9 development covenant existed or not. The Court found that
10 since the purchaser knew about the covenant it really wasn't
11 a bona fide purchaser at the time of the sale. Not our
12 situation.

13 National Pipe, and this is a case where I actually
14 think you need to understand the dynamics of what was going
15 on in this case. There the bankruptcy court, the bankruptcy
16 judge was extremely annoyed about what happened here. A
17 known --

18 THE COURT: Is this the Peter Walsh case?

19 MR. STEINBERG: That's correct. There a
20 bankruptcy judge, there in that situation a known creditors
21 who had actually sued the debtor prior to the sale and would
22 have been on the top 20 claims if they had been listed did
23 not get notice and the court said that that person should
24 get notice. Now it affected a remedy as against the
25 purchaser. But the reason why it did that was that under

1 the plan that the debtor had, an indemnity fund was set up
2 vis-à-vis the purchaser. If claims had been made against
3 the purchaser, the purchaser had the right to make a claim
4 against the indemnity fund.

5 The claim that was at issue here was less than the
6 remaining proceeds in the indemnity fund. So what the judge
7 did when he knew he was ordering this decision because he
8 granted both relief at the same time, said you could make a
9 claim against the purchaser and I'm letting the purchaser
10 make the claim against the indemnity fund and now go figure
11 it out. And what happened was the case was settled for an
12 amount that was taken out of the indemnity fund and the
13 purchaser didn't pay anything except it got some of its
14 legal fees reimbursed. That's what actually happened in
15 National Pipe.

16 Ninth Avenue v. Remedial. Creditor was at least
17 an unknown creditor. That's what the Court determined. So
18 that the publication notice was fine. The issue in that
19 case was whether a CERCLA claim arose after the sale because
20 that was when it was discovered and if so it would be
21 binding on the purchaser. Notably if the creditor could
22 assert a claim against the debtor that would have protected
23 the purchaser and since the plaintiffs here argue that they
24 were known creditors, this case actually supports New GM's
25 position.

1 Reinert. It was a Section 363 sale notice and it
2 said it did not say that it would sell free and clear of
3 specific domain names and that the claimant asserted
4 ownership in certain domain names. The Court said that the
5 sale order did not determine ownership of the domain name so
6 that the claimant was free to claim ownership to the assets
7 after the sale. That's essentially the same thing as what I
8 was saying with Koepp. There the Court was saying I don't
9 have to touch my sale order because my sale order didn't
10 strip anybody of these rights.

11 THE COURT: Because it didn't cover it in the
12 first place?

13 MR. STEINBERG: That's correct. And then the last
14 one I want to talk about is Savage Industries. There, and I
15 think your Honor is familiar with this case, no notice of
16 any kind, including publications, was provided for the sale.
17 The court did not approve the sale terms or the no successor
18 liability finding and therefore the sale procedure was so
19 deeply flawed and the order itself not covering successor
20 liability that there was no reason to enforce the sale order
21 against the claimant.

22 Your Honor may recall that in the -- at the sale
23 hearing in 2009 objectors tried to argue Savage Industries
24 to you and say that this falls within the rubric of Savage
25 Industries and your Honor quickly went back and said that's

1 not our case here. We have publication notice. It was
2 widespread.

3 THE COURT: You're being too kind. I don't
4 remember that back and forth. Was that something I
5 addressed in the opinion or do I need to go to the
6 underlying transcript?

7 MR. STEINBERG: I think it's in the transcript.
8 It's in the transcript and if your Honor at some point in
9 time we'll -- we can provide you the citation to the
10 transcript. But Savage Industries --

11 THE COURT: And that was in the back and forth in
12 that case kind of like I have with all of you guys?

13 MR. STEINBERG: That's correct. It was I think
14 Harvey Miller said something in response and then your Honor
15 picked up on that as well. So the argument -- Savage
16 Industries was clearly a case that was discussed at the sale
17 hearing and the case doesn't get better with age. It's the
18 same issue and the same reason.

19 Now, your Honor, we highlighted two things
20 yesterday that would allow you to decide these issues
21 without regard to the reasonable ascertainable due process
22 issue. In effect to sort of decide these issues on other
23 grounds and I just wanted to quickly tick them off because I
24 think it's important to know that you don't necessarily have
25 to jump into the weeds on the reason ascertainable issue if

1 you don't want to.

2 One is that we argued that there was no due
3 process violation because there was no property right
4 extinguished by the 363 sale and we gave four reasons for
5 that. Just to quickly tick them off, a 363(f) sale doesn't
6 extinguish a claim, sales attach to the proceeds of sale.
7 Two, we've cited to you and your Honor had expressed some
8 reservations about it, but we cited to you the Emoral case
9 which relied on Keane which was a Southern District case
10 which said that it's a bankruptcy estate asset and therefore
11 the debtor had the right to give it up as part of the sale
12 process.

13 Third, we highlighted to you federal preemption
14 argument which was clearly set forth in White Motor and was
15 alluded to in your sale decision in footnote 99 and four, we
16 said that as a matter of fact and law your Honor had
17 determined that there was no successor liability claim
18 because there was no continuity of ownership and that with
19 regard to the product line exception, that doesn't apply to
20 economic loss claims or would apply to pre-sale accident
21 claims.

22 And there I would just like to point out that in
23 the case of Conway v. White Trucks 885 F.2d 90 (3d Cir.
24 1989) the Court sort of dealt with this issue when it said
25 that if you add -- and it was dealing with the Pennsylvania

1 product line exception, said that if you could have made a
2 claim against the seller here, you don't have an ability to
3 go against the purchaser and in this particular case clearly
4 everybody who was a plaintiff in this case had the ability
5 to go against the seller. They had the ability to go
6 against the sale proceeds, make a claim. Whether they did
7 it or not and whether there was a problem in that, that
8 wasn't a New GM issue. That was strictly an Old GM issue,
9 Old GM presented the bar date. Old GM was responsible for
10 the notice of what was there and Old GM dealt with that.
11 It's clearly not something that New GM was dealing with.

12 The second thing I said which allows you not to
13 deal with the reasonable ascertainable issue is the
14 prejudice point and I think, your Honor, there you and I
15 when we were talking about this thing, I actually think we
16 were saying the same thing, but we were saying it in a
17 different way and maybe the best analogy was, and hopefully
18 I'm right when I say this, is that I was saying it was an
19 element of the claim and you were saying I could see it as a
20 remedy, but not as the process. And I guess the way that I
21 approached it was that when I think of a claim I think of
22 the liability aspect of something and the damage aspect of
23 something.

24 So, if someone had a due process violation that's
25 technically a --

1 THE COURT: So you're focusing on the partly
2 metaphysical distinction of whether for it to be a dup
3 violation it's got to be a violation end of discussion or
4 whether the prejudice, which I would consider as the second
5 thing that needs to be addressed, although Mr. Weisfelner
6 argued to the contrary, is part or not of the initial
7 failure to provide due process conclusion.

8 MR. STEINBERG: That's correct, your Honor. I
9 looked at it as if I were litigating a case I would
10 sometimes argue to a judge there were no damages. That's
11 the equivalent of saying no prejudice. You could have
12 argued that there was a liability, the plaintiff didn't
13 suffer any damages and therefore they have no claim. So I
14 wasn't slicing and dicing it the way that you were, I was
15 just saying that when you consider the issue overall you
16 have to consider prejudice and we cited so many cases in our
17 brief that talk about the prejudice. And, your Honor, when
18 you approach this issue at various points in time after the
19 sale also used prejudice type concepts.

20 So, in the Morgenstein case, which your Honor had,
21 you noted that the result in the plan would have been the
22 same even if they disclosed another product defect. In the
23 Robley matter you said that the publication notice guarded
24 the attention of objectors who made the same argument that
25 Robley counsel would have made, the prepetition accident

1 plaintiff's cases.

2 Your Honor was introducing the concept of no
3 prejudice here for purposes of analyzing whether there was
4 an overall due process argument that was made.

5 THE COURT: Let's go with that for a second. If I
6 agree with you that prejudice has to be shown before I grant
7 any relief for a due process violation, the distinction you
8 just articulated doesn't matter. But if I were to agree
9 with Mr. Weisfelner that I can and should grant relief
10 solely on the basis of finding a due process violation
11 without focusing on whether or not it makes a difference,
12 then the distinction you're talking would make a big
13 difference.

14 MR. STEINBERG: That's correct, your Honor, and
15 I'd like to be able to show you a couple of the no prejudice
16 arguments that will illustrate why I think I'm correct on
17 this on its most basic level. And I think it was
18 established yesterday because no one refuted it and I think
19 it's clearly true.

20 If the plaintiffs didn't get a direct mail notice,
21 but because of the publication notice, the fact that they
22 may have been trade creditors or shareholders so they got
23 notice otherwise besides being a vehicle owner, if they got
24 direct mail notice or they were aware of the sale hearing
25 because of the publication notice or the media coverage,

1 then what was the prejudice? I understand they talked about
2 you needed to specify the notice, but what's the difference
3 whether they should have gotten a mail notice or they
4 otherwise were aware of the hearing and had the ability to
5 show up?

6 That's why the cases when you read the cases they
7 say well, if you knew about the hearing anyway, if you
8 otherwise knew about it then you didn't have a prejudice and
9 that's why I went through yesterday the distinction when
10 they cited the cases that talked about merely being aware of
11 the bankruptcy filing doesn't give you awareness of the bar
12 date. Well, that's true because the bar date sets a
13 deadline for the extinguishment of a claim and merely
14 knowing that there's a bankruptcy doesn't tell you that a
15 bar date has been entered.

16 But that's not the same thing as if you were aware
17 that there was a sale hearing. If I knew that there was a
18 sale hearing and I could have shown up and I chose not to
19 show up then there's no prejudice and that's an element of
20 why I believe prejudice is an element of establishing due
21 process.

22 The argument that we made about no prejudice that
23 if they had shown up they wouldn't have said anything about
24 successor liability that your Honor hadn't heard. One of
25 the questions that your Honor had asked was what would you

1 have told me that was different? There was nothing that
2 they said that was different. There's nothing new to say.

3 That's an element of no prejudice which is if you
4 weren't going to say anything new -- that's why you see in
5 these cases that said if I had given you notice what would
6 you have said? What would have been the difference as a
7 practical matter? And if you can't articulate what the
8 difference was that would have in effect in any way change
9 the view then the ruling wasn't going to be --

10 THE COURT: Well, if I heard Mr. Weisfelner right
11 he was not arguing that it would have changed my legal
12 analysis on the successor liability issues. He was arguing
13 that if New GM had revealed to the world how bad its guys
14 had acted it would have created such a Congressional uproar
15 that Congress would have pressured Treasury or Treasury
16 would have felt so reluctant to assist GM that the whole
17 case might have been different.

18 MR. STEINBERG: Well, I think that if you want to
19 -- that was the other element which is that if the recall
20 had come to light just before the sale or during the sale
21 process and there was this massive safety defect that had to
22 be dealt with and that was going to impact what the
23 purchaser otherwise would have to pay because the purchaser
24 was taking on the recall covenant, the purchaser could have
25 backed out of the transaction I assume. And if that's the

1 case where does that get them? Right? What happens in this
2 case if this purchaser walks away from the transaction?
3 That's another element of no prejudice argument which is
4 that if they had shown up and opposed the sale and opposed
5 the no successor liability finding and the sale hadn't gone
6 through they would have been in a worse off situation than
7 they are now. That's another reason why the no prejudice
8 affects the due process argument.

9 The other thing, your Honor, is that no prejudice
10 is illustrated by the fact that the notice actually
11 attracted hundreds of objections and the arguments that
12 they're making now were made by people exactly the same and
13 your Honor considered them as part of the sale hearing. So,
14 the first thing on successor liability was that the
15 creditors committee, the fiduciary for all of the unsecured
16 creditors including the plaintiffs, the fiduciary that had
17 three tort creditors on their committee of 15, they filed an
18 objection objecting to the no successor liability finding.
19 They ultimately agreed at the end when there was a change
20 that was made to support the sale. But they were trying to
21 fight that throughout the process.

22 The Center for Auto Safety filed an objection.
23 They are a not-for-profit entity that provides consumers
24 with a voice for auto safety and quality. That's what they
25 have on their website. They stated in their objection that

1 the sale process should not release consumer claims for
2 losses as a result of defects in Old GM vehicles. They
3 argued that New GM should assume broader warranty-related
4 claims and not be shielded by successor liability. They
5 claimed it was unfair to apply the no successor liability
6 finding to vehicle owners who may not realize they had a
7 claim against Old GM as of the sale hearing.

8 Their objection was overruled and their argument
9 was also raised on the appeal of the sale order in Campbell
10 and was rejected. There were over 40 states attorney
11 generals who showed up opposing the no successor liability
12 finding including the state attorney general of California
13 who Mr. Esserman was talking about who filed another lawsuit
14 against New General Motors and they objected to the sale.
15 They argued at the sale hearing that New GM should take on
16 liability such as implied warranties, additional expressed
17 warranties, statutory warranties. They argued that the sale
18 agreement divested customers of legal rights without regard
19 to state laws that may when a claim is eventually be made be
20 made to hold otherwise. They were essentially arguing the
21 product line exception and their argument was rejected.

22 And this Court remarked in your sale decision that
23 you well understood the circumstances of the tort claimants
24 and that they could look to New General Motors as an
25 additional source of recovery. If they could not look to it

1 they would get less. But the Court recognized that if New
2 GM did not get this protection it would not close the
3 transaction and the purchaser had the right to close which
4 liabilities to assume as part of the transaction.

5 It's critical to understand that the no successor
6 liability finding was not from the perspective of any
7 individual creditor and it was not from the perspective of
8 any objectors to the sale. So it's not a matter of
9 conjecture of how the Court would have ruled if plaintiffs,
10 as compared to the other tort claimants, had raised the same
11 objection to the no successor liability finding. The result
12 was intended to apply to all creditors, the known creditors,
13 the unknown creditors and the future creditors and the
14 result would have been the same.

15 And I remarked yesterday that the issue with
16 regard to the pre-sale accident plaintiffs about expanding
17 the sale -- carving them out from protection from the no
18 successor liability was actually urged at the sale hearing
19 and they tried to make their showing that the claims aren't
20 that much and so why don't you just take them on and the
21 government said no. And then we also made the point that
22 the government had refused to pay economic loss claims and
23 that if they were not specifically assuming warranty claims
24 and tort claims, which are the retained liabilities, then it
25 automatically follows that they were not going to assume

1 economic loss claims which are built on those foundations.
2 The government refused to take on the class-action
3 settlements which were economic loss claims. The Castillo
4 case, the Dex-Cool case, the Soders case, those claims were
5 fixed. In contrast, the government certainly would not have
6 assumed economic loss claims, as now being asserted by the
7 plaintiffs, which are potentially very large and have never
8 been determined. And the government was never going to take
9 on economic loss claims for the diminution in value of a car
10 and leave the pre-sale accident victims out there. It was
11 drawing the hard line of only taking on what was
12 commercially reasonable.

13 So, your Honor, those are the four reasons why
14 that the no prejudice element, that the fact that people
15 argued the same points, the fact that no one is advancing a
16 new argument on successor liability, the no prejudice is
17 shown because they were otherwise aware of the sale hearing
18 and no prejudice is shown because if they were right they
19 would have had a worse result than they have right now.

20 All of those things determine why there was no due
21 process violation because there was no prejudice. And you
22 could either get it there directly because it's an element
23 of whether there's a claim or you can get there because you
24 decided to parse it through between liability and remedy.

25 I'd like to say a few words about the notice that

1 was sent by Old GM with regard to the sale motion. One, the
2 direct mail notice that went out included every party who
3 was in litigation with Old GM at the time. This included
4 all pre-sale accident plaintiffs who were in litigation and
5 thus any litigant suing Old GM with respect to its vehicle,
6 in essence the active plaintiffs' bar at the time got direct
7 mail notice of the sale.

8 THE COURT: Pause please, Mr. Steinberg, and if
9 you were about to answer that next forgive me. Were any of
10 the people who were suing Old GM back in 2009 suing for
11 something other than a death or injury or property damage in
12 a car wreck such as the economic types of loss that are now
13 being alleged?

14 MR. STEINBERG: I actually don't know the answer
15 to that, your Honor. I do know that in looking at some of
16 the more recent complaints it seems that they sue for
17 multiple reasons. But I don't have the answer.

18 THE COURT: Sure. But when you're in a car wreck
19 you know it. We all know that people sue for things other
20 than being in car wrecks. But I guess your answer was you
21 don't know whether back in 2009 people had sued for stuff
22 other than car wrecks.

23 MR. STEINBERG: Well, I'm sure that Old GM for
24 things other than car wrecks because Castillo, Dex-Cool and
25 Soders were those types of claims.

1 THE COURT: Oh, I see. And they got actual
2 notice.

3 MR. STEINBERG: Yeah.

4 THE COURT: Okay.

5 MR. STEINBERG: In fact, your Honor may remember
6 that was it Castillo that I argued that they got a
7 distribution in the case and therefore they had chosen their
8 remedy against Old GM and therefore that they're judicially
9 estopped from pursuing. So there was a --

10 THE COURT: You'll have to forgive me. I've had
11 20 or 25 of these decisions now and they tend to blur.

12 MR. STEINBERG: Okay. So the second point is that
13 besides now we're seeing the active form plaintiffs' bar,
14 the sale notice also included anybody who filed a notice of
15 appearance in the case. So, in this highly publicized case
16 anybody who wanted to monitor it got direct mail notice of
17 the sale.

18 And the Fourth Circuit in Vancouver Women's v.
19 A.H. Robbins, 820 F.2d 1359, properly noted that a
20 bankruptcy court approving a notice procedure must balance
21 the needs of notification of potential claimants with the
22 interest of existing creditors and claimants and bankruptcy
23 estates' resources are always limited and the bankruptcy
24 court must use discretion in balancing these interests when
25 deciding how much to spend on notification.

1 THE COURT: What case were you reading from?

2 MR. STEINBERG: This is Vancouver Women's v. A.H.
3 Robbins, 820 F.2d 1359 on page 1364 Fourth Circuit 1987.

4 THE COURT: Fourth Circuit.

5 MR. STEINBERG: Right. Now, Mr. Weisfelner said
6 it was hard for him to do the math if you had applied it to
7 27 million vehicles instead of 70 million vehicles. If you
8 accept my math in a very sort of rough basis if four million
9 people cost, four million vehicles cost \$3 million then 28
10 would cost \$21 million so the cost would be around \$20
11 million. You can quibble with me by \$1 million, but that's
12 roughly what it would cost.

13 THE COURT: All right, so in substance you were
14 just working off of cost per million.

15 MR. STEINBERG: That's correct.

16 THE COURT: In terms of sending out mail notices.

17 MR. STEINBERG: That's right and that's the way it
18 was priced in the Garden City application.

19 THE COURT: Your noticing agent, that's the way it
20 billed?

21 MR. STEINBERG: That's right. The Old GM sale
22 order was actually filed publicly on 8Ks so the original
23 sale agreement was signed on a June 1, 2009 8K, the
24 amendment was on the July 2, 2009 8K. So there was
25 additional notice of the sale agreement and what was going

1 on by virtue of securities filings. The sale motion --

2 THE COURT: Pause once again. The proposed sale
3 order, closely similar, but not identical to the one that
4 was ultimately entered on the 4th of July weekend, was filed
5 in the ECF docket on I think the first day of the case, June
6 1st. If not June 1st, June 2nd.

7 Was the proposed sale also part or an attachment
8 or an exhibit to that 8K?

9 MR. STEINBERG: I think it was just the sale
10 agreement.

11 THE COURT: The sale agreement.

12 MR. STEINBERG: That's correct.

13 THE COURT: Which provided for successor
14 liability.

15 MR. STEINBERG: Provided for no successor
16 liability.

17 THE COURT: Excuse me, for no success liability.

18 MR. STEINBERG: And set forth what the retained
19 liabilities were.

20 THE COURT: Okay.

21 MR. STEINBERG: The sale motion when it was filed,
22 the lawyers had said up front that it was not practical to
23 serve all contingent creditors and the publication notice
24 should be sufficient. And so when your Honor entered the
25 sale procedures order you said that Old GM was not required

1 to serve direct mail notice to unknown creditors and that
2 clearly pre-sale accident plaintiffs who had not commenced
3 litigation or made a claim against old GM were unknown
4 creditors.

