CFC 14001077

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CALLAN CAMPBELL, KEVIN C. CHADWICK (individually and through his court-appointed administrators, JAMES H. CHADWICK AND JUDITH STRODE CHADWICK), JAMES H. CHADWICK, JUDITH STRODE CHADWICK, THE TYLER JUNSO ESTATE (through KEVIN JUNSO, its personal representative), KEVIN JUNSO, AND NIKI JUNSO, all on their own behalf and on behalf of a class of all others similarly situated, Plaintiffs, v. UNITED STATES, Defendant.	No. 15- 717 C

CLASS ACTION COMPLAINT

Callan Campbell ("**Campbell**"), Kevin C. Chadwick (individually and through his court-appointed administrators, James H. Chadwick and Judith Strode Chadwick) ("**Kevin Chadwick**"), James H. Chadwick, individually ("**James Chadwick**"), Judith Strode Chadwick, individually ("**Judith Chadwick**," and together with Kevin Chadwick and James Chadwick, the "**Chadwicks**"), the Tyler Junso Estate (through Kevin Junso, its personal representative) ("**Tyler Junso Estate**"), Kevin Junso, individually ("**Kevin Junso**"), and Niki Junso ("**Niki Junso**," and together with the Tyler Junso Estate and Kevin Junso, the "**Junsos**") (collectively, the "**Plaintiffs**"), on their own behalf and on behalf of a class of all other persons similarly situated, by and through their attorney of record, Steve Jakubowski of Robbins, Salomon & Patt, Ltd., and with knowledge as to their own acts and events taking place in their presence and upon information and belief as to all other matters, for their complaint against the United States

(including the Department of the Treasury and its agents acting at its direction) (the "**Government**") allege as follows:

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I.

NATURE OF THIS ACTION

1. Plaintiffs and the members of the class are natural persons, court-appointed administrators, decedents' estates and their representatives, and others (collectively, the "**Personal Injury Claimants**") that hold allowed prepetition claims (the "**Allowed Claims**") in the bankruptcy case of *In re Motors Liquidation Company, et al., f/k/a General Motors Corp.*, Case No. 09-50026 (reg) (Bankr. S.D.N.Y) (the "**GM Bankruptcy**") based on deaths or personal injuries caused by defective motor vehicles (or component parts thereof) manufactured, sold, or delivered by General Motors Corporation and affiliates ("**Old GM**") before June 1, 2009. The total Allowed Claims of these Personal Injury Claimants is estimated to be $300 million.

2. Plaintiffs bring this case because the Government took from all Personal Injury Claimants, without just compensation, their rights to assert successor liability claims against Old GM's successor, a U.S. Treasury-sponsored entity ("**New GM**"), which purchased substantially all of Old GM's operating assets in a sale approved by the GM Bankruptcy court" (the "**363 Sale**" or "**Sale**") that closed on July 10, 2009.

3. In deciding what liabilities to assume as successor or leave behind with Old GM, the Government's lead actors in this saga (which they snidely dubbed, the "auto caper") drew a

line in the sand and determined that New GM would assume only those liabilities that they determined were commercially necessary for New GM's success.

4. One Government official responsible for the GM acquisition testified in his deposition before the closing of the 363 Sale that "our animating principle from the very beginning … was what's the commercial basis, the commercial need for that liability to be brought to New [GM], why would a buyer buy that liability if he or she didn't have to."

5. While that approach may be expected in the shark tank of Wall Street from which the Government's lead actors were recruited, it is not the standard by which the propriety of governmental action is judged under the Takings Clause of the Fifth Amendment to the United States Constitution (the "**Takings Clause**"), which states "[n]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

6. Moreover, the Government's "commercial need" standard radically—and inexplicably—changed a mere 45 days before the closing of the 363 Sale. As late as May 25, 2009, the Government supported Old GM's attempt to fashion an out-of-court restructuring through its pending public exchange offers of debt for equity.

7. Had the requisite number of bondholders voted in favor of the exchange offers, Old GM would not have filed bankruptcy, the Personal Injury Claimants would have been paid in full, and the Government would have been content with a significantly less advantageous deal than it received in the 363 Sale just 45 days later.

8. Following the collapse of the exchange offers on May 26, 2009, the Government seized the moment. Embracing its considerable leverage as Old GM's only lender, and offering the 363 Sale as Old GM's only alternative to outright liquidation, it squeezed all Personal Injury Claimants out of the deal (including victims of accidents that had not even occurred yet so long

as the car was manufactured prepetition) and demanded that the Personal Injury Claimants' rights to assert successor liability claims against New GM be extinguished in the bankruptcy court order approving the Sale.

9. Given the seamless transition from Old GM to New GM after the 363 Sale (as demonstrated in Section V.I below), it was only the unique ability under federal bankruptcy law to execute "free and clear" sales that enabled the GM Bankruptcy court to find, purely as a matter of bankruptcy law, that—facts aside—New GM would not be deemed a legal successor to Old GM. For this reason, New GM fought so hard to eliminate all rights to assert successor liability claims against it following the Sale.

10. The Government effected a takings of these rights without just compensation by insisting that Personal Injury Claimants' rights to assert successor liability claims be eliminated in the 363 Sale despite its having agreed with Old GM, on the eve of Old GM's bankruptcy filing, that if New GM ultimately were to assume these "politically sensitive" liabilities (as the Government called them in advance of the Sale), then New GM would still proceed forward with the Sale without any adjustment to the purchase price.

11. Absent from this case are loss causation concerns raised before the Federal Circuit in *In re A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1157 (Fed. Cir. 2014) ("[P]roving economic loss requires a plaintiff to show what use or value its property would have but for the government action."), and before this Court in *Starr Int'l Co., Inc. v. United States*, No. 11-799, 2015 WL 3654465, at *6 (Ct. Cl. June 15, 2015) ("The analysis here leads to the conclusion that, if the Government had done nothing to rescue AIG, the company would have gone bankrupt, and the shareholders' equity interest would have been worthless.").

12. Unlike those cases, this is not a case where the central fact question before the Court is what remedy (or lack thereof) the Personal Injury Claimants would have had if the Government had not closed on the 363 Sale (*i.e.*, "but for the government action").

13. Here, the Government specifically represented to the Old GM Board of Directors at a meeting to vote on the bankruptcy filing and the Sale agreement with New GM, held three days before the filing, that if these "politically sensitive" claims were required to be assumed by New GM as part of the Sale, the Government would still close the deal without any change to the consideration paid to Old GM.

14. Consequently, the only appropriate "but for" analysis in this case is as follows: but for the decision of the Government's private equity taskmasters who made decisions based on "what a reasonable commercial buyer would do," instead of what the Takings Clause to the Fifth Amendment required, the liabilities of Old GM to the Personal Injury Claimants would have been assumed in the 363 Sale and paid in full.

15. Old GM filed bankruptcy a day after an identically-patterned 363 sale was approved in the bankruptcy case of Chrysler, LLC. In the GM Bankruptcy, however, the Government faced much stiffer political winds from consumer advocacy groups and the Attorneys General of several states regarding the treatment of products liability claims than it had faced in Chrysler's bankruptcy case.

16. This opposition organized with greater force in the GM Bankruptcy primarily because in Chrysler's bankruptcy case, the bankruptcy court held that the rights of all products liability claimants (including future accident victims) to assert claims for successor liability against the purchaser could be extinguished in a 363 sale.

17. In response to the increased political and public pressures, the Government partially altered its steadfast opposition to the assumption of any personal injury products liability claims and agreed that New GM would assume the products liability claims of future accident victims (but not those of prepetition accident victims, despite Old GM's advocating for their assumption). True to its word to the Old GM Board, the Government did not attempt to renegotiate a change in the purchase price as a result of this change and still closed the deal.

18. By deciding to proceed forward and eliminate the rights of prepetition accident victims to assert successor liability claims against New GM, the Government gilded the lily. Those remaining claims (estimated at the time at no greater than approximately $420 million) were but a pittance of the entire consideration of $92 billion paid by New GM for the Old GM assets.

19. Had the Government done what the Takings Clause required it to do by not eliminating the rights of claims to bring successor liability claims as to which the Government was indifferent (because it still would have closed the 363 Sale without a change to the purchase price even if required to assume these "politically sensitive" liabilities), the Personal Injury Claimants would have been paid in full. Instead, their claims were relegated to bottom of the barrel, limited to a share of whatever recoveries—if any—all general unsecured creditors of Old GM would receive.

20. Recoveries to general unsecured creditors at the time of the Sale, however, were neither determinable nor guaranteed. A bar date for the filing of proofs of claim had not even been established in the GM Bankruptcy as of the Sale closing. When it finally was set shortly after the closing of the Sale, over 70,000 proofs of claim were filed, having an aggregate face value of approximately $270 billion. The aggregate face amount of filed priority claims alone

may have exceeded the value of the entire $7.4 to $9.8 billion valuation placed on total equity consideration transferred to Old GM in the Sale (which represented the only tangible consideration received by Old GM in the Sale that could be distributed to creditors according to their relative priorities).

