UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	.	Case No. 09-50026-mg
	.	
MOTORS LIQUIDATION COMPANY, et al., f/k/a GENERAL MOTORS CORP., et al,	.	Chapter 11
	.	(Jointly administered)
	.	
	.	One Bowling Green
	.	New York, NY 10004
Debtors.	.	
	.	Tuesday, March 5, 2019
. . . . .	.	9:43 a.m.

TRANSCRIPT OF MOTION TO ALLOW INCLUSION OF THE TONAWANDA FORGE SITE IN THE RACER TRUST, OR IN THE ALTERNATIVE, FOR AUTHORITY TO FILE A LATE CLAIM AGAINST THE DEBTORS TO PARTICIPATE IN DISTRIBUTIONS FROM THE GUC TRUST(DOC. NO. 14392, 14393)

BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For American Axle Manufacturing Holdings, Inc. and its Affiliates:	Hodgson Russ By: JEFFREY C. STRAVINO, ESQ. JAMES C. THOMAN, ESQ. The Guaranty Building 140 Pearl Street, Suite 100 Buffalo, NY 14202-4040
For the GUC Trust:	Drinker, Biddle & Reath LLP By: MARITA S. ERBECK, ESQ. 600 Campus Drive Florham Park, NJ 07932-1047 (973) 549-7076
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APPEARANCES (Continued):

For the Revitalizing Auto Communities Environmental Response Trust:	Thompson & Knight, LLP By: MICHAEL V. BLUMENTHAL, ESQ. 900 Third Avenue, 20th Floor New York, NY 10022-4728 (212) 751-3001
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(Proceedings commence at 9:43 a.m.)

THE CLERK: All rise.

THE COURT: All right. Please be seated. We're here in Motors Liquidation Company, 09-50026. This is a motion in connection with the Tonawanda Forge site. Let me have the appearances, please. First, the moving party.

MR. STRAVINO: Good morning, Your Honor. Jeff Stravino from Hodgson Russ on behalf of American Axle, and I have with me my partner, Jim Thoman from Hodgson Russ --

THE COURT: Thank you.

MR. STRAVINO: -- on behalf of American Axle.

THE COURT: Thank you.

MS. ERBECK: Good morning, Your Honor. Marita Erbeck, Drinker, Biddle & Reath, on behalf of the GUC Trust.

MR. JONES: And good morning, Your Honor. David Jones from the U.S. Attorney's Office, Southern District of New York, for the United States.

MR. BLUMENTHAL: Morning, Your Honor. Michael Blumenthal from Thompson & Knight on behalf of the RACER Trust.

THE COURT: All right. Go ahead, Counsel.

MR. STRAVINO: Good morning, Your Honor. We're here today, American Axle's motion to include the former Tonawanda Forge site in the RACER Trust, which was created approximately eight years ago, back in March 2011. The reason for the request is that recently, the State of New York has contacted

American Axle to -- about environmental contamination that currently exists at the site and has not sent a formal PRP letter --

THE COURT: American Axle has known about the contamination since it acquired the property, correct, because Old GM disclosed it to it.

MR. STRAVINO: Correct, Your Honor.

THE COURT: Go ahead.

MR. STRAVINO: Yes, they did. And --

THE COURT: What year -- they acquired it in what year, 1990 --

MR. STRAVINO: In 1994, Your Honor.

THE COURT: Go ahead.

MR. STRAVINO: And for ten years, at least, GM was cleaning up that property and cleaning up the PCBs that had been in the, you know, on the property. I think the relevant issue, just to cut to the chase, is that when GM filed for bankruptcy -- and American Axle sold the property in late 2008. The closing occurred in early 2009. The property is currently owned by the Lewis Brothers. We understand that the Lewis Brothers are a defunct, non-operating Virginia LLC.

GM files for bankruptcy on June 1st, 2009. The proof of claim bar date was November 30th, 2009. The other --

THE COURT: And American Axle received notice of the filing of the case, received notice of the bar date, correct?

MR. STRAVINO: Yes, we did, Your Honor. We're not disputing that at all. And the RACER Trust was created in March 2011.

THE COURT: For 89 properties that Old GM owned at the time of the bankruptcy, correct?

MR. STRAVINO: Mainly correct, except, Your Honor, there were another property, at least we know, or part, that was not owned by Old GM at that time but was adjacent or contiguous, but where Old GM was the sole PRP.

THE COURT: Right. And none of the 89 properties had been disposed of by Old GM between 1994, when it sold Tonawanda to American Axle, and up to the time of the bankruptcy, correct? I mean, you're dealing with a very old --

MR. STRAVINO: Almost.

THE COURT: -- very old property, and the RACER Trust was established to deal with environmental contamination at properties that GM owned. You say one of them was adjacent to a property it owned at the time of the bankruptcy on June 1st, 2009, correct?

MR. STRAVINO: Right. So, Your Honor, it's not, though, that no property -- it's not that every single property or every single parcel that was part of the RACER Trust --

THE COURT: It specifically identified and included 89 properties, and it had various provisions about -- that resolved potential environmental liability claims against

Old GM. These were -- none of the 90 properties were acquired by New GM as part of the bankruptcy sale, correct?

