

**RESPONSE DEADLINE: June 3, 2013**  
**REPLY DEADLINE: June 17, 2013**

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Company GUC Trust*

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

In re:

MOTORS LIQUIDATION COMPANY, *et al.*,  
f/k/a General Motors Corporation, *et al.*,

Debtors.

Chapter 11

Case No.: 09-50026 (REG)

(Jointly Administered)

MOTORS LIQUIDATION COMPANY GUC TRUST,

Plaintiff,

v.

APPALOOSA INVESTMENT LIMITED  
PARTNERSHIP I; *et al.*,

Defendants.

Adversary Proceeding  
Case No.: 12-09802

**NOTICE OF MOTORS LIQUIDATION COMPANY  
GUC TRUST'S MOTION FOR RELIEF UNDER RULE 60(b) OF  
THE FEDERAL RULES OF CIVIL PROCEDURE MADE APPLICABLE  
BY RULE 9024 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE**

**PLEASE TAKE NOTICE** that the Motors Liquidation Company GUC Trust (the “**GUC Trust**”), formed by the above-captioned debtors (collectively, the “**Debtors**”) in connection with the Debtors’ Second Amended Joint Chapter 11 Plan, dated March 18, 2011, hereby files its Motion for Relief Under Rule 60(b) of the Federal Rules of Civil Procedure made applicable by Rule 9024 of the Federal Rules of Bankruptcy Procedure (the “**Motion**”) to set forth in greater detail the grounds for the Rule 60(b) relief requested in the July 2, 2010 *Official Committee of Unsecured Creditors’ Objection to Claims Filed by Green Hunt Wedlake, Inc. and Noteholders of General Motors Nova Scotia Finance Company and Motion for Other Relief*, (Bankr. Dkt. No. 6248), and November 19, 2010 *Official Committee of Unsecured Creditors’ First Amended Objection to Claims Filed by Green Hunt Wedlake, Inc. and Noteholders of General Motors Nova Scotia Finance Company and Motion for Other Relief*, (Bankr. Dkt. No. 7859), and that a hearing date will be fixed by an order of this Court to consider the Motion and will be held before the Honorable Robert E. Gerber, United States Bankruptcy Judge, in Room 621 of the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, New York 10004.

**PLEASE TAKE FURTHER NOTICE** that any responses to the Motion must be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court, and shall be filed with the Bankruptcy Court (a) electronically in accordance with General Order M-399 (which can be found at [www.nysb.uscourts.gov](http://www.nysb.uscourts.gov)) by registered users of the Bankruptcy Court’s filing system, and (b) by all other parties in interest, on a CD-ROM or 3.5 inch disk, in text-searchable portable document format (PDF) (with a hard copy delivered directly to Chambers), in accordance with the customary practices of the Bankruptcy Court and General Order M-399, to the extent applicable, and served in accordance

with General Order M-399 and on (i) Dickstein Shapiro LLP, attorneys for the GUC Trust, 1633 Broadway, New York, New York, 10019-6708 (Attn: Barry N. Seidel, Esq., and Eric. B. Fisher, Esq.); (ii) the Debtors, c/o Motors Liquidation Company, 401 South Old Woodward Avenue, Suite 370, Birmingham, Michigan 48009; (iii) General Motors, LLC, 400 Renaissance Center, Detroit, Michigan 48265 (Attn: Lawrence S. Buonomo, Esq.); (iv) Cadwalader, Wickersham & Taft LLP, attorneys for the United States Department of the Treasury, One World Financial Center, New York, New York 10281 (Attn: John J. Rapisardi, Esq.); (v) the United States Department of the Treasury, 1500 Pennsylvania Avenue NW, Room 2312, Washington, D.C. 20220 (Attn: Joseph Samarias, Esq.); (vi) Vedder Price, P.C., attorneys for Export Development Canada, 1633 Broadway, 47th Floor, New York, New York 10019 (Attn: Michael J. Edelman, Esq. and Michael L. Schein, Esq.); (vii) Kramer Levin Naftalis & Frankel LLP, attorneys for the statutory committee of unsecured creditors, 1177 Avenue of the Americas, New York, New York 10036 (Attn: Thomas Moers Mayer, Esq., Robert Schmidt, Esq., Lauren Macksoud, Esq., and Jennifer Sharret, Esq.); (viii) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Tracy Hope Davis, Esq.); (ix) the U.S. Attorney's Office, S.D.N.Y., 86 Chambers Street, Third Floor, New York, New York 10007 (Attn: David S. Jones, Esq. and Natalie Kuehler, Esq.); (x) Caplin & Drysdale, Chartered, attorneys for the official committee of unsecured creditors holding asbestos-related claims, 375 Park Avenue, 35th Floor, New York, New York 10152-3500 (Attn: Elihu Inselbuch, Esq. and Rita C. Tobin, Esq.) and One Thomas Circle, N.W., Suite 1100, Washington, DC 20005 (Attn: Trevor W. Swett III, Esq. and Kevin C. Maclay, Esq.); (xi) Stutzman, Bromberg, Esserman & Plifka, A Professional Corporation, attorneys for Dean M. Trafelet in his capacity as the legal representative for future asbestos personal injury claimants,

2323 Bryan Street, Suite 2200, Dallas, Texas 75201 (Attn: Sander L. Esserman, Esq. and Robert T. Brousseau, Esq.); (xii) Gibson, Dunn & Crutcher LLP, attorneys for Wilmington Trust Company as GUC Trust Administrator and for Wilmington Trust Company as Avoidance Action Trust Administrator, 200 Park Avenue, 47th Floor, New York, New York 10166 (Attn: Keith Martorana, Esq.); (xiii) FTI Consulting, as the GUC Trust Monitor and as the Avoidance Action Trust Monitor, One Atlantic Center, 1201 West Peachtree Street, Suite 500, Atlanta, Georgia 30309 (Attn: Anna Phillips); (xiv) Crowell & Moring LLP, attorneys for the Revitalizing Auto Communities Environmental Response Trust, 590 Madison Avenue, 19th Floor, New York, New York 10022-2524 (Attn: Michael V. Blumenthal, Esq.); and (xv) Kirk P. Watson, Esq., as the Asbestos Trust Administrator, 2301 Woodlawn Boulevard, Austin, Texas 78703, so as to be received no later than **June 3, 2013** (the “**Response Deadline**”).

**PLEASE TAKE FURTHER NOTICE** that if no responses are timely filed and served with respect to the Motion, the GUC Trust may, on or after the Response Deadline, submit to the Bankruptcy Court an order granting the relief requested in the Motion, which order may be entered with no further notice or opportunity to be heard offered to any party.

Dated: New York, New York  
May 3, 2013

Respectfully submitted,

By: /s/ Eric B. Fisher

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Company GUC Trust*

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X	
In re:	: Chapter 11
	: :
MOTORS LIQUIDATION COMPANY, <i>et al.</i> ,	: Case No.: 09-50026 (REG)
f/k/a General Motors Corporation, <i>et al.</i> ,	: :
	: (Jointly Administered)
Debtors.	: :
	: :
-----X	
MOTORS LIQUIDATION COMPANY GUC TRUST,	: :
	: :
Plaintiff,	: Adversary Proceeding
	: Case No.: 12-09802
v.	: :
	: :
APPALOOSA INVESTMENT LIMITED	: :
PARTNERSHIP I; <i>et al.</i> ,	: :
	: :
Defendants.	: :
	: :
-----X	

**MOTORS LIQUIDATION COMPANY  
GUC TRUST'S MOTION AND INCORPORATED  
MEMORANDUM OF LAW FOR RELIEF UNDER RULE 60(b)  
OF THE FEDERAL RULES OF CIVIL PROCEDURE MADE APPLICABLE  
BY RULE 9024 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE**

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

The Motors Liquidation Company GUC Trust (the “**GUC Trust**”) respectfully submits this motion and incorporated memorandum of law (the “**Motion**”) for relief under Rule 60(b) (“**Rule 60(b)**”) of the Federal Rules of Civil Procedure (the “**Federal Rules**”) made applicable by Rule 9024 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”).<sup>1</sup>

**RELIEF REQUESTED AND PRELIMINARY STATEMENT**

By this Motion, the GUC Trust seeks relief from the order approving the Amended and Restated Master Sale and Purchase Agreement dated as of June 26, 2009 (as amended on June 30, 2009 and July 5, 2009) between General Motors Corporation (“**Old GM**”) and General Motors LLC (“**New GM**”) (the “**MSPA**”)<sup>2</sup> and the related orders of this Court (collectively, the “**Sale Order**”).<sup>3</sup>

The grounds for this motion could not be simpler: because the Lock-Up Agreement and Swaps (defined below) were not adequately disclosed and were never the subject of a motion before this Court, the Sale Order should not have any impact upon the GUC Trust’s ability to challenge the Lock-Up Agreement, Swaps and related claims. This Motion is brought in the

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<sup>1</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the GUC Trust’s June 11, 2012 Amended Complaint (the “**Amended Complaint**”) (Adv. Pro. Dkt. 37) filed in *Motors Liquidation Co. GUC Trust v. Appaloosa Investment Ltd. Partnership I, et al.*, Adv. Pro. No. 12-09802 (the “**Adversary Proceeding**”). All references herein to “**Pl. Ex.**” and “**Def. Ex.**” refer to the GUC Trust’s and Defendants’ exhibits admitted into evidence in connection with the trial in the Adversary Proceeding and hearing on the November 19, 2010 Official Committee of Unsecured Creditors’ First Amended Objection to Claims Filed by Green Hunt Wedlake, Inc. and Noteholders of General Motors Nova Scotia Finance Company and Motion for Other Relief (the “**First Amended Objection**”) (Bankr. Dkt. No. 7859). All references herein to “**Decl.**” refer to the direct testimony affidavits submitted in connection with the Adversary Proceeding.

<sup>2</sup> Def. Ex. 226 (Sale Approval Order attaching MSPA and its amendments) (Bankr. Dkt. No. 2968).

<sup>3</sup> The related orders include the June 2, 2009 order approving the June 1, 2009 master sale and purchase agreement (the “**Sale Procedures Order**”) (Pl. Ex. 275) (Bankr. Dkt. No. 274), and the July 5, 2009 order approving the MSPA dated as of June 26, 2009 (the “**Sale Approval Order**”) (Def. Ex. 226) (Bankr. Dkt. No. 2968).

alternative. For the reasons to be set forth in the GUC Trust's post-trial brief, this Court may grant all of the relief sought in the GUC Trust's Amended Complaint and First Amended Objection<sup>4</sup> without any need to modify the Sale Order.

In particular, the alternative relief sought by this Motion includes rulings that:

- the Lock-Up Agreement was not assumed by the Debtors and assigned to New GM;<sup>5</sup>
- the Swaps (defined below) were not assumed and assigned, or otherwise transferred, to New GM;<sup>6</sup> and
- avoidance actions related to payment of the Consent Fee (defined below) were not sold to New GM.<sup>7</sup>

If the Court reaches the GUC Trust's request for Rule 60(b) relief, the Motion should be granted because the Lock-Up Agreement and Swaps were not properly disclosed to this Court or the Creditors' Committee until well after the Court approved the Sale Order in July 2009.<sup>8</sup>

New GM admitted at trial that the Lock-Up Agreement and Swaps were not disclosed to the Court prior to July 2009 and, indeed, that there were no efforts to disclose either the Lock-Up

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<sup>4</sup> First Am. Objection (Bankr. Dkt. No. 7859); Amended Compl. (Adv. Pro. Dkt. 37).

<sup>5</sup> This relief will not be necessary if, for example, the Court decides that the Lock-Up Agreement is void or was not transferred to New GM for other reasons.

<sup>6</sup> This relief will not be necessary if, for example, the Court decides that the Swaps were not assumed and assigned due to the failure to comply with the applicable procedures.

<sup>7</sup> This relief will not be necessary if, for example, the Court decides that these particular avoidance actions were not sold to New GM because the transfers at issue were not transfers to or from a Purchased Subsidiary (as that term is defined in the MSPA); or if the Court decides that, even if the avoidance actions have been sold, the GUC Trust may nonetheless obtain relief defensively under 11 U.S.C. § 502(d).

<sup>8</sup> Although this Motion precedes the GUC Trust's post-trial brief, which is due to be filed in two weeks, the Court has already ruled in its July 19, 2012 bench decision on New GM's Motion for Summary Judgment ("**New GM SJ Hr'g**," attached hereto as Exhibit A) that the GUC Trust's request for Rule 60(b) relief is not ripe for adjudication. This Motion will only need to be decided if the Court construes the terms of the Sale Order to preclude any of the relief sought by the GUC Trust in its Amended Complaint and First Amended Objection. *See* New GM SJ Hr'g Tr. 90:15-16 ("Because I find that the issues aren't ripe I'm not deciding the 60(b) motion today ...."). For reasons to be set forth in the GUC Trust's post-trial brief, the reading of the Sale Order advanced by the Noteholders is mistaken.

Agreement or the Swaps to the Court.<sup>9</sup> It is unsurprising then that the representatives of the Creditors' Committee were unaware of the Lock-Up Agreement during the sale approval process.<sup>10</sup> Indeed, the Court observed that it was a "shock" to learn of the Lock-Up Agreement after the sale,<sup>11</sup> and that had it been aware of the Lock-Up Agreement, it "might well have refused to sign the order in its then existing form, and [...] insisted the lock-up agreement not be insulated from judicial scrutiny no matter what threats the Nova Scotia Noteholders had made at the time."<sup>12</sup>

Because the Lock-Up Agreement was not properly disclosed, and has never been the subject of an approval motion, the Creditors' Committee did not know to object to its terms before the Sale Order was entered, and the Court was never asked to, and was never in a position to, determine whether the Lock-Up Agreement was in the best interests of the Debtors' estates. Accordingly, as explained in detail below, the record supports the GUC Trust's request for relief under Rule 60(b)(1), (2), (3) and (6).

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<sup>9</sup> See Buonomo Tr. 132:12-15 (Aug. 10, 2012) (Lawrence Buonomo, Practice Area Manager and Global Process Leader of Litigation for New GM's Legal Staff, in response to the Court's question "[a]re you aware of any efforts on the part of GM or its counsel to disclose the lock-up to me before this controversy arose?" responded "To you specifically, no."); *id.* at 132:22-133:1 (Court: "Do you know of any efforts on the part of GM or its counsel to disclose the existence of those swap agreements to me at any time before this controversy arose?" Buonomo: "No, as to that, I'm quite certain there was never any specific effort[] to disclose.").

<sup>10</sup> See Vanaskey Tr. 96:4-5 (Nov. 27, 2012); Mayer Tr. 171:16-19; 173:10-23 (Oct. 3, 2012).

<sup>11</sup> New GM SJ Hr'g Tr. 94:10-14 (Court: "It never once occurred to me, and nobody bothered to disclose, that amongst all of the assigned contracts was this lock-up agreement, if indeed it was assigned at all. When I heard about that it wasn't just a surprise, it was a shock."); *id.* at 92:18-23 (there was a "failure of anyone to say anything to me at the time of the 363 sale hearing about the lock-up agreement or at the prospect that the sale order I'd signed would have the purpose or effect of authorizing the transactions that are said to be protected under my order here").

<sup>12</sup> *Id.* at 93:14-18.

## **JURISDICTION AND VENUE**

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

## **FACTUAL BACKGROUND**<sup>13</sup>

### **I. THE LOCK-UP AGREEMENT**

The terms of the Lock-Up Agreement at the heart of this matter, which involve the postpetition payment of approximately \$367 million dollars and purportedly give rise to claims against the Old GM estate totaling approximately \$2.7 billion dollars, were not properly disclosed to this Court or the Creditors' Committee in advance of entry of the Sale Order. Indeed, the Lock-Up Agreement has never been the subject of any motion seeking this Court's approval.

When Old GM's bankruptcy petition (the "**Petition**")<sup>14</sup> was filed with this Court at 7:57 a.m. (EDT) on June 1, 2009, Old GM, certain holders of Notes issued by Nova Scotia Finance (the "**Noteholders**") and their respective counsel had still not completed the Lock-Up Agreement.<sup>15</sup> The parties to the negotiations completed the Lock-Up Agreement after Old GM filed its bankruptcy petition, setting in motion a series of postpetition actions designed to secure

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<sup>13</sup> The GUC Trust refers the Court to the GUC Trust's forthcoming post-trial brief for a complete summary of the facts of this case. This Motion only addresses those facts pertinent to Rule 60(b) relief.

<sup>14</sup> Bankr. Dkt. No. 1.

<sup>15</sup> As the GUC Trust will explain in its forthcoming post-trial brief, the evidence at trial shows that the Lock-Up Agreement is a postpetition agreement. *See, e.g.*, Jones Tr. 212:16-25; 213:1-6 (Sept. 4, 2012) (the metadata log and the internal metadata for the execution version of the Lock-Up Agreement show that the execution version was created postpetition).

advantages for the Noteholders not enjoyed by Old GM's other unsecured creditors. These actions include:<sup>16</sup>

- (i) Payment of a \$367 million "consent fee" (the "**Consent Fee**") representing over 36% of the face amount of the Notes to the Noteholders – funded by a \$450 million transfer from Old GM to GM Canada (the "**450 Million Loan**") that was earmarked for the Noteholders;<sup>17</sup>
- (ii) Execution and delivery of Old GM's consent to Nova Scotia Finance filing for bankruptcy;
- (iii) Old GM's consent to the allowance of claims against it for the full amount of the Notes based on Old GM's guarantee of those Notes, without any reduction of principal to account for payment of the Consent Fee (the "**Guarantee Claims**"); and
- (iv) Old GM's consent to the allowance of a duplicative claim against it on account of Old GM's alleged liability, under Nova Scotia law, for the balance due on the Notes at maturity and the Swap Liability (the "**ULC Claim**") to be asserted against it by Nova Scotia Finance's bankruptcy trustee, (the "**Nova Scotia Finance Trustee**"), who was selected by the Noteholders to administer Nova Scotia Finance's estate.

## **II. THE SWAPS**

As an indirect consequence of the Lock-Up Agreement, the Swap Liability, which was an asset of Old GM as of the Petition Date, became a purported liability against Old GM in excess of half a billion dollars.<sup>18</sup> The Swap Liability arose out of currency swap agreements entered into by Old GM and Nova Scotia Finance in July 2003 (the "**Swaps**") in connection with the issuance of the Notes.<sup>19</sup> Notably, as of June 1, 2009, Old GM was "in the money" with respect

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<sup>16</sup> See generally Pl. Ex. 315 (Nova Scotia Finance Trustee Proof of Claim); Pl. Ex. 16 (executed Lock-Up Agreement).

<sup>17</sup> Ammann Tr. 85:18-25; 86:1-2 (Sept. 27, 2013); Buonomo Decl. ¶ 43.

<sup>18</sup> See Pl. Ex. 315 (Green Hunt Wedlake Proof of Claim).

<sup>19</sup> Buonomo Decl. ¶¶ 22, 23.

to the Swaps.<sup>20</sup> However, under the Lock-Up Agreement, the amount of the Swap Liability was to be included in the ULC Claim and any claim against Nova Scotia Finance based on the Swaps would be subordinated to payment in full of the Notes should the ULC Claim be disallowed, even in part. The Swaps were then purportedly transferred to New GM in connection with Old GM's 363 sale in the bankruptcy case (the "**363 Sale**").<sup>21</sup> As the supposed claimant under the Swaps, New GM asserted a \$564 million claim against Nova Scotia Finance in its Canadian bankruptcy proceeding (the "**New GM Swap Claim**") on November 9, 2009.<sup>22</sup> The Nova Scotia Finance Trustee, in turn and at the direction of the Noteholders, included the amount of the New GM Swap Claim in his ULC Claim against Old GM.<sup>23</sup> As a consequence of these behind-the-scenes maneuvers, a claim that should have been for the benefit of Old GM became a purported liability.<sup>24</sup>

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<sup>20</sup> See Pl. Ex. 16 (executed copy of the Lock-Up Agreement) ¶ 6(v) ("Guarantor confirms that its only claim against [Nova Scotia Finance] is the Swap Liability").

<sup>21</sup> See Pl. Ex. 139 (New GM Swap Claim, filed in the bankruptcy case of Nova Scotia Finance) (Buonomo certifies that New GM "acquired rights in the account as of July 10, 2009 pursuant to its acquisition of substantially all of the assets of" Old GM). Subsequently, New GM took the position that the Swaps were assumed and assigned. Buonomo Tr. 106:5-7 (Aug. 9, 2012) ("[The Swaps] were designated for assumption according to the procedures in place ....").

<sup>22</sup> *Id.*

<sup>23</sup> See Pl. Ex. 315 (Green Hunt Wedlake Proof of Claim).

<sup>24</sup> In fact, the key individuals at New GM did not always believe that the Swap Liability had been assumed and assigned to New GM, a fact known to at least Aurelius Investment, LLC ("**Aurelius**"), one of the Noteholders. See Pl. Ex. 248 (July 27, 2009 email from Prieto to Gropper: "there is a view [at GM] that [the] swap claim is not included when calculating the wind-up claim"); Pl. Ex. 22 (July 30, 2009 email from Buonomo to Prieto stating: "I inquired with Weil Gotshal, which reminded me that inasmuch as the Swap was not assigned this decision rests with Motors Liquidation Company (Oldco), which apparently has it under review."); Gropper Tr. 33:23-34:3 (Sept. 28, 2012) (Gropper was aware of this view). Nevertheless, as will be explained more fully in the GUC Trust's post-trial brief, the Noteholders encouraged New GM to assert the claim. See Gropper Tr. 84:13-22 (Sept. 28, 2012) (Gropper recommended that the swap claim be included in the wind-up claim).



**III. THE LOCK-UP AGREEMENT WAS NOT THE SUBJECT OF A MOTION OR ADEQUATELY DISCLOSED**

Even though the Lock-Up Agreement involved a \$367 million payment to the Noteholders from funds advanced by Old GM,<sup>25</sup> and ultimately gave rise to more than \$2.67 billion in claims, there was never a motion before this Court concerning the Lock-Up Agreement. Nor was there otherwise any adequate disclosure of the Lock-Up Agreement's key terms. As a result, the terms of the Lock-Up Agreement, and its serious consequences for creditors of Old GM, were unknown to the Debtors' creditors, other parties in interest and this Court until months after the Sale Order was approved.

**A. The \$450 Million Loan and Anticipated Settlement with the Noteholders Were Not Disclosed in the First Day Affidavit Pursuant to Local Bankruptcy Rule 1007-2**

The disclosure failures began on the first day of this bankruptcy proceeding, when the First Day Affidavit filed by the Debtors under Local Bankruptcy Rule 1007-2<sup>26</sup> omitted any mention of the \$450 Million Loan or the anticipated settlement with the Noteholders.

**B. The Lock-Up Agreement and Swaps Were Not Adequately Disclosed in the Disclosure Schedules to the MSPA**

The failure to disclose the Lock-Up Agreement and Swaps continued into the month of June. In early June of 2009, confidential disclosure schedules to the MSPA (the "**Disclosure Schedules**") that were not otherwise publicly available, were provided to Kramer Levin Naftalis & Frankel LLP ("**Kramer Levin**"), counsel for the Creditors' Committee.<sup>27</sup> Among the 145-

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<sup>25</sup> As will be shown in the post-trial brief, these funds constituted property of Old GM's estate and were earmarked for payment to the Noteholders. The advance of the funds was subject to an undisclosed Trust Agreement, the conditions of which were not satisfied. *See* Buonomo Tr. 80:13-25; 81:1-9 (August 9, 2012).

<sup>26</sup> Bankr. Dkt. No. 21.

<sup>27</sup> *See* Pl. Ex. 265 at CC005517-5664 (June 5, 2009 email from Weil, Gotshal & Manges LLP circulating schedules).

pages of disclosure schedules, the Lock-Up Agreement is mentioned in a single paragraph in Schedule 6.2.<sup>28</sup> However, this is only one schedule among many where the Creditors' Committee would expect an agreement such as the Lock-Up Agreement to appear, and this particular Schedule 6.2 was omitted from the publicly filed version of the Disclosure Schedules.<sup>29</sup> The Disclosure Schedules also fail to disclose the amount of the Swaps (\$564 million), the amount of the Consent Fee (\$367 million) or the amount of the \$450 Million Loan.<sup>30</sup> In fact, the final version of the confidential schedule attached to the MSPA did not contain any disclosure at all about the \$450 million transfer.<sup>31</sup>

Likewise, there is no mention of the Swaps in the Disclosure Schedules. At trial, in response to the Court's questions, Lawrence Buonomo conceded that he does not "believe the word swap was ever mentioned" in the schedules and that the Swaps were not adequately disclosed to the Court in the MSPA.<sup>32</sup>

**C. There Was No Notice of the Purported Assumption and Assignment of the Lock-Up Agreement and Swaps**

New GM and the Noteholders contend that the Lock-Up Agreement and Swaps were assumed by Old GM and assigned to New GM in connection with the 363 Sale. However, the Creditors' Committee never received any notice concerning the supposed assumption and

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<sup>28</sup> *Id.* at CC005655-56 (Disclosure Schedule 6.2). Schedule 4.6 of the MSPA also briefly mentions a "Nova Scotia Settlement" without any further detail or background. *See id.* at CC005566 (¶ 14).

