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April 19, 2017

VIA E-MAIL TRANSMISSION
AND ECF FILING
The Honorable Martin Glenn
United States Bankruptcy Judge
United States Bankruptcy Court
Southern District of New York
Alexander Hamilton Custom House
One Bowling Green
New York, New York 10004

Re: In re Motors Liquidation Company, *et al.*
Case No. 09-50026 (MG)

Letter Regarding Update on Related Proceedings

Dear Judge Glenn:

King & Spalding LLP is co-counsel with Kirkland & Ellis LLP for General Motors LLC ("**New GM**") in the above-referenced matter. Pursuant to Judge Gerber's Endorsed Order dated May 5, 2015 [ECF No. 13131], we write to update the Court regarding developments in proceedings relating to New GM. Specifically, on April 10, 2017, Judge Furman entered a "text only" order in MDL 2543 [MDL ECF No. 3826] directing the parties to submit, by April 18, 2017:

> supplemental briefs, not to exceed ten pages, addressing the following questions: (1) Whether the Court should treat the economic loss claims of the pre-2009 Delta Ignition Switch Plaintiffs asserted in the Fourth Amended Consolidated Complaint ("FACC") as having been filed in the first instance in this District and, if so, whether the Court should (assuming federal choice-of-law law does not apply) apply the choice-of-law law of New York State to Plaintiffs' successor liability claims, not based on the Sale Order or bankruptcy proceeding, but because this Court sits in New York, see, e.g., Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); and (2) what impact, if any, a ruling by the Bankruptcy Court allowing Plaintiffs to file late proofs of claim against the GUC Trust would have on the successor liability claims.

Attached hereto as **Exhibit "A"** and **Exhibit "B"** are, respectively, New GM's supplemental brief (without exhibits[1]) and the plaintiffs' supplemental brief addressing Judge Furman's questions.

Respectfully submitted,

/s/ Scott Davidson

Scott Davidson

SD/hs
Encl.

[1] The exhibits to New GM's supplemental opening brief are voluminous. If the Court would like copies of the exhibits, they can be provided.

Exhibit A

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April 18, 2017

The Honorable Jesse M. Furman
United States District Court for the
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: In re: General Motors LLC Ignition Switch Litigation, 14-MD-2543

Dear Judge Furman:

New GM submits this supplemental letter brief in response to the Court's successor liability questions set forth in its April 10, 2017 Order (Docket No. 3826).

For the first question, the economic loss claims of the pre-July 10, 2009 Delta Ignition Switch plaintiffs asserted in the Fourth Amended Consolidated Complaint ("FACC") should be determined to have been filed in the first instance in this District. Under the procedural history in this case, the FACC is a substantive complaint that supersedes all named plaintiffs' prior complaints. Because the FACC was filed in federal court in New York, and if federal choice-of-law rules for some reason do not apply, then the Court should apply New York choice-of-law rules to plaintiffs' successor liability claims under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

For the second question, a Bankruptcy Court ruling permitting plaintiffs to file late proofs of claim against Old GM would further support summary judgment for New GM, both in mere continuation/de facto merger states and in continuity-of-enterprise states. Nonetheless, for reasons already explained, the Court should grant New GM summary judgment regardless of whether the Bankruptcy Court allows late proofs of claims.

I. NEW YORK CHOICE-OF-LAW RULES APPLY TO PRE-2009 DELTA IGNITION SWITCH FACC PLAINTIFFS' SUCCESSOR LIABILITY CLAIMS.

A. Pre-2009 Delta Ignition Switch Plaintiffs' Claims Were Directly Filed In This District Via The FACC, Which Supersedes Plaintiffs' Prior Complaints.

Order No. 50 expressly provides that consolidated complaints such as the FACC are the operative complaints for the pre-2009 Delta Ignition Switch FACC plaintiffs: "The Consolidated Complaints have been, and will continue to be, critical tools to organize and conduct motion practice, both here and in the Bankruptcy Court, to address class certification, and to manage the

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discovery process. They are the operative pleadings for these purposes." Docket No. 875, Order No. 50 ¶ 2; *see also id.* ¶ 5 ("The Court has designated the Consolidated Complaints as the operative class action complaints in these MDL 2543 proceedings."). Furthermore, Order No. 50 dismissed any pre-transfer complaints that the pre-2009 Delta Ignition Switch FACC plaintiffs may have filed in other jurisdictions. *Id.* ¶ 5(a). Dismissed complaints are legal nullities. *See, e.g.*, *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994); *In re Crysen/Montenay Energy*, 226 F.3d 160, 162 (2d Cir. 2000); 6 Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 1476 (3d ed. 2017).

Explaining Order No. 50, this Court held that the FACC supersedes any economic loss complaints filed elsewhere but transferred here. *In re Gen. Motors LLC Ignition Switch Litig.*, 2015 WL 3619584 (S.D.N.Y. June 10, 2015). Specifically, "Order No. 50 is intended to facilitate management of the MDL by clarifying that the Consolidated Complaints do supersede individual complaints for purposes of pretrial proceedings (including motion practice) and ensuring that the parties do not have to file or litigate motions in hundreds of individual cases." *Id.* at *5; *see also id.* at *10 ("Order No. 50 makes clear that the Consolidated Complaints . . . are legally operative—that is, that they are intended to be superseding rather than administrative.").

In holding that the FACC is operative and supersedes prior complaints filed in other jurisdictions, this Court relied on *Gelboim v. Bank of Am.*, 135 S. Ct. 897 (2015). 2015 WL 3619584, at *7. *Gelboim* noted that "[c]ases consolidated for MDL pretrial proceedings ordinarily retain their separate identities," but the "[p]arties may elect to file a 'master complaint' and a corresponding 'consolidated answer,' which supersede prior individual pleadings." 135 S. Ct. 904 & n.3. "In such a case, the transferee court may treat the master pleadings as merging the discrete actions for the duration of the MDL pretrial proceedings." *Id.* at 904 n.3.

