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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a GENERAL MOTORS CORP., *et al.*,	:	Case No. 09-50026 (REG)
Debtors.	:	(Jointly Administered)

JOHN MORGENSTEIN, MICHAEL JACOB, as Executor of the Estate of Doris Jacob, and **ALANTE CARPENTER** individually and on behalf of all others similarly situated, Plaintiffs, v. **MOTORS LIQUIDATION COMPANY f/k/a GENERAL MOTORS CORPORATION**, a Delaware Corporation, Defendant.	:	Adversary Proceeding No. 11-09409-reg

PLAINTIFFS JOHN MORGENSTEIN, MICHAEL JACOB, AND ALANTE CARPENTER'S CORRECTED MEMORANDUM IN OPPOSITION TO MOTORS LIQUIDATION COMPANY'S AND MOTORS LIQUIDATION COMPANY GUC TRUST'S AMENDED MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR REVOCATION OF DISCHARGE AND, IN THE ALTERNATIVE, MOTION TO STRIKE CLASS ALLEGATIONS

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I. INTRODUCTION

Plaintiffs John Morgenstein, Michael Jacob, and Alante Carpenter (collectively "Plaintiffs"), on behalf of themselves and the other members of the below-defined Class (collectively, the "Impala Claimants"), respectfully submit this Motion in Opposition to Motors Liquidation Company's and Motors Liquidation Company GUC Trust's Amended Motion to Dismiss Plaintiffs' Complaint for Revocation of Discharge and, in the Alternative, Motion to Strike Class Allegations ("Old GM Mem.") (Dkt. No. 20). Old GM[1] and the GUC Trust (collectively "Old GM") have moved to dismiss Plaintiffs' Complaint, contending that the Complaint seeks "partial revocation": (a) as to an infinite number of Chevrolet Impala automobiles; (b) without temporal limitation; and (c) seeking modification of Plan terms in order to recover damages for premature tire wear.

Old GM's contentions with respect to the Complaint for Revocation are particularly surprising, *because none of them are true*.[2] Rather, by their Complaint, Plaintiffs, individually

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[1] On June 1, 2009, General Motors Corporation ("**GM**") commenced voluntary cases under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**") before this Court. Shortly after the filing, GM filed a motion to sell substantially all of its assets and transfer certain liabilities to Vehicle Acquisition Holdings, LLC, which has now changed its name to General Motors Company ("**New GM**"). On July 5, 2009, this Court issued an order approving the sale motion (the "**Sale Order**"). As a result of the Sale Order and the consummation of the sale shortly thereafter, GM changed its name to Motors Liquidation Company ("**Old GM**"). On March 29, 2011, the Court entered its Findings of Fact, Conclusions of Law, and Order Pursuant to Sections 1129(a) and (b) of the Bankruptcy Code and Rule 3020 of the Federal Rules of Bankruptcy Procedure Confirming Debtors' Second Amended Joint Chapter 11 Plan (Dkt. No. 9941) (the "**Confirmation Order**"), which, among other things, confirmed the Debtors' Second Amended Joint Chapter 11 Plan (the "**Plan**").

[2] Old GM's errors are endemic throughout its brief. For example, Old GM errs in its representation to the Court (Old GM Mem. at ¶ 11) that "[o]n March 28, 2011, the Court entered its Findings of Fact, Conclusions of Law, and Order Pursuant to Sections 1129(a) and (b) . . . ." Dkt. No. 9941, the Confirmation Order, states the date of entry as March 29, 2011, as does the document itself at the Court's signature. Then, in note 6, Old GM argues in a footnote, almost as an afterthought, that Plaintiffs' filing is untimely, because one must move under Section 1144 *before* 180 days after confirmation. These types of mistakes – which are disturbingly prevalent throughout Old GM's Amended Motion – not only cast doubt on all of Old GM's arguments here, but have the further deleterious effect of unnecessary expense to the estate and, more significantly, create a risk that matters will be decided other than on their merits. Indeed, "errors" similar to this one, which create serious flaws of record, precipitated this entire litigation.

and on behalf of all others similarly situated (the "Class," as defined in the Complaint and below) allege Old GM's fraud on the court as grounds for revocation of the Confirmation Order, whereupon, in a separate claims process, they could recover damages for failure of consideration, breach of warranty, and/or unfair or deceptive trade practices in having purchased or leased 2007-2008 consumer model Chevrolet Impalas ("Consumer Impalas") with defective rear suspension systems. Old GM has refused to remedy Plaintiffs' and the other Class members' damages arising from this serious product defect, despite providing a $450 "fix" per automobile to owners of the police model Chevrolet Impalas from those same model years for the identical defect. Simply stated, permitting Old GM to shirk its fiduciary obligations to Plaintiffs and the other Class members – a process that began with Old GM's willful refusal to even provide them with proper notice of their claims or the claims process relating thereto – would be inequitable in the extreme. Plaintiffs have stated a Section 1144 claim and that claim should be permitted to proceed as pleaded.

II. PRELIMINARY STATEMENT

Plaintiff John Morgenstein contacted counsel in July 2011 concerning excessive wear on the tires of his 2008 Chevrolet Impala.[3] (Complaint ¶¶ 16, 25) Counsel conducted research to determine if there were similar complaints from other individuals, and were soon after retained by Plaintiffs Michael Jacob and Alante Carpenter, who had suffered similar issues. During the course of the investigation, counsel learned that in or about July 2008, Old GM had issued Product Service Bulletin 08032A (the "PSB") to Authorized Chevrolet Dealerships, and initiated a recall as to "Police Package" Chevrolet Impalas ("Police Impalas") from the 2007-2007 model years. (Complaint ¶¶ 5-8) No similar Product Bulletin was issued, and no recall initiated, as to

[3] Plaintiffs Jacob and Carpenter replaced their rear tires at 21,000 and 14,000 miles respectively. (Complaint ¶¶ 26-27).

other consumers who had purchased or leased the consumer versions of those Chevrolet Impalas for those same 2007-2008 model years (the "Consumer Impalas"). (Complaint ¶ 4) In the course of their due diligence, counsel learned that the excessive tire wear was caused by a suspension issue attendant to defectively designed, engineered and manufactured rear spindle rods. This defect is a danger to drivers and causes rear wheel misalignment resulting in excessive, abnormal, and premature wear to the inboard side of all subject Impalas' rear tires. Consumer Impala owners reportedly have had to replace rear tires within 6,000 miles of tire life.[4] In addition, counsel learned that there was no material difference between the spindle rod/suspension issue of the Police Impalas and the Consumer Impalas. (Complaint ¶ 10)

On August 5, 2011, Plaintiff Morgenstein, by his counsel, advised New GM of the defective rear spindle rod issue and requested warranty coverage for that defect, under the warranty he received at the time he purchased that automobile. *See* Exhibit 1; *see also* Complaint ¶16. On August 12, 2011, New GM refused to extend the requested warranty coverage, contending that the rear spindle rod problem resulted from a design defect and was, therefore, not covered under the warranty obligations New GM assumed under its asset purchase agreement with Old GM. *See* Exhibit 2; *see also* Complaint ¶ 16.

Upon receiving New GM's response, Plaintiff Morgenstein, by his counsel, investigated whether provisions had been made in Old GM's Plan of Reorganization for owners of defective Consumer Impalas or any other similar product defect claims, quickly discovering that no such provisions were made, nor had Old GM taken any steps to provide notice to any 2007-2008 Consumer Impala owners or lessees of (1) this serious design defect, (2) their ability to file claims, or (3) the Bar Date.

[4] *See* http://www.autoweek.com/article/20110706/CARNEWS/110709946

Approximately 400,000 2007-2008 model year Consumer Impalas were sold or leased to consumers, some of which were manufactured and/or sold after Old GM was already providing relief to Police Impala owners/lessees. According to the PSB, the cost of repairing the defective spindle rods is approximately $450.[5] (Complaint ¶ 15). Old GM neither listed Plaintiffs nor the other Impala Claimants in the schedules, nor disclosed them in the Disclosure Statement, nor disclosed them at the confirmation hearing or otherwise. Absent the extraordinary relief of revocation, no Consumer Impala owner/lessee will have an opportunity to establish an entitlement to relief from the GUC Trust.

The Complaint for Revocation, which was necessitated by the foregoing, sufficiently and succinctly pleads a clear case of fraud on this Court in connection with Old GM's procurement of confirmation of its Chapter 11 Plan of Reorganization. Old GM intentionally omitted a class of known creditors from its Chapter 11 Schedules, from its Disclosure Statement, and from the Court's visage throughout these proceedings. Old GM affirmatively misrepresented in its Disclosure Statement that it had effected notice of Bar Dates in accordance with the Bar Date Order, specifically requiring notice to non-scheduled known creditors. By so doing, Old GM was able to secure a Confirmation Order on false pretenses – improperly securing statutorily required findings of satisfaction of 11 U.S.C. §§ 1129(a) (*see* Findings G-I of Confirmation order of March 29, 2011) requiring, among other things, Old GM's and the Plan's compliance under Sections 1107, Section 1123(a)(2)(ii)-(iii), Section 1123(a)(3), Section 1125, and Fed. R. Bankr.

[5] Plaintiffs are not seeking damages in this action or its related claims process predicated on the premature tire wear that they and the other Class members may have sustained as a result of the above-described design and manufacturing defects. Although Plaintiffs believe that discovery may lead to a viable tire wear damage model, the Court ordered that discovery shall not go forward at this time, thereby precluding Plaintiffs' proper pursuit of the tire damage claims.

P. 1007(b)(1).[6] The affirmative misrepresentation and the information withheld were material because they would have factored into the Court's independent determination as to the satisfaction of Section 1129 confirmation standards. Without presuming the Court's decisions, had the Court known the truth about the undisclosed, un-noticed class of creditors, it is likely it would not have confirmed Old GM's Second Joint Amended Plan as filed.[7]

The Complaint for Revocation provides specific allegations that Old GM, long before filing of various schedules and publication of the Disclosure Statement relating thereto, knew for a certainty that Plaintiffs and the other Impala Claimants had product defect claims, wholly latent, of which Old GM, but neither Plaintiffs nor the other Impala Claimants, had actual knowledge. The Complaint alleges that Old GM breached its statutory and fiduciary duties of full disclosure to the Court and creditors in suppressing material information regarding the fact of Plaintiffs' and the other Impala Claimants' claims, to the damage of this Court's integrity.[8] Fortunately, the Bankruptcy Code provides the remedy of revocation of the Confirmation Order – which, absent revocation,[9] will bind Plaintiffs to its injustice. This Court has retained jurisdiction to adjudicate Plaintiffs' complaint for revocation.

[6] Good faith means, among other things, fundamental fairness with one's creditors; and fundamental fairness begins with notice and an opportunity to be heard, absent which, Old GM has undermined the integrity of the Chapter 11 process. *See, e.g. Tenn-Fla Partners v. First Union Nat'l Bank of Florida* (*In re Tenn-Fla Partners*), 229 B.R. 720, 731(W.D. Tenn. 1999), aff'd, 226 F.3d 746 (6th Cir. 2000).

[7] "The suppression of material facts that likely would have led to a different result unambiguously constitutes an impairment of the adjudicatory process." *Official Committee of Unsecured Creditors v. Michelson* (*In re Michelson*), 141 B.R. 715, 729 ((Bankr. E.D. Cal. 1992).

[8] "The integrity of the confirmation process is dependent on a plan proponent's honest compliance with the requirements of § 1129." *In re Tenn-Fla Partners,* 229 B.R at 731 (W.D. Tenn. 1999).

[9] The Complaint is imprecisely styled "Complaint for Revocation of Discharge," since this is a liquidating chapter 11 case in which no discharge is ordered. But see 11 U.S.C. § 1144(2) ("revoke the discharge of the Debtor"); Trans. of Confirmation Hearing, Dkt. 9791 at p.127 ("section of the plan 10.7 looks an awful lot like a discharge injunction") As the first sentence of the Complaint states, however, the Complaint's exclusive purpose is to obtain on behalf of the proposed class of Impala Claimants "a limited revocation of the confirmation order entered herein on March 29, 2011."

The fraud alleged in the Complaint for Revocation (as evidenced by Exhibit A, attached thereto), that Old GM was intentionally and grossly derelict in carrying out its bankruptcy disclosure obligations, is clear and straightforward. By not disclosing, Old GM's conduct runs directly counter to established Bankruptcy norms.[10] Yet Old GM, with slight exceptions, completely ignores Plaintiffs' allegations of fraud and their nexus to fraudulent procurement of the Confirmation Order. Rather, Old GM devotes the majority of its Amended Motion to extraneous matters either not before the Court, or not appropriately considered on a motion to dismiss or, in some instances, not even potential issues under the Complaint. *See* Amended Motion to Dismiss at Table of Contents, IV and V.[11]

Old GM's motion purports to contain five separate arguments, but contains, in reality, a proliferation of issues and arguments of astounding proportions.[12] Its first three arguments, *i.e.* (1) "partial revocation" unavailable . . . must be revocation in its entirety; (2) failure to plead fraud with particularity or "fraud on the court"; and (3) equitable mootness, (*i.e.* the Court can do nothing to right the wrong) – issues we agree are appropriate for the Court's present

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[10] "In failing to make the proper disclosures, the Defendant has acted in a manner antithetical to the spirit of the Bankruptcy Code. The three most important words in the bankruptcy system are: disclose, disclose, disclose." *Sanchez v. Ameriquest Mortg. Co*. (*In re Sanchez*), 372 B.R. 289, 305 (Bankr. S.D. Tex. 2007).

[11] At the pretrial of November 22, 2011 the Court granted leave to Old GM to argue broadly for dismissal, which is generally consistent with the Court's practice in other matters pled as putative class actions in this District.

[12] By comparison to *In re Worldcom, Inc.*, No. 02-13533 (AJG), 2007 U.S. Bankr. LEXIS 2232 (S.D.N.Y. 2007), the Court can appreciate how far afield we view Old GM's Rule 12(b)(6) Motion. In *Worldcom* the Plaintiff pursued in a class action filed pre-petition on behalf of millions of Worldcom customers, a claim alleging Universal Service Fund overcharges of approximately $1.93 per class member. The matter proceeded to Summary Judgment, and evidence was presented. Summary Judgment was granted on the facts and the law, with the Court finding no genuine issue of material act as to the alleged overcharges. The class claim was filed on January 16, 2003 and decided on June 27, 2007. The case did not touch upon issues of the gravity presented here.

consideration – amount to nothing more than a litany of word games and red herrings;[13] while the last three arguments, *i.e.* (4) "excusable neglect"; (5) striking of class allegations; and (6) failure to satisfy the confirmation standards of Rule 23, are not issues ripe for adjudication in the Rule 12(b)(6) context, but rather arise from the Court's threshold concerns of balancing the bankruptcy needs of the case against the use of the class action device. *See* p. 49, above, discussing *Paikai v. General Motors Corp.*, C.A. No. S-07-892, 2009 U.S. Dist. LEXIS 8538 (E.D. Cal. Feb. 5, 2009) (in similar case, threshold attack on Rule 23 aspects held improper).

Moreover, Old GM's arguments 4-6 do not relate to primary issues of the Complaint's Rule 12(b)(6) sufficiency at law, but rather, superimpose rhetoric from wholly dissimilar cases upon truncated and fractured renditions of the Complaint. As stated in *Collier on Bankruptcy*, this Court should carefully weigh Plaintiffs' argument:

> The requirement of protecting persons acquiring rights under the plan has led many courts to dismiss complaints seeking revocation on the grounds of equitable mootness. If there is nothing the court can do to fashion appropriate relief, there may be no alternative but to dismiss an action under section 1144 as moot. The standards that apply in determining whether an appeal is moot are relevant in determining mootness under section 1144. **A court should strive, however, to find an appropriate method of providing relief, such as permitting an aggrieved party to seek damages, so as not to allow a party to benefit by the commission of fraud.**

8-1144 *Collier on Bankruptcy* ¶ 1144.06 ("*Collier*"). (Emphasis added.) Accordingly, the key question before this Court is whether this Court can "fashion appropriate relief" under the Complaint for Revocation as pleaded.