21. From a takings perspective, the decision of the Government to eliminate Personal Injury Claimants' rights to assert successor liability claims against New GM went too far by extinguishing, without just compensation, the legitimate claims of a small, disadvantaged group of claimants whom Old GM's CEO believed should be paid in full and whom the Government would have agreed to pay in full had the political winds blown more favorably towards them.

22. The economic impact of the Government's actions on the Personal Injury Claimants was depressingly severe. Instead of receiving just compensation for the costs of their medical treatment and therapy (which alone could be astronomical), their pain and suffering, and—in many cases—their loss of limbs, mobility, capacity, livelihood, consortium, or even life itself, the Government deprived these victims a just recompense.

23. The Personal Injury Claimants had reasonable, investment-backed expectations that GM would stand behind its cars, as Old GM had so often promised it would in its marketing campaigns over the years. Certainly they could not have expected that the Government, through a team of appointees with little or no auto industry experience, would eliminate their rights to assert successor liability claims, thereby annulling Old GM's marketing promises as well as the recommendation of Old GM's CEO that these claims be assumed by New GM. They could not have expected to be treated so unfairly for their loyalty to the GM brand.

24. Nor did anyone from Old GM ever advise consumers that its products liability insurance coverage kicked in only if the Old GM's liability, *per occurrence*, exceeded $35

million (meaning that Old GM was effectively self-insured). Even one of the leaders of the Auto Team, himself an experienced bankruptcy lawyer, seemed surprised to learn that the automakers had such paltry products liability insurance coverage.

25. The Government effected a taking of the rights of Personal Injury Claimants to assert successor liability claims against New GM without paying them just compensation, as required by the Fifth Amendment. To remedy this wrong, the Government should be ordered to pay all the Allowed Claims of these claimants in the GM Bankruptcy (less whatever fraction of that amount actually recovered on these claims in the GM Bankruptcy), compound interest from the date of allowance, and reasonable attorneys' fees and costs.

26. Failure to do so would eviscerate nearly a century of regulatory takings law since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and validate a new "animating principle" (as one Government official described it) that the only constraint on governmental action when it is a purchaser of assets in bankruptcy is what "a reasonable commercial buyer would do."

27. Leaving interpretation of the Takings Clause to Wall Street bankers, however, cannot be what our founding fathers intended and, indeed, no takings case has held that the "reasonable commercial buyer" standard is one by which governmental action should be measured when, as here, the Government itself is the purchaser.

28. Under the unique circumstances of this case, where the Government agreed it would close the 363 Sale with no change in the purchase price even if it were compelled to assume the claims of the Personal Injury Claimants, the Government violated the Takings Clause by stripping these claimants of their rights to assert successor liability claims against New GM, without just compensation, in order to maximize taxpayer returns. Considered in this light, it is clear that the requested relief should be granted and just compensation paid to these claimants.

II.

JURISDICTION

29. The Tucker Act, 28 U.S.C. § 1491(a)(1), provides exclusive jurisdiction in the United States Court of Federal Claims for any claim against the Federal Government to recover damages founded on the Constitution. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1491(a).

III.

CONSTITUTIONAL PROVISION

30. Plaintiffs' claims are governed by the Takings Clause of the Fifth Amendment to the United States Constitution, which provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

IV.

THE PARTIES

31. Plaintiff Callan Campbell is a United States citizen and a resident of the state of Pennsylvania. She is one of thousands of Personal Injury Claimants holding an Allowed Claim in the GM Bankruptcy. On August 17, 2004, one week before she was to start college, Campbell was a front-seat passenger in a 1996 GMC Jimmy when the driver of the vehicle lost control while attempting to make a left turn. The vehicle entered a driver-side leading roll and rolled 1.5 times before ending on its roof. The defectively designed roof of the car collapsed over Campbell's seat. Campbell sustained a cervical spinal cord injury at C6-7, which rendered her a quadriplegic. She has been confined to a wheelchair since her injury. Her medical advisors have advised that she will need a wheelchair for the rest of her life. Campbell holds an Allowed Claim in the GM Bankruptcy in the amount of $4,900,000.00. Her rights to assert successor liability

claims against New GM, like those of all of the other Personal Injury Claimants holding an Allowed Claim in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government

32. Plaintiff Kevin Chadwick, individually and through his court-appointed administrator, James Chadwick, is United States citizen and a resident of the state of Louisiana. He is one of thousands of Personal Injury Claimants holding an Allowed Claim in the GM Bankruptcy. On July 4, 1994, Kevin was driving his 1988 Chevrolet Beretta when a pickup truck ran a stop sign and the vehicles crashed. Kevin was paralyzed from the neck down. The injury was caused by a defective seat belt and a defectively designed hood latch and hood hinge system that allowed the hood to invade the passenger compartment and strike Kevin in the head, causing injury to his brain. He holds an Allowed Claim in the GM Bankruptcy in the amount of $2,200,000.00. His rights to assert successor liability claims against New GM, like those of all of the other Personal Injury Claimants holding an Allowed Claim in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government.

33. Plaintiff James H. Chadwick, the father of Kevin Chadwick and the court-appointed administrator of Kevin Chadwick's Special Needs Trust, is a United States citizen and a resident of the state of Louisiana. He is one of thousands of Personal Injury Claimants holding an Allowed Claim in the GM Bankruptcy. He holds an Allowed Claim in the GM Bankruptcy, in his individual capacity, in the amount of $150,000.00. His rights to assert successor liability claims against New GM, like those of all of the other Personal Injury Claimants holding an Allowed Claim in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government.

34. Plaintiff Judith Strode Chadwick, the mother of Kevin Chadwick, is a United States citizen and a resident of the state of Louisiana. She is one of thousands of Personal Injury Claimants holding an Allowed Claim in the GM Bankruptcy. She holds an Allowed Claim in the GM Bankruptcy in the amount of $150,000.00. Her rights to assert successor liability claims against New GM, like those of all of the other Personal Injury Claimants holding an Allowed Claim in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government.

35. Plaintiff the Tyler Junso Estate, through its personal representative, Kevin Junso, holds an Allowed Claim in the GM Bankruptcy in the amount of $1,487,500.00. It is one of thousands of Personal Injury Claimants holding an Allowed Claim in the GM Bankruptcy. On April 25, 2006, Tyler and his father, Kevin Junso, were involved a single car rollover accident while driving a 2003 GMC Envoy. During the rollover, the windshield and side windows were knocked out, reducing the strength of the roof structure. The GMC Envoy sustained catastrophic damage to the roof structure, which buckled inwardly toward Tyler and Kevin. Despite being belted, both occupants were partially ejected from the vehicle during the roll over. Seventeen year old Tyler, the driver, sustained massive skull and neck injuries and died at the scene of the accident. Tyler's head was partially outside the vehicle during the roll over sequence, due to the broken window and lateral displacement of the roof structure, and made contact with both the ground and the roof during the crash. The paramedics found Kevin, still buckled in on the passenger side, with his left leg out the windshield and his right leg out the passenger side window. Kevin sustained severe injuries to both of his knees and lower legs, eventually leading to the amputation of his right leg below the knee and multiple surgeries to address the severe ligament damage sustained in his knees. The Tyler Junso Estate holds an Allowed Claim in the

GM Bankruptcy in the amount of $1,487,500.00. Its rights to assert successor liability claims against New GM, like those of all of the other Personal Injury Claimants holding an Allowed Claim in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government.

36. Plaintiff Kevin Junso is a United States citizen and a resident of the state of Utah. He is one of thousands of Personal Injury Claimants holding an Allowed Claim in the GM Bankruptcy. Kevin Junso, in his individual capacity, holds an Allowed Claim in the GM Bankruptcy in the amount of $175,000.00. His rights to assert successor liability claims against New GM, like those of all of the other Personal Injury Claimants holding an Allowed Claim in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government.

37. Plaintiff Niki Junso is a United States citizen and a resident of the state of Utah. She is one of thousands of Personal Injury Claimants holding an Allowed Claim in the GM Bankruptcy. Niki holds an Allowed Claim in the GM Bankruptcy in the amount of $87,500.00 for damages associated with loss of her son Tyler and lifetime injuries to her husband Kevin. Her rights to assert successor liability claims against New GM, like those of all of the other Personal Injury Claimants holding an Allowed Claim in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government.

38. Defendant United States includes, without limitation, the Department of the Treasury ("**Treasury**") and its agents acting at its direction.

39. This action is brought by the Plaintiffs against the United States on behalf of themselves and on behalf of a class of all others similarly situated.

V.