5 Your Honor actually found that way in the Robley
6 case afterwards. At the time of the sale as well as now
7 Bankruptcy Court's for the Southern District of New York had
8 established guidelines for bankruptcy asset sales. Your
9 Honor had asked what should be the procedures. The
10 bankruptcy judges of this district have actually tried to
11 try to tell their practitioners what they think should be
12 the procedures subject to individual judges modifying it.

13 And the guidelines at the time in 2009 set forth
14 the notice procedures generally, who should get notice, and
15 what the content of the sale notice should be. The orders
16 that your Honor entered in this case were broader than the
17 guidelines. You went beyond the guidelines. The guidelines
18 don't actually say you have to notify by direct mail known
19 creditors and the publication notice that was given here was
20 to non-widely circulated people.

21 So when your Honor asked the question what should
22 be the guidelines, the courts, the judges have told the
23 practitioners they think as a general proposition the
24 guidelines should be.

25 THE COURT: Do you know whether our present

1 guidelines are the same as those we had in the summer of
2 2009?

3 MR. STEINBERG: They changed, but I don't think
4 they've changed in these points.

5 THE COURT: Do you have or do I have in have in
6 the record is the better way of putting it, what the
7 guidelines were back then? I assume I could take judicial
8 notice of --

9 MR. STEINBERG: You could take judicial notice.

10 THE COURT: -- if they're available, but I don't
11 know if we keep old guidelines on the website.

12 MR. STEINBERG: We can provide them to your Honor
13 after we show it to the other side to make sure they're
14 comfortable that we're providing the right guidelines. But
15 we can do that after this hearing.

16 THE COURT: All right.

17 MR. STEINBERG: And I said your Honor had actually
18 ruled on this notice issue in the Robley case and the Robley
19 case is actually a very important case because it was a
20 post-sale contested matter arising in the Old GM case.
21 Robley was a pre-sale accident claim and who did not sue Old
22 GM prior to the sale and the Court confirmed that Old GM was
23 not required to send direct mail notice to vehicle owners
24 who had not sued Old GM and that publication notice was
25 sufficient. So your Honor actually had this issue, not in

1 the context of the ignition switch case, but you have this
2 issue before.

3 The Court referred to the circumstances
4 surrounding the 363 sale and that Old GM did not have the
5 luxury of sending notice by mail to hundreds of thousands of
6 GM car owners. I'm being passed a note that in the Robley
7 case --

8 THE COURT: Talk into the mic if you would please.

9 MR. STEINBERG: I'm sorry, I was being passed a
10 note that the Savage Industries case was actually also
11 discussed in the Robley case that your Honor got, in the
12 Robley transcript.

13 So, Robley I think is relevant here. The pre-sale
14 accident plaintiffs in litigation, as I said, at the time of
15 the sale received direct mail notice and that was approved
16 by the Court. People refer to the Powledge matter here.
17 The Powledge matter was a circumstance where not only did
18 they get the notice, they actually filed a claim in the
19 bankruptcy case. They actually went in litigation. They
20 actually went to mediation. They actually got paid from the
21 Old GM bankruptcy estate. So, pre-sale accident plaintiffs,
22 and they're part of the group that Mr. Weintraub represents,
23 they are people who filed claims against old GM, having
24 gotten notice and actually have gotten a distribution.

25 The form of direct mail notice and the publication

1 notice was approved by the sales procedures order and that's
2 significant. Your Honor in the Chemtura case said that
3 bankruptcy judges look at the form of the notice and make a
4 judgment as to whether it was reasonably calculated to
5 achieve the notice that the Constitution and tradition
6 concepts of fairness requires.

7 Now, you know, I know that someone could say that
8 the concept of a computer is garbage in, garbage out, and I
9 don't mean to try to foist this on you saying that -- I
10 mean, you approved it based on the knowledge that you had.
11 But it's significant for purposes of the cases that the
12 notice that was actually, the notice in controversy, was
13 approved by a court and was reviewed by the court and it was
14 significant in this case in that that notice was never
15 challenged by all of the objectors to the plan including the
16 creditors committee. And it was never challenged on the
17 claim specificity notice at all too.

18 Everybody recognized that that was appropriate
19 notice. In fact I would challenge the other side to find me
20 a 363 notice that has the Chemtura specificity of specific
21 claims. I'm sure if it exists they would have put it in
22 their briefing. It doesn't exist as far as I can tell and
23 it would be crazy to do that in the context of this case
24 because Old GM was selling free and clear of all of its
25 liabilities, not just the liabilities of these plaintiffs.

1 So what would that notice have said about listing all the
2 claims that were free and clear? What would it have said
3 about listing all of the claims that would no longer be able
4 to assert a de facto merger type claim? What would that
5 notice have said? How long would it have taken? How much
6 would that have cost? How much would that have delayed the
7 sale? No one ever thinks that would make sense at all.

8 Judge Gonzales had the same issue, by the way, in
9 Chrysler and there he had the publication notice for
10 potential future tort claimants was sufficient from a due
11 process perspective. The sale decision confirmed that the
12 notice was proper. Paragraph E of the sale order says
13 potential contingent warranty claims were unknown creditors
14 entitled to publication notice. Economic loss plaintiffs
15 held contingent warranty claims, contingent in the sense
16 they had not brought their claims against Old GM as of the
17 sale, contingent in that they were arguing that they had a
18 latent design defect. The same --

19 THE COURT: Pause Mr. Steinberg. Does that suffer
20 from the potential attack of the same garbage in garbage out
21 expression used a minute ago?

22 MR. STEINBERG: Well, you know, I don't think so
23 because when someone says that it's free and clear of
24 contingent warranty claims, there's a recognition that those
25 claims haven't been asserted and you don't know what they

1 are and they could be anything. And therefore when you're
2 saying that with respect to those claims that publication
3 notice is sufficient, then I think that that's the case.

4 I think if your Honor said does that bring me back
5 to the reasonable ascertainable, reasonable foreseeable
6 standard, that probably is true. You're probably back to
7 say whether that was sufficient. It gets you back to that
8 issue.

9 But the concept that at the time that you approve
10 this you knew that you were approving publication notice for
11 what would otherwise be latent design defects, potential
12 recalls down the road, I mean, every car manufacturer does a
13 recall at some point in time. They do it every year. I
14 mean, New GM did a lot of recalls last year, but if you go
15 through the history of recalls they all do it every year.
16 It was anticipated that you could have this circumstance.
17 It was anticipated that you could have a circumstance that
18 related to Old GM conduct, the conduct of the Old GM
19 employees and that's why paragraph AA of the sale order says
20 that New GM is not assuming the conduct of Old GM whether it
21 was disclosed or whether it was undisclosed. It just wasn't
22 picking that up. It was getting that fresh start. It was
23 not assuming those liabilities at all.

24 The claim-specific notice issue. Your Honor, you
25 asked what the sale notice should have said and I think the

1 short answer is the sale notice properly said what it was
2 supposed to say. The sale would be free and clear of
3 claims, all claims except if it was an assumed liability.
4 You didn't need to break it down to its components. It gave
5 assets to the sale agreement which said that there was no
6 successor liability. The sale motion described this as a
7 special relief that was being requested there and it also
8 defined what the retained liabilities were.

9 THE COURT: I understand the benefit of oral
10 argument. I'm going back to review the briefs, particularly
11 Mr. Weintraub's brief, because the question I had asked was
12 based on I think page 26 of his brief.

13 He says that even if you had mailed the notice, if
14 you spent the, what are we talking, \$20 million bucks, is
15 that what it would have cost to send out mail notice
16 roughly? Mr. Weintraub says that even if you sent out
17 mailed notice to everybody whose car was subject to an
18 ignition switch defect, I presume like it was to the car
19 wreck victims, it wouldn't have done the job because it
20 didn't provide the information that the recall notices, if
21 they had been sent out, would have provided.

22 That's a variant of what you're saying I think.
23 Can you comment on that please?

24 MR. STEINBERG: Sure. One is that your Honor
25 actually had this issue and decided this issue with the

1 Saturn plaintiffs' case. There the Court said that
2 publication notice did not require the debtor to notify
3 claimants about the problem in their car. If anyone had a
4 problem with a failed timing chain he or she would have
5 known then and could easily have filed a regular proof of
6 claim in this case. The Court ruled that the quality of the
7 363 sale notice was not even debatable. It was
8 unquestionably satisfactory and that was right. 363 sale
9 notices --

10 THE COURT: That was one of my decisions?

11 MR. STEINBERG: It related to the Saturn
12 plaintiffs --

13 THE COURT: Yeah, that was (indiscernible). I'm
14 sorry?

15 MR. STEINBERG: It was in a transcript on February
16 10, 2011 and what I was reading from was on page 41, lines
17 16 to 42 and I think it was attached to our reply brief,
18 right? So it was part of our reply brief.

19 But your Honor was right because 363 sale notices
20 don't have this type of claim specificity. There's not a
21 precedent that's out there that says that that's what you're
22 supposed to do and that's because the focus of a 363 sale is
23 not the quantification of the liabilities or the ability to
24 assert liabilities. The purpose of the 363 sale notice is
25 to notify people that there's a sale, that this is what

1 we're trying to do and to try to get the most people bidding
2 on the asset and to try to get the best price. And there
3 was no --

4 THE COURT: Pause please. 363 notices when
5 they're done right have double or triple barreled
6 significance. The main reason why we have notices in 363
7 sales, and you don't even have to have a hearing if nobody
8 objects although of course I've never seen that, is so that
9 the creditor community is comfortable that the existing
10 captains of the ship, which are usually still debtors in
11 possession, aren't giving away the store and giving away the
12 estate's assets for too little.

13 But they also give the creditors of the world
14 notice of what the 363 orders are going to say because I've
15 never seen a 363 order, and there's a lot of people in the
16 courtroom, I don't know if anybody left in here has been
17 practicing longer than I have, they never say you're
18 authorized to do this sale. They go on for five, 10 or 100
19 pages laying out a zillion conditions, protections and other
20 things incident of the sale and I've always assumed that if
21 somebody thinks the sale itself is okay, but thinks the
22 order has offensive stuff in it he, she or it can complain.

23 And this is really a category II case. Nobody on
24 the other side of your table contends that Old GM shouldn't
25 have been sold. They're complaining about what the order

1 said. So, we can't wholly divorce ourselves, can we, from
2 the fact that people might care about both halves.

3 MR. STEINBERG: Well, your Honor, I think that
4 there are certainly circumstances where people do care about
5 both halves. I mean, in the sale order there's probably
6 five paragraphs relating to the TPC lenders which I was
7 involved in which talked about how they would be dealt with
8 as part of the sale.

9 THE COURT: Well, warehouses or something where
10 the lien is attached to the proceeds who had a valuation
11 fight on it?

12 MR. STEINBERG: That's correct. So there I think
13 it is relevant. But here what we're talking about is
14 successor liability. It was the condition to the deal.
15 There wasn't anything to debate about what the order was
16 going to say about successor liability. Either it was going
17 to be in, that there was no successor liability. You're
18 going to have paragraph 46 that said that there was no de
19 facto merger, etcetera, etcetera or there wasn't going to be
20 a sale. That was what was involved. This wasn't an aspect
21 where there were nuances here and this wasn't applied just
22 to hurt the plaintiff's bar. This was applied across the
23 board. And this wasn't something that was hidden or
24 debatable. There actually is no debate on successor
25 liability. It was an up or down proposition.

1 And the reason why I focused on the fact that the
2 sale hearing didn't try to quantify liabilities and
3 therefore Mr. Weintraub's argument I don't think holds
4 water, is that there was no evidence that was presented at
5 the sale hearing as any specific contingent liability.
6 There was no trial exhibit that was introduced to try to
7 justify the sale on that basis and that after the sale
8 hearing it's significant that when they did the bar date
9 that there were 70,000 claims that were filed and 29,000 of
10 those claims were unliquidated. People said they had
11 claims, but they couldn't put a number on it. There was no
12 attempt, it would have been ludicrous to try to deal with
13 those issues at the sale hearing and the original claims
14 filed against Old GM after the sale in the aggregate, and
15 you get this information from the disclosure statement that
16 was filed in this case, was \$270 billion.

17 THE COURT: What was that? \$270 billion?

18 MR. STEINBERG: \$270 billion.

19 THE COURT: What's that? I'm sorry.

20 MR. STEINBERG: That the aggregate unsecured
21 claims filed against Old GM as a result of the bar date.

22 THE COURT: So, if I hear you right, by the time
23 of the bar date there were \$270 billion of claims against
24 Old GM. The 29,000 and 70,000, that's number of claims I
25 take it.

1 MR. STEINBERG: That's correct. 29,000 --

2 THE COURT: And that's as of June of 2009?

3 MR. STEINBERG: That was the claims that were
4 filed, there were 29,000 of the 70,000 claims filed that
5 were unliquidated. They couldn't put a number on it.

6 THE COURT: I see and that's the number of claims
7 that asserted in the aggregate \$270 billion?

8 MR. STEINBERG: 70,000 claims asserted \$270
9 billion of claims. 29,000 of the 70,000 claims asserted
10 couldn't put a number on it.

11 THE COURT: Okay.

12 MR. STEINBERG: And your Honor may recall from
13 reading the GUC Trust reports, the allowed claims in this
14 case are somewhere between \$32 and \$33 billion. So there's
15 been an 85 percent reduction or more of the claims that were
16 filed. So no one was trying to tackle the claims. No one
17 was trying to fix the claims. No one was trying to
18 extinguish the claims and that was why I read yesterday the
19 comments where Your Honor was saying that's an issue for
20 another day.

21 So the argument about the -- should have been
22 specific notice in the sale, because you needed to identify
23 the claims, is I submit, irrelevant especially if the issue
24 was relating to successor liability which was a fundamental,
25 foundational element of the sale.

1 The other thing to sort of illustrate this point
2 was that the purchase price actually had an adjustment
3 feature that if the aggregate claims equal \$35 billion or
4 more there would be additional purchase price consideration
5 paid by New General Motors. So, there was no attempt to
6 figure out what the claims were, they didn't know. All they
7 were saying to the creditor body is you're getting a pot.
8 Augment the pot if the claims get to be too big, but we
9 can't determine that now. That will be determined
10 throughout the course of this case.

11 And there was no incentive to suppress claims as
12 part of the sale. Old GM was insolvent by billions of
13 dollars. Recognition of additional unsecured claims would
14 not have created a further impediment for the sale. In
15 fact, the more insolvent Old MS was the more compelling a
16 case was for the 363 sale. And your Honor sort of said the
17 same thing in Morgenstein when talking about the plan. It
18 said if you had another product liability claims we were
19 carving up the limited pot of assets. It wouldn't have
20 mattered. People may have gotten a little less, but it
21 wouldn't have changed anything and that would have been the
22 same thing here because the government had offered an amount
23 way beyond what anybody else would have paid. Because the
24 government, and it came out in your sale decision, was
25 paying not for the value of these assets, just the value of

1 these assets, they were paying for the impact on the
2 domestic automobile industry, the need to maintain the
3 national interest of having a domestic automobile industry,
4 preserving jobs and trying to stem a severe recession at the
5 time. This was part of government overall bailouts of
6 certain industries to try reverse the worst recession that
7 the country had exhibited since the Great Depression. So
8 the government was paying an amount way beyond what anybody
9 else would have paid.

10 And I think, your Honor, when you think about the
11 claim-specific notice you have to think about the
12 ramifications of other section 363 cases. If you accept Mr.
13 Weintraub's view and impose a duty on sellers to tell people
14 that they have a claim when their claim is not being
15 extinguished that would be unprecedented. That would have
16 cost, that would have delay. Ms. Rubin said you should use
17 the Chemtura notice. Where? Who? Who actually has ever
18 done that? What judge has ever required that? How
19 impractical a solution would that be?

20 Let me turn to the remedy section. The remedy
21 cited, the cases cited by the plaintiffs are readily
22 distinguishable from the situation at hand because notice
23 was extensively given and the Court approved the form of the
24 notice and that's much different than the cases that the
25 plaintiffs cite when there was no notice given for any of

1 the sale process and the New GM the government was a good
2 faith purchaser for value. The designated counsel brief
3 cites the U.S. Treasury as not being aware of the ignition
4 switch issue so they've essentially, even with the benefit
5 of hindsight, conceding the good faith issue. And what New
6 GM did after the sale or didn't do after the sale is not
7 relative to the good faith finding that the Court made as of
8 the sale.

9 Mr. Weintraub read from Section 363(m) of the
10 Bankruptcy Code to say that it protects the validity of the
11 sale. And I think I have used 363(m) to talk about the
12 rationale, the reasons for that to benefit bona fide
13 purchasers. He put the period in the middle of the section.
14 When the section goes on, when they talk about the validity
15 of the sale they say that it's to the entity that purchased
16 the property in good faith. So, it's not protecting the
17 validity of the transaction. It's protecting the validity
18 of the transaction to the good faith purchaser. The purpose
19 of that section is to protect on appeal the rights of the
20 bona fide purchaser for value. You need to introduce that
21 clause to understand what the section is trying to deal
22 with.

23 The plaintiffs in the GUC Trust believe that
24 notice and a bar date of a Section 363 sale or equivalent,
25 and I won't repeat again why for all the reasons I said

1 yesterday why I don't believe that's correct at all and that
2 that Mullane's due process issues are for the particular
3 circumstances and in Campbell they talked about the
4 particularities and peculiarities of the Old GM case
5 dictating what the due process notice should be.

6 The sale order specifically said New GM was not
7 responsible for Old GM's conduct and it anticipated that
8 there would be unknown claimants and future claimants that
9 would be bound by the order. It's therefore unfair to
10 fashion a remedy against New GM when the circumstances
11 complained of now was expressly contemplated by the sale
12 order. And we talked about before, and I won't delve into
13 it much more, my simple proposition is that you can't have a
14 partial revocation of the sale order and that there is no
15 difference between partially revoking the sale order to make
16 it inapplicable to the plaintiffs and entering a new order
17 holding that the sale order is inapplicable to the
18 plaintiffs. It's functionally the same thing and we're not
19 writing on a clean slate here.

20 The plaintiff suggested relief would violate the
21 integration clause of the sale order in paragraph 69 and it
22 would violate the Campbell ruling which talked about you
23 can't do elective surgery and you can't knock out the props
24 upon which the foundational element of the sale was made.

25 And your Honor actually dealt with this in the

1 Morgenstein case in a different context. When you looked at
2 saying I just want to be carved out of the plan and I want
3 to have in effect -- and your Honor said that that's really
4 a partial revocation of the plan and to say something else
5 is really just a play on words and I would say that the same
6 reasoning that your Honor did by sifting through what was
7 being asked for applies here.

8 THE COURT: What did the circuit do in the Johns-
9 Manville Chubb situation? I take it that there it was
10 pretty clear that the order as it originally came out of
11 Judge Lifland's court had covered by its literal terms in
12 this era of plain meaning and textual analysis, all that
13 stuff the Supreme Court tells us, had covered a claim of the
14 type that (indiscernible) Chubb, but the circuit exempted
15 Chubb from the application of that order even though it
16 didn't knock out the entire order.

17 MR. STEINBERG: I think that my recollection of it
18 was not that. I think the Second Circuit interpreted the
19 order saying it couldn't possibly have tried to enjoin this
20 cause of action and therefore it was never really intended -
21 -

22 THE COURT: But was that a diplomatic way of
23 saying that nobody in their right mind could have included a
24 provision of that character in the agreement or in the
25 order?

1 MR. STEINBERG: I think they actually used words
2 almost to that effect which was beyond the contemplation of
3 anybody to have included that there. So, you know, it is
4 what it is, but that's the way they dealt with the issue.

5 THE COURT: You're hitting on what would have been
6 counterintuitive to me being a bankruptcy judge for 15 years
7 and a lawyer for 30 before that. But when the circuit tells
8 me that something's okay I listen to the circuit.