<sup>29</sup> *Compare* Pl. Ex. 265 with Bankr. Dkt. No. 2649.

<sup>30</sup> *See generally* Pl. Ex. 265 CC005655-56. Mr. Buonomo also conceded that disclosure schedules make no disclosure of the amount of the \$450 Million Loan. *See* Buonomo Tr. 100:18-24 (Aug. 10, 2012).

<sup>31</sup> *Compare* Pl. Ex. 265 (Disclosure Schedule 6.2, ¶ 3 at CC005655-656) with Bankr. Dkt. No. 8087 (Disclosure Schedule 6.2, ¶ 2 at 106-107).

<sup>32</sup> Buonomo Tr. 129:2-18 (Aug. 10, 2012).

assignment of the Lock-Up Agreement and Swaps.<sup>33</sup> While notice to the Creditors' Committee was not strictly required under the Sale Procedures Order,<sup>34</sup> notice should have been provided, given the enormous consequences of the Lock-Up Agreement upon unsecured creditors and the lack of information about the Lock-Up Agreement.

Indeed, notice was not even provided to the Noteholders themselves, who were required to receive notice as a prerequisite to assumption and assignment.<sup>35</sup> Mr. Buonomo concedes that no assumption notice was sent to the Noteholders prior to the 363 Sale.<sup>36</sup> The first indication the Noteholders received that the Lock-Up Agreement had purportedly been assumed and assigned was in November 2009, several months after entry of the Sale Order, when Mr. Zirinsky received an email from Mr. Buonomo purporting to "confirm" that the Lock-Up Agreement was assumed.<sup>37</sup>

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<sup>33</sup> Buonomo Tr. 145:13-20 (Aug. 9, 2012) (Fisher: "For clarification, before we objected to – before the creditors' committee objected to the claims that are at issue, are you aware of the creditors' committee having received notice of the assumption of the lockup agreement? ... I'm just asking whether you're aware." Answer: "I have no knowledge. Not that I'm aware.").

<sup>34</sup> See Pl. Ex. 275 (Sale Procedure Order) ¶ 10, p. 10 (requiring Old GM to provide an assumption and assignment notice containing an objection deadline, in the form attached as Exhibit D to the Sale Procedures Order).

<sup>35</sup> See *id.*; Zirinsky Tr. 109:21-23. (Aug. 8, 2012) (neither he, as counsel for the Noteholders, nor any of his clients received notice that the Lock-Up Agreement was assumed); *id.* at 112:12-10 (he does not recall ever having seen Exhibit D in relation to the Lock-Up Agreement).

<sup>36</sup> Buonomo Tr. 143:20-144:4 (Aug. 9, 2012).

<sup>37</sup> See Pl. Ex. 153 (November 18, 2009 email from Buonomo to Zirinsky attaching letter that purported to "confirm" that New GM assumed the rights and obligations of Old GM under the Lock-Up Agreement); Pl. Ex. 43 at AUR\_GM020970 (November 18, 2009 emails between Buonomo and Zirinsky regarding database, "Each of the noteholder parties should have received a notice of assumption with a login to view contract to which they are a party."); Zirinsky Tr. 109:14-23 (Aug. 8, 2012) (Zirinsky was unaware that the Lock-Up Agreement had been assumed until he spoke with Buonomo in November); *id.* at 110:1-111:5 (same).

**D. The Lock-Up Agreement and Swaps Were Not Disclosed During the Sale Approval Process**

Finally, there was an overall failure to disclose the Lock-Up Agreement and Swaps to the Court and the Creditors' Committee during the sale approval process. For example, the Sale Motion itself does not mention the Lock-Up Agreement.<sup>38</sup> In fact, the trial testimony establishes that the Lock-Up Agreement was never disclosed to the Court at any point in the sale process.<sup>39</sup> Nor were the Swaps disclosed prior to approval of the sale.<sup>40</sup>

As the Court noted during the July 19, 2012 New GM summary judgment hearing, there was a failure to disclose the Lock-Up Agreement prior to commencement of this claim objection proceeding in July 2010, and the disclosures that were made were "scattered and incomplete."<sup>41</sup> The Court went on to explain that it was not just a "surprise" to learn of the Lock-Up Agreement, but a "shock."<sup>42</sup> The Court explained that there was a "failure of anyone to say anything to me at the time of the 363 sale hearing about the [Lock-Up Agreement] or at the prospect that the sale order I'd signed would have the purpose or effect of authorizing the transactions that are said to be protected under my order here."<sup>43</sup> The Court noted it was unaware that when it approved the sale agreement, "I was also authorizing a payment to a limited number of creditors of \$367

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<sup>38</sup> See Pl. Ex. 274 (Bankr. Dkt. No. 92).

<sup>39</sup> See, e.g., Mayer Tr. 171:16-19 (Oct. 3, 2012) (Fisher: "Do you recall the lock-up agreement being the subject of discussion at the hearing with respect to approval of the sale in this case?" Answer: "No."); Buonomo Tr. 132:12-15 (Aug. 10, 2012) (Court: "Are you aware of any efforts on the part of GM or its counsel to disclose the lock-up to me before this controversy arose?" Answer: "To you specifically, no.").

<sup>40</sup> See Buonomo Tr. 132:22-133:1 (Aug. 10, 2012) (Court: "Do you know of any efforts on the part of GM or its counsel to disclose the existence of those swap agreements to me at any time before this controversy arose?" Answer: "No, as to that, I'm quite certain there was never any specific efforts to disclose."); *id.* at 133:2-5 (Court: "And would I be correct in concluding from that that your answer would be the same with respect to any assignment of the swap agreements?" Answer: "Yes.").

<sup>41</sup> New GM SJ Hr'g Tr. 92:23.

<sup>42</sup> *Id.* at 94:13-14.

<sup>43</sup> *Id.* at 92:18-23.

million, a commitment not to object to as much as \$2.67 billion in claims, and an assignment out of the estate of the right to bring important avoidance actions.”<sup>44</sup> Had the Court been aware of the Lock-Up Agreement, it “might well have refused to sign the order in its then existing form, and I would have insisted that the [Lock-Up Agreement] not be insulated from judicial scrutiny no matter what threats the Nova Scotia Noteholders had made at the time.”<sup>45</sup> As the Court observed, the lack of disclosure had the “potential to injure Old GM creditors to the extent of hundreds of millions, if not billions of dollars.”<sup>46</sup>

**E. Old GM’s Funding of the Consent Fee Was Not Disclosed**

While disclosure of the Lock-Up Agreement was paltry and insufficient to provide adequate notice to any party-in-interest, disclosure of the nearly half a billion dollar Old GM loan used to fund the Consent Fee was wholly absent. Prior to approval of the Sale Order, there was no disclosure that on May 29, 2009, Old GM transferred \$450 million to GM Canada. Nor was there a disclosure to the Creditors’ Committee that the \$450 Million Loan, supposedly made one business day before the Petition was filed, was earmarked to fund the \$367 million Consent Fee that eventually made its way to the Noteholders.<sup>47</sup> In fact, Old GM attempted to transfer the funds on May 29th, even though the parties had not yet agreed on the amount of the Consent Fee, because the parties wanted the funds out of Old GM’s accounts in a deliberate attempt to keep

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<sup>44</sup> *Id.* at 94:5-9.

<sup>45</sup> *Id.* at 93:14-18.

<sup>46</sup> *Id.* at 91:19-21.

<sup>47</sup> *See* Pl. Ex. 263 (August 11, 2009 Interim Report ) (Bankr. Dkt. No. 3762) (fails to disclose the loan to GM Canada); September 15, 2009 Statement of Financial Affairs for Motors Liquidation Company (f/k/a General Motors Corporation) (Bankr. Dkt. No. 4060) (fails to disclose the loan made to GM Canada).

the funds from being “attackable.”<sup>48</sup> In short, the Creditors’ Committee and the Court were left completely in the dark as to the use of estate funds to pay the \$367 million Consent Fee.

Nor was it disclosed that the \$450 million transferred from Old GM to GM Canada was subject to a Trust Agreement.<sup>49</sup> The Trust Agreement governed the advance of the funds, and as of June 1, 2009, its conditions had not been satisfied. The conditions set forth in the Trust Agreement were then amended postpetition without this Court’s approval, but, even then remained unsatisfied.<sup>50</sup> Postpetition, the terms of the Trust Agreement were amended to “conform to the deal that was reached”<sup>51</sup> without any disclosure and without this Court’s approval.

The failure to disclose the \$450 million transfer, the associated Trust Agreement and the Consent Fee disadvantaged the Creditors’ Committee during the sale approval process. Had these transactions been made known to the Creditors’ Committee, it could potentially have understood the implications of the Lock-Up Agreement, including the purported transfer of the avoidance actions to New GM under the Sale Order. Without this knowledge, the Creditors’ Committee had no reason to object to the Sale Order.

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<sup>48</sup> See Pl. Ex. 3 (Prieto Notebook) at AUR\_GM021457 (“[T]he money is in a trust account in Canada where it is being held for the deal – does not think that money will be attackable where it is now ... the rights to this preference will be assumed by NewCo in the 363.”); see also Zirinsky Tr. 38:15-18 (Aug. 8, 2012) (“[W]e wanted to be comfortable that the way this transaction was going to be structured would do so, would do it in the right way so that there wouldn’t be any potential attack.”); *id.* at 41:7-13 (Fisher “And, Mr. Zirinsky, when you were participating in the [Lock-Up Agreement] negotiations, you wanted to be sure that you didn’t end up in a position where the money used to fund the settlement was still in a GM U.S. account, right?” Answer: “Mr. Fisher, my concern was to make sure that if we went ahead and did this agreement that the money would be there to pay the [Noteholders] the consent fee.”); Gropper Tr. 66:9-12 (Sept. 28, 2012) (it was important that funds not be in a GM account at the time of GM’s bankruptcy petition).

<sup>49</sup> See Pl. Ex. 134 (May 29, 2009 email from Joyce Zhou to Buonomo and others attaching \$450 Million Loan Promissory Note, Trust Agreement and Approval Note).

<sup>50</sup> Buonomo Tr. 80:13-81:9 (August 9, 2012).

<sup>51</sup> See Buonomo Tr. 87:4-5 (Aug. 8, 2012); see also Pl. Ex. 136 (June 5, 2009 email forwarding second amendment to Trust Agreement).

**F. The June 1, 2009 Form 8-K Disclosure Was Inadequate**

Throughout the case, Defendants and New GM have pointed to Old GM's June 1, 2009 Form 8-K (the "**Form 8-K**")<sup>52</sup> as evidence that the Creditors' Committee and the Court should have been aware of the Lock-Up Agreement and its associated transactions. Despite Defendants' and New GM's repeated contentions, the disclosure in the Form 8-K is inadequate for two reasons.

First, the Form 8-K is not a pleading in this bankruptcy proceeding. Defendants and New GM are essentially arguing that the Court and the Creditors' Committee were obligated to search the public record for evidence of the Lock-Up Agreement, an agreement neither knew existed. This contention is absurd. It was perfectly reasonable for the Creditors' Committee and this Court to expect that an agreement involving Old GM, and as monumental as the Lock-Up Agreement, would be the subject of a transparent filing in this bankruptcy proceeding. This is particularly so in light of the numerous filings, described above, which should have disclosed the substance of the Lock-Up Agreement, but failed to do so. As Mr. Mayer of Kramer Levin testified, the Lock-Up Agreement was not the type of transaction as to which an 8-K filing would have been sufficient to put the Creditors' Committee on notice.<sup>53</sup>

Second, even if, *arguendo*, the Form 8-K had been brought to the attention of the Court and Creditors' Committee prior to entry of the Sale Order, the import of the Lock-Up Agreement would still be unknown to anyone other than the select few involved in negotiating its terms.

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<sup>52</sup> See Pl. Ex. 29 (Form 8-K).

<sup>53</sup> See Mayer Tr. 173:10-23 (Oct. 3, 2012) (Fisher: "And in or about October 2009 did you have any communications with Weil, Gotshal about the lock-up agreement?" Answer: "Yes, we did." Fisher: "And what did you discuss with them?" Answer: "Well, my recollection is that we said – and at some point and it may have been to Mr. Karotkin – I said what the heck is this, and my interlocutor said, well, there was an 8-K filed that – on June 1 that showed we were doing this. And I said to him, you're telling me you expected a \$2.6 billion claim settlement and a 350 million cash payment to be done with adequate notice by 8-K without actually bringing it to court for approval on notice to parties? You got to be kidding.").

The Form 8-K downplays the Lock-Up Agreement, describing it merely as a settlement of the Nova Scotia Proceeding “for a release of all defendants to that proceeding.”<sup>54</sup> The Form 8-K also mentions a cash payment, funded by GM Canada, to be paid by GM Nova Scotia to the Noteholders in exchange for extinguishment of the Intercompany Loans.<sup>55</sup> This limited description, however, omits critical aspects of the Lock-Up Agreement. For example, the Form 8-K does not mention Nova Scotia Finance’s consent to bankruptcy (and contemplated duplicative assertion of the Guarantee and ULC Claims).<sup>56</sup> Nor does the Form 8-K disclose the Swaps in any way.<sup>57</sup> At trial, witnesses conceded that the Form 8-K also does not mention Old GM’s transfer of \$450 million to pay the Consent Fee.<sup>58</sup>

Thus, even if the Court overlooks the failure to disclose the terms of the Lock-Up Agreement in this bankruptcy proceeding and considers the Form 8-K a proper vehicle for disclosure, the Form 8-K’s omission of critical terms of the Lock-Up Agreement still warrants Rule 60(b) relief from the Sale Order.

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<sup>54</sup> See Pl. Ex. 29 (Form 8-K) at AUR\_GM014280-81.

<sup>55</sup> *Id.*

<sup>56</sup> See Pl. Ex. 29 (Form 8-K); Zirinsky Tr. 84:18-20 (Aug. 8, 2012) (Fisher: “Does [the Form 8-K] say anything about the Nova Scotia – the contemplated Nova Scotia Finance Company bankruptcy filing?” Answer: “Not to the best of my recollection.”); Buonomo Tr. 139:21-24 (Aug. 9, 2012) (Fisher: “[The Form 8-K] doesn’t say anything about GM Nova Scotia Finance Company being authorized to consent to a bankruptcy, does it?” Answer: “Not to my recollection.”).

<sup>57</sup> See Buonomo Tr. 142:7-10 (Aug. 10, 2012) (“I know there was never an 8-K filed by either Old or New GM about the swaps. I don’t think – I’m not aware of any other public disclosure, but I know pretty close to the certainty that there was never an 8-K done.”).

<sup>58</sup> See Pl. Ex. 29 (Form 8-K); Ammann Tr. 87:6-8 (Sept. 27, 2012) (Fisher: “Now, the transfer of \$450 million from Old GM to GM Canada is not disclosed in this 8-K, correct?” Answer: “It doesn’t appear to be.”); Zirinsky Aug. 8, 2012 Tr. 84:5-84:6 (Fisher: “[The Form 8-K] didn’t say anything about the loan, right?” Answer: “I don’t believe so.”); *id.* at 83:22–25 (Fisher: “And did [the Form 8-K] make any reference to a loan that had been made by old GM to GM Canada?” Answer: “I don’t think the 8-K specifically referred to a loan by GM U.S. to GM Canada I don’t believe.”); Buonomo Tr. 139:10-14 (Aug. 9, 2012) (Fisher: “And the [Form 8K] that ultimately was filed, does it say anything about the \$450 million loan from Old GM to GM Canada?” Answer: “I don’t think so, although I don’t have it in front of me, but I don’t believe so.”).



**G. The Parties to the Lock-Up Agreement Attempted to Evade this Court's Review**

Rather than disclose the Lock-Up Agreement, the parties to the agreement sought to evade this Court's review. The parties repeatedly discussed whether court approval was necessary,<sup>59</sup> and decided that it was not, with the Noteholders' counsel concluding that "perhaps court approval isn't so important."<sup>60</sup> The parties were fully aware that any post-petition amendment of the Lock-Up Agreement would require Court approval,<sup>61</sup> but the parties chose not to seek Court approval of the agreement even though the Lock-Up Agreement was completed postpetition.<sup>62</sup> Ultimately, the parties, knowing the inequities of the Lock-Up Agreement, kept the substance of the agreement hidden because they were aware that creditors would object and did not want this transaction to face the scrutiny of the Court or Old GM's creditors.<sup>63</sup>

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<sup>59</sup> See Zirinsky Tr. 22:13-21 (Aug. 8, 2012) (the issue of bankruptcy court approval was discussed at least one or two times); Pl. Ex. 3 (Prieto Notebook) at AUR\_GM021454 ("GM is not a party to the agreement, do not envision this being approved by Bankruptcy Court.").

<sup>60</sup> Pl. Ex. 148 (May 30, 2009 email from Zirinsky) at NGM000000636; Zirinsky Tr. 30:7-31:1 (Aug. 8, 2012) (Zirinsky concedes his initial view was that bankruptcy court approval was not important).

<sup>61</sup> See Pl. Ex. 527 (June 26, 2009 email from Buonomo to Gropper discussing possible postpetition amendment to the Lock-Up Agreement) at AUR\_GM037331 ("I need to be certain we can do it without bankruptcy court approval ...").

<sup>62</sup> See Jones Tr. 212:16-25; 213:1-6 (Mar. 3, 2013) (the metadata log and the internal metadata for the execution version of the Lock-Up Agreement show that the execution version was created postpetition).

<sup>63</sup> See Buonomo Tr. 113:6-12 (Aug. 10, 2012) (when Buonomo was negotiating the Lock-Up Agreement, he knew that there would be objections down the road from Old GM's creditors); Pl. Ex. 3 (Prieto Notebook) at AUR\_GM021453 ("[D]o not want to give GM US creditors more reasons to object.").

#### **IV. PROCEDURAL BACKGROUND**

##### **A. The Creditors' Committee Did Not Become Aware of the Lock-Up Agreement Until October 2009**

It was not until October of 2009, well after entry of the Sale Order, that the Creditors' Committee became aware of the significance of the Lock-Up Agreement.<sup>64</sup> The Lock-Up Agreement was not brought to the attention of counsel for the Creditors' Committee until the fall of 2009 when Old GM's counsel called Mr. Mayer to alert him to the Lock-Up Agreement for the first time.<sup>65</sup> After Mr. Mayer was told about the Lock-Up Agreement by Old GM's counsel, the Creditors' Committee's counsel began to investigate the matter. However, New GM and the Nova Scotia Finance Trustee did not cooperate with requests for information made by Kramer Levin in December 2009 concerning the Nova Scotia Proceeding and the Lock-Up Agreement.<sup>66</sup> As Canadian counsel for certain of the Noteholders commented to Mr. Zirinsky, "I do not think that Wedlake will wish to spend much time or money providing such information to the unsecured creditors committee..."<sup>67</sup>

After investigating the Lock-Up Agreement, its related transactions and the many related complexities, the Creditors' Committee filed its Objection to Claims Filed by Green Hunt Wedlake, Inc. and Noteholders of General Motors Nova Scotia Finance Company and Motion

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<sup>64</sup> See Vanaskey Tr. 96:4-5 (Nov. 27, 2012) ("I don't recall discussing the matters of the lockup agreement before October of – of 2009 with anybody."); *id.* at 96:13-15 ("[The Committee became aware of the Lock-Up Agreement] sometime [in] October or you know the fall of 2009 is the first time the committee actively discussed the lockup agreement and or the Nova Scotia bonds.").

<sup>65</sup> See Mayer Tr. 173:10-23 (Oct. 3, 2012).

<sup>66</sup> See Pl. Ex. 157 (December 8, 2009 email from Kramer Levin to Lawrence Buonomo attaching information request); Buonomo Tr. 103:20-22 (Aug. 10, 2012) (Fisher: "You never provided any information to Ms. Macksoud, did you?" Answer: "Not directly, I don't believe so."); Wedlake Tr. 123:15-18 (Aug. 7, 2012) (Fisher: "And in fact, Mr. Wedlake, in response to this request from the creditors committee you did not provide any information right?" Answer: "Not that I recall no.").

<sup>67</sup> Pl. Ex. 273 (December 8, 2009 email from Robert MacKeigan of Cox & Palmer to Zirinsky) at GHW0004126.

for Other Relief on July 2, 2010 (the “**Initial Objection**”)<sup>68</sup> and the First Amended Objection on November 19, 2010.<sup>69</sup> Both pleadings seek narrow Rule 60(b) relief from the Sale Order in the alternative, to the extent the Court rules that the Sale Order “authorized the Debtors to assume and/or assign the Lock-Up Agreement and any other obligations incident thereto, including those concerning the swap transactions.”<sup>70</sup> For the nearly three years following that initial filing in July 2010, the Creditors’ Committee and, later the GUC Trust, have never deviated from the limited request for alternative relief.

**B. The GUC Trust’s Request for Rule 60(b) Relief Has Been Limited, Alternative and Consistent**

Since filing its Initial Objection in July 2010, the GUC Trust has only sought Rule 60(b) relief in the alternative, should the Court find the Lock-Up Agreement was assumed and assigned to New GM, that the Swaps were assumed and assigned (or otherwise transferred) to New GM, or that avoidance actions with respect to the Consent Fee were sold to New GM. The GUC Trust has consistently told Defendants, New GM and this Court that the need for Rule 60(b) relief, although justified, is highly unlikely and only raised protectively.

For example, at the December 15, 2010 Status Hearing before this Court, counsel for the GUC Trust noted: “[Defendants are] trying to use the assumption [of the Lock-Up Agreement] itself to bootstrap arguments on the merits and to argue that the lockup agreement in its entirety is insulated from review. And so to the extent that the sale order and assumption order can be construed to be a judicial finding to that effect, we might need [Rule 60(b)] relief from such an

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<sup>68</sup> Bankr. Dkt. No. 6248.

<sup>69</sup> Bankr. Dkt. No. 7859.

<sup>70</sup> See Initial Obj. ¶ 70; see also First. Am. Obj. ¶ 73 (“This request for relief is asserted protectively”).

order.”<sup>71</sup> Again in its pre-trial brief, the GUC Trust reserved its rights to limited Rule 60(b) relief should it become necessary based on the outcome of the trial.<sup>72</sup> Finally, upon conclusion of the trial on March 19, 2013, the GUC Trust’s counsel acknowledged that the Rule 60(b) claim was an argument in the alternative and explained:<sup>73</sup>

Your Honor, for more than two years now, [our petition] for 60(b) relief has been consistent and there is not any change in our position on Rule 60(b) relief. To reiterate our position and to be clear, we do plan to brief the Rule 60(b) issue as an alternative argument in our post-trial briefs[.] [S]pecifically, what the 60(b) relief goes to. Again, it’s been constant for a very long time[.] [B]ut it goes to the argument that New GM or the Noteholders may make that avoidance actions related to the consent fee have been sold to New GM and, therefore, we can’t seek 502(d) relief on the basis of any avoidance theory. We don’t think the court will need to grant 60(b) relief to get us to the relief that we are looking for in this case[.] [B]ut if the court finds that the avoidance action related to the consent fee was sold to [N]ew GM, we would ask the court to amend the sale order in that respect. Again, I don’t think it will come to that[.] [I]t is in the nature of an alternative argument, as it always has been. With regard to the swap claim, ... it’s our position that those swaps were never validly terminated, don’t give rise to a proper claim, were not assumed and assigned, were not sold to [N]ew GM, but, in the event that the Court finds that they were sold to [N]ew GM by virtue of the sale order, then we would seek relief from the sale order to get us the relief that we think we’re entitled to with regard to the swap claim, and finally, with regard to the [Lock-Up Agreement] itself, it’s our position and we think that the evidence shows, that the [Lock-Up Agreement] is a void, post-petition agreement, but, in the event that the Court finds that the [Lock-Up Agreement] was assumed by the Old GM estate and assigned to [N]ew GM, then we reserve all rights to seek relief from any provisions of the sale order that endorse that view, that the [Lock-Up Agreement] was assigned to [N]ew GM. Those are the areas in which we seek 60(b) relief and only in the alternative.

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<sup>71</sup> Dec. 15, 2010 Status Hr’g Tr. 52:8-13 (Bankr. Dkt. No. 8626).

<sup>72</sup> July 27, 2012 GUC Trust Pre-Trial Br. at 25 n.6 (Adv. Pr. Dkt. 148) (“The GUC Trust has not briefed, but reserves all of its rights in connection with, any future requests for relief from the Sale Order under Rule 60(b) of the Federal Rules of Civil Procedure.”).

<sup>73</sup> Lopez Tr. 68:3-69:16 (Mar. 19, 2013).

