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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 the Impact of *In re Tronox Inc.* on
2016 Threshold Issue No. 2 as it Relates to Independent Claims

Dear Judge Glenn:

King & Spalding LLP is co-counsel with Kirkland & Ellis LLP for General Motors LLC ("**New GM**") in the above-referenced matter. At the April 20, 2017 hearing on the 2016 Threshold Issues[1] ("**April 2017 Hearing**"), the Court noted that the Second Circuit had just issued an Opinion in *In re Tronox Inc.*, Dkt. No. 16-343, 2017 WL 1403001 (2d Cir. Apr. 20, 2017), and asked the parties whether there should be any supplemental letter briefs filed about that Opinion. The parties then agreed to submit letter briefs regarding the *Tronox* Opinion on 2016 Threshold Issue No. 2, focusing on whether plaintiffs with vehicles without the Ignition Switch Defect had asserted viable Independent Claims, and whether such gate-keeping issues should continue to be decided by the Bankruptcy Court. The parties further agreed to submit letter briefs previously filed in MDL 2543 regarding the impact of the *Tronox* Opinion on

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the *Order To Show Cause Regarding Certain Issues Arising From Lawsuits With Claims Asserted Against General Motors LLC ("New GM") That Involve Vehicles Manufactured By General Motors Corporation ("Old GM")*, dated December 13, 2016 [ECF No. 13802], and the Glossary of Terms attached thereto as Exhibit "B."

putative class plaintiffs' successor liability claims against New GM.[2] This aspect of the *Tronox* Opinion is related to Threshold Issue No. 4 (whether Non-Ignition Switch Post-Closing Accident Plaintiffs can seek punitive damages based on a purported successor liability claim). The primary focus of *Tronox* is the successor liability issue.

Tronox, though, also supports New GM's position that the Bankruptcy Court has continuing jurisdiction to review alleged independent claims against an asset purchaser like New GM to determine whether such claims are truly independent, or whether they are barred by the Sale Order or another Bankruptcy Court order. Indeed, the entire focus of *Tronox* was whether an alter ego/successor liability claim[3] was a derivative claim and thus property of the bankruptcy estate, or an "independent claim" owned by the creditor. In holding that the *Tronox* plaintiffs could not pursue alter ego/successor liability claims, the Second Circuit recognized and affirmed the gate-keeping function that this Court preserved under the Sale Order, and that this Court has exercised many times since 2009.

Various plaintiffs in this proceeding present Threshold Issue No. 2 as a theoretical question: whether plaintiffs in vehicles without the Ignition Switch Defect can assert Independent Claims against New GM in light of the Second Circuit Opinion? The answer is and always has been "yes" if the claim is truly independent. A valid Independent Claim must be based solely upon a New GM duty incurred after the 363 Sale and predicated solely on New GM conduct (*i.e.*, not based on Old GM conduct, the Sale Agreement and/or the 363 Sale transaction). The real question, therefore, is whether the claims actually pled by plaintiffs are viable independent claims against New GM. With regard to the alleged independent claims filed by vehicle owners without the Ignition Switch Defect that were before this Court in the Fall of 2015, the answer was "no", as the Bankruptcy Court reviewed the "marked pleadings" and found that "[t]o the extent such Plaintiffs have attempted to assert an Independent Claim against New GM in a pre-existing lawsuit with respect to an Old GM Vehicle, such claims are proscribed by the Sale Order, April Decision and the Judgment dated June 1, 2015[.]" December 2015 Judgment, ¶ 14.

By analogy to this case, *Tronox* confirms that the Bankruptcy Court had jurisdiction to make such determinations in 2015.[4] And here, the failure to appeal those rulings by the Non-

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[2] For the Court's convenience, a copy of the New GM letter submitted to Judge Furman on the successor liability issue is attached hereto as **Exhibit "A."**

[3] For bankruptcy purposes, alter ego and successor liability claims are both treated as property of the estate. *See In re Konstantinou*, Adv. Proc. No. 16–1103, 2017 WL 83350, at *7 (D. VT. Jan. 6, 2017) ("the Court finds the successor liability claim should not be treated any differently than the alter ego claims because both are derivative actions against bankruptcy debtors").

[4] The *Tronox* Opinion supports the Bankruptcy Court exercising jurisdiction to perform the gate-keeping function with respect to various claims for economic loss and personal injuries against New GM. *See Tronox*, 2017 WL 1403001, at *22 ("The District court 'plainly had jurisdiction to interpret and enforce its own prior order[ ] [the Injunction]' which it 'explicitly retained jurisdiction to enforce.'" (citations omitted)); *see also In re Bernard. L Madoff Sec. LLC*, 740 F.3d 81, 91-92 (2d Cir. 2014) ("We are nonetheless wary of placing too much significance on the labels appellants attach to their complaints, lest they circumvent the New Equity Decision by pleading around the automatic stay and permanent injunction.").