9 MR. STEINBERG: Well yeah, I think if your Honor
10 was to hold that what they're asking for now was beyond what
11 you had found in the sale order and that you couldn't have
12 contemplated that you were releasing successor liability
13 then you'd have to deal with the Chubb analysis. I don't
14 think you have -- you don't have that there. Your Honor was
15 explicit when you're dealing with successor liability. You
16 were explicit about who it would be applied to. It was
17 applied across the board to anybody and therefore I think
18 Manville IV doesn't apply to this case at all. Manville IV
19 is predicated on remedies because they claim that they
20 couldn't have been contemplated at the time of a plan
21 injunction and that's not what these plaintiffs are saying.
22 These plaintiffs are saying I was a known creditor and I
23 should have had direct mail notice. They're the polar
24 opposite of the people complaining about in Manville IV.

25 And Manville IV has the issue that the injunction

1 -- by the way, the Campbell case says plan injunctions are
2 different than injunctions under a 363 sale. They're meant
3 to accomplish different purposes. The 363 sale has the
4 bankruptcy policy objectives of trying to give certainty to
5 the purchaser, finality in trying to achieve the best
6 purchase price, not necessarily involved in the same way in
7 the plan injunction. But beyond that the sale order clearly
8 tie into the res. The injunction that your Honor gives in a
9 363 sale is protecting the person who's buying the asset.
10 In the Manville IV case they're saying you enjoined the
11 claim that was a direct claim between one insurer and
12 another insurer that existed prepetition and that you had no
13 right to do that, it was beyond your jurisdiction to do
14 that.

15 There's no question you have jurisdiction to issue
16 a 363 sale injunction. In Manville IV they said they
17 couldn't have issued that injunction from the beginning and
18 therefore it was beyond their contemplation.

19 The issue as far back as in Factors' & Traders,
20 which is a Supreme Court case from I think the 1880s,
21 understood that when you deal with a sale order it's not
22 possible to in effect give partial relief to some people and
23 leave everybody else the same. It said that if you are
24 going to vacate it for one lienholder you have to vacate it
25 for all lienholders. And the fundamental element of that is

1 that it's unfair to give the plaintiffs the benefits of the
2 sale order, the fact that we actually -- New GM is doing the
3 recall now, the fact that we did glove box warranty repairs
4 throughout this entire period of time, and then say they're
5 exempt from the other provisions of the order.

6 And the cases are consistent that the plaintiff
7 should not be in a better position than they would have been
8 if notice had been given under the 363 sale notice. The
9 Stamco case, the Fernwood case, the Transaction World
10 Airlines case cautioned against providing these windfalls to
11 people who complained of the sale.

12 And then one final thing about the remedy section.
13 The GUC Trust unit holders argue -- will be arguing later
14 about equitable (indiscernible). They say it's too late to
15 fashion a remedy as against them. But you've heard Ms.
16 Rubin say yesterday that there should be a remedy that's
17 fashioned against New General Motors. I'm not sure how
18 they'll be drawing the distinction as to why they get the
19 free ride and we shouldn't, but it's clear that from New
20 GM's perspective we are five and a half years since the
21 sale, there have been billions of transactions that have
22 been done by virtue of the 363 sale. The appeal of the sale
23 order was dismissed as statutorily moot and equitably moot
24 already. So, how they think that they get a free ride and
25 those concepts don't apply to us will be a mystery to me,

1 but I'll be listening to that argument later on.

2 Finally, the Old GM claim threshold issue. With
3 regard to the used car purchasers I'd like you to think
4 about this example. If the Old GM vehicle had not been
5 resold after the 36e sale, the owners claim would be
6 subsumed in the pre-sale consolidated complaint. Claims
7 therein are conceded to be retained liabilities. In other
8 words, it's conceded that New GM was not responsible for
9 maintaining the value of Old GM vehicles sold before the 363
10 sale. The fact that an owner decides to sell its used Old
11 GM vehicle to another party in a transaction which did not
12 involve New GM cannot transform what is otherwise a retained
13 liability into an assumed liability of New GM.

14 Stated otherwise, the purchaser of a used Old GM
15 vehicle from a third-party does not have greater rights
16 against New GM than its third-party seller had against New
17 GM. It's derivative of whatever the seller could give them.

18 The fact that used car purchasers are claims are
19 really successor liability claims was further evidenced when
20 Mr. Esserman talked about the causes of actions asserted
21 against New GM in the post-sale consolidated complaint.
22 Clearly New GM did not make representations or sell the Old
23 GM vehicles to the used car purchasers or receive any of the
24 sale consideration thus causes of actions that he talked
25 about, like unjust enrichment, rescission, fraudulent

1 concealment, false advertising as set forth in the consumer
2 statutes all deal with the point of sale event and that
3 clearly has no merit to New GM who was a stranger to the
4 used car sale transaction.

5 Under section 2.3 of the sale agreement, the
6 definition of retained liabilities is everything that is not
7 as an assumed liability. Ms. Rubin read from Section
8 2.3(b) to say that the purchaser is not assuming any
9 liability of the seller and that's where she stopped.

10 The rest of Section 2.3(b) says that the purchaser
11 is not assuming any liability of the seller whether
12 occurring, accruing, before, at or after the closing. He
13 contemplated the situation. The actual term liability is
14 defined in the sale agreement to include unknown liabilities
15 as well as undisclosed liabilities. Thus my argument, which
16 was that there was no gap in responsibility as it relates to
17 Old GM vehicles and that the parties specifically parse out
18 who is going to be responsible for what aspect of an Old GM
19 vehicle, was dealt with by the sale agreement. And no one
20 tried to address paragraph 46 of the sale order. There
21 paragraph 46 said that Old GM, except for assumed
22 liabilities which don't apply, will not have a liability for
23 any claim A, that relates to the production of vehicles
24 prior to the closing date. And by the way, it doesn't use
25 the term retained liabilities. It just says it

1 categorically -- New GM shall not have any liability for any
2 claim that relates to production of vehicles prior to the
3 closing date.

4 And it separately says New GM shall not have any
5 liability for any claim that is otherwise assertable against
6 Old GM. And clearly you heard from Mr. Weisfelner yesterday
7 and --

8 THE COURT: The second one you were reading from,
9 is that a continuation of 46 or it different?

10 MR. STEINBERG: That's also part of 46. So the
11 sale order specifically talked about this, you're not
12 responsible for Old GM vehicles. It confirmed my reading of
13 the sale agreement. The sale agreement expressly
14 contemplated that Old GM employees would be hired by you GM.
15 It was one of the benefits of the sale. Section 6.17 of the
16 sale agreement talks about that. It also says in paragraph
17 AA of the sale order that New GM would not be liable for the
18 conduct of Old GM and that protection applied for claims
19 that arose before or after the sale that are based on Old GM
20 conduct.

21 THE COURT: That comes back full circle to one of
22 the things that I telegraphed was of interest to me
23 yesterday. You said two different things or the language of
24 the sale agreement says two different things or, excuse me,
25 the sale order. I'm not sure if it's on 46 or if it's

1 somewhere else.

2 In the first you said New GM isn't responsible for
3 anything that relates to and then I forgot how the words in
4 between relates to and Old GM --

5 MR. STEINBERG: It says relates to the production
6 of vehicles prior to the closing date.

7 THE COURT: Okay. Then the second one you said
8 that New GM isn't responsible for --

9 MR. STEINBERG: Any --

10 THE COURT: -- anything that was the fault of Old
11 GM or words to that effect.

12 MR. STEINBERG: That was otherwise assertable
13 against Old GM.

14 THE COURT: Okay. You see how they're different?

15 MR. STEINBERG: Yes.

16 THE COURT: And if that distinction had been
17 brought to my attention in 2009 I'm not sure what I would
18 have done under those circumstances. I'm not sure today. I
19 guess I can think it through.

20 MR. STEINBERG: Well, your Honor, there could be
21 lots of claims that are assertable against Old GM that have
22 nothing to do with the production of vehicles prior to the
23 closing date. It could have been monies loaned.

24 THE COURT: Yeah, but that isn't what I'm talking
25 about. It's suppose -- it gets back to some of the points

1 that Mr. Esserman was making about what he calls independent
2 tortious conduct. If it is independent tortious conduct by
3 New GM, but happens to involve something that was originally
4 manufactured before the sale date by Old GM in some respects
5 that's where the rubber hits the road.

6 MR. STEINBERG: Yes, but my argument, your Honor,
7 is, and I think it's borne out by the sale agreement and the
8 sale order, that unless it was covered by the glove box
9 warranty or the Lemon Law or related to an accident or
10 involved New GM having to comply with the federal laws
11 relating to recall -- unless it fits within those buckets
12 that there was no longer any responsibility by New GM for an
13 old GM vehicle.

14 THE COURT: As a matter of contract.

15 MR. STEINBERG: As a matter of contract.

16 THE COURT: And then your opponents are contending
17 that if they had shown up at the hearing, well they would
18 have been arguing for the world, but for the more persuasive
19 part of what they'd be arguing for they'd say limit to not
20 sticking us with anything that was really defaultive of GM.

21 MR. STEINBERG: Your Honor, if there was a latent
22 design defect, if the ignition switch was designed
23 incorrectly, should have had more torque than it did, if
24 that was the argument that was made and that was relating to
25 an Old GM vehicle any claim that's derivative of that was a

1 retained liability. The government --

2 THE COURT: As a matter of contract.

3 MR. STEINBERG: As a matter of contract. The
4 government wasn't taking that on.

5 THE COURT: All right, go on.

6 MR. STEINBERG: So, finally the covenant to comply
7 with federal law relates to recalls and that's in Section
8 6.15 of the sale agreement.

9 THE COURT: 6.15 of the sale agreement?

10 MR. STEINBERG: Right. And Ms. Rubin was talking
11 about that yesterday, 6.15.

12 THE COURT: The recall obligation.

13 MR. STEINBERG: Right.

14 THE COURT: And compliance with federal law?

15 MR. STEINBERG: That's right. And that's not part
16 --

17 THE COURT: Pause before you go on. Excuse me.
18 Is there a counterpart in the sale order?

19 MR. STEINBERG: Yes.

20 THE COURT: And the number of that please.

21 MR. STEINBERG: I'm going to have someone look it
22 up.

23 THE COURT: Have somebody look it up. Keep going,
24 but don't finish before you give me that.

25 MR. STEINBERG: The definition of what's an

1 assumed liability versus a retained liability is based on
2 what's in Section 2 of the sale agreement. So a covenant in
3 Section 6 doesn't affect what is an assumed liability or a
4 retained liability. It's a separate independent obligation
5 by the purchaser to comply with federal law. But it doesn't
6 change the contract between Old GM and New GM as to what was
7 an assumed liability or a retained liability. And so
8 therefore a failure to timely make a recall for Old GM
9 vehicles could not change what otherwise was a retained
10 liability into something else.

11 And in fact when you look at the post-sale
12 consolidated -- paragraph 17 of the sale order. When you
13 look at the post-sale consolidated complaint, they actually
14 don't make a claim for breach of Section 6.15 of the recall
15 provision. They're not actually making a claim like that.
16 Instead they try to do it in a more clever way. They try to
17 say that there were consumer statutes and that the failure
18 to timely recall was a breach of those consumer statutes.

19 But the substance of a retained liability with
20 respect to Old GM vehicles cannot be transformed into a New
21 GM liability based on this type of pleading. Consumer
22 statutes cannot be used to create an alternate remedy
23 against New GM for a retained liability, especially when the
24 sale agreement Section 2.3(b)11 says Old GM is not liable
25 for torts.

1 The sale agreement was clear as to what specific
2 liabilities New GM would assume with respect to Old GM
3 vehicles, parts and conduct. If the parties to the sale
4 agreement had intended for New GM to assume this broad new
5 category of liabilities based on the eventuality that there
6 could be a recall in the future they would have clearly said
7 so as an assumed liability in the sale agreement and they
8 didn't do so.

9 Your Honor, I'm going to conclude with this. When
10 we did the Trusky matter and your Honor was trying to give
11 guidance to other courts as to how you interpret the sale
12 order, we set forth what we were asking your Honor to do and
13 so I'd like to list the six things that we think underlie
14 the motions to enforce that we ask your Honor to do.

15 One, that the pre-sale accident claims are barred
16 by the sale order. Two, that the pre-sale consolidated
17 complaint is barred by the sale order. Three, that the
18 economic loss claims for Old GM vehicles in the post-sale
19 consolidated complaint are barred by the sale order and this
20 essentially means the used car purchasers. Four, all
21 governmental claims based on consumer statutes for Old GM
22 vehicles are barred by the sale order. This includes the
23 State of California claims and it should be noted, as I said
24 before, that the state AG was an objector to the 363 sale,
25 appeared at the sale hearing and we believe this is an end

1 run around what had already been determined.

2 THE COURT: Is this the one that was already
3 before Judge Furman?

4 MR. STEINBERG: That's correct, where he remanded
5 it back.

6 THE COURT: I beg your pardon?

7 MR. STEINBERG: He remanded it back. He issued a
8 decision saying that the removal statute did not allow for
9 this client to come into the MDL. So it's now --

10 THE COURT: Did he rule on the merits of whether
11 any of the issues that are (indiscernible)?

12 MR. STEINBERG: The condition before -- the only
13 issue that was before Judge Furman was whether removal was
14 appropriate or whether it should be remanded. The sides had
15 agreed before that that your Honor would be able to
16 determine this issue and they entered into a stay
17 stipulation so that your Honor could enter into a decision
18 with regard to the motion to enforce.

19 Your Honor, we actually have this as a contested
20 matter just to remind you where, you know, the procedure
21 was. We designate this as subject to the motion to enforce.
22 They have a certain period of time to file an objection and
23 the State of California filed an objection saying I just
24 want to be able to argue the remand issue. I agree to be
25 abide by the stay. We stipulated that that would be

1 sufficient for a stay stipulation and then it was argued
2 before Judge Burman.

3 THE COURT: Go ahead.

4 MR. STEINBERG: Item number five, substantial
5 portions of the post-sale consolidated complaint are copied
6 from the pre-sale consolidated complaint and they refer to
7 numerous events that took place before the 363 sale with
8 respect to Old GM's conduct. Paragraph AA of the sale order
9 expressly provides that New GM is not responsible for claims
10 arising in any way in connection with any acts or failures
11 to act of Old GM whether that conduct was known or unknown
12 at the time of the sale. To the extent that the post-sale
13 consolidated complaint seeks punitive damages based on Old
14 GM's conduct, that conduct is expressly barred by the sale
15 order.

16 And lastly, all claims related to New GM vehicles
17 where there was an Old GM part installed by a third-party
18 that was unrelated to New GM when New GMs didn't sell that
19 part to the third-party are barred by the sale order.

20 THE COURT: Can you qualify that by saying that
21 New GM didn't provide an Old GM part to the --

22 MR. STEINBERG: That's correct.

23 THE COURT: -- to the mechanic?

24 MR. STEINBERG: That's correct. I qualify it by
25 that. If New GM installed it or if New GM sold the part

1 that installed it we're not looking for protection from the
2 sale order.

3 THE COURT: So you're now answering the question
4 that bothered me yesterday.

5 MR. STEINBERG: That's correct. And this
6 primarily relates to the early -- one of the early ignition
7 switch recalls. With that, your Honor, I'm finished with my
8 reply.

9 THE COURT: Okay. I'm going to give you a chance
10 to surreply, Mr. Weisfelner or on of your allies. But let's
11 take 10 minutes before we do that.

12 MR. WEISFELNER: Thank you, judge.

13 CLERK: All rise.

14 THE COURT: Have seats please.

15 MR. STEINBERG: Your Honor, I asked Mr. Weisfelner
16 if I can just say two things to your Honor. One, on the
17 Savage Industries case I was told by my colleagues that I
18 may have merged the sale hearing to the Robley hearing so
19 Savage Industries was discussed by your Honor at the Robley
20 hearing on June 1, 2010 on pages 60 to 61.

21 And the other thing was with response to your
22 Honor's question --

23 THE COURT: Pause. But not at the 2009.

24 MR. STEINBERG: Not at the sale hearing as far as
25 someone could do a quick search.

1 The other thing was that the old guidelines for
2 the sale is on the Court's website. It's a general order
3 and it's specifically referenced in the sale motion. That's
4 the notation I have.

5 THE COURT: The one that was made back in 2009.

6 MR. STEINBERG: That's correct.

7 THE COURT: Okay. Mr. Weisfelner.

8 MR. WEISFELNER: Your Honor, for the record,
9 Edward Weisfelner of Brown Rudnick, designated counsel on
10 behalf of the lead plaintiffs.

11 Your Honor, first I want to thank the Court for
12 the opportunity afforded us to in effect I guess surreply.
13 Your Honor, I will tell you that when I was preparing for
14 today's session the focus I had was on three concepts;
15 precedent, policy and prejudice. And quite frankly, I had
16 not given a lot of additional thought to the notion of
17 whether or not from a due process perspective the creditors
18 at issue here were known or unknown or, as Mr. Steinberg
19 argued for about an hour and a half this morning, whether
20 they were reasonably ascertainable or reasonably foreseeable
21 and the reason for that, and I presume it's my mistake, was
22 that at the outset of yesterday's hearing, your Honor
23 cautioned the parties that they should go ahead with the
24 outline of their presentation with one exception and that
25 was that there was enough to require a recall back in 2009

1 and that GM acted badly.

2 And, your Honor, as a consequence I took, and I
3 think all of us took, a lot of our respective outliers out of
4 the equation as we had intended to demonstrate as a matter
5 of fact based on the record that's been established in this
6 case, that's the stipulated facts, 179 paragraphs, the
7 Valukas Report, that in point of fact what Old GM knew and
8 for that matter what New GM subsequently knew as car
9 manufacturers are reflected in federally mandated books and
10 records. Those federally mandated books and records contain
11 the requisite information to put those companies, each of
12 them, on notice that there was a pervasive serious safety
13 defect that they were required to report and recall and that
14 as a matter of law, and in particular the cases cited in
15 Valukas at about page 279, the DC Circuit cases U.S. v.
16 GM, stood for the proposition that what a car manufacturer
17 knows is a function of what it actually knows or what it
18 constructively knows as a matter of law.

19 And I know that I incurred bit of your Honor's
20 righteous indignation if not wrath when there were some
21 elements of what GM's conduct did pre-2009 that could have
22 been categorized as more salacious. And I appreciated that
23 your Honor wanted me to back off or at the time I
24 appreciated your Honor wanted me to back off, because again,
25 I took your Honor's opening comments to say we're no longer

1 talking about whether these creditors from a bankruptcy due
2 process perspective were known versus unknown.

3 If they had to do a recall, I assume my mistake
4 potentially, your Honor was telling us that you're going to
5 presume they were required in 2009 to do a recall. Then I
6 thought then that meant automatically that for due process
7 purposes as a matter of bankruptcy law these were known
8 creditors and their due process rights flowed from whether
9 or not in fact they were known.

10 Now, your Honor, I think I can, with your Honor's
11 permission, correct my potential mistake about reading too
12 much into your Honor's commentary about let's all assume
13 that GM acted badly and were required to do a recall in
14 2009. And I'm not going to re-do the argument that I had
15 prepared for yesterday, but rather than take your Honor
16 through meticulous elements of the record that was
17 stipulated to, I think it would suffice, if your Honor would
18 allow me, to reference just a couple of provisions that I
19 think are directly on point from the Valukas report and not
20 the body of the Valukas report, but its very introduction.

21 What Valukas tells us is that the ignition switch-
22 -

23 THE COURT: Let's make sure we're on the same page

24 --

25 MR. WEISFELNER: Sure.

1 THE COURT: -- because I'm not sure if we are.
2 You're starting correctly with my observation that New GM
3 knew enough to have engaged in a recall before the summer of
4 2009. The legal issue, I don't understand it to be a
5 factual issue, the legal issue -- as such at least, unless
6 there are facts that enable me to bridge the gap -- is
7 whether knowledge of the duty to make a recall is, as you
8 contend, or is not, as Mr. Steinberg contends, knowledge
9 within the meaning of the due process cases of whether
10 creditors are known or unknown. And of course what we're
11 talking about is not car wreck victims because they've
12 already been taken care of unless Mr. Weintraub is right,
13 that they have to know not just that they were in wrecks and
14 that they had potential claims, but arguments they could
15 make in connection with that.