**C. Defendants, New GM and the Court Have Long Been Aware of the Nature of the GUC Trust's Limited Rule 60(b) Relief**

Defendants and New GM have been aware that the GUC Trust seeks Rule 60(b) relief as alternative relief for almost three years.<sup>74</sup> In fact, certain Defendants addressed the GUC Trust's claim for Rule 60(b) relief in their initial response to the First Amended Objection, which they filed on December 13, 2010.<sup>75</sup> The Court has also been consistently apprised of the nature of the GUC Trust's Rule 60(b) request.<sup>76</sup>

Similarly, before the trial of this matter, New GM sought and was granted permission to move for summary judgment to dismiss the GUC Trust's Rule 60(b) claim.<sup>77</sup> In the process, New GM filed almost sixty pages of briefing on the issue of Rule 60(b).<sup>78</sup> In its opposition brief and during oral arguments on the motion, the GUC Trust argued that Rule 60(b) relief was

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<sup>74</sup> See Oct. 28, 2011 Status Hr'g Tr. 19:17-22 (Bankr. Dkt. No. 11105) (Steinberg concedes he was aware of the request for Rule 60(b) relief); December 15, 2010 Status Hr'g Tr. 42:12-43:2 (Bankr. Dkt. No. 8626) (Steinberg: "[T]here's a Rule 60(b) request to vacate the sale order," and the relief sought is "protective."); Lopez Tr. 66:14-17 (Mar. 19, 2013) (Steinberg: "When the claims objection was filed, there was one paragraph there. It said that they were asserting it protectively in anticipation of a need to respond to the [N]oteholders' argument.").

<sup>75</sup> See Response of Certain Noteholders to First Amended Objection at 59-67 (Bankr. Dkt. No. 8084) ("The Committee is asking the Court to modify the Sale Order and set aside MLC's assumption and assignment to New GM of the Lock-Up Agreement."); Nova Scotia Trustee Response to First Amended Objection at 18 (Bankr. Dkt. No. 8088) (the Nova Scotia Trustee joins in the Noteholders' arguments regarding Rule 60(b)).

<sup>76</sup> Lopez Tr. 70:21-71:6 (Mar. 19, 2013) (Court: "As you well know, [E. Fisher] has on many occasions, expressed his desire to ask for 60(b) relief in the alternative[.] [T]he problem to which I was subjected and you were subjected was not him coming up with new contentions today, March 19th. It was him holding out the wild card that you might have to deal with new or shifting contentions. This is not materially different than anything he's said before. What he has brought to the table today is he has said, honest injun, this is all of it. So now you know what you need to deal with.").

<sup>77</sup> See May 15, 2012 Status Conference (granting request to file motion for summary judgment); May 24, 2012 Scheduling Order Regarding New GM Motion for Summary Judgment (Adv. Pr. Dkt. 24).

<sup>78</sup> See June 8, 2012 Memorandum of Law In Support of New GM's Motion for Summary Judgment (Adv. Pr. Dkt. 33); July 11, 2012 Reply Brief in Support of New GM's Motion for Summary Judgment (Adv. Pr. Dkt 95).

limited, sought alternatively, and was likely unnecessary.<sup>79</sup> Ultimately, New GM's motion was denied on the ground that the Rule 60(b) claim was not ripe for decision until the very issues the GUC Trust identified were decided.<sup>80</sup> In light of the over ninety pages of briefing filed on the Rule 60(b) claim alone, it is not credible for New GM, or for any other party, to claim that they are unaware of the basis for the GUC Trust's request for Rule 60(b) relief.

## ARGUMENT

### **I. RULE 60(b) RELIEF IS WARRANTED**

#### **A. The Standard for Relief Under Rule 60(b)**

This Court has discretion to rescind or amend a final judgment under Rule 60(b). *Kotlicky v. U.S. Fid. & Guar. Co.*, 817 F.2d 6, 8 (2d Cir. 1987). In applying the rule, the Court must “strike[] a balance between serving the ends of justice and preserving the finality of judgments.” *Pasquino v. Lev Parkview Developers, LLC*, No. 09 Civ. 4255, 2011 WL 4502205, at \*3 (S.D.N.Y. Sept. 29, 2011) (quotation and citation omitted); *Catskill Dev., LLC v. Park Place Entm't Corp.*, 286 F. Supp. 2d 309, 312 (S.D.N.Y. 2003).<sup>81</sup> Because final judgments should not be reopened lightly, “Rule 60(b) is ‘invoked only upon a showing of exceptional circumstances.’” *Pasquino*, 2011 WL 4502205, at \*3 (citation omitted).

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<sup>79</sup> June 29, 2012 GUC Trust Opp. Br. at 6-16 (Bankr. Dkt. No. 11884; Adv. Pr. Dkt. 72); New GM SJ Hr'g Tr. 49:17-19 (“In July 2010 as part of our initial objection in this case we indicated that we were asserting and reserving our rights to pursue 60(b) relief protectively.”); *id.* at 50:9-13 (“The reason that we asserted 60(b) protectively is because what we were saying is if we do not need relief from the sale order we won't pull the trigger on that. We respect that wherever possible judgments should be treated as final.”).

<sup>80</sup> New GM SJ Hr'g Tr. 90:15-16.

<sup>81</sup> *Judgment reinstated*, 345 F. Supp. 2d 360 (S.D.N.Y. Nov. 15, 2004), *vacated and remanded*, *Catskill Litig. Trust v. Park Place Entm't Corp.*, 169 Fed. App'x 658 (2d Cir. 2006), *on remand to Debary v. Harrah's Operating Co., Inc.*, 465 F. Supp. 2d 250 (S.D.N.Y. 2006) *aff'd* by 547 F.3d 115 (2d Cir. 2008), *cert. denied*, *Catskill Dev., LLC v. Harrah's Operating Co., Inc.*, 129 S. Ct. 1908 (2009).

Rule 60(b) provides in relevant part: “On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b); Fed. R. Bankr. P. 9024. The burden of showing the judgment should be amended or vacated rests on the movant, who must “(1) support its motions with highly convincing evidence; (2) show good cause for its failure to act sooner; and (3) prove that granting the motion will not impose any undue hardship on the other parties.” *Green v. Advanced Cardiovascular Imaging*, No. 07 Civ. 3141, 2009 WL 3154317, at \*2 (S.D.N.Y. Sept. 30, 2009).

As demonstrated more fully below, courts consistently grant Rule 60(b) relief under subsections (1), (2), (3) and (6) because of failures to disclose information that, if known, would have altered the final judgment or order in question. *See e.g., SEC v. Wojeski*, 752 F. Supp. 2d 220, 229-31 (N.D.N.Y. 2010) (allowing reconsideration of judgment where trust failed to disclose certain pertinent annuity agreements), *aff’d, Smith v. SEC*, 432 F. App’x 10 (2d Cir. 2011); *Vasquez v. Carey*, No. 03 Civ. 3905 (RJH), 2010 WL 1140850, at \*8 (S.D.N.Y. Mar. 24, 2010) (granting Rule 60(b)(1) motion for relief because identity of proper defendant was not revealed to movant until after entry of the order); *Judith Ripka Creations, Inc. v. Rubinoff Imps., Inc.*, No. 03 Civ. 9377 (BSJ), 2004 WL 1609338, at \*3-4 (S.D.N.Y. July 16, 2004) (vacating judgment where defendants failed to disclose facts pertinent to settlement negotiations); *In re*

*Jack Kline Co., Inc.*, 440 B.R. 712, 738-39 (Bankr. S.D. Tex. 2010) (granting relief from, and amending, a sale order pursuant to Rule 60(b)(3)); *In re Enron Creditors Recovery Corp.*, No. 01-16034 (AJG), 2009 WL 3756951, at \*4 (Bankr. S.D.N.Y. Nov. 6, 2009) (granting Rule 60(b)(6) relief because movant did not receive adequate notice of hearing). Rule 60(b) relief is appropriate here because of the failure to disclose the Lock-Up Agreement and the Swaps prior to entry of the Sale Order.

**B. Relief Under Rule 60(b)(1) and (2) Is Appropriate Because of the Failure to Disclose the Lock-Up Agreement and Swaps**

**1. The Creditors' Committee Should Be Excused Under Rule 60(b)(1) for Not Challenging the Lock-Up Agreement Prior to Entry of the Sale Order**

Subsection (1) of Rule 60(b) permits relief from an order or judgment in the case of mistake, inadvertence, surprise, or excusable neglect. Rule 60(b)(1) is typically applied to vacate default judgments. The subsection is not limited to that use, however, and permits the court to vacate an order or judgment based on mistakes or excusable neglect by a party or its counsel. Excusable neglect is evaluated under the factors set forth by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates, LP*, 507 U.S. 380, 395 (1993): (1) the danger of prejudice to the non-moving party; (2) the length of delay and its potential impact on the judicial proceedings; (3) the reason for delay; and (4) whether the movant acted in good faith. *Green*, 2009 WL 3154317, at \*2; *Guishan, Inc. v. Arici*, 635 F. Supp. 2d 187, 192 (E.D.N.Y. 2009). The analysis of these factors is subsumed by the general Rule 60(b) requirements that relief from the order not impose undue hardship, and that the motion be brought within a reasonable time. As discussed below, in Sections II and III, the GUC Trust has satisfied the *Pioneer* standard.



Here, relief under Rule 60(b)(1) is warranted because the Creditors' Committee's failure to challenge the Lock-Up Agreement and Swaps before entry of the Sale Order resulted from "excusable neglect." The Creditors' Committee did not challenge the Lock-Up Agreement and Swaps before entry of the Sale Order only because it was unaware, through no fault of its own, of the Lock-Up Agreement or its potential effect on the unsecured creditors of Old GM. Under Rule 60(b)(1), the Creditors' Committee should thus be excused from the consequences of not challenging the Lock-Up Agreement and its related transactions before entry of the Sale Order, because the Creditors' Committee's inaction was not a calculated or deliberate choice. *Katz v. Mogus*, No. 07 Civ. 8314, 2012 WL 263462, at \*3 (S.D.N.Y. Jan. 25, 2012).

**2. Failure to Disclose the Lock-Up Agreement and Swaps Warrants Relief Under Rule 60(b)(2)**

Rule 60(b)(2) permits relief from a judgment or order if the moving party shows the existence of "newly discovered evidence that, with reasonable diligence, could not have been discovered" in advance of the order and the "evidence [is] of such importance that it probably would have changed the outcome of the previous decision." *Bd. of Trs. of S. Cal. IBEW-NECA Defined Contribution Plan v. Bank of N.Y. Mellon Corp.*, No. 09 Civ. 6273 (RMB) (AJP), 2010 WL 3958790, at \*3-4 (S.D.N.Y. Sept. 7, 2010) (granting Rule 60(b) motion and reopening case without "definitively deciding" whether evidence would have changed the outcome of the judgment) (citation and quotation omitted); *Commer v. McEntee*, No. 00 Civ. 7913 (RWS), 2005 WL 1250214, at \*2 (S.D.N.Y. May 27, 2005); *Kurzweil v. Philip Morris Cos., Inc.*, Nos. 94 Civ. 2373, 94 Civ. 2546 (MBM) (MBM), 1997 WL 167043, at \*6 (S.D.N.Y. April 9, 1997).

The GUC Trust has shown that no party brought the Lock-Up Agreement or related transactions to the attention of the Creditors' Committee until October 2009, well after the Sale Order was entered. The Creditors' Committee acted diligently in investigating the terms of the

Sale Order. However, because disclosure of the Lock-Up Agreement and Swaps was deficient, they remained unknown to the Creditors' Committee and its counsel. The Creditors' Committee had no reason to investigate the substance of an agreement it did not know about prior to entry of the Sale Order. As this Court has noted, the substance of the Lock-Up Agreement came as a "shock" to the Court when this current controversy arose upon the filing of the Creditors' Committee's Initial Objection.

The sale process and, ultimately, the Sale Order would have been different if the Creditors' Committee and this Court had known about the Lock-Up Agreement. Undoubtedly, the Creditors' Committee would have challenged the Lock-Up Agreement and related Swaps had it been aware of the relevant facts before entry of the Sale Order. Further, the Court has stated that, had it known about the Lock-Up Agreement, it "might well have refused to sign the order in its then existing form, and I would have insisted the lock-up agreement not be insulated from judicial scrutiny no matter what threats the Nova Scotia Noteholders had made at the time."<sup>82</sup> All of the information about the Lock-Up Agreement that has come to light only after entry of the Sale Order satisfies the "newly-discovered evidence" standard of Rule 60(b)(2) and constitutes exceptional circumstances warranting modification of the Sale Order under Rule 60(b)(2). *Kurzweil*, 1997 WL 167043, at \*6 (granting Rule 60(b)(2) motion).

**C. Failure to Disclose the Lock-Up Agreement and Swaps Constitutes Misconduct Which Warrants Relief Under Rule 60(b)(3)**

Rule 60(b)(3) permits relief from a judgment or order that was the subject of fraud, misrepresentation, or misconduct. Fed. R. Civ. P. 60(b)(3). A failure to disclose relevant information that influences the Court's judgment or order constitutes exceptional circumstances that justify Rule 60(b)(3) relief. *Wojeski*, 752 F. Supp. 2d at 229 n.17 (SEC was entitled to

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<sup>82</sup> New GM SJ Hr'g Tr. 93:14-18.

reconsideration of a judgment based on a newly discovered annuity contract that was previously not disclosed). The movant must come forward with clear and convincing evidence that the fraud, misrepresentation or misconduct complained of prevented the moving party from “fully and fairly presenting his case or defense.” *In re Olejnik*, No. 09-76714-AST, 2010 WL 4366183, at \*4 (Bankr. E.D.N.Y. Oct. 28, 2010) (granting relief where debtor misrepresented his assets and failed to file mandatory disclosure statements).

Even where there was no duty to disclose, courts can find that the omission of pertinent information satisfies Rule 60(b)(3), if that information would have affected the judgment or order. *Judith Ripka Creations, Inc.*, 2004 WL 1609338, at \*3-4 (granting Rule 60(b)(3) motion and noting that “even if I did not find that Defendants had a duty to disclose, I would nonetheless vacate the judgment under Rule 60(b)(3) because [Defendants] made statements in the course of settlement negotiations that affirmatively misrepresented the amount that defendants profited ...”). The Court need not find intentional bad faith in order to vacate a judgment under Rule 60(b)(3). *Id.* at 4; *Catskill Dev., LLC*, 286 F. Supp. 2d at 314 (“even an accidental failure to disclose ... can constitute ‘misconduct’ within the purview of Rule 60(b)(3)”).

As described above, the terms of the Lock Up Agreement were never adequately disclosed to the Creditors’ Committee or this Court. The failure to adequately disclose the Lock-Up Agreement prior to entry of the Sale Order is misconduct that justifies Rule 60(b)(3) relief because the concealment of this information impeded the Creditors’ Committee’s ability to act in the interest of unsecured creditors with respect to the Sale Order. Thus, Rule 60(b)(3) relief is appropriate.

**D. The Extraordinary Circumstances of this Matter Justify Rule 60(b)(6) Relief**

Rule 60(b)(6) can be invoked for “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(6). Should the court find that the other subsections of Rule 60(b) are inapplicable, it can

use Rule 60(b)(6) to modify the Sale Order.<sup>83</sup> Rule 60(b)(6) is described as a “grand reservoir of equitable power to do justice in a particular case.” *In re Enron Creditors Recovery Corp.*, 2009 WL 3756951, at \*3 (citation and quotation omitted). The movant must show extraordinary circumstances or that the judgment results in an extreme or undue hardship to justify relief under Rule 60(b)(6). *Montco*, 666 F.2d at 759 (citing *U.S. v. Karahalias*, 205 F.2d 331, 333 (2d Cir. 1953)).

The facts of this case are nothing short of extraordinary. The parties to the Lock-Up Agreement sought to evade judicial review of an agreement that resulted in the assertion of almost \$2.7 billion in claims and a \$367 million cash transfer to the Noteholders from funds advanced by Old GM. Facts far more ordinary than these have warranted Rule 60(b)(6) relief.

For example, in *Montco, Inc. v. Barr (In re Emergency Beacon Corp.)*, 666 F.2d 754 (2d Cir. 1981), the Second Circuit affirmed a lower court’s modification of an order under Rule 60(b)(6). The underlying order permitted a debtor to issue a certification of indebtedness, giving the holder of the certificate priority over other general creditors of the debtor. *Id.* at 761. The bankruptcy court had declined to authorize the certification at a hearing held prior to entry of the order because it lacked sufficient information about the certification, and no subsequent application for permission was made to the court. *Id.* at 756. Despite this, authorization to issue the certificate was included in a proposed order. Unaware that the provision was included, the Court, not intending to authorize the certificate, signed the order. *Id.* at 759. Because “the court simply did not intend to authorize such a certificate,” the Second Circuit found extraordinary circumstances justifying Rule 60(b)(6) relief. *Id.*

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<sup>83</sup> If the relief sought falls within Rule 60(b)(1) through (5), Rule 60(b)(6) relief is not available. *Montco, Inc. v. Barr (In re Emergency Beacon Corp.)*, 666 F.2d 754, 758 (2d Cir. 1981).

Here, like in the Second Circuit's *Montco* decision, the Court was not aware of the Lock-Up Agreement or Swaps prior to entering the Sale Order and no one sought the Court's approval of the Lock-Up Agreement. Like *Montco*, this Court did not intend the unknown consequences of approving the Sale Order. As this Court stated in denying New GM's motion for summary judgment:

When I approved the sale agreement and entered the sale approval order I mistakenly thought that I was merely saving GM, the supply chain, and about a million jobs. Likewise, I thought that as part of that I was approving the assumption and assignment of contracts mainly with the many vendors in the supply chain whose contracts were essential to New GM's future and the health of the U.S. auto industry. I was unaware that by an agreement undisclosed to me that would be said to be assumed and assigned incident to the sale order or that might have been an unauthorized post-petition transaction, I was also authorizing a payment to a limited number of creditors of \$376 million, a commitment not to object to as much as \$2.76 billion in claims, and an assignment out of the estate of the right to bring important avoidance actions. It never once occurred to me, and nobody bothered to disclose, that amongst all of the assigned contracts was this [Lock-Up Agreement], if indeed it was assigned at all.

New GM SJ Hr'g Tr. 93:19-94:12. As the Second Circuit found in *Montco*, if indeed the Court inadvertently approved assignment and assumption of the Lock-Up Agreement and the Swaps, then there are extraordinary circumstances warranting relief under Rule 60(b)(6).

## **II. THE GUC TRUST'S REQUEST FOR RULE 60(b) RELIEF IS TIMELY**

Timeliness under Rule 60(b) is a fact-intensive inquiry that requires a court to "look at the particular circumstances of the case, and balance the interests in finality of a judgment with the reasons for any delay." *In re Olejnik*, 2010 WL 4366183, at \*4 (finding moving party's lack of knowledge of particular sale which influenced the judgment, justified the seven month delay after the case was closed); *P.T. Busana Idaman Nurani v. Marissa by GHR Indus. Trading*, 151 F.R.D. 32, 35 (S.D.N.Y. 1993) ("What constitutes a reasonable time for purposes of Rule 60(b)(6) will necessarily vary with the particular circumstances of a case."). To be timely, a

motion for relief under Rule 60(b)(1) through (5) must be brought within one year of entry of the judgment or order that is the subject of the motion. Fed. R. Civ. P. 60(c)(1). Any motion for Rule 60(b) relief, even those brought within one year of entry of the judgment or order, must also be made “within a reasonable time.” *Id.* It is the movant’s burden to show that it acted in a reasonable time and that there was good cause for any delay. *Guishan, Inc.*, 635 F. Supp. 2d at 192.

The Sale Order in this case was entered on July 5, 2009. Less than one year later, the GUC Trust requested Rule 60(b) relief in its Initial Objection, satisfying the first prong of the timeliness requirement of Rule 60(b). Further, the gap between entry of the Sale Order and the GUC Trust’s Initial Objection was “reasonable” under Rule 60(b). Because of the concealment of the terms of the Lock-Up Agreement prior to entry of the Sale Order, the Creditors’ Committee, despite its due diligence during the sale process, did not become aware of the Lock-Up Agreement until October 2009. Upon being told about the Lock-Up Agreement, counsel for the Creditors’ Committee began an in-depth investigation of the Lock-Up Agreement and the complex surrounding circumstances. As soon as counsel for the Creditors’ Committee had a sufficient understanding of the Lock-Up Agreement, Rule 60(b) relief was sought.

Numerous cases hold that delays longer than one year are reasonable under Rule 60(b). *See, e.g., Montco*, 666 F.2d at 760 (affirming an order vacating order despite a 26 month period between entry of the order and trustee’s challenge to the order); *Golden Oldies, Ltd. v. Scorpion Auction Grp., Inc.*, 199 F.R.D. 98, 100 (E.D.N.Y. 2001) (granting Rule 60(b) motion, finding two-year gap between entry of the order and challenge reasonable). This is particularly so when the reason for the delay is lack of disclosure. *Vasquez*, 2010 WL 1140850, at \*8 (holding nearly one year delay was justified because pertinent information was not known to the movant for

many months); *In re Olejnik*, 2010 WL 4366183, at \*4 (finding moving party's lack of knowledge of particular sale which influenced the judgment justified the seven month delay after the case was closed).

For example, in *Montco*, the Second Circuit held that a 26 month delay was reasonable where neither the "chairman of the creditors' committee nor co-counsel for the committee had been served" with a copy of the proposed order that was the subject of the Rule 60(b) motion. *Montco*, 666 F.2d at 760. Although notice of the proposed order was not strictly required by the Bankruptcy Rules, the *Montco* court noted that "lack of notice is an appropriate consideration in evaluating the reasonableness of the time at which the motion to vacate was made." *Id.* As in *Montco*, the failure to disclose the Lock-Up Agreement and Swaps to the Creditors' Committee demonstrates that any delay on the part of the Creditors' Committee was reasonable.

### **III. RULE 60(b) RELIEF WILL NOT IMPOSE UNDUE HARDSHIP ON THE PARTIES**

Applying Rule 60(b)(1) and Rule 60(b), generally, many courts analyze whether vacating the judgment in question will prejudice or impose undue hardship on the non-moving parties. *Kotlicky*, 817 F.2d at 9; *Katz*, 2012 WL 263462, at \*4; *Sec. Pac. Mortg. & Real Estate Servs., Inc. v. Herald Ctr. Ltd.*, 731 F. Supp. 605, 610 (S.D.N.Y. 1990). This condition lends itself more appropriately to evaluating default judgments, when the non-moving party, through no fault of its own, loses the benefit of a favorable judgment.

In this case, it is the Creditors' Committee that lost the opportunity to challenge the Lock-Up Agreement and the Swaps through no fault of its own. Moreover, the Noteholders are – at least in part and in collaboration with Old GM employees and advisors who now work for New

GM<sup>84</sup> – responsible for the failure to disclose the Lock-Up Agreement and Swaps.<sup>85</sup> The Noteholders supported limited disclosure of the Lock-Up Agreement and Consent Fee because they did not want the agreement to be subject to genuine scrutiny.<sup>86</sup> Thus, unlike review of a default judgment where the nonmoving party innocently loses the benefit of a favorable judgment, Defendants here supported the lack of disclosure which serves as the basis for the Rule 60(b) relief.

Also, none of the parties will be prejudiced if the Court grants the Motion because the GUC Trust is seeking a narrow modification of the Sale Order only as to the Lock-Up Agreement and Swaps, and transfer of certain avoidance actions. Defendants cannot argue they will be prejudiced by these modifications because the evidence at trial shows that, months after entry of the Sale Order, Defendants themselves were not aware that the Lock-Up Agreement had been assumed and assigned.<sup>87</sup> Similarly, the parties did not always think that the Swaps had been assumed and assigned to New GM.<sup>88</sup> Thus, Defendants cannot argue that they relied on the

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<sup>84</sup> Along with the Noteholders, current employees of New GM also had a hand in the failure to disclose, and New GM has benefitted from the Lock-Up Agreement. Dan Ammann, the former outside financial advisor for Old GM and Lawrence Buonomo, a former Old GM employee, are both now employed by New GM and both knew of the inadequate disclosures made by Old GM in June 2009. *See* Buonomo Tr. 132:12-15, 132:22-133:1 (Aug. 10, 2012); Ammann Tr. 87:6-8 (Sept. 27, 2012).

<sup>85</sup> *See* Truong Tr. 36:20-24 (Sept. 20, 2012) (Truong of Fortress had an opportunity to, and did, comment on the June 1, 2009 8-K); Buonomo Tr. 138:25-139: 4 (Aug. 9, 2012) (Gropper of Aurelius reviewed the Form 8-K before it was filed).