Revocation of the Confirmation Order can be accomplished without the rescission of any prior stock distributions or trades, without any other frustration of actions taken in reliance upon

[13] Old GM states: "Plaintiffs have not stated a claim upon which relief may be granted because (i) Debtors did not receive a discharge … and (iii) only a debtor or a proponent of a confirmed plan may seek partial plan modification." (Old GM Mem. at ¶ 18). Plaintiffs, however, have not sought Plan modification and do not seek to revoke a discharge. *See* n. 9, above.

the Confirmation Order, and in a manner completely consistent with what Old GM contemplated in principle in the Disclosure Statement and Second Amended Joint Plan. See Dkt. No. 9791, p.73, quoted below. Elsewhere, Old GM has represented "the Plan is essentially a 'pot plan' for holders of Asbestos Personal Injury Claims and holders of other allowed general unsecured claims." (Dkt. No. 7782, p.4). Assuming that only assets of Old GM's General Unsecured Creditors' Trust (the "GUC Trust") are at issue, there is funding with which to fashion relief, *i.e.* to satisfy any allowable claims of Plaintiffs and the other Impala Claimants, *pro rata,* just as other General Unsecured Creditors have received and will receive distributions.[14] To the extent that a General Unsecured Creditor receives less than it would have received absent revocation, the Court shall have done equity nonetheless, as the differential would have been a windfall to allowed unsecured creditors at the expense of similarly situated (but barred) Plaintiffs and the other Impala Claimants, with no countervailing equities or policy demands supporting the loss to Plaintiffs.[15] As explained below, revocation will have no impact on, and can be fashioned in a manner to avoid injury to, innocent third parties who have acted in reliance upon the efficacy of the Confirmation Order.

And finally, neither these proceedings nor the associated process of claims determination need delay the implementation of the Plan of Reorganization **unduly**, if at all. Per the Bankruptcy Code and the Second Amended Joint Chapter 11 Plan and Confirmation Order, this Court is vested with the authority to estimate the claims at issue, for allowance purposes, in

[14] "While necessarily complex in aspects of its implementation, the Plan at bottom is a relatively simple, and classic, liquidating 'Pot Plan.'" *In re Motors Liquidation Co.*, 447 B.R. 198, 201 (Bankr. S.D.N.Y. 2011).

[15] Section 1123(a)(4) requires "the same treatment for each claim or interest of a particular class," while Section 1129(a)((1) essentially embraces Section 1123(a)(4) as a condition precedent to confirmation. *See In re Motors Liquidation Co*., 447 B.R. 198 at 215.

accordance with Section 11 U.S.C. §502(c).[16] *In re Chemtura Corp.,* 448 B.R. 635, 650 (Bankr. S.D.N.Y. 2011) ("Using estimation for claims allowance purposes, while permissible (and, indeed, expressly mentioned in section 502(c)(1)), can sometimes raise due process concerns...").[17] Indeed, but-for an unanticipated settlement, estimation was to be used in Old GM's Chapter 11 case, to fix the aggregate size of asbestos injury claims against Old GM. See Debtors' Motion to Estimate Debtors' Aggregate Asbestos Liability and Establish a Schedule for Estimation, Dkt. No. 7782. Moreover, just as this Court contrasted the relative complexities and burdens of estimating proposed claims in *Apartheid*[18] as being more onerous than estimation of aggregate asbestos liability, so it is that estimation here is less burdensome than the asbestos liability process, which this Court ordered to hearing within 90 days. *See, e.g.*, Exhibit A to Complaint, defining the cost of the "fix" as the Rod Kit plus 2.5 hours of labor, for an estimated cost of $450. *See also* Complaint at ¶ 15. This baseline cost was Old GM's exact, unconditional measure of relief to affected Police Impala owners, throughout the U.S. and Canada; and Old GM's formula will provide reliable (if not definitive) guidance to the Court in its Section 502(c) estimation here. The class claim to be proposed here lends itself well "to a kind of

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[16] The specific provisions providing for Section 502(c)(1) estimation in this case include Debtor's Second Amended Joint Chapter 11 Plan, Dkt. No. 9791, Art. 7.3 at 67 (retention of §502(c) jurisdiction); the GUC Trust Agreement, Dkt. No. 9477, Exhibit B, Art. 13.3 at 56 (Court's continuing and exclusive jurisdiction); Art.5.1(e) at p. 21: [t]he GUC Trust Administrator may at any time request that the Bankruptcy Court estimate any contingent claim, unliquidated claim or Disputed General Unsecured Claim pursuant to Section 502(c) of the Bankruptcy Code . . . ." The foregoing provisions are all ordered at ¶ 1 (Decrees) at p.17 of the Confirmation Order, over which the Court expressly retained jurisdiction. *Id*. at ¶ 69, p.70.

[17] There is no Constitutional concern in this instance, because Plaintiffs have invoked this Court's core equity (i.e. claims) jurisdiction, and the Old GM has no right to demand a jury trial. ("The Seventh Circuit has also since held that a trustee or debtor-in-possession has no right to demand a jury trial on a claim filed by a creditor. A number of bankruptcy courts have agreed at least in result with the Seventh Circuit, and one need not agree with its waiver reasoning similarly to agree.") *Germain v. Connecticut Nat'l Bank*, 988 F.2d 1323, 1333 (2d Cir. 1993) (Oaks, J. in dissent) (internal citations and comments omitted).

[18] *In re Motors Liquidation Co.* ("*Apartheid*"), 447 B.R. 150, 168 (Bankr. S.D.N.Y. 2011).

'macroeconomic' analysis that could estimate overall" *Apartheid,* 447 B.R. at 166. On the state of record at this time, absent disputative evidence from Old GM countering the PSB and its uncontroverted surrounding circumstances, this Court would be justified, if not required, to find that each Class member is entitled to an allowed claim of $450.[19]

Moreover, colloquy at the Confirmation Hearing evidences that the GUC Trust was established with a conscious intent and purpose that, notwithstanding a reasonable delay, resolved-allowed claims would receive *pari passu* treatment with creditors holding initial-allowed claims:

> MR. MAYER: Your Honor, it's the purpose of the GUC Trust to make sure that people get the same treatment of their claim, whether they're allowed early or late. That's what we've tried to draft.
>
> THE COURT: So you're saying that the purpose was to help people whose claims might later be resolved or allowed, rather than to prejudice them?

(Dkt. No. 9791, p.73). It makes no difference whether or why claims are allowed subsequent to the effective date. The Confirmed Plan anticipated and provided protection for claims allowed after Confirmation.

III. OVERVIEW

Plaintiffs seek limited revocation of this Court's Confirmation Order entered March 29, 2011, pursuant to Section 1144 of the Bankruptcy Code, predicated on Old GM's fraud in procuring that Confirmation Order. As alleged in the Complaint, Old GM's fraud consisted

[19] "We note in passing that the Brokers do not argue with the Debtors'' legal for factual conclusions regarding the probable outcome of MDL 581. Thus, our estimation is based upon undisputed facts and law." *In re Baldwin-United Corp*., 55 B.R. 885, 903 (Bankr. S.D.N.Y. 1985). *See also Samuel-Bassett v. Kia Motors, Inc.*, No. J-31A-C-2009, ___ A.3d ___, 2011 Pa. LEXIS 2896 at *103 (Pa. Dec. 2, 2011) (damage award of $600 per class member sustained, because "all class members were entitled to have good brakes").

primarily of the intentional and material omission to disclose,[20] in the schedules,[21] disclosure statement, or otherwise, a class of claimants whose standing is, unremarkably, not challenged by Old GM in its Motion to Dismiss. Further, Plaintiffs have adduced proof (in the record of the Chapter 11 case, which this Court may judicially notice, *see* n. 41, below) that Old GM falsely stated in the Disclosure Statement that notice of the Bar Date had been mailed to "all parties **known** to the Debtors as having **potential Claims** against any of the Debtors' estates." (Dkt. No. 8023, p.34).[22] Though "known creditors"[23] to Old GM since June-July 2008, the facts underlying Plaintiffs' and the other Impala Claimants' status as creditors was unknown to

[20] Though in most proceedings, mere omission of material facts do not rise to the level of fraud on the court, in actions to revoke a bankruptcy court's order, courts have been willing to examine disclosures of a party with a duty to disclose for fraudulent omissions. *In re Tenn-Fla Partners*, 229 B.R. at 730 (W.D. Tenn. 1999), aff'd, 226 F.3d 746 (6th Cir. 2000), citing *In re Circle K Corp*., 181 B.R. 457, 463-65 (Bankr. D. Ariz. 1995); *Ogden v. Ogden Modulars, Inc.*, 180 B.R. 544, 547 (Bankr. E.D. Mo. 1995); *Kelly v. Giguere (In re Giguere)*, 165 B.R. 531, 534-36 (Bankr. D.R.I. 1994); *In re Michelson*, 141 B.R. at 725 (fraudulent omission by an Attorney rises to the standard of fraud on the court).

[21] "Accordingly, it is self evident that a debtor must exercise great care in compiling his list of creditors." *In re Weintraub*, 171 B.R. 506, 508 (Bankr. S.D.N.Y. 1994). Cf. *Miller v. Guasti*, 226 U.S. 170, 33 S. Ct. 49, 57 L. Ed. 173 (1912)("It was a fraud to state a creditor's address as unknown when in fact it was known to the bankrupt.")

[22] Substantially the same affirmative material misstatement of fact was made at the Confirmation Hearing in relation to ordered service of the Notice Package. Both affirmative misstatements are discussed in detail at p.28, below.

[23] "[A] known creditor is one whose identity is either known or reasonably ascertainable by the debtor" – *i.e.*, someone "can be identified through reasonably diligent efforts." *DePippo v. Kmart Corp.*, 335 B.R. 290, 296 (S.D.N.Y. 2005). "Known" creditors must be given direct notice by mail of a deadline to file a proof of claim, publication notice is generally sufficient for "unknown" creditors. *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 317, 70 S. Ct. 652, 94 L. Ed. 865 (1953). We note the words of this Court in its Apartheid decision: "For persons who are **missing or unknown**, "employment of an indirect and *even a probably futile* means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights". (Boldface emphasis added, italics in original). *In re Motors Liquidation Co.* ("*Apartheid"*), 447 B.R. 150 at 168. However, where Plaintiffs were "known" creditors at the time of the Bar Order and failed to receive actual notice, their claims may not be discharged. "Generally, if a known creditor is not given formal notice, he is not bound by an order discharging the bankruptcy's [sic] obligations." *Levin v. Maya Constr. Co.* (*In re Maya Constr. Co*.), 78 F.3d 1395, 1399 (9th Cir.), *cert. denied*, 519 U.S. 862, 117 S. Ct. 168 (1996). Here, by affording relief to all owners of "Police Impalas," Old GM has permitted an inference that it had equal knowledge of Plaintiffs and the other Impala Claimants.

Plaintiffs and those other Impala Claimants until July 2011.[24] As set forth below, the factual basis for revocation is plausibly set forth in sufficient detail, in the allegations of the Complaint, to withstand Old GM's Rule 12(b)(6) dismissal motion.

A. Background and Relevant Plan Structure: GUC Trust

The Second Amended Joint Chapter 11 Plan provides for six (6) classes of claims and interests. Had Plaintiffs and the other Impala Claimants been disclosed, they would fall within Class 3, known as General Unsecured Claims, estimated by Old GM at $34.4 to $39 billion.[25] At no time has Old GM offered, guaranteed, or represented to any Class 3 Claimant a specific GUC Trust payment or percentage of recovery. In fact, Old GM's Plan (at page 7) affirmatively states that: "[t]he Debtors do not believe it is necessary to estimate the value of the foregoing in view of the liquidating nature of the Plan and the recent public offering by New GM."[26] Further, the eventual distributions to Class 3 creditors from the GUC Trust[27] are dependent upon numerous

[24] Generally, because the identity of ''future claimants'' cannot be determined, as a matter of due process, the bar date does not ordinarily apply to such claimants. 1-7 ACTL Mass Tort Litigation Manual § 7.04.

[25] The Claims in Class 3 consist of the Claims of unions, suppliers and other vendors, landlords with prepetition rent claims and/or claims based on rejection of leases, employment, personal injury, and other litigation claimants to the extent not covered by insurance, Asbestos Property Damage Claims, environmental claims subject to discharge under Environmental Laws to pay money to private and governmental entities for cleanup or remediation of property not owned by the Debtors, including Superfund liabilities, parties to contracts with the Debtors that are being rejected, the principal and interest accrued and unpaid through the Commencement Date under the notes, bonds, or debentures that are subject to the Indentures, the Eurobond Claims, the Nova Scotia Guarantee Claims, the Nova Scotia Wind-Up Claim, and other general unsecured claims. Amended Disclosure Statement, Dkt. No. 8023, p. 57.

[26] By way of example, the Plan currently leaves open whether holders of Allowed General Unsecured Claims or the DIP Lenders are entitled to the proceeds of any recovery on the Term Loan Avoidance Action. Amended Disclosure Statement, Dkt. No.8023 at p. 59.

[27] The GUC Trust holds, administers and directs the distribution of certain assets pursuant to the terms and conditions of the Motors Liquidation Company General Unsecured Creditors Trust Agreement (Dkt. No. 9477 Ex. B) (the "GUC Trust Agreement") and pursuant to the Second Amended Joint Chapter 11 Plan (the "Plan", Dkt. No. 9836) of MLC and its debtor affiliates (collectively, along with MLC, the "Debtors"), for the benefit of holders of allowed general unsecured claims against Old GM ("Allowed General Unsecured Claims").

contingencies which have not been, and cannot be, quantified with any degree of certainty. *See, e.g.*, Exhibit A to Notice of Filing of (I) Filing of Revised GUC Trust Agreement and (II) Official Committee of Unsecured Creditor's Filing Relating Thereto and I Further Support of the Debtors' Amended Joint Chapter 11 Plan (Dkt. No. 9477).

As of the Effective Date, there were approximately $8,154 million in disputed general unsecured claims, reflecting liquidated disputed claims. There are also unliquidated and contingent claims, e.g. Class 5 Asbestos Personal Injury Claims, bearing significant ramifications for Class 3 claimants and the GUC Trust. The Court has established an ADR mechanism to address most or all of the disputed general unsecured claims, including class claims. See Amended. Disclosure Statement, Dkt. No. 8023, at p. 35; Debtors' Second Amended Joint Chapter 11 Plan, Dkt. No. 9477, p.39 (Art. 5.11).

The GUC Trust may well receive material sums of money in the future. For example, the Term Loan Avoidance Action, with a prayer of $1.5 billion, is in process.[28] Moreover, in the event that Old GM commence and are successful in prosecuting legal actions arising under the Bankruptcy Code to compel certain recipients of transfers from Old GM to disgorge the value of such disputed transfers, and in recovering the proceeds of such legal actions, such Avoidance Action Proceeds will flow to the GUC Trust.

Presumably, if Plaintiffs, individually and on behalf of the other Impala Claimants, were allowed to pursue a class claim following revocation, a streamlined estimation procedure in accordance with 11 U.S.C. 502(c) (such as that adopted for asbestos claims, *see, e.g.*, Dkt. No.

[28] On June 6, 2011, the Committee commenced a separate adversary complaint seeking a declaratory judgment that (a) the DIP Lenders are not entitled to any proceeds of the Term Loan Avoidance Action and have no interests in the trust established for the action under the Plan (the "Avoidance Action Trust"), and (b) the holders of Allowed General Unsecured Claims have the exclusive right to receive any and all proceeds of the Term Loan Avoidance Action, and are the exclusive beneficiaries of the Avoidance Action Trust with respect thereto. This action is still pending. *See* GUC Trust Balance Sheet of September 30, 2011, Dkt. No. 11090-1 at Exhibit A, at Notes, p. 3.

8121), followed up, if necessary, by the ADR procedure already in place,[29] would efficiently dispose of this controversy and facilitate distribution. Indeed, the Plan specifically provides for the adjudication of class claims within the ADR apparatus.[30]

B. <u>Release from Third-Party Releases: Part and Parcel of the Section 1144 Relief</u>

The Confirmation Order, at ¶¶ 51-54, affords broad releases to Old GM's pre- and post-petition officers and directors[31]. As will be discussed below, however, those parties – or some of them – have breached their respective fiduciary duties to Plaintiffs and the other Impala Claimants. As a result, Plaintiffs have a right to seek damages from those fiduciaries. This is an intended remedy under Section 1144, separate and apart from Plaintiffs' and the other Impala Claimants' rights as against the assets of the GUC Trust.[32] Plaintiffs, individually and on behalf of the other Impala Claimants cannot freely exercise that right so long as Paragraphs 51-54 (and perhaps other provisions) of the Confirmation Order remain in full force and effect as to Plaintiffs and the other Impala Claimants. This Court's precedent as to non-consensual third-

[29] Given Old GM's definitive valuation of the defect "fix" at 2.5 hours of labor and the cost of new spindle rods, the process envisioned here would be considerably less protracted than that ordered on December 15, 2010 for contingent asbestos claims.