MR. STRAVINO: Correct. And the Tonawanda Forge site was not acquired by New GM, correct.

THE COURT: Well, New GM hadn't owned it since 1994. It would have been very hard for the -- for all of -- for New GM to acquire it from Old GM.

MR. STRAVINO: Right. But at the end of the day, Your Honor, we're talking about -- so I think the key distinguishing factor here is we're talking about CERCLA claims. And CERCLA claims right now, arguably, are not ripe for American Axle because we have not incurred any response costs. That being said, when would we become knowledgeable, potentially, about a CERCLA claim, and it's only since the State of New York provided us with this notice.

Also, Your Honor, I think it's relevant that the State of New York, when they filed proofs of claim in this case, they filed 21 of them. And none -- they included other sites across New York State, but they did not include the Tonawanda Forge site. So I think it's unfair and would be very difficult and improper and inequitable to say, American Axle, you should have known back in -- on June 1st, 2009, you should have known that on March 31st, 2011, that there's some potential environmental issue at this site and that you would have a CERCLA claim.

THE COURT: This isn't in the record of anything that I've read in connection with the motion, but has American Axle been identified as a PRP in connection with any other properties that it owned at any time in the past?

MR. STRAVINO: Yes, Your Honor.

THE COURT: And at how many properties?

MR. STRAVINO: I don't know the answer to that, Your Honor.

THE COURT: And going back how -- how far back in time was American Axle identified as a PRP with respect to properties -- you don't have to own the property to be identified as a PRP, correct?

MR. STRAVINO: Correct. You --

THE COURT: Sometime in the past, you allegedly owned the property and there was some --

MR. STRAVINO: Or operated --

THE COURT: Owned or operated.

MR. STRAVINO: -- owned or operated normally, Your Honor, yes.

THE COURT: And so do you know this -- again, this is not in the record of the motions before me, but do you know how many properties American Axle was identified as a PRP?

MR. STRAVINO: I do not, Your Honor. I'm frankly representing American Axle with respect to this site. I do know of another site --

THE COURT: They're not a stranger to issues of environmental contamination.

MR. STRAVINO: No, they're not, Your Honor. But on the other hand, they're also not --

THE COURT: And the potential liability, CERCLA or state parallels that -- potential liability where they owned the property at the time the contamination is identified or owned or operated it sometime in the past, and both state and federal environmental laws make such parties as PRPs, correct?

MR. STRAVINO: Correct, Your Honor, although what I would say there is then does that mean -- and if that's the rule, that's the rule that Your Honor will have -- that every single GM site in the U.S., any party that ever owned or operated on any of those sites should have filed a proof of claim? And I don't think that's --

THE COURT: Whether they should have or not is not fo me to determine. They haven't, but -- let me ask you another question. I saw in the sale documents to American Axle, there was disclosure of the PCB and other possible contamination, and American Axle released Old GM from liability for it. Is that correct?

MR. STRAVINO: Well, Your Honor, there was a -- there were different indemnities that were in there and different provisions, and depending on the type of problem and whether it was something that had been disclosed before or after the sale

and GM was responsible for cleaning up. And I think the key point there is, Your Honor, as of 2004, upon information and belief, American Axle, from everything we know, had been told and seen in documents, never notified GM to say, you still need to do some further cleanup. New York State never notified GM to say, you should do further cleanup.

So in 2009 when the bankruptcy was filed, again, New York State filed 21 proofs of claim. They didn't file with respect to the site. They filed with a bunch of other sites. Nobody knew or -- it wasn't within the reasonable contemplation of the parties. It was not expected that there would be an environmental issue with this site.

So that's the point. That's why all these years later, and frankly, that's why the State's letter and notice to American Axle didn't just come out left field, it seemed to come from another planet. And -- but we do not believe that it's --

THE COURT: I've heard that before with respect to environmental contamination and potential PRP responsibility. Everybody is shocked that this has suddenly gotten this notice. There's been no determination of American Axle's responsibility with respect to Tonawanda, correct?

MR. STRAVINO: No, there hasn't, Your Honor.

THE COURT: All right.

MR. STRAVINO: And that being said, maybe if other

parties arguing and there's been a bunch of other cases cited, but I think, for example, if you look back to In re Chateaugay from the Second Circuit in 1991, there, the Environmental Protection Agency had already incurred some response costs. Here, no response costs have been incurred.

If you look at the different cases also that we cited on Page 6 of our reply papers -- and, for example, the Laidlaw case from the Western District of New York, the Chicago Milwaukee Railroad case, AM Intern. Basically in Chicago Milwaukee, the Court -- it's, granted, the Seventh Circuit, but they had canvassed case law on the issue and determined that creditors whose claims have arisen when they knew they had a potential CERCLA claim before the close of the bankruptcy proceedings. Here, we did not know we had a potential CERCLA claim.

THE COURT: The purchase agreement disclosed -- in 1994 disclosed contamination by PCBs and other possible contaminants. This came as no surprise to American Axle. They knew it when they bought the property, correct?