FACTUAL ALLEGATIONS

A. Background to the Government's Intervention in Old GM's Restructuring.

40. By the fall of 2008, Old GM was in the midst of a severe liquidity crisis and its ability to continue operations grew increasingly uncertain.

41. In November 2008, as the economic crisis worsened, Old GM was compelled to seek financial assistance from the Government.

42. Recognizing the crippling effects that Old GM's collapse would have on the U.S. economy, the Government made initial assistance loans to the domestic automotive industry, with $24.8 billion in such loans provided to four companies in the first of what would eventually total nearly $80 billion in assistance through the Troubled Asset Relief Program ("**TARP**").

43. TARP was established by Congress, effective as of October 3, 2008, in the Emergency Economic Stabilization Act of 2008, Pub.L. 110-343, 122 Stat. 3765 ("**EESA**").

44. EESA authorized the Secretary of the Treasury to purchase troubled assets from "financial firms," but this definition did not mention manufacturing companies.

45. On December 18, 2008, Treasury made the decision to make TARP money available to the U.S. auto industry and created TARP's Automotive Industry Financing Program ("**AIFP**").

46. Over approximately the next seven months, through the closing of the 363 Sale on July 10, 2009, Treasury advanced Old GM nearly $50 billion in first priority, senior secured loans.

47. The Government's loans, at their maximum amount at the time of the closing of the 363 Sale, were undersecured in that they were not projected to be fully recoverable in any sale or liquidation of Old GM.

48. Treasury first provided Old GM with a $13.4 billion TARP loan in December 2008 under AIFP.

49. Treasury's loan agreement with Old GM in connection with that advance (the "**TARP Loan Agreement**") required Old GM to submit by February 17, 2009, for approval by the "President's Designee," a restructuring plan showing how Old GM would achieve "long-term viability" using TARP funds.

50. In order for Old GM to access further TARP funding after March 31, 2009, the TARP Loan Agreement required that the viability plan be acceptable to Treasury and contain the following three conditions:

- Old GM was required to establish a comprehensive agreement for labor and retiree cost reductions with the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("**UAW**"), which represented nearly all of Old GM's union employees as well as an estimated 500,000 retirees;

- As part of any new agreement with the UAW, it would have to agree that at least 50% of the approximately $18 billion obligation owed by Old GM to the UAW retiree health care trust (called the Voluntary Employee Beneficiary Association Plan) (the "**VEBA Trust**") would be funded through the issuance of equity alone; and

- Old GM would have to commence a voluntary debt exchange offer for the purpose of having its bondholders, who held approximately $27 billion in publicly traded unsecured bonds, exchange their debt for equity in Old GM.

51. None of the conditions to continued funding under the TARP Loan Agreement, however, included a requirement that Old GM devise a plan that would impair the ability of Personal Injury Claimants to fully recover on their products liability claims.

52. On February 17, 2009, Old GM submitted its restructuring plan to the Auto Team, as required by the TARP Loan Agreement. The Auto Team promptly sent a memo to the heads of the Auto Task Force with "first-blush impressions" of Old GM's restructuring plan. The memo listed four central risks to Old GM's, none of which mentioned any adverse impact to Old GM from having to pay Personal Injury Claimants in full.

B. The Auto Team Is Formed and Its Directives Are Established.

53. On February 15, 2009, the President convened the Presidential Task Force on the Auto Industry (the "**Auto Task Force**") to deal with the bailouts of GM and Chrysler. Treasury Secretary Timothy Geithner and National Economic Council Director Lawrence Summers were named co-chairs of the Auto Task Force, which had 21 members, including several Cabinet-level officials from across the Executive Branch.

54. While the Auto Task Force was formed to address the restructuring of GM and Chrysler, a group known as the Auto Team (the "**Auto Team**") was formed and charged with responsibility for evaluating the restructuring plans of GM and Chrysler, negotiating the terms of any further assistance, and making day-to-day decisions on behalf of the Auto Task Force.

55. Leading the Auto Team was Steven Rattner ("**Rattner**"), co-founder of the Quadrangle Group, a private equity firm. Rattner's deputy on the Auto Team was Ron Bloom ("**Bloom**"), an investment banker with significant union-related experience who had worked for Lazard Frères & Co.

56. The other two key members of the Auto Team who worked on Old GM's restructuring with Rattner and Bloom were Matthew Feldman, who was head of the corporate restructuring practice at the law firm of Wilkie, Farr & Gallagher, and Harry Wilson ("**Wilson**"), who was a member of Silver Point Capital, a hedge fund management firm.

57. These four leaders of the Auto Team played a major role in directing Old GM's restructuring through the close of the 363 Sale, with Wilson leading the team having responsibility for direct oversight of Old GM's financial and operational restructuring.

58. In interviews with the Office of the Special Inspector General for the Troubled Asset Relief Program ("**SIGTARP**") and in testimony in the GM Bankruptcy, Auto Team officials said that their directive from Treasury and the Obama Administration was to act in a "commercially reasonable" manner.

59. The Auto Team, however, lacked any policies or procedures to define commercial reasonableness.

60. Rattner told SIGTARP that he interpreted this directive to mean "as if we would be doing this in the private sector and spending money on it."

61. Wilson testified in the GM Bankruptcy that in making decisions as to which liabilities to assume or reject as purchaser, "our test had to be what a commercial buyer would do."

62. Regarding the treatment of products liability personal injury claims, Wilson testified in the GM Bankruptcy that "[t]he animating principle [for the Government] from the very beginning" was whether there was a "commercial need for that liability to be brought to New [GM]; why would a buyer buy that liability if he or she didn't have to…. That's the only real issue before us."

63. Even the "tragic cases" acknowledged by the Government as stemming from its decision to leave Personal Injury Claimants behind, however, failed to deter the Auto Team from zealously applying the "commercial reasonableness" standard to these cases.

64. In justifying the Government's decision to leave Personal Injury Claimants with Old GM despite these "tragic cases" as to which "there are some obvious human sensitivities," Wilson testified in the GM Bankruptcy that: "[O]ur test had to be what a commercial buyer would do; we had a fiduciary duty to use taxpayer dollars in the most appropriate way, and that's the judgment that we had to ultimately make."

C. The Auto Team Exercises Its Substantial Leverage to Push a 363 Sale as Its Preferred Path for Restructuring Old GM.

65. On or around March 19, 2009, according to Rattner, the Auto Team determined that the driving factor in establishing a target filing date for the GM Bankruptcy was an upcoming payment due June 1, 2009 to Old GM's bondholders.

66. The Auto Team members reasoned that if Old GM made that payment, it would be paying 100 cents on the dollar to bondholders who, as unsecured creditors, were only entitled to a fraction of that amount given Old GM's value relative to its capital structure.

67. What followed was the Auto Team's direct involvement in the decisions affecting Old GM, using its financial leverage as Old GM's only conceivable lender to significantly influence the decisions Old GM through the closing of the 363 Sale.

68. In March 2009, the Auto Team believed that Old GM, under the leadership of then Chief Executive Officer Rick Wagoner ("**Wagoner**"), was unwilling to move toward bankruptcy.

69. Wagoner had been adamantly opposed to putting Old GM into bankruptcy and had done little, if any, planning for the possibility because he did not believe that Old GM company could survive a bankruptcy.

70. On March 27, 2009, Rattner called Wagoner and its then-President and Chief Operating Officer, Fritz Henderson ("**Henderson**"), to separate meetings.

71. At the meeting with Wagoner, Rattner asked for his resignation, which Wagoner tendered.

72. Rattner then asked Henderson to serve as Old GM's CEO, which Henderson accepted.

73. Henderson told SIGTARP that the Auto Team's decision to replace Wagoner with its hand-picked selection, Henderson, sent a clear message to the Old GM Board of Directors and senior executive team of Old GM that the Government would have significant influence over Old GM's operating and restructuring decisions.

74. Three days after this management shake-up, on March 30, 2009, the Obama Administration publicly rejected the restructuring plan Old GM had submitted on February 17, 2009 as not viable, stating that Old GM's "best chance at success may well require utilizing the bankruptcy code in a quick and surgical way."

75. Concurrently, the Administration issued a "viability determination fact sheet," which signaled its preference for the 363 Sale alternative by stating:

> In order to execute a new, more aggressive restructuring plan within 60 days, we will work with [Old] GM to use all available tools to implement this plan. The best path to achieve this may well be an expedited, court-supervised process to extinguish unsustainable liabilities, should an out-of-court restructuring not be possible.

76. With the issuance of the viability determination fact sheet, Treasury also advanced an additional $6 billion in TARP funds to Old GM, enough to enable it to survive over the next 60 days.

77. Nothing in the Administration's viability determination fact sheet mentioned the need to eliminate or reduce the costs associated with personal injury products liability claims.