16 Now, what are you trying to tell me here? Are you
17 trying to focus on the precedents of whether knowledgeable
18 recall obligation, which is effectively conceded, is the
19 same or different or is it something other than the
20 precedents that bear on that?

21 MR. WEISFELNER: Oh, I think that the knowledge of
22 the need to conduct a recall is as a matter of fact and law
23 for due process purposes the equivalent of the concession
24 that these creditors were for bankruptcy and due process
25 purposes creditors at the time of the 2009, were known

1 creditors, reasonably ascertainable and that the ability to
2 give them notice in terms of knowing their addresses and
3 where they lived was reasonably ascertainable as a matter of
4 bankruptcy law, due process in a 363 context.

5 And let me just give you one of the quotations out
6 of Valukas I think bears directly on this point. And maybe
7 before I do that let's take a step back and appreciate
8 something. So, it's the 2009 hearing and GM comes in on
9 this hypothetical and says your Honor, we just want to make
10 sure that you're aware before you approve the notice that
11 we've just conducted a recall and the recall we're
12 conducting is as to the ignition switches. They're bad.
13 The torque is way below specifications and it's a safety
14 recall because if it runs -- turns into the accessory or off
15 position these cars will stall, you will lose power
16 steering, you'll lose power brakes and the airbags, if you
17 were involved in a crash, will deploy making your accident
18 that much more severe.

19 What would have been the entitlement of the
20 plaintiffs at that point? Not necessarily a monetary damage
21 amount for economic loss. The plaintiffs would have said
22 had the defect been disclosed I'm entitled to a new part.
23 I'm entitled to an ignition switch that works and all of the
24 attendant costs associated with you replacing my bad
25 ignition switch.

1 THE COURT: We're talking -- you're saying in
2 substance that even though they could have been claimants
3 for \$50 or \$100 or \$200 but whatever it takes to replace the
4 switch, if GM doesn't do it for free it still makes them
5 creditors.

6 MR. WEISFELNER: Well yeah and not only that,
7 judge, but there are all sorts so attendant damages that,
8 again, I think are better discussed and adjudicated in front
9 of Judge Furman. But the point is if they would have come
10 to you as you were considering and contemplating the notice
11 to go out and said well, you know, we have a number of cars
12 and the number of cars is about 12 million that have a
13 safety problem in them and we're going to do a couple of
14 things. We are going to replace those parts, that that
15 wouldn't have been enough. The other thing they would have
16 had to do was to afford, as an example, someone who's got
17 this defective part the opportunity to rent a car at their
18 cost.

19 This is a known safety defect. If I continue to
20 drive the car with this ignition switch, chances are I could
21 be involved in an accident where my airbags don't deploy and
22 I die. So guess what, I'm not driving this car anymore and
23 GM, give me a rental car. Come pick up the car. I'm not
24 driving it to the station. I'm not driving it to the repair
25 center.

1 My point, your Honor, is that, and maybe it was a
2 mistake, when we made the connection between this is a
3 safety recall that GM should have done where the conclusion
4 is a matter of due process and bankruptcy law, that that
5 meant your Honor was telling us that you don't have to argue
6 that these were known creditors from a bankruptcy
7 perspective.

8 What Valukas tells us in the introduction to his
9 report is the following. Investigators at Old GM were
10 neither diligent nor incisive. They quote -- and this is
11 the important part -- "failed to search for or obtain
12 critical documents within GM's own files or publicly
13 available documents that linked the ignition switch defect
14 to airbag non-deployment."

15 You heard a lot from Mr. Steinberg about what are
16 the right books and records, notwithstanding Drexel's
17 comments about pennies on the floor, remember this is a car
18 company. A car company by federal law and regulations
19 determines whether or not it has a safety defect and as a
20 consequence if it's sold to a car with a safety defect you
21 are a creditor. You're a known creditor. And GM is to
22 determine whether or not it sold you a faulty car with a
23 safety defect by looking at its books and records, the ones
24 that the federal law tells them they have to maintain -- the
25 TREAD database, the PTRS database -- not their ledgers, not

1 their accounting books and records, but the records that the
2 government tells a car manufacturer these are the ones that
3 you've got to retain.

4 They failed to search for or obtain critical
5 documents within GM's own files or publicly available. He
6 goes on to indicate in his introduction, Valukas does, that
7 GM failed to take certain basic investigative steps and the
8 introduction to the report concludes that many individuals
9 have substantial responsibility and that committees and
10 groups failed to demand action in the face of mounting
11 injuries and fatalities, to make themselves or others
12 accountable and, this is the again critical part from a due
13 process perspective, to "marshal the information and
14 expertise at their disposal."

15 GM had information at its disposal. Information
16 it was required by federal law to maintain which told GM or
17 should have told GM or GM was on constructive knowledge that
18 it was selling product with a known safety defect and yet it
19 didn't disclose it. And, your Honor, I think that that
20 permeates much of Mr. Steinberg's argument, and I want to
21 get back to the point I was going to raise which is
22 precedent, policy and prejudice. But we heard a lot about
23 what the contract, the agreement and the effectuating order
24 provides. And I was struck with the conclusion that so you
25 mean to tell me that you can contract away the result of a

1 due process violation. You can contemplate what a litigant
2 might have already -- might have said had they been afforded
3 due process and just contract away the result so that you
4 have an order that gets entered that you have no opportunity
5 to contest or talk about, but if it got entered whether you
6 had due process or not doesn't really matter. That can't be
7 the law.

8 Your Honor, let me go back and start where I was
9 going to start today before I heard a whole new argument
10 about whether these plaintiffs were known and unknown and
11 start with precedent and policy considerations. And, your
12 Honor, I understand and I appreciate that this is an
13 important matter and that 363 has important policy
14 considerations for bankruptcy cases, bankruptcy
15 practitioners, people like me that make their living in the
16 bankruptcy context. Very often we find cases where
17 companies do need to in a very quick fashion undergo a 363
18 sale to avoid wholesale liquidation and this case is even
19 more dramatic because we literally had the U.S. auto
20 industry at risk, as the record clearly demonstrates.

21 But in terms of setting policy and precedent it's
22 terribly important that we all keep in mind that we are
23 talking about a car manufacturer and in my generation, and
24 maybe for many successive generations in the future,
25 certainly in the past we've had all of two -- count them,

1 two -- car manufacturers that have gone through Chapter 11
2 in the context of 363 sales. The specific and unique facts
3 and circumstances of those two car company cases will not, I
4 assert, set policy for 363s generally and there's a reason
5 for that. The facts in this case, as opposed to Chrysler,
6 the facts in this case demonstrate that the debtor, GM, knew
7 that there was an ignition switch defect, knew that it was a
8 safety probably, knew at the time of the sale that it had an
9 absolute obligation to change out the part and or accord
10 damages or recognize damages on account of the plaintiffs
11 which may ultimately have to get dealt with later on in the
12 case.

13 THE COURT: Pause please, Mr. Weisfelner.

14 MR. WEISFELNER: Certainly.

15 THE COURT: I infer from what you just said then
16 that as you try to harmonize this case with 363 law
17 generally and what needs to be done under 363s, that if New
18 GM had prior to the June 1st 2009 Chapter 11 filing the
19 notice it gave out then by publication, if it had issued the
20 recall notices required under law that would have skinned
21 the cat in terms of notifying the world.

22 MR. WEISFELNER: I think it would have gone a long
23 way towards skinning the cat, yes your Honor. First of all
24 it would have effectively put people on notice of two things
25 that didn't happen in this case when you talk about

1 prejudice.

2 Prejudice number two, I'll get back to prejudice
3 numbers one and bring it closer to the 2009 sale, but
4 prejudice number two, the ultimate prejudice in this case
5 and I think it's completely disingenuous and artificial to
6 separate what happened in 2009 when your Honor approved the
7 sale from what ultimately happened when there was a bar date
8 set in this case and from what ultimately happened in terms
9 of distributions to general unsecured creditors.

10 The same problem that affected the sale, affected
11 the ability of people to make claims on the proceeds of
12 those sales, to have their legitimate claims attached to
13 those proceeds because the cover up, GM's failure to give
14 notice of the ignition switch defect presenting a known
15 safety hazard which killed scores of people and injured
16 scores of people pre-sale were never disclosed as of the bar
17 date. So the ability to attach to those proceeds didn't
18 exist and I'll go through some statistics on that in a
19 second.

20 Pulling back through the prejudice associated with
21 what happened in front of this Court at the 2009 hearing,
22 now, Your Honor, we talked about prejudice in a couple of
23 different ways. I'm going to try it one more time to be
24 specific, because I think the elements of prejudice are
25 multiple. Number one, we argued that the cases tell us that

1 you're not supposed to do a hindsight, look back or
2 speculate as to what might have happened. But let's assume
3 that Your Honor believes that such hindsight or speculation
4 would be appropriate.

5 Well, Your Honor, we have the US Treasury. The US
6 Treasury is in there, recognizing the interests, the
7 national interests of keeping this car company alive,
8 keeping the industry functioning, for the benefit of
9 employees, customers, supplies and the whole universe of
10 affected parties. And Treasury drew a line in the sand that
11 said, "We will only allow new GM to assume those liabilities
12 that we think are 'commercially reasonable'."

13 And then I think about the Feinberg protocol, and
14 as Your Honor knows, the Feinberg protocol is a voluntary
15 program - I put the word voluntary in air quotes, the record
16 couldn't reflect that my fingers were going like this - but
17 it was a voluntary program that new GM put in place through
18 Ken Feinberg, which is already recognized, I think the
19 number is 56, pre-sale death claims, and I forgot the exact
20 number of pre-sale injury claims, and there are hundreds of
21 pending claims, still pending in that hopper.

22 But we all know that GM's contention is -- new
23 GM's contention is, the sale order bars all those claims.
24 New GM is undertaking the Feinberg protocol why? I suggest
25 to you that they're undertaking the Feinberg protocol

1 because they recognize that there is a public perception
2 problem, a Congressional inquiry concern, an Attorney
3 General ongoing investigation, both criminal and civil
4 investigations, and that providing this pot of money for
5 people who might otherwise be barred under their
6 interpretation of the sale order, is a good "commercially
7 reasonable thing for them to do" to protect, preserve and
8 enhance their brand, after this firestorm of negative
9 publicity.

10 Well, Your Honor, if GM after the fact, reaches
11 the conclusion that opening up the floodgates to pre-
12 petition claims -- and by the way, only if they comply with
13 the Feinberg protocol, so it's not like they're saying,
14 "Hey, listen, if you had a pre-petition death or accident,
15 we're paying you." It's, "If you had a pre-petition death
16 or accident and you comply with the Feinberg protocol, we'll
17 pay you the amounts that we want to pay you," but they're
18 doing that because they say it's commercially reasonable.

19 Well, now, I'm supposed to take my time machine,
20 go back to 2009 and the question that you're being asked is,
21 if we laid this out for Treasury, I could take Harry Wilson,
22 who is no longer asking GM to spend \$8 billion of its \$25
23 billion dollars cash on its balance sheet, to make
24 distributions to shareholders. I know have Harry Wilson in
25 front of me, who's a member of the task force, and I say,

1 "Harry, come on, you want to preserve GM's commercial
2 ability to move forward, enhance the brand? You've got to
3 give me a carve-out for these specific claims. Not any
4 warranty claim, not any defect in the car that may arise in
5 the future. A known safety defect that's killed people,
6 that rendered these cars basically undriveable if people
7 knew what was wrong with them. Harry, you've got to give me
8 a carve-out on this one, because if we go into the Court in
9 front of Judge Gerber, he may force you to give the carve-
10 out."

11 I don't know what Harry would have said when he
12 went back to Treasury and the rest of the task force. I
13 don't know what Your Honor would have determined, but I do
14 know at a minimum, we're talking about old GM and the second
15 after the 2009 sale order was entered, new GM both had
16 recall responsibilities. That meant, you can't write me a
17 check to satisfy my concern. You've got to replace the
18 part. This is a dangerous part. Replace it.

19 And I don't know what Your Honor would have done
20 in 2009, had they bothered to give me notice of a known
21 safety defect. I want to make sure that we have the math
22 right, because Your Honor has gotten all sorts of
23 representations about the math. I don't know why it
24 matters, but we talk about the cost of doing some sort of
25 direct notice. And Your Honor, I'm not going to argue

1 Garden City, and I'm not going to argue what was in their
2 fee application. Your Honor knows or could take judicial
3 notice of the fact that Garden City has a profit margin
4 built into --

5 THE COURT: Well, I take it you have a more
6 fundamental point, and clearly, whether it makes some of the
7 other facts moot or not, if I heard you right, and I don't
8 think I heard Mr. Steinberg dispute this portion, you have a
9 statutory obligation to send out recall notices at some
10 point, and is your point as simple as, if new GM has to do
11 it -- excuse me, if old GM has to send out those recall
12 notices anyway, the incremental cost of supplemental mail
13 notices aren't all that important?

14 MR. WEISFELNER: It's that, but Your Honor, also,
15 you were given some figures that just don't make any sense.
16 There are 70 million GM cars on the road. I'm not concerned
17 about 70 million GM cars on the road. They recalled 27
18 million cars. I'm not concerned about 27 million cars. I'm
19 concerned about the 13 million cars that have an ignition
20 switch defect, which was a known safety defect, and by the
21 way, of those 13, 3 of them, 3 million, are acknowledged to
22 have been post-sale new GM-sold and manufactured, affected
23 cars. So we had 10 million ignition switch affected cars,
24 as of 2009, and if you do the algebraic math that 70 million
25 would cost you 42 million, to give the right notice, even

1 with a built in profit margin, you're talking about \$6
2 million dollars.

3 THE COURT: But help me on this, and if I'm seeing
4 ghosts in the closet, correct me. You're not shy. I
5 thought I heard arguments from either you or Mr. Esserman or
6 both, that the contention being made on the Plaintiff's side
7 is that the failure to deal with the ignition switches
8 damaged the GM brand, and is some Court of competent
9 jurisdiction then going to hear an argument that there are
10 70 million vehicles that lost value and not just the 27
11 million that are the subject of the recalls, or the lesser
12 13 million to which you just made reference?

13 MR. WEISFELNER: Your Honor, I will tell you that
14 my input into this matter is focused, laser-focused, on the
15 12, 13 million cars affected with the ignition switch
16 defect. I've read the two consolidated complaints. I'm not
17 counsel of record there, but I guess I would be surprised if
18 the Plaintiffs in those actions aren't likewise looking for
19 recompense for the people without ignition switch defects in
20 their car, on the theory, which may or may not be upheld by
21 Judge Furman - I'll start using Furman instead of Court of
22 competent jurisdiction - may or may not be considered by
23 Judge Furman as giving rise to cognizable claims and causes
24 of action.

25 I mean, I've read that as part of the complaint,

1 but my job is just to demonstrate to Your Honor that those
2 people that were the subject of the ignition switch defect
3 were known Creditors whose identity were reasonably
4 ascertainable because there were Federally mandated books
5 and records that GM was aware of, it wasn't a matter of
6 foreseeability. They were known. You know when you sell a
7 defective product to someone, you've given them a claim that
8 sounds in the nature of money damages or, in a car company
9 case, replace this part and all of the attendant damages
10 that are associated with "replace this dangerous part".

11 And Your Honor, again, you know, we think about
12 prejudice and we think about -- I think yesterday, you and I
13 had a colloquy about who was looking to get a leg up, and
14 frankly, I'm sensitive to the notion that, when you think
15 about economic loss Plaintiffs and you compare them to other
16 people that were impacted by GM's bankruptcy, economic loss
17 Plaintiffs may not have the same sympathetic allure that
18 some of Mr. Weintraub's clients do because they're either
19 dead or seriously injured.

20 And Mr. Steinberg has made a lot of people driving
21 eight-year-old cars that just have a switch that needs to be
22 repaired, and it being hard to generate a lot of sympathy
23 for those people. Well, sympathy as compared to whom?
24 Sympathy as compared to new GM? Because it's new GM who's
25 looking to enforce the order. Sympathy for new GM, when we

1 talk about the assumption that old GM was required to do a
2 recall in 2009 because it new as a matter of law that there
3 was a safety defect that impacted these cars, that were
4 subjecting people to death and personal injury, let's not
5 forget that new GM, for a period of approximately five full
6 years, maintained the fiction that there was nothing wrong
7 with those cars, continued to allow on the highways and
8 byways of this country, cars that by definition, posed a
9 serious safety defect to the general public.

10 It's new GM that likewise failed to determine,
11 based on records it was mandated to maintain under Federal
12 law, that these cars had to be recalled. And as Mary Barra
13 has admitted, people did bad things and bad things happened,
14 such that 17, I think is the right number, new GM employees
15 were fired for misconduct and negligence relating to the
16 ignition switch.

17 So again, let's balance the relative equities. I
18 have economic loss Plaintiffs, I have new GM. I have
19 economic loss Plaintiffs. Should they really do better
20 than, for example, the bond holders, the trade Creditors,
21 the employees who had their pension claims reduced, that are
22 represented by the GUC Trust and the unit holders that are
23 represented by Aiken? Is it fair for them to do better?
24 Well, let's think about this. Had the bar date, or the bar
25 notice, reflected what GM, both old and new, knew at the

1 time that the bar order was being prosecuted, then my
2 constituency would have flooded the bar -- the claims notice
3 with their claims.

4 THE COURT: You would have flooded it to a
5 material extent, because \$10 billion dollars of extra claims
6 is certainly going to be something that gets the GUC Trust's
7 attention --

8 MR. WEISFELNER: Especially since --

9 THE COURT: But -- forgive me.

10 MR. WEISFELNER: Sure.

11 THE COURT: But in the claims process, you don't
12 get punitive damages, you don't get RICO damages, because
13 there's well-established authority. I think I held this
14 earlier in GM in the (indiscernible) opinion, that punitives
15 in the claims context, in a liquidating plan, penalized the
16 wrong guys. They penalized the innocent unsecured
17 Creditors.

18 MR. WEISFELNER: Right, and Your Honor --

19 THE COURT: So you're talking about wager claims,
20 but you're not talking about the claims of the full
21 magnitude that we have here.

22 MR. WEISFELNER: And again, Your Honor, I would
23 agree with you if we were focused on the nature of the
24 claims, that the Plaintiffs, had they gotten notice, could
25 have asserted against the residual estate. Your Honor, I

1 respectfully disagree with you, although I don't think it
2 was your intention to tell me that the claims that the
3 Plaintiffs could have served against new GM under the right
4 theory, with the right proof, at an eventual trial, couldn't
5 assert punitive damages.

6 But I agree with you that, as to the claims pool
7 here, understand that - and you heard some math on this one
8 too, but I think it's important that you know what the facts
9 are - there was about \$9.4 billion dollars of value in the,
10 for lack of a better term, Creditor trust, as of March 2011.
11 There was an initial distribution that took that number down
12 to \$1.2 billion dollars, that's as of December of 2011. In
13 other words, 87 percent of the pot is gone. There was \$843
14 million left, or about 9 percent of the pot left, at or
15 about the time that the recalls were finally, finally
16 undertaken.

17 And Your Honor, there was some dialogue yesterday
18 about the November distribution. You should know, Your
19 Honor, that that distribution was all of \$240 million
20 dollars, or about 2.6 percent of the initial \$9.4 billion
21 dollars. My point is that whatever our claims were, or
22 would have been, with our without punitives, and I
23 understand Your Honor's contention, it would have materially
24 diluted the pot that was otherwise available for the GUC
25 Trust beneficiaries, but more than just dilution, you have

1 the time value issue.

2 Your Honor knows, I know from other case
3 experiences, that when you have disputed claims, the time
4 and effort it takes to resolve those disputed claims, and I
5 would venture to guess that the claims that would have been
6 asserted by the Plaintiffs, had they gotten appropriate
7 notice, which they didn't, might not have been accepted by
8 the GUC Trust on the face value of it, and there would have
9 had to have been a determination as to what the correct
10 amount of those claims were.