MR. STRAVINO: They knew that there were PCBs at the site when they bought the property. Correct, Your Honor. But if this -- if GM files for bankruptcy in 1997, we'd be in a different situation. If GM files for bankruptcy in 2002, we'd be in a different situation. If GM --

THE COURT: You thought you were home-free. I Mean,

that's --

MR. STRAVINO: Right. We thought because of when GM files for bankruptcy, because there were no issues that we understood at the site with GM or with the State, that --

THE COURT: Do you understand what the concept of contingent claims means --

MR. STRAVINO: Yes, I do, Your Honor.

THE COURT: -- in bankruptcy? And don't you agree that with respect to contamination that existed in the property at the time American Axle acquired the property, that it had a contingent claim that it could assert?

MR. STRAVINO: No, I don't, Your Honor.

THE COURT: Why not?

MR. STRAVINO: Because the contingent claim is not the fact that the contamination existed. The contingent claim is the fact you had a CERCLA or some other cause of action, which American Axle did not have on June 1st, 2009.

THE COURT: Doesn't have to be a cause of action asserted. I mean, if you look at the whole line of products liability cases, the issue is whether American Axle had a contingent claim, knowing that the property was contaminated with PCBs, potentially other contaminants, at the time it purchased the property. That, you can't dispute. It's in the purchase agreement. By 1994, had PCBs been identified as really bad contamination for which property would -- might well

have to be remediated, depending on concentrations and whether it's in the groundwater and the direction it's flowing? You agree with that?

MR. STRAVINO: Yes, I do, Your Honor.

THE COURT: Okay. So they knew the property was contaminated with PCBs. They knew PCBs were a really bad contaminant and potentially could be -- lead to remediation costs, correct?

MR. STRAVINO: At the time in 1994, yes, Your Honor.

THE COURT: Okay.

MR. STRAVINO: And in 2009 --

THE COURT: And you're saying those circumstances didn't give rise to a contingent claim as those terms have been well-developed in bankruptcy case law?

MR. STRAVINO: Well, Your Honor, I think that we have to slice the salami a little thinner or get down and break it down. I had a law school professor I loved who said if you don't understand, you know, a paragraph, break it down by the sentence; the sentence, break it down by the phrase; phrase by the word. And I think you have to focus on environmental case law in bankruptcy and contingency. And there's the DMJ Associates case from the Eastern District of New York from 2016 that we cited where the court had rejected a debtors' argument that the occurrence in discovery of environmental contamination prior to the filing of the debtor's bankruptcy petition

discharged CERCLA claims against it. And I believe, Your Honor, the key is we're talking about CERCLA here. Otherwise, again, as I said, then the law wouldn't just be in the GM case, but anywhere, that if there was a --

THE COURT: Chateaugay and subsequent case law in this circuit and elsewhere distinguishes between liability or cleanup costs for contamination within a property which can be discharged and liability for preventing continuing pollution on adjacent properties, things like that. That's -- you agree with that? I mean, there's a difference. You can -- you may be able to discharge what the cleanup costs were on -- within the four corners of this property. The problem that can't be discharged -- liability can't be discharged if the contamination is crossing the -- continuing to cross the boundaries, contaminate water wells on adjacent properties, and an injunction is issued requiring PRPs to avoid that ongoing contamination. That's not dischargeable. You agree with that?

MR. STRAVINO: Yes, Your Honor. But I don't know if that's the case -- I don't believe that's the case here. I don't think we're talking about --

THE COURT: You don't know because there hasn't been -- the state hasn't, at this stage, made clear to American Axle whether it -- whether the State believes it is responsible for remediation costs or not. They put you on notice -- put your client on notice of the potential liability that they may

assert. They haven't asserted it so far. Correct?

MR. STRAVINO: Well, two things, Your Honor. One, with respect to the offsite argument, I believe what's in the record and what's public record from the DEC report and the DEC ruling, my understanding is that because it's still -- there is a GM Powertrain site adjacent to the former Tonawanda Forge site and that --

THE COURT: That New GM is operating?

MR. STRAVINO: Correct ,yeah. And my understanding is that there had been environmental work and barriers and other remedial work done to ensure that there was not any type of flow of contamination across that property. The GM Powertrain site basically sits on the Niagara River in Buffalo. There's the 190 there, and I think the concern is to prevent that from going into the water. The American Axle site is behind it.

And so that was all done, and that was all taken care of before 2004, before 2009, before 2011. So again, preventative measures, remedial measures were taken. That's where I think the facts here are key and distinguish from many of the other, you know, general premises that we're talking about.

So the fact -- you know, for example, if a party spilled had a -- knew that a gallon of gasoline or ten gallons of gasoline were spilled onsite at one point, does that mean

that they should then -- and they were an owner of a site 30 years later, get a notice of some bankruptcy that they should be filing a proof of claim with respect to that? I don't -- that, to me, seems like a problematic argument. I know in --

THE COURT: Is that what happened here? They spilled a gallon of PCBs and that was the only contamination on the property?

MR. STRAVINO: No. It was -- well, we believe it was -- we understand it's more than that, but --

THE COURT: Then don't give me that as a hypothetical.

