No. 16-764

IN THE

Supreme Court of the United States

GENERAL MOTORS LLC,

Petitioner,

v.

CELESTINE ELLIOTT, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION

William P. Weintraub
Gregory Fox
Counsel to Ignition Switch Pre-Closing Accident Plaintiffs
GOODWIN PROCTER LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018

Thomas C. Goldstein
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave., Suite 850
Bethesda, MD 20814
(202) 362-0636
tgoldstein@goldsteinrussell.com

Robert C. Hilliard
Catherine Tobin
Anne Fornecker
Steve Shadowen
Counsel to the Ignition Switch Pre-Closing Accident Plaintiffs
HILLIARD MUÑOZ GONZALES L.L.P.
719 S Shoreline Blvd # 500
Corpus Christi, TX 78401

Jonathan L. Flaxer
Counsel to the Groman Plaintiffs
GOLENBOCK EISEMAN ASSOR BELL & PESKOE LLP
711 Third Avenue
New York, NY 10017

Alexander H. Schmidt
Counsel to the Groman Plaintiffs
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
270 Madison Avenue
New York, NY 10016

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STATEMENT OF THE CASE

In 2002, pre-bankruptcy General Motors (Old GM) began manufacturing and selling dangerously defective vehicles to millions of unsuspecting customers. These vehicles contained a defective ignition switch that could inadvertently slip from the "run" position to "auxiliary" or "off" position while the vehicle was in motion. Every car containing this defect was prone to spontaneous and unexpected moving stalls if the key was inadvertently jostled or bumped (even at highway speeds). Compounding the danger of these moving stalls, the slippage of the Ignition Switch to the "off" or "auxiliary" position also resulted in the loss of airbag deployment and power brakes. This defect—unknown to the vehicle owners—caused scores of deaths and serious injuries. *See generally In re Motors Liquidation Co.*, 829 F.3d 135, 149-50 (2d Cir. 2016).

Referred to internally at Old GM as "the switch from hell," there were early electrical problems with the switch, high failure rates during testing, and the torque required to supply the resistance necessary to prevent the switch from inadvertently slipping was known internally to be inadequate and below specification even before mass production began. *Id.* at 150. Although unexpected stalling is immediately recognizable as a safety hazard, Old GM improperly treated the possibility of an unexpected moving stall as merely an issue of "customer convenience." Valukas Report at 2, 33, 133 (A-9650, 9681, 9781). By misclassifying the problem that way, Old GM avoided having to issue a recall, which federal law mandates for known safety issues. 40 U.S.C. §§ 30111-21 (2016). Certain Old GM employees knew better and wanted to

categorize the moving stalls as a safety issue; however, they were either intimidated into acquiescence or ignored. *See* Stipulated Facts, Exh. B ¶ 14(R)(i), (S)(i) (A-5996-98); Valukas Report at 83, 93 (A-9731, 9741).

During the seven-year period from 2002 to 2009, Old GM initiated no fewer than six investigative reports with respect to moving stalls resulting from the defective Ignition Switch, including three "Problem Resolution Tracking System" inquiries. Stipulated Facts, Exh. B ¶ 14(F) (A-5987-88); Valukas Report at 63 (A-9711). These internal probes followed as a result of (i) customer complaints, (ii) the observations of Old GM's own employees who had either witnessed or experienced stalling in Subject Vehicles, (iii) negative press reports, (iv) inquiries from the National Highway Traffic Safety Administration about the high rate of airbag non-deployments in certain Old GM vehicles, and (v) crashes involving afflicted vehicles. As a result of these investigations, Old GM redesigned the key for the Ignition Switch from a slot to a hole. Stipulated Facts, Exh. B ¶ 14(F)(ii) (A-5988); Valukas Report at 133 (A-9781). This change was acknowledged internally at Old GM to be a "band-aid" that fell short of the needed changes to the Ignition Switch. Stipulated Facts, Exh. B ¶ 14(R)(ii) (A-5997).

During this same seven-year period, Old GM issued at least two "Technical Service Bulletins" to all of its dealers warning of the possibility of an unexpected moving stall in these vehicles. Stipulated Facts, Exh. B ¶¶ 10, 11, 14(R)(ii) (A-5979-81, 5997). But neither of the Technical Service Bulletins actually used the word "stall" because "stall" was considered to be a hot-button word that would alert the federal

regulators to a safety issue and a possible recall. Valukas Report 8, 93-94 (A-9656, 9741-42).

On June 1, 2009, Old GM and certain of its affiliates filed chapter 11 cases in the Bankruptcy Court for the Southern District of New York. Immediately after filing for bankruptcy, Old GM filed a motion seeking authority under 11 U.S.C. § 363 (Section 363) to sell substantially all of its assets to a newly created and taxpayer-funded acquisition shell company (New GM) "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." *Motors Liquidation*, 829 F.3d at 146. Put otherwise, New GM would receive two things: unencumbered title to Old GM's assets; and a prohibition on any party filing suit against it on the theory that New GM was the "successor" to Old GM. On June 2, 2009, the Bankruptcy Court entered an order governing the procedures for the sale, which enumerated those categories of known creditors to receive actual notice via first class mail of the proposed sale and provided for notice of the sale to be published in several newspapers. *Id*.

Although aware of the Ignition Switch Defect and the names and addresses of all purchasers of affected vehicles, Old GM did not provide actual notice of the forthcoming hearing to approve the sale to the known owners or lessees of the vehicles which it knew were defective. *Id.* at 159. Old GM also failed to disclose the existence of the Ignition Switch Defect, such as through a recall, and the sale notice contained no mention of the defect.