<sup>86</sup> *See* Pl. Ex. 3 (Prieto Notebook) at AUR\_GM021457 (“[T]he money is in a trust account in Canada where it is being held for the deal – does not think that money will be attackable where it is now ....”); Zirinsky Tr. 38:15-18 (Aug. 8, 2012) (“[W]e wanted to be comfortable that the way this transaction was going to be structured would do so, would do it in the right way so that there wouldn’t be any potential attack.”).

<sup>87</sup> *See* Pl. Ex. 153 (November 18, 2009 email from Buonomo to Zirinsky attaching letter that purported to “confirm” that New GM assumed the rights and obligations of Old GM under the Lock-Up Agreement).

<sup>88</sup> *See* Pl. Ex. 248 (July 27, 2009 email from Prieto to Gropper, “there was an internal debate at GM at around the time of the settlement as to whether the swap claim would be included in the wind-up claim” and “apparently there is a view that [the] swap claim is not included when calculating the wind-up



assumption and assignment of the Lock-Up Agreement and Swaps if the evidence shows that, when the Sale Order was entered (and for months after), they did not believe that those acts had occurred.

Thus, New GM and the Noteholders will not suffer undue hardship if the limited Rule 60(b) relief is granted.

**NOTICE**

Notice of this Motion has been provided to the parties in interest in accordance with the Sixth Amended Order Pursuant to 11 U.S.C. § 105(a) and Bankruptcy Rules 1015(c) and 9007 establishing Notice and Case Management Procedures, dated May 5, 2011.<sup>89</sup> The GUC Trust submits that such notice is sufficient and no other or further notice need be provided.

Although this relief was first requested on July 2, 2010, this matter has not previously been presented to this Court for adjudication.

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claim”) at AUR\_GM039690-R (05-2012); Pl. Ex. 22 (July 30, 2009 email from Buonomo to Prieto stating: “I inquired with Weil Gotshal, which reminded me that inasmuch as the Swap was not assigned this decision rests with Motors Liquidation Company (Oldco), which apparently has it under review.”) at AUR\_GM021994.

<sup>89</sup> Bankr. Dkt. No. 10183.

**CONCLUSION**

WHEREFORE, the GUC Trust respectfully requests that the Court enter an order granting the Motion for relief under Rule 60(b), and granting such other and further relief as this Court deems just and proper

Dated: New York, New York  
May 3, 2013

Respectfully submitted,

By: /s/ Eric B. Fisher

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*Counsel for the Motors Liquidation  
Company GUC Trust*

# **EXHIBIT A**

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026 (REG)

Adv. Case No. 12-09802 (REG)

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In the Matter of:

GENERAL MOTORS CORPORATION,

Debtors.

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MOTORS LIQUIDATION COMPANY GUC TRUST,

Plaintiff,

v.

APPALOSSA INVESTMENT LIMITED,

Defendant.

- - - - - x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

July 19, 2012

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

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3     Hearing re:   On the Record Conference

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25     Transcribed by:   Dawn South

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P R O C E E D I N G S

THE COURT: Have seats everybody.

All right, we're here on the New GM summary judgment motion. I will hear argument on 60(b) relief and on anything that is relevant to that aspect of the request. That was the one and only thing for which I authorized a summary judgment motion to be made.

I want both sides to focus principally on ripeness issues and the extent to which I should be deciding this now when I don't know whether the GUC Trust is actually going to be asking me for 60(b) relief, and if so, exactly what it's going ask me to do, and how and what it's going to want me to do in the way of modifying the earlier 363 order or anything else.

Mr. Steinberg, when it's your turn, I want you to focus incident to the ripeness issue on whether you dispute that the ripeness doctrine applies. I take it that you don't dispute that there is a ripeness doctrine, that it applies not just in declaratory judgment actions, but in general to any matter in the federal courts to which Article 3 applies, and your real point is that although is such a doctrine you think that your matter is ripe. I'll need you to flesh that out.

Mr. Fisher, when it's your turn I need you to either confirm or explain otherwise that the matter of

1 whether you need 60 (b) relief is still entirely in the air  
2 or can or should I assume that in one way or another you're  
3 still going to be asking for it.

4 I also need you to tell me the extent to which  
5 we're only talking about one kind of a 60 (b) motion or  
6 whether the nature of any 60 (b) relief your request may turn  
7 on further developments later in the case.

8 Another question that occurred to me, Mr. Fisher,  
9 since it seems that you don't need 60 (b) relief today or  
10 next week or three weeks from now, is why you didn't simply  
11 dismiss without prejudice the request for the 60 (b) relief  
12 to bring it on again? Is that because of the one-year  
13 deadline for bringing a 60 (b) motion or is it for some  
14 different reason? I guess at this point I would need to  
15 approve a voluntary dismissal, but I have a need for  
16 clarification in that regard.

17 Also I need both sides to discuss the underlying  
18 issues to the extent of getting my arms around how they  
19 could or would moot the need for 60 (b) relief, and how or  
20 why it is that people believe there are no issues of fact on  
21 that.

22 I'm also troubled by this void/avoidable  
23 distinction which seems to have at least some conflict in  
24 the cases if you compare the decisions by Fred Block in the  
25 Eastern District, albeit in a very different factual

1 context, and by Jim Marlar in Phoenix.

2 I think it goes without saying that over the -- I  
3 guess it's 42 years now that I've been out of school, I've  
4 seen a zillion cases in which reorganized debtors decided  
5 not to bring preference actions which are avoidable  
6 transfers in their discretion because they don't want to  
7 kill their vendor community, and those are plainly voidable  
8 and not void, but I wonder if unauthorized post-petition  
9 transactions should be in the same category or not, and  
10 whether judges should be helpless to remedy unauthorized  
11 post-petition transfers, assuming of course they're  
12 established, and I very well understand that there's a  
13 zillion issues of fact associated with that, when they see  
14 them on their watch.

15 All right, I'll hear first from you,  
16 Mr. Steinberg. Main lectern, please.

17 MR. STEINBERG: Good morning, Your Honor, Arthur  
18 Steinberg from King & Spalding on behalf of the purchaser,  
19 New General Motors.

20 I'm very cognizant of your questions. The  
21 admonition that you made at the prior pretrial conference as  
22 to what you thought the -- you had approved for the filing  
23 the summary judgment motion, and I'd like to very much stay  
24 on point with regard to responding to each of your  
25 questions; however, one of the arguments that we made and

1 some of the questions that you've asked today relates to the  
2 fact that I do believe that the Rule 60(b) relief is ripe,  
3 and the reason is because I believe that the issues that  
4 lead you to the 60(b) relief are issues where there are no  
5 genuine issues of material fact in dispute, and therefore  
6 you ultimately have to get to the Rule 60(b) relief.

7 I also believe that it's ripe because for all the  
8 reasons why Judge Sweet, when he handled the appeal of the  
9 sale order, talked about equitable mootness doctrine and the  
10 need to address these types of issues, which could affect  
11 the sale, and Judge Sweet in that appeal also dealt with the  
12 issue, which is very ripe, in connection with this motion  
13 about the inability to selectively strike provisions of a  
14 sale order and try to keep the rest of the sale order in  
15 tact.

16 Judge -- Judge Sweet said the opposite when was  
17 urged by the bondholders, and cited Second Circuit  
18 precedence, and you just could not do that.

19 And then he cited the equitable mootness doctrine  
20 because New GM had, as Your Honor had found, a Section  
21 363(m) filing that they were a good faith purchaser, and  
22 therefore the rights that they acquired under the MSPA, the  
23 master sale and purchase agreement, could not be avoided as  
24 long as they contacted in good faith.

25 That was the law of -- that is the law of this

1 case and that was established years ago already.

2 The further that you delay addressing the issue of  
3 whether the sale order could be modified in any way is a  
4 further prejudice to everybody who is --

5 THE COURT: Are you contending that Bob Sweet or I  
6 for that matter focused on matters of which I was totally  
7 ignorant at the time that I entered the sale order? Or are  
8 you suggesting, contrary to my memory, that in those three  
9 days of the trial on the 363 hearing or in the briefs that  
10 accompanied it that I was told that Old GM had entered into  
11 a lock-up agreement, that I was informed of its terms, that  
12 I was told that the debtor had agreed to make a payment of  
13 about 367 million bucks to a select number of creditors, or  
14 that it agreed to the allowance of some \$2 billion odd in  
15 claims, albeit as I understand the lock-up agreement only to  
16 the extent authorized by law?

17 MR. STEINBERG: Well, Your Honor, I want to be  
18 very careful here, because I am New General Motor's counsel,  
19 and I was not the person to try to push this through Your  
20 Honor, and I was not the counsel of record handling this on  
21 behalf of Old GM in June of 2009. So I am not privy to  
22 whatever you may have been told, and I -- I've not carefully  
23 studied transcripts or anything that was done in chambers,  
24 conferences off the record. So I have -- I'm incapable of  
25 answers that.

1 I will say with regard to Judge Sweet that he set  
2 forth a proposition that you cannot selectively strike the  
3 sale order, you can strike selective provisions of the sale  
4 order, that it's either an all or nothing type of  
5 proposition, and he did refer to Second Circuit opinion on  
6 that in the context of an appeal and not a 60(b) motion, but  
7 it was in the context of an appeal.

8 As to what was in the public record whether people  
9 had actually said to Your Honor anything about it, but what  
10 was in the public record was the 8-K that was filed on  
11 June 1, prepared by Old GM's counsel, a securities filing,  
12 which described all of the material terms of the lock-up  
13 agreement. That was --

14 THE COURT: Do you think that there's a duty on  
15 the part of judges with 363 cases on their watch, or for  
16 that matter Chapter 11 cases on their watch, to go foraging  
17 outside the matters that lawyers put before them to put  
18 themselves on notice of facts that they should think about  
19 as to whether one bunch of creditors got an advantage over  
20 the remainder of the creditor community?

21 MR. STEINBERG: Your Honor, these are excellent  
22 questions, and I hope I can give you some excellent answers  
23 as well too.

24 There are many judges who feel that their jobs as  
25 judges are to do balls and strikes, which is that issues are

1 presented and they're supposed to decide those issues.

2 The issues relating to the lock-up agreement were  
3 in the public arena, they were made known to the people who  
4 would otherwise bring it to your attention if they thought  
5 there was a problem. The debtor's counsel is probably the  
6 most experienced debtor counsel in the nation having handled  
7 a plethora of cases. If they thought in the context of what  
8 was going on in the Old GM bankruptcy case that this  
9 particular issue had to be brought to your attention I'm  
10 sure that they would have done it, and they certainly  
11 operate all of their large cases with the play book of being  
12 open and notorious of everything that was going on.

13 I mean to tell you, Your Honor, that there was no  
14 attempt, and that's clear from the record, that there was no  
15 attempt to hide anything from the public arena, whether or  
16 not someone should have specifically referred it to Your  
17 Honor, but there was no attempt to hide it in the public  
18 arena, and I say that for five things that were done in the  
19 public arena before the sale order was entered, some of  
20 which was actually before Your Honor. And I don't have a  
21 record of the transcript to say whether anybody particularly  
22 focused on it, but my guess is, is that no one focused on it  
23 to be able to tell Your Honor.

24 But I actually don't think that that is not  
25 surprising. Because -- and I know I'm already off script,



1 but I'm trying to be responsive to your questions. When  
2 asked at his deposition the committee counsel, when asked  
3 the question about whether he, as the committee counsel,  
4 focused on GM Canada situation, whether that was a focus for  
5 him to be able to look at, and obviously if it was a focus  
6 for him he would bring it to your attention if he thought  
7 that there was something wrong. He answered, and we did  
8 cite his deposition answer in our reply, and that is a  
9 statement of undisputed fact in connection with the summary  
10 judgment motion. He said:

11 "Because the basic deal was that we got equity  
12 securities representing 20 percent of New GM and remanaged  
13 to negotiate for an adversary proceeding against the term  
14 lenders and enough cash to get us through the case and that  
15 was it. And everything else went to New GM or the DIP  
16 lenders, and the unsecured creditors never saw any of it.

17 So whatever GM Canada had -- would not have come  
18 to our -- would not have registered to our register or radar  
19 screen. It was so unimportant with everything else we had  
20 to worry about."

21 So what normally happens in the case is that you  
22 make sure that the parties who are evaluating the sale  
23 transaction are given the information to be able to evaluate  
24 it, and then if there are issues that are raised in  
25 connection with that information it's incumbent on those

1 people to raise those issues to Your Honor so that Your  
2 Honor could rule on it. No one expects Your Honor to be in  
3 the same position as the advocates, the professionals who  
4 are working on a transaction. Your Honor is really I think  
5 supposed to decide issues that are raised where there are a  
6 problem.

7 So when someone files an 8-K on the day of the  
8 bankruptcy filing, calls it a material and definitive  
9 agreement, and then discloses all of the terms of the lock-  
10 up agreement in that securities filing, and that securities  
11 filing is reviewed by the creditors' committee, and the  
12 creditors' committee calls it a standard form of diligence  
13 to look at that type of information, then the information is  
14 in the arena. No one is quarreling about that at all. And  
15 four days later the schedules to the asset purchase  
16 agreement are delivered to the creditors' committee, and  
17 those schedules themselves specifically describe issues  
18 relating to the lock-up agreement. It's there in front if  
19 there's an issue that's involved.

20 I'll leave aside the fact that the issue about the  
21 lock-up agreement was published in the Financial Times, you  
22 know, whether -- whether people are -- can rely on  
23 publication for purposes of due process notice is an issue  
24 that comes up in bar date notices, I just point it out that  
25 it was there.

1           The lock-up agreement was also specifically  
2 mentioned in file before Your Honor in connection with the  
3 amendment to the debtor-in-possession agreement. It  
4 specifically refers to the lock-up agreement and says that  
5 the DIP lenders, who are the governments here, are not going  
6 to call a default if Nova Scotia Finance files a bankruptcy  
7 proceeding.

8           The schedules that were delivered to the committee  
9 specifically say that -- that as far as ordinary course  
10 business transactions GM -- Old GM could do whatever it  
11 wants. With things that are not necessarily in the ordinary  
12 course of business they can't do what they want without  
13 notifying the purchaser or the governments, unless it's on a  
14 schedule, Schedule 6.2. Schedule 6.2, given to the  
15 creditors' committee, specifically says do everything that  
16 are otherwise required in Canada that relates to  
17 consummating the lock-up agreement.

18           So -- and then the one thing that happened before  
19 just to round out the five items, was that prior to the  
20 bankruptcy filing you had an S-4, a bond exchange offer.  
21 The bond exchange was not just for the U.S. bonds, it was a  
22 bond exchange actually for GM Nova Scotia as well too. It  
23 was a joint bond exchange offer. The bond exchange offer  
24 has a description of the Nova Scotia bonds, and even has a  
25 discussion about what happens if it fails and then you may

1 have a GM Nova Scotia bankruptcy proceeding and the prospect  
2 of in effect a deficiency claim as well as a guarantee claim  
3 being asserted against Old GM.

4 That S-4, which was published, was given to the  
5 indenture trustees who are on the creditors' committee, was  
6 reviewed by committee counsel as well too.

7 So -- so to get back to Your Honor's question, if  
8 the S-4 describes the Nova Scotia bond situation and the day  
9 of the bankruptcy filing there's an 8-K that talks about the  
10 definitive agreement, it describes all the terms of the  
11 lock-up agreement, and four days later you're giving the  
12 committee the disclosure schedules which describe the lock-  
13 up agreement, and you're publishing in the Financial Times,  
14 and you're also providing for amendments in a DIP agreement  
15 which specifically refer to the words lock-up agreement,  
16 then I think that that was -- that's not an issue of  
17 connecting the dots, that's an issue of being right in front  
18 of the committee, where a committee who has acknowledged  
19 that they didn't care about the issue, that they weren't  
20 looking at the issue. And that certainly is relevant for a  
21 Rule 60(b) motion.

22 Because if you -- if you were given the  
23 information and you turned in effect a blind eye, you  
24 didn't care about it then you don't have a basis to argue  
25 about it later on.

1           Now, we also cite to the fact that after the sale  
2 order in August of 2009 the New GM files an 8-K which  
3 actually attaches the lock-up agreement. That was of  
4 record. And we also say that the interim report was filed  
5 on August 7th, 2009 at the request of the U.S. Trustee to  
6 basically say what went on and what's left to be doing in  
7 the case. That interim report also references a specific  
8 discussion about the lock-up agreement.

9           Both of those things, the interim report and the  
10 8-K filed by New GM were reviewed by committee counsel and  
11 they were told they were important documents for them to  
12 review. If the committee counsel didn't raise those issues  
13 with you when having been presented to it before the sale  
14 order or even shortly after the sale order then the question  
15 is, is -- should someone have --

16           THE COURT: Well, the sale order was entered on or  
17 about July 7, 2009; am I correct?

18           MR. STEINBERG: That's correct, Your Honor.

19           THE COURT: Now some of the events that you're  
20 talking about took place before that time and several took  
21 place after; am I correct?

22           MR. STEINBERG: That's correct. Five before, two  
23 after, that's what I've described so far.

24           THE COURT: Go on.

25           MR. STEINBERG: The -- the other thing, just to

1 put it on the table as it relates to the Rule 60B issue and  
2 whether it -- whether there -- whether this was a timely  
3 time issue, is that the -- Mr. Mayer was the (indiscernible  
4 - 01:28:45), the committee counsel from Kramer Levin. He  
5 said, I didn't understand anything until October of 2009  
6 until he was asked questions by myself and by the  
7 noteholder's side. And in those questionings he ended up  
8 saying, yes, I understand -- I understand that there were  
9 Nova Scotia notes. I knew that before the sale order. Yes,  
10 I knew about the issue about two types of claims, the  
11 guaranteed claim and the deficiency claim, because I  
12 represent on the other side, I have a noteholder signing  
13 Calpine (ph), and I actually understood the issue of  
14 unlimited liability companies and I knew the prospect of it.  
15 He didn't say whether he had reviewed the S-4, which also  
16 talked about that as well.

17 And then he was asked this specific question, you  
18 know, you represent Orelus (ph) in other matters, right?  
19 So do you remember talking to Dan Gropper (ph) of Orelus  
20 about the Nova Scotia bonds in July of 2009? And he said,  
21 you know what, I guess I do remember, I had a conversation  
22 about it. And he says you know what Mr. Gropper told me, he  
23 told about the good deal that Orelus got on the Nova Scotia  
24 bonds.

25 So that's just the facts. October 2009 they could

1 -- they can postulate that they didn't know the world until  
2 that point in time, but they knew about the world before  
3 then for sure. Whether it happened before the sale or not  
4 they knew about it for sure before then, and they were given  
5 all the information before the sale and they purposely  
6 chose, they made the decision, they chose not to look at it.

7 Now, Your Honor's question said, do you think I  
8 should know about whether the estate is funding money, large  
9 sums of monies to preferred bondholders? And I think that  
10 that's the consent fee type issue I and need to sort of  
11 address that head on so Your Honor understands the  
12 perspective of what happened in this case, and then Your  
13 Honor could accept it or not.

14 The money that was paid for the consent fee was  
15 the compromise of the intercompany loan that was between GM  
16 Canada and GM Nova Scotia, both of them are non-debtors.  
17 The money that was given to GM Canada to fund that  
18 obligation was given on May 29th. It was given purposely  
19 before --

20 THE COURT: The 450 million bucks?

21 MR. STEINBERG: That's correct. That \$450 million  
22 loan was made to GM Canada before the bankruptcy, it was  
23 made with the consent of the governments and with the  
24 knowledge of the governments, and it was made for the  
25 possibility that if a deal was cut with the noteholders over

1 the weekend before June 1 that there would be money at GM  
2 Canada to consummate that deal. \$450 million I guess was  
3 the outside specter of what they were prepared to do. If  
4 not GM Canada was going to file a parallel proceeding as the  
5 U.S. proceeding on June 1.

6 The governments have said that the world had to --  
7 you had to have some solution by June 1. And when the bond  
8 exchange offer failed on May 26th then Old GM knew that the  
9 only thing it could do is to do a 363 sale, that was the  
10 only chance of survivability.

11 And the question was when that happened on  
12 May 26th, would they have to file any other debtors at the  
13 same time?

14 At that time GM Canada had one major issue that  
15 had been left unresolved. It had other issues in May that  
16 it was trying to deal with, but the one major issue was the  
17 intercompany loan from Nova Scotia Finance to GM Canada. If  
18 that couldn't be resolved then GM Canada was going to file  
19 on June 1 at the same time and they would try to do parallel  
20 363 sales of the GM Canada assets and the U.S. assets.

21 And remember, the DIP lenders are not just the  
22 U.S. government, they are the Canadian government, and the  
23 Canadian government, for lots of reasons, didn't want GM  
24 Canada to file for bankruptcy if the price was right and  
25 then they could afford not to do that.



1           So the money for the payment of the consent fee  
2 was part and put as a loan, an interest bearing loan, to GM  
3 Canada on May 29th, before the bankruptcy.

4           So as of the bankruptcy filing date that money was  
5 not property of the estate, that money was GM Canada's  
6 money, a non-debtor entity.

7           And there is an issue which is not a genuine issue  
8 of material fact in dispute. The reality is, is that loan,  
9 that \$450 million loan was repaid by GM Canada, and was  
10 repaid by GM Canada before the sale. It was GM Canada, not  
11 Old GM, who paid for the satisfaction of that intercompany  
12 loan. It came out of -- it's their coffers, not Old GM  
13 coffers, didn't affect the GUC Trust constituency at all.

14           In the reply to the summary judgment motion the  
15 GUC Trust tries to take issue with that. We had produced  
16 the receipts. Right, I mean it should be obvious, either  
17 you paid something or you didn't pay something. We had  
18 produced the receipts showing that it was repaid prior to  
19 the bankruptcy filing. They said, you know what, I draw an  
20 issue about that, I dispute it because in that interim  
21 report that I referred to in August there was a one-page  
22 exhibit to the interim report which tracks something called  
23 receipts, receipts obtained by Old GM for the period June 1  
24 to June 10th. But when you look at what was the definition  
25 of receipts, what they were trying to capture by that sheet

1 it did not involve repayments on intercompany loans, it  
2 essentially referred to payments made from outside sources.

3 So therefore there is nothing to dispute the fact  
4 that the loan was repaid, and that was GM Canada satisfying  
5 that obligation.

6 Now the -- you've raised the issue and you wanted  
7 me to respond to the void/voidable issue, and I will agree  
8 with you, I thought I knew the answer before, I actually  
9 tried to read some more of the cases, and the cases are not  
10 consistent.

11 549 cases I think are pretty consistent. 549  
12 cases say it's voidable, not void.

13 363 cases raise the specter as to whether it is  
14 void ab initio, and 362 cases talk about it being void ab  
15 initio.

16 THE COURT: 549 offenses are a lot more series  
17 than 547 preferences.

18 When I was a practicing lawyer, maybe I was an  
19 irresponsible one, I used to counsel my clients that it was  
20 okay to take a preference, but I would never in 1,000 years  
21 have told a client that it was okay to take an unauthorized  
22 post-petition transfer.

23 MR. STEINBERG: Oh, I agree with that, Your Honor.  
24 But there are -- there are I think three or four responses I  
25 have to Your Honor to that particular point.

1 First, there was no 549 violation if you agree  
2 with me that it was GM Canada who was paying the obligation.  
3 The loan --

4 THE COURT: Well, Mr. Fisher, if he's going to  
5 tell me the same thing orally that he told me in his brief  
6 is going to say that he has a couple of answers to that.  
7 One, his contention, which I assume is hotly disputed, that  
8 the lock-up agreement itself was a post-petition transfer,  
9 but also that collapsing doctrine is respected in the Second  
10 Circuit, and then he points out a number of things,  
11 including the 450 million buck loan being conditioned on the  
12 premise that funds be used solely to settle the Nova Scotia  
13 obligation on the notes and the similarity between the 367  
14 million going in and out of the escrow.

15 Those look like things that walk and talk and  
16 quake his contentions of fact with which I assume you're  
17 going to differ.

18 MR. STEINBERG: Yeah, but I think there are issues  
19 that make that actually ripe for Your Honor's determination  
20 right now, and if I can I'd like to address each one of  
21 those issues.

22 THE COURT: Well, do you dispute that collapsing  
23 doctrine under appropriate circumstances be you used in the  
24 Second Circuit?

25 MR. STEINBERG: Your Honor, I agree that the --

1 that there is such a thing as a collapsing doctrine and it  
2 is relevant law in the Second Circuit, but I will add, Your  
3 Honor, that the collapsing doctrine has zero application if  
4 the actual transfer was repaid. There's nothing to collapse  
5 at that time and there's no damage at that point in time,  
6 and that's why it's so central for Your Honor to make the  
7 factual determination, which is not in dispute, that the  
8 consent fee was paid -- that the now -- the \$450 million  
9 loan was repaid, and repaid before the bankruptcy -- before  
10 the sale order.

11 If that happens what is the damage to Old GM? It  
12 made a loan and it got repaid. What are you collapsing?  
13 What's the avoidable transfer? There is none.