MR. STRAVINO: Understood, but if you think it's cleaned up and that there aren't that many PCBs still there at the time, then -- and the State doesn't say that it's not clean up -- cleaned up, then why should you have to -- so I guess maybe I was wrong with my analogy or my example, but if you believe something's been cleaned up properly and nobody's asserting a claim, none of the regulatory agencies -- we don't believe EPA's asserted a claim. We couldn't find exactly everything with respect to EPA, but New York State, again, filed 21 proofs of claim, some other ones in Western New York. If they really thought this was a problem, they would have asserted a claim there.

So that's our problem, Your Honor, respectfully why we think that this is distinguishable, why we think it's

inequitable if we aren't included in the RACER Trust.

THE COURT: Well, spell out for me how you think, in 2019, Tonawanda can be added to one of the properties in -- to add to the 89 properties in the RACER Trust, all of which were either owned or operated or, you said, adjacent to properties that Old GM was operating at the time of the bankruptcy. That's -- I don't follow, okay? I thought that Mr. Jones's argument was quite persuasive on the issue of you can't come back in 2019 and add -- and modify a heavily negotiated agreement that established the RACER Trust only as to 89 properties. Lay that out for me.

MR. STRAVINO: Well, Your Honor, I think that consent orders and agreements can be amended, and there's case law that allows the amendment.

THE COURT: You're not a party to the consent order.

MR. STRAVINO: Right.

THE COURT: You're -- I don't see how you have standing to even seek a modification of a heavily negotiated, court-entered order that dealt with 89 properties that Old GM owned or operated at the time of the bankruptcy. Do you have any -- let me ask you this. Do you have -- what's your case authority to support modifying the court orders that established the RACER Trust for the 89 properties to add a property that Old GM had sold in 1994? What's your authority?

MR. STRAVINO: Your Honor, we believe Federal Rule

60(b) allows standing on non-parties like American Axle, and we cited Dunlop v. Pan American World Airways, Inc., 672 F.2d 1044 (2d. Cir. 1982) for a holding that non-parties had standing to modify a judgment where non-parties were sufficiently connected with the initial lawsuit.

THE COURT: How are you sufficiently connected to an order that dealt with 89 specific properties, not including this one, and established a mechanism to deal with environmental liability, how it would be -- remediation would be compensated or paid for for 89 specific properties? That, I don't see.

MR. STRAVINO: Well, Your Honor, our understanding and my interpretation and reading of the case law is that the Grace v. Leumi Second Circuit case from 2006 had applied the standard in Dunlop and determined that a party had standing, and the key determination in that case and the lines of case that they cited was whether the non-parties' interests are strongly affected by a legal instrument --

THE COURT: Your clients' interest are not affected whatsoever by the 89 properties included in the RACER Trust, correct? You don't -- the -- how -- would you agree with that?

MR. STRAVINO: Well, Your Honor, I would respond this way. Six-hundred-plus-million dollars was put in the RACER Trust to clean up former GM or current GM properties.

THE COURT: Eighty-nine specific properties, not

including Tonawanda that had been sold in 1994.

MR. STRAVINO: And then, I respond to that with why wasn't Tonawanda included, because nobody at the time thought that it -- there was a contamination issue there. The EPA didn't. The State didn't. American Axle didn't. Current owners at the time presumably didn't. I can't speak for them, Lewis Brothers, and to the other parties. So I can't disagree, Your Honor, it wasn't included back then. So -- but we do think that our interest is greatly affected, and we also think that given the amount of money that was put in the trust, now it's going to be eight years ago later this money and the amount that still remains and the --

THE COURT: How much still remains?

MR. STRAVINO: I believe it's in a few hundred million dollars. I'm not sure that's -- but that including this one additional property for fairness --

THE COURT: You think if this one's added that there won't be a dozen or more motions made to include properties that Old GM owned at some distant time in the past to add them to the RACER Trust? See what you did as to Tonawanda, Judge?

MR. STRAVINO: I understand that argument, but we're now eight years past the formation of RACER.

THE COURT: Why don't you move on to your argument about leave to file late claim.

MR. STRAVINO: Okay. Well, Your Honor, we

respectfully request that contrary to the -- I guess that we already argued this a little bit, but contrary to the GUC Trust position, we do not believe that our claim did exist prior to the bar date in November 30, 2009. And if that's what Your Honor was asking -- are you talking about the --

THE COURT: Well, if it didn't exist prior to the bar date, you can't assert a late claim against Old GM in its bankruptcy.

MR. STRAVINO: Well --

THE COURT: Isn't that true?

MR. STRAVINO: It --

THE COURT: If it didn't have a contingent claim as of the petition date on June 1, 2009, American Axle can't assert a claim against the GUC Trust standing in for Old GM, correct?

MR. STRAVINO: Perhaps, Your Honor, that's not --

THE COURT: Can you answer that yes or no?

MR. STRAVINO: I guess the answer -- I don't want to give you a yes or no answer --

THE COURT: Well, I know that.

MR. STRAVINO: -- because I know you're saying --

THE COURT: That's pretty obvious.

MR. STRAVINO: It's --

THE COURT: But you do have to answer my question.

MR. STRAVINO: -- what's the definition of a claim,

what's the definition of a claim.

THE COURT: Well, you said it didn't have a claim as of June 1, 2009, the petition date. If it didn't have a claim as of the petition date, it couldn't assert the claim, timely or untimely, in Old GM's bankruptcy, correct?