11 My guess is that some lawyer or group of lawyers
12 may have purported to represent them during the claims
13 administration process and asked for a whopping reserve, and
14 would have prevented any interim distributions to the GUC
15 unit holders until those claims were resolved. My point is
16 that, another, unintended beneficiary of the prejudice that
17 befell the economic loss Plaintiffs, were the GUC Trust
18 beneficiaries, who didn't suffer dilution from our claims,
19 and didn't have to wait or spend the money to adjudicate our
20 claims before they could make a distribution. Your Honor,
21 when we talk about prejudice and we focused before on, what
22 is it that we would have had anyone do differently, had we
23 been here with appropriate notice in 2009?

24 I think the entire discussion that was had about
25 the various provisions of the order, and what they did or

1 didn't do with respect to carve-outs and retained liability,
2 makes my point. Let's assume again, as we started this
3 hearing, with the presumption that old GM had a recall
4 obligation, which it failed to perform, and it's recall
5 obligation that had failed to perform for a period of
6 approximately seven years.

7 In 2002, some people claimed that the knowledge
8 dates back even before 2002, to when the ignition switch was
9 first being designed and everyone knew that it didn't meet
10 its torque requirements, but for an extended period of time
11 before the 2009 sale was being considered, GM knew but
12 failed to disclose, that it had a safety defect.

13 Now it discloses it at the hearing, because we're
14 taking our hypothetical time machine back, because we're
15 told that you've got to find some sort of prejudice as a
16 pre-condition to showing a due process violation. We think
17 this whole exercise doesn't make any sense, that's what
18 Fuentes tells us, that's what other cases tell us, but let's
19 assume we go through that exercise. I'm back in 2009. I
20 don't know if it's me or Mr. Esserman or Mr. Weintraub, or
21 some other bankruptcy lawyer representing the Plaintiffs,
22 not the Plaintiffs who showed up in 2009 who didn't know
23 anything about the defective ignition switch and that it was
24 killing people and injuring people, but people who show up
25 now to represent those people who have a safety defect in

1 their car.

2 Do you think we wouldn't be fly-specking the order
3 to insure that whatever liability we thought, as a car
4 manufacturer with an admitted safety defect, would need to
5 undertake for the benefit of people who had the switch in
6 their cars. Don't you think we would have had an
7 opportunity right then and there to convince Treasury, if
8 not Your Honor, that given their acknowledgement of putting
9 defective parts on the road, we were entitled to protection
10 in the order to insure that they were going to take the
11 switch out. Give me a switch that works. Prevent me from
12 falling into the same category of people that drove their
13 cars into trees when their power failed and their air bags
14 didn't deploy.

15 Lots of other things that I think effective
16 counsel may have been able to achieve back in 2009, but
17 we'll never know, because no counsel was accorded the
18 ability to be effective, because no counsel was told, "Hey,
19 we happened to sell 12 million cars with a defective
20 ignition switch that, guess what, in normal conditions,
21 could jump from run to accessory to off, no power steering,
22 no power brakes, and don't worry about it, because any real
23 man can restart the car and try and drive the car off the
24 road."

25 But they now know it's a known safety defect, they

1 now know that it causes death and injury, but do you think
2 that competent counsel may have been able to suggest to
3 Treasury, "Listen, you're setting aside shares of new GM and
4 cash that have the value of \$9.8 billion dollars. In order
5 to make this thing work, now that we know there's a safety
6 defect, maybe you need to bump it up by \$2 billion dollars."

7 And maybe Treasury would have said, "Okay," and
8 maybe they would have given us the \$2 billion in the form of
9 stock, and maybe they would have given it to us in the form
10 of additional warrants. I don't know. We weren't there.
11 We weren't given an opportunity to protect our rights and
12 our interests. There's a flex provision that says that if
13 the claims are more than \$35 billion, they've got to put in
14 more money.

15 More money, by the way, equates, if I've run the
16 math correctly, to about another \$8- or \$9 hundred million
17 dollars. But you don't get to the flex provision unless the
18 claims go from the current estimate of \$32, up to \$35
19 billion.

20 Well, if someone as good as Mr. Weintraub or Mr.
21 Esserman were there representing the Plaintiffs at the time,
22 they may have succeeded in convincing Harry Wilson and the
23 rest of Treasury to make the flex provision different. You
24 would have added more value if the claims exceeded a lower
25 threshold number. I don't know. No effective counsel was

1 there because there was no notice. Your Honor, this is the
2 problem with saying that, if you have a due process
3 violation, you're not entitled to a remedy unless you show
4 prejudice.

5 That's not what the cases demonstrate, but even if
6 they did, how much more prejudice could we lay out for you?
7 The inability to make sure that the order protected people.
8 The inability to make sure that these switches got switched
9 out by a car manufacturer who has Federal obligations, like
10 new GM. New GM.

11 The other point I want to make, Your Honor, is a
12 lot of discussion, a lot of effort to make sure that, from
13 Your Honor's perspective, you characterize all of these
14 people, I guess with the limited expectation of Mr.
15 Weintraub, as here, waving the flag for economic loss
16 Plaintiffs who don't deserve a lot of Your Honor's sympathy.

17 Your Honor, I think that that's a purposeful
18 misdirection by new GM, because they're painfully aware of
19 the types of Plaintiffs that are in the two consolidated
20 complaints, and lest there be any confusion, I just want to
21 make sure that Your Honor is clear to the extent that we
22 weren't good enough in making ourselves clear in our
23 pleadings, there, in essence, are three types of Plaintiffs.
24 Plaintiff category number one are Plaintiffs who bought cars
25 from new GM that were manufactured by new GM, and what I

1 think I've heard today, if not yesterday, was a concession
2 by Mr. Steinberg that new GM does not seek to enforce the
3 2009 sale order against those Plaintiffs who bought cars
4 from new GM that were manufactured by new GM.

5 He does hold out, of course, the contention that,
6 to the extent that you bought a car from new GM, and it
7 contained a part that was manufactured by old GM, "Huh huh,
8 not so fast, we're not conceding anything on that score."
9 Think about that from the construct of what Your Honor told
10 us at the outset of the hearing. Old GM had an obligation
11 to recall these cars, and if we're going to make believe
12 that it told the world that at the sale hearing. So, new GM
13 says, "I have no liability for selling a car with a defect
14 that I know exists. I know it exists," because new GM is
15 charged with the same knowledge, as a matter of Federal
16 statutes, and cases that construe when a car manufacturer is
17 deemed to know it has a safety defect, that's new GM is
18 deemed to know.

19 But new GM, even though it's deemed to know that
20 the ignition switch is a safety defect, sells a car with
21 that safety defect and says, "Not my responsibility because
22 it was engineered by DiGiorgio and all the old guys at old
23 GM, and by contract, I don't have that liability. By
24 contract, I don't have that liability.

25 So, notwithstanding the fact that your due process

1 rights were violated and that we kept this dangerous
2 condition a secret, I contracted away my exposure for the
3 ramifications of my violation of Federal law and, knowing
4 that there was a due process violation, I'm going to
5 contract away any exposure I might have as a consequence."
6 That's not the way it works.

7 Category number two. Plaintiffs who bought cars
8 manufactured by old GM after the sale hearing in July 2009.
9 GM's argument suggests that GM doesn't know that there's a
10 used car market. They sell a car to one owner and that's
11 it. They have no way of knowing, nor should they be
12 responsible for the fact that there's this weird thing that
13 happens. People sell and buy used cars. From a due process
14 perspective, it is crystal clear, that in July of 2009,
15 there was no way for GM to give notice of the sale to
16 anybody that was going to buy a car in the future, new or in
17 the used car market.

18 That's Grumman Olsen, pure and simple. You can't
19 give notice, from a due process perspective, to someone who
20 doesn't have a pre-petition relationship. Why? They're not
21 Creditors. Can you imagine someone who walks in -- you
22 know, there's this new commercial I see on TV, where someone
23 walks up to a guy who owns a car and says, "Be careful of
24 that car. I'm the next owner. Don't get it dirty, don't
25 let your dog jump in the car, because I'm the new -- I'll be

1 the new owner."

2 Can you imagine that person having come into Court
3 in connection with the bar date and saying, "I'd like to
4 file a claim because I'm thinking about buying a GM car, or
5 I bought a GM car, used car, after the date of the filing of
6 the petition." You bought a car after the date of the
7 filing of the petition? As of the date of the filing of the
8 petition, what was your Creditor status? "I don't know."
9 Well, there was no Creditor status on behalf of Plaintiffs
10 that didn't own GM cars pre-sale, pre-petition. No notice
11 would have been possible to that class.

12 And then finally, the third class of Plaintiffs
13 are the people who bought cars manufactured by old GM before
14 the July 2009 sale hearing. And Your Honor, I must
15 emphasize this. People in category three have claims
16 asserted that do not rise and/or fall on the question of
17 whether or not there is successor liability, as a matter of
18 law. There are other theories, under which, even Plaintiffs
19 in category number three can assert claims against new GM
20 that once again, do not rely on successor liability
21 theories.

22 All of the Plaintiffs in categories one, two or
23 three, are asserting claims against new GM, direct
24 liability, for its own knowledge, conduct and breach of
25 affirmative duties that they had. They're not just

1 repacking successor liability-type claims.

2 Your Honor, I'm just going through my notes. I
3 don't know that I really have much, if anything else, to
4 argue, but I think what's amazing about this case is that we
5 did have a three-month process, where in order to avoid
6 discovery, the parties sat and went through a detailed
7 stipulation of fact exercise. The Valukas Report, which is
8 obviously part of the record, it's never been opposed, it
9 was part of my affidavit, is in the record.

10 Those stipulations, that Valukas Report, the cases
11 cited by Valukas beginning at page 279 of, I think it's one
12 of the appendices, talks about - and it's almost as if
13 Valukas was prescient about what the issues before the
14 bankruptcy court were going to be - can you consider the
15 victims of the ignition switch defect to be known Creditors
16 as a matter of law? The answer is, yes, they're known
17 Creditors as a matter of law, both product liability law,
18 and specifically car manufactural law, and it's applicable
19 in this case as a matter of due process.

20 If you've had a violation of due process, which,
21 Your Honor, I suggest, is incontrovertible, the remaining
22 questions are, do you require prejudice in order to remedy
23 that violation? I think, Your Honor, we have laid out for
24 you all sorts of prejudice. The problem I have is that it
25 requires us to imagine what might have happened had we

1 gotten notice back in 2009, a difficult proposition which
2 the case law suggests we're not supposed to embark on.

3 And Your Honor, what's the appropriate remedy?
4 Your Honor, I think the appropriate remedy in a case where,
5 because of the actions of old GM and new GM, which precluded
6 any of these Plaintiffs from being able to attach their
7 claims to the proceeds of the sale, because many of these
8 Plaintiffs had no claim in a bankruptcy context, and
9 therefore, any order that Your Honor entered that sold
10 assets free and clear of claims, doesn't impact people who
11 aren't Creditors at the time, and most significantly,
12 because every Plaintiff in either of the two actions have
13 asserted direct claims against new GM, this Court ought not
14 enforce the 2009 order as to these specific Creditors.

15 In doing so, you won't prejudice 363 Sales. This
16 is a unique, special, very different situation. It involves
17 a car company, first and foremost. Not like we're going to
18 have a lot more car company bankruptcies. And it involves a
19 car company that purposefully failed to disclose a serious
20 safety issue. Not a latent safety issue that may arise in
21 the future. A current safety issue that was causing
22 accidents and deaths and serious injuries, and GM knew it,
23 and didn't tell anybody about it.

24 And then new GM, who picked up the tread database,
25 picked up the PTRS reporting database, picked up all of the

1 internal information on customer complaints, picked up all
2 the information regarding warranty claims. All of the
3 information they were required by law to maintain, and
4 still, through and including the bar date process, didn't
5 disclose, and didn't disclose again for any number of years.
6 Under those unique facts and circumstances, new GM is not
7 entitled, as a matter of law or as a matter of equity, to
8 enforce the 2009 order against our narrow class of
9 Plaintiffs. Thank you, Judge.

10 THE COURT: All right, thank you. Mr. Weintraub?

11 MR. WEINTRAUB: Good morning, Your Honor. William
12 Weintraub of Goodwin Procter for the pre-sale accident
13 Plaintiffs. Speaking third, you always have the misfortune
14 of having to rewrite and redo everything, so my presentation
15 may be somewhat anecdotal, but I'm going to try to hit some
16 of the things that I think Mr. Weisfelner did not hit and
17 address the --

18 THE COURT: Disjointed is okay. Anecdotal isn't.

19 MR. WEINTRAUB: [LAUGHS] I'll just be disjointed
20 today, Your Honor. I think, Your Honor, with respect to
21 notice, you really cannot separate the sale notice that was
22 given here from the seven-year non-disclosure of the
23 ignition switch defect. Generic notice might have been
24 sufficient in a case where knowledge of the existence of the
25 ignition switch defect was widespread.

1 Generic notice may have been sufficient, had there
2 been a prior recall, but without that widespread knowledge,
3 but without that widespread knowledge, without that prior
4 recall, that generic notice was not informative to the
5 people that needed to be informed to come to Court to make
6 their best arguments against the imposition of the successor
7 liability shield.

8 And without going through much of what Mr.
9 Weisfelner said about prejudice, I think the prejudice to
10 the clients that my group represents is different, because
11 we were injured pre-sale, but nonetheless, the prejudice
12 that we suffered was that we would have challenged the
13 equity, and all of this would have been in the context of
14 disclosure of the contents of the Valukas Report. The
15 Plaintiffs would have challenged the equity of the Buyer's
16 request for protection in the context of the withheld
17 information.

18 The Plaintiffs would have challenged the good
19 faith of the Buyer and the Seller. The Plaintiffs would
20 have questioned the absence of a prior recall, the absence
21 of warning to unsuspecting drivers and most of all, as I
22 said yesterday, Your Honor, the Plaintiffs would have
23 questioned the actions of their own Federal government in
24 trying to push through a sale in light of historical non-
25 disclosure, faced with, now a new and disturbing factual

1 record. I think the dynamics would have been very different
2 if that had been the case here.

3 With respect to what the notice should have been,
4 Your Honor, we did address that yesterday but since it was
5 re-argued again today, we think that content is what drives
6 due process, and the generic notice here was imply
7 insufficient, whether you were giving people notice by mail,
8 or in some cases, we've done notice by postcard to save
9 money, or notice by publication.

10 Without the recall, without the widespread
11 knowledge of the existence of the ignition switch defect,
12 what should have been disclosed were the conditions that
13 were attendant to that ignition switch defect, which were
14 unexpected stalling, loss of power brakes, loss of power
15 steering, and disengagement of air bags in the event of a
16 collision.

17 Now, Mr. Steinberg said, "Does that mean that we
18 have to disclose hundreds of thousands of items that might
19 have to be disclosed to people because they might have
20 claims?" and I think the answer to that, Your Honor, is no.
21 What you should have disclosed was this ignition switch
22 defect because there was a seven-year history within GM of
23 investigating this ignition switch defect. There was a
24 wealth of information in tread in the PRST database within
25 GM, so this should have been disclosed.

1 And, if there are any other types of defects that
2 had not been disclosed for seven years under the same
3 circumstances, those probably should have been disclosed,
4 too. But what I'm here to talk about is the ignition switch
5 defect, and that should have been disclosed,

6 Your Honor. One of the things that was mentioned
7 by Mr. Steinberg was the Robie decision, and we actually
8 discussed Robie in our brief in a footnote on page 18. And
9 one of the things that we noted in Robie was that, when
10 ruling against Mr. Robie, this Court made clear that the
11 result might have been different had there been evidence
12 that old GM had known of Mr. Robie's injuries and chose to
13 use publication notice rather than a more effective method.

14 That's what our brief says, and then in the
15 parenthetical, we have a quote from the transcript. "If GM
16 knew back then that your client had already been injured,
17 and chose to use the publication route rather than a way
18 that would get to him more directly, that kind of factual
19 circumstance would have troubled me."

20 And we think, Your Honor, that GM's knowledge of
21 the ignition switch defect and the fact that every car,
22 every car that had that ignition switch in it was defective,
23 and entitled to repair, that put everybody in the category
24 of being a known Creditor, not --

25 THE COURT: Are you suggesting that any of your

1 150 guys had been in accidents that old GM knew about?

2 MR. WEINTRAUB: I'm sure that people were in
3 accidents that old GM knew about.

4 THE COURT: Your guys.

5 MR. WEINTRAUB: Yes.

6 THE COURT: And you're saying --

7 MR. WEINTRAUB: When I say -- that's kind of a --
8 not based upon actual knowledge, but the reason I say that
9 I'm sure is because I think some of these lawsuits, like
10 Powledge, was pre-bankruptcy, and we know that GM maintained
11 a database, I forget what the acronym was for it, accidents
12 --

13 THE COURT: Mr. -- that's kind of my point, Mr.
14 Weintraub. I'm just trying to get my arms around the facts.
15 I thought I heard Mr. Steinberg say that the Powledge family
16 got actual notice.

17 MR. WEINTRAUB: Well, you know, the Powledge
18 family is in a whole different bucket. The reason that the
19 Powledge family is in a whole different bucket was, not only
20 did the car have the defective ignition switch and not only
21 did they have litigation with GM, what the contention is by
22 the Powledge family, is that they were in discovery with GM
23 and had issued discovery that should have, if GM was being
24 truthful, given them the information about the ignition
25 switch defect.

1 THE COURT: Well, this is the first I've heard in
2 these two days about discovery violations. Discovery
3 violations don't occur often, but when they do, they bug me
4 like they bug a lot of people, but --

5 MR. WEINTRAUB: I didn't acknowledge --

6 THE COURT: I guess what you're arguing is, not
7 just that you can unwind a settlement or do a lawsuit over
8 by reason of the settlement agreement, but you can go after
9 a different Defendant.

10 MR. WEINTRAUB: No, what I'm arguing -- I didn't
11 raise Powledge. Mr. Weisfelner and Mr. Steinberg raised
12 Powledge. Your Honor, ask me about Powledge. I happen to
13 know about Powledge because I've been working with
14 Powledge's lawyer. I also happen to know that Powledge --
15 it may not have reached Your Honor's desk yet, but I think
16 about a week or two ago, they filed a motion in the
17 Bankruptcy Court to vacate their settlement.

18 THE COURT: Well, somebody did. I don't remember
19 the name of the litigant.

20 MR. WEINTRAUB: It's Powledge. So, you ask me
21 about Powledge, and Powledge is not, I think, typical, but
22 there may be other instances where people were in discovery
23 with General Motors and did not get what they felt to be
24 candid and appropriate responses, and in fact, one of the --
25 we submitted three stipulated facts that have not been

1 disputed, and one of the stipulated facts that we submitted
2 was that the underlying circumstances of what GM said to
3 people who had been injured and what those people have said
4 back to GM have not yet been established.

5 THE COURT: Go on, please.

6 MR. WEINTRAUB: So, my point, with respect to
7 Robie, Your Honor, was that we think that the ignition
8 switch defect, and knowing that the car had needed repair,
9 and that applies to everyone, not just people who had
10 accidents, but people who have the economic damages claims,
11 put them into the same bucket that you were concerned about
12 with Mr. Robie. If GM knew something and didn't say
13 something, that may change things.

14 What I'd like to do, Your Honor, is go back
15 through some of the cases that were cited here, Your Honor,
16 by Mr. Steinberg and just revisit them a bit. Chemtron was
17 an interesting case because that was a bankruptcy of a
18 company that, as I recall, stored radioactive waste, and
19 there was a discharge in that case and years after the
20 discharge, people came forward with radiation illness and
21 said that our claim shouldn't be barred because we didn't
22 have notice of the case.

23 And what the Court held in Chemtron was that it
24 would have been too burdensome and impossible for the Debtor
25 to find out who had lived near this radioactive site during

1 the relevant years, and in fact, people who said they had
2 visited there were injured and the Court said it would be
3 impossible for the Debtor to know who had been an overnight
4 guest in somebody's house during those periods of time, so
5 those people were not entitled to direct notice.