Plaintiffs agreed that the FACC supersedes prior complaints, stating that this "Complaint is not an administrative Complaint, but one that supersedes all MDL transferee complaints, and whose function is set forth in the Court's Orders, including Order No. 50 (Dkt. No. 875) and the Court's Opinion and Order dated June 10, 2015." (FACC at 1.) This acknowledgment comports with plaintiffs' agreements concerning previous consolidated complaints. *GM Ignition Switch*, 2015 WL 3619584, at *3 ("Lead Counsel agreed that the Consolidated Complaints were intended to have superseding rather than administrative effect . . . .").

Consequently, any complaints filed by the pre-2009 Delta Ignition Switch FACC plaintiffs in other jurisdictions have been dismissed and superseded, and thus have no legal effect. The pre-2009 Delta Ignition Switch FACC plaintiffs' only legally operative complaint is the FACC, which was filed in the first instance in this Court and in this federal district.

The FACC's allegation that "this Complaint is filed by each new Plaintiff as if they have filed in the district in which they reside" cannot overcome this Court's orders or the reality that

the FACC was filed in this District. (FACC ¶ 39.) Plaintiffs' allegation is a mere legal conclusion, and need not (and should not) be considered. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Mercer v. Gupta*, 712 F.3d 756, 758 (2d Cir. 2013). Furthermore, the FACC fails to identify any order in support of its assertion that "the Court's instructions" allow plaintiffs to treat the complaint as having been filed in another district. (FACC ¶ 39.) In fact, this Court's Order No. 1 provides that directly filed complaints will be transferred to a federal district court of proper venue after the completion of pretrial proceedings, not that direct filed cases will be treated as though filed in another district. Docket No. 19, Order No. 1, § III. The pre-2009 Delta Ignition Switch FACC plaintiffs filed the FACC in this Court and it is the operative complaint for pre-trial purposes. Claims by pre-2009 Delta Ignition Switch FACC plaintiffs should be treated as having been filed in the district—particularly given plaintiffs' agreement and admission concerning the superseding nature of their complaint.

B. New York Choice Of Law Should Apply To The Pre-2009 Delta Ignition Switch FACC Plaintiffs' Successor Liability Claims.

Because pre-2009 Delta Ignition Switch plaintiffs filed the FACC asserting their successor liability claims in this district, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), requires that New York choice of law apply to these claims. Under *Klaxon*, when "a federal district court sits in diversity, it generally applies the law of the state in which it sits, including that state's choice of law rules." *In re Coudert Bros. LLP*, 673 F.3d 180, 186 (2d Cir. 2012). *Klaxon's* rule applies in class actions. *In re Bridgestone/Firestone Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1015 (2d Cir. 2002); *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 724 (5th Cir. 2007); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012). Accordingly, MDL courts apply the choice of law of the MDL forum where plaintiffs have filed a consolidated complaint that supersedes individual complaints. *E.g.*, *In re Bridgestone/Firestone, Inc.*, 155 F. Supp. 2d 1069, 1078 (S.D. Ind. July 27, 2011) (noting that "normally the transferee court must make an independent choice of law determination for each state from which a case was transferred into the MDL proceeding" but here, "[h]owever, the parties agree that this Court should be treated as the forum court because Plaintiffs filed their Master Complaint in this Court.");[1] *see also In re Vioxx*, 478 F. Supp.2d 897, 904 (E.D. La. 2007) (the "filing of these cases in this district also suggests that the Court should apply the law of the state in which it sits, including Louisiana's choice-of-law rules"); *In re Trasylol*, 2011 WL 1033650, at *3 (S.D. Fla. Jan. 18, 2011) ("Ms. Medlinger filed her Complaint against Bayer with this Court. Therefore, Florida choice of law rules apply.").

This result is correct because this Court has held, and both plaintiffs and New GM *have agreed*, that the FACC supersedes complaints filed in other districts. And the agreements of

[1] The Seventh Circuit reversed this decision because the district court improperly conducted the choice of law analysis for Indiana, but agreed that Indiana choice of law applied. *Bridgestone/Firestone*, 288 F.3d at 1015.

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counsel mean something; they cannot be disregarded for tactical purposes. Accordingly, *Van Dusen v. Barrack*, which holds that a case transferred for convenience of the parties is subject to the choice of law principles of the transferor court, does not apply here. 376 U.S. 612 (1964). The pre-2009 Delta Ignition Switch plaintiffs filed a new FACC in this Court that superseded any complaints filed elsewhere and transferred here.

Cases relying on *Van Dusen* are inapposite given the superseding FACC and Order No. 50. Certain MDL courts have ruled that where a case is transferred as part of an MDL, the transferee court applies the choice of law rules of the state in which each individual action was first filed. *E.g.*, *In re Rezulin*, 390 F. Supp. 2d at 329 n. 62; *In re Fresenius Granuflo/Naturalyte*, 76 F. Supp. 3d 294, 304-05 (D. Mass. 2015); *In re Guidant Corp.*, 489 F. Supp. 2d 932, 936 (D. Minn. 2007). But these decisions pre-date the Supreme Court's statement in *Gelboim* that a master complaint can "supersede prior individual pleadings" and "merg[e] the discrete actions for the duration of the MDL pretrial proceedings." 135 S. Ct. at 904 n.3. Moreover, these cases either stated or assumed that the consolidated complaints were administrative in nature and did not supersede the individual complaints. For example, *Rezulin* considered the cases before it to be individual actions that were consolidated before the court, such that each case retained its individual character despite the consolidated amended complaint. 390 F. Supp. 2d at 329 n.62.