Quite the opposite. A section entitled "Support for Consumers and the Auto Industry" reassured consumers that the restructuring would not adversely affect them. It stated:

> During this process, the Administration wants to ensure that consumers have confidence in the cars they buy…. Consumers who are considering new car purchases should have the confidence that even in this difficult period, their warranties will be honored.

78. With only 60 days of funding available through TARP, the Auto Team significantly influenced Old GM's restructuring plans.

79. This influence extended beyond the Government's rights under the TARP Loan Agreement, which only gave it the specific right to approve or prohibit transactions over $100 million that were outside of the ordinary course of Old GM's business or that resulted in an increase in pension obligations.

80. In describing this situation, one Old GM official told SIGTARP that "[u]ltimately it was that [Old] GM is not in control. And [Old] GM is totally dependent."

81. Rather than merely providing advice, the Auto Team used its leverage as Old GM's largest lender and only restructuring lifeline to influence and set the parameters for decisions by Old GM.

82. When one Auto Team official was asked how the Auto Team was assured that its preferences were adopted by Old GM given that Old GM was ultimately free to choose its own course, the Auto Team official told SIGTARP: "Well, they could, but then they couldn't exist. I mean, as I said, as the lender we had a fair amount of leverage."

83. Auto Team officials first raised the prospect of an expedited bankruptcy with Old GM during the first week of April 2009 when it outlined the 363 Sale process for Old GM's executive team and advised that a 363 Sale of Old GM would be similar to that which was being arranged by the Auto Team for Chrysler.

84. Old GM's Chief Financial Officer, Ray Young ("**Young**"), told SIGTARP that the Auto Team "highly suggested" and felt "pretty strongly" that a 363 Sale was the "best approach" because it would be quicker to complete than a normal bankruptcy.

85. The Government's view, according to Henderson, was that speed had real power, and that to do a deal in a commercial and fast way could only be accomplished through a 363 Sale.

86. The Government's influence over Old GM, however, deepened after it decided to fund the GM Bankruptcy and attempt to purchase substantially all the assets of Old GM in a 363 Sale.

87. With its leverage as the only viable purchaser of for substantially all of Old GM's assets in a 363 Sale, the Government had significant influence over Old GM to require it to make decisions that were consistent with the Government's preferences.

88. Old GM's CFO, Young, summarized for SIGTARP this leverage as follows: "We put forward recommendations, but at the end of the day, the [Government as] purchaser makes the final decision."

89. Another Auto Team official testified in a deposition that the leverage the Government had with Old GM was that the Government was the only buyer for Old GM's assets, thus providing "considerable" leverage because the alternative was "catastrophic" (meaning a liquidation).

D. The Government Identifies Liabilities for Possible Assumption in the Sale.

90. On March 31, 2009, Old GM reported consolidated global assets and liabilities of approximately $82 billion and $172 billion, respectively.

91. Old GM's CFO, Young, stated that Old GM and the Auto Team analyzed Old GM's balance sheet in great detail to determine which liabilities New GM would assume in the 363 Sale.

92. Wilson testified in the GM Bankruptcy that the 363 Sale process allowed the Auto Team alone to cherry-pick the liabilities of Old GM that would be assumed by New GM. He stated: "It is up to the purchaser to exclude or assume liabilities…. It is my understanding that as the buyer, we get to determine which assets are, you know, assets we would buy and which liabilities we would take on."

93. As regards the methodology adopted in deciding which liabilities to assume, Wilson testified: "[O]ur general perspective, and in general the right way to do a 363 sale as a buyer, is to assume all assets unless explicitly excluded, and to reject all – to leave behind all liabilities unless explicitly assumed."

94. One Auto Team official told SIGTARP that the decision as to which liabilities New GM would assume was dictated by the leverage of the parties to the negotiations.

95. Auto Team officials established a hierarchy of important stakeholder-related issues that had to be resolved prior to the GM Bankruptcy to assure a successful "quick-rinse bankruptcy" (as Rattner called it) that would enable the 363 Sale to be consummated within 40 days after the bankruptcy filing.

96. To further drive the process towards a "quick-rinse" conclusion within 40 days, the Auto Team conditioned its $30.1 billion commitment for additional TARP funding on consummating the 363 Sale within 40 days after the bankruptcy filing.

97. Based on this condition, if the 363 Sale were not completed within this 40-day timeframe, the Government could declare the TARP Loan Agreement in default and push Old GM into a forced liquidation.

98. Mandating that the 363 Sale be consummated within 40 days after the bankruptcy filing provided significant leverage to the bargaining positions of the UAW and the bondholders, who were represented by an unofficial committee comprised of bondholders with significant holdings.

99. The leverage of these parties to the negotiations increased as a result of the Government's 40-day mandate because they knew that the Government was committed not to let Old GM fail.

100. An Auto Team official told SIGTARP that "[w]e had to negotiate a deal that the UAW and bondholders would accept."

101. Consequently, this 40-day "quick-rinse" mandate enabled these well-represented factions to threaten to hold up Old GM's bankruptcy and thereby extract more concessions than would have been possible in a traditional bankruptcy where the Government could have pushed back with its own countervailing litigation threat.

102. With the Government giving no indication that it would extend the 40-day window, Old GM's executive team was under great pressure to cut deals with the UAW and the unofficial bondholder committee, believing it had to reach agreements with these parties before a

possible June 1, 2009 bankruptcy filing or risk losing Government funding and being forced to liquidate.

103. The Government did not view the Personal Injury Claimants as having leverage in this process because they did not have organized support and, in the view of the Government, they lacked the ability to prevent consummation of the 363 Sale in a 40-day "quick-rinse" bankruptcy.

E. With the Government's Support, Old GM Commences Public Exchange Offers in Hopes of Effectuating an Out-of-Court Restructuring of Old GM.

104. Old GM and the Auto Team adopted very different approaches to the shared objective of restructuring Old GM so that it would be a viable company long-term.

105. Old GM's executives continued to prefer an out-of-court restructuring.

106. One of Henderson's first acts as new CEO was to advise Old GM executives that his preferred approach was to restructure Old GM through an out-of-court restructuring centered around an exchange offer, approved by the holders of the $27 billion in publicly-held debt securities, who would convert their debt into common stock of Old GM.

107. Old GM considered the bond exchange as "Plan A" and a bankruptcy filing as "Plan B."

108. Young stated that with the right terms attached to the bond exchange, Old GM could reduce its liabilities sufficiently to avoid having to file for bankruptcy.

109. On April 27, 2009, with the Government's express approval, Old GM commenced public exchange offers, expiring May 26, 2009, for $27 billion of its publicly-traded bondholder debt (the "**Exchange Offers**").

110. Old GM advised the public in a press release accompanying the Exchange Offers that:

- "The exchange offers are a vital component of GM's overall restructuring plan to achieve and sustain long-term viability and the successful consummation of the exchange offers will allow GM to restructure out of bankruptcy court"; and

- "GM believes its restructuring plan and the successful consummation of the exchange offers will provide the best path for the future success of the company while enabling it to continue operating its business without the negative impacts of a bankruptcy and reducing the risk of a potentially precipitous decline in revenues in a bankruptcy."

111. The Government approved the form of the press release issued by Old GM in connection with the Exchange Offers.

112. Consummation of the Exchange Offers was conditioned upon the satisfaction or waiver of several conditions imposed by the Government, including acceptance by holders of 90% of the $27 billion in bondholder debt.

113. Had all the Government's conditions to the Exchange Offers been satisfied, the Government agreed that it would consent to the Exchange Offers and convert its debt into a majority equity stake in Old GM's common stock, thereby eliminating the need for a bankruptcy filing despite the fact that the Government would receive a significantly less advantageous deal in the Exchange Offers than it received upon the closing of the 363 Sale just 45 days later.

114. If consummated, the Exchange Offers would have had no impact on Personal Injury Claimants, whose claims would have been paid in full in the ordinary course.

F. Personal Injury Products Liability Claims Are Identified as "Politically Sensitive" Liabilities.

115. On May 1, 2009, Old GM and the Government engaged in a planning meeting to carve up the myriad tasks necessary to plan for a possible bankruptcy filing and 363 Sale in the event the Exchange Offers failed.

116. Among the action items requested by the Government was development of a list of so-called "politically sensitive" liabilities.

117. These liabilities carried sensitivities for Old GM and the Government primarily because the manner in which they were handled in the prospective 363 Sale had a reputational impact on both Old GM and the Government, so treatment of such claims needed to be carefully considered.

118. Old GM's CFO Young stated that this exercise was about identifying liabilities that might present a public relations challenge if New GM did not assume them.

119. Old GM's management considered payment of personal injury product liability claims in the ordinary course was considered by to be an important component of the customer relationship program for the GM brand and therefore put these claims on the list of "politically sensitive" liabilities.