MR. STRAVINO: Well, here's my concern why I don't want to --

THE COURT: Can you answer my question yes or no?

MR. STRAVINO: I'm going to say no, Your Honor.

THE COURT: Okay. Tell me why.

MR. STRAVINO: Because I believe with, for example, ignition plaintiffs who perhaps didn't know at that time that they had a claim, and then later on, there was a problem with the car or --

THE COURT: The Second Circuit held in the Elliott case that the ignition switch defect was a known defect, known to Old GM, not disclosed by Old GM, disclosed for the first time in 2014 when New GM issued recalls. The opinion recounts -- and there was an investigation about it -- recounts Old GM's knowledge about the ignition switch defect, the failure to disclose it. It's completely distinguishable from American Axle, where it knew about PCB contamination because Old GM disclosed it in the sale agreement, okay.

MR. STRAVINO: So -- but if then, I guess, the contamination existed, I don't think that, in 2009, provided

the basis for a claim, a CERCLA claim, but there were the underlying -- you know, what Your Honor said before. I'm not trying to argue against what I said before.

THE COURT: You say a CERCLA claim, but there could be state law nuisance claims. There could be a whole host of potential claims arising from environmental contamination on property, not just CERCLA liability. States all have their own versions of the CERCLA statute. There's common law liability in many states for nuisance. There's a whole host of claims.

MR. STRAVINO: But Your --

THE COURT: So just deal with the issue of why you believe American Axle should be permitted to file a late claim now. You started by -- in answering my question talking about future claims. Well, future claims don't cut it because you wouldn't be able to file a proof of claim if a contingent claim didn't exist as of the petition date. Agreed?

MR. STRAVINO: Agreed, Your Honor. But I think -- I guess I'll go with our final argument that we had made in our papers, where we said that if American Axle's claim is not a prepetition claim, it is not futile nor is it barred by 11 U.S.C. 502(e)(1)(B). And there -- and this was at the end of our reply papers that we briefly addressed, but in the context of environmental liability, our understanding from precedent is that 502(e)(1)(B) won't bar a private creditor's claim or the relevant government agency does not file a claim

against the debtor.

And so at the time of the bar date, as well as -- well, at the time of the bankruptcy, at the time of the bar date, there had been no government claims against the debtor. There had been no private party claim against the debtor. And so we believe that because New York hadn't filed a claim, that there was no co-liability element and therefore it's not present here.

THE COURT: Okay. I (indiscernible). Thank you.

MR. STRAVINO: Okay.

THE COURT: Let me hear from the GUC Trust next.

MS. ERBECK: Good morning, Your Honor. Marita Erbeck, Drinker, Biddle & Reath, on behalf of the GUC Trust. I don't think anything that we've heard today really changes what we've articulated in our papers and changes the fact that there was sort of a classic contingent claim that existed as of the bar date. I'm going to just sort of hit on a few points. I won't sort of rehash everything that's in our papers.

You know, the Court sort of picked up on one of the main themes of, I think, our papers and, you know, what I intended for the presentation to be here today, and that's that American Axle had notice of the environmental contamination as early as 1994, rather, and also had actual notice of the bankruptcy, the bar date. Usually in late claim motions like this, we're sort of arguing about whether someone's an unknown

creditor, whether we can sort of loop them in using publication notice, but here, we sort of have the rare case of actual notice of the bankruptcy and the bar date, and I think those things are ally important to keep in mind.

Just with respect to, you know, whether or not a contingent claim existed, I think this is sort of your classic contingent claim. Section 1055(a) of the Code is broad and is broad by design. It expressly includes contingent claims, and those contingent claims are claims that are dependent on something that may or may not happen in the future here.

THE COURT: Like New York finally coming around and saying clean it up.

MS. ERBECK: Hey, you might be -- you might have to pay. That's exactly right. You know, sort of the basis of the claim, the foundation of the claim, is the contamination itself. And so to answer the question that Your Honor was asking counsel for American Axle, you know, does this mean -- or the hypo that he presented, does this mean that everybody -- every, you know, owner or operator of every property that was ever owned by Old GM had to -- would have to file a proof of claim? If they want to seek recovery or reimbursement for environmental cleanup costs, the answer to that question is yes, right? In particular in this case where there was, again, knowledge of the contamination and now actual knowledge of the bankruptcy case. And so I think here, we sort of have your

classic contingent claim.

American Axle talked a little bit about Chateaugay, and I think Chateaugay is important, obviously, when we think about contingent claims generally, but Chateaugay was also important because it, you know, was really about environmental claims, claims of the EPA. And I just want to draw the Court's attention to a little bit of language from Chateaugay. It's at Page -- 944 F.2d 1005. And here, the Second Circuit says the:

"EPA does not yet know the full extent of the hazardous waste removal costs that it may one day incur and seek to impose upon LTV" --

-- that was the debtor --

-- "and it does not yet even know the location of all the sites at which such wastes may yet be found. But the location of these sites, the determination of their coverage by CERCLA, and the incurring of response costs by EPA are all steps that may fairly be viewed, in the regulatory context, as rendering EPA's claim 'contingent,' rather than as placing it outside the Code's definition of 'claim.'"