Similarly, some MDL courts have opined that the choice-of-law rules of plaintiffs' home states should apply to claims filed directly in the MDL, but once again these cases involved administrative complaints that did not supersede individual complaints. *E.g.*, *Wahl v. Gen. Elec.* 786 F.3d 491 (6th Cir. 2015); *In re Yasmin & Yaz*, 2011 WL 1375011, at *6 (S.D. Ill. Apr. 12, 2011); *In re Zimmer*, 890 F. Supp. 2d 896, 901 (N.D. Ill. 2012). For example, the court in *Toyota Motor Corp. Unintended Acceleration* concluded that California choice of law principles could not apply to non-California plaintiffs who filed their complaints in the California MDL. 785 F. Supp. 2d 925 (C.D. Cal. 2011). That court, however, explained that its MDL proceeding was "merely a collection of individual cases" that maintain their "separate and distinct nature," and that the master complaint was "a procedural device rather than a substantive pleading with the power to alter the choice of law rules applicable to the plaintiffs' claims." *Id.* at 930-31. Similarly, the *Takata* court refused to apply Florida choice of law to all plaintiffs' claims, concluding that *Van Dusen's* "choice of law framework is not altered by the use of a consolidated complaint as a procedural device to streamline the litigation, unless the parties so consent" and, unlike here, there was no consent. 193 F. Supp. 3d 1324, 1332-33 (S.D. Fla. 2016). Thus, the cases transferred to the *Takata* MDL retained their "separate identities." *Id.*

By contrast, in this case pursuant to Order No. 50 and *Gelboim*, any prior complaints have been dismissed and the pre-2009 Delta Ignition Switch plaintiffs' successor liability claims are no longer separate. All such prior individual complaints were superseded by the new FACC

filed in this Court to which *Klaxon* rather than *Van Dusen* applies.[2] Indeed, the *Toyota* and *Takata* courts' reliance on consolidated complaints as mere procedural devices indicates that they would have reached a different conclusion if the consolidated complaints had been substantive and superseding. Accordingly, New York choice of law should apply to pre-2009 Delta Ignition Switch FACC plaintiffs' successor liability claims.

Nor is there any inconsistency between applying New York choice of law to pre-2009 Delta Ignition Switch FACC plaintiffs' successor liability claims and *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). *Lexecon* requires only that cases transferred to an MDL be remanded to the districts from which they originated after pretrial proceedings are complete. *Id.* at 34-35. Order No. 1 preserves this right, including for direct filing plaintiffs. Docket No. 19, Order No. 1 § III. But nothing in *Lexecon* prevents an MDL court from holding that the MDL forum state's choice of law applies. MDL courts have the power to rule on plaintiffs' claims, including determining what choice of law applies. *See In re WorldCom, Inc.*, 2005 WL 2403856, at *3 (S.D.N.Y. Sept. 30, 2005) (collecting cases holding that MDL courts may rule on dispositive pretrial motions).

In sum, the consequence of filing the new, substantive consolidated complaint in this District is that New York choice of law rules applies to the pre-2009 Delta Ignition Switch FACC plaintiffs' claims. This is an entirely just and natural result.

II. AN ORDER ALLOWING PLAINTIFFS TO FILE LATE PROOFS OF CLAIM WOULD PROVIDE A FURTHER REASON TO GRANT SUMMARY JUDGMENT TO NEW GM.

A ruling permitting plaintiffs to file late proofs of claim would provide a further reason to grant New GM summary judgment, both in mere continuation/de facto merger states and in continuity-of-enterprise states. Nonetheless, regardless of whether the Bankruptcy Court allows late proofs of claims against Old GM, the Court should grant summary judgment in favor of New GM on plaintiffs' successor liability claims.

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[2] New GM notes that in a February 2015 brief, it argued that the "choice-of-law rules of the transferor states continue to apply even if the MDL plaintiffs file an amended, consolidated complaint" and that "the choice-of-law rules of plaintiffs' home states also apply to those plaintiffs who filed their claims directly in the MDL through the consolidated complaint." (Docket No. 597 at 22-23.) But that brief was filed before the Court's June 2015 opinion holding that the Consolidated Complaints in this case were superseding rather than merely administrative. Given the change in circumstances after that brief was filed, the February 2015 brief's conclusions do not apply to the superseding consolidated complaint that is operative in this MDL, especially given that plaintiffs agreed to the superseding effect of the consolidated complaint.

A. An Order Allowing Plaintiffs To File Late Proofs Of Claims Would Further Support Summary Judgment In States Where Plaintiffs Are Pursuing Mere Continuation Or De Facto Merger Theories.

Mere continuation and de facto merger are "equitable doctrine[s]" designed to "protect creditors from having assets of a debtor entity put beyond their reach through manipulation of corporate forms." *In re Acme Sec.*, 484 B.R. 475, 492 (Bankr. N.D. Ga. 2012); *Cargo Partner v. Albatrans*, 207 F. Supp. 2d 86, 94-95 (S.D.N.Y. 2002). Thus, courts in mere continuation and de facto merger states often hold that successor liability is precluded by a debtor's continued existence and ability to be sued. *See, e.g.*, cases from various states collected at New GM Mem. at 51-53; New GM Reply at 6-8. As the court explained in *In re Polyurethane*, 86 F. Supp. 3d 769, 785 (N.D. Ohio 2015) (New York law):

> In this case, following the Asset Sale, Foamex remained in existence for a while as a corporate entity. Indeed, the undisputed facts show that *seven months after* the Asset Sale closed, the bankruptcy court directed the extant Foamex to *pay administrative priority claims and wind down expenses from its remaining $4 million in assets.* Under New York law, this fact precludes application of the "mere continuation" exception. *Id.* at 785 (emphasis added).

Although the *Polyurethane* debtor did not pay *plaintiffs*, the fact that the debtor continued to exist, paid *non-plaintiff creditor claims*, and dissolved approximately *seven months* after the sale precluded successor liability. Here, the fact that *plaintiffs themselves* are pursuing, and may be permitted by the Bankruptcy Court to assert, late claims against the still-extant MLC GUC Trust *eight years* after the Sale is a further compelling reason to grant summary judgment. Plaintiffs' arguments that their MLC GUC Trust claims are irrelevant—either because the MLC GUC Trust is not an "operating" entity or because it is a separate "trust" "or "entity" from the MLC entity that funded it[3]—are meritless. *E.g., Doktor v. Werner*, 762 F. Supp.2d 494, 499 (E.D.N.Y. 2011) ("[T]he corporate realities of the asset sale preclude a finding of liability under a 'de facto merger,' or 'mere continuation' theory" where "Old Ladder continues to exist as a distinct corporate entity, even after the consummation of the APA, *as a liquidated trust*. Where, as here, the predecessor corporation continues to exist after the transaction, in however gossamer a form, the mere continuation exception is not applicable.") (emphasis added) (internal quotations omitted).