In response to objections to the sale by numerous parties who had received notice, New GM agreed to amend the original draft Sale Agreement. Under the revised sale agreement, New GM would assume Old GM's liabilities for additional categories of claims. These newly-assumed liabilities were (i) liability under state Lemon Laws and (ii) liability for personal injuries and wrongful death claims arising from post-sale car crashes involving Old GM manufactured vehicles. *Id.* at 163-64 & n.27.

With these material changes to the scope of New GM's "assumed liabilities," the Bankruptcy Court conducted the sale hearing and on July 5, 2009 entered an order approving the sale of Old GM's assets to New GM free and clear of successor liability claims pursuant to section 363(f) of the Bankruptcy Code. To effectuate the free and clear sale, the Sale Order contained a broad injunction prohibiting creditors of Old GM from pursuing recovery on their claims from New GM on successor liability theories. The sale subsequently closed on July 10, 2009, and at that moment New GM acquired Old GM's employees, books, records, files, and databases (including all records and employee knowledge of the Ignition Switch Defect). *Id.* at 146-47.

At closing, Old GM's proceeds of the sale were contributed to a new trust (GUC Trust), which was created to resolve and make distributions on account of claims filed against Old GM in its bankruptcy. *Id.* at 147. Over the next several years, the GUC Trust resolved thousands of claims and, by March of 2014, had distributed over 90% of the assets held in trust for Old GM creditors, resulting in creditors holding allowed claims receiving roughly thirty cents on the

dollar. *Id.* at 148. Throughout virtually this entire period, until February 2014, New GM continued to withhold information of the defect from owners of the vehicles. *Id.* at 148-50.

Thus, for almost five years following the closing of the sale, New GM—like Old GM before it—continued to cover up the existence of the Ignition Switch Defect.[1] In February and March of 2014, well after the great majority of the assets had been distributed by the GUC Trust, New GM for the first time publicly disclosed the Ignition Switch Defect and began a series of recalls of millions of vehicles afflicted with defective ignition switches. *Id.* New GM's disclosure of these defects was followed by hundreds of lawsuits seeking to hold New GM responsible for personal injuries, wrongful deaths (Ignition Switch Pre-Closing Accident Plaintiffs) and economic losses (Ignition Switch Plaintiffs) suffered by owners and lessees of defective vehicles prior to the bankruptcy sale.

Beginning in April of 2014, New GM sought to enjoin these lawsuits by filing with the Bankruptcy Court motions to enforce the provisions of the Sale Order prohibiting successor liability claims against New GM. *Id.* at 150. The Bankruptcy Court identified four threshold issues to consider in connection with deciding New GM's motions to enforce the Sale Order: (i) whether the Ignition Switch and Ignition Switch Pre-Closing Accident Plaintiffs suffered a due process

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[1] Indeed, in 2015 New GM paid $900 million as part of a deferred prosecution agreement to resolve the federal government's criminal investigation into New GM's failure to timely recall vehicles with the Ignition Switch Defect. *Id.* at 165 (citing *United States v. $900,000,000 in U.S. Currency*, No. 15 Civ. 7342 (S.D.N.Y.), ECF No. 1).

violation in connection with the Sale Order; (ii) if so, what is the proper remedy for that due process violation; (iii) whether any claims against New GM are claims against the Old GM bankruptcy estate; and (iv) if so, should such claims be disallowed or dismissed on grounds of equitable mootness. *See Supplemental Scheduling Order Regarding (I) Motion of General Motors LLC Pursuant to 11 U.S.C. §§ 105 and 363 to Enforce the Court's July 5, 2009 Sale Order and Injunction, (II) Objection Filed by Certain Plaintiffs in Respect thereto, and (III) Adversary Proceeding No. 14-01929*, at 3, *In re Motors Liquidation Co.*, No. 09-50026-mg (S.D.N.Y. dated July 11, 2014) (ECF No. 12770).

In the litigation over the four threshold issues, the respondents did not have the benefit of discovery with respect to Old GM's pre-sale knowledge of the Ignition Switch Defect. Instead, the parties presented the Bankruptcy Court with a set of stipulated facts derived primarily from the Valukas Report – the report of an investigation into the delayed recalls conducted by New GM's own counsel.

Based on the stipulated record before it, the Bankruptcy Court found that (i) the Ignition Switch Defect was a pervasive safety defect that should have resulted in a recall before the bankruptcy and (ii) the level of knowledge within Old GM of the Ignition Switch Defect was sufficient such that all Ignition Switch Plaintiffs and Ignition Switch Pre-Closing Accident Plaintiffs were "*known creditors*" of Old GM at the time of Old GM's bankruptcy filing. Specifically, the Bankruptcy Court found that:

- "[A]t least 24 Old GM engineers, senior managers and attorneys knew of the

Ignition Switch Defect – a group large in size and relatively senior in position.";

- "a group of this size is sufficient for the Court to conclude that a 'critical mass' of Old GM had the requisite knowledge – *i.e.*, were in a position to influence the noticing process";
- "Old GM had enough knowledge of the Ignition Switch Defect to be required, under the Safety Act, to send out mailed recall notices to owners of affected Old GM vehicles….";
- "by reason of the *known safety risk* that required the recall – *i.e.*, that here there was known death or injury in the making to someone (or many)…."; and
- Because of the obligation under the Safety Act to maintain records of vehicle owners' names and addresses, "Old GM knew exactly to whom, and where, it had to send the statutorily required notice."