120. Shortly thereafter, Old GM sent the Government a memo that identified approximately $6 billion in such "politically sensitive" liabilities.

121. Included on the list was the $916 million in personal injury products liability claims that, as of December 31, 2008, comprised Old GM's products liability loss reserve (the "**Products Liability Loss Reserve**").

122. Old GM set the Products Liability Loss Reserve based on a rigorous annual review of Old GM's historical loss records conducted by Aon Global Risk Consulting ("**Aon**") to determine the projected losses associated with personal injury products liability claims.

123. This $916 million Products Liability Loss Reserve figure was then reported on Old GM's publicly-filed audited financial statements for the year ended December 31, 2008.

124. Aon determined that the $916 million Products Liability Loss Reserve could be segregated into $388.8 million for expected losses associated with existing reported claims and another $376.4 million for expected losses associated with unreported claims that would eventually be reported. The remaining $150.8 million was allocated to defense costs for both categories of claims.

125. Because Old GM's insurance coverage for these claims was triggered only when the loss per occurrence exceeded $35 million, Old GM was essentially self-insured for all these personal injury products liability claims.

126. Old GM management recommended assumption of these "politically sensitive" personal injury products liability claims because it was concerned that rejecting such claims would adversely impact the company's reputation.

127. Old GM projected that the cash flow impact of assuming all personal injury products liability claims represented by the $916 million Products Liability Loss Reserve would only be approximately $100 million per year for the first five years following consummation of the 363 Sale.

128. Notwithstanding this recommendation, it became clear to Old GM management that if the Exchange Offers failed and the 363 Sale was the sole remaining option, the Government would insist on leaving not only all personal injury products liability claims behind but also any future claims arising from accidents after the closing of the 363 Sale that related to a car or component part manufactured by Old GM before the closing of the 363 Sale.

129. Because Old GM was essentially self-insured, this decision by the Government meant that holders of personal injury products liability claims would only recover a fraction of their claims in the GM Bankruptcy, if anything.

130. Old GM and the Auto Team agreed that the decision of whether New GM would assume these "politically sensitive" personal injury products liability claims or leave them behind would not be made until it was clear that a bankruptcy filing would be necessary because the Exchange Offers failed to garner the requisite approvals from bondholders.

G. The Sale Agreement Is Finalized and the GM Bankruptcy Is Commenced.

131. Old GM's Board of Directors met on May 29 and 30, 2009 to approve the bankruptcy filing of Old GM and the "Master Purchase and Sale Agreement" that would set the precise terms of the 363 Sale (the "**Sale Agreement**").

132. Before that board meeting, the Government mandated that the section of the Sale Agreement governing the assumption of liabilities by New GM exclude all personal injury products liability claims, whether presently existing or arising in the future, along with most of the other "politically sensitive" liabilities.

133. With regards to the treatment of "politically sensitive" liabilities, however, the Government specifically represented to the Board at the meeting that if the Government decided before the close of the Sale to assume any of these liabilities, it would still close the Sale without any change to the consideration paid to Old GM.

134. At the conclusion of the board meeting, Old GM's Board of Directors voted to authorize the filing of the GM Bankruptcy and the concurrent filing of the Sale Agreement for approval by the bankruptcy court and closure within the 40-day timeframe mandated by the Government.

135. Old GM filed its bankruptcy petition on June 1, 2009 (the "**Filing Date**") in the United States District Court for the Southern District of New York (the "**Bankruptcy Court**").

136. Contemporaneous with its bankruptcy filing, Old GM filed a motion for authority to enter into the Sale Agreement.

H. The Government Changes the Treatment of Certain Personal Injury Products Liability Claims After the Filing Date.

137. Old GM filed its bankruptcy petition a day after an identically-patterned 363 sale in the bankruptcy case of Chrysler, LLC was approved by the bankruptcy court in that case.

138. In the GM Bankruptcy, the Government faced much stiffer political winds from consumer advocacy groups and the Attorneys General of several states regarding the treatment of personal injury products liability claims than it had faced in Chrysler's bankruptcy case.

139. This opposition organized with greater force in the GM Bankruptcy primarily because the bankruptcy court in the Chrysler case, the filing of which preceded the GM Bankruptcy by exactly one month, held that even the products liability claims of future accident victims could be extinguished in a bankruptcy 363 sale if those accidents occurred in cars manufactured prepetition.

140. In response to this increased political pressure, the Government agreed to a significant change in the treatment of certain personal injury products liability claims so that the personal injury products liability claims arising from accidents occurring after the Filing Date would be assumed by New GM, even if the defective vehicle or component part had been manufactured prepetition by Old GM.

141. Despite this major change to the treatment of personal injury products liability claims, the Government remained true to its word to the Old GM Board and neither attempted to renegotiate a change in the purchase price nor threatened to walk from the deal.

142. Following the GM Bankruptcy filing, Old GM's senior management continued to advocate for New GM's assumption of existing personal injury products liability claims arising

from accidents that occurred prepetition, but the Government—clinging steadfastly to its "commercial reasonableness" standard—refused to allow New GM to assume them.

143. In the GM Bankruptcy, Wilson stated that the Government would not assume these claims because of the "clear recognition that a reasonable buyer would not buy product liability claims."

144. Another change to the Sale Agreement, agreed to by the Government a few days after the Filing Date, resulted from postpetition agreements reached with Old GM's dealer network. Pursuant to this change, New GM agreed to indemnify these dealers for any personal injury products liability claims asserted against them.

145. Old GM and the Government agreed that this single change to the dealer indemnity agreements would benefit approximately $434 million (or 46%) of the personal injury products liability claims represented by the $934 million Products Liability Loss Reserve at March 31, 2009, resulting in that amount being treated as effectively assumed by New GM in the Sale.

146. Consequently, the projected cash flow impact of assuming the remaining prepetition personal injury products liability claims (which Old GM projected at $500 million, or approximately 54% of the $934 million Products Liability Loss Reserve recorded by Old GM on its publicly filed financial statements as of March 31, 2009) would have been reduced from an estimated $100 million per year for the first five years following consummation of the 363 Sale to approximately $54 million per year.

147. After accounting for this change to the deal resulting from the dealer indemnity agreements, the projected cash flows associated with the remaining prepetition personal injury products liability claims would have been reduced from an estimated $100 million per year for

the first five years following consummation of the 363 Sale to approximately $54 million per year.

148. Of this remaining $500 million reserve, approximately $81 million would have represented projected defense costs and $419 million would have represented the projected actual liability to the remaining personal injury claimants whose liabilities were not assumed by New GM.

149. Despite this additional significant change to the treatment of prepetition personal injury products liability claims as a result of the postpetition dealer indemnity agreements, the Government remained true to its word to the Old GM Board and neither attempted to renegotiate a change in the purchase price nor threatened to walk from the deal.

I. The Sale Is Approved by the Bankruptcy Court and the Rights of Personal Injury Claimants to Assert Successor Liability Claims Are Extinguished by the Sale Order.

150. On July 5, 2009, following three days of hearing, the Bankruptcy Court entered an order approving the 363 Sale (the "**Sale Order**"). A copy of the Sale Order is attached hereto as **Exhibit 1**.

151. In conjunction with the 363 Sale, the Government refused to yield one iota in its demand that the Sale Order contain specific language extinguishing all rights to assert successor liability claims, including on account of personal injury products liability claims not explicitly assumed in the Sale Agreement.

152. The Sale Order provided, for example, that the closing of the Sale would "vest New GM with all right, title, and interest of the Debtors [*i.e.*, Old GM] … free and clear of liens, claims, encumbrances, and other interests …, including rights or claims … based on any successor or transferee liability." (Sale Order, Ex. 1, at p. 13, ¶ AA; p. 24, ¶ 10).

153. The Sale Order also provided that "New GM shall not be deemed … to: (i) be a legal successor … to the Debtors …, (ii) have, de facto or otherwise, merged with or into the Debtors; or (iii) be a mere continuation or substantial continuation of the Debtors or the enterprise of the Debtors. (Sale Order, Ex. 1, at p. 40, ¶ 46).

154. The Sale Order further provided that "all persons and entities are forever prohibited and enjoined from commencing or continuing in any manner any action or other proceeding … against New GM … with respect to any … successor or transferee liability of New GM for any of the Debtors." (Sale Order, Ex. 1, at p. 41, ¶ 47).

155. The Bankruptcy Court issued a written opinion to accompany the Sale Order (the "**Sale Opinion**"). A copy of the Sale Opinion is attached hereto as **Exhibit 2**.