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[3] The MLC GUC Trust exists for the "purpose of resolving claims, distributing Distributable Cash (following the aforementioned liquidation of all New GM Securities) and *winding down the affairs of MLC*, all in *accordance with a plan of liquidation of MLC* approved by the Bankruptcy Court and the Liquidation Order." (Ex., A, MLC GUC Trust 2/13/17 10-Q, at 10 (of pdf)) (emphasis added). MLC did not dissolve until over two years after the Sale, *see* Ex. 35 to New GM Memo (MLC certificate of dissolution), after it had transferred its assets to the MLC GUC Trust to pay creditor claims, *see* Ex. 25 to New GM Memo., Bkr. Plan §§ 4.3, 5.2(a), 6.2(b), 6.2(c), 6.2(l), 6.10, 10.1; Ex. D hereto, Confirmation Order ¶¶ 1, 5, 6, 23.

B. Plaintiffs' Ability To File Late Proofs Of Claim Further Bars Plaintiffs' Claims In Continuity-Of-Enterprise States (Michigan And Alabama).

New GM does not believe that the continuity of enterprise theory is relevant to any plaintiff's successor liability claims because either Delaware or New York substantive law applies. (New GM Memo. at 19-32.) Plaintiffs claim that Michigan substantive law should apply in 16 states if federal choice of law rules apply, and in five states if federal choice of law rules do not apply. (Pls. Opp. 16-35.)

Under Michigan[4] law, "[w]hile failure of the predecessor to dissolve may not be fatal in every action for successor liability, especially, for example, where the predecessor continues as a shell or is otherwise underfunded, the fact that a predecessor remains a viable source for recourse is." *Foster v. Cone-Blanchard*, 460 Mich. 696, 701–06 (1999). In *C.T. Charlton v. Thule*, 541 F. App'x 549, 554 n.2 (6th Cir. 2013), the Sixth Circuit[5] defined "viable source for recourse":

> As *Foster* holds, even in products-liability cases, a plaintiff cannot recover from a successor corporation where the "predecessor remains a viable source for recourse." [Footnote] "Viable source for recourse" is not the same thing as solvent. *Creditors have recourse* (*i.e.*, a right to recovery) against insolvent companies, even though they may ultimately get *pennies on the dollar or nothing*.

Id. at 554 & n.2 (emphasis added). Thus, although plaintiffs' claims are barred regardless of the Bankruptcy Court's ruling on late claims, an order permitting plaintiffs to file such claims would independently bar their claims under *Charlton*, even if plaintiffs "ultimately get pennies on the dollar or nothing."[6] *Id.*

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[4] Alabama's test is even more restrictive than Michigan's, and precludes successor liability because the MLC GUC Trust has not dissolved and because Old GM shareholders recovered nothing. (New GM Reply at 39.)

[5] As this Court has ruled, "some deference is due the [court of appeals'] interpretation of the state law of a state within its jurisdiction, given its familiarity with" the law of a state within its jurisdiction. *In re Gen. Motors LLC Ignition Switch*, 2016 WL 3920353, at *26-*27 (S.D.N.Y. 2016).

[6] Plaintiffs incorrectly argue that "[t]his case is a far cry from *Foster*," because "the plaintiff had already 'successfully pursued a remedy'. . . ." (Pls. Opp. 44.) But *Foster* did not hold that a "successful" claim was required for summary judgment. It held that successor liability claims fail if the predecessor is "viable" and "capable of being sued," and that therefore a "successful" claim "certainly" precludes liability. *Foster*, 460 Mich. 696 at 705-06. In any event, as the Sixth Circuit made clear in *Charlton*, plaintiffs' pursuit of bankruptcy claims independently forecloses Michigan successor liability, even if plaintiffs recover "nothing." *Charlton*, 541 F. App'x at 554 n.2. Moreover, plaintiffs' claims would be barred even if they had not pursued claims against the MLC GUC Trust, because it is "crystal clear" that the continuity of enterprise exception only applies when a plaintiff has "been deprived *by the asset transaction* of an effective remedy." *Santa Maria v. Owens-Illinois, Inc.*, 808 F.2d 848, 859 (1st Cir. 1986) (emphasis in original); *see also* New GM Memo. at 70-71, Reply at 37-38; *Section* E, *infra*.

C. Plaintiffs' Claim That The MLC GUC Trust Has No Assets To Distribute Is Legally Irrelevant And Factually Incorrect.

Plaintiffs have argued that their claims against the MLC GUC Trust are irrelevant to successor liability because "there are no GUC Trust assets left to distribute." (Pls. Opp. 41.) As an initial matter, this argument is legally irrelevant for two reasons: (i) under *Charlton*, even if plaintiffs recover "nothing," they have "recourse" and their successor liability claims are barred, *C.T. Charlton*, 541 F. App'x at 554 n.2; and (ii) unsecured creditors like plaintiffs would have recovered nothing ($0) in the Old GM bankruptcy *but for* the Sale (*see* Section E *infra*).