See In re Motors Liquidation Co., 529 B.R. 510, 557, 558 n.154 (S.D.N.Y. 2015). Because at the time the bankruptcy was filed, each owner and lessee of a vehicle containing the Ignition Switch Defect had an unsatisfied claim against Old GM to recall and repair their faulty ignition switches, the Bankruptcy Court held that all Ignition Switch Pre-Closing Accident Plaintiffs and Ignition Switch Plaintiffs were known creditors of Old GM. *Id.* at 525-26.

As known creditors of Old GM at the time of the sale, the Bankruptcy Court held that the Ignition Switch Plaintiffs and Ignition Switch Pre-Closing Accident Plaintiffs were entitled to actual notice of the

sale free and clear of their potential successor liability claims, not mere publication notice. *Id.* at 557-60. The Bankruptcy Court nonetheless held that the vehicle owners were bound by the successor liability bar in the Sale Order because they had not demonstrated prejudice from the lack of notice. *Id.* at 565-73. The Bankruptcy Court also held that, although the Ignition Switch Plaintiffs and Ignition Switch Pre-Closing Accident Plaintiffs were denied due process and prejudiced by not being provided with constitutionally sufficient notice of the deadline to file proofs of claim in Old GM's bankruptcy and participate in recoveries from the GUC Trust, these plaintiffs were barred from recovering on their claims from the GUC Trust under the doctrine of equitable mootness. *Id.* at 583-92.

On appeal, the Second Circuit upheld the Bankruptcy Court's findings that the Ignition Switch Pre-Closing Accident Plaintiffs and the Ignition Switch Plaintiffs were "known" creditors of Old GM at the time of the sale and that due process required that they receive actual written notice of the sale via first class mail as opposed to the constructive publication notice provided to them. *Motors Liquidation*, 829 F.3d at 159-61. The court rejected New GM's arguments that claims associated with the Ignition Switch Defect were contingent as of the time of the bankruptcy. "By May 2009, at the latest, Old GM personnel had essentially concluded that the ignition switch, moving stalls, and airbag non-deployments were related" and that regardless of what Old GM knew, it "surely *should have known* about the defect" at the time the bankruptcy was filed. *Id.* at 160 (emphasis in original). Regardless of whether Old GM had linked the moving stalls and airbag non-deployment to the

faulty ignition switches, the Second Circuit held that those defects alone "would still be the basis of 'claims,' even if the root cause (the ignition switch) was not clear." *Id.*

The Second Circuit explicitly rejected New GM's arguments that the extreme financial distress that led to Old GM's bankruptcy somehow excused Old GM from providing actual notice of the sale to its known creditors with claims arising from the Ignition Switch Defect because doing so would "reward debtors who conceal claims against potential creditors." *Id.* at 160-61. Instead, the court held that "[d]ue process applies even in a company's moment of crisis." *Id.*

The Second Circuit reversed, however, the Bankruptcy Court's conclusion that the Ignition Switch Pre-Closing Accident Plaintiffs and the Ignition Switch Plaintiffs were not prejudiced as a result of not having received the notice of the sale that due process required. *Id.* at 163-66. The court determined that the Bankruptcy Court erred in determining conclusively that the outcome of the sale and the imposition of the injunction against successor liability claims would have been no different if the Ignition Switch Defect were disclosed prior to the bankruptcy and the Ignition Switch Pre-Closing Accident Plaintiffs and the Ignition Switch Plaintiffs were given an opportunity to actively participate in the negotiations over the terms of the sale and the liabilities that New GM would assume. In other words, "[t]he bankruptcy court failed to recognize that the terms of this § 363 sale were not within its exclusive control" because the sale was "a negotiated deal with input from multiple parties—Old GM, New GM, Treasury, and other stakeholders." *Id.* at 163.

The Second Circuit determined instead that "the business circumstances at the time were such that plaintiffs could have had some negotiating leverage, and the opportunity to participate in the proceedings would have been meaningful." *Id.* at 164. Moreover, the Second Circuit noted that "New GM was not a truly private corporation" and that because the United States Treasury funded New GM and its acquisition of Old GM's assets for reasons other than turning a profit, it was possible that (if given constitutionally sufficient notice), these plaintiffs could have convinced the government to alter the terms of the sale to protect "millions of faultless individuals with defective Old GM cars." *Id.* at 165.

Accordingly, the Second Circuit held that as a result of the due process violation inflicted upon them, the Ignition Switch Pre-Closing Accident Plaintiffs and the Ignition Switch Plaintiffs were not bound by the Sale Order's injunction barring their successor liability claims against New GM.

REASONS FOR DENYING THE WRIT

Neither of the Questions Presented by the petition comes close to satisfying this Court's criteria for granting certiorari review. Most obviously, no court of appeals has ever adopted any of petitioner's legal arguments. By definition, there is no circuit conflict. Petitioner's only claim of a conflict with this Court's precedent is directed to a late-1880s decision that has nothing to do with the statute in this case. Rather, petitioner has largely presented a merits brief about how it would read the statute – one that also seeks to smuggle in an array of entirely fact-bound objections to the ruling below – and written "Petition for a Writ of Certiorari" on the cover.