[30] On February 23, 2010, the Bankruptcy Court entered an order (the "ADR Procedures Order", Dkt. No. 5037) authorizing the implementation of the ADR Procedures with respect to the following types of unliquidated and/or litigation Claims: (i) personal injury Claims… (ix) class action Claims (collectively, the "Subject Claims"). Amended Disclosure Statement, Dkt. No. 8023 at 35.

[31] In discussing this issue at the Confirmation Hearing there seemed to be relative certainty that "somebody who steps out of this exclusive jurisdiction, . . . the debtors are going to come in and seek, I think, contempt or some sanction with respect to a violation of the confirmation order (Dkt. 9791, p.95); that "section of the plan 10.7 looks an awful lot like a discharge injunction (*Id. at* 127); and that 12.6, exculpation, "does protect creditors' committee, debtor, all the people who are listed, from a claim by somebody out in the hallway." *Id.* at 131. Moreover, there may be considerable doubt as to whom a particular claim belongs as between the estate and an alleged claimant, thus setting the stage for threatened exposure and protracted litigation. *Id*. at 134.

[32] "A court should strive, however, to find an appropriate method of providing relief, such as permitting an aggrieved party to seek damages, so as not to allow a party to benefit by the commission of fraud." 8-1144 *Collier on Bankruptcy* ¶ 1144.06.

party releases is well known and understood.[33] This facet of the confirmation Order is alone sufficient to warrant revocation:

> "But I'm constrained by existing law to place some limits on their protection. I've spoken many times, including earlier in this very case, of the importance of stare decisis and predictability in commercial cases in this district, and thus must remain consistent with my earlier decisions, not to mention the Circuit's. Accordingly, the exculpation provisions of Article 12.6 must be fixed, consistent with Chemtura, DBSD, and the Adelphia decisions."

In re Motors Liquidation Co., 447 B.R. 198 at 221. This Court would not have approved such releases as against non-consenting Consumer Impala owners/lessees had it known of their existence and circumstances. Indeed, one is struck by the broadly pernicious effects, to the entire Chapter 11 process, of material non-disclosure.[34]

C. <u>Allegations of Fraud on the Court</u>

Although Old GM claims (1) Plaintiffs do not plead the predicate Section 1144 fraud with particularity, but rather, in conclusory fashion, and that (2) Plaintiffs do not plead "fraud on the Court," the Complaint (with due inferences) speaks otherwise:

> Old GM has known since at least June-July 2008 that the rear spindle rods in its Impalas were defective as engineered and/or manufactured (Complaint ¶ 4). Such a defect creates rights to relief, *inter alia,* in warranty, strict liability and related theories.[35] On or about June 1, 2008, and in July of 2008, Old GM issued

[33] "Though exculpation provisions have a salutary purpose, that salutary purpose is insufficient by itself to make them proper as a general rule. As the Second Circuit's decision in Metromedia, and my earlier decision in Adelphia provide, exculpation provisions (and their first cousins, so-called "third party releases") are permissible under some circumstances, but not as a routine matter . . . Except for those particular entities that are providing new funding to the Debtors as part of the New Financing Facility, I'm not in a position to approve the exculpation provisions except on the basis of consent." *In re DBSD N. Am., Inc.*, 419 B.R. 179 (Bankr. S.D.N.Y. 2009), *aff'd*, No. 09 Civ 10156, slip op., (S.D.N.Y. Mar 24, 2010), *aff'd in part, rev'd in part on other grounds*, 634 F.3d 79 (2nd Cir. 2011) .

[34] "Among the most important schedules are those relating to creditors and liabilities . . . This broadest possible definition [of "claim" under Section 101] contemplates that all legal obligations of the debtor, no matter how remote or contingent, can be dealt with in the bankruptcy case . . . The **purpose** of including this information in the schedules is threefold: (a) **to give the court information as to the persons entitled to notice** . . . Therefore, the importance of strict compliance is obvious." 4-521 *Collier on Bankruptcy* ¶ 521.06 (2011) (emphasis added).

[35] "To prevail on a claim of breach of express warranty, a plaintiff must show 'an affirmation of fact or

Technical Service Bulletin 08032, National Highway Transportation Safety Administration ("NHTSA") Item Numbers 10026504 and 10026484 concerning these defects and the necessary repairs . . . but only as to Police Package Impalas (Complaint ¶ 5). There are no material differences between the rear wheel spindle rods installed and equipped in Police Package Impalas and the rear wheel spindle rods installed and equipped in Impalas without a police package. ("Consumer Impalas") (Complaint ¶ 10). When Old GM filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on June 1, 2009, and at all times before and after, Old GM failed to provide notice of the rear wheel spindle rod defect to Consumer Impala owners and/or lessees; further, Old GM failed to provide Consumer Impala Owners with notice of Old GM's bankruptcy proceedings and the claim deadlines relating thereto (Complaint ¶ 12). Once Old GM became insolvent and filed for Bankruptcy, it became subject to certain common law and statutory duties of a fiduciary to its creditors, including fiduciary duties of full disclosure; and its failure to provide full disclosure was a breach of fiduciary duty as to the Class (Complaint ¶ 14). Old GM had actual knowledge of Plaintiffs, their class and their claims (Complaint ¶ 1).[36] Minimum damages per class member, according to Old GM-authored documents annexed to the Complaint, are $450 plus premature tire wear[37] (Complaint ¶ 15). To protect the interests of those creditors, i.e. the class, and to preserve the integrity of the Chapter 11 process, the Bankruptcy Code requires full disclosure throughout the Bankruptcy process (Complaint ¶ 43). Old GM had a duty to list Plaintiffs as scheduled creditors and to disclose Plaintiffs as creditors under and in the context of Sections 1125, 1129(a)(3) and 1107 of the Bankruptcy Code; but Old GM did not do so (Complaint ¶ 46). As a fiduciary under Section 1107 Debtors (*i.e.* insolvents), had a duty to disclose all material information, including the defective

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promise by the seller, the natural tendency of which was to induce the buyer to purchase and that the warranty was relied upon.'" *Factory Assocs. & Exps., Inc. v. Lehigh Safety Shoes Co., LLC*, 382 F. App'x 110, 111 (2d Cir. 2010) (quoting *Schimmenti v. Ply Gem Indus., Inc.*, 156 A.D.2d 658, 549 N.Y.S.2d 152, 154 (N.Y. App. Div. 1st Dep't 1989)). In addition, "[w]hether an action is pleaded in strict products liability, breach of warranty, or negligence, the plaintiffs must prove that the alleged defect is a substantial cause of the events which produced the injury." *Fahey v A.O. Smith Corp.*, 77 A.D.3d 612, 908 N.Y.S.2d 719, 723 (N.Y. App. Div. 2d Dep't 2010); *Oscar v. BMW of N. Am.*, 274 F.R.D. 498, 511 (S.D.N.Y. 2011).

[36] The Court of Appeals for the Eleventh Circuit has stated: [A]n individual has a § 101(5) claim against a debtor manufacturer if (i) events occurring before confirmation create a relationship, such as contact, exposure, impact, or privity, between the claimant and the debtor's product; and (ii) the basis for liability is the debtor's prepetition conduct in designing, manufacturing and selling the allegedly defective or dangerous product. *Epstein v. Official Comm. of Unsecured Creditors of the Estate of Piper Aircraft Corp. (In re Piper Aircraft Corp.)*, 58 F.3d 1573, 1577 (11th Cir. 1995); cited by *Wright v. Owens Corning*, 450 B.R. 541, 551-2 (W.D. Pa. 2011).

[37] Plaintiffs do not seek damages in this class action for his or any class member's premature tire wear occasioned by the defect aforesaid, as they are presently without information sufficient to posit an average tire wear damage per Impala owner/lessee or an actual amount of premature tire damage. Although Plaintiffs believe that discovery may lead to a viable tire wear damage model, the Court ordered that discovery shall not go forward at this time.

> nature of Consumer Impalas; but Old GM concealed that information at all relevant times(Complaint ¶ 47) Debtor caused the Plan to be confirmed upon materially false information, i.e. material omissions of fact, thereby failing in its statutory/fiduciary duty to this Court and manifesting the requisite Section 1144 intent to commit fraud on the Court; full disclosure of a class of Impala Owners, i.e. whose claims were neither scheduled nor dealt with by the plan, would have precluded confirmation under Section 1129 standards due to lack of good faith, discriminatory treatment of similarly-situated creditors, and breach of fiduciary duty; the Disclosure Statement was executed by an attorney appointed for Old GM by this Court; the Schedules were executed by attorneys representing Old GM in this matter;[38] and the Debtors' confirmation order was thus procured by fraud, including disclosure violations under Sections 1107 and 1125, either or both of which materially impacted this Court's adjudication under 1129 of the Bankruptcy Code. (Complaint ¶¶ 48 and 52). The element of intent flows from the foregoing.[39]

The above allegations comfortably and plausibly satisfy the requirements of Section 1144 revocation by reason of fraudulent non-disclosure of material information,[40] as is further discussed below.

IV. ARGUMENT

A. Standards Governing Motions To Dismiss

"In considering a motion to dismiss pursuant to Rule 12(b)(6), a court construes the complaint broadly, 'accepting all factual allegations in the complaint as true, and drawing all

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[38] "Behind most frauds on the court lurks an officer of the court. And, as noted above, participation by an officer of the court elevates garden-variety fraud into fraud on the court. Accordingly, it is pertinent focus on just who is an officer of the court in the context of bankruptcy. Counsel practicing before the court is a fortiori an officer of the court." *In re Michelson*, 141 B.R. at 726-727. Michelson was later endorsed in the leading case of *In re Tenn-Fla Partners* ("...fraud may include not only intentional misrepresentations but also misrepresentations by intentional omission 'of material facts in the disclosure and confirmation process.' *In re Michelson*, 141 Bankr. 715; *In re Tenn-Fla Partners*, 170 B.R. at 946.

[39] " . . .a person who (1) is obliged to disclose, (2) knows of the existence of material information, and (3) does not disclose it has fraudulent intent for purposes of revoking the order confirming a plan of reorganization. *In re Michelson*, 141 Bankr. at 725.

[40] The issue of defective disclosure in reorganization cases arises within the framework of chapter 11, which has provisions setting minimum standards for plans (11 U.S.C. § 1123), requiring disclosure of adequate information to those who are entitled to accept or reject the plan (11 U.S.C. § 1125), requiring that the plan proponent prove at the confirmation hearing that it has complied with those requirements (11 U.S.C. § 1129(a)(2), and permitting revocation of orders confirming plans based on fraud (11 U.S.C. § 1144). *In re Michelson,* 141 Bankr. at 718.

reasonable inferences in the plaintiff's favor'." *Bank of N.Y. Trust, N.A. v. Franklin Advisors, Inc.*, No. 07 Civ. 1746, 2007 WL 4116225, at *2 (S.D.N.Y. Nov. 16, 2007) (citation omitted). "A court should not dismiss a complaint for failure to state a claim if the factual allegations sufficiently 'raise a right to relief above the speculative level.'" *Id.*, quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965 (2007). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Villager Pond, Inc. v. Town of Darien,* 56 F.3d 375, 378 (2d Cir. 1995), *cert. denied,* 519 U.S. 808, 117 S.Ct. 50 (1996) *(quoting Scheuer v. Rhodes,* 416 U.S. 232, 235-36, 94 S.Ct. 1683, 1686 (1974)).

In addressing a motion to dismiss, the Court must limit its analysis to the facts stated within the complaint, incorporated into it by reference, or contained within documents attached to it. *Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F.3d 660, 662 (2d Cir. 1996) (stating rule, and reversing district court because it had based its decision to dismiss claims upon material outside the four corners of the complaint, including an affirmation proffered by defendant). The Court may take judicial notice of certain matters. *Adelphia Communications. Corp. v. Bank of Am., N.A.* (*In re Adelphia Commc'ns. Corp.*), 365 B.R. 24, 34 (Bankr. S.D.N.Y. 2007), aff'd in part, 390 B.R. 64 (S.D.N.Y. 2008).[41] If a plaintiff's claims have been adequately pleaded, then the motion to dismiss under 12(b)(6) must be denied. *Bayou Superfund, LLC v. WAM Long/Short Fund II, L.P.* (*In re Bayou Group, LLC*), 362 B.R. 624, 632 (Bankr. S.D.N.Y. 2007).

[41] To the extent referenced in this Memorandum, Plaintiffs respectfully request that the Court take judicial notice of documents that are referenced in or attached to the Complaint, documents that Plaintiffs relied on in bringing suit, records and reports of administrative bodies, items in the record of the case, and matters of general public record. *Person v. White*, No. 09-CV-3920, 2010 U.S. Dist. LEXIS 66827 (E.D.N.Y. July 2, 2010).

B. Plaintiffs' Revocation Request Satisfies the 180 Day Standard

Section 1144 provides, "On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation . . . ." Rule 9006 of the Federal Rules of Bankruptcy Procedure states in relevant part,

> Rule 9006. Time
>
> (a) COMPUTING TIME.
>
> The following rules apply in computing any time period specified in these rules, in the Federal Rules of Civil Procedure, in any local rule or court order, or in any statute that does not specify a method of computing time.
>
> (1) Period Stated in Days or a Longer Unit.
>
> When the period is stated in days or a longer unit of time:
>
> (A) exclude the day of the event that triggers the period;
>
> (B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and
>
> (C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday. . . .
>
> (5) Next Day Defined.
>
> The next day is determined by continuing to count forward when the period is measured after an event and backward when measured before an event. (Emphasis added).

The Confirmation Order was filed on March 29, 2011. The 179th day after March 29, 2011 was on a Saturday, September 24, 2011[42] and the 180th day after March 29, 2011 was on a Sunday, September 25, 2011. Rule 9006 (a) (1) (C), states that ". . .if the last day is a Saturday,

[42] As demonstrated in n. 2, above, Old GM *misread* the docket and Confirmation Order to say March 28th instead of March 29th as the Order date. To the extent Old GM had a colorable argument using a March 28th date of entry and a 179-day window to file, that colorable argument fades quickly in the light of truth.

Sunday, or legal Holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal Holiday…" The "next day" is defined in Rule 9006 (a) (5) as being "…determined by continuing to count forward when the period is measured after an event." In the case at bar, the period is measured as 180 days after the date of entry of the order of confirmation. The deadline was before the 180th day (or by the 179th day). The 179th day was on a Saturday and the 180th day was a Sunday, so the "next day" was Monday, September 26, 2011 (the 181st day). Since the Plaintiff filed on September 26, 2011, Plaintiff met the deadline enunciated in Section 1144.

C. <u>Plaintiffs Seek Revocation, Not Partial Revocation</u>

In Paragraph 19 of its Memorandum, Old GM purports to quote the "pertinent part" of Section 1144 *without* quoting subsection 1, the pivotal subsection thereof, by which the Court is broadly empowered to protect innocent third parties from impermissible effects of a revocation of the Confirmation Order. Section 1144, *in its entirety,* provides as follows:

> On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud. An order under this section revoking an order of confirmation shall-
>
> (1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and
>
> (2) revoke the discharge of the debtor.

Absent subsection (1), this Court might be constrained to dismiss Plaintiffs' Complaint lest, upon revocation, the issuance of New GM's securities would need to be reversed and all manner of catastrophe present itself. Under the authority of subsection (1), however, the Court is empowered to right the fraud done to the Court and to Plaintiffs, *i.e.* to find a way, fully compatible with the need to protect innocent third parties. *See Collier*, above ("strive . . . to find

an appropriate method of providing relief"). "Finding a way" is essentially what Chief Judge Bernstein spoke of when he wrote as follows:

> If a plan, even a substantially consummated plan, simply distributes money to creditors, revocation may not pose a significant problem. The reinstated debtor-in-possession can sue to recover the distributions under the plan. *Cf. Fulton Cty. Silk Mills v. Irving Trust Co. (In re Lilyknit Silk Underwear Co.)*, 73 F.2d 52, 53-54 (2d Cir. 1934) (discussing a bankruptcy trustee's inherent equitable authority to recover payments made pursuant to a confirmation order that is subsequently reversed). Alternatively, the court can treat a dividend paid to a creditor as an offset against the creditor's allowed claim, i.e., as a pre-plan distribution. *See Kelly v. Giguere (In re Giguere),* 165 B.R. 531, 537 (Bankr. D.R.I. 1994). Lastly, vendors who dealt with the reorganized debtor and were paid would not require protection; unpaid vendors could be granted an administrative priority in the reinstated proceeding.

By omitting subsection (1) from its Memorandum, Old GM sought to avoid the simple truth that this Court has broad, flexible discretion to craft provisions, on a case-by-case basis, in matters warranting revocation by reason of fraudulent procurement of a confirmation order. For an excellent case addressing Section 1144, where the Court had no difficulty utilizing subsection (1) to effect fraud-based revocation and yet simultaneously protect third parties, we direct the Court to *In re Michelson,* 141 B.R. at 718 which has been widely cited and followed in this and other courts nationwide.