156. In the Sale Opinion, the Bankruptcy Court stated that regarding the question of whether rights to assert successor liability claims are "interests in property" that could be extinguished in the Sale, it would follow the holding in *In re Chrysler, LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009), *aff'd*, 576 F.3d 108 (2d Cir. 2009), which held that the rights to assert successor liability claims of tort claimants are "interests in property" because they are claims "that arise from the property being sold." *In re Chrysler, LLC*, 576 F.3d 108, 126 (2d Cir. 2009). (*See* Sale Opinion, Ex. 2, at p.60 n.109 (*citing* 3 *Collier on Bankruptcy* at ¶ 363.06[1] ("the trend seems to be in favor a broader definition [of "interests in property"] that encompasses other obligations that may flow from ownership of the property"))).

157. At the hearing before the Bankruptcy Court on the 363 Sale, the Government's attorneys expressly concurred at oral argument in the assessment that rights to assert successor liability claims are "interests in property."

158. The Sale Order became effective by its terms on July 9, 2009. The 363 Sale closed on July 10, 2009.

159. The provision in the Sale Order that New GM shall not be deemed the legal successor to Old GM was based on a Bankruptcy Code section that authorized the Bankruptcy Court to find, as a matter of federal bankruptcy law, that the assets of Old GM could be transferred to New GM "free and clear" of all "interests in property," regardless of whether—in fact—New GM could be deemed a "successor" to Old GM under applicable nonbankruptcy law.

160. Given the seamless transition from Old GM to New GM after the 363 Sale, only the peculiar aspects of federal bankruptcy law that allow for "free and clear" sales enabled the Bankruptcy Court to find, purely as a matter of bankruptcy law, that—facts aside—New GM could never be deemed the legal successor to Old GM. Those facts would ordinarily give rise to clear rights to assert successor liability claims against New GM based on the following:

- Four of Old GM's eight brands were assumed by New GM (the remainder were discontinued);
- Old GM's management and employees continued in their same roles with New GM;
- New GM marketed its operating business under the identical "GM" brand name and trademarks;
- Most of Old GM's tangible and intangible assets were purchased and used by New GM (including Old GM's goodwill);
- New GM continued to sell cars through dealers who were dealers of Old GM;
- New GM continued to purchase the same materials from the same suppliers under the same contractual terms available to Old GM;
- Service relationships with dealers continued under New GM;
- New GM's marketing campaign was designed so that the customer viewed the transfer as a uninterrupted transition of the best parts of Old

GM to the New GM from a warranty, services, parts, and experiential perspective;

- Press releases announced that, after the 363 Sale, GM "would execute the key elements of its April 27 viability plan, along with additional initiatives, to achieve winning financial results by putting customers first, concentrating on adding to the Company's line of award-winning cars and trucks through four core brands"; and

- The Government effected a "loan to own" strategy that enabled it, as the Old GM's only viable lender, to obtain significant control over Old GM prepetition and to direct it towards a "quick-rinse" bankruptcy sale (as one Government official called it) to the Government.

161. The obvious basis for New GM's being declared a "successor" to Old GM under applicable nonbankruptcy law (such as the law of Michigan, where all Personal Injury Claimants could have invoked their right to assert successor liability claims against New GM) explains why New GM fought so hard to eliminate all rights to assert successor liability claims against it following the 363 Sale. (Sale Opinion, Ex. 2, at p.3 ("Issues as to how any approval order should address successor liability are the only truly debatable issues in this case.")).

162. New GM paid approximately $91.1 to $93.5 billion for substantially all the assets of Old GM in the 363 Sale, comprised of the following components:

- a $48.7 billion credit bid of senior secured debt owed the U.S. Treasury, plus

- $48.4 billion of assumed liabilities to pay trade suppliers and certain non-UAW pension obligations in whole or substantial part, plus

- $7.4 to $9.8 billion in value being given to Old GM in the form of New GM equity (stock and warrants), less

- $13.4 billion of excess cash on hand at Old GM from TARP loan advances that would be transferred to New GM at the closing of the 363 Sale.

163. Old GM's financial advisor valued these combined interests at the time of the 363 Sale at between $13.15 and $14.9 million, thereby resulting in an approximately 73%-82% recovery on the general unsecured claims of the VEBA Trust.

164. The post-closing common equity ownership of New GM was distributed as follows:

- 60.83% to the Government;
- 11.67% to the Canadian Government (in exchange for $9.5 billion in debt assumed by New GM and immediately converted to common stock);
- 17.5% to the VEBA Trust; and
- 10% to Old GM (having an estimated value at the closing of the 363 Sale of $3.8-$4.8 billion).

165. As further consideration, Old GM also received two tranches of warrants to purchase up to 15% of New GM common stock, having an estimated value of $3.6-$5.0 billion at the closing of the 363 Sale.

166. The equity consideration distributed to Old GM, however, was not delivered at or around the time of the closing of the 363 Sale to Personal Injury Claimants or holders or any other general unsecured claim.

167. Nor was any other consideration guaranteed at the time of the Sale to Personal Injury Claimants or holders of any other prepetition general unsecured claim.

168. When the Sale closed, a claims bar date had not been set in the GM Bankruptcy.

169. Consequently, no one at the time of the closing of the Sale could be certain as to whether intervening administrative or priority claims would consume all the equity consideration delivered to Old GM in the deal.

170. Nor at the time of the closing of the Sale could anyone be certain as to whether final allowed general unsecured claims against Old GM would be several orders of magnitude in excess of the $31-$35 billion range projected at the time of the Sale.

171. The Bankruptcy Court set a claims bar date of November 30, 2009.

172. Over 70,000 proofs of claim were timely filed in the GM Bankruptcy.

173. These proofs of claim, representing both priority and unsecured claims had an aggregate face value of $270 billion.

174. The aggregate face amount of filed priority claims alone may have exceeded the $7.4 to $9.8 billion valuation placed on total equity consideration transferred to Old GM in the Sale.

175. This equity consideration represented the only tangible consideration received by Old GM in the Sale that could be distributed to creditors of Old GM according to their relative priorities.

176. Old GM's Plan of Reorganization was not confirmed by the Bankruptcy Court until March 29, 2011, and did not become effective until March 31, 2011, nearly two full years after the closing of the Sale.

177. The effective date of the Plan was the earliest possible time that any Personal Injury Claimants became eligible to receive any consideration from Old GM on account of their "Allowed" claims.

178. No additional consideration was given to the Personal Injury Claimants on account of the extinguishment in the 363 Sale at the direction of the Government of their rights to assert successor liability claims against New GM.

VI.

CLASS ALLEGATIONS

179. This action is brought and may be properly maintained as a class action pursuant to the Rules 23(a) and Rules 23(b)(2)-(3) of the Rules of the Court of Federal Claims ("**RCFC**"). This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority prerequisites of Rule 23. The named class representatives seek to maintain this case as a class action on behalf of a class (the "**Class**") defined as follows:

> The Class is defined as any person or entity that is a holder of a claim that is "Allowed" (as such term is defined in the "Debtors' Second Amended Joint Chapter 11 Plan" (the "Plan") confirmed by order of the United States Bankruptcy Court for the Southern District of New York in the chapter 11 bankruptcy case captioned *In re Motors Liquidation Company, et al., f/k/a General Motors Corp., et al.*, Case No. 09-50026 (reg) (the "GM Bankruptcy"), entered on March 29, 2011) in the GM Bankruptcy for death or personal injuries arising before June 1, 2009 and caused by motor vehicles designed for operation on public roadways, or by the component parts of such motor vehicles, and in each case, manufactured, sold, or delivered by General Motors Corporation, Saturn, LLC, Saturn Distribution Corporation, or Chevrolet-Saturn of Harlem, Inc. (collectively, "Sellers").
>
> For avoidance of doubt, the Class does not include the following claims (whether or not such claims represent an "Allowed Claim" in the GM Bankruptcy): (i) "Asbestos Claims" (as defined in the Plan); (ii) claims asserted by the "Ignition Switch Plaintiffs," "Pre-Closing Accident Plaintiffs," "Non-Ignition Switch Plaintiffs," "Economic Loss Plaintiffs," "Pre-Closing Accident Victim Plaintiffs," or "Groman Plaintiffs" (as such terms are used or defined in that certain judgment of the Bankruptcy Court dated June 1, 2015 (Dkt. No. 13178) (the "Sale Enforcement Order")), whether asserted on one's own behalf or on behalf of a class of all others similarly situated; (iii) claims asserted in any of the "Ignition Switch Actions" (as such term is used or defined in the Sale Enforcement Order), whether asserted on one's own behalf or on behalf of a class of all others similarly situated; or (iv) Allowed Claims in the GM Bankruptcy that are exclusively for economic loss to the value of one's vehicle or other personal property and do not include a claim for any personal injuries.

180. The named Plaintiffs are all holders of Allowed Claims in the GM Bankruptcy for death or personal injuries arising before June 1, 2009 that were caused by motor vehicles

designed for operation on public roadways, or by the component parts of such motor vehicles, and in each case, manufactured, sold or delivered by one of the Sellers (the "**Personal Injury Claims**").