6 We think that, certainly my clients, who had
7 accidents, and Mr. Weisfelner's clients who had a car with
8 the ignition switch defect, do not fall into the category
9 for the reasons Mr. Weisfelner stated, of Creditors that you
10 didn't know the identity of and couldn't find. So Chemtron
11 is a very different case from our case.

12 Mr. Steinberg also talked about New Century. In
13 New Century, what the Court held was that, "we cannot find
14 that a particular borrower had irregularities in their loan
15 file, which would give rise to a Truth in Lending and other
16 types of violations, just because there were generic
17 assertions that, in general, this mortgage lender was lax,
18 and that each loan file was different and had to stand of
19 fall on its own facts, and therefore, this particular
20 claimant didn't qualify for direct notice, because no one
21 would have known she was a Creditor without reviewing her
22 loan file, and that was not a requirement that the Court was
23 willing to put on the Debtor.

24 Obviously, again, for the reasons Mr. Weisfelner
25 said, this case is very different. This case was a known

1 defect baked into the DNA of every one of the affected
2 vehicles. It was no difference between the ignition switch
3 in my Cobalt from his Cobalt from her Cobalt, if it all had
4 the same platform, it all had the same defect. And our
5 contention is that General Motors knew about that.

6 Likewise, Your Honor, with respect to Enron, what
7 Enron dealt with was an external investigation where the
8 company, the Debtor, would have no way of knowing what the
9 results or consequences of an external investigation by a
10 Government lender might be. It might be absolved, it might
11 not be absolved. So, the Court held that that wasn't enough
12 to require notice.

13 Again, we think, because we have a known ignition
14 switch defect across the board in all of the affected
15 vehicles, it's a very different case. The burden, we think,
16 Your Honor, was primarily not a due process case, and the
17 only reason due process was discussed in the Burton case was
18 because the Plaintiffs there, who were not future Creditors,
19 tried to categorize themselves as future Creditors, but once
20 you got past that very small discussion of Grumman Olsen,
21 that case was basically a contract interpretation case,
22 where the Court looked at whether or not these were assumed
23 liabilities. You didn't have the due process violation in
24 Chrysler and the seven years of non-disclosure that you have
25 here.

1 DPWN. The premise of the District Court was that
2 the Debtor had particular and peculiar knowledge that no one
3 else had, and for that reason, the Debtor should have given
4 notice to DHL. What the Second Circuit did, was it said,
5 "We've looked at this complaint," because this was done on a
6 motion to dismiss. "We've looked at this complaint, and we
7 think there are some indications in this complaint that DHL
8 may have known about this anyway," so what the Second
9 Circuit did was send it back to the District Court to
10 develop a factual record as to whether or not,
11 notwithstanding what DHL has said in its complaint, it
12 actually did know that there were antitrust and price fixing
13 violations.

14 That's not the case here, because only GM knew
15 about the ignition switch defect. The Folger case. The
16 Folger case, I think, is a good case for us. That was the
17 case where the Court held that the assets were not held free
18 and clear of the supplier's defenses. And what the Court
19 said was, the content of the notice of sale, the content of
20 the notice of the sale, was insufficient to give notice to
21 this party who was obligated on accounts receivable, that
22 there was an effort to sell free and clear of its defenses.

23 The Cook case, or the Keck case, Your Honor, which
24 is the Second Circuit case that follows Manville. Whether
25 or not it's a summary order, what that case did was, it

1 expressly followed Manville, and what the Court stated at
2 page 2 of the Lexus decision, is, "Bankruptcy Courts cannot
3 extinguish interested parties who lack notice of, or did not
4 participate in the proceedings.

5 See, for example, in re Johns Manville. (Holding
6 the bankruptcy is no exception to the due process principle
7 that one is not bound by a judgment in personam in
8 litigation in which he is not designated as a party, or to
9 which he has not been made a party by service of process.)"
10 And that's the important point, Your Honor, not that Keck
11 had involved a 363 Sale. Keck relies on Manville, and
12 Manville makes it very clear that there is no dispensation
13 from due process just because you're in a bankruptcy case.
14 Due process is just as important as subject matter
15 jurisdiction.

16 My favorite case of all, Your Honor. The Factors'
17 case, that's the old Supreme Court case from the 1800s.

18 THE COURT: Which one?

19 MR. WEINTRAUB: Factors'.

20 THE COURT: Mm hmm.

21 MR. WEINTRAUB: That case is not a sale free and
22 clear of liens, and I would urge the Court to read that
23 case.

24 THE COURT: Do you have a cite for me to make it
25 easier for me?

1 MR. WEINTRAUB: Yes. 111 U.S. 738.

2 THE COURT: Okay.

3 MR. WEINTRAUB: What happened in that case was,
4 there was a bankruptcy sale. The bankruptcy sale was done
5 subject to the liens of four lienholders who thought they
6 were working in concert, and those four lienholders took
7 title to the property in their respective names,
8 collectively. And what they did was, they paid off the
9 taxes, rehabilitated the property and wanted to sell it.
10 One of the (indiscernible) four lienholders said, "Wait a
11 minute. I wasn't part of this. I wasn't part of this
12 group. Nobody told me about this," even though there was
13 evidence that this person was represented by an agent at the
14 hearing.

15 What the State Court did, because I think it was
16 started in State Court and then made it to Federal Court,
17 they ruled that there was a merger -- well, what this
18 recalcitrant lienholder argued was, "Not only was I not part
19 of this group, but when this group took title, even though
20 the liens were kept in place, the lesser title merged into
21 the greater title. So now, their lien has been
22 extinguished, they're the owners. I wasn't part of this and
23 I didn't get notice, therefore I'm the only surviving lien,
24 jumping ahead of everybody."

25 And what the Supreme Court said was, "Wait a

1 minute, that's not what seemed to have happened here. What
2 seemed to have happened here is you're all working together,
3 and if these guys didn't think you were working together, if
4 they were wrong, we're not going to let you argue that there
5 was a merge, which by the way there wasn't those liens are
6 still good," so the Supreme Court determined that there
7 wasn't a merger of the lesser title into the greater title,
8 they said, "We're going to do a do-over, because either
9 you're going to live by the agreement that we thought you
10 made, or we're just going to do the whole sale over again,
11 and you're going to get the exact same rights that you had
12 before. So we're not going to let you, basically, turn on
13 your partners and say that you were not part of this."

14 So it's a completely distinguishable case and it
15 can't be subject to the proposition that sales free and
16 clear of liens will be set aside or not set aside under
17 certain circumstances because it never was a sale free and
18 clear of liens.

19 Lastly, Your Honor, with respect to remedies,
20 without belaboring the point, we think that Manville 4
21 controls, and we think that Manville 5 makes it clear that
22 you're not invalidating or blue penciling the order. You're
23 just applying the order as entered, only against those
24 people who had appropriate notice.

25 What the Supreme Court said in Bailey, which was

1 the case that resulted in the coming back down, the Supreme
2 Court said that the language of the agreement at issue here,
3 which was basically an agreement that went back to 1986, and
4 then Judge Lifland entered a clarifying order, I think, in
5 2004, where they tried to do whatever they were trying to
6 do, I won't speculate, Your Honor. The Supreme Court said
7 that that language in the agreement actually did cover
8 direct claims, and it held that, in Bailey, that subject
9 matter jurisdiction was res judicata, even though, without
10 commenting on whether or not there was subject matter
11 jurisdiction, the Court said it's too late to collaterally
12 attack it, except those who were not given notice of the
13 original order are not bound by it.

14 And when it went back down, the only issue back
15 below was the effect of this ruling, this due process
16 ruling, on whether or not Travelers still had to pay the,
17 whatever it was, three or four hundred million dollars,
18 which ultimately, the Second Circuit had said they had to
19 pay. But we think that Manville 4 is the law of this
20 Circuit, and we think that Keck recognizes that. Thank you,
21 Your Honor.

22 THE COURT: All right, thank you. Okay, Ms.
23 Rubin, come on up.

24 MS. RUBIN: I'm sorry, Your Honor, and I beg you
25 to indulge me just for a few minutes. Mr. Weintraub

1 actually covered some of what I intended to cover, which was
2 to talk about some of the cases that had been discussed by
3 Mr. Steinberg this morning, and point out to Your Honor some
4 of the factual distinctions that Mr. Weintraub so ably
5 covered, particularly with respect to the Chemtron case, the
6 Manville case and the DPWN case.

7 There are a couple of things that I wanted to
8 clarify for Your Honor or answer for Your Honor if we could.
9 The first is, you made a reference to the 150 people that
10 Mr. Weintraub represented, and yesterday you questioned
11 whether or not that was, in fact, the case, given the number
12 that you recalled from the GUC Trust brief. I wanted to
13 clarify --

14 THE COURT: I think you had said something like
15 eight and he had said something like 150 --

16 MS. RUBIN: Yes.

17 THE COURT: -- and that had given rise to the
18 confusion.

19 MS. RUBIN: Yes, and I wanted to clarify where the
20 confusion arises. At the time that the GUC Trust submitted
21 its brief, it based its count on the number of pre-sale --
22 I'm sorry, pre-closing accident victims who actually had
23 pre-closing accidents based on schedules filed by new GM in
24 connection with its motion to enforce.

25 At that time, meaning when new GM filed its motion

1 to enforce, in its original motion, it cabined the Edwards
2 case that Mr. Weintraub spoke about with you yesterday and
3 said, "At this point in time, we don't consider that to be a
4 pre-closing accident case. We reserve the right to come
5 back to Your Honor and schedule that case."

6 To the best of my knowledge, the Edwards case has
7 never since been part of any of the subsequent schedules
8 that have been filed. I certainly encourage Mr. Steinberg
9 and Mr. Davidson to correct me if I'm wrong. By our counts,
10 at this point in time, there are 31 cases, or rather 31
11 Plaintiffs that qualify as pre-closing accident victims, not
12 including those in the Edwards case.

13 Again, that's based on a count of the schedules
14 filed by new GM, and just in terms of the motion to enforce
15 that GM had originally filed, it talked about the Edwards
16 case. There's footnote 6 in that motion to enforce. That
17 motion was filed, I believe, on August 1st of 2014. I,
18 unfortunately, don't have the docket number with me.

19 To turn to the other issues, Mr. Steinberg asked
20 this morning, or he raised the point this morning, that
21 there's no situation in a prior 363 Sale in which a
22 Chemtura-like notice has previously been approved. Well,
23 Your Honor, I would pose a different question, or a
24 different retort to that, which is, there's no company
25 that's ever been accused of doing what old GM and new GM

1 collectively have been found to do here, which is, to
2 withhold from the public, information justifying the recall
3 of millions of vehicles.

4 With respect to the ignition switch defect alone,
5 I think Mr. Weisfelner pointed out to you that there are 2.6
6 million vehicles encompassed in what new GM considers the
7 ignition switch recall. There are additional 12 million,
8 give or take, vehicles that have ignition switch-related
9 defects. They were described in press releases in ways that
10 are almost identical to the ignition switch defect as new GM
11 considers it alone. So, with respect to the assertion that
12 there's no case in the history of the Bankruptcy Courts that
13 find Chemtura notices appropriate in a 363 Sale context, nor
14 am I aware of any circumstance or situation that presents
15 itself precisely like this.

16 That raises another point. Your Honor asked Mr.
17 Weisfelner if the recall notices had been timely issued,
18 would that have obviated the need for more disclosure in the
19 notice? Mr. Weisfelner said that he thought it would have
20 largely addressed it. I'll take a step further. If the
21 recall notices had been timely issued here, yes, I believe
22 that the publication notice here would have been
23 appropriate, but barring that, that's not the situation
24 we're in.

25 Barring that, yes, I believe the Chemtura notice

1 would have been appropriate here, because this situation,
2 like Chemtura, and in fact, even like Chemtron, where the
3 Debtor had been participating in clean up of the toxic site
4 for 18 years, there was clearly contemplation that folks
5 would have claims based on their exposure. They just
6 couldn't find the people in those circumstances that might
7 have claims because, as Mr. Weintraub pointed out, the
8 people who were posing claims at that point were guests of
9 those who owned the property in the vicinity.

10 This is even worse than that, Your Honor. If they
11 in fact, knew enough to have issued a recall in 2008, no one
12 has says to you, in that circumstance, had they in fact
13 issued the recall, those folks would not have constituted
14 known Creditors, even by the more stringent standards that
15 Mr. Steinberg is asking you to adopt in terms of, reasonably
16 ascertainable from books and records.

17 In terms of some of the cases that have been
18 discussed, one case that didn't come back to Your Honor on
19 this side is the Ex-Cel case, and Mr. Steinberg represented
20 to you that that case was decided on different facts because
21 the Purchaser there was found not to be a good faith
22 purchaser.

23 Respectfully, Your Honor, I would disagree.
24 There's a footnote in that case that indicates that while
25 the good faith of the Purchaser was, as Ninth Circuit

1 Bankruptcy Appellate Panel said, in doubt, they then go on
2 to say the following, Your Honor, and I quote, "We therefore
3 respectfully disagree with Edwards, to the extent that it
4 allows considerations such as," and it provides a list, and
5 one of them is as follows: "The innocence or good faith of
6 third parties involved in bankruptcy sales." In other
7 words, the Ex-Cel case is saying, whether or not someone is
8 a good faith Purchaser, we disagree with Edwards to the
9 extent that it allows considerations like the good faith of
10 that Purchaser, and I'll further quote, "to justify
11 departures from due process standards in adjudicating
12 property rights."

13 Your Honor, Mr. Steinberg, I think, also
14 referenced Judge Gonzalez's decision in the Chrysler case
15 with respect to future claimants, and I know that there's
16 been a lot of discussion about whether the used car
17 purchasers here constitute future claimants. I certainly
18 was one who made an argument to Your Honor yesterday that
19 they do. Without revisiting that argument, I will just say
20 that, as Your Honor is well aware, when the Second Circuit
21 issued its decision in the Chrysler matter at the time that
22 Your Honor entered his sale decision, oral argument had
23 already been held, Your Honor was well aware of the
24 arguments that had been made.

25 The sale decision reflects Your Honor's

1 understanding of what that decision would have reflected.
2 But the decision in the Chrysler matter was not issued until
3 after Your Honor issued the sale decision, and in that
4 decision --

5 THE COURT: No, the written decision in Chrysler
6 wasn't issued until after I issued my decision, but the oral
7 decision of the Second Circuit in Chrysler, which was
8 confirmed by a written order at the time, had held that
9 Judge Gonzalez's decision was affirmed for substantially the
10 reasons set forth by the Bankruptcy Court, and if your point
11 is that a decision of I don't know how many pages of the
12 Second Circuit self-destructs because after the fact, the
13 Supreme Court on the appeal by those Indiana bond holders
14 had directed that the judgment be reversed as moot, it's
15 more difficult to see how it was moot at the time that the
16 Circuit issued the first of its orders.

17 MS. RUBIN: That actually wasn't my point, Your
18 Honor, and I don't disagree with the factual predicate that
19 you just laid forth, and I apologize for suggesting
20 otherwise.

21 My only point was to suggest, when the Second
22 Circuit did issue its written opinion, at the end of that
23 opinion, it said that it was going to affirm Judge Gonzalez
24 in so far as approving the 363 order free and clear of
25 future claims was consistent with the bankruptcy code, but

1 as Your Honor knows, it caveated and left for a future day,
2 whether or not the disposal of those claims was in fact
3 constitutional and said that, when and if the case came
4 before it that raised post-sale claims that could not have
5 been anticipated and were properly qualified as future
6 claims, it would revisit that issue. That's all I meant to
7 suggest to Your Honor.

8 Let me return, if I can, Your Honor, to the sale
9 agreement itself. So, Mr. Steinberg referenced the sale
10 agreement this morning and said that I may have
11 mischaracterized the language in 2.3(b), which pertains to
12 retained liabilities, saying that I didn't read to Your
13 Honor the rest of that provision. Respectfully, even if I
14 had read the remainder of the provision, it doesn't change
15 the fact that the definition of retained liabilities in this
16 sale agreement still pertains to the liability of any
17 Seller, and all of the liability as it's defined there, is
18 still referential to the liability of any Seller. You can't
19 escape that phrase, so whether it arises or accrues before
20 or after the closing, the definition or retained liabilities
21 still goes back to, and is inseparable from, the liability
22 of any Seller.

23 Now, to the extent that the sale order goes beyond
24 that in paragraph 46, I'll also point Your Honor, as Mr.
25 Steinberg did, to paragraph 17 of the sale order, which

1 pertains to the recall-related obligations that new GM took
2 upon itself, saying from and after the closing, and I'll --
3 I'm reading from the sale order, "the Purchaser shall comply
4 with the certification, reporting and recall requirements of
5 the National Traffic and Motor Vehicle Safety Act, as
6 amended and recodified." And it goes on to --

7 THE COURT: Yeah, can you reference by number,
8 because that's (indiscernible).

9 MS. RUBIN: Sure, it's paragraph 17 of the sale
10 order, Your Honor.

11 THE COURT: Okay, and I think --

12 MS. RUBIN: And --

13 THE COURT: Pause for a second. I think that's
14 the same one that Mr. Steinberg made reference to before.

15 MS. RUBIN: It is. It's no different than the
16 provision that Mr. Steinberg was referencing. My only
17 point, Your Honor, is Mr. Steinberg has framed for you a
18 universe, as you know, where everything in the sale
19 agreement is either a retained or assumed liability, and
20 there can be no other liability for new GM whatsoever, in
21 respect of vehicles manufactured by old GM.

22 To the extent that paragraph 46 purports to
23 provide him with that protection, I'll revert back to what
24 Mr. Weisfelner and Mr. Weintraub ably said, which is, to the
25 extent that Your Honor is going to consider prejudice to be

1 an essential component of the test for due process here,
2 that is the prejudice to them.

3 Had they been aware of the recall-worthy safety
4 defects, either through a recall notice, or through a
5 modification of the publication notice that was provided
6 here, or even a notice that had been sent to each of their
7 clients' homes, there's no doubt in my mind that they would
8 have come to this Court and complained about the language in
9 paragraph 46. They would have complained about the purchase
10 price. They would have complained about the upward
11 adjustment provision, as Mr. Weisfelner points out, because
12 where we are now in terms of allowed, general unsecured
13 claims, we're at about the \$32 billion dollar mark, and the
14 upwards adjustment, as Mr. Weisfelner pointed out to you
15 correctly, doesn't kick in until the \$35 billion dollar
16 mark.

17 That means we've got \$3.2 billion dollars, not
18 just in claims, in allowed, general unsecured claims to go
19 before the GUC Trust is entitled to any of the adjustment of
20 the purchase price in terms of securities. And at that
21 point, what comes back to the GUC Trust, it's not shares and
22 warrants, Your Honor. It's just shares.

23 Now, paragraph AA of the sale order was also
24 referenced by Mr. Steinberg, and I don't read paragraph AA
25 to say what he does. I read paragraph AA to talk about

1 Successor and Transferee liability, and not, more broadly,
2 to suggest that new GM can never be culpable for its own
3 actions in respect of the subject vehicles that we're
4 talking about here, and again, Your Honor, I'll read to you
5 partially, not because I'm trying to be obfuscatory, but
6 only for the matter of time.

7 It says, "the transfer of the purchase assets to
8 the Purchaser will be a legal, valid and effective transfer
9 of the purchased assets, and except for the assumed
10 liabilities, will vest the Purchaser with all right, title
11 and interest of the Sellers to the purchased assets, free
12 and clear of liens, claims, encumbrances and other
13 interests," and then again, going down a couple of lines to
14 just take out some of the additional language, "based on any
15 Successor or Transferee liability," and then goes on to say,
16 "including, but not limited to," to define what Successor or
17 Transferee liability mean, again, I don't take that
18 paragraph to suggest that new GM could not be liable to
19 folks in the Plaintiffs' position, for actions of their own
20 making.

21 THE COURT: Their own making, being new GM's own
22 making, is contrasted to old GM's making.

23 MS. RUBIN: Yes, that's correct, Your Honor. New
24 GM's own making. And Your Honor mentioned yesterday that he
25 thought that the argument that any of Plaintiffs' claims

1 fell into the definition of assumed liabilities was not a
2 particularly good one, so I won't waste your time with that,
3 except to say this, Your Honor.