Ignition Switch Post-Closing Accident Plaintiffs, among others, makes the December 2015 Judgment final and binding pursuant to *res judicata* principles.

Background of *Tronox*

The appellants in *Tronox* were tort claimants who alleged injuries from the operation of a wood-treatment plant owned by the debtor (Old Kerr-McGee). Prior to its bankruptcy, Old Kerr-McGee spun off its more profitable oil and gas business to New Kerr-McGee. After the spin-off (but before Old Kerr-McGee's bankruptcy), the tort claimants sued (a) Old Kerr-McGee asserting toxic tort claims, and (b) New Kerr-McGee based on alter ego/successor-liability theories. No direct liability, non-derivative claims were asserted against New Kerr-McGee.

During the bankruptcy proceeding, the bankruptcy estate representative settled an adversary proceeding against New Kerr-McGee relating to the spin off. The tort claimants, as creditors of the debtor, received a portion of the settlement proceeds but nonetheless sought to revive their lawsuit against New Kerr-McGee in violation of the settlement injunction shielding New Kerr-McGee from the claims of Old Kerr-McGee creditors who asserted alter ego/successor liability-type claims. New Kerr-McGee filed a motion to enforce the settlement injunction in the District Court, seeking dismissal of the tort claimants' litigation, and for contempt and sanctions. The District Court accepted jurisdiction over the dispute, held that the tort claimants' claims were derivative of the claims settled by the bankruptcy estate representative, and ordered the tort claimants to dismiss their litigation.[5] Inherent in this holding was the review and analysis of the nature of the claims being asserted by the tort claimants and whether they fell within the injunction in favor of New Kerr-McGee. That is the same analysis undertaken by this Court in 2015, and which is still necessary with regard to new purported independent claims against New GM.

The *Tronox* Opinion and Its Impact on 2016 Threshold Issue No. 2

In analyzing whether it had jurisdiction over the appeal pursuant to 28 U.S.C. § 1292(a)(1), the Second Circuit reviewed the claims made by the tort claimants—like the District Court did in *Tronox*, and like this Court did in the marked pleading exercise—to determine if those claims were (i) derivative of claims settled as part of the bankruptcy representative's litigation, and thus were property of the estate that could be released, or (ii) direct, independent claims against New Kerr-McGee based on its own wrongdoing that could proceed. The Second Circuit found that the tort creditors' claims were derivative. Thus, the alter ego/successor liability-type claims belonged to the bankruptcy estate—not the tort claimants—and could properly be settled by the bankruptcy estate representative.

In so ruling, the Second Circuit recognized that the lower courts had jurisdiction to review the claims at issue, holding that "[t]he District court 'plainly had jurisdiction to interpret and enforce its own prior order[ ] [the Injunction]' which it 'explicitly retained jurisdiction to

[5] The District Court did not rule on the contempt and sanctions issue which, according to the Second Circuit, affected its jurisdiction to review the District Court Opinion.

enforce.'" *Id.* at *22 (quoting *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009)). The Second Circuit further held that "[a] court can take 'any reasonable action ... to secure compliance,' and the 'scope of a district court's equitable powers to remedy past wrongs is broad.'" *Id.* (quoting *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985)).

The same is true, and actually occurred, here in the Bankruptcy Court. In 2015, this Court plainly had jurisdiction to review claims being asserted against New GM to determine if they fell within the injunction in the Sale Order.[6] The Court unquestionably had, and still has, jurisdiction to enforce that injunction by taking any reasonable action, including, as the District Court did in *Tronox*, directing plaintiffs to dismiss such claims with prejudice. In the proceedings leading to the December 2015 Judgment, the Bankruptcy Court went through this precise analysis as part of the marked pleading process. Its final and unappealed rulings with respect to such claims asserted by plaintiffs without the Ignition Switch Defect are binding.

Respectfully submitted,

/s/ Arthur Steinberg

Arthur Steinberg

AS/sd
Encl.

[6] The Court stated at the April 2017 Hearing that it had "satisfied [it]self that the Court needs to maintain a gatekeeping role." April 20, 2017 Hr'g Tr., at 78:2-3. The *Tronox* Opinion supports that correct conclusion.