181. Plaintiffs reserve the right to modify the Class as may be appropriate based upon the evidence discovered during the course of discovery.

182. The Class is comprised of several thousand holders of Allowed Personal Injury Claims in the GM Bankruptcy, making joinder impractical. The aggregate amount of Allowed Personal Injury Claims in the GM Bankruptcy is presently estimated at approximately $300 million.

183. There is a well-defined community of interest among Class members and disposition of the Allowed Personal Injury Claims of the Class members in a single class action will provide substantial benefits to all parties and to the Court.

184. The Class meets the prerequisites of RCFC 23(a). First, the Class is so numerous that the individual joinder of all members is impracticable.

185. While the exact number and identities of the Class members are unknown at this time to the Plaintiffs, the number and identities of the Class members is known to Wilmington Trust Company ("**WTC**"), the administrator of the "Motors Liquidation Company GUC Trust" (the "**GUC Trust**") which was established under the Plan to, among other things, determine the allowed amount of general unsecured claims in the GM Bankruptcy, including the Allowed Personal Injury Claims.

186. The GUC Trust, through its administrator WTC, has been making distributions to holders of Allowed Personal Injury Claims and has been responsible for resolving all outstanding disputed Personal Injury Claims.

187. WTC is believed to have separately categorized all Allowed Personal Injury Claims, thereby making identification of such claims entirely feasible.

188. As required by RCFC 23(a)(2), common questions of law and fact exist as to all Class members and predominate over any questions affecting only individual members. Plaintiffs, like all class members, had their rights to assert successor liability claims against New GM extinguished in the Sale Order, effective upon the closing of the 363 Sale.

189. All actions by the Government in causing the rights of Personal Injury Claimants to assert successor liability claims against New GM to be extinguished upon the closing of the 363 Sale also affected the Class members equally and coterminously.

190. As such, the principal question of law and fact in this case, common to the Class members, is whether the actions of the Government in causing the rights of Personal Injury Claimants to assert successor liability claims against New GM to be extinguished in the 363 Sale constituted a taking of property from Class members without just compensation.

191. As required by RCFC 23(a)(3), Plaintiffs' claims are typical of the claims of the Class members, as the Plaintiffs each hold Allowed Personal Injury Claims in the GM Bankruptcy and each of their respective rights to assert successor liability claims against New GM were extinguished in the 363 Sale at the direction of the Government.

192. Such action by the Government constituted a direct taking of such claims from the named Plaintiffs and other Class members without just compensation.

193. As a result of the Government's actions to extinguish the Personal Injury Claimants' rights to assert successor liability claims against New GM, instead of being paid in full on their Allowed Personal Injury Claims, the recoveries of each Class member were limited

to those limited recoveries paid to general unsecured creditors in the GM Bankruptcy, which at the time of the Sale were not paid or capable of determination.

194. Each of the Plaintiffs suffered injury as a proximate result of the Government's actions. But for the actions of the Government in requiring that the Class members' rights to assert successor liability claims against New GM be extinguished on the basis of "what a reasonable commercial buyer would do," instead of what the Takings Clause requires, these rights would have survived the 363 Sale because their underlying claims against Old GM were "politically sensitive" liabilities as to which the Government agreed that it would neither walk away from the deal nor change the purchase price if required to assume these liabilities.

195. As required by RCFC 23(a)(4), Plaintiffs will fairly and adequately protect the interests of the Class members and have no interest antagonistic to those of Class members. Plaintiffs have retained counsel experienced in the litigation of class actions and arbitrations, with particular experience in the relevant facts and law applicable to this case because of counsel's extensive representation of Plaintiffs in the hearings on the 363 Sale.

196. This action is maintainable as a class action pursuant RCFC 23(b)(1) because, as noted above, the Government acted or refused to act on grounds generally applicable to the Class, conduct making the subject of this action a common course of conduct involving standardized documents, regulations, policies, and actions applicable to the Class as a whole.

197. As required by RCFC 23(b)(2), the questions of law or fact common to Class members predominate over any questions affecting only individual members. The common predominating question in this case, applicable to all Class members, is whether the Government's decision to extinguish the Class members' rights to assert successor liability claims against New GM based on "what a reasonable commercial buyer would do," despite the

Government's indifference as to such claims because it still would have closed the 363 Sale without a change to the purchase price even if forced to assume them, constituted a takings without just compensation.

198. Further, the question of what damages any individual member of the Class suffered is common to the Class for it is based on the difference between each member's Allowed Personal Injury Claim and the actual amounts paid on that claim in the GM Bankruptcy. Consequently, there are no individualized issues of law. Each Class member had successor liability rights against New GM that were extinguished in the 363 Sale, regardless of which of the 50 states that Class member lived or was injured, because each Class member had the right to assert successor liability claims against New GM in Michigan, which was New GM's principal place of business and which recognizes rights to assert successor liability claims under a multitude of theories, none of which are unique to any particular member of the Class.

199. A class action also is superior to other available methods for the fair and efficient adjudication of this controversy since individual joinder of the thousands of Class members is impracticable. The expense and burden of individual litigation also would make it difficult, if not impossible, for individual Class members to obtain redress for the rights taken from them by the Government.

200. The cost to the court system of adjudicating such individualized litigation also would be substantial, if not prohibitive. And while many Class members have large Allowed Claims, the paltry recoveries on these Claims paid in the GM Bankruptcy, relative to the continuing financial hardships faced by Class members on account of their injuries, makes it unlikely that Class members would pursue their claims individually.

201. Maintaining this action as a class action presents fewer management difficulties, conserves the resources of the parties and the court system, and protects the rights of each Class member.

202. Notice of the pendency of this action, and any resolution thereof, can be readily provided to Class members simply through the well-established notice and distribution mechanisms established in the GM Bankruptcy by WTC and the GUC Trust for handling notices and distributions to holders of Allowed Personal Injury Claims.

VII.

FIRST CLAIM FOR RELIEF

DIRECT TAKING OF RIGHTS TO ASSERT SUCCESSOR LIABILITY CLAIMS IN VIOLATION OF THE TAKINGS CLAUSE

203. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 202.

204. The Takings Clause requires that the United States pay just compensation for all property taken for public use.

205. Each of the respective rights of Class members to assert successor liability claims against New GM constitute interests in property that were extinguished in the 363 Sale at the direction of the Government.

206. The Government's actions in directing the extinguishment in the 363 Sale of the rights of the Plaintiffs and other Class members to assert successor liability claims against New GM constituted a direct, *per se*, taking without just compensation.

207. The rights of the Plaintiffs and other Class members to assert successor liability claims against New GM are traditional rights that have long existed at common law.

208. The Bankruptcy Court in the Sale Opinion declared that the rights of the Plaintiffs and other Class members to assert successor liability claims against New GM are interests in property.

209. At the hearing before the Bankruptcy Court on the 363 Sale, the Government's attorneys at oral argument expressly concurred in the assessment that rights to assert successor liability claims against New GM are interests in property.

210. The Government itself directly benefited from its mandate that the rights of the Plaintiffs and other Class members to assert successor liability claims against New GM be extinguished because New GM was wholly-owned by the Government at the time of the 363 Sale. Even after the consummation of the deals between New GM and other stakeholders contemplated by the 363 Sale, the Government retained a 60.8% fully diluted equity ownership stake in New GM.

211. The Government's taking of the rights of the named Plaintiffs and the other Class members to assert successor liability claims occurred on the July 10, 2009 closing date of the 363 Sale.

212. The Government mandated that the rights of the Plaintiffs and other Class members to assert successor liability claims against New GM be extinguished.

213. The Government issued this mandate on the basis that it believed, as Wilson stated, that it had "a fiduciary duty to use taxpayer dollars in the most appropriate way."

214. The Government's extinguishment of the rights of the Plaintiffs and other Class members to assert products liability claims was done for the express benefit of the US taxpayers at large (*i.e.*, the public), who funded the acquisition of Old GM's assets in the 363 Sale.

215. None of the consideration paid to Old GM in the 363 Sale was distributed, or guaranteed to be distributed, to the Plaintiffs or Class members at the time of the taking.

216. Each of the Plaintiffs and each member of the Class suffered injury as a proximate result of the Government's actions.

217. All Personal Injury Claims ultimately Allowed in the GM Bankruptcy were designated as "politically sensitive liabilities" that, if assumed by the Government, would neither have given the Government the right to walk away from the deal nor have changed the consideration payable to Old GM under the Sale Agreement.

218. But for the actions of the Government in determining to extinguish the Plaintiffs' and Class members' rights to assert successor liability claims against New GM on the basis of "what a reasonable commercial buyer would do," instead of what the Takings Clause requires, their rights would have survived the 363 Sale.

219. As a direct and proximate result of the acts of the Government, Plaintiffs and the Class have been damaged in the amount of at least $200 million, plus compound interest thereon at a rate to be established by this Court.