In *Michelson*, the Bankruptcy Court provided wide-ranging and scholarly discussion of Section 1144, its historical antecedents, and its jurisprudence under the Bankruptcy Code. Upon directly confronting the language of subsection (1) the Court noted, quite simply:

> Finally, the order revoking the plan must contain provisions that are necessary to protect any entity that acquired rights in good faith reliance on the order of confirmation. 11 U.S.C. §1144(1). The intervenors are such persons and are agreed upon language that will protect their rights.

Id. at 730. Accordingly, Old GM's "partial revocation" argument is essentially an inflexible way of approaching equitable mootness, which doctrine, as we shall see immediately below, is the

ratio decidendi of three out of four cases advanced by Old GM in support of its novel theory of "partial revocation."[43] *See, e.g., Shoshone Hospital Dist.*, *Almeroth*, *and Circle K,* discussed below at 37-38. We have found no reported case which turned upon the rule of "partial revocation" advocated by Old GM. Accordingly, by citing cases which relied on Equitable Mootness for their results, Old GM's partial revocation argument is a classic "bootstrapping argument;" it assumes the truth of its own argument (*i.e.* that the cited cases stand for something that they do not stand for) as its major premise.

A second helpful, even critical, lesson from *Michelson* is that "[w]hen the Congress enacted section 1144, however, it was not writing on a clean slate . . . Congress did not work a major change of pre-Code law when it enacted section 1144 of the Bankruptcy Code in 1978. *Id.* at 724. As of 1978, existing Second Circuit case law under the Bankruptcy Act of 1898 provided that an order of revocation was entirely consistent with the simultaneous protection of innocent third parties:

> "[T]he setting aside of a confirmation order is without prejudice to rights which arise from bona fide transactions therefore entered into in reliance upon the original order. Thus, § 64, sub. b, supra – relied on by claimant here as establishing his priority – gives priority to debts contracted 'after the confirmation of an arrangement' over debts provable in the arrangement, in the event the arrangement is set aside…" *Seedman v. Friedman,* 132 F.2d 290, 295 (2d Cir. 1942).

This is the essential result for which Plaintiffs here contend. "Debts provable in the arrangement" (*i.e.* Class 3 claimants in this case), shall be afforded equitable treatment, although not afforded the deferential treatment afforded those who changed their positions based on the efficacy of the Confirmation Order. This is a reasonable reading of Section 1144, supported by

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[43] The fourth case Old GM cites, *The Paul H. Shield, MD, Inc. Profit Sharing Plan, et al., v. Northfield Labs. Inc.* (*In re Northfield Labs Inc.*)*,* No. 09-53274 (BLS), ___ B.R. ___, 2010 WL 3417229 (Bankr. D. Del. Aug. 27 2010), is not an "equitable mootness" case, but rather, found that "[m]ost importantly… Plaintiffs have failed to allege any facts showing that the Confirmation Order was procured by fraud."

Seedman v. Friedman; and there is no basis in the cases or authorities which warrants Old GM's reading of Section 1144.[44]

Indeed, in *In re Giguere*, 165 B.R. 531 (Bankr. D.R.I. 1994) the Bankruptcy Court revoked confirmation under Section 1144 due to fiduciary's material omissions from disclosure/confirmation process. However, the Court exercised its §1144(1) authority as follows: "Any entity that received payment under the plan is entitled to retain the same and to offset the amount against its allowed claim." *Id.* at 537. In *Trico Marine Services,* Chief Judge Bernstein cited *Giguere* approvingly for its flexibility in permitting unsecured creditors to retain distributions made to them prior to revocation. *Salsberg v. Trico Marine Services, Inc., et al. (In re Trico Marine Services, Inc.),* 343 B.R. 68, 71 (Bankr. S.D.N.Y. 2006).

As to Old GM's discussion of "partial revocation," the word "partial" does not appear in the Complaint. The word "limited" appears there; so does the verbiage "carefully crafted" appear there, in fact, in Paragraph 1 thereof. Indeed the Complaint is founded upon the Court's jurisdiction and power to limit the effect of revocation as narrowly as necessary, so as to provide relief to Plaintiffs while harming no innocent third party. Plaintiffs' respectfully submit that their view of Section 1144 is correct. Indeed, what purpose would subsection (1) of Section 1144 serve if the Court were unable or unwilling to simultaneously afford relief to the complainant and limit the effect of revocation to protect innocent third parties?

All of the cases Old GM cites in support of its bold assertion, *i.e.* that "a confirmation

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[44] *Collier* has no difficulty coupling revocation with steps validating even distributions made to unsecured creditors: "While there may be some circumstances where disgorgement by creditors of amounts received under the plan could be appropriate, it would generally be unfair to creditors who have received plan distributions to be obligated to return those distributions. A more typical approach would be to allow creditors to retain distributions already received, but to credit the amounts received against their claims in the case." 8-1144 *Collier on Bankruptcy* ¶ 1144.06, *citing In re Giguere*, 165 B.R. 531 (material omissions from disclosure/confirmation process led to revocation, with following §1144(1) provision: "Any entity that received payment under the plan is entitled to retain the same and to offset the amount against its allowed claim."

order and a debtor's discharge may only be revoked in their *entirety* under 11 U.S.C. § 1144," are utterly inapposite and are not persuasive. Old GM misreads *The Paul H. Shield, MD, Inc. Profit Sharing Plan v. Northfield Labs. Inc.* (*In re Northfield Labs. Inc.*), No. 09-53274 (BLS), ___ B.R. ___, 2010 WL 3417229, at *4 (Bankr. D. Del. Aug. 27, 2010), when Old GM represents that the revocation complaint was there dismissed because "'[t]he plain language of section 1144 . . . only provides for revocation of an entire confirmation order.'" In fact the Court stated: "It is unclear whether partial revocation is permissible pursuant to section 1144 and Plaintiffs have cited no case law in this regard… [m]ost importantly… Plaintiffs have failed to allege any facts showing that the Confirmation Order was procured by fraud." *Id.* at *4. The ruling did **not**, as Old GM contends, turn upon a requirement that revocation must vacate the entire Confirmation Order.

As to *In re E. Shoshone Hosp. Dist.*, No. 98-20934-9, 2000 WL 33712301, at *4 (Bankr. D. Idaho Apr. 27, 2000), the court, in *dicta*, did offhandedly make the statement upon which Old GM relies. However, as in *Shield,* the case did not turn on that offhanded statement. Rather, in *East Shoshone Hospital* a municipality brought a motion to set aside its own stipulation, which was incorporated in a confirmed plan. The Court found that (1) the motion was filed outside the 180-day window, (2) the debtor in that case was bound by *res judicata,* (3) the plan contained no provision for post-confirmation modification, and (4) Section 105 was unavailing. Finding the debtor's effort to be a "direct and frontal assault on the finality of the confirmation order," the Court denied the motion to set aside the stipulation. *Id*. at *4. It is an understatement to say that *East Shoshone* is far from "persuasive" here.

Next, Old GM cites *Almeroth v. Innovative Clinical Solutions, Ltd. (In re Innovative Clinical Solutions, Ltd.),* 302 B.R. 136 (Bankr. D. Del. 2003), confusing the instant fraud-based

revocation issue with "scope of discharge" – an issue not before the Court. *Almeroth,* however, was expressly decided on the basis of equitable mootness.

Finally, Old GM cites *S.N. Phelps & Co. v. Circle K Corp. (In re Circle K Corp.)*, 171 B.R. 666, 670 (Bankr. D. Ariz. 1994). However, this case involved a repeat filer who had lost his appeal from the confirmation order prior to filing a Section 1144 complaint. The complaint was dismissed for mootness, i.e. a dismissal having nothing to do with Old GM's theory of partial revocation. Accordingly, Old GM's lead argument concerning "partial revocation" fails.

D. <u>Plaintiffs Sufficiently Plead Fraud Under Section 1144</u>

Failing to acknowledge the obvious fact that the Complaint adequately alleges fraud on the Court,[45] Old GM states:

> To maintain an action under section 1144, a creditor must point to specific acts of the debtor involving fraudulent intent. *See In re Longardner & Assocs., Inc.*, 855 F.2d at 461-62; *see also In re Nyack Autopartstores Holding Co.*, 98 B.R. 659, 662 (Bankr. S.D.N.Y. 1989) ("Fraudulent intent on the part of the debtors cannot be inferred . . . . Indeed, if fraud must be inferred from the language in the complaint in order to support a claim for revocation, the complaint must be regarded as legally insufficient because it fails to particularize the fraudulent conduct . . . ."). "Although under Rule 9(b) a complaint need only aver intent generally, it must nonetheless allege facts which give rise to a strong inference

[45] While Plaintiffs address each of Old GM's many contentions on this issue, Plaintiffs respectfully submit that it is indeed "obvious" that fraud on the court has been well pleaded and that Old GM's arguments are entirely counterintuitive. *See In re Michelson,* 141 B.R. at 715, which imparts that a bankruptcy court must confirm a plan of reorganization if all of the requirements of § 1129 are met, and cannot confirm the Plan if any of those requirements are unmet. Thus, an order of confirmation can only be procured by fraudulent non-disclosures if the court would not have issued the order had it been aware of the undisclosed information or material misrepresentations of fact. It is certainly plausible to contend that, had the Court known that substantially all 2007-2008 Impala owners/lessees, known creditors who were required to be disclosed as such – and were in fact neither disclosed to the Court nor given individual notice of the case or their claims – this Court would not have confirmed the Plan on grounds, among others, that Old GM failed to satisfy Sections 1107, 1123, and 1125. *See, e.g. In re Tenn-Fla Partners,* 229 B.R. 720, 733-35 (W.D. Tenn. 1999), *aff'd,* 226 F.3d 746 (6th Cir. 2000)*; In re Michelson, 141 B.R. 715, 729 (Bankr. E.D. Cal. 1992)*. The same question must be asked as to third-party releases and exculpation provisions affecting non-consenting Plaintiffs and class members. This Court has spoken several times to this issue. Is it not plausible that this Court, having been "constrained by existing law to place some limits" on Third Party Releases/Exculpation in this very case (as well as in the *Chemtura*, *DBSD*, and the *Adelphia* decisions), would have held similarly as to Plaintiffs and the other Impala Claimants? Plaintiffs have thus sufficiently pleaded Old GM's fraud on the Court.

that the defendants possessed the requisite fraudulent intent." *Cosmas v. Hassett*, 886 F.2d 8, 12-13 (2d Cir. 1989).

To suggest that the "factual content" detailed above in Overview, Part C. does not plausibly allege the requisite intent, borders on the absurd.[46]

1. Plaintiffs Have Pleaded Old GM's Fraudulent Intent

To determine whether disclosure omissions rise to the standard of fraudulent intent for purposes of Section 1144, there is no bright-line standard. However, there have been criteria used by bankruptcy courts in the past to help in such determination. Fraudulent intent under Section 1144 can be determined as follows: ". . . a person who (1) is obliged to disclose,[47] (2) knows of the existence of material information,[48] and (3) does not disclose it, has fraudulent intent for purposes of revoking the order confirming a plan of reorganization. *In re Michelson,* 141 B.R. at 725.

First, Old GM had an affirmative duty to fully disclose its assets and liabilities, as well as a statement of its financial affairs. See 11 U.S.C. § 521(1). This disclosure was required to include all "contingent and unliquidated claims of every nature" and estimate a value as to each claim. Bankruptcy Rule 1007(b)(1); Official forms, Schedule B. App. An omission of material

[46] Old GM contends that: Plaintiffs' Fraud Allegations Are Conclusory and Should Be Rejected by the Court; Plaintiffs' Fraud Allegations Fail to the Extent They Allege Fraud Against Plaintiffs, as Opposed to the Court; Plaintiffs' Fraud Allegations Fail Because Debtors Had No Statutory Duty to Disclose Any Alleged Defects; Failure to List Creditors on Schedules or Disclosure Statements, Without More, Is Inadequate to Maintain a Claim for Fraudulent Intent. To quote a learned court, "[t]hose arguments miss the critical point that the *court* was deceived in its decision to confirm the debtor's plan when the debtor knowingly concealed information." *In re Tenn-Fla Partners,* 229 B.R. at 730 (emphasis in original).

[47] *See also In re St. Vincent's Catholic Med. Ctrs. of N.Y., No. 05-14945, slip op.*, 2007 Bankr. LEXIS 3006, at *16 (Bankr. S.D.N.Y. Aug. 29, 2007) ("Complete and timely disclosure of all relevant and material information and documents lies at the heart of the bankruptcy process. This is particularly so in a Chapter 11 case, where the Creditors' Committee and the U.S. Trustee's office, each with fiduciary duties of their own, must have confidence and trust in the debtor and its professionals.").

[48] " . . . material information is information that is necessary for a court to decide whether the elements prescribed for confirmation have been satisfied." *In re Tenn-Fla Partners*, 220 B.R. at 734.

information is equal in effect to an affirmative misrepresentation.[49] As stated previously and hereafter, moreover, post-commencement review of various orders and transcripts in the Chapter 11 case has revealed Old GM's affirmative misrepresentations as well as its material omissions.

The second requirement (*i.e.* "knows of the existence of material information"), although a demanding requirement, is satisfied here for Rule 12(b)(6) purposes. First, Paragraph 4 of the Complaint alleges that GM has known since at least June-July 2008 that the rear spindle rods on its Impalas were defective as engineered and manufactured; that GM issued a Product Service Bulletin and recalled all Impalas with Police Packages due to this defect (Exhibit A to Complaint); and that there are no material differences between the vehicles recalled and the Impalas owned or leased by Plaintiffs which were not recalled. The Complaint clearly alleges that GM had actual knowledge of Plaintiffs, the other Impala Claimants, and their claims. These allegations relate to the knowledge of a major international corporation that enjoys the services of unparalleled restructuring and Chapter 11 professionals.

Significantly, in its Objection, Old GM does not deny that Plaintiffs and the other Impala Claimants are "Known Creditors."[50] The syllogism which follows from the Complaint's factual content is as follows:

> All Police Impalas have the suspension/spindle rod defect.
>
> Consumer Impalas are materially identical to Police Impalas.

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[49] "These requirements, however, do not require that fraud allegations disclose an affirmative statement of fraud, as a concealment or omission of a material fact is sufficient to support the claim of fraudulent concealment." *Grubin v. Rattet* (*In re Food Mgmt. Group, LLC*), 380 B.R. 677, 702 (Bankr. S.D.N.Y. 2008), *citing Mitschele v. Schultz*, 36 A.D.3d 249, 826 N.Y.S.2d 14 (App. Div. 2006).

[50] Large commercial Chapter 11 cases routinely deal with "any contingent or non contingent liability on account of representations or warranties issued on or before the Effective Date." *In re Citadel Broadcasting Corp.*, No. 09-17442 (BRL), 2010 WL 2010808 at *15, 70 (Bankr. S.D.N.Y. 2010). Regardless of contingency or remoteness, these potential section 101 "claims," which are to be barred by the legal process, must be scheduled if known. *See Collier*, at n.33, above.

All Consumer Impalas have the suspension/spindle rod defect.

[Consumer Impala Owners have Section 101 claims herein.]

Third, it is uncontested that Old GM did not disclose Plaintiffs' claims or those of the other Impala Claimants in the schedules, disclosure statement, at the confirmation hearing, or otherwise. Old GM therefore violated the disclosure requirements of both Chapter 11 and this Court's Bar Date Order – which, among other things, required notice and a proof of claim form be mailed to "all parties known to the Debtors as having potential Claims against any of the Debtors' estates." Old GM's own motion relative to the Bar Date included this commitment. (Dkt. No. 3940, p. 7).

Compounding the failure of notice and lack of Bar Order compliance, Old GM submitted in its **Disclosure Statement** the following *affirmative* material misstatement of fact: "Notice of the Bar Dates was given as required." (Dkt. No. 8023, p. 34). Further, Old GM made the same essential affirmative misstatements of material fact in connection with service of the Notice Package. This Court ordered that the Notice Package be mailed to "**any other known holders of Claims against or Equity Interests in the Debtors**." (Dkt. No. 8043, ¶ 32(f)) (emphasis added).

At the Confirmation Hearing, this Court was falsely informed that service of the Notice Package had been made "fully in compliance with [This Court's] order." (Dkt. No. 9791, p.15). Thus, Old GM well knew the requirements of Constitutionally-compliant notice, the Court ordered Constitutional notice, Old GM certified compliant notice, but Old GM, in truth, did not cause such notice as was required, ordered, and certified.