Petitioner thus argues first that Old GM could give respondents notice of the Section 363 sale while continuing to deceive respondents about the defect and withholding from respondents any information about the *reason* that they were creditors and therefore would want to object to the sale. That argument answers itself: such meager notice would have been empty to respondents. The Second Circuit correctly held that Due Process requires more. But in any event, petitioner's argument is irrelevant to the court of appeals' judgment, which independently rested on the fact that Old GM did not provide respondents with *any* direct notice of the sale—wholly apart from the notice's content.

Petitioner next argues that the failure to provide the required notice should have no effect on it, because respondents retained the right to assert claims in bankruptcy against Old GM. Put in terms, petitioner argues that there is no consequence of any kind for the failure to provide the notice required by Due Process and Section 363. That argument answers itself, too: it would render the statutory notice requirement empty. The Second Circuit correctly held that respondents could not be prohibited from pursuing their successor liability claims against New GM when (i) respondents were not provided with an opportunity to participate in the judicial process that gave rise to the injunction, and (ii) there is a reasonable prospect the outcome would be different if they had.

Petitioner's plea that it thinks its case is really important echoes the hyperventilating claims of innumerable denied petitions that involve the routine application of settled law to large dollar amounts. Precisely because the ruling below is addressed to the

narrow facts of this case, it implicates none of the broader concerns hypothesized by petitioner. Of note, petitioner cannot identify any real-world evidence to support its claims that the ruling below is problematic. That is all the more telling because the court of appeals ruling is consistent with how the Bankruptcy Code has always been understood and the bankruptcy system has performed just as intended.

The case is also interlocutory. The Second Circuit has invalidated the injunction against respondents asserting successor liability claims against petitioner. But whether petitioner in fact has any liability on that theory, and if so to which groups of respondents, has yet to be determined. The case will be in a superior posture for possible review in this Court after those further proceedings on remand. That is reason enough to deny review.

I. Certiorari Is Not Warranted To Determine Whether Old GM Was Required To Provide Respondents Notice Not Merely Of The Section 363 Sale But Also The Nature Of Respondents' Interests In That Sale As Creditors.

The first Question Presented argues that the Second Circuit erred in holding that Old GM was required to notify respondents in a manner that gave them some indication of their claims against it. That question does not merit this Court's review.

Petitioner's argument has no practical significance in this case or any other, because the court of appeals found two distinct errors in the notice Old GM provided respondents. Petitioner challenges only one. Old GM employed only publication notice. But petitioner accepts the Second Circuit's holding that

Old GM was required to notify petitioners directly in writing of the contemplated sale of its assets. Indeed, the premise of the Question Presented is that "a debtor selling its assets under Section 363 [must] notify its creditors . . . of the details of the sale, as required by Section 363." Pet. i. As explained by *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and its progeny, due process requires that known creditors receive direct notice in writing of matters that will affect their substantive rights. *See Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962). The requirement of notice is a statutory predicate for all "free and clear" bankruptcy sales. Petitioner does not dispute that the Due Process Clause imposes the same obligation, at a minimum. Pet. 6, 20-26.

The holding petitioner seeks thus would not change the outcome of the case. Old GM did not even provide respondents with direct notice of the sale. Pet. App. 39a-43a. Thus, the notice in this case was invalid, irrespective of the Second Circuit's holding that the content of the notice was specifically required to identify the defect. Whether the notice was required to include the nature of the defect is essentially an academic question, with no prospective significance. This is not a case in which, for example, the court of appeals ordered that a new notice be provided, so that its required contents would guide later proceedings.

The notice cannot be a mere gesture but instead must give the affected party a meaningful opportunity to participate in the proceeding. *Mullane*, 339 U.S at 313-15. It is far from clear that any individual respondent would have understood that her receipt of notice of the sale meant that she had an interest in

objecting to the sale's treatment of claims arising from the defect. But again, this is a fact question in any event.

Petitioner argues that the text of Section 363 permitted Old GM to continue to deceive respondents about the defect, so that it could merely provide them notice of the sale itself. Pet. 20-26. But petitioner does not identify any basis for this Court to review that question, given that no other court of appeals has adopted its reading. As noted, petitioner's argument also makes no difference in this case because Old GM did not provide respondents with even direct notice of the sale itself, irrespective of the notice's content.

Petitioner's interpretation of Section 363 is also mistaken. A purchaser takes title under Section 363(f) only pursuant to a sale under Section 363(b). Under the latter provision, the sale is authorized only after the required "notice and a hearing," which is a defined term. Bankruptcy Code Section 102(1) (Rules of Construction) provides that "after notice and a hearing, or a similar phrase -- (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances…." 11 U.S.C. § 102(1).

Contrary to petitioner's assumption (Pet. 20), the statute does not categorically limit the debtor's obligation to providing "*only*" notice of the sale, and never the nature of the creditor's claim. Often the debtor will not need to specify the latter, because most creditors already know why the debtor owes them money. A lender knows about the loan; a supplier knows about the account payable; a lessor knows about a lease; and so on.

But that will not always be true, as this case illustrates. Respondents did not know about their claims. In fact, they did not know because of the debtor's misconduct. Old GM had purposefully hidden the defect from respondents. Pet. App. 14a-20a. If Old GM had complied with its duty to recall the defective vehicles, respondents would have been aware of their claims. Petitioner cannot claim the benefit of Old GM's misconduct to excuse the extinguishing or diminishing respondents' claims.

The Second Circuit thus did not in any respect determine that Section 363 was "unconstitutional as applied." *Contra* Pet. 33. Nothing in the statute limited the notice required in this context, much less forbade it.