14 So I can say to Your Honor that there is a concept  
15 of collapsing, but if the facts don't match up it's an  
16 irrelevancy, and that's what I'm saying to Your Honor today,  
17 it is an irrelevancy for the one fact that makes it  
18 difference in this case.

19 I will also say to Your Honor that -- that it's  
20 not -- it's not unusual in the context of these cases when  
21 you're faced with a 363 sale and you're trying to act very  
22 quickly and it's a very, very important case of national  
23 interest, that Your Honor signed a cash management order in  
24 this case, and the cash management order essentially try to  
25 keep business as usual between Old GM and New GM.

1           You authorized Old GM, which was in some respects  
2 the central back of all its (indiscernible - 01:39:20) of  
3 all its subsidiaries and make transfers as appropriate to  
4 its non-debtor subsidiaries.

5           If this was a post-petition transfer they could  
6 have paid the consent fee in order to keep GM Canada out of  
7 bankruptcy. They could have funded all of their non-debtor  
8 entities for purposes of trying to keep those entities out  
9 of bankruptcy if it was in their business judgment.

10           Under the purchase order they were never going to  
11 do that without the consent of the governments, because the  
12 governments had covenant protections on that both in the  
13 master MSPA and the DIP loan agreement.

14           So there was an automatic check on their ability  
15 to do that, but the governments said yes.

16           And the reason why that's relevant is that the  
17 governments, who became the owner of New GM -- the primary  
18 owners of New GM -- all bought cash.

19           So that is another argument that we make in our  
20 case, which is since New GM bought the cash this was their  
21 decision about how to spend their money for purposes of  
22 doing the acquisition.

23           If the \$450 million loan would not have been made  
24 that cash would have gone to New GM. It could have then  
25 done the same transaction a month later. If the receivable

1 had not been repaid, the \$450 million loan was made but not  
2 repaid, New GM would have bought that receivable and kept  
3 that obligation.

4 And the issue about that there was strings  
5 attached to the money. It was clearly documented as a loan.  
6 The people involved in this transaction, when you talk about  
7 candor to Your Honor about whether you should take a post-  
8 petition transfer or not, they documented this as a loan,  
9 they believed that this was GM Canada's money.

10 There were some strings attached to that, but that  
11 just meant that there were contractual rights that Old GM  
12 could have exercised against it wholly-owned subsidiary if  
13 it chose to in order to try to bring back the money earlier  
14 rather than later.

15 It chose not to do that because it was  
16 effectuating an agreement that had the approval of the  
17 governments, that was included in the disclosure schedules  
18 as to what they needed to do to keep old -- GM Canada out of  
19 bankruptcy so they could accomplish their 363 sale without  
20 the detriment of trying to run two paralegal proceedings at  
21 the same time and trying to have coordinations between a  
22 Canadian judge and Your Honor and how to effectuate that  
23 within a very short period of time.

24 They had the ability under the cash management  
25 order to make this post-petition if they had wanted to, but

1 it happened prepetition any way, and they had the ability  
2 that it was end of the day New GM's money, not anybody  
3 else's money that was making the decision.

4 And these -- these noteholders -- and I know Your  
5 Honor has -- has recognized the fact that -- that sometimes  
6 when I talk it sounds like I'm the noteholders talking as  
7 well too, and I don't -- I don't hide from that fact for a  
8 particular reason, and I'd like to be able to explain that.

9 The reason why this lock-up agreement -- the  
10 reason why this lock-up agreement is so important to New GM  
11 -- forget about the noteholders -- why it's important to New  
12 GM is because there's a release of the intercompany loan to  
13 GM Canada, which is their wholly-owned subsidiary.

14 The structure of their 363 acquisition, what they  
15 were trying to do, was to see whether I could get Canada  
16 without have been to file a Canadian insolvency proceeding.  
17 They needed to get that release done in order not to have  
18 the parallel proceeding.

19 The attack on the lock-up agreement, whether it's  
20 prepetition or post-petition, has really very, very little  
21 to do with a claims objection. The reason why I say that is  
22 that the lock-up agreement by its terms does not constitute  
23 the allowance of the noteholder's claims or the deficiency  
24 claim. It says it's going to be allowed to the fullest  
25 extent permitted by law. It preserved objections by

1 somebody to be able to go to Your Honor. That was clear  
2 from the -- from the discovery here, the request was made by  
3 the noteholders to have it deemed allowance. And Weil  
4 Gotshal and Old GM people properly said, I can't do that, I  
5 can't bind a circumstance like that. We'll support you.  
6 We'll support you. We think you have good grounds for the  
7 support, but we can't bind anybody, it wouldn't be binding  
8 any way, so take it for what it is.

9 So the lock-up agreement itself does not  
10 constitute the allowance of the claims. The lock-up  
11 agreement itself doesn't even create the claims. The  
12 guaranteed claim was created in 2003, pursuant to a  
13 guarantee instrument that was signed, and the deficiency  
14 claim was created by the fact that Nova Scotia is an  
15 unlimited liability company, it's inherent with that claim,  
16 and the swaps that were -- the swap issue came because New  
17 GM bought the swaps as part of the MSPA, as part of the  
18 asset purchase agreement. It's not part of the lock-up  
19 agreement.

20 So why do you -- why do you attack the lock-up  
21 agreement in the context of a claims objection? It's the  
22 reason why Mr. Venaski (ph) testified at his definition,  
23 Mr. Venaski being the GUC Trust administrator, the guy from  
24 Wilmington Trust. And this is -- this an undisputed fact as  
25 well too as part of our summary judgment motion. He says,



1 we're going after the release that GM Canada got. We want  
2 these noteholders to go against GM Canada, we don't want  
3 them to go against the funds in the GUC Trust, that's why  
4 they're doing it.

5 Now, the intercompany loan settlement is a  
6 bilateral settlement, right? Because you have Nova Scotia  
7 Finance on one side, GM Canada is on the other side. Both  
8 sides to that settlement want to see the settlement  
9 preserved.

10 The Nova Scotia Finance side is the Nova Scotia  
11 trustee and indirectly the noteholders, they have that  
12 aligned interest that New GM has. New GM, as the purchaser  
13 of GM Canada, wants to see that preserved. Their structure  
14 was three years ago to acquire GM Canada and not be saddled  
15 by this intercompany loan of a billion three Canadian.

16 The reason why I've been such an active  
17 participate in this case, why you've heard my voice  
18 sometimes when you didn't want to hear my voice, was because  
19 I'm trying to preserve for this purchaser, this good-faith  
20 purchaser who structured a deal that they didn't have to  
21 file a Canadian filing, that that intercompany release is --  
22 that that intercompany loan release is preserved. That's  
23 the primary reason why the lock-up agreement is such a  
24 central focus in the claims objection, and that's why the  
25 primary focuses that it's New GM more than anybody else who

1 wants to make sure that that doesn't happen. And it's New  
2 GM who says that when you deal with Rule 60(b) relief when  
3 you'd want to sit there and say 2.7 years since the sale  
4 order and push it off even further to leave this issue  
5 outstanding, and New GM has been saying for two years the  
6 issue should not be left outstanding.

7 Each day that you leave it outstanding you make it  
8 even more emphatic why the equitable mootness doctrine  
9 applies.

10 And it is kind of shocking that someone sits there  
11 and wants to attach nefarious motives to Old GM -- not New  
12 GM -- Old GM as to how they conducted this case when they  
13 put the information all out in the public arena and put the  
14 information to the creditors' committee, and the creditors'  
15 committee chose at that time not to deal with it. And even  
16 if they tried to deal with it there was nothing to be dealt  
17 with.

18 And Your Honor has raised the issues about the --  
19 the loan that was made to sort of -- to summarize it, the  
20 loan was made prebankruptcy, the loan proceeds were GM  
21 Canada's proceeds, GM Canada took actions after the filing.  
22 GM Canada wasn't in bankruptcy to effectuate an intercompany  
23 settlement that involved its assets. It ended up repaying  
24 that loan to Old GM so Old GM was never hurt at all, and the  
25 person who could have been hurt was not the unsecured

1 creditors in this case, it was New GM who could have been  
2 potentially hurt, but it was never going to be hurt.

3 Because the issue of whether -- when you buy a  
4 company and you have as part of a conglomerate change a  
5 wholly-owned subsidiary, whether your cash is sitting in  
6 your wholly-owned subsidiary or whether you're upstreaming  
7 the cash to the parent company which you bought both, it  
8 really doesn't change the consolidated value of the entity  
9 that you bought. You just decide to keep the cash there or  
10 not cash there. For whatever reasons GM Canada repaid the  
11 loan before the sale.

12 I think the reason that was given to me, it's not  
13 in the record, I'll just throw it out, it was an interest  
14 bearing loan. GM Canada didn't want to -- didn't want to  
15 incur the interest if it ultimately had the cash to repay  
16 the loan.

17 And why -- why didn't they just pay it off  
18 original, why did they need the loan from Old GM? Is that  
19 because in the uncertain chartered waters that everybody was  
20 facing on May 29th you didn't know what was going to happen  
21 in the Old GM bankruptcy, you didn't know whether GM Canada  
22 was going to end up having to file for bankruptcy, and you  
23 needed to preserve some cash at the GM Canada side to be  
24 able to deal with circumstances in running a business.

25 So -- and by the way, the notion that GM Canada's

1 creditors were treated differently than Old GM's creditors  
2 is true. You know, GM Canada wasn't in bankruptcy, GM  
3 Canada wasn't governed by the U.S. Bankruptcy Code, it  
4 wasn't governed by the plan. By definition non-debtor  
5 foreign subsidiaries sometimes treat their creditors  
6 differently. Why? One that they're allowed to. But the  
7 other why is because those parties have different  
8 contractual rights and different obligations than -- than  
9 the creditors on the U.S. side. It's just -- it's just the  
10 fundamental truth that's involved there. And that's what  
11 happened here.

12 The noteholders in this case, they had the benefit  
13 of having a claim against GM Nova Scotia as well as a claim  
14 against Old GM.

15 It is not much different than some -- you know,  
16 when I -- and when I was involved in Enron I represented the  
17 examiner and they were always dealing with the issue whether  
18 the Enron North America creditor, who had a guarantee from  
19 Enron Corp., should be entitled to get a greater  
20 distribution than the -- than the direct creditors of Enron  
21 Corp., whether substantive consolidation should apply or  
22 not, they had claims against two borrowers, and they argued  
23 that they should be able to -- be able to collect from both  
24 borrowers, which would give them a greater recovery.

25 In this case they're not both governed by a U.S.

1 proceeding, but they both had different contractual rights.  
2 The U.S. bondholders didn't have those rights, and that was  
3 the fundamental issue that the governments and the New GM  
4 had to face when doing the acquisition. Do I want to  
5 effectuate a repayment to the noteholders, which would free  
6 up GM Canada from filing for bankruptcy and provide for a  
7 more expedient and clearer path for Old GM to reorganize,  
8 and is it worth it from New GM's perspective, from the  
9 governments perspective to buy that kind of surety, to buy  
10 that kind of certainty? Was it worth it?

11 They made the business decision, and it wasn't a  
12 decision made by Old GM or New GM, it was a decision made  
13 primarily by the people who controlled the checkbook. It  
14 was ultimately approved by the governments. Canadian and  
15 U.S., both who was funding the loan and the sale. They made  
16 the decision this is the way we wanted to go. This is the  
17 structure that we wanted to go.

18 Now, I wish with the benefit of hindsight I was  
19 their special counsel and on June 2 I could have said to you  
20 this is what we're doing, and be able to tell Your Honor  
21 that this is what we're doing so Your Honor would have been  
22 able to see this and would have foreclosed every type of  
23 opportunity.

24 No one raised the issue, no one thought that it  
25 was -- it was an issue that needed to be presented because

1 they thought they had dealt with it in a certain way, a way  
2 where GM Canada was dealing with its own fiscal  
3 responsibilities and that GM Canada was facilitating. But  
4 there clearly -- there clearly was no attempt to hide it.

5 And even though I'm not the person who was the  
6 orchestrator or the person who had the disclosures, I have  
7 the utmost respect to Old GM's counsel, and they clearly  
8 understood what they were doing. They put it in a  
9 securities filing. The market reacted to what had happened  
10 there, the price of the noteholder bonds went up  
11 significantly because of this deal. The market knew right  
12 away what was going on. The disclosures that happened in  
13 this case knew what was going on. Every opportunity that  
14 there was a disclosure that was going on.

15 It's kind of funny when you look at the papers and  
16 you see what was the -- what was the fallibility of the 8-K  
17 on June 1? What did the -- what did the GUC Trust say was  
18 wrong? What should have been the grade of disclosure? What  
19 was the underlying issue that leads to what they tried to  
20 argue on Tuesday was the insider trading issue? What was  
21 the things that were omitted? Two things, only two things  
22 that they said.

23 One, that there was no disclosure that Old GM had  
24 lent the money to GM Canada, it was a statement that GM  
25 Canada was paying the consent fee. There was clearly a

1 disclosure that the consent fee was paid. There was clearly  
2 a disclosure that the noteholders were going to get a  
3 consent fee and it wasn't going to reduce the amount of the  
4 debt. That was in the 8-K. That information was there, it  
5 was out in the public arena, everybody understood that. But  
6 he said we should have disclosed that this emanated from an  
7 original loan from Old GM as for purposes of the lack of  
8 disclosure.

9 My simple answer to that was, I disagree with  
10 that, I think he's wrong, but I don't even pretend to be a  
11 securities lawyer, I'll just say it simply, four days later  
12 in the disclosure --

13 THE COURT: Well, I used to be a securities lawyer  
14 and we had a doctrine then, unless they've done away with it  
15 in the 25 years since I did so much of this, you call it  
16 half truths, and you are not allowed, or at least you used  
17 to not be allowed until 10(b)(5) to state facts without  
18 additionally stating facts necessary to make those facts  
19 that had been stated not misleading. That may be a  
20 paraphrase, it was a while ago, for the last 20, 25 years  
21 I've been doing bankruptcy, but I remembered that principal.

22 And I'm not saying that Old GM violated the 34 Act  
23 or made a false 8-K filing or a false filing of any sort,  
24 but what I am saying is that half truths aren't whole  
25 truths, and certain facts that Old GM gave out \$450 million

1 for the purpose, as least one of the exhibits your opponent  
2 puts forward, of funding the \$367 million consent fee might  
3 in the view of some be necessary to clarify a statement that  
4 otherwise suggests that GM Canada was the source of that  
5 money.

6 MR. STEINBERG: Well, Your Honor, I think what you  
7 said about the half truths sounds true. So while not a  
8 securities lawyer and only knowing a little to be dangerous  
9 I'm not even going to try to quibble with what your memory  
10 is.

11 The thing -- the point that I was going to try to  
12 make was that four days later in the disclosure schedules  
13 that were sent over in connection with the MSPA it was  
14 disclosed in the disclosure schedules that Old GM had made  
15 the \$450 million loan to GM Canada. So that information was  
16 made known to the creditors' committee right away.

17 Well, we can leave it for somebody else, it's not  
18 going to be part of this trial whether the fact that that  
19 information wasn't in an 8-K was in any way relevant to a --  
20 to the noteholders as to whether what this transaction was  
21 about. But the \$450 million loan from Old GM to GM Canada  
22 was disclosed in the disclosure schedules on June 5th.

23 So my simple answer to you on that first point  
24 which they talked about the infirmity is it was there, they  
25 knew about it. Whether anybody thought that it was



1 important or not, you've already heard from Mr. Mayer's  
2 testimony he didn't think anything about GM Canada was  
3 important.

4 The second thing that they said was the infirmity  
5 in the 8-K, just to put it on the table, was that they  
6 believed that Old GM was going to facilitate Nova Scotia  
7 Finance's bankruptcy filing which would then make it easier  
8 to assert a deficiency claim and that should have been  
9 disclosed that Old GM was going to facilitate it, not oppose  
10 it.

11 And my simple answer to that was the 8-K referred  
12 to the deficiency claim. The deficiency claim comes up in  
13 the context of a Nova Scotia Finance bankruptcy filing.

14 The S-4 that was filed before and also in the  
15 public arena talked about the unlimited liability company  
16 nature of this and that it could be asserted in a deficiency  
17 claim.

18 The notes themselves had a default if Old GM filed  
19 for bankruptcy. These notes then would automatically be in  
20 default and the noteholders have the ability to put Nova  
21 Scotia Finance into bankruptcy any way.

22 The -- those issues about whether an entity -- and  
23 by the way it was GM Nova Scotia, not Old GM that consented  
24 to the filing.

25 So those are the only two things of all the things

1 in the lock-up agreement that they've identified was  
2 deficient in the 8-K. Everything else was disclosed.  
3 Everything else was open and notorious as the material  
4 definitive agreement entered into on day one of the  
5 bankruptcy petition.

6 Now they try to argue that, you know, all right,  
7 you made all these disclosures, but ah ha, you didn't make  
8 these disclosures in certain areas and therefore we gotcha.  
9 And so they point to the schedules and said you didn't  
10 describe the \$450 million loan in your schedules. And the  
11 reason why is that the schedules say they're not tracking in  
12 the schedules intercompany loans. So whatever they thought  
13 was the gotcha wasn't applicable.

14 They say that you didn't put in the fact that Nova  
15 Scotia Finance should be one of the 50 largest unsecured  
16 creditors in the case in the context of filing a petition.  
17 Well, okay, but you're not supposed to list insiders and  
18 affiliates, so you weren't going to list that any way.

19 The fact of the matter is they're grasping at  
20 straws to try to -- to basically deflect the attention from  
21 the fact that it was all there. It was all there and they  
22 knew about it.

23 And Your Honor, when you -- when you -- when you  
24 said that -- in response to the half truth about is it  
25 relevant that Old GM gave the money to GM Canada? In the

1 public filings made to Your Honor where they explain the  
2 cash management system they explain that Old GM was sort of  
3 like the central bank and it gave out its monies to its  
4 subsidiaries as needed and when needed for purposes of their  
5 operations. That -- that wasn't anything that was really  
6 hidden. And I'm assuming while not being there that the  
7 motion papers probably explain that in a sufficient way, and  
8 they got authorization to make transfers to their non-debtor  
9 subsidiaries, including GM Canada.

10 So -- so I believe that -- that there was nothing  
11 that was wrong.

12 I'd like to -- I appreciate very much, Your Honor,  
13 the opportunity for you to let me talk. I'd like to now  
14 specifically go to the 60(b) issues and why I think they're  
15 ripe and what's involved here, because I don't think I've  
16 touched on all the issues.

17 The -- on the 60(b) issues. First as a general  
18 matter they don't say what ground under Rule 60 that they're  
19 moving under. Right? They throw out it could be (1), (2),  
20 (3), or (6), but they never try to say what it is about (1).  
21 (2), (3), or (6) that are applicable.

22 If you move under (1), (2), or (3) you  
23 automatically have taken yourself out and moving under  
24 60(b)(6). 60(b)(6) is your catch-all, which you can't use  
25 if you're moving under specific grounds.

1           The -- the only thing they really say after just  
2 listing the sections that these are exceptional  
3 circumstances.

4           It is a little like the 2008 election when  
5 President Obama now, and Obama would say I'm for change, but  
6 never answered what the change was that he was for. He was  
7 just for change.

8           In this particular case they're citing exceptional  
9 circumstances, but they're not saying what the exceptional  
10 circumstances are.

11           And I think I've cited to you about Judge Sweet's  
12 decision about you can't selectively move to strike  
13 provisions of a sale order, that it's -- that the -- in the  
14 context of a sale it is all or nothing.

15           And I think it's important to look at what it is  
16 specifically that they're trying to obviate under Rule 60.  
17 There are two grounds.

18           One is assuming the lock-up agreement is  
19 considered a purchase contract. And I think our papers  
20 clearly demonstrate why it's a purchase contract. Well, it  
21 was validly assigned to New GM. And I think our papers  
22 clearly show why it was validly assigned to New GM. Should  
23 the provisions of the sale order approving the MSPA be  
24 stricken to the extent required to eliminate the provisions?

25           And without trying to repeat all the things in our

1 papers as to why we had established that it was a purchase  
2 contract and why it was a valid assignment, on the executory  
3 contract side the lock-up agreement is clearly put into the  
4 database as being assigned. It clearly says I'm assigning  
5 it.

6 And while the notice didn't immediately go out to  
7 the noteholders, we attached in our summary judgment papers  
8 the letters that Mr. Benamo (ph) from New GM gave to  
9 Mr. Zirinsky saying the lock-up agreement has been assigned  
10 to you, and Mr. Zirinsky's continual representations  
11 throughout this proceeding that he recognizes that the lock-  
12 up agreement has been assigned to us -- assigned to the  
13 noteholders.

14 So there is no doubt that the lock-up agreement  
15 was designated as an executory contract, was assigned, and  
16 no one has questioned it.

17 And by the way, the committee has no standing to  
18 object to an executory contract issue. The committee did  
19 not have notice of what was an executory contract. The  
20 committee did not have access to the database. And the  
21 committee negotiated the terms upon which that was to  
22 happen. And the reason for that was a logical base.

23 New GM was taking every asset that it wanted to  
24 take. So they wanted to take an asset they were going to  
25 take the asset. The only person they had to deal with was

1 the counterparty to the contract. And if the counterparty  
2 was going to oppose it then they would oppose it. If not  
3 they were going to take it. If it wasn't even a good asset  
4 but it was more of akin to a liability but New GM wanted to  
5 take it any way, God bless from the estate's viewpoint, they  
6 just relieved the estate of a liability. That's why the  
7 committee took themselves out of this -- this circumstance.

8 They don't have standing. Not having access to  
9 the database, not having access to notice, they don't have  
10 standing to object to the assignment of the lock-up  
11 agreement. The only party who had standing to do that were  
12 the noteholders, the parties of the lock-up agreement, they  
13 chose not to. They chose to accept it.

14 The other thing is that we say it's a purchase  
15 contract because -- and as I've argued before, Your Honor,  
16 on other issues relating to the MSPA -- it's a purchase  
17 contract, because it's not an excluded contract. It doesn't  
18 meet the definitions of excluded contracts. Purchase  
19 contracts are a broader term than executory contracts. The  
20 people who drafted this MSPA did a belt and suspenders  
21 approach. I'll have something called purchase contract,  
22 I'll have something called executory contracts. Executory  
23 contracts aren't even 365 definition executory contracts.  
24 It's anything that we designate as potentially being  
25 executory as a manifestation of our intent that we want to

1 have it assigned to us, and that's what happened here. And  
2 that process of designating contracts and assigning it to  
3 New GM had no time limit. It wasn't like I had to do it by  
4 two months three months, four months from now, it had no  
5 time limit to do that at all.

6 So on the first 60(b) issue is that we clearly  
7 establish that under the MSPA the lock-up agreement was  
8 assigned to us. That's why they need to have the 60(b)  
9 release, because they want to say forget what we agreed to  
10 before, forget that we don't -- you know, forget that they  
11 originally understood that we didn't have standing, we don't  
12 like it.

13 And by the way, just so it's clear, what's the  
14 significance -- what's the significance of the fact that  
15 this is assigned to us as -- assigned purchase contract? It  
16 takes away the prepetition/post-petition issue clearly.  
17 Because purchase contracts are prepetition and post-petition  
18 agreements. It doesn't matter. When Old GM filled it was  
19 an ongoing business, it was entering into contracts every  
20 day. So anything that was designated as something that they  
21 wanted to take over they were going to take it. It was  
22 going to be -- it didn't matter whether it's preopposed.

23 So if the lock-up agreement is a purchase  
24 contract, if the lock-up agreement is an assigned executory  
25 contract it doesn't matter whether this was a prepetition or

1 a post-petition agreement. It was assigned to New GM. New  
2 GM took what the responsibilities are, and what those  
3 responsibilities are, as limited as they are on, an ongoing  
4 basis it's the cooperation provision, the cooperation  
5 provision, which would have kept me in the tenth row of this  
6 argument letting someone else talk if not for the fact that  
7 they're going after the release given on the intercompany  
8 loan which affects GM Canada.

9 So the first issue that they talk about --

10 THE COURT: Mr. Steinberg, you've been going on  
11 for over an hour now. Are you going to get to ripeness?

12 MR. STEINBERG: Uh-huh. Yeah.

13 THE COURT: Please.

14 MR. STEINBERG: Okay. The ripeness issue is that  
15 when you move for 60(b) relief there's not an issue as to  
16 whether it's provisional or not. You have to move. You  
17 found grounds for it, you have to move. Otherwise you're  
18 faced with what is here already, which is the equitable  
19 doctrine. If they felt there was a need to act because they  
20 were facing a one-year statute of limitations because they  
21 were moving under 60(b)(1), (2), or (3), they had to move  
22 that and move that on the agenda immediately, not defer this  
23 for two years and say to Your Honor take a wait and see  
24 approach and defer it even further.