In any event, plaintiffs' argument is factually incorrect and belied by their filings in Bankruptcy Court a few months ago. As part of the Sale, New GM paid MLC 10% of New GM's shares, for the benefit of MLC's unsecured creditors.[7] MLC, in turn, funded the MLC GUC Trust using those shares (worth billions) and other assets, so that the MLC GUC Trust could pay MLC's creditors. (Ex. 25 to New GM Memo., Bkr. Plan §§ 4.3, 5.2(a), 6.2(b), 6.2(c), 6.2(l), 6.10, 10.1; Ex. D, Confirmation Order ¶¶ 1 (p. 17) (approving Plan), 5 (p. 18), 6 (p. 18), 23 (p. 32); Ex. 16 to New GM Memo., Worth Decl., at Ex. F, 14). As of December 31, 2016, the MLC GUC Trust had $533 million in assets and $46 million in estimated liabilities. (Ex. A, MLC GUC Trust 12/31/16 Form 10-Q, at 5). Moreover, "[a]s of December 31, 2016, the GUC Trust held as reserves . . . approximately $50.0 million in claim amount that is not associated with any particular claim, but which has been set aside by the GUC Trust Administrator as a general claim contingency," separate from administrative reserves (an additional $47.4 million). *Id.* at 12, 16. Furthermore, in connection with the term loan litigation, the MLC Avoidance Action Trust continues to pursue approximately $1.5 billion from certain banks.[8] An entity with a "$50 million in claim amount" reserved for "general claim contingency"—not to mention

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[7] *See* Ex. 51 to New GM Memo, 7/1/2009 Tr. at 101 (Testimony of U.S. Treas. Representative Wilson) ("Q. How much of the common equity do unsecured creditors receive under the sale transaction? A. The *creditors* of OldCo as part of the sale transaction will receive ten percent of NewCo plus warrants in two tranches.") (emphasis added); Ex. D, Conf. Order, Par. N ("Equity Interests in MLC in Class 6 are not entitled to receive or retain any property under the Plan."); *In re Motors Liquidation*, 407 B.R. 463, 520 (Bankr. S.D.N.Y. Jul. 5 2009) ("nothing for stockholders").

[8] Regardless of the outcome of the term loan litigation, the amounts potentially available to creditors such as plaintiffs will increase as a result of that litigation. If the MLC Avoidance Action Trust prevails, plaintiffs here have claimed "exclusive access" to the Avoidance Action Trust share of the potential $1.5 billion recovery. (Ex. B, at ¶ 13, 55). Pursuant to a settlement between the DIP Lenders and the Avoidance Action Trust, after the repayment by the Avoidance Action Trust of certain cash advances, any distributable proceeds are to be paid as follows: 70% to holders of Allowed General Unsecured Claims and 30% to the DIP Lenders. (Ex. A, at 46.) If the banks prevail, then additional GUC Trust reserves will be freed for distribution to creditors including plaintiffs. (If the banks are determined not to be secured creditors and thus have to pay the $1.5 billion, as unsecured creditors they will then claim from the MLC GUC Trust the amount thus paid, and the MLC GUC Trust has reserved hundreds of millions for that possibility; if the banks prevail those reserves can be used for other creditors. (*See generally* Ex. A, GUC Trust 10-Q at 1, 42; *see also* New GM Memo. at n.6 (explanation of the approximate amount of distributions made to unsecured creditors).)

additional amounts relating to the term-loan litigation—is a "viable" entity "capable of being sued"; this fact independently precludes Michigan successor liability. *See Foster*, 460 Mich. at 705 ("*Turner's* holding indicates that the 'continuity of enterprise' doctrine applies *only* when the transferor is *no longer viable and capable of being sued*.") (emphasis added).

Recognizing these sources of recovery, plaintiffs are seeking billions of dollars from the MLC GUC Trust. On December 22, 2016, plaintiffs told Judge Glenn they will seek: (i) "exclusive access" to the proceeds of the Avoidance Action Trust, (ii) clawbacks of billions of dollars in past distributions, (iii) recovery on a priority basis of the hundreds of millions of dollars now in the MLC GUC Trust, and (iv) to trigger New GM's alleged obligation under the accordion feature in the Sale Agreement. (Ex. B, ¶¶ 13, 55 (plaintiffs' late-claims motion: "A remedy for the Plaintiffs may be fashioned, even without upsetting distributions already made.")) Plaintiffs' claim to billions of dollars of MLC GUC Trust assets (including assets now in the MLC GUC Trust and assets from the term loan litigation) further undermines any argument that the MLC GUC Trust is "no longer viable and capable of being sued." *Foster*, 460 Mich. at 705.

D. Plaintiffs Strategically Chose Not To Preserve GUC Trust Assets.

Under *Charlton*, even if plaintiffs recover "nothing," their pursuit of claims against the MLC GUC Trust provides a further reason to grant summary judgment for New GM. *C.T. Charlton*, 541 F. App'x at 554 n.2. But even if the *amount* of recovery mattered (and it does not matter, *see* Section II.B), and even if the MLC GUC Trust was non-"*viable*" (and it is viable, *see* Section II.C), plaintiffs have themselves to blame for not preserving MLC GUC Trust assets. Plaintiffs admitted that, after the recalls were announced, they chose for strategic reasons not to seek a stay of MLC GUC Trust distributions. (Ex. 64 to New GM Reply, 2/17/15 Hrg. at 112) (plaintiffs' counsel: "[Y]es[,] there was a strategic element to the decision that was taken on our side [not to block the GUC Trust distributions].") The MLC GUC Trust distributed approximately $486 million after the first recall, corresponding to approximately $1.6 billion in claim dollars. (Ex. C, Bankr. ECF. 13873 at 5-7; New GM Memo. n.6 (explaining relationship between distributions and claim dollars)). Plaintiffs' strategic election to delay seeking available remedies from the MLC GUC Trust further precludes their successor liability claims.[9]

E. Any Speculation That Plaintiffs Would Have Obtained A Greater Recovery But For Old GM's Conduct Is Legally Irrelevant In All States.

Plaintiffs may speculate that, even if their late-claims motion is granted, they would have recovered more if "Old GM"[10] had not prevented them from filing proofs of claim in 2009. (Pls.

[9] *See LaFountain v. Webb*, 951 F.2d 544, 547 (3d Cir. 1991) (no successor liability where "claimant had a potential remedy against the original manufacturer, but failed to exercise all available means to assert his or her claim").

[10] Plaintiffs do not base their successor liability claims on any alleged misconduct by New GM. (Pls. Opp. at 2, 6).