The petition says that its contrary reading represents "long-settled law," Pet. 20, then conspicuously cites exactly zero decisions in support of that claim. Petitioner's reading also is senseless: the reason due process, applicable case law such as *Mullane*, and the "notice and a hearing" requirement of the statute require a debtor to provide direct written notice to affected parties is to permit known creditors whose rights are to be affected to object to the Section 363 sale; if the debtor can deceive its creditors about the substance of their claim so that they fail to advance an objection, the notice is pointless.

Petitioner advances various policy arguments in favor of its interpretation of Section 363. None is a basis for review in this Court. In any event, all are misguided. Petitioner argues that it would be too burdensome to require a debtor to identify and notify every potential creditor of every potential claim. Pet. 22-23. But the Second Circuit imposed no such

requirement. The basis of its ruling is its conclusion that respondents were *known creditors*. Pet. App. 37a-43a. Agreeing with every other court of appeals, *see infra* at 20-21, the court of appeals held that category is limited to parties whose status as creditors is "reasonably ascertainable." Pet. App. 21a. Here, each vehicle that was subject to the defect was in need of repair the moment it came off the assembly line, and every owner of that vehicle—respondents here—had a right to a repair paid for by Old GM, and Old GM was aware of that right. Each was thus a known creditor. In addition, before the Section 363 sale in 2009, each of the respondents had suffered an economic loss or had been injured or killed in car crashes in vehicles with the undisclosed Ignition Switch Defect. Just as important, the court did not adopt any generalized rule at all governing the content of the notice to known creditors under Section 363.

Petitioner's argument is particularly empty on these facts. There is nothing "costly and unwieldy" about a requirement that when Old GM provided respondents with notice, that notice would contain some explanation for why respondents should care about the sale. Old GM specifically knew from its files how to contact the purchasers of the vehicles in question. *Id.* 39a-40a. Old GM knew the defect existed. *Id.* 40a-41a. On these facts, neither providing notice nor identifying the claim would have represented an exceptional burden. *Id.* 37a-43a. Plainly, petitioner has no basis to complain when, as both the lower courts concluded, Old GM had the legal obligation to undertake the far more costly *recall* of the vehicles, a process that would have provided the most effective notice of all.

Petitioner also argues that it would make sense for Congress to design Section 363 not to require a debtor to provide a known creditor with notice of the substance of its claim, because that claim may still be asserted against the debtor post-sale. But as noted, the only point of the notice is to alert creditors whose rights are to be affected of the opportunity to object to the sale and associated injunction. If the creditor does not know the basis for its claim, the notice is worthless.[2]

Further, petitioner's reliance on the creditor's ability to recover from the debtor post-sale is disingenuous, as this case well illustrates. The creditor's interests may be worth far, far less when its successor liability claims are extinguished. Here, respondents were unable to participate in the original distribution of funds from the Old GM trust, precisely because the defect was concealed. Even if they had been able to recover at the same time as other creditors, they would have received only approximately 30% of the value of their claims. However, by the time the defect was finally uncovered five years later in 2014, only 10% of the trust's funds remained, meaning that the claims were worth only roughly 3 cents on the dollar. *See supra* at 4-5.

Moreover, respondents were deprived of the ability to seek relief from the proposed successor liability bar. Disclosure of Old GM's misconduct could have resulted in enormous pressure on Old GM to set

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[2] The Second Circuit did not operate under the mistaken impression that a sale under Section 363 extinguished the debtor's liability. *Contra* Pet 23-25. The single sentence quoted by petitioner merely cited by analogy the effect that notice has on creditors in other bankruptcy contexts.

up a fund for respondents or provide some other form of relief. Old GM's deprivation of notice, however, foreclosed this possibility.

Petitioner attempts to suggest to the contrary that respondents "strategically" bypassed claims against Old GM, Pet. 12, waiting for an opportunity to sue New GM. This makes no sense and is offensive. The concealment of the existence of the defect began sometime in 2002 and continued throughout the sale until 2014.

Further, whatever the meaning of Section 363, notice of the nature of the claim was required by the Due Process Clause. Pet. App. 36a-39a. And the constitutional issues raised by petitioner's interpretation of Section 363 are serious enough to compel rejecting it. *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (When "a serious doubt of constitutionality is raised, it is a cardinal principal that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). Petitioner concedes that the constitutionally required notice "is inherently context-specific." Pet. 22 (citing *Mullane*, 339 U.S. at 314). Merely telling respondents that they might have some unidentified claim against Old GM would not be sufficient to permit them to protect their interests in the bankruptcy. Ignorant of the facts hidden from them, respondents would have no reason to appear before the bankruptcy court and object to a sale that severely diminished their interests and eliminated their successor liability claims against New GM.

At the tail end of its argument, petitioner briefly argues that certiorari is nonetheless warranted on the basis of a supposed oblique conflict between the ruling

below and decisions of the Third and Fifth Circuits. Neither case could give rise to a conflict, because neither involved a sale under Section 363. But in any event, neither ruling is in any tension with the decision below. To the contrary, the Second Circuit's decision is consistent with all extant precedent. *See, e.g.*, *Tillman v. Camelot Music, Inc.*, 408 F.3d 1300, 1307-08 (10th Cir. 2005) (debtor corporation took out life insurance policies on employees but concealed existence of policies from employees and their families; post-emergence, widow of deceased employee sued to recover life insurance proceeds paid to debtor pre-petition; because debtor concealed existence of policies underlying claim, claimant was denied due process as a result of only receiving generic publication notice of the bankruptcy and, thus, her claims were not discharged in bankruptcy).