And I think that's really important to keep in mind here. Here, we have American Axle sort of arguing that, we didn't know in 2009 what the -- you know, that there would be response costs, what the response costs would be, and I think, you know, the Second Circuit in Chateaugay kind of tells us

that you still have to file your claim if you want to later seek recovery again. In particular here, there was actual knowledge of the contamination.

I think the cases that were cited in the reply missed the mark. A few of them were mentioned today. It was argued so far today that Old GM was the sole PRP. I think CERCLA kind of tells us that while Old GM may have been the only PRP that was, at that point, looked at for payment of some of these environmental remediation costs, every owner and operator was a potentially responsible party under CERCLA and applicable state law. I certainly think that sort of rings hollow. While American Axle argues that they were not aware of their CERCLA claim, it's been acknowledged in the papers and here today that they were aware of sort of the underlying contamination, and I think that's dispositive of the issue.

Just to sort of hit very briefly on a few of the cases that were mentioned today, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company case, the Seventh Circuit case from 1992, I think American Axle wants to look to this case for the standard of, you know, the factors that should be considered, but I think it's also important to sort of read the rest of that case. In that case, the Seventh Circuit expressly stated:

> "When a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous

substance which this potential claimant knows will lead to CERCLA response costs, and when this potential claimant has, in fact, conducted tests" -- -- I think here maybe there weren't tests conducted but there was actual knowledge --

-- "with regard to this contamination problem, then this potential claimant has, at least, a contingent CERCLA claim."

I think there's sort of similar language in the AM International case that was mentioned here today. I think in that case, the court ultimately actually followed Chateaugay, and I think that's sort of important. Both ownership and CERCLA were facts that were identified by that court as important things to think about when you're deciding whether something was fairly contemplated. And then, in the DMJ Associates case, the 2016 case from the Eastern District of New York, American Axle cites this case for the proposition that a claim hadn't -- didn't arise at the time that the creditor became aware of the contamination but rather when the CERCLA claim became available. I think in that case, it's important to know that there wasn't liability in that case because the relevant section of CERCLA had not yet been enacted. And so there couldn't have been any sort of fair contemplation because the statutory provision was not yet law. So I think with respect to those issues, the actual knowledge of the

contamination and CERCLA itself is dispositive of that issue.

I'll touch very briefly on Pioneer. The Pioneer standard is well known to the Court, and so I won't rehash it of the four factors. I think the factor that we're most focused on today is the reason for the delay. The motion itself, the reply, and I think that we've heard here today can be fairly characterized as American Axle sort of fundamentally misunderstanding when they had a claim and what that claim was.

This Court has noticed, has identified, has recognized before that a claimant's neglect is not excusable when its failure to comply with the rule of filing a claim by the bar date was the result of a mistake of law. And counsel argued here today that, you know, they just didn't think there was a contamination issue anymore. I think -- and essentially that there -- they didn't have a claim because they hadn't yet been asked to pay anything.

And I think the district court's opinion in Michigan Self-Insurers' Security Fund v. DPH Holdings is sort of instructive on this point. The claimant in that case was the Michigan Self-Insurers' Security Fund, and that was a fund that was created by state law essentially to pay for workers' comp. claims when the employer became insolvent. When the debtor in that case filed bankruptcy in 2005, it was current on its workers' comp. payments. It was current on its workers' comp. payments, you know, through the bankruptcy case, up to

confirmation. And in connection with confirmation in that case, the debtor essentially indicated that it was going to stop making its workers' comp. payments. And only at that point did the fund in that case essentially try to file two proofs of claim to address unpaid workers' comp. payments. The debtor objected to the claims because they were after the bar date. Then, the claimant in that case filed late claims motions, as you would. The debtor objected to those late claims motions too, essentially saying, you had these claims, they were contingent, you had these claims at the time of the bar date and you had to assert them. The bankruptcy court agreed, and Judge Scheindlin in the district court also agreed.

Essentially, that's the same excuses here. We -- I didn't think I had a claim because they were current on their payments, there was nothing for me to pay. And I think Judge Scheindlin's decision there is important to the issues that we're sort of considering here today. Even though the fund in that case had no right to payment because the debtor was still current at that time, same would go for American Axle, that there was always a risk that the debtor would stop making those workers' comp. payments. I think likewise, there's a risk -- there was always a risk that American Axle would be identified as a source of funds for, you know, paying for some of these environmental contamination costs. There was always a risk of that under CERCLA and applicable state law,

and so Judge Scheindlin recognized that the fund in that case made a mistake of law, and that was ultimately fatal to its motion to file a late claim.

And then, the final point that I will make is on the futility point. I think the reply brief and the argument here today essentially was that the claim shouldn't be disallowed because, A, there's no double-dip, which is sort of a policy, you know, idea behind whether or not 502(e)(1)(B) should be invoked, but also whether or not there was another claim that was actually filed, right, so whether there's actual co-liability in the sense of the bankruptcy claims. And I think with respect to that point, the APCO Litigation [sic] Trust case that we cite in our papers is relevant to that issue. In that case, whether the claim was actually filed is not the measure of whether or not 502(e)(1)(B) can be invoked but rather the mere existence of multiple claims. Again, whether or not they were asserted is not relevant to that analysis.