4 The definition of assumed liabilities includes at
5 Section 2.3(a) 11 of the sale agreement the following. "All
6 liabilities arising out of, relating to, in respect of, or
7 in connection with, the use, ownership or sale of the
8 purchased assets after the sale," and then Your Honor, in a
9 separate provision of the sale order, in the definition of
10 purchased assets, there is a portion of the definition --

11 THE COURT: But you've made that argument in your
12 brief.

13 MS. RUBIN: I did.

14 THE COURT: Are you saying that that trumps
15 prohibitions against successor liability?

16 MS. RUBIN: No, what I'm saying, Your Honor, is,
17 to the extent that Mr. Steinberg has submitted to you that
18 his client is only liable for assumed liabilities, the
19 express definition of assumed liabilities within the sale
20 agreement encompasses his client's own use of purchased
21 assets, meaning old GM's books, records, legal records,
22 databases, including some of the same databases that Mr.
23 Weisfelner has amply referred to in his argument earlier
24 this morning.

25 That's not a successor liability argument, Your

1 Honor. That's talking about when new GM assumed the assets
2 that they purchased on day one, they would be liable from
3 that point forward as an assumed liability, their use of
4 those purchased assets, including all of the books and
5 records that they held on to. In fact, Your Honor, in
6 mediating claims with those who made claims against the
7 Estate, to the extent that Motors Liquidation Company and
8 subsequently, the Trust, needed information about particular
9 accidents or litigation that had commenced before, where did
10 they go for that information? They went to new GM.

11 For example, in the Phillips case that Mr.
12 Weintraub was referring to earlier, when MLC was mediating
13 that case, when they needed more information about, "What is
14 this case about? What are her claims? Is there any merit
15 to them?" Where did they go for that information? They
16 went to their liaison in the new GM in-house legal
17 department.

18 So, to say that new GM has no liability predicated
19 on their use of the purchased assets, including books,
20 records, legal records, databases, I think is a fairly
21 specious argument. Recognizing that Your Honor has already
22 indicated that that's not an argument he's necessarily pre-
23 disposed to.

24 The final thing I'll say is, I think my colleagues
25 over here have talked at great length about prejudice and

1 the points of 363 hearings. I'll just say this. There's
2 not a single case that new GM can cite to you that stands
3 for the proposition that due process works by proxy. So,
4 while they have cited to you --

5 THE COURT: Works by proxy?

6 MS. RUBIN: Works by proxy, in other words, the
7 fact that I get due process doesn't mean that Mr. Weisfelner
8 gets due process, doesn't mean Mr. Steele gets due process,
9 Mr. Esserman gets due process. We all may be similarly
10 situated in some way, but that's not the way the law stands.
11 That's not what our Constitution mandates or entails. So,
12 Mr. Steinberg can say a bunch of similarly situated people
13 did in fact get notice, they showed up at the sale hearing
14 and made some arguments, I think Mr. Weisfelner has amply
15 refuted that the arguments being made were, in fact, the
16 arguments he would have made, had he been given adequate
17 notice.

18 But putting that aside, there's no case that I'm
19 aware of that stands for the proposition that giving due
20 process to someone like you necessarily fulfills a company's
21 due process obligations in the course of a bankruptcy or in
22 any other proceeding, for that matter.

23 The final thing that I would say is, Your Honor
24 obviously has indicated that precedent is very important to
25 him, and the concern about what would happen here if he

1 finds that the appropriate remedy for a due process
2 violation is to find that Mr. Weisfelner and Mr. Weintraub
3 and Mr. Esserman's clients are necessarily exempt from the
4 363 Sale order and injunction entered here. But let me pose
5 a different question.

6 If there is no remedy here for the clear due
7 process violation, and I'll submit that if Your Honor is
8 willing to find that new GM knew enough that it should have
9 triggered a recall, that there is a due process violation
10 here. If there's no remedy here for a clear due process
11 violation, maybe that gives prospective 363 Purchasers some
12 minimal additional comfort, but what else is it going to
13 signal? That companies are entitled to saddle Creditors
14 with the knowing misconduct not just of the Debtor, but of
15 the Purchaser? I don't know that that necessarily is
16 justice either, Your Honor, and with that, I'll rest. Thank
17 you, Your Honor.

18 THE COURT: All right.

19 MR. STEINBERG: I have just 90 seconds, Your
20 Honor.

21 THE COURT: [LAUGHS]

22 MR. STEINBERG: You can hold me to the 90 seconds.
23 I'll stop at that point.

24 THE COURT: Go ahead.

25 MR. STEINBERG: Mr. Weisfelner said that he was

1 only aware of two manufacture -- car manufacturing cases. I
2 just point out White Motors, another car manufacturing case,
3 75 B.R. 944. It was the case that I cited to before, which
4 talks about successor liability being Federally pre-empted.
5 Mr. Weintraub and I actually agree that the Edwards case is
6 part of the motion to enforce. When I refer to paragraph AA
7 of the sale order, I was talking about old GM conduct, not
8 new GM conduct, and I don't really know what Mr. Weintraub
9 was talking about as three stipulated, non-disputed facts
10 that we agreed to, because I don't think we agreed to
11 anything. But I rest with that.

12 THE COURT: All right.

13 MR. WEINTRAUB: I need to respond to that, Your
14 Honor.

15 THE COURT: Go ahead.

16 MR. WEINTRAUB: When Mr. Steinberg says he doesn't
17 know what those facts are, they were sent to him. They were
18 sent to him and it said, "You can object to them, not object
19 to them, agree or disagree." There was never a response. I
20 filed them with the Court, they were served on him, they
21 were part of the record in the case. They have never been
22 disputed.

23 MR. STEINBERG: Oh, but they have. I'll show you
24 the 11.

25 MR. WEINTRAUB: You have disputed them?

1 THE COURT: All right. Folks, this isn't the
2 English Parliament. Speak to me. All right, am I correct
3 that we can still finish with this in about 40 minutes?

4 MR. STEINBERG: This is correct, Your Honor.

5 THE COURT: Ms. Newman? Was that a yes?

6 MS. NEWMAN: I think so, Your Honor.

7 THE COURT: All right. A ten-minute recess, and
8 then we're going to go take mootness next. We're in recess.

9 [PAUSE RECORDING]

10 [RESUME RECORDING]

11 THE CLERK: All rise.

12 THE COURT: Have seats, please. Ms. Newman,
13 you're leading off.

14 MS. NEWMAN: Yes, Your Honor. Good afternoon,
15 Your Honor. For the record, I'm Deborah Newman from Akin
16 Gump on behalf of the participating unit holders, and I will
17 be addressing the equitable mootness threshold issue on
18 behalf of both the participating unit holders and the GUC
19 Trust administrator.

20 Your Honor, as I'm sure you are well aware, the
21 law of equitable mootness is well-settled in the Second
22 Circuit and was recently re-affirmed by the Second Circuit
23 in its BGI decision, the cite of which is 772 F3D 102. A
24 claim that would require a material modification of a
25 substantially consummated plan of liquidation is presumed to

1 be equitable moot, unless the claimant can satisfy all of
2 the factors established in the Second Circuit Chateaugay
3 decision that have been held to apply to liquidations. Of
4 course, there is no dispute here that the plan has been
5 substantially consummated.

6 In allowing Plaintiffs to assert their claims
7 against the GUC Trust now, claims that they allege to be in
8 the multiple billions of dollars, would require a material
9 modification of the substantially consummated plan. The
10 plan cleanly provides that GUC Trust beneficiaries consist
11 only of Creditors that have held allowed or disputed claims
12 as of the effective date, the Defendants in the currently
13 pending JP Morgan action, and the holders of the publicly
14 traded GUC Trust units.

15 Expanding these beneficiaries now to include
16 Plaintiffs and their multiple billions of dollars of claims
17 would require that the plan be materially modified.

18 Now, turning to the showing the Plaintiffs must
19 overcome to defeat the presumption that their claims are
20 equitable moot as against the GUC Trust, those factors
21 require Plaintiffs to show one, that they acted diligently
22 in pursuing claims against the GUC Trust; two, that they
23 provided notice of their potential claims against the GUC
24 Trust and these proceedings to all parties who could be
25 affected by their claims if allowed against the GUC Trust;

1 three, that the Court can fashion relief for Plaintiffs, and
2 can do so without inequitably impacting the rights of third
3 parties; and four, that providing such relief will not
4 unravel intricate transactions so as to knock the props out
5 from under them, and create an unmanageable and
6 uncontrollable situation for the Court.

7 Your Honor, Plaintiffs cannot satisfy any of these
8 factors.

9 THE COURT: Were you directing those from
10 Chateaugay or from something else?

11 MS. NEWMAN: I'm sorry, Your Honor, I didn't hear
12 you.

13 THE COURT: Were you paraphrasing Chateaugay or?

14 MS. NEWMAN: Yes, Your Honor. I was paraphrasing
15 Chateaugay as it subsequently then applied in the context of
16 plans of liquidation which omit one of the Chateaugay
17 factors, which is the factor that requires a showing that
18 awarding the relief will not affect the reorganized Debtor
19 from emerging as a revitalized entity.

20 THE COURT: Mm hmm.

21 MS. NEWMAN: And you can find those factors as
22 applied towards a liquidation in the BGI decision, recently
23 -- the recent Second Circuit BGI decision.

24 THE COURT: Okay.

25 MS. NEWMAN: Most glaring, Your Honor, of these

1 factors and the failure -- the Plaintiffs' failure to meet
2 them, is the point that Your Honor alluded to yesterday,
3 which is that Plaintiffs have taken no actions whatsoever to
4 pursue claims against the GUC Trust or to stay GUC Trust
5 distributions. Quite the contrary, Plaintiffs have taken
6 pains to point out that they were not pursuing claims
7 against the GUC Trust. Now, under binding Second Circuit
8 case law, this factor alone mandates a ruling that equitable
9 mootness would bar any of the Plaintiffs' claims against the
10 GUC Trust.

11 Plaintiffs argue in their opposition brief that
12 this Chateaugay factor should not apply to them, given their
13 argument that their procedural due process rights were
14 violated, because they were given insufficient notice of the
15 bar date and the confirmation order. But Your Honor, in
16 BGI, the appellants were similarly arguing that Judge
17 Glenn's decision denying their motion to file late claims
18 should be reversed because they were provided insufficient
19 notice of the bar date, in violation of their due process
20 rights.

21 And the Second Circuit affirmed the District
22 Court's ruling that those appellants' claims were equitably
23 moot, because, notwithstanding the claims of insufficient
24 notice and procedural due process violations, because the
25 appellants had failed to seek a stay of a liquidating

1 Trust's distributions after becoming aware of their claims
2 or alleged claims, and because the appellants there had
3 failed to provide notice to general, unsecured Creditors,
4 who would be stripped of their recoveries if the relief that
5 appellants had sought, had been granted.

6 Here, Plaintiffs' argument that their procedural
7 due process claims should relieve them of having to comply
8 with Chateaugay's diligence factor rings especially hollow,
9 given that Plaintiffs chose for strategic reasons, not to
10 pursue claims against the GUC Trust and not to seek to stay
11 the GUC Trust's distributions even after they became aware
12 of their alleged claims, and there's no dispute about that,
13 Your Honor.

14 Under binding Second Circuit case law, the
15 ramification of that strategic decision is that any claims
16 the Plaintiffs may seek to pursue against the GUC Trust now
17 or in the future, are barred by the doctrine of equitable
18 mootness. And this is the case, Your Honor, even if the
19 Court accepts Mr. Weisfelner's somewhat half-hearted
20 argument that the reason that Plaintiffs chose not to seek a
21 stay was because they believed that they would not have been
22 able to obtain one under the law. Even if that is so, Your
23 Honor, the case law is clear that what is important to
24 satisfy in Chateaugay's diligence factor is that a claimant
25 seek a stay, not that it obtain one.

1 And the Second Circuit stated, Your Honor, in
2 Chateaugay, for example, that a party who fails to seek a
3 stay, quote, "does so at his own risk." In the Metro Media
4 decision, the Second Circuit said, "A chief consideration
5 under Chateaugay 2 is whether the appellant sought a stay of
6 confirmation." The Court went on to say, "We insist that a
7 party seek a stay, even if it may seem highly unlikely that
8 the Bankruptcy Court will issue one."

9 And in the Campbell case, Your Honor, Judge
10 Buchwald said, it's footnote 30, "We emphasize that the
11 Second Circuit has made it clear that an appellant is
12 obligated to protect its litigation position by seeking a
13 stay, even where a stay may be unlikely to be granted."
14 Judge Buchwald went on to say, "At oral argument, it became
15 clear that appellant's counsel deliberately chose not to
16 seek a stay because he was confident that the appeal would
17 not be equitably mooted. This was an audacious litigation
18 strategy. Nonetheless, having chosen not to seek the stay,
19 appellants are now faced with the consequences of that
20 choice."

21 A known litigation risk did not give appellants
22 license to flout well-settled procedural rules. Accepting
23 appellants' arguments to the contrary would both frustrate
24 the policy of the equitable mootness doctrine, and undermine
25 the doctrine itself. All of these cases mandate that the

1 ramification of Plaintiffs' decision not to seek a stay of
2 Trust distributions, or to assert claims against the GUC
3 Trust, is that Plaintiffs' claims are equitable moot.

4 Turning to the notice factor under the Chateaugay
5 decision, Your Honor, Plaintiffs have also failed to satisfy
6 this factor. They have not provided any notice to GUC Trust
7 beneficiaries whose remaining recoveries could be completely
8 eviscerated if Plaintiffs are permitted to pursue claims
9 against the GUC Trust. Plaintiffs argue, in their
10 opposition papers, that they satisfied this factor because
11 the GUC Trust administrator and the participating unit
12 holders have notice of these proceedings, and the GUC Trust
13 provided notice of the motions to enforce and the threshold
14 issues in its public disclosures beginning in May 2014.

15 But this falls far short of the notice required by
16 Chateaugay, which necessitates actual notice to all parties
17 that could be adversely affected by Plaintiffs claims, as
18 Judge Marrero stated in Calpine, Your Honor, an assertion
19 that potentially affected parties may have had constructive
20 or actual notice is not sufficient to satisfy the burden of
21 establishing that such parties had notice, and that's at 390
22 B.R. 508, the pinpoint cite is 522.

23 Here, Your Honor, the potentially affected
24 parties, the parties who could be significantly adversely
25 affected if Plaintiffs are permitted to pursue the GUC

1 Trust's assets, go far beyond the GUC Trust administrator
2 and the participating unit holders that we represent, and
3 they include all GUC Trust unit holders and the holders of
4 disputed claims and allowed claims that have not yet
5 received distributions. There is no evidence in the record
6 that all of these parties were provided with actual notice.

7 Now, Your Honor, turning to the next two
8 Chateaugay factors that apply here, Plaintiffs and new GM
9 also both spend a significant amount of time in their briefs
10 arguing that relief can be fashioned for Plaintiffs from GUC
11 Trust's assets without harming innocent third parties, or
12 knocking the props out from under the plan. This just is
13 not the case, Your Honor.

14 First, as Ms. Rubin has touched upon both
15 yesterday and today, as things currently stand, there are no
16 assets in the GUC Trust that could be awarded to the
17 Plaintiffs. All of the GUC Trust's assets have been
18 allocated to fund recoveries to the Defendants in the JPM
19 litigation in the event that they are required to disgorge
20 the distributions that they received in connection with the
21 bankruptcy, disputed claims that have not yet been resolved,
22 allowed claims that have not yet received distributions, and
23 GUC Trust administrative costs and taxes.

24 And even Plaintiffs appear to concede that the GUC
25 Trust assets cannot be diverted from these allocations to

1 the --

2 THE COURT: All right, pause just for a minute. I
3 let you go on for a long time --

4 MS. NEWMAN: Sure.

5 THE COURT: -- without interrupting, but you
6 haven't hit yet on the things that are of the most concern
7 to me.

8 MS. NEWMAN: Okay.

9 THE COURT: You're relying on the failure to
10 provide notice to the GUC Trust beneficiaries, but I've
11 heard for about a day and a half about another kind of
12 failure to provide notice, and in substance, you're saying
13 that the failure to give your guys notice trumps the failure
14 to give Mr. Weisfelner's guys and Mr. Weintraub's guys their
15 notice. I haven't heard anybody else speak yet, but somehow
16 I suspect that one or another of them is going to say that,
17 because they weren't given notice of the provision in the
18 confirmation order that you are talking about, that's not
19 any more binding on them than the sale order is, and my
20 task, obviously confined by the limits of law, is to do
21 what's fair and right.

22 Now, I haven't heard you mention yet, if you ever
23 will, 502(j), but that kind of contemplates a situation
24 where you have late arrivers at the party, or different
25 claims, and seems to set out a roadmap for what's equitable,

1 which is that you don't give people who already got
2 distributions and claims, you don't make them give any money
3 back, but to the extent you haven't given out any more, you
4 do a stop, look and listen to make sure that those who may
5 have been prejudiced before, catch up.

6 Also, it's my impression, I haven't gotten a
7 mandate yet, but the Circuit didn't like my decision on JP
8 Morgan Chase, and presumably, if things materialize now, I
9 know there are issues on who owns the cause of action, which
10 I ruled on, but which a District Judge says was not ripe.
11 Arguably, it's riper now, but that would bring in a pot of
12 money beyond what you have now, which presumably will be
13 distributed to the unsecured Creditor community, unless
14 something else happens.

15 MS. NEWMAN: Okay.

16 THE COURT: Can you address what's really bugging
17 -- I mean, a tactical choice --

18 MS. NEWMAN: Sure. Sure, sure.

19 THE COURT: -- that's the low hanging fruit, okay?

20 MS. NEWMAN: Yes.

21 THE COURT: Okay? Let's talk about the harder
22 stuff.

23 MS. NEWMAN: Sure, Your Honor, I'd be happy to do
24 that, and I'm going to start in the reverse order of the way
25 in which you posed the questions and begin with the JPM

1 question. I think Your Honor --

2 THE COURT: Forgive me. You haven't appeared
3 before me as much as many people. I hate acronyms. JP
4 Morgan?

5 MS. NEWMAN: Yes, Your Honor, JP Morgan.

6 THE COURT: JPM is JP Morgan Chase?

7 MS. NEWMAN: Yes, Your Honor, I will keep that in
8 mind.

9 THE COURT: Okay.

10 MS. NEWMAN: And I apologize to the Court. I will
11 begin by addressing Your Honor's question with respect to
12 the JP Morgan litigation, and I think, Your Honor, I
13 understand the status of the JP Morgan litigation to
14 actually be the reverse of what you just articulated. Given
15 the recent rulings in the JP Morgan litigation, my
16 understanding is that JP Morgan will, at least the way
17 things stand and as I acknowledge as you did, that there is
18 a lot more that will likely transpire in that case, but
19 there is a cha -- given the reversal of Your Honor's
20 decision, JP Morgan may be required to disgorge the
21 distributions that it was provided with in the bankruptcy,
22 and if that is the case, then JP Morgan, then, will have a
23 resulting claims against the GUC Trust.

24 THE COURT: An unsecured claim.

25 MS. NEWMAN: An unsecured claim, and so, of the

1 approximately \$700 million dollars worth of assets in shares
2 and warrants that are currently in the Trust, I think
3 approximately, between \$400 and \$500 million dollars would
4 then have to be paid out to the Defendants in the JP Morgan
5 litigation. So, where things currently stand I think has
6 actually been a negative development, from the GUC Trust's
7 perspective, because it is more likely now that the assets
8 in the GUC Trust that have been reserved for the JP Morgan
9 litigation will now have to be distributed.

10 THE COURT: Forgive me, that sounds upside down to
11 me.

12 MS. NEWMAN: Okay.

13 THE COURT: I thought the whole idea of the JP
14 Morgan / Trust litigation was to make JP Morgan Chase give
15 back the amounts that it got as a secured Creditor.

16 MS. NEWMAN: That's correct.

17 THE COURT: And it has to pay back in
18 (indiscernible) dollars, money that you're now going to give
19 out in (indiscernible) bankruptcy dollars.