In *Chemetron Corp. v. Jones*, 72 F.3d 341, 344 (3d Cir. 1995), the Third Circuit held that "a group of former residents and occasional visitors to a neighborhood containing a toxic site" were "not known creditors and . . . therefore publication notice satisfied the requirements of due process." Given the broad diversity of people who had entered the neighborhood, the court explained, "We are hard-pressed to conceive of any way the debtor could identify, locate, and provide actual notice to these claimants." *Id.* at 347.

There is no tension between *Chemetron* and the ruling below. The Third Circuit reached its decision by determining whether the alleged creditors were "reasonably ascertainable." *Id.* at 346-48. Petitioner omits that the Second Circuit applied that exact standard in this case. Pet. App. 21a, 37a-43a.

Because the courts applied the identical legal rule, the two cases simply involve different conclusions about the nature of the tort victims as creditors on different facts. The petition in this case does not even present the question decided in *Chemetron—viz.*, whether respondents are "known creditors." *See supra* at 16-17.

Petitioner points to the Third Circuit's statement that "[a] debtor does not have a 'duty to search out each conceivable or possible creditor and urge that person or entity to make a claim against it.'" 72 F.3d at 346-47. But of course, respondents are not "conceivable or possible creditor[s]"; they are "known creditors." Nothing in the Third Circuit's decision casts doubt on the debtor's obligation to provide creditors in respondents' position with notice of the nature of their claim.

In re Placid Oil Co., 753 F.3d 151 (5th Cir. 2014), is inapposite for essentially the same reason. The Fifth Circuit held in that case that certain asbestos victims were "unknown creditors" of a natural gas company, such that they were entitled only to "constructive notice." *Id.* at 154-57. Applying the same "reasonably ascertainable" standard as the Second and Third Circuits, *id.*, the Fifth Circuit focused on the fact that in that early period prior to which asbestos injuries became prominent "no instances of asbestos-related injury or illness were known to" the debtor, *id.* at 157.

There is no conflict between *Placid Oil* and the ruling below. The cases apply the identical legal standard to very different facts. Old GM itself manufactured the defective product, knew of its danger, and conspired to hide that danger from

respondents. The prospect of a deadly accident from the debtor's defective product (this case) is much more concrete than the then-unknown risks of disease eventually emerging from a product manufactured by someone else and only incidentally used in the debtor's workplace (*Placid Oil*).

Petitioner argues that the ruling below conflicts with the Fifth Circuit's statement that "[w]e have never required bar date notices to contain information about specific claims." Pet. 24; 753 F.3d at 158. That argument rips the court's statement from its context. In fact, the quoted language refers to the very different requirements for *publication* notice to *unknown* creditors. The very next sentence explains: "To the contrary, we have determined that publication in the national edition of the *Wall Street Journal* discharges the pre-confirmation claims of unknown creditors." *Id.* Further still, *Placid Oil* does not involve the requirements for notice under Section 363 at all.

In truth, petitioner's statutory argument and its reliance on precedent are so weak that they seemingly depend on an inappropriate effort to smuggle into the petition two issues. Neither is encompassed within the Questions Presented or would merit this Court's attention if it were. Both amount to a pure request for error correction, not an argument that the court of appeals adopted an incorrect legal rule that conflicts with the precedent of this Court or of another court of appeals.

First, in a passing footnote, petitioner complains about the finding of the lower courts (Pet. App. 39a-42a, 145a-52a) that respondents were known creditors of Old GM. Pet. 25 n.4. That issue is not encompassed within the Question Presented, which as noted accepts

that Old GM was required to provide respondents with notice.

It is also a pure question of fact. Respondents' status as known creditors turns on what GM employees knew about the ignition defect and when they knew it. The bankruptcy court found as a matter of fact that Old GM knew of respondents' claims, rendering respondents known creditors. Pet. App. 145a-52a. The Second Circuit found no clear error in that finding. *Id.* 42a-43a. Under the "two court rule," that factual determination – which is plainly correct – governs proceedings in this Court. *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

Second, in a single paragraph, petitioner complains about the Second Circuit's conclusion (Pet. App. 47a-53a) that respondents were prejudiced because there is a reasonable prospect that if Old GM had provided respondents notice, the resulting negotiations over the terms of the sale might well have led New GM to assume liability for their claims. Pet. 25-26. Petitioner endorses the bankruptcy court's view (Pet. App. 165a-71a) that the sale would have occurred on the same terms. Pet. 26. Petitioner disagrees with the court of appeals' rejection (Pet. App. 47a-53a) of that view of the negotiations. Pet. 25-26.

But that question is totally fact-bound. The effect of the notice on the terms of the sale depends on an assessment whether on these facts negotiators would have felt either an obligation or sufficient pressure to accommodate respondents' claims, as they did with respect to other claims. The issue also lies outside the Questions Presented. It therefore does not merit this Court's review. Petitioner does not argue otherwise.

In any event the Second Circuit's extensive explanation for its view was plainly correct. *See supra* at 9-10. There was a clear precedent for modifying the terms of the sale taken directly from the events surrounding the Section 363 sale. The record below amply demonstrates that at the time of the Section 363 sale, outside pressure from objectors, consumer groups, and state attorneys' general *twice* altered the original agreement through negotiation. First, the original form of the transaction would have immunized New GM for liability for post-sale accidents involving vehicles manufactured by Old GM. But in the face of objections, New GM agreed to accept that liability. Pet. App. 48a n.27. Second, still under pressure, New GM also agreed to be bound by Lemon Laws covering vehicles manufactured by Old GM. *Id.* 48a-50a.