THE COURT: Thank you.

MS. ERBECK: That's all I have. Thanks, Judge.

THE COURT: Mr. Jones.

MR. JONES: Good morning, Your Honor. May it please the Court. Your Honor's question --

THE COURT: Just make your appearance for the record.

MR. JONES: Oh, sorry. David Jones with the U.S.

Attorney's Office for the United States, opposing the motion.

Your Honor's questioning, I think, revealed a quite fair grasp of our position, so I won't go on at length, but because of the motion's importance to the United States, especially the floodgates fear we have, which is very substantial -- let me just spell out the core of our position. The top line is -- what we're here for is to oppose any order that would in any way make RACER Trust responsible for this site. We take no position on the late motion -- late claim allowance portion of the motion.

First, as to the standing question that was briefly touched on, I -- that's not the main thing we're hanging our hat on because I think we have an overwhelmingly strong case as to why the consent decree shouldn't be modified on the merits, but I will pause to say that the Dunlop case on which American Axle relies recognizes that ordinarily to modify a consent decree, you have to be a party and to seek relief on that basis and -- but said that in narrow circumstances, which the Court emphasized were narrow, where a party is sufficiently close to the underlying dispute and directly affected by it, they could be allowed to seek such relief. As the Court's questioning also questioned -- I'm not at all convinced that's the case here because the purpose of RACER is for the specific purpose of cleaning up 89 listed and designated properties and is specifically not for cleaning up or providing recourse for

properties where GM might -- that GM didn't have any ownership interest in at the time of the petition. But -- so formerly owned properties were all consigned to the world of unsecured claims in this case, and that's where, you know, the Tonawanda Forge site at issue here belongs.

So -- and just to tease out a little bit why exactly that is, American Axle talks about RACER -- the fact that RACER did have certain responsibilities for non-owned sites. That was very limited. I think there were two specific cleanup obligations, one at Framingham, Massachusetts and one at the Upper Ley Creek portion of the -- a site near Syracuse called IFG Syracuse generally in our case. Both of those met criteria that were carefully explained in Docket Number 9311, which was our statement in support of the settlement, and specifically which something that American Axle hasn't acknowledged. What was necessary for those two sites to be included in RACER is that they were immediately adjacent to GM-owned properties that were very polluted and they were -- and GM, at the time of the petition, was subject to an order to clean those up, those adjacent properties, as part of its omnibus duty to remediate, under environmental laws, an area that included their own property and some -- and a spillover area. Again, that's not at all the case here. There was no order as, I think, American Axle agrees.

But for those narrow exceptions, unowned sites are

not RACER's responsibility. Again, that Docket Number 9311, at Pages 11 and 12, talks about the basis for including what's in the RACER Trust and its portfolio of responsibilities, and that same document at Pages 32 to 37 explains and justifies why other non-owned sites are not included in the RACER Trust. A number of objectors to the settlement said, me too, I should be covered by that, as well, and we said, no, so sorry, we sympathize with your problems, but, you know, the RACER Trust can only exist to serve a core set of estate obligations. And that's true -- that's important not only as a matter of prioritizing resources, but also because as a matter of law, debtors are obliged to fully fund and comply with their non-bankruptcy law obligations post-petition. That is the genesis of the obligation that led to the RACER Trust. So you have to clean and remediate your properties once you're post-petition to meet your administrative claim obligations and to meet your injunctive obligations. That's also true about areas where -- which you may not own but where you're subjected to orders. That doesn't apply to sites like the Tonawanda Forge site.

So that really is the heart of our position. Oh, I'll just say something that came up in colloquy today where the movant acknowledged that GM had largely remediated and contained any positive spillout from the facility it owned in that area is -- demonstrates that this is -- and explains why

this isn't that kind of property that could trigger RACER obligations. GM had already done the work to confine whatever contamination it had to its own property, and so there was no ongoing problem that the debtor could have been legally required to address and fix and that would have triggered and justified assignment to RACER.

Having drawn no questions, and I think that's the heart of my position, I think I'll stop talking. So thank you very much, Your Honor.

THE COURT: Thank you very much, Mr. Jones.

MR. JONES: We request that RACER not be -- have its mission diluted and that it be able to continue its good work. Thank you.

THE COURT: Thank you.

Mr. Blumenthal.

MR. BLUMENTHAL: Good morning. Michael Blumenthal from Thompson & Knight on behalf of the RACER Trust.

Your Honor, I will not belabor the record. Mr. Jones, who -- the U.S. Government is our beneficiary. I just want to point out two or three things. I think it's already been pointed out by Mr. Jones that the American Axle property is not adjacent to any of the 89 properties that were transferred by Old GM, which were owned by Old GM at the time they were being transferred, and that the only property -- or two properties that were included in the trust were adjacent to

the properties that were transferred to the trust and, more importantly, were specifically funded under the consent decree along with the other 89 properties. There's a budget for each property, Your Honor. The amount that was funded by the Government was not a gross amount just, here, go remediate 89 properties. It was specific funding for each property. We are not allowed to take from one property for another. It would violate the consent decree. And I think Your Honor may have hit upon an important point, that --

THE COURT: Accidents happen sometimes.