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Opp. at 6 ("Old GM's failure prevented Plaintiffs from filing timely proofs of claims against Old GM in the bankruptcy.").) But as the unrebutted affidavits submitted with New GM's motion demonstrate (irrespective of the Sale Order), and as plaintiffs (who concede they bear the burden of proving exceptions to the general rule of asset purchaser non-liability) do not dispute, *but for the Sale* Old GM would have liquidated and plaintiffs would have recovered nothing in an Old GM bankruptcy. And plaintiffs cite no authority holding that they may pursue a successor liability claim not because the Sale *deprived* them of a recovery but instead simply due to a belief that the Sale should have provided them an *even greater* recovery. While plaintiffs' factually unsupported theory may be relevant to other claims, it is not relevant to establishing successor liability against New GM. Instead, successor liability arises from transactions that *deprive* creditors of recoveries that would have been available to them *but for* the transaction. *See* Restatement (Third) of Torts § 12 cmt. b (successor liability plaintiffs have "no legitimate claim that the transfer should increase those chances [of recovery] over what they would have been *if no transfer had occurred*") (emphasis added)[11]; *Santa Maria v. Owens-Illinois*, 808 F.2d 848, 859 (1st Cir. 1986) (even under continuity of enterprise exception, "it is *crystal clear* that [under *Turner*] it is absolutely essential for the broader exception to the rule of nonliability in products liability cases to come to bear that the injured plaintiff must have been deprived *by the asset transaction* of an effective remedy") (emphasis partly in original). Thus, regardless of whether the late claims motion is granted, the Court should grant New GM summary judgment.[12]

In sum, the successor liability doctrine is designed to protect creditors from transactions that deprive them of recoveries they would have had from the seller. It is undisputed that the Sale transaction did not make plaintiffs *worse* off than they would have been but for that transaction, and this fact alone requires summary judgment for New GM. An order permitting late claims against the MLC GUC Trust (with its substantial assets) would make plaintiffs *better* off than they would have been in an Old GM bankruptcy without the Sale, and that is a further reason to grant New GM summary judgment.

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[11] *See* also Restatement (Third) of Torts § 12, cmt. b (exceptions (a)-(d), including mere continuation and de facto merger exceptions, do not create risk that the "transfer may give tort plaintiffs a windfall at the expense of companies that engage in asset transfers").

[12] Regardless of whether plaintiffs are permitted to file late claims, summary judgment should be granted for multiple additional reasons, including but not limited to: (1) the rationale for the mere continuation and de facto merger exceptions is to prevent "sham" transactions, California Practice Guide (Rutter Group): Corporations Ch. 8-D, Section § 8.656 (Feb. 2017 Revision) (section titled "Purchaser as 'mere continuation' of seller ('sham sale')"); *accord* Restatement (Third) of Torts § 12, cmt. b (discussing mere continuation and de facto merger: "If mere changes in form were allowed to control substance, corporations intending to continue operations could periodically wash themselves clean of potential liability at practically zero cost, in sham transactions"); (2) the $90 billion in consideration provided by New GM was adequate and has resulted in $32 billion in allowed creditor distributions to date; and (3) there was no continuity of shareholders.

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Respectfully submitted,

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/s/ Andrew B. Bloomer, P.C.

Counsel for Defendant General Motors LLC

cc: MDL Counsel of Record

Exhibit B

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April 18, 2017

VIA ELECTRONIC FILING

The Honorable Jesse M. Furman
United States District Judge
40 Centre Street
New York, NY 10007-1312

RE: *In re General Motors, LLC Ignition Switch MDL*, 14-md-2543 (JMF)
Supplemental briefing on motion for summary judgment on successor liability

Dear Judge Furman:

Plaintiffs address the questions set forth in the April 10, 2017 Order With Respect to Motion for Summary Judgment on Successor Liability (ECF No. 3826).

I. Issue One.

A. If Federal Common Law Does Not Apply, the Court Should Apply the Choice of Law Principles of Each Plaintiff's Home State.

If the Court concludes, as Plaintiffs submit it must, that federal common law does not dictate choice of law in this case, the parties' prior positions in this case and the applicable case law confirm that the Court should apply the choice-of-law principles of each Plaintiff's home state to his or her claims. This is the position Plaintiffs took in their opposition to summary judgment [ECF No. 3617, at 2], and it is the position New GM has taken in prior briefs on choice of law:

> [F]or each individual Plaintiff's claims here, this Court should apply the choice-of-law principles of the state from which the case was transferred, notwithstanding the filing of the Post-Sale Consolidated Complaint. … In addition, the choice-of-law rules of plaintiffs' home states also apply to those plaintiffs who filed their claims directly in the MDL through the consolidated complaint.

Opening Brief Concerning Choice of Law, ECF. No. 597, at 23. *See also* FACC ¶ 39 ("Pursuant to the Court's instructions that Plaintiffs could file directly in the MDL court and reserve the right to have filed in another district, this Complaint is filed by each new Plaintiff as if they had filed in the district in which they reside.").

The parties' position is consistent with well-established law that while a court sitting in diversity jurisdiction typically applies the choice-of-law rules of the state in which it sits, "[i]n multi-district litigation, we apply the choice-of-law rules from the transferor forum—in this case, California—to determine which state law controls." *Anschutz Corp. v. Merrill Lynch & Co., Inc.*, 690 F.3d 98, 112 (2d Cir. 2012). *See also, e.g., In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2015 WL 6243526 (S.D.N.Y. Oct. 20, 2015); *In re Rezulin Prods. Liab. Litig.*, 392 F. Supp. 2d 597, 606 (S.D.N.Y. 2005) ("When an action is transferred as part of an MDL, the transferee court applies the choice of law rules of the state in which the action first was filed"); *In re WorldCom, Inc. Sec. Litig.*, 2005 WL 2403856, at *2 (S.D.N.Y. Sept. 30, 2005) ("When an action involving state law claims is transferred pursuant to the MDL provision of 28 U.S.C. § 1407, a transferee court applies the substantive state law, including choice-of-law rules, of the jurisdiction in which the action was filed."); *In re Ski Train Fire in Kaprun, Austria*, 257 F. Supp. 2d 717, 723 (S.D.N.Y. 2003) ("[i]n an MDL proceeding, the forum state is the district court where the action was originally filed, and therefore that state's law must be applied").