220. Plaintiffs, for themselves and on behalf of the Class have incurred, and will incur, attorneys' fees, expert witness fees, and costs and expenses of litigation in an amount as yet unascertained, and these too are compensable at such amount to be established by this Court.

221. These damages represent the just compensation due the Plaintiffs and other Class members under the Fifth Amendment for the Government's having directed the extinguishment in the 363 Sale of these individuals' rights to assert successor liability claims against New GM.

VIII.

SECOND CLAIM FOR RELIEF
(Pleaded in the Alternative)

CATEGORICAL OR *"PER SE"* REGULATORY TAKING OF THE RIGHT TO ASSERT SUCCESSOR LIABILITY CLAIMS

222. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 202.

223. The purpose of the Takings Clause is to prevent the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

224. The Takings Clause may be violated when a governmental regulation denies a property owner all economically beneficial use of the property.

225. The Bankruptcy Court found that the rights of the Personal Injury Claimants to assert successor liability claims against New GM are "interests in property" and the Government concurred in that assessment.

226. Despite having designated the underlying claims of Personal Injury Claimants against Old GM as "politically sensitive" liabilities that, if required to be assumed by the Government, would neither have given the Government the right to walk away from the deal nor changed the consideration payable to Old GM under the Sale Agreement, the Government directed that the rights of these claimants to assert successor liability claims against New GM be extinguished in the Sale.

227. In so doing, the Government was not simply adjusting the benefits and burdens of economic life in a manner that secures an average reciprocity of advantage to the Personal Injury Claimants.

228. Rather, the Government singled out this group of "politically sensitive" liabilities to unjustly bear the burden of a broader problem not of their making (*i.e.*, the potential collapse of the domestic auto industry).

229. The Government's taking of the rights of the named Plaintiffs and the other Class members to assert successor liability claims occurred on the July 10, 2009 closing date of the 363 Sale.

230. Plaintiffs and the other Class members received nothing in the Sale on account of their rights to assert successor liability claims against Old GM.

231. Nor were they guaranteed to receive anything at the time of the closing of the Sale.

232. The Government's actions in directing the extinguishment of the rights of the Plaintiffs' and other Class members' rights to assert products liability claims against New GM was a categorical regulatory taking within the meaning of the Takings Clause.

233. Each of the Plaintiffs and each Class member suffered injury as a proximate result of the Government's actions.

234. But for the actions of the Government in determining to extinguish the rights of the Plaintiffs and the Class members to assert successor liability claims against New GM on the basis of "what a reasonable commercial buyer would do," instead of what the Takings Clause requires, the rights of the Plaintiffs and the Class members to assert successor liability claims against New GM would have survived the 363 Sale.

235. As a direct and proximate result of the acts of the Government, Plaintiffs and the Class have been damaged in the amount of at least $200 million, plus compound interest thereon at a rate to be established by this Court.

236. Plaintiffs, for themselves and on behalf of the Class have incurred, and will incur, attorneys' fees, expert witness fees, and costs and expenses of litigation in an amount as yet unascertained, and these too are compensable at such amount to be established by this Court.

237. These damages represent the just compensation due the Plaintiffs and other Class members under the Fifth Amendment for the Government's categorical taking of their rights to assert successor liability claims against New GM.

IX.

THIRD CLAIM FOR RELIEF
(Pleaded in the Alternative)

NON-CATEGORICAL REGULATORY TAKING OF THE RIGHT TO ASSERT SUCCESSOR LIABILITY CLAIMS

238. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 202.

239. A non-categorical regulatory taking may arise from the adverse impact a regulation has on an owner's use of property, without entirely destroying the property's value.

240. Determining whether a non-categorical regulatory taking occurred requires an analysis in this case of (i) the economic impact of the regulation on the Personal Injury Claimants, (ii) the extent to which the regulation interferes with the objectively-determined investment-backed expectations of the Personal Injury Claimants, and (iii) the character of the government action and whether the regulation has "gone too far" by disproportionately burdening a small class of persons for the public's benefit.

241. Each of the respective rights of the Plaintiffs and other Class members to assert successor liability claims against New GM constituted interests in property that were extinguished in the 363 Sale at the direction of the Government in such manner as to disproportionately burden the Plaintiffs and other Class members for the public's benefit.

242. The Bankruptcy Court found that the rights of the Personal Injury Claimants to assert successor liability claims against New GM are "interests in property" and the Government concurred in that assessment.

243. The economic impact of the Government's action on the Plaintiffs and other Class members was severe and affected the least fortunate among all the unsecured creditors in the GM Bankruptcy. While awaiting the mere possibility of a distribution years down the road from Old GM, the Plaintiffs and other Class members continued to incur significant hardship and suffer financial loss in attending to their personal injuries.

244. The Personal Injury Claimants also had reasonable, investment-backed expectations that GM would stand behind its cars, as Old GM consistently promised in its marketing campaigns.

245. None of these claimants could have expected such unfair treatment when they bought their defective vehicle given the assurances given consumers about the reliability of Old GM.

246. No one from Old GM ever advised its customers that Old GM's products liability insurance coverage was only triggered when the liability per occurrence exceeded $35 million (meaning that Old GM was effectively completely self-insured).

247. Even an Auto Team leader seemed surprised to learn that the automakers maintained such inconsequential products liability insurance coverage.

248. Nor could these claimants have expected that the Government, through a team of appointees with little or no auto industry experience, would eliminate their rights to assert successor liability claims, thereby annulling Old GM's promises of reliability as well as the recommendation of Old GM's CEO that these claims be assumed by New GM.

249. Despite having designated the underlying claims of Personal Injury Claimants as "politically sensitive" liabilities that, if required to be assumed by New GM, would neither have given the Government the right to walk away from the deal nor changed the consideration payable to Old GM under the Sale Agreement, the Government directed that the Personal Injury Claimants' rights to assert successor liability claims against New GM be extinguished in the Sale.

250. The Government's actions in extinguishing the Personal Injury Claimants' rights to assert successor liability claims against New GM went too far because their total Allowed Claims were projected at the time of the Sale at no more than approximately $420 million, or about one-half percent of the purchase price paid by the Government in the Sale.

251. Because approximately $434 million of the $934 million representing Old GM's Products Liability Loss Reserve at March 31, 2009 was being treated as assumed by New GM as a result of indemnity agreements reached with dealers after the filing of the GM Bankruptcy, the projected cash flow impact of the personal injury products liability claims left behind in the 363 Sale would not have exceeded approximately $55 million per year over the five year period following the consummation of the 363 Sale.

252. Meanwhile, New GM agreed in the Sale to assume over $48.4 billion in liabilities in full or in substantial part in the Sale, including $5.4 billion in trade supplier debt (which was assumed in full) and $18 billion of debt to the VEBA Trust (which received common and preferred stock of New GM at the close of the Sale, enabling a projected recovery of between 73% and 82%).

253. Assumption by New GM of the "politically sensitive" personal injury products liability claims, therefore, represented a mere rounding error in terms of the consideration

payable by the Government in the Sale. Given the indifference of the Government to assumption of these liabilities (because it still would have closed the 363 Sale without a change to the purchase price), the Government's action went too far.

254. Justice and fairness require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on the relatively small pool of Personal Injury Claimants whose rights to assert successor liability claims against New GM were extinguished in the Sale.

255. As a direct and proximate result of the acts of the Government, Plaintiffs and the Class have been damaged in the amount of at least $200 million, plus compound interest thereon at a rate to be established by this Court.

256. Plaintiffs, for themselves and on behalf of the Class have incurred, and will incur, attorneys' fees, expert witness fees, and costs and expenses of litigation in an amount as yet unascertained, and these too are compensable at such amount to be established by this Court.

257. These damages represent the just compensation due the Plaintiffs and other Class members under the Fifth Amendment for the Government's non-categorical taking of these claimants' rights to assert successor liability claims against New GM.

X.

RELIEF REQUESTED

WHEREFORE, Plaintiffs, on behalf of themselves and the members of Class, demand judgment against the United States as follows:

A. That the Court certify this case as a class action under RCFC 23(b) and find that the Plaintiffs have met the requirements of class representatives and may maintain this action as representatives of the Class;

B. That the Court certify the Class comprised of any person or entity identified in Paragraph 179 of this Complaint;

C. That the Court award a money judgment to Plaintiffs and other Class members in an amount to be determined at trial, estimated at no less than $200,000,000 in the aggregate, for damages sustained as a result of the permanent taking of their rights to assert successor liability claims against New GM, together with pre-judgment and post-judgment compound interest thereon and any and all further costs, disbursements, and reasonable attorneys' and expert fees; and

D. That the Court grant such other and further relief as the Court deems to be just and proper.

Dated: Washington, D.C.
July 9, 2015

By: Steve Jakubowski

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