Although the Second Circuit stated there were many arguments that might have been made by the respondents at the time of the sale had they been given proper notice, the court of appeals chose to focus on what was demonstrably the least speculative potentially different outcome – the possibility of a negotiated resolution – precisely because pressure and bargaining by adequately informed parties had twice before altered the treatment of claims by New GM.

The concealment of the defect prevented the victims from opposing the injunction based on the essential inequity of the bankruptcy court giving equitable relief in the form of an injunction to a "newco" that would be populated by the very same people that withheld the information about the Ignition Switch Defect for the seven years before the sale. Revelation of GM's misconduct likely would have

changed the terms of the sale in the fevered and fluid negotiations that led to a change in the sale arrangements.

Petitioner also attempts to suggest, Pet. 9-10, that other parties objected to the sale based on similar arguments and lost. That is not correct. These arguments were not similar since those objectors were not then-current victims of the Ignition Switch Defect but instead parties arguing against barring claims by future creditors, or parties contesting subject matter jurisdiction. No creditor argued that the sale should be prohibited or modified in light of the effects of the defect for the obvious reason that no one other than Old GM knew of its existence.

II. Certiorari Is Not Warranted To Review The Second Circuit's Holding That On These Particular Facts The Respondents Are Not Enjoined From Pursuing Claims When Respondents Did Not Receive The Constitutionally Required Notice That Those Claims Would Be Extinguished.

The second Question Presented is directed to the Second Circuit's holding that in certain circumstances a violation of the Section 363 notice requirement may invalidate an injunction against filing successor liability claims against the purchaser. Pet. App. 54a-55a. Here, the terms of the sale purported to enjoin any claims against New GM. The court of appeals held that because the notice violated the Due Process Clause, that injunction was invalid. Petitioner does not offer any basis for this Court to review that ruling.

Petitioner argues that by statute it was awarded title to the purchased assets "free and clear of any interest in such property." 11 U.S.C. § 363(f). On

petitioner's view, it acquired the assets on those terms without regard to whether the owner of the interest received the required notice. But petitioner's argument fails at the outset, because the Bankruptcy Code cannot trump the Constitution. The Second Circuit held that respondents received inadequate notice under the Due Process Clause. Whatever the meaning of Section 363, it obviously cannot strip creditors of their claims unconstitutionally.

Petitioner's reading of Section 363 is in any event an obvious *non sequitur*; petitioner simply assumes its own conclusion. Nothing in the statute awards the purchaser title without regard to whether the antecedent notice requirements are satisfied. To the contrary, Section 363(f) refers to the consequences of a sale under Section 363(b) after notice and a hearing. As discussed above, even petitioner concedes that for known creditors, notice requires direct mail notification. Pet. 6. That requirement was not satisfied here. *See supra* at 8-9.

Further, in this context, the notice to respondents would have been ineffective unless it disclosed the defect, because Old GM had deceived respondents about the existence of their claims. Respondents who suffered death or injury in particular suffered the double whammy of not being told their crash had a mechanical cause that was the fault of Old GM and not being warned that their valuable successor liability claims were to be extinguished in the sale. Economic loss victims would not have known to file a claim to recover the diminished value of their vehicle. The prerequisites to taking title "free and clear" under Section 363(f) were therefore not satisfied.

Petitioner in any event misunderstands the meaning of the phrase "free and clear" title. 11 U.S.C. § 363(f). Petitioner *does* hold clear title to the assets it purchased from Old GM. Respondents do not assert a lien or other specific interest in those assets. The Second Circuit's ruling did not revise the sale order, modify the sale order, or interfere with the finality of the sale. Rather, respondents are suing petitioner on a theory of successor liability – essentially, that New GM has stepped into the shoes of Old GM and is liable for the latter's wrongdoing. The settled doctrine of successor liability law gives tort victims a second source of recovery that is personal to them; this second source of payment is no different in effect from a guaranty from a solvent third party. Successor liability claims do not generally arise in cases implicating Section 363 – making this case all the more an anomalous vehicle for interpreting the statute – because most sales under that provision involve the genuine purchase of particular assets, not the effective continuation of the prior business under the same operating name.

Petitioner argues that its contrary reading makes better policy sense, because creditors do not actually need notice, given that they retain the right to pursue their claims against the debtor post-sale. Pet. 17, 30-32. But that reading makes no sense. It renders the statutorily required notice meaningless. On petitioner's view, there would be no consequence for failing to provide it. The better understanding is that the statute is designed to protect the interests of creditors, such as respondents, in objecting to the diminishment or elimination of their constitutionally protected property rights.

The Second Circuit's ruling also gives purchasers an incentive to ensure that all creditors are provided with the required notice. New GM cannot take an ostrich approach to notice, whether as a buyer or as the intended beneficiary of an injunction, and do nothing but point the finger at Old GM and say it was Old GM's fault if notice was insufficient and it (New GM) should not be penalized as a result. That rule would only incentivize incompetence and even deception.

Petitioner also seriously misreads the ruling below as holding that the remedy for every failure to provide the required notice of a Section 363 sale is to eliminate a bar to successor liability. That false premise underlies petitioner's argument (Pet. 34-36) that the ruling below destabilizes sales in bankruptcy. In fact, as discussed, the Second Circuit ruled for respondents only after determining through a lengthy analysis that petitioner had failed to establish that the results of the sale would have been the same if respondents had been provided the required notice of their claims. No doubt, in many cases presenting different facts, the terms of the sale will remain the same and the purchase will be unaffected.