25 All the grounds and all the basis for why you have



1 equitable mootness when you have a plan that's been  
2 substantially consummated and thousands of transactions that  
3 are predicated upon the 363 sale structure, you have to move  
4 to upset it if you want to upset it, and do it now, not  
5 before.

6 The reality is they can't do what they're trying  
7 to do. The reality is that they can't do that.

8 And why it's appropriate for summary judgment is  
9 because if Your Honor agrees with the issues that I've  
10 raised in the summary judgment you will have taken this  
11 trial and you will have cut it by more than 50 percent and  
12 you will have eliminated more than 50 percent of the  
13 witnesses in this case. And that's the reason why people  
14 have moved for summary judgment. That's the reason why it's  
15 ripe to deal with that issue now.

16 And, you know, I know that what I've said today in  
17 my -- in my more than an hour has touched on issues that are  
18 part of the trial, and the reason why if I can remember the  
19 childhood refrain, and my kids are old enough that my memory  
20 is a little saggy on this, but you know, the knee bone is  
21 attached to the ankle bone, the ankle bone is attached to  
22 the foot bone. You know, things are connected. Issues in  
23 cases are connected. My job here is to try the make this to  
24 cut out the knee and the ankle and to make this an issue  
25 about the foot, because the knee and ankle pertain to me,

1 and there are no genuine issues of disputed material facts  
2 that are involved here. That's why it's ripe to be decided  
3 now.

4 The notion that you could put off 60(b) relief  
5 indefinitely on the grounds that maybe you don't need it.  
6 You definitely need it. I've established the grounds that  
7 you need it. And you can't get it. And you might as well  
8 get rid of it so you can have a streamline trial instead of  
9 taking Your Honor's time for three weeks when this should be  
10 a four-day trial.

11 Because if I'm right that a purchase contract and  
12 assigned executory contract means that the prepetition/post-  
13 petition distinction of when the lock-up agreement was  
14 signed doesn't matter then you don't -- then you've  
15 eliminated witnesses, you've eliminated half of the direct  
16 testimony on everybody in this case.

17 So -- so that's the reason why it's ripe for Your  
18 Honor to deal with it for purposes of economy, for purposes  
19 of the judicial policy on summary judgment, and for purposes  
20 that it's ripe right now.

21 The other grounds that they're moving for  
22 eliminating the -- the 60(b) relief is that assuming the  
23 swaps of purchased assets were validly assigned to New GM  
24 should the provisions of the sale order approving the MSPA  
25 be stricken to the extent required to eliminate those

1 provisions. And in our papers we establish that we  
2 designated the ISDA (ph), the October 15, 2001 ISDA for an  
3 assignment to the executory contract, and we attached the  
4 confirmations which say in 2003 that that confirmation is  
5 being entered into pursuant to the 2001 ISDA, that this is  
6 an integrated agreement and it'll constitute one  
7 transaction. This was assigned. The only party who could  
8 object to that is the Nova Scotia Finance trustee. He's not  
9 objected to it, he's accepted the fact that New GM owns the  
10 swaps.

11 These issues are before Your Honor because there  
12 are no genuine issues of material fact. They're wrong, I'm  
13 right, they haven't presented any reason to suggest that I'm  
14 wrong. Anything that's genuine, that is material, that's  
15 disputed, and therefore the 60(b) issues are ripe before,  
16 and I think it's appropriate to get rid of them so that this  
17 case moves forward.

18 And I think it's incumbent when you have this type  
19 of issue, this overlay that you need to get rid of it.

20 The -- Your Honor, I'm not sure -- Your Honor, I'm  
21 not sure if I've answered all of your questions. If I have  
22 not answered your questions I -- if you could remind me then  
23 I would like to do it now. If I have done that and you've  
24 heard enough of me for now then I'm proceeded to cede the  
25 platform.

1 I probably had some other things to talk about,  
2 but if I look at my script I probably could figure out  
3 whether they were taken or not.

4 So if you don't have any other questions I'm  
5 prepared to --

6 THE COURT: I think it's time to hear from  
7 Mr. Fisher.

8 MR. FISHER: Your Honor, Eric Fisher from  
9 Dickstein Shapiro for the GUC Trust.

10 There's a manner in which this motion has become a  
11 motion about everything, and I'm sure that Mr. Steinberg and  
12 I could go back and forth all day about all of the  
13 underlying facts in the case, and I'm not going to spend my  
14 argument time doing that, Your Honor. I'd like to focus in  
15 very quickly on the 60(b) relief issue and on the questions  
16 that Your Honor asked at the outset.

17 In July 2010 as part of our initial objection in  
18 this case we indicated that we were asserting and reserving  
19 our rights to pursue 60(b) relief protectively. That's the  
20 word that we used. And we also made clear in the objection  
21 that in the event that we needed to pursue 60(b) relief that  
22 relief -- retried to make that relief as limited as  
23 possible.

24 What the Second Circuit has said about Rule 60(b),  
25 "Is that it strikes a balance between serving the ends of

1 justice and preserving the finality of judgments and should  
2 be broadly construed to do substantial justice."

3 So what's at stake when Your Honor deals with  
4 60(b) issues are two competing policy concerns. One, the  
5 finality of judgments, and the other doing substantial  
6 justice.

7 We actually had tried to proceed in a way that  
8 respects both of those objectives and respects that balance.

9 The reason that we asserted 60(b) protectively is  
10 because what we were saying is if we do not need relief from  
11 the sale order we won't pull the trigger on that. We  
12 respect that wherever possible judgments should be treated  
13 as final.

14 The reason why we felt compelled nonetheless to  
15 include a request like that for relief in our initial  
16 objection back in July 2010 is because we were concerned  
17 that the demands of justice may require that we pull the  
18 trigger on that relief. That's exactly why we're in the  
19 situation that we're in right now.

20 Your Honor asked is the request for 60(b) relief  
21 still quote "Up in the air"? Yes, it is. The reason that  
22 it is, is because we're actually more confident now than we  
23 were back in July 2010 that we likely won't need any relief  
24 from the sale order because of what we've learned in  
25 discovery.

1           Before you get to the question of whether it's  
2 necessary to provide relief from the sale order you need to  
3 construe the sale order.

4           So at the heart of this is the question of whether  
5 the sale order constitutes this Court's approval of the  
6 assumption and assignment of the lock-up agreement.

7           For example, that's one question at stake. If the  
8 sale order is not construed to mean that the lock-up  
9 agreement was assumed and assigned to New GM then at least  
10 with regard to that issue we don't need relief from the sale  
11 order.

12           And so at trial we're going to set out to prove  
13 that the lock-up agreement is void because it's a post-  
14 petition agreement. If it's a void then it wasn't assumed  
15 or assigned and it's not otherwise a purchase contract.

16           We're also going to set out to show that even if  
17 it were a prepetition agreement it wasn't validly assumed  
18 and assigned because of non-compliance with the assumption  
19 and assignment procedures order.

20           All of these facts are we're going to show at  
21 trial. And if we prevail that the lock-up agreement was not  
22 properly assumed and assigned then we won't need relief from  
23 the sale order with regard to that issue.

24           Similarly with regard to the swaps. At trial  
25 we're going to show that the swaps were not properly assumed

1 and assumed to New GM. If we can show that we won't need  
2 relief from the sale order with regard to any issue  
3 concerning the swaps.

4 So it's only when Your Honor gets to the end of  
5 the trial that Your Honor will even need to consider whether  
6 relief from the sale order is necessary. And that's why  
7 when we say that this issue is premature or this issue is  
8 not ripe I think there's two components to that. There's a  
9 legal component. We're saying legally this is something  
10 we've asserted, but we're not now seeking that relief. And  
11 so at the moment as a legal matter the issue is not ripe.

12 But I think we're also saying that prudentially  
13 and pragmatically that this is an issue that the Court may  
14 never need to reach, and if the Court may never need to  
15 reach it why reach it now, particularly since as is apparent  
16 from Mr. Steinberg argument in order to reach it Your Honor  
17 needs to wade your way through almost all of the facts in  
18 the case.

19 Mr. Steinberg said that if Your Honor takes 60(b)  
20 out of the case and rules now that this was a prepetition  
21 agreement that was validly assumed and assigned then 50  
22 percent of the witnesses go away. Yes, 50 percent of the  
23 witnesses go away because Mr. Steinberg has set up his  
24 summary judgment motion, which was supposed to be about  
25 limited issues, in a way that tries to cover everything and

1 tries to get this Court to decide now that this was a  
2 prepetition agreement validly assumed and assigned in order  
3 to force our hand on Rule 60(b).

4 If New GM wanted to be respectful about the  
5 finality of that judgment it wouldn't try to force any hand  
6 when we're here saying we may not need relief from the sale  
7 order. It just doesn't make any sense.

8 In terms of the relief that we're seeking under  
9 Rule 60(b). Well, 60(b) provides:

10 "On motion and just terms the Court may relieve a  
11 party or its legal representative from a final judgment,  
12 order, or proceeding for the following reasons."

13 And there are four different sub-provisions of  
14 Rule 60(b) that we think would apply here.

15 The first is mistake. Because, Your Honor, if the  
16 lock-up agreement -- if the sale order is read to mean that  
17 the lock-up agreement was validly assumed by Old GM and  
18 assigned to New GM, then we respectfully submit that the  
19 sale order is mistaken, and that Your Honor didn't have a  
20 record on which to make any findings about the lock-up  
21 agreement, whether it was prepetition or post-petition,  
22 whether it was subject -- whether it was executory or non-  
23 executory, whether the funds that were used were property of  
24 Old GM or property of GM Canada, there simply was no record.

25 I don't think that there's any question that this



1 agreement is monumentally important to the unsecured  
2 creditors of Old GM, and obviously monumentally to the  
3 noteholders who stand to get a windfall if the lock-up  
4 agreement is applied in accordance with its terms.

5 So if the order is read to mean that the lock-up  
6 agreement was a valid prepetition agreement that was validly  
7 assumed and assigned to New GM then we respectfully submit  
8 that the sale order in that narrow regard is mistaken and  
9 would seek relief from this portion of a sale order that  
10 achieves that result.

11 But again, Your Honor, we don't think that's the  
12 proper reading of the sale order. We actually think the  
13 evidence will show that it wasn't validly assumed and  
14 assigned so therefore the sale order is no obstacle to the  
15 relief that the GUC Trust is seeking.

16 So that's why we've been careful to preserve our  
17 rights under 60(b)(1), but also not to pull the trigger.

18 Another ground listed in 60(b)(1) is excusable  
19 neglect. Mr. Steinberg says there was disclosure out there,  
20 the creditors' committee knew about the lock-up agreement,  
21 if they wanted to litigate the lock-up agreement the time to  
22 litigate the lock-up agreement was before the sale order was  
23 approved.

24 Well, the reason why these disclosure issues take  
25 us down this factual rabbit hole, is because in order for

1 Your Honor to decide whether the disclosure was fair and  
2 appropriate and complete -- and by the way we're not talking  
3 about the standards of the securities laws, we're talking  
4 about was it complete enough to put the creditors' committee  
5 on notice that there was a major transaction happening that  
6 had a major impact on the unsecured creditors of Old GM?  
7 That's the disclosure standard. I'm not quibbling with  
8 securities filings. We're taking fundamental issue with the  
9 question of whether the creditors' committee and also  
10 whether this Court had fair notice of what this lock-up  
11 agreement transaction was all about.

12 And no matter what -- certainly I could go in and  
13 out of each of the disclosures that Mr. Steinberg mentioned,  
14 but fundamentally what was not disclosed was that Old GM was  
15 the source of funds for the payment of this \$367 million  
16 consent fee, that there was a \$450 million wire transfer on  
17 Friday, May 29th, and that that wire transfer to a GM Canada  
18 account was pursuant to a trust agreement, and if the terms  
19 of the trust agreement were not satisfied under the trust  
20 agreement the money reverted to Old GM. And the trust  
21 agreement terms on June 1 were not satisfied. And the trust  
22 agreement was modified post-petition on two different  
23 occasions because the condition was not satisfied.

24 Those facts were not disclosed. And certainly  
25 those facts wouldn't need to be disclosed in the securities

1 filing, but those facts would need to be disclosed to the  
2 creditors' committee or certainly to this Court in  
3 connection with -- if anyone thought that Your Honor's sale  
4 order was approval of the lock-up agreement at a minimum the  
5 fact that \$450 million of Old GM's money was moving into an  
6 account pursuant to a trust agreement, the conditions of  
7 which were not satisfied as of GM's filing of its bankruptcy  
8 petition, was certainly a fact that Your Honor should have  
9 been apprised of, if Your Honor was being asked to approve  
10 the lock-up agreement in connection with the sale order.

11 THE COURT: Mr. Fisher, you haven't yet used the  
12 word surprise, which also appears in 60(b)(1).

13 As my questions to Mr. Steinberg indicated, the  
14 idea that my sale order was approving in all of this was a  
15 surprise to me. And he may not have been at the trial, but  
16 I was. Surprise is subject to double entendre.

17 But how in your view does the fact that I was  
18 ignorant of all of this bear on 60(b) relief, if in fact I  
19 get to the merits of 60(b) relief today?

20 MR. FISHER: If Your Honor was not aware of the  
21 critical facts concerning the lock-up agreement, and Your  
22 Honor is now being told by New GM and the noteholder parties  
23 that Your Honor's sale order in effect led to the assumption  
24 and assignment of the lock-up agreement, then Your Honor, I  
25 see it more under the mistake rubric than under the surprise

1 rubric, because I don't know that surprise is directed at  
2 the Court so much as the parties, but mistake certainly is  
3 just directed at the judgment itself.

4 So Your Honor is saying that certainly by  
5 approving the sale it wasn't your intent to approve the  
6 lock-up agreement. They're saying that while in effect the  
7 sale order does that. Then I would say, Your Honor, that if  
8 they're right about their reading of Your Honor's order then  
9 the order is mistaken. And that's why I think it fits more  
10 comfortably under that -- under that rubric.

11 Surprise and excusable neglect I think applies to  
12 the fact that the creditors' committee did not -- was not  
13 aware of the significance of this transaction for Old GM's  
14 creditors.

15 No matter -- no matter what the disclosure was the  
16 significance of this transaction for Old GM's creditors was  
17 not something that the creditors' committee was aware of.  
18 And Mr. Mayer, creditors' committee's counsel, has been  
19 referred to a number of times by Mr. Steinberg. When  
20 Mr. Mayer said that they weren't -- that the creditors'  
21 committee wasn't focusing on Canada, when his deposition  
22 transcript is seen in context, it's very clear that what  
23 he's saying is we didn't know that there would be anything  
24 going on over there that would have a very dramatic effect  
25 on the constituency that we were looking to represent,

1       namely the unsecured creditors of Old GM. That's all he  
2       meant. There was no intent to look the other way and let  
3       this lock-up agreement get through and then come back a year  
4       later and challenge the lock-up agreement.

5               The idea that the creditors' committee  
6       deliberately looked the other way and now it should be  
7       punished and not allowed to challenge the lock-up agreement,  
8       that's absolutely false.

9               I thought that New GM was making a sort of knew or  
10       should have known argument. And there I say that even under  
11       a should have known standard this disclosure does not  
12       disclose the critical facts that a creditors' committee  
13       would want to know, and those critical facts did not come to  
14       light until there was sort of the full heat of adversarial  
15       discovery directed at the circumstances of this transaction.

16               What -- one thing that Mr. Mayer did testify to in  
17       his deposition was -- and this is about the 8-K -- he said  
18       that the idea that the lock-up agreement quote "was the kind  
19       of transaction that we would have expected to have received  
20       formal notice and Court approval of and we didn't consider  
21       the filing of an 8-K with a summary of the transaction  
22       without a description of its entire nature to be sufficient  
23       to in any way put us on notice of something we should have  
24       known earlier. It was in the nature of you have got to be  
25       kidding. You got a \$2.8 billion claim allowed and the

1 blessing of a massive avoidance actions cash transfer days  
2 before the case and we were supposed to divine that an act  
3 on an -- divine that and act on an 8-K without you guys  
4 going to court?" Close quote.

5 Of all the disclosure that happened with regard to  
6 the lock-up agreement -- all the disclosure that supposedly  
7 happened, but really isn't very good disclosure at all --  
8 the one place you really would have expected to find some  
9 discussion of a lock-up agreement is in the motion to  
10 approve the sale order.

11 In the proceedings before Your Honor to approve  
12 the sale order this was a deal that involved the transfer of  
13 \$450 million from Old GM on the eve of bankruptcy that we  
14 think we're going to be able to show at trial actually still  
15 -- that money still belonged to Old GM as of the date of the  
16 bankruptcy.

17 It involved an agreement that we think we're going  
18 to be able to show at trial wasn't finalized until after the  
19 GM bankruptcy petition.

20 You'd think at a minimum, even if it were just as  
21 exercise of caution, there would have been some description  
22 of this transaction to Your Honor. Even if everyone really  
23 believed that this was all done and tied up with a bow  
24 prepetition you would have thought that Your Honor would  
25 have been apprised of this -- of this -- of this agreement.

1           The creditors' committee wasn't apprised of it,  
2     aside from what if perhaps should have been known. And by  
3     the way, there's no evidence that the creditors' committee  
4     actually knew. Mr. -- Mr. Steinberg assumes that the  
5     creditors' committee read the June 1 8-K because there are  
6     time records indicating that in June lawyers at Kramer Levin  
7     reviewed public filings related to this matter, but there's  
8     no specific evidence that that particular 8-K was reviewed.

9           So we really are talking about should have known,  
10    and we're talking about an environment in which the most  
11    important things about the lock-up agreement when it comes  
12    to the question of whether or not it's a valid agreement.  
13    Those are the things that were not disclosed.

14           The amount of the consent fee, that was disclosed.

15           The fact that the consent fee doesn't apply  
16    against the principal amount of the notes according to the  
17    lock-up agreement, that was disclosed.

18           What wasn't disclosed was this massive wire  
19    transfer on the eve of bankruptcy subject to the trust  
20    agreement.

21           What also wasn't disclosed was the fact that --  
22    that the -- in the June -- in the June 1 8-K there's no  
23    discussion about the fact that Old GM had given its consent  
24    to the post-petition bankruptcy filing of GM Nova Scotia  
25    Finance Company, and that's what gave rise to this massive

1 deficiency claim.

2 And whatever was said about the swap agreement  
3 there was no discussion about the fact that ultimately this  
4 swap agreement, which they claim the worth \$564 million  
5 would become a claim against the Old GM estate.

6 Getting back to Rule 60(b), Your Honor. Under  
7 (b) (2), 60(b) relief is appropriate when there's newly  
8 discovered evidence that with reasonable diligence could not  
9 have been discovered in time to move for a new trial under  
10 Rule 59(b).

11 Here all of the evidence about the facts and  
12 circumstances that we submit will show that this was a post-  
13 petition agreement and therefore void were not facts that  
14 anyone on the outside of this transaction knew or should  
15 have known or could have reasonably discovered. It has  
16 taken many, many months and much thorough discovery to get  
17 to the bottom of those facts and circumstances.

18 Similarly the trust agreement that I mentioned to  
19 Your Honor, and that's the agreement that governed the wire  
20 of cash, the \$450 million of wire of cash from Old GM to GM  
21 Canada, that agreement was not discussed in any public  
22 filing.

23 The fact that the conditions under that agreement  
24 were not satisfied was not discussed in any public filing.

25 And again, it's taken the Federal Rules of Civil



1 procedure to get to the bottom of those facts.

2 Three, fraud. 60(b)(3) allows for relief in the  
3 event of fraud. The cases are very clear it doesn't require  
4 even bad faith. So fraud here is generally bad disclosure.  
5 And I think it's somewhat -- it's somewhat redundant of the  
6 issues I've already discussed, but we think that that  
7 applies.

8 And finally, Your Honor, 60(b)(6), any other  
9 reason that justifies relief.

10 Mr. Steinberg is half right in that if Your Honor  
11 finds that 60(b)(1), (2), or (3) apply then we're not also  
12 entitled to relief under 60(b)(6). 60(b)(6) is the catch-  
13 all. But it's not true that you can't argue that you'd be  
14 entitled to relief under (1), (2), (3), or (6), and that's  
15 all we're arguing.

16 But again, it's unfortunate that I'm even arguing  
17 that today, because I don't know that I need to argue that.  
18 I don't know that we'll ever get to a place where we'll need  
19 relief under Rule 60(b) from the sale order. That depends  
20 on what happens at trial.

21 Your Honor asked whether we've considered  
22 dismissing the request for Rule 60(b) relief without  
23 prejudice to renewing the request at some later date. And  
24 the reason we haven't is because -- again, because it could  
25 affect the finality of that judgment. We thought it was

1 important to get that request on the record and let the  
2 public know about that request and the possibility for that  
3 request before the one-year period from the sale order  
4 judgment expired, and we wouldn't want to do anything to  
5 create any impression that that's completely off the table  
6 and that 60(b) relief may not in the future be an issue.

7           And you've heard from Mr. Steinberg, you know, he  
8 accuses us of not moving fast enough. He says we should  
9 have -- we should have, you know, jumped at the 60(b)  
10 relief, we should have pressed it perhaps by TRO, and we  
11 didn't do that again out of respect for the finality of  
12 judgments and out of the incredible uncertainty about what  
13 the real facts surrounding this lock-up agreement were.

14           And it's somewhat inconsistent for New GM to argue  
15 on the one hand that getting 60(b) relief would upset the  
16 plan structure and on the other hand to try to force our  
17 hand and make us ask for that relief when it may not be  
18 necessary.

19           The idea that if the lock-up agreement were voided  
20 or if the -- or if there were relief from the sale order  
21 granted to find at least that the lock-up agreement had not  
22 been assumed or assigned to New GM, that would not knock the  
23 props out from under the sale transaction, Your Honor.

24           I'm not here to write some counter-history, but  
25 the other way that this could have happened is there could

1 have been fair disclosure about the lock-up agreement before  
2 the sale order was entered, the creditors' committee could  
3 have started to investigate it. In all likelihood there's  
4 no way that that investigation could have been completed  
5 before the sale order had to be approved given the  
6 exigencies of the circumstances. And so certainly one could  
7 imagine a situation where the ability to continue to  
8 investigate the lock-up agreement and bring such claims as  
9 may be necessary to get relief from the lock-up agreement  
10 would simply be carved out of the sale order.

11 And in that circumstance, again, it's --

12 THE COURT: By that you mean a clause like we're  
13 so often asked to do in limited objections that would say  
14 something like but nothing in this order shall be deemed to  
15 be a finding as to whether or not it was assumed or assigned  
16 or something of that sort?

17 MR. FISHER: Exactly, Your Honor.

18 And so really what the 60(b) relief is about now  
19 is if that had happened then 60(b) relief certainly would  
20 not be necessary because the sale order would have been  
21 written in a way that made crystal clear that it didn't have  
22 a bearing on the lock-up agreement.

23 Because the sale order was not written that way,  
24 because the lock-up agreement was not properly brought to  
25 our attention, it was not brought to this Court's attention,

1 we're simply preserving our right to effectively have that  
2 carve out now if it turns out that we need it.

3 On the topic of void and voidable. Although I  
4 think that's something of a side issue, I agree with  
5 Mr. Steinberg that the 363 cases seem to be inconsistent.  
6 Sometimes describing an act that violates 363 as void and  
7 sometimes describing it as voidable.

8 But I think what New GM did not address is Rule  
9 9019, which also applies here.

10 What the lock-up agreement did, among many other  
11 things, is it settled litigation that was pending against  
12 Old GM in Nova Scotia. Litigation that was brought by the  
13 group of noteholders that ultimately became party to the  
14 lock-up agreement.

15 And so it was a settlement that if it's a post-  
16 petition settlement, which is something that needs to await  
17 trial, but if it's a post-petition settlement it's one that  
18 required this Court's approval under Rule 9019. And under  
19 Rule 9019 it's simply not an agreement if this Court's  
20 approval was not secure and had was necessary.

21 And so under 9019 I think it's very clear, even if  
22 there's -- there are inconsistent cases that would need to  
23 be dealt with under 363, under Rule 9019 I think it's very  
24 clear that if we can show that the agreement is post-  
25 petition it's void.

1 (Pause)

2 MR. FISHER: There are so many factual points,  
3 Your Honor, that I could respond to, and I'm happy to  
4 respond to any factual questions that Your Honor finds --

5 THE COURT: If there's anything that Mr. Steinberg  
6 said that you think you need to take issue with you can, but  
7 as I tried to indicate in my opens remarks I see this all  
8 about whether 60(b)(6) is ripe for a decision now, and if it  
9 is ripe whether there are issues of fact that would prohibit  
10 me from deciding the 60(b)(6) issue today.

11 I don't want a preview of stuff that I think is  
12 going to go on for days on and after August 7th.

13 MR. FISHER: So just to respond to a couple of  
14 points.

15 Mr. Steinberg said, well, of course the GM Nova  
16 Scotia Finance creditors were treated better because  
17 creditors of GM Canada -- could be treated better because GM  
18 Canada never filed for bankruptcy.