20 MS. NEWMAN: So, that's correct with one
21 exception, which is that the money that will be paid by the
22 JP Morgan liti -- Defendants goes not to the GUC Trust but
23 to a separate avoidance action Trust, and the beneficiaries
24 of the avoidance action Trust, and I -- if I say something
25 that's incorrect, I assume that someone from the GUC Trust

1 will correct me because they're more familiar with these
2 facts, but I think that what happened was that avoidance
3 action Trust interests were distributed to certain general
4 unsecured Creditors.

5 I'm not sure that the whole general unsecured
6 Creditor community received those Trust interests, but the
7 entire GUC Trust -- excuse me, the entire unsecured
8 community received interests in the GUC Trust and here is
9 Mr. Martorana, who may correct something that I said.

10 The bottom line, just before Mr. Martorana comes
11 in and cleans up what I just probably fumbled, is that the
12 money that's being paid by the defense in the JP Morgan
13 litigation in the event that they are ultimately required to
14 disgorge, goes to a Trust that is not the GUC Trust, that is
15 different from the GUC Trust, and it does not share an
16 identity of beneficiaries with the GUC Trust.

17 THE COURT: Go on.

18 MS. NEWMAN: And if I --

19 MR. MARTORANA: Sorry. To be clear, Your Honor,
20 again, Keith Martorana, Gibson, Dunn & Crutcher, on behalf
21 of the GUC Trust. Just to clarify how things work between
22 those two different Trusts, the plan provided for two
23 different Trusts to be set up, the GUC Trust, and the
24 avoidance action Trust. Both had, potentially, the same
25 beneficiaries at the outset, which was general unsecured

1 Creditors for the GUC Trust and for the avoidance action
2 Trust. It was either the DIP lenders or the general
3 unsecured Creditors, and that has not been decided yet, as
4 you well know and as you've noted.

5 But what happened subsequently was that the GUC
6 Trust -- the beneficiaries of the GUC Trust were given units
7 that became transferrable. So you end up with a situation
8 where you've got one Trust, which is the avoidance action
9 Trust, which may recover on the JP Morgan action. If that
10 happens, cash comes into that Trust, the beneficiaries of
11 that Trust will be either Treasury, who may benefit from the
12 cash, or it will be the original general unsecured
13 Creditors, which include bond holders and trade claims and
14 employee claims, and then you've got a completely different
15 set of beneficiaries of the GUC Trust.

16 Potentially, now, you have people that were either
17 original holders of claims or people that have sold their
18 units into the market and the unit holders, who bought them
19 in the secondary market, are now the beneficiaries of the
20 GUC Trust.

21 So, you could have a situation where cash is
22 collected by the avoidance action Trust, but does not
23 actually go out to general unsecured Creditors. So, just to
24 clarify.

25 THE COURT: All right, thank you.

1 MS. NEWMAN: Yes, and just to add to that, I think
2 it's clear that you certainly will have -- there will be GUC
3 Trust unit holders who will not benefit, who have bought
4 their units in the aftermarket and will not benefit at all
5 from what happens with the JP Morgan litigation and the
6 avoidance action Trust, because they didn't receive
7 interests in the avoidance action Trust.

8 THE COURT: Mm hmm.

9 MS. NEWMAN: So, turning next to the first
10 question that Your Honor posed, reconciling the notice
11 requirements and the alleged lack of notice here, and
12 Section 502(j) of the Bankruptcy Code. To begin with, it's
13 not clear to me that Section 502(j) applies here --

14 THE COURT: Well, it plainly doesn't apply by its
15 terms.

16 MS. NEWMAN: Okay.

17 THE COURT: The question is, doesn't that
18 establish kind of a Congressional intent for what's just --

19 MS. NEWMAN: Mm hmm.

20 THE COURT: -- when you have latecomers to a
21 liquidating situation.

22 MS. NEWMAN: So I think you have to go back to the
23 Second Circuit's ruling in BGI where they said, "Look, we
24 acknowledge that these claimants are saying they never
25 received notice of the bar date, but even after they'd

1 realized what was happening, they didn't show up. They
2 didn't seek to stay Trust distributions." And in that -- in
3 those circumstances, their claims are equitably moot, and I
4 think this --

5 THE COURT: Forgive me, and you're saying that
6 applies not just to the incremental distribution that was
7 made in late 2014, but the whole salami?

8 MS. NEWMAN: I think it -- I think that when you
9 are balancing the equities between unit holders and other
10 GUC Trust beneficiaries, who have an expectation of what the
11 finite amount of liabilities of the GUC Trust is, and with
12 respect to unit holders, went out into the market and
13 purchased units in reliance on that finite amount of
14 potential claims.

15 When you are trying to reconcile the potential
16 prejudice of that universe of parties with the potential
17 prejudice to Plaintiffs by not being able -- by precluding
18 them from pursuing the GUC Trust, you have to take into
19 account, and the Second Circuit says you have to take into
20 account, what have the Plaintiffs done to protect themselves
21 against the prejudice? And here, they've done nothing, and
22 the Second Circuit says quite clearly, Your Honor, they have
23 to try to stay distributions. They have to, even if they
24 think there's no chance they're ever going to be able to do
25 it, they have to go the Court and try.

1 And, they have to put GUC Trust beneficiaries on
2 notice that they may come in and wipe out any remaining
3 distributions that those GUC Trust beneficiaries are
4 expecting. They have to do that, and there's a reason for
5 that requirement, because GUC Trust units have continued to
6 trade, since February of 2014, no doubt. And the people who
7 continue to purchase those GUC Trust units, they were
8 entitled, under Second Circuit law to be told, "Hey, you may
9 not want to buy that unit because you may not be get --
10 there may be no more distributions, and while you think, you
11 know, you can conduct an assessment of what the potential
12 claims against the GUC Trust may be, there may be multiple
13 billions of dollars of claims that will be piled upon what
14 you think is the finite amount of liabilities."

15 THE COURT: I'm with you. Keep going.

16 MS. NEWMAN: Okay, so Your Honor, I think where I
17 left my outline was talking about the Plaintiffs' argument,
18 and this argument was made by new GM as well, that the Court
19 can fashion relief out of the GUC Trust's assets without
20 harming innocents, GUC Trust's beneficiaries and without
21 knocking the props out from under the plan. And I touched
22 upon this a little bit in responding to Your Honor's
23 questions.

24 There are, as I said before I started to respond
25 to Your Honor's questions, there are no assets in there

1 right now that could be -- they're -- all of the assets are
2 reserved for the known GUC Trust liabilities, and to the
3 extent that those known GUC Trust liabilities turn out to be
4 less than is currently estimated, for reasons of fairness,
5 what I just went over, equity, the plan, the confirmation
6 order, all demand that the unit holders receive those
7 assets.

8 THE COURT: Slice and dice that, please, Ms.
9 Newman.

10 MS. NEWMAN: Sure.

11 THE COURT: Because you make a very strong
12 argument for the equity of not tapping funds that have been
13 reserved for people whose claims haven't been totally filed,
14 but haven't been either allowed or disallowed, so they
15 shouldn't be prejudiced.

16 MS. NEWMAN: Mm hmm.

17 THE COURT: But it's at least possible, especially
18 given your luck, not luck, skill, in reducing claims from
19 the initial enormous amount they were to the much lesser
20 amount, that you may be equally successful now, and that
21 you're going to have extra stuff at the end.

22 MS. NEWMAN: Mm hmm.

23 THE COURT: You're arguing, in a sense, that that
24 should become a windfall to those who arrived at the party
25 first, rather than those who, it might turn out, have

1 equally valid claims.

2 MS. NEWMAN: Oh, Your Honor, I don't think that's
3 a windfall. The GUC Trust units, as Mr. Martorana said,
4 have been trading. They are freely tradable. I think the
5 number is approximately 100 million worth of GUC Trust units
6 have traded since the date when they became freely tradable
7 through November of 2014, and I'm sure today that number is
8 larger, and -- excuse me, that's 100 million in number.
9 It's \$2.1 million in value, and I don't think there can be
10 any question that the people who purchased those GUC Trust
11 units, did so based on the GUC Trust disclosures of what the
12 maximum amount of claims against the GUC Trust could
13 possibly be.

14 And so, it's not a windfall. For them, had they
15 made a decision, which I believe they most likely did, no
16 one would purchase the GUC Trust units saying, "Well, I'm
17 going to make an assessment that there are not going to be
18 any more distributions made from the GUC Trust," certainly
19 they purchased those units based on their estimation, given
20 what was known at the time, that there would be additional
21 distributions, and to take those distributions away now, I
22 don't think would be a windfall.

23 I think it would be highly prejudicial to the unit
24 holders, and I think that's entirely consistent, Your Honor,
25 with the statements that you made in addressing the

1 equitable mootness argument, although it was not decided, in
2 the Morgenstein case.

3 People are entitled to rely on what is known under
4 the plan about what the total maximum amount of liabilities
5 for the GUC Trust could be when they purchased their GUC
6 Trust units, and that is especially the case here, when
7 Plaintiffs have done nothing to apprise them of the risk
8 that those liabilities could be increased by multiple
9 billions of dollars, as Plaintiffs say.

10 I wanted to talk briefly, Your Honor, about the
11 accordion feature under the sale agreement, because that was
12 raised in Plaintiffs' briefing that, perhaps the accordion
13 feature could solve this question and that the funds that
14 new GM may be required to pay under the accordion feature
15 could be used to fund Plaintiffs' claims against the GUC
16 Trust. As Ms. Rubin stated this morning, the accordion
17 feature, or the requirement for new GM to pay additional
18 funds under the sale agreement does not kick in unless
19 allowed claims reach \$35 billion dollars.

20 Right now, they're at approximately \$32 billion
21 dollars, so getting -- we hope that that won't -- that the
22 allowed claims will never go up to the \$35 billion and that
23 this will be resolved today or shortly after today, but
24 getting from the \$32 billion to the \$35 billion, with
25 respect to Plaintiffs' claims should that happen, would

1 clearly require the GUC Trust to expend a significant amount
2 of both time and money, and it's unclear how much money is -
3 - how much the value of the securities left in the GUC Trust
4 is available to fund, really, anything, given the reserves
5 that have already been established.

6 So, I don't think it's realistic that the funds
7 that would come in -- could potentially come in under the
8 accordion feature in the sale agreement could be used to
9 fund Plaintiffs' claims. Certainly, that could not be done
10 without prejudicing existing GUC Trust beneficiaries.

11 Additionally, I will just note that the amount
12 that's required under that accordion feature is a maximum
13 of, I think, approximately a billion dollars based on
14 today's share prices of new GM common stock, and it's
15 something like \$160 million for every billion dollars in
16 allowed claims over \$35 billion, so it's really a small
17 fraction of what the Plaintiffs' allowed claims would be,
18 because remember we'd have to have at least \$3 billion to
19 get up to the \$35 billion dollar threshold, and then another
20 billion to get that \$160 million that would be required
21 under the sale agreement. It really would be a very small
22 fraction of Plaintiffs' claims.

23 Plaintiffs also made an argument that perhaps
24 their claims could be funded by dividends that the GUC Trust
25 received from new GM. I think that's also very unrealistic.

1 To date, new GM has ---

2 THE COURT: That's dividends on what's, in
3 substance, a kind of like Treasury stock? In other words,
4 dividends you get on the shares you're holding in reserve?

5 MS. NEWMAN: Correct, dividends paid on the shares
6 that are owned by the GUC Trust, Your Honor. To date, the
7 GUC Trust has received \$14 million, a little bit less than
8 \$14 million dollars in dividends, and approximately \$4
9 million dollars of that has been distributed. That's
10 clearly going to be a drop in the bucket for what Plaintiffs
11 are alleging are going to -- the amount of the claims the
12 Plaintiffs are alleging or asserting.

13 Your Honor, I can speak to the ripeness issue, if
14 it's something that your Court -- that Your Honor would like
15 me to --

16 THE COURT: You mean the Colleen McMahon ripeness
17 issue?

18 MS. NEWMAN: Well, there was an argument made by
19 both Plaintiffs and new GM that the equitable mootness
20 threshold is not ripe for adjudication. We understand --

21 THE COURT: Oh, I'm still thinking the JP Morgan
22 Chase.

23 MS. NEWMAN: Sure.

24 THE COURT: Go ahead.

25 MS. NEWMAN: Okay, so we --

1 THE COURT: Yeah, we better address it.

2 MS. NEWMAN: Okay, so we understood Your Honor to
3 say when we were here in August, well, my partner Mr. Golden
4 was here in August, that as a matter of fundamental
5 fairness, Your Honor wanted to consider all potential
6 avenues of recovery for Plaintiffs at the same time.

7 As a matter of fundamental fairness both to the
8 Court and to all the parties, and we agree that that is the
9 best approach and the only approach that is fair, but as a
10 matter of law, the equitable mootness threshold issue
11 clearly presents a real and substantial controversy of
12 sufficient immediacy to warrant adjudication by this Court.

13 Now, new GM has stated repeatedly that Plaintiffs
14 do not need to, and should not be permitted to, pursue
15 claims against new GM because they may instead pursue claims
16 against the GUC Trust. And the Plaintiffs have demanded
17 that the GUC Trust withhold future distributions in reserve
18 for their claims notwithstanding that they've taken no
19 actions to actually assert claims against the GUC Trust, or
20 to stay distributions, or to obtain an order from Your Honor
21 staying distributions.

22 I think it's plain that a ruling from the Court
23 clarifying that the Plaintiffs cannot, at this late date,
24 pursue assets that rightfully belong to GUC Trust
25 beneficiaries, will solidify and clarify the parties' rights

1 and be to the benefit of everyone in this room.

2 Your Honor, I think that -- unless Your Honor has
3 additional questions, I think we'll rest and reserve some
4 time for rebuttal.

5 THE COURT: Fair enough. Who's next? Mr.
6 Weisfelner?

7 MR. WEISFELNER: Your Honor, I don't have a lot to
8 say. I think we will rest on our papers. I just want to
9 make one point. As to the argument Ms. Newman made about
10 prejudice and failure to pursue remedies, I just want to
11 stress the fact that the distribution, to which Plaintiffs
12 took no action, was all of about \$240 million dollars, or
13 some two percent of what the initial distribution was. And
14 Your Honor asked the question, I don't think \$240 million or
15 2.6 percent in any way, shape or form, represents the
16 proverbial salami. So, as to the prejudice argument, I
17 think I'd underscore that.

18 The other point is, GUC unit holders. Now, we
19 don't have a record beyond what's in the stipulations, but
20 I'm going to bet, because I know a little bit about Trusts
21 that were created from a plan of reorganization, and how
22 they tend to operate, but I'm going to bet that the value of
23 those units went down dramatically after the recalls took
24 place, and certainly after the statements by new GM that
25 they thought the right remedy was for the Plaintiffs to go

1 attack the GUC Trust.

2 I don't know what Debtor notice could be given to
3 the GUC unit holders, other than through their counsel,
4 other than through the public statements made by both GM
5 and, for that matter, the GUC Trust administrator with
6 regard to the possible implications for the market value of
7 their units. And other than that Your Honor, unless you
8 have any questions, we'll just -- we'll rest on our papers.

9 THE COURT: Fair enough, thank you. Mr.
10 Steinberg?

11 MR. STEINBERG: Your Honor, the issue of equitable
12 mootness assumes that the Plaintiffs claims are retained
13 liabilities and that they're assertable against the old GM
14 Estate, but for equitable mootness principles. Its premise
15 on the Creditors' expectations from the confirmation order
16 in the plan, and in a somewhat circular argument, the GUC
17 Trust argues equitable mootness based on their own quarterly
18 reports.

19 Importantly, the mootness doctrines predicated on
20 point of seeking to upset the confirmation order, and that's
21 why they went through the Chateaugay factors, but no one has
22 tried to do that. The time to appeal has expired already,
23 and the underlying premise of the equitable mootness issue
24 is that claims will be filed against the GUC Trust by the
25 Plaintiffs, but that never occurred.

1 In October, when the Plaintiffs were given a
2 chance to re-plead their consolidated complaints in the MDL,
3 they did not assert a claim against the GUC Trust or the old
4 GM Estate. And then, as people talked about today, the
5 Plaintiff took no action to stop the GUC Trust from
6 distributing over \$200 million dollars in a distribution in
7 November of 2014.

8 So the question that we raise in our papers is,
9 why is this issue ripe for anything at this point in time?
10 We don't know what is going to be asserted, and we don't
11 know what the defense is. We're actually trying to deal
12 with the tail instead of the actual issue at all.

13 I share with Mr. Weisfelner's concerns as to
14 whether the GUC Trust is as broke as they say, and certainly
15 the impact of the JP Morgan litigation, and other than that,
16 I'll rest on my papers, because I do think in our papers, we
17 cited to some actual statements which we didn't think was
18 true, and we wanted the record to be clarified. Thank you.

19 THE COURT: Okay. Thanks. Ms. Newman, reply?

20 MS. NEWMAN: I'll be brief, Your Honor. I just --
21 to respond to Mr. Weisfelner's argument that the can't think
22 of any better notice than the GUC Trust disclosures, it is
23 clear, based on the existing case law, and in particular,
24 the Calpine case --

25 THE COURT: Hold the mic closer to you, please?

1 MS. NEWMAN: Sure. I can lean a little forward,
2 too -- and also in the Calpine case, there were similar
3 arguments made that it's incumbent upon the Creditors
4 Committee, the Debtors, to provide notice, and that people,
5 in fact, did have actual notice of what was being sought in
6 the Calpine case, and that argument was rejected, and the
7 Court very clearly held that it is -- the party seeking the
8 modification must show that it provided actual notice to
9 parties who could be adversely affected by the relief it was
10 seeking.

11 With respect --

12 THE COURT: Well, forgive me, Ms. Newman.

13 MS. NEWMAN: Sure.

14 THE COURT: How did you, or Mr. Golden, show up if
15 it weren't for the fact that somehow you knew that there was
16 a threat to your constituency's interest?

17 MS. NEWMAN: Well, it's quite clear, Your Honor,
18 that certain unit holders did know, but we don't represent
19 the entire universe of unit holders, nor do we represent all
20 GUC Trust beneficiaries. So the fact that some people may
21 know, some beneficiaries, some unit holders may be aware,
22 does not satisfy the necessary showing that all unit
23 holders, all beneficiaries be provided with notice that
24 their recoveries may be significantly impaired and
25 potentially completely eviscerated.

1 With respect to Mr. Steinberg's argument that this
2 is not the time to address this, I'll just note, Your Honor,
3 I think it's highly ironic that new GM is taking the
4 position that the Court should refrain from ruling on this
5 issue while saying at the same time, that Plaintiffs can and
6 should be pursuing the GUC Trust. Under the requirements
7 under applicable law about the kind of dispute that is
8 necessary in order to render a dispute right and ready for
9 adjudication, I think we clearly satisfy that standard.

10 THE COURT: All right, thank you.

11 MS. NEWMAN: Thank you, Your Honor.

12 THE COURT: All right, folks, it's been a long day
13 and a half. I'm going to take all of the matters under
14 submission. Has a transcript already been ordered by any of
15 the people who have argued?

16 MR. STEINBERG: Your Honor, we tried to order the
17 transcript yesterday so I could prepare for today, but it
18 hasn't arrived today. I assume it'll come --

19 MAN: You should get yesterday's today.

20 MR. STEINBERG: I assume we'll get yesterday's
21 today, and we'll order today's transcript as well, and as a
22 courtesy, I guess, to Your Honor and to the other parties,
23 anybody wants a transcript, we'll provide it.

24 THE COURT: Well, somehow, I suspect that there's
25 going to be a pile of appeals. You're going to need a

1 transcript for the record on appeal. Get it to my Chambers
2 as quickly as you can. United States Congress being what it
3 is, I don't know if we have the funding to order them on our
4 own. Would you provide them, please?

5 MR. STEINBERG: Absolutely.

6 THE COURT: Thanks very much. Very helpful
7 arguments all around. We're adjourned.

8 MR. STEINBERG: Thank you, Judge.

9

10 (Whereupon these proceedings were concluded at

11 1:14 PM)

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

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

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Date: February 20, 2015

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