Petitioner contends that review is nonetheless warranted because of a supposed conflict between the ruling below and an 1884 decision of this Court and a ruling of the Seventh Circuit. Those arguments lack merit.

In *Factors' & Traders' Ins. Co. v. Murphy*, 111 U.S. 738 (1884), property was sold in bankruptcy to the parties who held liens on it. A single lienholder who had participated in the bankruptcy later objected, arguing that she had not specifically participated in

the sale, so that her lien – and only her lien – survived. This Court rejected that argument, applying principles of equity. It held that the property could be resold, subject to the objector being treated equally with all the other lienholders.

For several independent reasons, *Factors'* does not bear on the issues presented by this case. *Factors'* was decided based on pre-Bankruptcy Code principles of equity, *id.* at 743-45, not Section 363, so by its terms it does not apply here. Nor did *Factors'* consider any issue under the Due Process Clause. Respondents moreover are entirely unlike the creditor in *Factors'*. Respondents are not lienholders; they do not claim an interest in the property sold to New GM; and they were unaware of their claim in bankruptcy.

Petitioner fares no better with its fleeting reference to *In re Edwards*, 962 F.2d 641 (7th Cir. 1992). In that case, a court clerk mailed a mortgage lienholder's notice of a bankruptcy sale to the wrong address. Although the lienholder knew of the bankruptcy, it therefore did not specifically know of the sale. More than a year after the sale, the lienholder moved under Fed. R. Civ. P. 60(b) to undo the sale on the ground that it was "void" because the lienholder did not receive the required notice.

The Seventh Circuit regarded the question presented as "in what circumstances can a civil judgment be set aside without limit of time and without regard to the harm to innocent third parties?" 962 F.2d at 644. It held that "[t]he answer requires a consideration of competing interests rather than a formula." *Id.* Reasoning that the court's error could not be attributed to the debtor or purchaser, the court of appeals refused to overturn the sale. *Id.* at 645-46.

There is no inconsistency between *Edwards* and the ruling below. Respondents are neither asserting a lien against the property purchased by petitioner nor seeking to undo the sale of that property, a remedy the Seventh Circuit highlighted as "of course disfavored." *Id.* at 643. Nor do respondents seek relief under Rule 60(b), which is governed by its own distinct set of principles limiting the reopening of judgments. Respondents instead assert that Due Process does not permit the entry of an injunction barring their successor liability claims against petitioner. That issue did not arise in *Edwards*.

Furthermore, here fault does distinctly lie with at least the seller, which deliberately withheld from respondents the facts that would have alerted them to their claim. In *Edwards*, the creditor knew of the bankruptcy and was left unaware of the sale through no fault of any party. There is no reason to believe that, even if the Seventh Circuit believed *Edwards* applied in this very different context, it would find that the "competing interests" required extinguishing respondents' claims against New GM.

Far more analogous is the Seventh Circuit's more recent ruling in *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 163-64 (7th Cir. 1994), that a buyer of a debtor's assets in a Section 363(f) free and clear sale was not entitled to an injunction against successor liability lawsuits by individuals who were injured post sale, because those creditors had no due process afforded to them in the bankruptcy sale. *See also, e.g.*, *W. Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F.3d 714, 721-22 (1st Cir. 1994) (holding that plaintiffs' successor liability claims against asset purchaser could not be enjoined,

notwithstanding "free and clear" nature of the sale, because plaintiffs were denied adequate notice in connection with sale).

This is also a uniquely poor vehicle in which to test the rights of an arms-length, good faith purchaser under Section 363. In reality, GM sold itself to….. itself. Old GM was not acquired by Ford or Daimler or some other company. Rather, the bankruptcy plan involved creating a new entity that would acquire Old GM's most valuable assets and continue to operate them, with the same principal management, employees, factories, supply chains, and products. The bankruptcy merely moved the business, intact, from one over-leveraged shell to a new de-leveraged shell, populated by the same product and safety engineers, executives, and in-house lawyers that had been concealing the defect for seven years before the sale and who continued to do so for five years after. To the extent special concerns arise with respect to sales under Section 363 to true arms-length purchasers, this case does not implicate them.

Petitioner's contrary assertion that it was previously determined to have acted in good faith (Pet. 9, 28) is misleading. That determination was unrelated to the Question Presented – it addressed whether the *speed* of the sale was proper, not whether New GM acted in good faith in failing to ensure that respondents had *notice* of the sale. *In re Gen. Motors Corp.*, 407 B.R. 463, 494 (S.D.N.Y. 2009).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Thomas C. Goldstein
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave
Suite 850
Bethesda, MD 20814

William P. Weintraub
Gregory Fox
Counsel to Ignition Switch Pre-Closing Accident Plaintiffs
GOODWIN PROCTER LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018

Robert C. Hilliard
Catherine Tobin
Anne Fornecker
Steve Shadowen
Counsel to the Ignition Switch Pre-Closing Accident Plaintiffs
HILLIARD MUÑOZ GONZALES L.L.P.
719 S Shoreline Blvd # 500
Corpus Christi, TX 78401

Jonathan L. Flaxer
Counsel to the Groman Plaintiffs
GOLENBOCK EISEMAN ASSOR BELL & PESKOE LLP
711 Third Avenue
New York, NY 10017

Alexander H. Schmidt
Counsel to the Groman Plaintiffs
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
270 Madison Avenue
New York, NY 10016

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