19 Well, the Nova Scotia Finance noteholders are not  
20 creditors of GM Canada, certainly not in any direct sense.  
21 They are creditors of GM Nova Scotia Finance, which is a  
22 wholly-owned subsidiary of Old GM. And the reason that they  
23 were treated better had nothing to do with GM Canada, it has  
24 everything to do with the lock-up agreement.

25 I don't think the fact -- on the swaps. This is

1 just by way of example, and then I think I'll stop this  
2 point and counter-point, but the fact that Mr. Wedlake (ph),  
3 the GM Nova Scotia Finance trustee agrees and does not  
4 dispute that the swap claim was properly transferred to New  
5 GM is something that we are going to take issue with at  
6 trial by showing that Mr. Wedlake acts completely at the  
7 behest of the noteholders and solely for their benefit. And  
8 so I don't think that his view on that is entitled to very  
9 much weight at all.

10 But again, that's the kind of issue that really  
11 needs to await the trial of this matter.

12 To return to the questions that Your Honor asked  
13 at the outset, we think that deciding Rule 60(b) now is not  
14 ripe both as a matter of law, because we haven't pulled the  
15 trigger on the 60(b) relief and we're saying we may never,  
16 and so there's not a case or controversy. But also as a  
17 matter of prudence and pragmatism we don't think that it  
18 makes sense to wade into all of the facts of this case to  
19 decide an issue that may not need to be decided.

20 In the event that Your Honor does reach Rule 60(b)  
21 we think that at the heart of the matter are these  
22 disclosure issues, and that we don't think that these  
23 disclosure issues can be resolved on summary judgment.  
24 Because before Your Honor can decide whether the information  
25 that was out there in the public was enough to put the

1 creditors' committee on notice that this lock-up agreement  
2 is something they better take a look at and possibly  
3 challenge, Your Honor can't make a determination like that  
4 without first hearing the evidence and determining the  
5 facts. Because without knowing the facts it's not possible  
6 to evaluate whether the disclosure is appropriate or not.

7 We think the facts at trial will show that the  
8 disclosure, at least with regard to the most important  
9 issues that go to the very legitimacy of the lock-up  
10 agreement, were not fairly disclosed in any public filing  
11 that was made available to anyone on the creditors'  
12 committees Your Honor.

13 THE COURT: All right, thank you.

14 Mr. Steinberg, I'll take reply from you. Much,  
15 much shorter than your opening remarks and limited to what  
16 we heard from Mr. Fisher.

17 MR. STEINBERG: I appreciate that, Your Honor.

18 We cited in our papers In re: Teligent, 326 B.R.  
19 219, a Judge Koeltl decision which raises issues as to  
20 whether a GUC Trust who derives its power under a plan has  
21 authority to vacate orders when the trust arrangement that's  
22 set up -- that set up that trust didn't specifically provide  
23 for that. Their rights are derivative of what rights they  
24 had under the plan. They rights have challenged --

25 THE COURT: Where did this contention come from

1 either in your opening papers or anything we heard from  
2 Mr. Fisher? And this sounds new to me.

3 MR. STEINBERG: We cited the Teligent case and  
4 Judge Koeltl in our papers, and in preparing for this oral  
5 argument I noticed that this argument existed. I had it in  
6 my original script to give it and it didn't (sic) able to  
7 give it. I thought it was important to give it to Your  
8 Honor as to appropriate precedent.

9 THE COURT: You're saying the GUC Trust doesn't  
10 have standing to do what?

11 MR. STEINBERG: To vacate orders. In the Teligent  
12 case it was a trust set up to assume voiding powers and they  
13 were looking to vacate an assumption order, and Judge Koeltl  
14 and Judge Bernstein both suggested that there was a strong  
15 argument that they didn't have -- the estate representative  
16 didn't have authority for that because their authority was  
17 based on the documents that were derived through the plan  
18 and the plan didn't give them that specific authority.

19 I give it to Your Honor for consideration for  
20 whatever it's worth, but I wanted to be able to pass that to  
21 Your Honor.

22 The -- Your Honor, just so it's clear, the  
23 concepts of executory contracts and whether it's assumed or  
24 assigned, that process took place after the sale order.  
25 What was blessed by Your Honor as of the sale order was the



1 process upon which it was taking place. No one was coming  
2 to Your Honor for blessing any particular executory  
3 contracts. All they did was to bless the process, a process  
4 which did not involve the creditors' committee, only  
5 involved the Old GM, New GM, and the counterparty to the  
6 executory contract.

7 Your Honor had raised the question about shouldn't  
8 someone have said something to me about the \$450 million  
9 loan at the sale hearing? Maybe or maybe not. But the fact  
10 remains is that that \$450 million loan was repaid before the  
11 sale hearing started.

12 So they could have been talking to you about a  
13 historical fact, but the loan was actually repaid, and that  
14 it was GM Canada who satisfied the obligation.

15 Mr. Fisher says that he was going to raise issues  
16 at trial relating to whether the -- whether the lock-up  
17 agreement was validly assigned because the notice was  
18 deficient. Well the fact of the matter is, is there's no  
19 genuine issue of material fact about what happened here, and  
20 the by-product of this being either a purchase contract or  
21 an assignment of an executory contract is that the  
22 prepetition/post-petition issue becomes irrelevant. That's  
23 the reason why it's being done. A lock-up agreement itself  
24 doesn't deal with claims.

25 Mr. Fisher raised Bankruptcy Rule 9019. The fact

1 of the matter is there was a settlement that was made under  
2 the lock-up agreement in favor of Old GM. Old GM paid  
3 nothing for that settlement. So it got a gratuitous release  
4 of a present action. I don't think you need to bring a 9019  
5 action for approval of a settlement where you're just the  
6 beneficiary of a release but you're not actually paying  
7 anything for the release.

8 The issue of 363 void/voidable, I think you just  
9 really got to ask what is the use sale or lease of property  
10 of the estate? Nothing was leased, nothing was sold.  
11 What's the use? The use is the consent fee. The consent  
12 fee, we take the position, and the papers are in front of  
13 Your Honor, that were a prepetition loan, the use was the --  
14 of a non-debtor GM Canada to pay an amount to satisfy its  
15 obligation and to -- and an obligation that it repaid.

16 So there is no -- I mean you can say there's an  
17 issue between void/voidability on 363, but the reality is,  
18 is that it doesn't apply, because there was no use of  
19 property of the estate, it was GM Canada's property, and GM  
20 Canada actually repaid their property, and if it was  
21 anybody's money at the end of the day it was going to be New  
22 GM's money, not anything that deals with the unsecured  
23 creditors.

24 The -- Your Honor has all the information on the  
25 trust agreement, there's not going to be a witness that's

1 going to say anything more than what the agreements actually  
2 say, and there were contractual rights clearly, but that  
3 didn't mean that the ownership of those loan proceeds didn't  
4 -- weren't with GM Canada.

5 The issue about excusable neglect. I think we put  
6 before Your Honor all of the hard facts of what information  
7 was given.

8 And specifically just so I'll say for the third  
9 time that it's clear, the issue that Old GM paid -- made a  
10 loan of \$450 million to GM Canada was disclosed to the  
11 creditors' committee on June 5th -- or June 4th in the  
12 disclosure schedules. So there was nothing hidden from  
13 them, that information was there.

14 The idea that he wants to proffer that it's  
15 excusable neglect, that an 8-K filed in the bankruptcy  
16 filing which says material definitive agreement no one  
17 looked at that 8-K, even though they may have looked at  
18 older 8-Ks, I'm not going to quibble with that. I mean if  
19 that's what his position is I'm prepared to rest on those  
20 facts and let Your Honor decide whether that's an excusable  
21 neglect or not.

22 We've -- we described to you five circumstances of  
23 what was publicly in the arena relating to the lock-up  
24 agreement, including documents that were before Your Honor.

25 So with that having been said the conclusion I

1 have on the Rule 60(b) is that there are no genuine issues  
2 of material fact that are in dispute. He can claim that  
3 there are, but the documents speak for themselves, and our  
4 facts that we presented and what he's admitted speak for  
5 themselves, and that's a basis for summary judgment on the  
6 underlying issues, which are the predicate for the Rule  
7 60(b) relief.

8 THE COURT: All right. Mr. Fisher, if you have  
9 any surreply limited to the new stuff that we just heard  
10 from Mr. Steinberg I'll give you that chance.

11 MR. FISHER: Thank you, Your Honor.

12 Just responding to those points, and some of them  
13 I'm not even sure why they're -- why they're relevant or  
14 exactly what they have to do with this motion, but standing  
15 certainly a relevant, and the GUC Trust inherited the  
16 objection that had been filed by the creditors' committee.  
17 There's no question that their rights are coterminous with  
18 what the rights of the creditors' committee were with regard  
19 to that objection, and that objection asserted and certainly  
20 the creditors' committee had standing to seek 60(b) relief.

21 Under Rule 9019 Mr. Steinberg argues Rule 9019  
22 doesn't apply because Old GM didn't pay anything in exchange  
23 for the release that it got with respect to the litigation  
24 that was pending in Nova Scotia. I don't think that's true.

25 As I've argued, first of all we think that the

1 funds were funds that were -- that belonged to Old GM, those  
2 were the funds that were transferred to pay the consent fee  
3 to secure the release, but additionally, Old GM has paid an  
4 awful lot in the terms -- in terms of a lock-up agreement  
5 that requires cooperation with a scheme to get two times the  
6 -- the face amount of the notes, but additional swap value  
7 on top of that.

8           So we think ultimately what will happen here is  
9 that Old GM used the currency of what Old GM's unsecured  
10 creditors were entitled to in order to settle litigation  
11 that was pending against it in -- in Nova Scotia, and  
12 certainly that's something that should have been brought to  
13 Your Honor's attention and required a motion under Rule  
14 9019.

15           In terms of the use of estate property under 363.  
16 As I've already argued it is the consent fee, but there are  
17 other uses of estate property that are at issue here as  
18 well. For example, Old GM used its stock powers when it  
19 consented to the bankruptcy filing of GM Nova Scotia Finance  
20 post-petition. The bankruptcy filing didn't happen until  
21 October, the extraordinary resolutions didn't happen until  
22 the end of June, and so that's additional post-petition  
23 conduct that involved property of the estate in violation of  
24 Section 363, Your Honor.

25           With regard to the MSPA schedules, the MSPA

1 schedules do not disclose the amount of any transfer from  
2 Old GM to GM Canada.

3 So I simply disagree with the characterization of  
4 that disclosure and rest on all of my earlier arguments  
5 about their not being any disclosure that fairly could have  
6 put the creditors' committee on notice of the full extent of  
7 the implications of the lock-up agreement for unsecured  
8 creditors of Old GM, Your Honor.

9 THE COURT: All right.

10 MR. STEINBERG: Your Honor, just two -- just two  
11 points I wanted to say. They're only two points.

12 THE COURT: Go ahead.

13 MR. STEINBERG: With regard to bankruptcy filing  
14 of subsidiaries, it's an admitted fact in this case that  
15 during the course of this case there were two other  
16 subsidiaries at least that were filled in October of 2009  
17 other than Nova Scotia Finance. No Court order was  
18 obtained. And it's traditional that if you're putting other  
19 entities into bankruptcy you don't necessarily need a court  
20 order for that.

21 And I just will highlight that Mr. Fisher said we  
22 took the currency that the unsecured creditors were entitled  
23 to, and I challenge him to say what that currency was,  
24 because the cash belonged to New GM.

25 MR. ZIRINSKY: Your Honor, may I briefly restate?

1 THE COURT: No. This was -- this was New GM's  
2 motion. Sit down, please, Mr. Zirinsky.

3 MR. ZIRINSKY: I would just like to make a  
4 statement for the record. I'm not going to argue the  
5 motion.

6 THE COURT: Make your statement.

7 MR. ZIRINSKY: Your Honor, I just want the record  
8 to -- Bruce Zirinsky on behalf of Morgan Stanley, Elliott,  
9 and Fortress noteholders -- Nova Scotia noteholders and  
10 holders of guarantee claims.

11 Your Honor, I just want the record to be clear  
12 that as you just noted this is GM's motion, not a  
13 noteholder's motion. I want the record to be clear that the  
14 noteholders had requested leave to file motions for summary  
15 judgment on these as well as other issues, and the Court did  
16 not permit such leave, and I just want the record to be  
17 clear that the noteholders that I represent are preserving  
18 all of their rights, claims, and objections to any 60(b)  
19 motion relief or with regard the any of the other matters  
20 that are before Your Honor today on the GM motion.

21 Thank you.

22 THE COURT: Now, back to where we were. We have a  
23 trial beginning on August 7th. I will give you a ruling on  
24 this today. I'm going to dictate it. I want everybody back  
25 here at 3 o'clock. I can't guarantee you that I'll have a

1 ruling by that time, but I want you back here in this  
2 courtroom at that time.

3 We're in recess.

4 MR. STEINBERG. Your Honor, there was a note that  
5 your chambers had said about a pretrial conference. Did you  
6 want to do that after your ruling? Was there any reason to  
7 do it now before your ruling? I just wanted to remind Your  
8 Honor.

9 THE COURT: How long will the conference take?

10 MR. FISHER: Your Honor, I think we agree on most  
11 of the pretrial logistics issues, if that's what Your Honor  
12 has in mind for the conference. So I think it could be done  
13 fairly quickly.

14 THE COURT: All right, then we'll do it right now.  
15 It may mean that I can't see you at 3:00 and you're going to  
16 have to wait longer, but let's go ahead, do it.

17 MR. STEINBERG: Your Honor, I would say that I  
18 think it will take shorter, and so -- and I know this has  
19 gone a long time, we can do it after Your Honor rules as  
20 well too, and that might make it more efficient.

21 THE COURT: I don't care what -- do you care,  
22 Mr. Fisher is?

23 UNIDENTIFIED SPEAKER: I would prefer it after.

24 MR. FISHER: It seems that some of the parties  
25 prefer to do it after Your Honor rules, and that's fine with



1 us, Your Honor.

2 THE COURT: Okay.

3 UNIDENTIFIED SPEAKER: We prefer afterwards.

4 THE COURT: We'll do it afterwards.

5 MR. FISHER: Thank you, Judge.

6 (Recess at 12:36 p.m.)

7 THE COURT: Have seats, please. Do we have  
8 Mr. Steinberg here?

9 MR. DAVIDSON: I believe he went to the bathroom,  
10 I can go get him, Your Honor.

11 THE COURT: I'll sit here.

12 (Pause)

13 THE COURT: I apologize for keeping you all  
14 waiting.

15 As we discussed in oral argument New GM's motion  
16 for summary judgment goes way beyond the issue for which I  
17 authorized New GM to file a motion for summary judgment,  
18 with the only issue properly before me being the GUC Trust's  
19 request for 60(b) relief.

20 To the extent the summary judgment motion goes  
21 beyond that it must be denied as unauthorized.

22 Though I note that here, as in the case of the  
23 summary judgment motions proposed by Nova Scotia  
24 bondholders, it raises issues of fact that can be determined  
25 only at the upcoming trial or thereafter in any event.

1           With respect to the one issue as to which I  
2 authorized a summary judgment motion to be made, 60(b)  
3 relief, I'm convinced after review of the briefs and hearing  
4 oral argument, that the issues raised in New GM's summary  
5 judgment motion aren't ripe for decision yet and won't be  
6 until and unless we know that the GUC Trust will be in fact  
7 seeking 60(b) relief from the sale order, and we know the  
8 nature of the relief the GUC Trust seeks.

9           Thus, I'm denying New GM's motion for summary  
10 judgment without prejudice to renewal if and when it ever is  
11 needed or would make a difference.

12           I also will say now however that if forced to  
13 decide a motion for summary judgment on 60(b) relief now I'd  
14 easily include that material issues of fact would preclude  
15 any grant of summary judgment in New GM's favor.

16           Turning first to the important threshold issue of  
17 ripeness.

18           The GUC Trust has raised a number of issues, all  
19 involving disputed material issues of fact, which if decided  
20 in the GUC favor would or at least could obviate the need  
21 for the GUC Trust to ask me for 60(b) relief or that could  
22 change the nature of the 60(b) relief the GUC would request.

23           Several involved the time at which the lock-up  
24 agreement was finalized and as related to that the time at  
25 which it was entered into.

1 I will hear expert testimony from each side I'm  
2 told based on computer metadata as to when the final version  
3 of the lock-up agreement came into being.

4 Other issues involve the extent to which there was  
5 compliance with the executory contract assumption  
6 procedures, and the GUC Trust contention that if there  
7 wasn't the lock-up agreement wasn't assigned to New GM.

8 The latter issues go to both the lock-up agreement  
9 and the swaps.

10 There's still another issue of fact as to whether  
11 there was an obligation outstanding under the swaps as of  
12 the time of the closing on July 7.

13 So these are all matters that if decided favorably  
14 to the GUC Trust at the trial, beginning two weeks from now,  
15 would or at least could make the 60(b) issues merely  
16 hypothetical and unnecessary to decide.

17 The GUC Trust says that the need for 60(b) relief  
18 is quote "unlikely," and though I don't think it's either  
19 possible or appropriate for me to quantify that likelihood  
20 in any way, I think that the need for it is at least highly  
21 uncertain.

22 New GM's contentions as to facts as to which it  
23 says it should prevail that would force the GUC Trust to  
24 seek 60(b) relief are to me unpersuasive.

25 The confidentiality agreement entered into on

1 May 28, three days before Old GM's Chapter 11 filing  
2 provided that quote:

3 "Unless and until the parties have entered into a  
4 definitive agreement with respect to the transaction,  
5 neither [Nova Scotia Finance] nor [Old GM] will be under any  
6 legal obligation of any kind whatsoever with respect to such  
7 a transaction by virtue of this or any written or oral  
8 expression with respect to such a transaction."

9 Cooperman (ph) declaration Exhibit 12 at Section  
10 11.

11 There's an issue of fact as to when the document  
12 that would embody that definitive agreement, what we now  
13 call the lock-up agreement, was finalized.

14 There is also an issue of fact as to whether the  
15 parties intended to be bound before the final agreement was  
16 prepared.

17 There's a fair degree of law on this subject, and  
18 under that law the standards are fact intensive. Parties  
19 may, if they wish, agree to be bound to a future deal based  
20 on an agreement only as to a deals key points, but they can  
21 also reserve the right not to be bound until the definitive  
22 documentation is prepared and executed, which at least  
23 arguably is the case here.

24 Though I can't find that to be true before trial,  
25 I can and must find that I can't decide that as a matter of

1 law on this motion.

2 Then the lock-up agreement, which among other  
3 things called for a cash payment of \$367 million, and  
4 acquiescence to the allowance of more than \$2 billion in  
5 claims, cannot be regarded as having been entered into in  
6 the ordinary course of business. And if the lock-up  
7 agreement wasn't entered into before Old GM's bankruptcy,  
8 it's at least arguably, if not plainly, a post-petition  
9 transaction that was not authorized by the Bankruptcy Court.

10 If the lock-up agreement was not lawfully entered  
11 into its enforceability would be subject to question.

12 New GM's answer to that, as stated at page 8 of  
13 its reply, is that even if a post-petition transfer  
14 requiring Court approval is unauthorized by the Court, it is  
15 merely voidable and not void. And New GM then goes on to  
16 contend that since New GM purchased all intercompany  
17 avoiding power claims, and that these would include Section  
18 548 claims, there would be nothing to quote "avoid," quote  
19 from the debtors' perspective.

20 I cannot agree. Though there is case law in a  
21 very distinguishable situation tending to support New GM's  
22 position and making distinctions between quote "void" and  
23 quote "voidable" quote, unauthorized post-petition  
24 transfers. See In re: Bean, 251 B.R. 196, Eastern District  
25 of New York, 2000. There is also law to the contrary,

1 referring to unauthorized post-petition transfers as quote  
2 "null and void." End quote. See In re: Koneta,  
3 K-O-N-E-T-A, 357 B.R. 540, 543 to 544, Bankruptcy District  
4 of Arizona, 2006.

5           Though Bean is more specific Koneta does a better  
6 job in dealing with the real concern here. The reason by  
7 which Section 549 was enacted, which is to protect a  
8 debtor's creditor community from unauthorized dispositions  
9 of estate property that come at the creditors' expense.

10           As importantly or more so, New GM's position is in  
11 substance that if the unauthorized post-petition disposition  
12 is egregious enough being accompanied by a disposition of  
13 the power to protect the estate from the very post-petition  
14 transfer, i.e., by a transfer of the right to bring the  
15 avoidance action, the transferee can thereby be immunized  
16 from judicial action with the Bankruptcy Court powerless to  
17 protect the estate from the resulting harm.

18           Section 363(b) and 549 would be renders nugatory  
19 by the simple act of assigning the right to bring the 549  
20 action outside of the estate. That cannot be the law.

21           Neither I, nor I think any other judge, could  
22 every subscribe to such a suggestion.

23           Likewise, there are issues of fact as to whether  
24 or not the payment of the consent fee should be deemed to  
25 have come from a quote "purchased subsidiary," quote, or by

1 contrast should be deemed to come from the entity that  
2 funded it in reality, Old GM.

3 The Second Circuit, like others, respects  
4 collapsing doctrine. See, for example, HBE Leasing Corp. v.  
5 Frank, 48 F.3d 623, 635, Second Circuit 1995.

6 As the Second Circuit there held, quote:

7 "It is well established that multilateral  
8 transactions may under appropriate circumstances be  
9 'collapsed' and treated as phases of a single transaction  
10 for analysis under the UFCA," i.e., the Uniform Fraudulent  
11 Conveyance Act.

12 There are at least issues of fact as to whether it  
13 was Old GM and not GM Canada that made the payment to the  
14 Nova Scotia noteholders as part of a single integrated  
15 transaction.

16 The GUC Trust has put forward evidence sufficient  
17 to invoke collapsing doctrine and to establish that GM  
18 Canada was merely a conduit and not the quote "initial  
19 transferee of such transfer or the entity for whose benefit  
20 such transfer was made," quote, as that expression is used  
21 in Section 550 of the Code.

22 That evidence includes evidence that on May 29,  
23 2009 Old GM approved the \$450 million loan to GM Canada,  
24 quote "conditioned on [the] premise, that funds be used  
25 solely to settle" end quote, Nova Scotia Finances'

1 obligation on the notes. See Cooperman declaration  
2 Exhibit 35.

3 That the \$450 million loan was listed as step one  
4 in the quote "Nova Scotia bondholder transaction-steps  
5 list": That on June 4, 2009 under an escrows agreement  
6 entered into among Old GM, GM Canada, Nova Scotia Finance,  
7 and the Nova Scotia noteholders, \$367 million in proceeds  
8 from that \$450 million loan was paid into an escrow account,  
9 and that on June 25th, 2011, \$367 million, that very same  
10 number, was paid from the escrow account for the Nova Scotia  
11 noteholders in satisfaction of the consent fee.

12 Those facts, if proven and not contradicted, might  
13 establish that the payment by Old GM through GM Canada and  
14 the escrow account and then to the Nova Scotia bondholders  
15 was a single integrated transaction, (avoids the payment by  
16 which Old GM to GM Canada was the first step, and the  
17 payment to the noteholders was the last), or that GM Canada  
18 and the escrow account were conduits for the transfer.

19 I don't know that for a fact at this point, that's  
20 the kind of thing we'll look at at the trial, but I  
21 certainly can't grant summary judgment premised on the  
22 notion that the payment of the consent fee wasn't from Old  
23 GM, and I remain surprised that New GM even suggests that I  
24 should.

25 Likewise, I'm surprised that New GM would even



1 suggest, as it does on page 8 of its reply, that a  
2 transaction of this character could have been authorized  
3 under my first day cash management order when its effect, if  
4 not also its purpose, was to use GM Canada as the conduit  
5 for the \$367 million in Old GM funds that found their way  
6 into the hands of certain noteholders.

7 We have a trial starting in 18 days on August 7.  
8 Issues determined at the trial have the potential, if not  
9 the certainty, of determining whether 60(b) relief will be  
10 requested, and if so, what the requested 60(b) relief will  
11 be. At this point we know neither.

12 Both general case or controversy principals and  
13 declaratory jurisprudence underscore the importance, if not  
14 also the absolute requirement, of deciding issues only when  
15 they with ripe.

16 In Thomas versus Union Carbide Agricultural  
17 Products Company, 473 U.S. 568, 1985, a non-declaratory  
18 judgment case involving general Article 3 jurisprudence  
19 principals, the Supreme Court observed that quote:

20 "Ripeness is peculiarly a question of timing. Its  
21 basic rationale is to prevent the courts through premature  
22 adjudication from entangling themselves in abstract  
23 disagreements." Internal quotation marks deleted.

24 See also Volvo New York American Corp. versus  
25 Men's International Professional Tennis Council, 857 F.2d

1 55, 63, Second Circuit 1988 quoting Thomas 419 U.S. at 580  
2 to 581.