Exhibit A

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April 27, 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 letter in response to the Court's Order granting leave to file supplemental briefs regarding the Second Circuit's decision in *In re Tronox Inc.*, 2017 WL 1403001 (2d Cir. Apr. 20, 2017). Dkt. No. 3897. That decision further supports summary judgment for New GM against plaintiffs' successor liability claims.[1] Both in *Tronox* and here, any successor liability claims would benefit all creditors and therefore are property of the Old GM bankruptcy estate ("Estate"), not the plaintiffs. *See Tronox*, 2017 WL 1403001 at *18.

Under the Bankruptcy Code, creditors of a debtor lack standing to assert claims that are property of the estate. *See, e.g., St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688 (2d Cir. 1989). Upon commencement of a Chapter 11 proceeding, the estate's property consists of "all legal or equitable interests of the debtor in property," including causes of action. 11 U.S.C. § 541(a)(1); *St. Paul*, 884 F.2d at 701. The estate's property also includes any "interest in property that the estate acquires after the commencement of the case." 11 U.S.C. § 541(a)(7).

In *Tronox*, the debtor's profitable assets were spun off into New Kerr-McGee. 2017 WL 1403001 at *2. Plaintiffs alleging injuries from a Tronox plant's chemicals sued New Kerr-McGee "based on various indirect-liability alter-ego/veil-piercing and successor-liability theories." *Id.* at *3. After Tronox filed for Chapter 11, the estate brought fraudulent conveyance claims against New Kerr-McGee. *Id.* at *3-4. New Kerr-McGee settled, receiving an injunction against claims extinguished by the settlement. *Id.* at *4-5. Once plaintiffs sought to renew their lawsuit, New Kerr-McGee moved to enforce that injunction. *Id.* at *5-7.

The Second Circuit held that "the District Court correctly classified the . . . Plaintiffs' claims as generalized, derivative claims comprising estate property." *Id.* at *18. As *Tronox* explained, successor liability claims belong to the bankruptcy estate because establishing

[1] New GM made this argument in its opening successor liability brief, without the benefit of *Tronox*. *See* Dkt. No. 3520 at 24 & 61 n.54. New GM also asserted it in the Bankruptcy Court and Second Circuit in connections with motions to enforce the Sale Order. *In re Motors Liquidation Co.*, 529 B.R 510, 551-55 (Bankr. S.D.N.Y. 2015); New GM Br. at 57-58 n.23, *In re Motors Liquidation Co.*, 829 F.3d 135 (2d Cir. 2016). The Bankruptcy Court rejected it, choosing to follow the dissent in *In re Emoral, Inc.*, 740 F.3d 875 (3d Cir. 2014). 529 B.R at 552-54. The July 2016 Second Circuit opinion did not address New GM's argument, which was then primarily based on the majority *Emoral* opinion. *Motors Liquidation*, 829 F.3d 135.

successor liability would benefit all creditors and the facts to prove successor liability are available to any creditor: "The critical distinction between the underlying tort claim against the Tronox debtors and the alter-ego claim against New Kerr-McGee is that establishing the former would benefit only the Avoca Plaintiffs as individual creditors, whereas establishing the latter—that New Kerr-McGee is the alter ego of the relevant Tronox debtors and should therefore be charged with all its liabilities—would benefit all creditors of the Tronox debtors generally." *Id.* "The facts necessary to prove that the Tronox debtors committed the underlying torts may be particular to the Avoca Plaintiffs, but the facts necessary to impute that liability to New Kerr-McGee 'would be . . . generally available to any creditor, and recovery would serve to increase the pool of assets available to all creditors.'" *Id.*

Tronox bars plaintiffs' successor liability claims here. Whether plaintiffs' *economic loss claims* are individualized is *irrelevant* under *Tronox*. Rather, the relevant inquiry is whether a determination that New GM "is the [successor] of [Old GM] would benefit all creditors of [Old GM] generally." *Id*. Moreover, the alleged facts supporting plaintiffs' successor liability claims—that New GM retained various Old GM personnel, operations, and trademarks; that New GM assumed certain Old GM liabilities; and that the U.S. exercised its discretion to give Old GM 10% of New GM shares to pay creditors, *see* Dkt. No. 3617 at 6-11—are "generally available to any creditor." 2017 WL 1403001 at *18. Thus, plaintiffs' successor liability claims against New GM are not individualized. Any successor liability claims are Estate property.