2. Plaintiffs Have Plausibly Pleaded that Old GM Had Knowledge of Impala Claimants and the Defects in Their Vehicles

Old GM, relying on *Stupakoff v. Otto Doosan Mail Order Ltd.* (*In re Spiegel, Inc.*), 354 B.R. 51 (Bankr. S.D.N.Y. 2006), further contends that the court should not infer from the facts pled that Defendant had knowledge of the defect in Consumer Impalas. As shown above, Plaintiffs have adequately pleaded Old GM's relevant knowledge at all times relevant to this action.

a. Presumptive Knowledge: Defect and Concomitant Liability

There are two facts to which Old GM's knowledge could be relevant to the instant inquiry, to wit: the defect in rear suspension and the resulting liability.[51] The law presumes that Old GM had knowledge of both the defect in the Consumer Impalas and of its associated liabilities.

i. Product Knowledge

A manufacturer is presumed[52] to have the knowledge of an expert concerning its products:

> We agree with the plaintiff that a manufacturer such as Philip Carey is held to the knowledge of an expert in its field, *Borel [v.] Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973), *cert. denied*, 419 U.S. 869, 42 L. Ed. 2d 107, 95 S. Ct. 127 (1974) . . . In this scientific age the manufacturer undoubtedly has or should have superior knowledge of his product.

George v. Celotex Corp., 914 F.2d 26, 28 (2d Cir. 1990). The District Court has so held as well. "In determining whether a manufacturer, such as Crane, should have known of the dangers of its products [here, the faulty rear suspension], the manufacturer is held to the knowledge of an

[51] We assume for purposes of this proceeding that Plaintiffs' and the other Impala Claimants' claims are contingent claims and that Old GM's 'duties include disclosure of all ""contingent and unliquidated claims of every nature,"" and to estimate a value as to each claim. Bankruptcy Rule 1007(b)(1).

[52] Federal Rule of Evidence 301 states in pertinent part:

> "[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

expert in its field." *See Caruolo v. A C & S, Inc.*, No. 93 CIV 3752 (RWS), 1999 U.S. Dist. LEXIS 3022*29 (S.D.N.Y. Mar. 11, 1999), *aff'd in part, rev'd in part on other grounds*, *Caruolo v. John Crane, Inc.*, 226 F.3d 46 (2d Cir. 2000).

ii. Knowledge of Financial Affairs

A debtor, through it management, is presumed to have intimate knowledge of its financial affairs. *In re Equitable Office Bldg. Corp.*, 83 F. Supp. 531 (D.C.N.Y.), aff'd, Aranow v. Equitable Office Bldg. Corp., 174 F.2d 827 (2d Cir.), *rev'd on other grounds*, *Berner v. Equitable Office Bldg. Corp.*, 175 F.2d 218 (2d Cir. 1949). ("Mr. Baker, it will be recalled, was a director of the debtor and, as such, he may be presumed to have had a more or less intimate knowledge of its financial affairs."). This presumption is strengthened where, as here, Old GM's counsel has signed key Chapter 11 documents.

> A third director with a special relationship of the company and the offering was held to an even more exacting standard. This director was also a member of the law firm that served as the company's counsel and had drafted the registration statement. His 'unique position' could not be 'disregarded'.

In re WorldCom, Inc. Sec. Litig., No. 02 Civ. 3288DLC, 2005 U.S. Dist. LEXIS 4193, *26 (S.D.N.Y. Mar. 21, 2005), *citing Escott v. BarChris Const. Corp.*, 283 F.Supp. 643, 690 (D.C.N.Y. 1968).

Whatever the exact contours of counsel's duty, Plaintiffs respectfully submit that it certainly includes matters, such as exist here, of fiduciary, statutory, and Constitutional significance.[53] "Directors and officers of a corporation are presumed to know the financial

[53] Weil, Gotshal, perhaps the most expert of Chapter 11 counsel, serves as Court-appointed Debtor's counsel. Alix Partners, a company which identifies itself as the "vision and strategy to lead the restructuring industry," (http://www.alixpartners.com/en/WhoWeAre/Founder.aspx), managed the Debtor prior to and throughout the reorganization process and continues to do so. Indeed, Alix Partners' knowledge of the Old GM's "claims" was described by Debtor's counsel at the confirmation hearing in these words: "Alix Partners – I mean, Alix Partners is in there, another checks and balance. They're very

condition of the corporation, and if they accept unlawful dividends as shareholders, the dividends may be recovered by the corporation," cf. 1 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations*, § 5426 (rev. 2004), cited in *Sheffield Steel Corp. v. HMK Enter*. (*In re Sheffield Steel Corp*.), 320 B.R. 405, 416 (Bankr. N.D. Okla. 2004).

In this case, where Old GM's counsel and related case professionals have been drawn from the pinnacle of Chapter 11 ranks, the presumption should unquestionably be applied:

> [P]articipation by an officer of the court elevates garden-variety fraud into fraud on the court. Accordingly, it is pertinent to focus on just who is an officer of the court in the context of bankruptcy. Counsel practicing before the court is a fortiori an officer of the court.

In re Michelson, 141 B.R. at 726-727 (Order of Revocation entered). To the extent Old GM seeks to discount its "fraudulent intent" by the absence of knowledge, it will have to do so with facts to rebut the presumption of relevant knowledge.[54] That is something it has not done – and cannot do – here.

b. <u>Actual Knowledge of Defect and Contingent Liabilities as Pleaded</u>

Opposing the Complaint's well-pleaded allegations, Old GM seeks to equate GM's incontrovertible knowledge of defective spindle rods in Consumer Impalas, with the facts in *Spiegel*, where the issue was whether a New York debtor knew of movants' potential claims as a result of unrelated Illinois litigation against a non-party. In *Spiegel*, however, Judge Lifland held that movants were not "known creditors," as "[t]he Plaintiffs did not become involved in the Illinois litigation until November 2005, months after the Plan was approved in the Spiegel

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familiar with the claims." *See* Transcript of Confirmation Hearing, March 3, 2011, p. 142 (Dkt. No. 9791).

[54] *See Hill v. Smith*, 260 U.S. 592, 595 (1923) (''We agree with the Court below that justice and the purpose of the section justify the technical rule that if the debtor would avoid the effect of his omission of a creditor's name from his schedules he must prove the facts upon which he relies.'').

cases." *In re Spiegel Inc*., 354 B.R. at 56 (Bankr. S.D.N.Y. 2006). Accordingly, the court in *Spiegel* properly opined that "[d]ebtors were not required to use their "crystal ball" to learn of movants' alleged claims. *Id.* at 57.

Old GM's *Spiegel* argument here is upside down, because unlike *Spiegel* it is Old GM – the Debtor (as opposed to the claimant) – who had exclusive knowledge of the facts underlying Plaintiffs' claims here. Judge Lifland further noted in *Spiegel* that "[p]laintiffs do not allege that a proper examination of the books and records would have uncovered their claim." *Id.* Here, Plaintiffs allege that Old GM had knowledge of Plaintiffs and the other Impala Claimants just as they knew of Police Impala owners. (Complaint ¶ 1). Had similar knowledge obtained in *Spiegel*, Judge Lifland would have held differently because, as numerous cases cited herein have held, reasonably ascertainable creditors must be individually notified.[55]

The PMB establishes for present purposes knowledge prompting an across the board recall of Police Impalas for spindle rod repair and modification, *i.e.* for a single, defined, fixed-price repair for all recalled vehicles.[56] Accepting the allegations of the Complaint as true – *i.e.* that Police and Consumer Impalas are materially identical with respect to the defect (Complaint ¶ 15) – this Court must draw an inference, even unaided by a presumption, that GM had

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[55] "Courts require debtors to take reasonably diligent efforts and provide notice of a plan and disclosure statement to reasonably ascertainable creditors." *Spiegel*, 354 B.R. at 57.

[56] Automobile manufacturers, and GM in particular, have, for many years, been required by Federal law to notify vehicle owners under certain circumstances, including defects. See e.g., *United States v. General Motors Corp*., 656 F. Supp. 1555, 1557 (D.D.C. 1987), aff'd, 841 F.2d 400 (D.C. Cir. 1988). The ability of automobile manufacturers to identify owners of and recall their products is a matter of common knowledge of which this Court may take judicial notice. *See United States v. Bari*, 599 F.3d 176, 181 (2d Cir. N.Y. 2010) (court permitted to use search engine to confirm a matter of common knowledge); *see also Kaggen v. IRS*, 71 F.3d 1018, 1019 (2d Cir. 1995) (holding that "[t]his Court may appropriately take judicial notice of the fact that banks send customers monthly bank statements").

Under Fed. R. Evid. 201, the Court may take judicial notice of a fact "not subject to reasonable dispute in that it is generally known within the territorial jurisdiction of the trial court." Were it necessary, this Court may judicially notice an auto manufacturer's ability to notify vehicle owners of its products, by ordinary mail; Plaintiffs so move the Court.

knowledge of a defect in Consumer Impalas and the resultant contingent liabilities arising therefrom.[57]

E. Plaintiffs Have Adequately Pleaded Old GM's Fraud on the Court

Perhaps realizing the extent of its wrongful conduct, Old GM seeks to deflect the issue, making much of Plaintiffs' incidental allegations that it did not disclose the defects to Plaintiffs or the other Impala Claimants. Old GM contends that Plaintiffs do not "even attempt to show with respect to this claim that the alleged fraud was used to procure the Confirmation Order." However, the "claim" to which Old GM addresses this argument is not a "claim" at all, but rather, one of many alleged common questions in the litigation. "Those arguments miss the critical point that the court was deceived in its decision to confirm the debtor's plan when the debtor knowingly concealed information . . . ." *In re Tenn-Fla Partners,* 229 B.R. at 730 (W.D. Tenn. 1999).[58]

Plaintiffs' claim, pleaded as "Cause of Action for Plan Revocation" (Complaint ¶ 53), is clearly a claim for Defendants' fraud on the Court, to wit: "[p]laintiffs request that the Court revoke the Debtor's Confirmation Order on the grounds that it was procured by fraud." *Id.* This allegation tracks the language of Section 1144. Throughout their Complaint, Plaintiffs allege Old GM's fraud on the Court, alleging, among other things: "Debtor falsely omitted disclosure

[57] "A facially plausible claim is one where 'the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949-50 (2009).

[58] The District Court in *Tenn-Fla Partners* further notes that 1144 does not require any creditor reliance on the fraud, citing *Collier*. "There is also no requirement in section 1144 that the person seeking revocation of the confirmation order was unaware of the fraud at the time of confirmation. [The predecessor to section 1144] required the party desiring to have a plan revoked demonstrate that it was not aware of the fraud at the time the plan was confirmed. Section 1144 imposes no such burden on the party seeking revocation... A party seeking confirmation of a plan has an affirmative duty of disclosure and good faith. If it is breached, and the breach amounts to fraud, there is a basis for revoking the confirmation order." *In re Tenn-Fla Partners,* 220 B.R. at 730 (W.D. Tenn. 1999).

of an entire class in schedules and disclosure statement . . . impairment of the adjudicatory process" (Complaint ¶ 1); "Plan confirmed upon materially false information . . . full disclosure would have precluded confirmation" (Complaint ¶ 48); and "Debtor's confirmation order was procured by fraud, including disclosure violations under Sections 1125, 1129, and 1107 of the Bankruptcy Code." (Complaint ¶ 46).

Approached differently:

> alleging fraud on the court requires (1) a misrepresentation to the court by the defendant; (2) a description of the impact the misrepresentation had on proceedings before the court; (3) a lack of an opportunity to discover the misrepresentation and either bring it to the court's attention or bring an appropriate corrective proceeding; and (4) the benefit the defendant derived from the misrepresentation.

Grubin v. Rattet (*In re Food Mgmt. Group, LLC*), 380 B.R. 677 (Bankr. S.D.N.Y. 2008). The above (1)-(4) are clearly and plausibly pleaded in the Complaint: (1) misrepresentation by omission (Complaint ¶ 1); (2) description of impact (Complaint ¶¶ 1, 48, 53); (3) lack of opportunity for discovery (Complaint ¶¶ 5, 12, 14, 46-48, 52); (4) benefit defendant derived (Complaint at, e.g., ¶ 1 ("the confirmation Order was procured by bad faith, breach of fiduciary relationship and fraud"); ¶ 48 ("[d]ebtor caused the Plan to be confirmed upon materially false information.").

1. Old GM Erroneously Contends That it had no Statutory Duty to Disclose Any Alleged Defects

Here, Old GM asks the wrong question. It is not disclosure of defects that is at issue, but rather, the statutory and fiduciary duty to disclose an entire class of "Known Creditors" (be their claims liquidated, contingent, or disputed) as required by Sections 1107 and 1125. Such non-disclosure infected the entire plan process. The fact that Plaintiffs and the other Impala Claimants knew nothing of the defective suspension and spindle rods fix did not relieve Old GM

of its obligation to disclose that information to Plaintiffs and the other Impala Claimants as creditors of the estate. At bottom, Old GM predicates its instant misplaced argument upon the erroneous urging, addressed and controverted above, that Plaintiffs "have made no showing that Debtors *knew* or *could have known* of the alleged defects." As discussed above, Old GM's contentions on that point are demonstrably false.

2. Old GM Erroneously Contends That its Failure to List Creditors on Schedules or Disclosure Statements, Without More, Is Inadequate to Maintain a Claim for Fraudulent Intent

Old GM misses the point with this argument as well. Plaintiffs have discussed above the requisite intent which accompanied Old GM's non-disclosures.[59] Indeed, Old GM did not merely "fail to list creditors on schedules and disclosure statements," but, rather, Old GM failed to list known creditors on schedules and disclosure statements, failed to notify said known creditors in writing by U.S. Mail, as required by this Court's Bar Date Order, and compounded its fraud by stating that "Notice of the Bar Dates was given as required" in Old GM's Disclosure Statement (Dkt. No. 8023, p. 34). These are not harmless errors, but demonstrate serial omissions and other wrongful conduct by Old GM – omissions which violated the requirements of Chapter 11, specifically, Section 1129's confirmation standards. Based on the foregoing, Old GM then secured a Confirmation Order which, but-for its material omissions, it likely would not have obtained, due to its demonstrated failure to satisfy the Section 1129 confirmation standards. Compounding the fraud, highly sophisticated Chapter 11 counsel executed both the Chapter 11 schedules and the disclosure statement and made affirmative misstatements of material fact

[59] *See, e.g.*, nn. 46-48 and accompanying text, above.

having the effect of circumventing this Court's prescribed notice of the Bar Date Motion and Notice Package.[60]

F. While Plaintiffs Are Able to Demonstrate Excusable Neglect, it is Not a Condition of Maintaining a Section 1144 Complaint[61]

In a further effort to shift the Court's focus from its sustained and demonstrable wrongful conduct, to non-issues of its own creation, Old GM contends that Plaintiffs must sustain "their burden to show excusable neglect under Bankruptcy Rule 9006(b)(1)." However, a Section 1144 Complaint need not allege excusable neglect, as the right to an Order of Revocation rests primarily upon Old GM's fraud on the court, and ***not*** on Plaintiffs' diligence or lack thereof. Nevertheless, in light of the Court's remarks at the pretrial conference of November 22, 2011, Plaintiffs readily satisfy the "excusable neglect" standard.

In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 113 S. Ct. 1489 (1993) the Supreme court articulated the "excusable neglect" standard for extending time under Bankruptcy Rule 9006 as to those who could have, but did not, timely file a proof of claim on or prior to a court-ordered bar date. The Court established a four-factor analysis:

> (1) whether granting the delay will prejudice the debtor; (2) the length of the delay and its impact on efficient court administration; (3) whether the delay was

[60] "Behind most frauds on the court lurks an officer of the court. And, as noted above, participation by an officer of the court elevates garden-variety fraud into fraud on the court. Accordingly, it is pertinent to focus on just who is an officer of the court in the context of bankruptcy. Counsel practicing before the court is a fortiori an officer of the court." *In re Michelson,* 141 B.R. at 726-727.

[61] In enacting Section 1144 allowing plan revocation proceedings commencing as much as 180 days following confirmation, Congress tempered its desire for prompt settlement of insolvent estates with the underlying purpose of the Code, i.e. that all those similarly situated should, within the statutory scheme of priorities, share equally in what remains of an insolvent debtor. Surely the Bankruptcy Courts must be mindful of the impact of late-filed claims, whether under Rules 3003/ 9006 or Section 1144. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 113 S. Ct. 1489 (1993). But matters under Section 1144 go to the integrity of the chapter 11 process itself, an overriding substantive concern of Congress . . . and not merely a matter of expedition. The delay mantra, one of four factors of *Pioneer* test, must not be afforded undue or uncritical effect under Section 1144. Were it otherwise, there would likely exist an inverse relationship between the expanse of the Section 1114 fraud on the court, and the Court's ability to afford relief by reason thereof.