The same rule applies even when a consolidated complaint has been filed. As the court stated in *Rezulin*,

> Just as transfers pursuant to Sections 1404 and 1407 do not affect the applicable choice of law rules, so too the next step in the streamlining process—namely consolidation into one proceeding of two or more actions filed in different states—does not affect them.

392 F. Supp. 2d 597 at 606 n.62. *See also, e.g., In re Takata Airbags Prods. Liab. Litig.*, 193 F. Supp. 3d 1324, 1333 (S.D. Fla. 2016); *Brown v. Hearst Corp*., 54 F.3d 21, 24 (1st Cir. 1995); *In re Zimmer NexGen Knee Implant Prods. Liab. Litig.*, 890 F. Supp. 2d 896, 901 (N.D. Ill. 2012); *In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 56 (D.N.J. 2009); *In re Guidant Implantable Defibrillators Prod. Liab. Litig.*, 489 F. Supp. 2d 932, 936 (D. Minn. 2007); *In re Educ. Testing Serv. Praxis Principles of Learning & Teaching: Grades 7-12 Litig.*, 517 F. Supp. 2d 832, 838-39 (E.D. La. 2007).

The same is also true for the claims of any plaintiffs who first filed their cases directly in the MDL in a consolidated complaint. As the Sixth Circuit (the only Circuit to consider this issue) has held:

> Direct-filed MDL suits that are then transferred to a more convenient forum for trial are an exception to the ordinary rule [that a claim is governed by the choice of law rules of the state of the federal court in which the claims were filed]. This must be so, or else every district court receiving a direct-filed MDL suit would be bound to apply the choice of law principles of the MDL forum. In effect, the accident of bureaucratic convenience would elevate the law of the MDL forum.

Wahl v. Gen. Elec. Co., 786 F.3d 491, 496 (6th Cir. 2015). As the court further elaborated, if parties "could avail themselves of the law of the MDL-court forum, every plaintiff in an MDL case would be able to choose the law of a state that is not an appropriate venue." *Id.* at 498. *See also, e.g., In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, 2011 WL 1375011, at *6 (S.D. Ill. Apr. 12, 2011); *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 2012 WL 3205620, at *2 (E.D. Pa. Aug. 7, 2012); *In re Am. Med. Sys., Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, 2014 WL 637189, at *8 (S.D. W. Va. Feb. 18, 2014); *In re Watson Fentanyl Patch Prods. Liab. Litig*, 977 F. Supp. 2d 885, 888 (N.D. Ill. 2013); *In re Bausch & Lomb Inc. Contacts Lens Solution Prods. Liab. Litig.*, 2007 WL 3046682, at *3 (D.S.C. Oct. 11, 2007); *Sanchez v. Boston Scientific Corp.*, 2014 WL 202787, at *4 (S.D. W. Va. Jan. 17, 2014); *In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 2014 WL 2445790, at *2 (E.D. Pa. May 29, 2014).

This remains the law after the footnote in *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 906 n.3, 190 L. Ed. 2d 789 (2015), which stated that when a consolidated complaint is filed in an MDL, "the transferee court may treat the master pleadings as merging the discrete actions for the duration of the MDL pretrial proceedings." This is because "*Gelboim* does not address the choice of law inquiry...." *Takata*, 193 F. Supp. 3d at 1332. *Gelboim* addressed only the question of when plaintiffs in an MDL proceeding might have an individual right to appeal a ruling of the MDL court, and did not change or even consider the rules governing choice of law, nor vitiate the rule that MDL cases must return to the court of origin. *See id.* at 1332-33.

Thus, while Plaintiffs are mindful that the Court, in Order No. 50, crafted particularly efficient procedures to protect due process, and has rightly implied that the outer contours of what a transferee court can do consistent with prior authority has not necessarily been fully explicated, the law remains that the Court should apply the choice-of-law principles of each Plaintiff's home state to their claims. However, even if the Court applies New York choice-of-law principles to Plaintiffs other than Plaintiffs from New York, those principles simply do not point to the outcome New GM seeks. Instead, a faithful application of New York choice of law points to the application of Michigan law or, alternatively, to the substantive law of each state, as set forth in Plaintiffs' opposition to summary judgment, and as explicated below in light of the Court's questions.

B. <u>New York Choice of Law.</u>

Under New York's "greatest interest" analysis, "the significant contacts are, almost exclusively, the parties' domiciles and the locus of the tort." *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 197 (N.Y. 1985). A corporation is domiciled where it has its headquarters and principal place of business, *Elson v. Defren*, 283 A.D.2d 109, 116 (N.Y. App. Div. 2001), and the locus of the tort "is the place of the injury, rather than the location where the allegedly defective product was manufactured." *Burnett v. Columbus McKinnon Corp.*, 69 A.D.3d 58, 60 (N.Y. App. Div. 2009).

As detailed in Plaintiffs' opposition brief, this analysis indicates that Michigan is the jurisdiction with the greatest interest in this litigation. ECF No. 3617, at 9-16. Here, a particularly compelling basis for choosing Michigan substantive law emerges from the underlying facts: the place of New GM's domicile/headquarters (Michigan) merges with the place of the defective products' manufacture (Michigan), as well as the place of New GM's wrongful conduct (Michigan). No other location presents as relevant a convergence of factors.

In the alternative, and depending on the salience the Court attaches to New York's place of injury factor, each Plaintiff's home state successor liability law should apply.

New York courts have expressly rejected the notion that the state of incorporation is the most relevant, let alone only relevant, fact in the context of successor liability:

> Here, BAC cites to its state of incorporation - Delaware. However, aside from its incorporation in Delaware, BAC asserts no other ties to that jurisdiction. . . . BAC cites to no New York state case law supporting this categorical disregard of the interest test.

MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 965 N.Y.S.2d 284, 295 (N.Y. Sup. Ct. 2013); *see also* Opp'n Br. at 29. Properly applied, "state of incorporation is a contact under New York's interest analysis but it is not *the only* relevant contact," and "the significant contacts are, almost exclusively, the parties' domiciles and the locus of the tort." *Id.* at 295, 297 (emphasis in original). For these reasons, the appellate court's decision in *Lippens v. Winkler Backereitechnik Gmbh*, 138 A.D.3d 1507 (N.Y. App. Div. 2016) is correct and instructive. As the court held there:

> [I]nasmuch as plaintiff is a New York domiciliary and the situs of the alleged tort is in New York, choice of law principles also compel the application of New York's successor tort liability rules.

138 A.D.3d at 1509 (citations omitted). *See also Colon v. Multi-Pak Corp.*, 477 F. Supp. 2d 620, 625-26 (S.D.N.Y. 2007) (considering, in the context of successor liability, the location of the parties and circumstances of the underlying tort, "notwithstanding that the manufacturer is incorporated . . . in another state").

By citing cases to the contrary, New GM invited the Court to compound a mistake made by other federal courts *in the absence of relevant state authority now available to this Court*. While several federal courts have focused on state of incorporation in determining which state's successor liability law to apply, these cases pre-dated the New York appellate court's decision in *Lippens*[1] and, sometimes, the trial court's decision in *MBIA*. GM Opening Br. at 25-26; GM

[1] The only post-*Lippens* case cited by New GM was *Energy Intelligence Grp., Inc. v. Cowen & Co., LLC*, 2016 WL 3939747 (S.D.N.Y. July 15, 2016), which failed to cite *Lippens* and more

Reply at 20. Moreover, these cases did not conduct an independent choice of law analysis in the context of successor liability, but rather applied veil piercing cases by analogy. *See, e.g.*, *Hayden Capital USA, LLC v. Northstar Agri Indus.*, 2012 WL 1449257, at *7 (S.D.N.Y. Apr. 23, 2012) ("Courts in this District have extended the general rule applicable in veil-piercing cases to claims for successor liability like the one at issue here.").

Because the New York Court of Appeals has not yet ruled on how to apply New York's choice of law analysis to successor liability claims, "this Court must try to predict how the [New York Court of Appeals] would rule on the issue by looking to decisions of the Second Circuit construing state law, as well as intermediate state court precedent, analogous cases in other circuits and any other sources that provide helpful guidance in deciding the issue." *New York v. Nat'l Servs. Indus., Inc.*, 380 F. Supp. 2d 122, 130 (E.D.N.Y. 2005), *aff'd*, 460 F.3d 201 (2d Cir. 2006).

Fortunately, as summarized above, there is intermediate state court precedent directly on point—*Lippens*—as well as other state authority that *expressly rejects* New GM's position—*MBIA*. If this does not lead to Michigan, it would lead to home state law. In the alternative to Michigan, New York choice of law would also support application of home-state successor liability law. Under New York's interest analysis, the most significant contact after domicile is locus of the tort, *Schultz*, 65 N.Y.2d at 197, meaning the place of plaintiff's injury, *Burnett*, 69 A.D.3d at 60. Both state and federal courts have therefore considered place of injury in deciding which state's successor liability law to apply. *See, e.g.*, *Lippens*, 138 A.D.3d at 1509 (considering "the situs of the alleged tort" in determining that New York choice of law compelled the application of New York successor liability law); *Colon*, 477 F. Supp. 2d at 625 (same).

Here, each Plaintiff's injury occurred in their home state. Accordingly, if the Court places weight behind this facet of New York's interest analysis, then each Plaintiff's home state successor liability law should apply.

II. Impact of Late Proofs of Claim Motion.

The Court has also asked the parties to discuss what impact a ruling of the Bankruptcy Court allowing Plaintiffs to file late proofs of claims might have on the successor liability claims. Plaintiffs contend there should be no impact on the successor liability claims. While a ruling by the Bankruptcy Court allowing Plaintiffs to file late proofs of claim would be of some practical significance, the possibility of such a ruling, notably still a ways away given that the parties are just now litigating over what standard should be applied, should not slow down or forestall a ruling on successor liability. Even if Plaintiffs are allowed to file late proofs of claim, that would simply mean that Plaintiffs had been allowed to file claims, and would not be a ruling on the

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important presented a case where the locus of injury was Delaware: "all the players in [that] litigation"—on both the plaintiff and defense sides—"are also Delaware entities." *Id.* at *11.

substance of those claims. Moreover, Plaintiffs will not recover twice for the same conduct and thus there may be offsets, but this is true in many cases and should not slow the orderly process of the litigation. The specific reasons are as follows:

First, there are different standards that apply to each set of claims. The late claims motion does not turn on successor liability, but instead on whether claimants have shown "excusable neglect" within the meaning of *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993), and its progeny—with the further complications in this case that the parties have briefed, as an initial matter, whether Plaintiffs even need to satisfy the *Pioneer* test, as we maintain we do not given earlier rulings in this case.

Second, the successor liability claims in this Court and the potential late claims in the Bankruptcy Court involve different defendants, and therefore different possible avenues for recovery. Thus, for example, it is possible that one defendant would settle the claims for only partial recovery for the Plaintiffs, or could not pay the entire claim, thus leaving Plaintiffs to pursue the remainder against the other defendant.

Further, there is no risk of double recovery because both claims theoretically exist. If Plaintiffs prevailed on both sets of claims, there would be an offset of the recoveries to ensure Plaintiffs did not recover more than they are entitled to, and of course there are procedural developments that might moot the issue.

This situation is thus analogous to any party suing multiple defendants for a single harm, either in the alternative, or on the basis of joint-and-several liability. Such claims are allowed to proceed simultaneously, even though full recovery on competing claims would be either impossible, or subject to an offset. *See, e.g., Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 175 F. Supp. 3d 44, 64 (S.D.N.Y. 2016) (Furman, J.).

While there may eventually be rulings or recoveries on one set of claims that impact the other claims, the bare fact that the late claims in the bankruptcy eventually could be allowed to be filed should have no impact on the successor liability claims, New GM's motion on those claims, or the Court's ruling on that motion.

Respectfully submitted,

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