Tronox relies on the majority opinion in *In re Emoral, Inc.*, 740 F.3d 875 (3d Cir. 2014) and rejects the dissent in that case. 2017 WL 1403001 at *14-15. The *Emoral* majority likewise held that mere continuation claims are property of the bankruptcy estate: "[O]ther courts applying New York and New Jersey law have held that state causes of action for successor liability . . . are properly characterized as property of the bankruptcy estate." *Id.* at 880 (*citing In re Keene Corp.*, 164 B.R. 844, 849 (Bankr. S.D.N.Y. 1994); *In re Buildings by Jamie, Inc.*, 230 B.R. 36, 43 (Bankr. D.N.J. 1998)). Importantly, *Emoral* noted that "[p]laintiffs concede that there is *no relevant caselaw* directly supporting their position that individual *personal injury claims asserted on a successor liability theory should not be considered property of the bankruptcy estate*." 740 F.3d at 881 (emphasis added).

Plaintiffs cannot avoid *Tronox* by alleging that they did not discover their claims until 2014. *Tronox* holds that the correct focus is on the *successor liability* allegations, not the nature or timing of the *underlying* claims. 2017 WL 1403001 at *18. Whether plaintiffs were aware of the *underlying* claims before 2014 is irrelevant.[2] Potential *successor liability* claims belong to the Estate from the time of the Sale.

[2] Moreover, even if (despite *Tronox's* plain holding) plaintiffs' underlying claims were relevant, plaintiffs had contingent claims as of the Sale date, *see Motors Liquidation*, 829 F.3d at 157, notwithstanding their alleged subsequent discovery of those claims.

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Nor can plaintiffs argue that their successor liability claims are different from those of other creditors because plaintiffs prevailed on their due process claim. As *Tronox* holds, a court must evaluate the successor liability claim itself, not any other claims, to determine whether it belongs to the estate. Whether all Old GM creditors would have benefitted from a successor liability claim is examined "at the time of the Sale," which plaintiffs themselves argue is the dispositive point of analysis. Dkt. No. 3617 at 37-38. At the time of the Sale, only the Estate and not individual creditors held a successor liability claim. Moreover, there is no evidence that the Estate transferred successor liability claims to plaintiffs after the Sale.

Plaintiffs may also posit that New GM's argument is inconsistent with *In re Motors Liquidation Co.*, 829 F.3d 135, 157 (2d Cir. 2016). This would be incorrect. New GM is not seeking to extinguish plaintiffs' successor liability claims due to the "free and clear" clause of the Sale Order. Instead, as the Second Circuit affirmed in *Tronox*, any successor liability claims are property of the Estate, preventing individual putative creditors like the FACC plaintiffs from pursuing them at all.

Further, plaintiffs might argue that their inability to challenge the consideration paid to Old GM renders *Tronox* inapplicable, given that *Tronox* involved a fraudulent conveyance claim. Dkt. No. 3617 at 2, 5. This again would be incorrect because it would override the essential point of Tronox—that a successor liability claim is general when proof of the allegations would be available to and benefit any creditor. 2017 WL 1403001, at *18. This conclusion is reinforced by *Emoral*, which held that "mere continuation" claims were property of the bankruptcy estate. 740 F.3d at 880; *see also id.* at 885 (Cowen, J., dissenting) (arguing, unsuccessfully, that dissent could "not see how [defendant's] alleged 'mere continuation' of Emoral could have harmed Emoral itself," an argument the *Emoral* majority rejected). Under *Emoral* and *Tronox*, because plaintiffs have "fail[ed] to demonstrate how recovery on their successor liability cause of action would not benefit all creditors of [the debtor] given that [the defendant], as a mere continuation of [the debtor], would succeed to all of [the debtor's] liabilities," *id.* at 880, any successor liability claims are property of the Estate.

Finally, plaintiffs' successor liability claims are far weaker than those asserted in the *Tronox* and *Emoral* bankruptcies. Unlike *Tronox* and *Emoral*, the 363 Sale transaction challenged here was Court-approved, and resulted in Old GM creditors having priority to the Sale proceeds over any Old GM shareholders. State-law mere continuation and de facto merger theories contradict the fundamental premise of Court-approved 363 Sales. *See CFTC v. Weintraub*, 471 U.S. 343, 355 (1985) ("One of the painful facts of bankruptcy is that the interests of *shareholders become subordinated to* the interests of *creditors*.") (emphasis added); *Cargo Partner AG v. Albatrans, Inc.*, 207 F. Supp. 2d 86, 95 (S.D.N.Y. 2002) (successor liability exceptions apply to circumstances in which shareholders "*retain the benefits of their ownership interest* while leaving creditors without a remedy") (emphasis added) (internal quotations omitted).

For all the foregoing reasons, the Court should grant New GM summary judgment.

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Respectfully submitted,

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

Counsel for Defendant General Motors LLC

cc: MDL Counsel of Record