> beyond the reasonable control of the person whose duty it was to perform; [and] (4) whether the creditor acted in good faith.

Pioneer, 50 U.S. at 385, *citing In re Dix*, 95 B.R. 134 (9th Cir. 1988)). Noting that the other three factors usually favor the party seeking an extension, the Second Circuit has relied most heavily on the third element – the reason for the delay. *See Midland Cogeneration Venture Ltd. P'ship v. Enron Corp. (In re Enron Corp.),* 419 F.3d 115, 123-24 (2d Cir. 2005), *citing Silivanch v. Celebrity Cruises, Inc*., 333 F.3d 355, 366 (2d Cir. 2003), cert. denied, *Essef. Corp. v. Silivanch*, 540 U.S. 1105, 124 S.Ct. 1047 (2004).

In this case, the Complaint alleges that (a) neither Plaintiffs nor the other Impala Claimants knew anything about the defect in the rear suspension until July 2011 (Complaint ¶ 1); (b) Old GM was aware of Plaintiffs' and the other Impala Claimants' claims against the estate (Complaint ¶ 4); (c) Old GM did not schedule Plaintiffs or the other Impala Claimants as creditors (Complaint ¶¶ 12, 44); and (d) Plaintiffs and the other Impala Claimants (who are "known creditors") did not receive individual notice of this Chapter 11 case or its bar date (Complaint ¶¶ 12, 44). Under circumstances such as these – and, indeed, under far less compelling circumstances – the Bankruptcy Courts in this District and elsewhere have found "excusable neglect."[62]

For example, this Court in *In re Thomson McKinnon Securities, Inc*., 159 B.R. 146, (Bankr. S.D.N.Y. 1993), held that a creditor who did not receive actual notice of the bar date established excusable neglect for filing a late claim. This Court initially stated that in

[62] In support of its position, Old GM cites *Nute v. Pilgrim's Pride Corp.*, No. 07-0081, *slip op.*, 2010 WL 2521724 (W.D. La. June 16, 2010); however in that case, the debtor *sent notice of the Bar Date Order to the known Creditor*, who then failed to file her proof of claim. ("Pursuant to the Bar Date Order, on April 15, 2009, PPC sent notice of the Bar Date Order to Nute and provided her a form to file a proof of claim in the bankruptcy proceeding. However, Nute did not file a proof of claim.") *Id*. at *1 (internal citations and quotations omitted). *Pilgrim's Pride* is instantly and imminently distinguishable from the actions in this case, where Old GM failed to schedule or notice Plaintiffs or the other Impala Claimants as known creditors.

determining the existence of excusable neglect for purposes of enlarging a bar date, consideration must be given to whether or not the creditor was given adequate notice to file a timely proof of claim. This Court specifically found that the debtor had actual notice of the creditor's claim against it, and, therefore, the creditor was due actual notice of the bar date, which he did not receive. Based on the foregoing this Court held that the creditor's proof of claim, filed 2.5 years after the bar date, was to be treated as timely filed.

Similarly, in *In re Arts Des Provinces de France, Inc.*, 153 B.R. 144 (Bankr. S.D.N.Y. 1993), this Court held that a landlord's failure to file a timely claim constituted excusable neglect. The debtor listed the landlord's managing agent as the creditor on its schedules, and sent the claims bar date notice to the landlord's managing agent rather than to the landlord or the landlord's counsel. This Court concluded that although there was neglect on the landlord's part, that neglect was excusable because the delay could have been avoided if the debtors had complied with bankruptcy procedure by properly listing the landlord as a creditor.

Likewise, the court, in *In re PT-1 Communications, Inc*., 292 B.R. 482, (Bankr. E.D.N.Y. 2003), held that the equities weighed in favor of allowing, on the basis of excusable neglect, an untimely claim filed by a State Department of Revenue (DOR), as it had no reason, based on the facts known to it prior to the bar date, to conclude that it had a claim against the debtor.

Although this Court need not address the Constitutional implications of a class of known claimants, who are ignorant of their claims in violation of Section 1107 and Bankruptcy Rule 1007(b)(1), being barred under circumstances of not having received notice of a bar date, it is nevertheless important to note of record that a failure to receive notice of a bar date will constitute an extraordinary circumstance because of the Constitutional requirements of due process. *See In re Arts des Provinces de France, Inc*., 153 B.R. at 147 (Bankr. S.D.N.Y. 1993);

In re Heater Corp. of the Americas, Inc., 97 B.R. 657, 659 (Bankr. S.D. Fla. 1989); *In re Green*, 89 B.R. 466, 472 (Bankr. E.D. Pa. 1988). *See also Bratton v. Yoder Co. (In re Yoder Co.)*, 758 F.2d 1114, 1118 (6th Cir. 1985) (applying former Rule 906).

G. No Cognizable Prejudice Will Flow From the Revocation Order Plaintiffs Seek

Old GM repeatedly argues that "revocation of the Confirmation Order would cause severe prejudice to the numerous creditors and innocent third parties that have received distributions under the Plan." However, Plaintiffs have conditioned their request for relief precisely upon the Court's ability under Sections 1144(1) to save all innocent third parties harmless from any adverse consequence of an Order of Revocation. Accordingly, this case by definition cannot harm innocent third parties.

It appears, however, that Old GM is questioning whether, under the "pot plan" in this case, the Court may properly dilute the ultimate dividend to similarly-situated Class 3 claimants in post-confirmation proceedings. Plaintiffs' position on this issue is set forth in Paragraph 50 of the Complaint:

> Plaintiffs seek only a limited revocation of discharge as to Known Creditors' specific, unsecured class claim, thereby having no effect upon any innocent third parties. Similarly situated unsecured creditors shall be returned to precisely the position they occupied prior to plan confirmation. To enjoy a dividend consisting in part of funds rightfully belonging to Known Creditors would be a windfall to allowed unsecured creditors, at the expense of Known Creditors, with no countervailing equities supporting the loss to Plaintiffs.

Plaintiffs' position comports with well-established law on this issue. Although allowing legitimate claims (timely or otherwise) inherently involves a dilutive effect on the claims of other creditors, this does not represent prejudice, but instead justice and equity. The "depletion of assets otherwise available for timely filed claims" does not constitute prejudice. *See In re R.H. Macy & Co.,* 166 B.R. 799, 802 (S.D.N.Y. 1994); *see also In re O'Brien Environmental Energy,*

Inc., 188 F.3d 116, 128 (3d Cir. 1999) (loss of windfall does not constitute prejudice); *In re Papp Int'l, Inc.,* 189 B.R. 939 (Bankr. D. Neb. 1995) (requiring the debtor to deal with a large tardy claim does not constitute prejudice).

Similarly, any delay occasioned by the relief sought was caused by Old GM – not by Plaintiffs. Unlike the facts in *In re Enron Corp.,* 419 F.3d 115 (2d Cir. 2005), where a six month delay was held to be too long, Plaintiffs here did not receive notice of the bar date, nor did they learn of the bar date, or of the information upon which their claims are predicated, until some two years after the bar date had expired. In other cases, including cases where lack of notice was an issue, courts have held that similar and longer delays did not prevent relief. *See In re Thomson McKinnon Securities, Inc.*, 159 B.R. at 148 (creditors allowed claim filed two years after deadline where it had not received notice); *In re Papp Int'l.*, 189 B.R. at 946. (IRS allowed claim filed two years after deadline where it had received ambiguous notice).

Moreover, the Supreme Court in *Pioneer* qualifies the length of delay factor by reference to the "potential impact on judicial proceedings." As shown above, the Section 502(c) process ordered as to aggregate asbestos claims – a far more complex process than called for here – was 90 days. The length of the delay that may be excused under Rule 9006(b), moreover, should not be fixed by strict rule, but rather should be evaluated in relation to the posture of the case itself. Here, where much remains of this case and its administration, and Plaintiffs, individually and on behalf of the other Impala Claimants – seek only their appropriate *pari passu* treatment, the Court should conclude that any realistic delay – and none whatever has been shown – is an appropriate incident of case administration. The record in this case has not revealed, nor has Old GM shown, that the delay necessary to a just disposition of Plaintiffs' and the other Impala Claimants' claims will adversely – and certainly not unjustly – impact the administration of this

case.

As quoted above (at p. 13) from colloquy at the Confirmation Hearing, focused attention was given to making "sure that people get the same treatment of their claim, whether they're allowed early or late." (Dkt. No. 9791, p.73). It makes no difference whether or why claims of the diligent are duly allowed subsequent to the effective date. The Confirmed Plan anticipated and provided protection for such claims allowed well after Confirmation.

As for Old GM's repeated concerns of the purported costs the estate would incur by affording a forum to Plaintiffs, individually and on behalf of the other Impala Claimants here, this Court should take note of the Sixth Circuit's recent decision in *United States v. $22,050.00 United States Currency*, 595 F.3d 318 (6th Cir. 2010), where it held that "it does not make intuitive sense that simply claiming an increase in litigation cost should be sufficient to establish prejudice." *Id*. at 325. By asserting the shopworn and factually incorrect mantras of "delay," "shake down," "precious few resources," "havoc," or otherwise, Old GM does little more than "intone that ancient abracadabra of the law."[63] In this regard Plaintiffs respectfully note the words of this Court in another failure-of-notice case: "the debtors may not assume the role of righteous indignation when they contributed to the confusion." *In re Arts de Provinces de France*, 153 B.R. at 147.[64] Simply stated, Old GM caused the very problem they now seek to

[63] *Neifeld v. Steinberg*, 438 F.2d 423, 429 (3d Cir. 1971).

[64] As explained at the pretrial of November 22, 2011, notwithstanding Old GM's failure to schedule and notice an entire list of known creditors, this matter could have been already resolved or, at minimum, well on the road to resolution. Plaintiffs approached New GM by letter of August 5, 2011, but New GM rejected Plaintiffs overture by letter of August 12, 2011, citing the terms of the Section 363 Order of this Court, protecting New GM from "design defect" claims. Plaintiffs then conducted needed due diligence, further conferred with an automotive expert, obtained bankruptcy counsel, and immediately thereafter, on Tuesday, September 20, 2011, emailed a certified letter of notice and invitation to negotiate to the attorney who signed Old GM's Disclosure Statement. The sole response, emailed to a secretary in Plaintiffs' counsel's office on September 20, 2011, was the following: "Please advise your colleagues to take their concerns up with the Bankruptcy Court in the Southern District of New York if they wish to proceed with protracted litigation." On Monday, September 26, 2011, Plaintiffs filed their Section 1144

sweep under the rug. This Court should not permit them to do so.

H. <u>The Doctrine of Equitable Mootness is Inapplicable because the Court Can and Should Fashion Appropriate Relief</u>

The doctrine of "equitable mootness" questions whether the relief sought is feasible under any circumstances. If not, the "case or controversy" requirement is deemed unmet and Court's jurisdiction wanting. At times the Courts question whether the *status quo ante* may be reinstated. However, the return to the status quo is a flexible requirement that permits appropriate adjustments co-extensive with non-prejudice to innocent third parties. See *In re Ogden Modulars, Inc*., 207 B.R. at 200 ("[R]evocation under Section 1144 returns the parties to their status prior to confirmation, subject to equitable adjustments that may be required to prevent further harm that might result from the fraudulent conduct that was the basis for the revocation.") In this case Plaintiffs, individually and on behalf of the other Impala Claimants, seek to be, and can be, returned to their pre-confirmation positions. There is no requirement that every party in interest in the case be returned to such party's pre-confirmation position.

The burden is upon the party asserting equitable mootness to prove that the doctrine applies. *Southern Pac. Transp. Co. v. Voluntary Purchasing Groups,* 246 B.R. 532, 534 (E.D. Tex. 2000). In addition, "the party asserting mootness has a heavy burden to establish that there

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Complaint accordingly.

Old GM could well have sought to supplement its schedules, providing notice and 30 days for Plaintiffs to file their claims. See Adoption of Second Amended Procedural Guidelines for Filing Requests for Bar Orders, M-386, p. 11. Such a good faith effort to resolve this matter would be within this Court's retained jurisdiction: "(g) To hear and determine any application to modify the Plan in accordance with section 1127 of the Bankruptcy Code, to remedy any defect or omission or reconcile any inconsistency in the Plan, the Disclosure Statement, or any order of the Bankruptcy Court, including the Confirmation Order, in such a manner as may be necessary to carry out the purposes and effects thereof." Plan, Art XI at 11.1(g). *See also In re DBSD N. Am., Inc.*, 419 B.R. 179 (Bankr. S.D.N.Y. 2009), *aff'd*, No. 09 Civ 10156, slip op., 2010 WL 1223109 (S.D.N.Y. Mar 24, 2010), *aff'd in part, rev'd in part on other grounds,* 634 F.3d 79 (2nd Cir. 2011) "The bankruptcy court's post-confirmation jurisdiction therefore is defined by reference to the Plan." Such facts as these belie Old GM's purported concerns with the expense of this litigation.

is no effective relief remaining for a court to provide." *In re Focus Media, Inc.,* 378 F.3d 916, 923 (9th Cir. 2004), cert. denied, 544 U.S. 968, 125 S.Ct. 1742, reh'g denied, 544 U.S. 1068, 125 S.Ct. 2515 (2005). In its Amended Motion to Dismiss, Old GM did not meet its "heavy burden" to establish that there is no effective relief remaining for this Court to provide.

"In bankruptcy proceedings, the mootness doctrine involves equitable considerations as well as the constitutional requirement that there be a case or controversy. *In re Chateaugay Corp.* (*Chateaugay II*), 10 F.3d 944, 952 (2d Cir. 1993).[65] In *Chateaugay II,* the Second Circuit established a five-part test to determine when an appeal from a bankruptcy order remains viable and is not moot, despite substantial consummation of a plan of reorganization. Constitutional and equitable considerations *dictate* that substantial consummation *will not* moot an appeal if all of the following circumstances exist:

> (a) the court can still order some effective relief;
>
> (b) such relief will not affect "the re-emergence of the debtor as a revitalized corporate entity";
>
> (c) such relief will not unravel intricate transactions so as to "knock the props out from under the authorization for every transaction that has taken place" and "create an unmanageable, uncontrollable situation for the Bankruptcy Court"
>
> (d) the "parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings"; and
>
> (e) the appellant "pursue[d] with diligence all available remedies to obtain a stay of execution of the objectionable order ... if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from".

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[65] Although equitable mootness is often applied on appeal, it applies to proceedings under Section 1144. *See Chang v. Servico Inc.* (*In re Servico, Inc.*), 161 B.R. 297, 300-01 (S.D. Fla. 1993); *Almeroth v. Innovative Clinical Solutions, Ltd.* (*In re Innovative Clinical Solutions, Ltd.*), 302 B.R. 136, 141 (Bankr. D. Del. 2003) (applying equitable mootness to dismiss a case brought under Section 1144); *S.N. Phelps & Co. v. Circle K Corp.* (*In re Circle K Corp.*), 171 B.R. 666, 669-70 (Bankr. D. Ariz. 1994) (dismissing Section 1144 complaint on grounds of mootness).

Chateaugay II, 10 F.3d at 953 (sub-paragraphing added and citations omitted; underlining added). "Ultimately, the decision whether or not to unscramble the eggs turns on what is practical and equitable." *Baker & Drake, Inc. v. Pub. Serv. Comm'n. of Nev.* (*In re Baker & Drake*), 35 F.3d 1348, 1352 (9th Cir. 1994), *citing Rochman v. Ne. Util. Serv. Group ("In re Pub. Serv. Co. of New Hampshire"),* 963 F.2d 469, 473 (1st Cir. 1992), cert. denied, 506 U.S. 908, 113 S.Ct. 304.

All five of these factors are satisfied here. First, the Court is able to provide some relief to Plaintiffs and the other Impala Claimants with a very limited revocation. In the GUC Trust, there remains approximately $1.2 billion in undisbursed funds,[66] plus substantial upside potential from pending litigation and litigation yet to be brought. The second factor is satisfied because the Section 363 Order protects New GM and therefore the relief provided to Plaintiffs and the other Impala Claimants will not adversely affect New GM. Third, as shown, courts have used subsection (1) of Section 1144 to effect fraud-based revocation and yet simultaneously protect third parties. *See, e.g., Michelson*, 141 B.R. at 718. The relief of a limited revocation in this case will not create an unmanageable situation for this Court because, as Plaintiffs have established throughout this Memorandum, the Court has the tools to do this (and has anticipated their use), including estimation of claims, ADR, GUC Trust, and class claims, to timely fashion and implement relief. Fourth, revocation will not adversely affect parties who previously obtained relief and will equitably impact parties to the extent they have not yet obtained relief. Fifth, there is no need for Plaintiffs to obtain a stay of the bankruptcy proceedings. Given the resources and intended/purposeful distribution schedule of the GUC Trust, adequacy of funding

[66] Due to mark-to-market accounting of its assets, the current value of the GUC trust is believed to be approximately $1.2 billion. At initial or par value, the assets total to approximately $2 billion. See GUC Trustee's Balance Sheet at Dkt. No. 11090-1, Exhibit A at p.2.

is not now an issue.[67] Therefore, given that Plaintiffs satisfy the five factors, the equitable mootness doctrine does not bar this action.