MR. BLUMENTHAL: Yes, Your Honor. The settlement -- the consent decree and settlement agreement was an agreement among 14 states, the U.S. Government, and the Mohawk tribe, not with properties owners, and it settled the proofs of claim that were filed by the various governmental agencies. It was only for properties that Old GM owned at the time.

This particular property is adjacent to a New GM facility, not ours. There is absolutely no funding. This property was not owned by Old GM at the time of the petition date and, moreover, has in excess of $4 million of liens against it. Under the consent decree, the properties that were transferred into the trust were transferred in free and clear. The -- as we indicated in the final paragraph of our objection, I'll call it a limited response, the only way that you could even consider this is sending notice out to 14 attorney

generals of the various states, the Mohawk tribe, and our beneficiary, and somehow come up with third-party funding and somehow release the liens from the property and transfer the property in. Those circumstances are not about to happen or occur. There would be a floodgate of litigation over that issue.

The trust has a specific -- has specific authority to do only what it is authorized to do. We cannot take on additional properties. We're not allowed to. And this really, Your Honor, boils down, at this point in time, to a two-party dispute between two non-debtors, New York State and American Axle. It has nothing to do with the trust or Old GM anymore.

THE COURT: Thank you.

MR. BLUMENTHAL: Thank you.

THE COURT: All right. Mr. Stravino, very briefly.

MR. STRAVINO: Yes, Your Honor, briefly.

First, with respect to the GUC Trust arguments and the citation to Chateaugay, again, at that point in time, the critical distinction in that case between ours is that there already was environmental remediation going on. There was not in ours at the time of the filing.

With respect to the DMJ case that was cited form the Eastern District of New York from 2016, it was noted that CERCLA's private cause of action under Section 107 arose in 2007. But the sentence before that said, quote:

"Here, the third-party plaintiffs lacked knowledge as to the existence of any claim whatsoever at the time RCPA filed for bankruptcy protection."

So I believe, Your Honor, that was the principal analysis by the court that it did not exist at the time, and we have cited in our papers various cases about when CERCLA claims actually become available.

With respect to the workers' compensation case, if an environmental remediation was ongoing and was being funded and GM filed for bankruptcy, then I could understand how you would say we should file a proof of claim because they may not be able -- just like the workers' comp. that was being funded and there was a bankruptcy. But, Your Honor, that's not the case here. Again, upon information and belief, even to the best of our knowledge and, I assume -- I can't speak on behalf of the State of New York, they didn't put in papers, but this was not one of their 21 proofs of claim. They did not think there was an issue here.

Furthermore, we did not argue this earlier, but in terms of when -- there had been -- the GUC Trust had taken a position in the Gillespie matter where Mr. Gillespie was -- in the 2017 decision, Mr. Gillespie was a former -- Your Honor's familiar with the case.

THE COURT: I'm familiar with Mr. Gillespie.

MR. STRAVINO: Yes. And they said that his claim did

not arise until his conviction was overturned or reversed in 2012. And so respectfully, Your Honor, we believe that supports our position here. So with respect to the workers' compensation and that matter --

THE COURT: What did I rule in Gillespie?

MR. STRAVINO: Your Honor, that was -- you were not favorable to us or to Mr. Gillespie, so acknowledged. I'm just saying what the --

THE COURT: I don't think you're getting any mileage out of the Gillespie decision. Let's put it that way.

MR. STRAVINO: Okay. Well, I'll move on. I'll take that as a -- and briefly, Your Honor, with respect to Mr. Jones saying that we thought that the -- I'll say "contamination" -- had already been contained. I believe that's correct, but we don't know, and now there's a question with respect to the site. We also thought that the entire site had been remediated.

So -- and finally with respect to Mr. Blumenthal saying that there would be a floodgate of litigation, I'm not sure if we know that or could predict that, especially this number of years later. If this was very soon thereafter --

THE COURT: Who thought American Axle was going to come forward this many years later.

MR. STRAVINO: Right. And we thought -- you're right. We thought New York State would come after American

Axle. But respectfully, Your Honor, we appreciate the Court's time and consideration. We rely on the arguments and our papers. We think the equitable result here is to both be included in the RACER Trust or, in the alternative, to be able to adjudicate the --

THE COURT: All right. I'm going to take the matter under submission. We're going to be in recess for about five minutes, ten minutes, and then we'll resume on the next matter. Thank you very much everybody.

UNIDENTIFIED: Thank you.

MR. STRAVINO: Thank you.

(Proceedings concluded at 10:55 a.m.)

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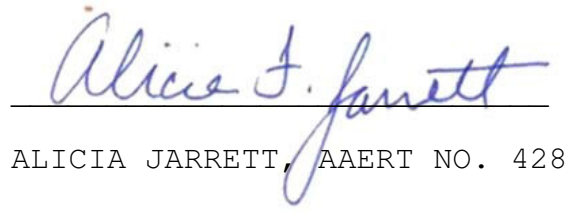
C E R T I F I C A T I O N

I, Alicia Jarrett, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



ALICIA JARRETT, AAERT NO. 428 DATE: March 11, 2019

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