3 In Volvo the Second Circuit observed that ripeness  
4 doctrine quote "cautions courts against adjudicating'  
5 contingent future events that may not occur as anticipated,  
6 or indeed may not occur at all." End quote.

7 Accord Cacchillo C-A-C-C-H-I-L-L-O, versus Insmed,  
8 I-N-S-M-E-D, Inc., 638 F.3d 401, 405 Second Circuit, 2011.

9 Let's remember what the Second Circuit twice then  
10 told us. Ripeness doctrine cautions courts against  
11 adjudicating contingent future events that may not occur as  
12 anticipated, or indeed may not occur at all.

13 Here we have exactly that as the GUC Trust may  
14 prevail on other issues that may make its need for a 60(b)  
15 relief academic or it may refine or amend the request for  
16 the 60(b) relief that it ultimately decides that it wants.

17 Likewise, there is another applicable doctrine  
18 that is distinct, but similar in purpose. It is quote  
19 "Prudential ripeness," end quote.

20 As explained by the Second Circuit in New York  
21 Civil Liberties Union versus Grandeau, G-R-A-N-D-E-A-U, 528  
22 F.3d 122, Second Circuit, 2008, Prudential ripeness is  
23 distinct from constitutional ripeness, but likewise  
24 addresses whether the case could be better decided later.  
25 Id. at 131. It is the tool that courts may use to enhance

1 the accuracy of their decisions and to avoid becoming  
2 embroiled in adjudications that may later turn out to be  
3 unnecessary.

4 It is often used in constitutional issue  
5 litigation, but there is no reason why it should be limited  
6 to that. Considerations of that type are equally applicable  
7 here.

8 About eight years ago based on similar  
9 considerations in Bank of New York versus Adelpia  
10 Communications Corp. In re: Adelpia Communications Corp.,  
11 307 B.R. 432 Bankruptcy Southern District of New York, 2004,  
12 I ruled that a controversy over an X-clause, that's X-  
13 clause, and a bond indenture wasn't ripe for adjudication  
14 even though the interpretation issue was unsettled and  
15 resolution would facilitate plan negotiations. I found that  
16 it wasn't ripe for declaratory judgment purposes, and also  
17 meet Article 3 case or controversy requirements "given the  
18 many uncertainties as to whether the adverse consequences  
19 the subdebt fears may or may not occur as expected or may  
20 not happen at all."

21 Eight years ago the same exact concerns that we  
22 have here today.

23 Just two weeks about in an adversary proceeding  
24 under the umbrella of this very Chapter 11 case, that of  
25 Motors Liquidation Company, Judge McMahon of the District

1 Court determined that a controversy wasn't ripe for decision  
2 in the face of a dispute that was far riper for decision  
3 than the one we have here. See U.S. Department of the  
4 Treasury versus Official Committee of Unsecured Creditors of  
5 Motors Liquidation Company, 2012 Westlaw, 2822547, \*1,  
6 Southern District of New York, July 3rd, 2012.

7 While that decision is binding on me only with  
8 respect to the matter she there decided, and turned in  
9 material part on events that took place after I issued my  
10 ruling, it still is deserving of consideration here like any  
11 other non-binding precedent.

12 In that case the creditors' committee had shown  
13 without dispute that it would be affirmatively  
14 counterproductive for it to continue its action against JP  
15 Morgan Chase if that adversary proceeding, if successful,  
16 would dramatically increase unsecured claims, while at the  
17 same time not give the Motors Liquidation estate the  
18 avoidance action proceeds.

19 Judge McMahon found, effectively, that the  
20 uncertainties as to whether there would be anything to fight  
21 over trumped the creditors' committee's other needs and  
22 concerns.

23 If that matter wasn't ripe, notwithstanding the  
24 all of the very real needs and concerns for which the  
25 creditors' committee then needed a decision, and despite

1       uncertainties that would exist in any case, as I had  
2       addressed in the opinion below, this far more hypothetical  
3       controversy on a 60(b) request that may not ever be  
4       necessary can't be regarded as ripe for decision now either.

5               Finally, I don't agree with New GM's position that  
6       if it's position is sustained on any of the four principal  
7       issues 60(b) relief is immediately implicated.

8               For instance, if it's found as a fact that the  
9       lock-up agreement wasn't a quote "purchase contract," quote,  
10       or was an executory contract that was assigned to New GM,  
11       most, if not all, of New GM's arguments would then fall, and  
12       in any event the terrain of any future 60(b) motion would be  
13       materially different.

14               (Pause)

15               THE COURT: Because I find that the issues aren't  
16       ripe I'm not deciding the 60(b) motion today, but I must  
17       say, that even if I knew with more clarity what I needed to  
18       rule on and why, I would have to deny summary judgment on  
19       the 60(b) issues.

20               Certain of the GUC Trust allegations, if proven,  
21       could indeed cause me to grant 60(b) relief.

22               I'm most assuredly not going to be ruling today as  
23       a matter of law that on this record the GUC Trust could  
24       never secure 60(b) relief.

25               Though the evidence may well not show that

1 disclosure of the lock-up agreement was intentionally  
2 concealed from the Court, the evidence will almost certainly  
3 show, unless I'm forgetting something that I can't believe  
4 that I would ever forget, that at the time of the sale  
5 hearing, at the end of June and beginning of July 2009, no  
6 disclosure was made to me whatever of Old GM's intention by  
7 that motion to include provisions under which it would  
8 cooperate in efforts to put beyond judicial review a payment  
9 of \$376 million to certain selected creditors, and  
10 acquiescence an additional \$2.67 billion in claims and the  
11 give up of the estate's rights as to important avoidance  
12 actions.

13 It may be simply that Old GM's lawyers had more  
14 important things on their mind than to mention these things  
15 to me when I approved the armsp (ph) and entered the sale  
16 order, but the bottom line is, is that this matter is huge,  
17 and if these things had been disclosed to me then I would  
18 have been as concerned about them then as I am now.

19 There was a lack of disclosure to the Court on the  
20 matter with the potential to injure Old GM creditors to the  
21 extent of hundreds of millions, if not billions of dollars.

22 Based on the record so far issues of fact would  
23 exist with respect to whether the GUC Trust could establish  
24 an entitlement to 60(b) relief on three of the four Rule  
25 60(b) subsections upon which the GUC Trust relies.

1 I've seen no evidence to support the fourth.  
2 Fraud in procuring the sale order, especially since I  
3 consider fraud to require scienter as contrasted to mere  
4 non-disclosure.

5 But facts known to date might support relief under  
6 subsection (1), for quote, "Mistake, inadvertence, surprise,  
7 or excusable neglect"; subsection (2), newly discovered  
8 evidence that with reasonable diligence could not have been  
9 discovered in time to move for a new trial," end quote, and  
10 subsection (6), quote, "Any other reason that justifies  
11 relief." End quote.

12 It might be that given my total lack of any  
13 understanding or intent when I entered the sale order that I  
14 was authorizing or immunizing from judicial scrutiny the  
15 matters in question here that Rule 60(b) relief might not  
16 even be necessary. Another reason of course for which New  
17 GM's summary judgment motion isn't yet ripe.

18 But in addition, given the failure of anyone to  
19 say anything to me at the time of the 363 sale hearing about  
20 the lock-up agreement or at the prospect that the sale order  
21 I'd signed would have the purpose or effect of authorizing  
22 the transactions that are said to be protected under my  
23 order here and the scattered and incomplete disclosures as  
24 to this matter that were available to the creditors'  
25 committee, I think there are at the very least issues of

1 fact as to whether a claimed lack of diligence by the  
2 creditors' committee would bar relief under 60(b) .

3 Given the importance of the sale, the underlying  
4 transaction, the jobs on the line, and the importance of  
5 GM's survival to the U.S. auto industry, I'm of course not  
6 suggesting that I would have disapproved the sale as a  
7 whole, but with appropriate disclosure of what people are  
8 now telling me was the consequences of the sale order that I  
9 signed, I very well might have done what we bankruptcy  
10 judges do all the time on limited objections to sales.  
11 Simply put in a provision in my approval order that nothing  
12 in the order should be deemed to be an authorization or  
13 approval of the things that went on here.

14 With appropriate disclosure I might well have  
15 refused to sign the order in its then existing form, and I  
16 would have insisted that the lock-up agreement not be  
17 insulated from judicial scrutiny no matter what threats the  
18 Nova Scotia noteholders had made at the time.

19 When I approved the sale agreement and entered the  
20 sale approval order I mistakenly thought that I was merely  
21 saving GM, the supply chain, and about a million jobs.

22 Likewise, I thought that as part of that I was  
23 approving the assumption and assignment of contracts mainly  
24 with the many vendors in the supply chain whose contracts  
25 were essential to New GM's future and the health of the U.S.



1 auto industry.

2 I was unaware that by an agreement undisclosed to  
3 me that would be said to be assumed and assigned incident to  
4 the sale order or that might have been an unauthorized post-  
5 petition transaction. I was also authorizing a payment to a  
6 limited number of creditors of \$376 million, a commitment  
7 not to object to as much as \$2.76 billion in claims, and an  
8 assignment out of the estate of the right to bring important  
9 avoidance actions.

10 It never once occurred to me, and nobody bothered  
11 to disclose, that amongst all of the assigned contracts was  
12 this lock-up agreement, if indeed it was assigned at all.  
13 When I heard about that it wasn't just a surprise, it was a  
14 shock.

15 The GUC Trust may well be able to make a showing  
16 of mistake or newly discovered evidence. It likewise may  
17 well be able to make a showing of quote "any other reason  
18 that justifies relief." End quote.

19 The motion for summary judgment is denied without  
20 prejudice to reconsideration if the GUC Trust ultimately  
21 decides to ask for 60(b) relief.

22 New GM has of course a full reservation of rights  
23 at any such time.

24 The GUC Trust is to settle on what are consistent  
25 with this ruling promptly so that New GM, if it is of a mind

1 to, can file a motion to leave to appeal.

2 We're going to trial on August 7, that's 18 days  
3 from now. If New GM wishes to continue to take sides in  
4 this dispute it can and should participate in the trial  
5 then.

6 Those who are here now for this decision are free  
7 to go. I will not be leaving the bench and will go into the  
8 conference with respect to the mechanics of issues that you  
9 wanted to raise concerning the upcoming trial.

10 (Pause)

11 MR. FISHER: Your Honor, Eric Fisher for the GUC  
12 Trust.

13 As we indicated earlier today, we think that  
14 there's substantial agreement among the parties with regard  
15 to the trial logistics, and I'm going to defer to  
16 Mr. O'Donnell, from Akin Gump, who will summarize what it is  
17 that we've agreed to and certain questions that we have for  
18 the Court about the conduct of the trial.

19 THE COURT: Okay.

20 MR. O'DONNELL: Good afternoon, Your Honor, Sean  
21 O'Donnell with Akin Gump on behalf of Nova Scotia trustee,  
22 may it please the Court.

23 There was a lot going on as the Court's aware  
24 today, and during that time the parties, in accordance with  
25 the Court's instructions, have met and conferred and tried

1 to coordinate some of the trial logistics for the hearing  
2 that begins on the 7th. All of this of course is subject to  
3 your approval, and the parties were going to endeavor put it  
4 in writing, but we thought it might be helpful to discuss a  
5 couple of the issues with you today.

6 THE COURT: Mr. O'Donnell, pull that microphone  
7 closer to you or speak a little louder.

8 MR. O'DONNELL: It's my height.

9 THE COURT: Yeah, you're pretty tall. Maybe  
10 you're pretty far away.

11 MR. O'DONNELL: Is that better, Your Honor?

12 THE COURT: Much. Go ahead.

13 MR. O'DONNELL: Okay. So with respect to the  
14 trial dates one of the questions that the party had to the  
15 Court is whether or not August 10th is also a date that's a  
16 possible trial date. It's a Friday.

17 (Pause)

18 MR. O'DONNELL: And I'll warn the Court we're  
19 going to ask if there are other days that you might have in  
20 mind as well should we continue beyond that week.

21 THE COURT: I don't know yet, Mr. O'Donnell. It's  
22 my wife's birthday. I have commitments outside of this  
23 courthouse. I'll have to let you know.

24 MR. O'DONNELL: Thank you, Your Honor, that's  
25 fine.

1           And beyond August 10th within that month or  
2           shortly thereafter are there other dates that you might have  
3           in mind as potential dates for continuation of the trial  
4           should we not finish that week? We're happy to take that  
5           under advisement as well.

6           THE COURT: I think I do.

7           (Court confer with clerk)

8           THE COURT: What day is Labor Day, September 3rd?

9           MR. O'DONNELL: The 3rd, yes, Your Honor.

10          (Court confers with clerk)

11          THE COURT: Mr. O'Donnell, I'll try to move the  
12          matters that I have during the days from August 20 to 23rd  
13          to earlier in the morning, as early as 8 o'clock if I can  
14          pull it off, in which case you can have the time after those  
15          days, not past 2:30 on the 20th, but you can have the  
16          afternoon of the 21st, 22nd, and 23rd. I'll confirm that  
17          with Ms. Blum, but I'll do my best.

18          MR. O'DONNELL: We greatly appreciate that, Your  
19          Honor. Thank you.

20          With respect to opens statements, and of course  
21          we'd defer to the Court, but in the interest of trying to  
22          expedite the trial the parties would wish to dispose of  
23          opening statements and proceed with the introduction of  
24          evidence.

25          THE COURT: You were reading my mind, especially

1 if you guys are giving me trial briefs.

2 MR. O'DONNELL: Hopefully that won't be the last  
3 time, Your Honor.

4 THE COURT: I'm sorry?

5 MR. O'DONNELL: Hopefully that won't be the last  
6 time we've read your mind.

7 THE COURT: All right.

8 MR. O'DONNELL: With respect to the introduction  
9 of evidence and the use of exhibits the parties envision  
10 using technology monitors and scanning in the exhibits. As  
11 the Court may or may not know we have a lot of exhibits we  
12 anticipate coming into trial. Is there any preference that  
13 the Court has in terms of monitors? I think what we  
14 envision of course is a monitor for Your Honor, for your  
15 clerks, for the witness, for the party's tables, as well as  
16 one for the courtroom, but if there are any particularities  
17 that you have please let us know.

18 THE COURT: At this time you didn't read my mind.  
19 I learned a lot about the way you guys use visual aids in  
20 the motion and aid in Adelphia. I can't take notes, pay  
21 attention to what witness's are telling me, and have my head  
22 bouncing up and down to watch a TV screen.

23 I want exhibits on paper. I also want exhibits  
24 that you can hand up that I can mark and scribble on using  
25 an old-fashion highlighter and pen.

1           If you want, for the benefit of the people who may  
2 be monitoring the case or even trading on it, you can set up  
3 whatever visual aids you wanted for the people sitting in  
4 the courtroom, as long as you make the arrangements in  
5 advance with the Court's information technology people.

6           MR. O'DONNELL: Yes, Your Honor, I apologize it  
7 wasn't clear. We had anticipated hard copies for the Court  
8 in addition to the monitor screens that would be in the  
9 courtroom.

10          THE COURT: Well, I'm not going look at the  
11 monitor, if you want to give me one any way you can, I  
12 mean --

13          MR. O'DONNELL: Thank you, Your Honor.

14          THE COURT: -- that's fine.

15          MR. O'DONNELL: The parties have also agreed that  
16 we will be exchanging the witness list, the anticipated  
17 order of witnesses one week prior to any particular block of  
18 trial that we have.

19                In addition the parties have agreed to exchange  
20 depo designations on July 31st, counter designations on  
21 August 3rd, demonstratives that will be used for the first  
22 week of trial, August 7th will be exchanged by 3 p.m. the  
23 day prior, and we'll do the same thing again for the  
24 following block of trial.

25                And with the Court's permission the plaintiff's

1 requested a slight extension to submit the pretrial briefs  
2 pushing that back to 7/27, which the defendants are in  
3 agreement with. And I believe it's by 10 a.m., is that  
4 right, Eric? Yeah, 10 a.m. on the 27th if that's okay with  
5 the Court.

6 THE COURT: So that would still give me about ten  
7 days?

8 MR. O'DONNELL: That's correct, Your Honor.

9 THE COURT: Yeah, that's okay.

10 One thing you said a moment ago, Mr. O'Donnell,  
11 that I was thinking more about, and I think I might have  
12 been too cynical and hard on you guys.

13 In a recent trial, I had a valuation trial back in  
14 March or April, I don't remember one, I discovered that you  
15 guys now have a technique where when you bring a document  
16 up for me to see you actually like electronically highlight  
17 it so it looks like it's yellow on the screen or the  
18 portions you want me to pay attention to.

19 MR. O'DONNELL: That's correct, Your Honor.

20 THE COURT: I actually found that was useful. And  
21 even though I then had to highlight it on my own hard copy  
22 it was helpful for me to see where you guys were referring  
23 to.

24 So I will take that offer for you to give me the  
25 screen if that's one of the things you might be using it

1 for.

2 MR. O'DONNELL: It is, Your Honor, and we'll be  
3 sure to do that.

4 THE COURT: Okay.

5 MR. O'DONNELL: I think that's it, unless -- and  
6 again, Your Honor, we'll put something in writing and submit  
7 it to the Court.

8 THE COURT: Okay.

9 MR. O'DONNELL: Thank you.

10 THE COURT: Anything else, anybody?

11 Mr. Reisman, I didn't know you were in this case.

12 MR. REISMAN: I am now, Your Honor.

13 THE COURT: Who are you representing?

14 MR. REISMAN: I am appearing for eight investment  
15 funds or accounts that are managed by Paulson & Company,  
16 Inc. and they are noteholders, I'll call them the Paulson  
17 noteholders if I could, Your Honor.

18 For the record as well, Steven Reisman, Curtis  
19 Mallet-Prevost, Colt & Mosle LLP on behalf of the Paulson  
20 noteholders.

21 The Paulson noteholders hold approximately 170  
22 million pound sterling of the notes that are at issue here.

23 THE COURT: Do you have a 2019 on file yet,  
24 Mr. Reisman?

25 MR. REISMAN: We do not, Your Honor, and they're



1 affiliated entities, so my understanding of the law -- we  
2 filed --

3 THE COURT: You're all a single family of --

4 MR. REISMAN: Yeah. Yeah.

5 THE COURT: Okay.

6 MR. REISMAN: Yes. And my understanding of the  
7 law is that it's not necessary to be -- to be done, but  
8 we've disclosed the interests that are owned by the -- each  
9 of the funds in a notice of appearance that we filed with  
10 the Court, and we've provided that as well to Mr. Fisher and  
11 his clients and the other parties in interest in this -- in  
12 this matter.

13 Your Honor, I rise because I wanted to suggest,  
14 and I know, you know, I'm kind of late to the game, but  
15 better late than never, one suggestion that I have on behalf  
16 of my clients, and I've broached it with other parties, is  
17 to see if mediation might be helpful here between the  
18 parties.

19 I am not in any way looking to postpone the  
20 August 7th trial date, I'm looking to see if it's possible  
21 that the parties can spend a day with a neutral third-party  
22 mediator to see if -- not a sitting bankrupt judge, but  
23 someone from the outside in a confidential mediation setting  
24 -- to see if the parties can gain closer ground in trying to  
25 resolve the issues that are here.

1 I would like to try and do that between now and  
2 the trial date of August 7th. If not there's also the --  
3 the week following, which I understand Your Honor is going  
4 to be out that week. Many times matters are mediated in the  
5 context of trial, Tronox Anadarko is a good example of that  
6 that's in this court right now, which is -- they're going to  
7 mediation from public records that I've -- that I've read.

8 So I'd like to suggest that, and I'd like to see  
9 if there's interest in it from the parties. It could be  
10 helpful in narrowing some of the issues or bring the parties  
11 closer together to see if a resolution can in fact be  
12 reached.

13 THE COURT: Well, I always welcome consensual  
14 resolution. I think I need to let other parties comment on  
15 your proposal, Mr. Reisman.

16 MR. REISMAN: Okay. Thank you.

17 THE COURT: Mr. Fisher, first you on the  
18 plaintiff's side, then I'll hear from those on the  
19 defendant's side.

20 MR. FISHER: Your Honor, we've been speaking with  
21 Mr. Reisman. Mr. Reisman's proposal to have this matter  
22 mediated between now and when the trial starts is something  
23 that we first heard about today. We will take it seriously,  
24 we will confer with our client about it.

25 To provide just a preliminary reaction. I'm

1 concerned that between now and August 7th is not the right  
2 time to mediate, because I don't know that it's the time  
3 most likely to have a constructive mediation, given my own  
4 sense of the parties representative views. It could be that  
5 the suggestion to attempt a mediation following that  
6 first --

7 THE COURT: In that gap week?

8 MR. FISHER: During that gap week. It could be  
9 that that's a more propitious time for a mediation.

10 But again, we're take thing proposal seriously, we  
11 learned of it for the first time today, we need to discuss  
12 the idea thoroughly with our clients before we can really  
13 provide a meaningful response, Your Honor.

14 THE COURT: Uh-huh. All right.

15 Defendant's side, Mr. Sher, Mr. Zirinsky?

16 MR. SHER: Your Honor, this is -- I literally  
17 didn't hear about it till just now. I didn't -- I wasn't  
18 consulted about it, so I am going to have to think about it,  
19 consult with my client, and -- and then if it's okay with  
20 the Court give you a reaction at -- at that point, because I  
21 literally heard it for the first time when Mr. Reisman just  
22 said it.

23 THE COURT: Uh-huh.

24 MR. SHER: If that's okay with the Court.

25 Thank you.

1 THE COURT: Mr. Zirinsky?

2 MR. ZIRINSKY: Your Honor, we heard about this I  
3 believe it was yesterday.

4 I've had the ability to communicate with my  
5 clients on the matter, and I just want to say that we do not  
6 want a mediation effort to in any way impact on the timing  
7 of the -- not only the commencement of the trial, but the  
8 conduct of the trial. But if the other parties feel it  
9 would be useful to have a mediation session with a third  
10 party on a confidential basis that would be agreeable to the  
11 parties we would certainly be happy to go along with that.

12 We do think however that there's an awful lot of  
13 work that needs to get done to get ready for trial, and so  
14 like Mr. Fisher I'm highly skeptical that we really have  
15 time between now and the -- and the scheduled start date for  
16 the trial to do that.

17 But also I would agree that, you know, during the  
18 gap period if the parties are -- at that time believe it  
19 would be useful and the Court would like the parties to make  
20 the effort we'll certainly will happy to participate.

21 Thank you.

22 THE COURT: Okay. Anybody else? Mr. O'Donnell?  
23 You've got Green Hunt Wedlake if I recall?

24 MR. O'DONNELL: Yes, Your Honor, counsel for the  
25 trustee.

1           It's also the first we've heard of it just now.  
2           I'm not automatically opposed to it, but something that  
3           we'll need to discuss with the client and share the same  
4           concerns in terms of timing.

5           THE COURT: Okay. Well, it seems to me folks,  
6           that in this area, perhaps this very limited area, your  
7           thinking is largely congruent, which is you need to talk to  
8           your guys and you also need to be pretty comfortable that  
9           you're not going to be using scarce trial prep time between  
10          now and the first day of the trial. And I was a practicing  
11          lawyer for 30 years, a general purpose litigator as well as  
12          a bankruptcy guy, and I know what it's like to be getting  
13          ready for a trial.

14          So what I -- I'm not going to order you guys to do  
15          much, but I am going to direct you to talk to your folks,  
16          your constituencies, and then to talk to each other about  
17          the second variant that Mr. Reisman had proposed, which is  
18          using the gap period between the first week of the trial and  
19          the second.

20          One way or another I think that this matter, as  
21          much or more so than many, deserves to be settled if you can  
22          do it, if you can do it responsibly. I don't on matters of  
23          this size get involved as a settlement judge myself, and I  
24          heard very carefully that Mr. Reisman was talking about  
25          somebody who would act in a totally confidential basis

1 without me being involved in any way, shape, or form, which  
2 is the right idea.

3 So why don't you talk to your guys and then  
4 Mr. Reisman be the center hub of the wheel in terms of  
5 knowing what people's thoughts are, and then somebody,  
6 Mr. Reisman or somebody else, just let me know whether your  
7 thinking is the same as Mr. Zirinsky's, or different.  
8 Although Mr. Zirinsky thinking doesn't seem to be all that  
9 different than Mr. Reisman's.

10 But in any event, I'm going to assume that other  
11 than the relatively brief time to talk to your  
12 constituencies and to communicate with each other on this  
13 that you're simply going to be putting all our other effort  
14 into getting ready for trial, or if you have any other cases  
15 to work on, stuff of that nature as well. All right?

16 Anything else? Okay, folks thank you very much,  
17 we're adjourned.

18 (Whereupon these proceedings were concluded at 5:33 PM)

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I N D E X

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

I, Dawn South, certify that the foregoing transcript is a true and accurate record of the proceedings.

Dawn South

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