I. Old GM's Premature Efforts to Defeat Class Certification are Without Merit

Old GM's effort to strike the class allegations is not well-taken and is legally unsupportable.[68] Rather than evincing manifest flaws, the Complaint clearly alleges Old GM's wrongful conduct and how it satisfies the Rule 23 requirements with respect to Plaintiffs and the other Impala Claimants. Indeed, there is compelling evidence of defect. Old GM has not even represented that GM was in the habit of recalling vehicles, and repairing them at GM expense, absent a defect. The fact of the recall, the dangerous condition occasioned by faulty rear suspension, and the admission of a precise cost of repair in the PSB render this matter capable of prompt and uniform disposition under Section 502(c)(1) estimation.

Old GM's arguments against Rule 23 application are erroneously premised on the notion that Plaintiffs seek damages for premature tire wear. To make this argument, however, Old GM needs to ignore the fact that Plaintiffs, individually and on behalf of the other Impala Claimants, do not seek damages for premature tire wear in this adversary proceeding, or in any related contested claims process; rather, Plaintiffs seek the cost of repair for the defect, which is generally regarded as an appropriate measure of damage in a product defect/property damage/sale of goods case.[69] Moreover, although Plaintiffs will seek leave, upon revocation of

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[67] "Here, MLC has substantial assets that are being distributed to other claimants; there is no 'limited fund' available solely to the members of the Putative Class." Amended Motion to Dismiss at 33-34.

[68] " . . . a Rule 23(d)(1)(D) motion to strike class allegations is designed to modify the pleadings only after the court has ascertained, in an earlier determination, that maintenance of a class action is inappropriate. *See, e.g., Korman v. Walking Co*., 503 F.Supp.2d 755, 762 (E.D. Pa. 2007).

[69] The appropriate measure of damages on a claim for defective design "is the cost to repair the defects." *Leeward Constr., Inc. v. Sullivan W. Cent. Sch. Dist*., No. 05 Civ. 8384, slip op., 2010 U.S. Dist. LEXIS 49574 (S.D.N.Y. Mar. 10, 2010), citing *Brushton-Moira Cent. Sch. Dist. v. Fred H. Thomas Assocs., P.C*., 91 N.Y.2d 256 (1998). *See also Winckel v. Atlantic Rentals & Sales*, 159 A.D. 2d 124 (N.Y. App.

Confirmation Order, to file a Rule 23(b)(3) class claim per Bankruptcy Rule 7023 via B.R. 9014, this adversary proceeding seeks only a Section 1144 Revocation, to the end that Plaintiffs may then file their class-wide damage claim, in a contested Section 502(c) proceeding under the Bankruptcy Rules, seeking for themselves and each of the other Impala Claimants an allowed claim for the cost of repair.

1. <u>Old GM's Argument that Plaintiffs Cannot Satisfy Rule 7023 is Premature</u>

With due deference to the Court's ability to evaluate the viability of a putative class action early on, "[m]otions to strike are generally looked upon with disfavor" and "[a] motion to strike class allegations under Rule 12(f) is even more disfavored because it requires a reviewing court to preemptively terminate the class aspects of . . . litigation, solely on the basis of what is alleged in the complaint, and before plaintiffs are permitted to complete the discovery to which they would otherwise be entitled on questions relevant to class certification." *Ironforge.com v. Paychex, Inc.*, 747 F. Supp. 2d 384, 404 (W.D.N.Y. 2010).[70] In the instant case – where Plaintiffs have not had the chance to engage in any class discovery and have yet to even file their substantive proof of class claim – this Court should reject Old GM's premature attempt to foreclose Plaintiffs' to-be-asserted substantive class claims.[71] Both within and outside of the

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Div. 2d Dept. 1990) (Absent evidence, such as an appraisal, of the actual value of goods, the only basis for awarding damages is the cost of repairing the goods so that they will conform to the warranties of sale); *VMB Sys. v. Exal Corp.*, No. 98 CA 172, 1999 Ohio App. LEXIS 5817*12 (Ohio App. 7 Dist. 1999); *East Co. v. Trammell*, No. 17188, 1999 Ohio App. LEXIS 273 (Ohio App. 2 Dist 1999); *Mountaineer Contractors Inc v. Mountain State Mack Inc*, 268 S.E. 2d 886 (W.Va. 1980) (buyer of defective bulldozers recovered repair costs).

[70] Plaintiffs are mindful of the wisdom of the Court's approach, but believe it appropriate, however, to respectfully suggest that to the extent well-conceived bodies of law may co-exist with special needs of bankruptcy, such precedents should be scrupulously observed.

[71] Old GM's Rule 23 arguments in its Amended Motion to Dismiss, in effect requiring of Plaintiffs the same showing as though they had been afforded discovery, seek to take unfair advantage of this Court's pretrial denial (without prejudice) of discovery at this time. Such an approach is not what this Court has required of Plaintiffs in its initial evaluation of case viability for Rule 12(b)(6) purposes. *See, e.g., Chenensky v. New York Life Ins. Co.*, C.A. 07 Civ. 11504 (WHP), 2011 U.S. Dist. LEXIS 48199, at *10-

Second Circuit, numerous courts have rejected nearly identical premature attempts to strike or dismiss class allegations:

- *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 21-23 (2d Cir. 2003) ("[I]t is likely that at least minimal class discovery must be conducted in order to provide the court with the factual information necessary to decide whether or not to certify a Rule 23(b)(2) class. . . Because the District Court decided [Defendant's motion to deny class certification as a matter of law] without the factual support necessary to support its legal conclusions, the decision to deny Rule 23(b)(3) class certification is vacated and this matter is remanded for further proceedings. Once it has the benefit of [Plaintiffs'] motion to certify and the evidence relevant to that motion, the District Court will be in a position to exercise its informed discretion regarding the factors affecting Rule 23(b)(3) certification.")

- *Kelly v. Giguere (In re Giguere),* 165 B.R. 531, 537 (Bankr. D.R.I. 1994). Although [Plaintiff] may have difficulty meeting Rule 23's 'predominance' requirement, such a conclusion, in the absence of any class discovery, would be 'based on assumptions of fact rather than on findings of fact,' and 'it remains unknown what class [Plaintiff will seek] to certify.'

- *Coultrip v. Pfizer, Inc.,* C.A. No. 06 Civ. 9952 (JCF), 2011 U.S. Dist. LEXIS 34213, at *37-38 (S.D.N.Y. Mar. 24, 2011) ("In response to the amended complaint, the defendant filed a motion to dismiss the plaintiffs' state law class action allegations, which the Honorable Alvin K. Hellerstein, U.S.D.J., denied without prejudice, finding that the issue would be better addressed through a motion for class certification.")

- *Ironforge.com v. Paychex, Inc.*, 747 F. Supp. 2d 384, 404 (W.D.N.Y. 2010) ("In the case at bar, I see no reason to depart from the usual practice by deciding now, on a motion to strike, whether [Plaintiffs'] claims are typical of those of the proposed class. Plaintiffs' motion for class certification is not before me at this time, and I see no undue prejudice to defendant by allowing these allegations to remain in the complaint at this point. [Defendant's] motion to strike [Plaintiffs'] class claims is therefore denied.")

- *Indergit v. Rite Aid Corp.*, No. Case No. 08 Civ. 9361 2009 U.S. Dist. LEXIS 42739, at *10, (S.D.N.Y. May 4, 2009) (denying motion to dismiss class claims in pre-certification procedural posture; "In short, once a named plaintiff establishes individual standing, the issue of whether a named plaintiff can

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11 (S.D.N.Y. Apr. 27, 2011) (denying, prior to class discovery, motion to strike class allegations; "[T]he harsh remedy of denial of class certification at this early stage, prior to any class discovery, is premature.").

> assert claims on behalf of absent class members is determined at the class certification stage of the litigation.")

Significantly, the Eastern District of California rejected GM's prior attempt to prematurely dismiss class allegations in a complaint alleging remarkably similar suspension and alignment defects in model year 2004–2006 Pontiac GTOs that caused uneven and premature tire wear and failure. *See Paikai v. General Motors Corp*., C.A. No. S-07-892, 2009 U.S. Dist. LEXIS 8538 (E.D. Cal. Feb. 5, 2009). The court's denial of GM's premature attack on the class allegations in *Paikai* is instructive here. Focusing on the "end run" aspects of GM's premature dismissal gambit, the *Paikai* court held that:

> To support the proposition that 'class allegations can, in some cases, be disposed of by a motion to dismiss,' defendant cites various cases which denied class certification under Rule 23. As these cases deal with class certification under Rule 23, and not motions to dismiss under Rule 12(b)(6), they are inapposite. . . . Defendant's arguments are more appropriately raised at the class certification stage. **At this juncture, it is sufficient that plaintiffs plead that GM knew about the defects prior to selling the subject vehicles, concealed the defects from the public, received numerous complaints and has refused to correct the defects.** . . . Defendant argues in its reply that the court should not defer addressing the 'inherent problems with the proposed class' to a later date. Yet this is the very purpose of allowing separate class certification proceedings.

Id. at *31, 36-37 (emphasis added).

As in *Paikai*, *every* authority Old GM cites in support of its argument concerning Plaintiffs' alleged inability to satisfy the requirements of Rule 23 is inapposite because plaintiffs in those cases had already engaged in class discovery and filed their motions for class certification, or at least filed their class proof of claim and then delayed for years the filing of their class certification motions.[72]

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[72] *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (GM Mem. at 31) "to make a fully informed decision, as class determination 'generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action'."); *In re Woodward & Lothrop Holdings*, 205 B.R. 365, 370 (S.D.N.Y. Bankr. 1997) (Old GM Mem. at 22) ("Sager filed his class claim in August 1994, but to date [1997], has still not moved to certify the class. Rather, he raised the issue only

Moreover, a leading treatise also notes that pre-motion for class certification deletion of class claims are procedurally improper. *See* 5-23 Moore's Federal Practice - Civil § 23.145:

> A court may not order deletion of class allegation without giving the class proponent an opportunity to prove the propriety of the class allegations, however. ***A Rule 23(d)(1)(D) order to strike class allegations is appropriate only after the court rules that class treatment is improper--such as after the court denies class certification.*** A court may order deletion of portions a complaint's class claims once it becomes clear that the plaintiffs cannot possibly prove the deleted portion of those claims.)

Id. (footnotes omitted, emphasis added).

In sum, the overwhelming weight of authority makes clear that Old GM's Amended Motion to Dismiss, as to Plaintiffs' class allegations in particular, is at best, premature, and should be denied in its entirety.

2. <u>Old GM's Other Rule 23 Arguments Are Also Defective</u>

In addition to Old GM's premature arguments regarding the ability of Plaintiffs to satisfy the requirements of Rule 23, Old GM raises a number of other points against eventual consideration of Plaintiffs' class claims that are at best incorrect and at worst disingenuous.

As an initial matter, Old GM argues that the proposed Class is without temporal limitation (Old GM's Amended Motion to Dismiss at ¶ 18), but this is simply not so. Plaintiffs

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indirectly and defensively in response to the debtor's post confirmation objection to his claim."); *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1249 (2d Cir. 2002) (Old GM Mem. at 29) (appeal from denial of motion for class certification); *Lundquist v. Sec. Pac. Auto Fin. Servs. Corp.*, 993 F.2d 11, 14 (2d Cir.), *cert. denied*, 510 U.S. 959 (1993) (Old GM Mem. at 31) (same); *Edwards v. McCormick*, 196 F.R.D. 487, 489 (S.D. Ohio 2000) (Old GM Mem. at 32) (on plaintiff's motion for class certification); *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 651 (Cal. App. 4th Dist. 1993) (Old GM Mem. at 32) (appeal of order denying plaintiff's motion for class certification); *Stephens v. Montgomery Ward*, 193 Cal. App. 3d 411, 416 (Cal. App. 1st Dist. 1987) (Old GM Mem. at 32) (same); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 827 (U.S. 1999) (Old GM Mem. at 33) (appeal of provisional certification of settlement class); *City of St. Petersburg v. Total Containment, Inc.*, 265 F.R.D. 630, 647 (S.D. Fla. 2008) (Old GM Mem. at 33 (on plaintiff's motion for class certification); *In re Ephedra Prods. Liab. Litig.*, 329 B.R. 1, 4 (S.D.N.Y. 2005) (Old GM Mem. at 27 (proof of claim filed); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 209 F.R.D. 323, 329 (S.D.N.Y. 2002) (Old GM Mem. at 34) (on motion for class certification); *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 449 (E.D. Pa. 2000) (Old GM Mem. at 34-35) (same).

will seek – at a later date and in accord with proper procedures – to certify a class of all owners of "Consumer Impalas." As used in the complaint for revocation, a "Consumer Impala" is a model year 2007 or 2008 Chevrolet Impala that was not equipped with a Police Package. *See* Complaint ¶ 3 (defining "Impalas" as model year 2007 and 2008 Chevrolet Impalas); Complaint ¶ 10 (defining "Consumer Impalas" as "Impalas," previously defined, without a police package), and Complaint ¶ 33 (defining the class as "All Current and former owners or lessees of Consumer Impalas in the United States."). Old GM evidently overlooked these well-pleaded allegations in the Complaint when asserting its misleading and inaccurate argument on this point. *See, e.g.*, Old GM Mem. at ¶ 17.

This simple scenario is easily contrasted to *In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig.*, 209 F.R.D 323, 349 (S.D.N.Y 2009), in which ascertaining the class members would be "unmanageable". In that case, the proposed class was private water well owners whose wells had been contaminated by the eponymous chemical MTBE. The Court found that the main problem was limiting the class by date- it was impossible to prove when the chemical had contaminated a wells. As such, any time-limited class would leave Defendants open to later litigation; "If and when any one of these individuals sued the defendants in the future, there would be no way to establish that he or she was a member of the class [of individuals who had suffered contamination within the class dates]." *Id.* at 349. With respect to the defective Consumer Impalas, the class is narrowly limited, defined, and easily ascertained.

Old GM also incorrectly contends that motor vehicle defect cases are not susceptible to class treatment. Old GM Mem. at ¶¶ 66–68. On that point, as with so many others in its papers, Old GM is demonstrably wrong. In fact, motor vehicle defect cases are readily susceptible to class treatment and are routinely certified. *See*, *e.g.*, *Wolin v. Jaguar Land Rover North Am.*,

LLC, 617 F.3d 1168, 1173 (9th Cir. 2010) (reversing denial of certification of action lawsuit against Jaguar Land Rover alleging that Land Rover's LR3 vehicles suffer from an alignment geometry defect that causes tires to wear prematurely; "Although early tire wear cases may be particularly problematic for plaintiffs seeking class certification, we reject Land Rover's suggestion that automobile defect cases can categorically never be certified as a class."); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 550 (6th Cir. 2006) (affirming certification of Mercury Villager defective throttle body assembly class). In support of its argument, Old GM cites *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441 (E.D. Pa. 2000) but that case is clearly distinguishable on its facts.

The class proposed in *Sanneman*, which involved allegations that Chrysler used a defective paint application process ("Ecoat") that resulted in premature delamination of vehicle paint, comprised "at least eight model years, 13 different manufacturing plants and hundreds of makes and models, with hundreds of different kinds and colors of paint supplied by two different paint companies." *Sanneman*, 191 F.R.D. at 450. Furthermore, due to the nature of the defect at issue, "each vehicle must be examined to determine whether its paint coat is in fact delaminating, as well as whether the vehicle was painted using the Ecoat system." *Id*. at 451.

In contrast, here, Plaintiffs underlying product defect claims – which again, Plaintiff has refrained from submitting to this Court as revocation of the confirmation order is a necessary predicate to Plaintiffs' proof of claim – is a particular, fungible part of a single car model's suspension system: the rear wheel spindle rods of 2007 and 2008 Chevrolet Impalas without a police package. See, e.g., *Samuel-Bassett v. Kia Motors, Inc.*, No. J-31A-C-2009, ___ A.3d ___, 2011 Pa. LEXIS 2896 at *103 (Pa. Dec. 2, 2011) (damage award of $600 per class member sustained, because "all class members were entitled to have good brakes"). Furthermore, all of

the Consumer Impalas at issue were assembled at a single plant – GM's manufacturing facility in Oshawa, Ontario.[73] The variability at issue in *Sanneman* inhibiting class treatment is absent here. Either the rear wheel spindle rods in Consumer Impalas (as defined in the complaint) are defective, or they are not, and no individual use or maintenance differences would impact whether this is so. Thus, the vehicle defect at issue in the instant case is precisely the sort of common defect that *is* appropriate for class treatment under Rule 23.

Old GM also misleadingly conflates the defect alleged in Plaintiffs' complaint for revocation – defective rear wheel spindle rods – with the manifestation of that defect – premature tire wear. While the legal issues concerning availability of class relief for an inherent defect that has yet to manifest is better addressed after at least class discovery – when Plaintiffs will be in a better position to allege defect manifestation rates – at this point, it is sufficient to note that manifestation of defect was not a condition to the "fix" afforded Police Impalas, and has not been necessary to support an individual's inclusion in similar vehicle defect classes. *See Wolin*, 617 F.3d at 1173 ("Although individual factors may affect premature tire wear, they do not affect whether the vehicles were sold with an alignment defect."); *Daffin*, 458 F.3d at 550 ("Although the class includes those owners who never actually experienced a manifestation of the alleged defect, the class certification was not an abuse of discretion because the class and the named plaintiff meet the elements of Federal Rule of Civil Procedure 23(a) and 23(b)(3)."); *Neale v. Volvo Cars of N. Am., LLC,* No. 10-CV-04407, slip op., 2011 U.S. Dist. LEXIS 39154 at *7 (D.N.J. Apr. 11, 2011) ("Moreover, the Court is not yet persuaded that Defendant's underlying contention, that all class members need to have suffered water damage based on the alleged

[73] http://en.wikipedia.org/wiki/Chevrolet_Impala#Ninth_generation

defect in the sun-roof drainage systems in order to participate in either the nationwide class or state specific classes is true.").

V. CONCLUSION[74]

For all of the foregoing reasons, Plaintiffs, individually and on behalf of the other Impala Claimants, respectfully request that the Court deny Motors Liquidation Company's and Motors Liquidation Company GUC Trust's Amended Motion to Dismiss Plaintiffs' Complaint for Revocation of Discharge and, in the Alternative, Motion to Strike Class Allegations in its entirety, and for such other and further relief as this Court deems appropriate.

Dated: December 26, 2011

By: /s/ Mark Schlachet

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55 Public Square, Suite 1950

[74] **ALTERNATIVE MOTION TO AMEND :** Rule 15(a) instructs, "A party may amend its pleading once as a matter of course" and "[t]he court should freely give leave [for further amendments] when justice so requires." Indeed, "the right to serve an amended pleading once is common." *Advisory Committee Notes*, Rule 15. In cases where such leave has ***not*** been granted, plaintiffs have usually already had an opportunity to plead with greater specificity, *see, e.g., Armstrong v. McAlpin*, 699 F.2d 79, 93-94 (2d Cir. 1983), or the defective allegations were made *after* full discovery in a related case, *Billard v. Rockwell International Corp.*, 683 F.2d 51, 57 (2d Cir. 1982). Here, none of the Plaintiffs filed a complaint prior to the instant Complaint. Where, as here, Plaintiffs specifically request leave to amend should dismissal be granted, denying leave to amend may constitute an abuse of discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962). See *Adelphia Communications Corp, et al. v. FPL Group Inc., et al.*, 452 B.R. 484, 489-90 (S.D.N.Y. 2011) (leave "should be denied only for such reasons as undue delay, bad faith, futility of the amendment, and perhaps most important, the resulting prejudice to the opposing party.")

Accordingly, Plaintiffs respectfully request the opportunity to amend to remedy any deficiencies should the Court dismiss any portion of the current pleading.

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Attorneys for John Morgenstein, Michael Jacob, and Alante Carpenter, individually and on behalf of the proposed Class

HEARING DATE AND TIME: January 10, 2012 at 9:45 a.m. (Eastern Time)
OBJECTION DEADLINE: January 3, 2012 at 4:00 p.m. (Eastern Time)

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One of the Attorneys for Plaintiffs
(additional counsel appear on signature block)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a GENERAL MOTORS CORP., *et al.*,	Case No. 09-50026 (REG)
Debtors.	(Jointly Administered)
JOHN MORGENSTEIN, MICHAEL JACOB, as Executor of the Estate of Doris Jacob, and **ALANTE CARPENTER** individually and on behalf of all others similarly situated, Plaintiffs, v. **MOTORS LIQUIDATION COMPANY** **f/k/a GENERAL MOTORS CORPORATION,** a Delaware Corporation, Defendant.	Adversary Proceeding No. 11-09409-reg

PROPOSED ORDER DENYING MOTORS LIQUIDATION COMPANY'S AND MOTORS LIQUIDATION COMPANY GUC TRUST'S AMENDED MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR REVOCATION OF DISCHARGE AND, IN THE ALTERNATIVE, MOTION TO STRIKE CLASS ALLEGATIONS

The Court, having held oral argument pursuant to notice in accordance with applicable law, rule, and order on *Motors Liquidation Company's and Motors Liquidation Company GUC Trust's Amended Motion to Dismiss Plaintiffs' Complaint for Revocation of Discharge and, in the Alternative, Motion to Strike Class Allegations*, and due and proper notice of the Motion having been provided, and it appearing that no other or further notice need be provided; and the Court having found and determined that the relief sought in the Motion is in the best interests of the Debtors, their estates, creditors, and all parties in interest and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefore, it is

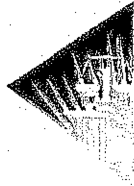
ORDERED that the Motion is DENIED; and it is further

ORDERED that this Court shall retain jurisdiction to hear and determine all matters arising from or related to this Order.

SO ORDERED.

____
THE HONORABLE ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT 1



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Anthony J. Garofoli (1936-2003)
Jack D. Maistros (1956-2001)
Paul S. Lefkowitz, Retired

August 5, 2011

VIA CERTIFIED MAIL

Daniel F. Akerson
Chairman and CEO
General Motors Corporate Office | Headquarters
300 Renaissance Center
Detroit, MI 48265

Re: *John Morgenstein v. General Motors Company*

Dear Mr. Akerson:

We represent the Plaintiff John Morgenstein and a putative class of all other consumers similarly situated in an action against the General Motors Company ("GM"), arising out of, *inter alia*, breach of express warranties, fraudulent concealment, violations of the Ohio Consumer Sale Practices Act and the Ohio Deceptive Trade Practices Act by GM. The Plaintiff, on behalf of himself and all other Class Members (collectively "Plaintiff" or the "Class") seeks damages, injunctive and declaratory relief for persons who purchased or leased model year 2007 or 2008 Chevrolet Impalas with defective rear spindle rods that have or may cause wheel misalignment and premature tire wear ("Defective Impalas"). The full claims, including the facts and circumstances surrounding these claims, are detailed in the Class Action Complaint, a copy of which is attached and incorporated by this reference.

GM issued a recall bulletin for model year 2007 and 2008 Impalas operated as police vehicles, yet GM failed to honor its warranties and affirmations with Plaintiff and the Class, by failing to correct the manufacturing defect in their vehicles. Moreover, there are no relevant material differences between the police Impalas and the Defective Impalas. The fact that GM fixed certain Impalas shows that GM knew of the defect. Despite this, GM continued to sell and has refused to honor the express warranties of hundreds of thousands of defective and potentially unsafe vehicles. Moreover, GM fraudulently concealed this defect from the Plaintiff and the Class. Therefore, the enclosed Complaint seeks damages, injunctive and a declaratory relief on behalf of the Plaintiff and the Class who purchased or leased model year 2007 and 2008 Chevrolet Impalas.

Therefore, we hereby demand on behalf of the Plaintiff and the Class Members that the General Motors Company immediately correct and rectify the breach of its express warranties. In addition, General Motors Company should pay damages to the Plaintiff and Class Members, plus provide reimbursement for interest, costs, and fees.

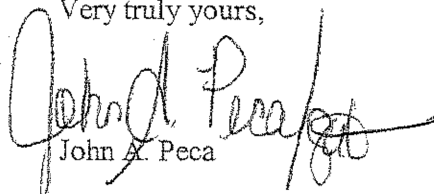
www.climacolaw.com

55 Public Square / Suite 1950 / Cleveland, OH 44113 216.621.8484 216.771.1632

Plaintiff will, after 10 days from the date of this letter, file the enclosed Complaint. The Complaint will include claims of breach of express warranty and fraudulent concealment. Thus, to avoid litigation, it is in the interest of all parties concerned that General Motors Company address this problem immediately.

We await your response.

Very truly yours,



John A. Peca

Enclosures

EXHIBIT 2

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August 12, 2011

Via Federal Express

John A. Peca, Esq.
Climaco, Wilcox, Peca, Tarantino
& Garofoli Co, L.P.A
55 Public Square
Suite 1950
Cleveland, Ohio 44113

Re: John Morgenstein v. General Motors Company (the "Claims")

Dear Mr. Peca,

This will respond to your letter dated August 5, 2011 addressed to Daniel Akerson.

Based on your letter and attached Class Action Complaint ("Complaint"), we understand that the Claims relate to 2007 and 2008 Chevrolet Impala vehicles (the "Vehicles"). The Claims may not be asserted against General Motors Company (together with its subsidiaries "New GM"). The Vehicles were not manufactured or sold by New GM, which did not exist until 2009, and neither made any representations relating to the sale of the vehicle nor issued the Program Bulletin attached to the Complaint.

As you know, General Motors LLC f/k/a General Motors Company, a remote subsidiary of the current General Motors Company, acquired substantially all of the assets of General Motors Corporation ("Old GM") on July 10, 2009 in a transaction executed under the jurisdiction and pursuant to approval of the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court"). *See generally In re General Motors Corp.*, 407 B.R. 463 (Bankr., SDNY 2009)("Sale Opinion")(approving sale transaction). In acquiring these assets, New GM did not assume the liabilities of Old GM. For example, New GM did not assume responsibility for product liability claims arising from incidents involving GM vehicles that occurred prior to the July 10 closing date. *Id.*, 407 B.R. at 499-507 (overruling objections by tort claimants seeking to preserve claims against New GM). *See also In re Chrysler, LLC*, 2009 WL 2382766, pp 11-13 (2nd Cir. 2009)(bankruptcy court was permitted to authorize the sale of substantially all Chrysler's automotive assets free and clear of claims).

The scope and limitations of New GM's responsibilities are defined in the Bankruptcy Court's "Order (I) Authorizing Sale of Assets Pursuant to Amended and Restated Master Sale and

Purchase Agreement with NGMCO, Inc., a U.S. Treasury-Sponsored Purchaser; (ii) Authorizing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases In Connection with the Sale; and (iii) Granting Related Relief," entered on July 5, 2009 (the "Sale Approval Order"), which is a final binding order.[1] The Sale Approval Order provides that, with the exceptions of certain limited liabilities expressly assumed under the relevant agreements, the assets acquired by New GM were transferred "free and clear of all liens, claims, encumbrances, and other interests of any kind or nature whatsoever. . . including rights or claims based on any successor or transferee liability. . ." *Id.*, ¶7.

The Claims asserted in the Complaint were not assumed. New GM did assume the repair obligations of General Motors Corporation in connection with certain "express written warranties of Sellers that are specifically identified as warranties and delivered in connection with the sale of" specified vehicles. MSPA, §2.3(a)(vii). However, the effect of that was that New GM assumed the obligation to fund and otherwise support formal express warranties of repair issued by Old GM in connection with initial sale transactions but not all liability claims asserted to relate in some way to "warranties." As confirmed by the Sale Approval Order, New GM's warranty responsibilities were strictly limited to express conditions of the formal written warranty:

> [New GM] is assuming the obligation of [Old GM] pursuant to and subject to conditions and limitations contained in their express written warranties, which were delivered in connection with the sale of vehicles and vehicle components prior to Closing of the 363 Transaction and specifically identified as a 'warranty.' [New GM] is not assuming responsibility for Liabilities contended to arise by virtue of other alleged warranties, including implied warranties and statements in materials such as, without limitation, individual customer communications, owner's manuals, advertisements, and other promotional materials, catalogs and point of purchase materials.

Sale Approval Order, ¶56 (emphasis added). Furthermore, New GM did not assume any "[l]iabilities arising out of, related to or in connection with any (A) implied warranty or other implied obligation arising under statutory or common law without the necessity of an express warranty or (B) allegation, statement or writing by or attributable to [Old GM]." MSPA, §2.3(b)(xvi). Thus, New GM did not assume any responsibility for the Claims.

The Claims asserted in the Complaint purported to arise under Old GM's express limited warranty were not assumed because they are inconsistent with the express "conditions and limitations contained" in the limited warranties issued by Old GM in connection with sale of plaintiff's vehicle. That warranty stated that "General Motors will provide for repairs to the vehicle during the warranty period in accordance with" applicable "terms, conditions and limitations." (emphasis added) The "warranty covers repairs to correct any vehicle defect related to materials or workmanship." It does not cover design defects, such as the defect alleged in the Complaint. Moreover, the warranty expressly notes that

[1] The Sale Approval Order is publicly available at http://docs.motorsliquidationdocket.com/pdflib/2968_order.pdf.

> Performance of repairs and needed adjustments is the exclusive remedy under this written warranty or any implied warranty. GM shall not be liable for incidental or consequential damages, such as, but not limited to, lost wages or vehicle rental expenses, resulting from breach of this written warranty or any implied warranty.

2007 Chevrolet Warranty Booklet, p. 11. The warranty specifically clarifies that "economic loss or extra expense is not covered." *Id.* Responsibility for tire wear or damage is expressly disclaimed. *Id.*, p. 8.

I note the reference in the Complaint to certain doctrines relating to warranty limitations that may permissibly be imposed by a seller of goods. Those doctrines have no applicability here, because New GM was not the seller of the Vehicles. New GM could have lawfully acquired the assets of Old GM and assumed no responsibility whatsoever related to the Vehicles. As a result, its responsibilities are strictly limited by the intent of the parties to the 363 transaction, as set forth in the MSPA and approved by the Bankruptcy Court. That intent was to assume responsibilities affirmatively described in the express warranties and not to assume other responsibilities, including particularly those expressly disclaimed. The liabilities alleged in the Complaint were not assumed.

Accordingly, the filing of the Complaint would constitute a violation of the Sale Approval Order, which unambiguously states that "all persons and entities, including, but not limited to . . . litigation claimants and [others] holding liens, claims and encumbrances, and other interests of any kind or nature whatsoever, including rights or claims based on any successor or transferee liability . . . are forever barred, estopped, and permanently enjoined. . . from asserting against [New GM], its successors or assigns, its property, or the Purchased Assets, such persons' or entities' [rights or claims], including rights or claims based on any successor or transferee liability." *Id.*, ¶8. *See also Id.*, ¶46 (". . . the Purchaser shall not have any successor, transferee, derivative, or vicarious liabilities of any kind or character for any claims, including, but not limited to, under any theory of successor or transferee liability, de facto merger or continuity, environmental, labor and employment, and products or antitrust liability, whether known or unknown as of the Closing, now existing or hereafter arising, asserted or unasserted, fixed or contingent, liquidated or unliquidated."), *Id.*, ¶52 (Sale Approval Order "effective as a determination that, except for the Assumed Liabilities, at Closing, all liens, claims, encumbrances, and other interests of any kind or nature whatsoever existing as to the Sellers with respect to the Purchased Assets prior to the Closing (other than Permitted Encumbrances) have been unconditionally released and terminated . . .").

Moreover, in the Sale Approval Order, the Bankruptcy Court retained "exclusive jurisdiction to enforce and implement the terms and provision of [the] Order" including to "protect [New GM] against any of the [liabilities that it not expressly assume under the MSPA]." *Id.*, ¶71. Any attempt to assert the Claims alleged in the Complaint may be made only in the Bankruptcy Court. The filing of the Complaint in the Northern District of Ohio would be a clear violation of the Sale Approval Order.

Accordingly, General Motors Company hereby demands that the assertion of Claim against New GM be immediately discontinued. If the Complaint is filed in any Court other than the Bankruptcy Court, New GM will initiate proceedings to enforce the Sale Approval Order, and reserves the right to seek all costs, expenses and fees incurred by reason of the Action, along with such other remedies as the Bankruptcy Court may deem appropriate.

Sincerely,

Lawrence S. Buonomo
Attorney

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