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,	:	No. 15-CV-00717 (VJW)
	:	The Honorable Victor J. Wolski
Plaintiffs,	:	
v.	:	
UNITED STATES,	:	
Defendant.	:	

FIRST AMENDED 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 First Amended Class Action 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 "**Personal Injury Products Liability 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 date Old GM filed its bankruptcy petition for relief.

2. The claims of all Personal Injury Claimants in the Class are fixed, liquidated, and not disputed by any party in the GM Bankruptcy. All Class members have received distributions on account of these allowed claims that are but a fraction of their stipulated allowed amount.

3. On July 10, 2009, the Government purchased substantially all of Old GM's operating assets out of the GM Bankruptcy through a wholly-owned, government-sponsored enterprise that it formed on the eve of Old GM's bankruptcy filing ("**New GM**"). The acquisition was authorized by the GM Bankruptcy Court under Sections 363(b) and (f) of the United States Bankruptcy Code (11 U.S.C. §§ 363(b), (f)), which together authorize a bankrupt debtor to sell its property outside of a chapter 11 plan of reorganization "free and clear of any interest in such property." This bankruptcy sale of Old GM's assets was commonly referred to as the "363 Sale" (the "**363 Sale**" or "**Sale**").

4. Old GM, however, did not want to file bankruptcy and worked hard to effectuate an out-of-court restructuring to obviate the need for a bankruptcy filing. The Government, as Old GM's sole funding source, however, said it would not fund Old GM's operations past June 1, 2009 except in a bankruptcy proceeding, thus forcing Old GM to file its bankruptcy petition for relief on June 1, 2009.

5. Old GM's senior management wanted the Personal Injury Products Liability Claims assumed in full as part of any restructuring. The Government, however, viewed bankruptcy as a golden opportunity to rinse away these claims and so excluded them from the nearly $60 billion in general unsecured claims of Old GM that were being assumed in whole or substantial part by New GM.

6. On the eve of Old GM's bankruptcy filing, as the Old GM's board of directors considered whether to authorize the bankruptcy filing and Old GM's entry into a "Master Purchase and Sale Agreement" with New GM that would set the precise terms of the 363 Sale (the "**Sale Agreement**"), the Government represented that if, for whatever reason, it were to agree before the close of the Sale to assume Old GM's liabilities to Personal Injury Claimants, then the Government would neither attempt to renegotiate a reduction of the purchase price nor walk from the deal.

7. In the bankruptcy proceedings that followed, the Government further demanded that the order approving the Sale (the "**Sale Order**") include a provision that enjoined the Personal Injury Claimants from pursuing successor liability claims against New GM, and the Bankruptcy Court included precisely such a provision in the Sale Order.

8. With the inclusion of that provision in the Sale Order, and effective upon the closing of the Sale, the Personal Injury Claimants lost valuable rights to assert successor liability

claims against New GM under a multitude of theories, including the "continuity of enterprise" doctrine (a well-established doctrine in Michigan, where any Personal Injury Claimant could have sued New GM after the closing of the Sale).

9. The Government's demand that Personal Injury Claimants' rights to assert successor liability claims against New GM be extinguished in the Sale Order violated the Takings Clause of the Fifth Amendment to the United States Constitution (the "**Takings Clause**") because there was no essential nexus—as is required when the Government so drastically extinguishes valuable property rights—between that demand and the Government's previously acknowledged indifference to assumption of the Personal Injury Products Liability Claims left behind.

10. The Government's claim that "commercial necessity" drove it to leave Personal Injury Products Liability Claims behind with Old GM, however, does not withstand scrutiny when one examines how those claims were to be treated in the solicitation commenced by Old GM on April 27, 2009, with the full support of the Government, for the voluntary exchange by holders of $27 billion in Old GM's publicly-traded debt securities (the "**Bondholder Debt**") into Old GM common stock (the "**Exchange Offers**"). If consummated, the holders of that debt (the "**Bondholders**") would have received a 10% ownership stake in Old GM, while Personal Injury Products Liability Claims would have been paid in full in the ordinary course.

11. Old GM, however, failed to obtain the requisite acceptances for the Exchange Offers, which expired by their terms on May 26, 2009, just six days before Old GM filed for bankruptcy.

12. In directing that Personal Injury Claimants receive markedly worse treatment in the Sale than the full payment proposed for them in the Exchange Offers, while concurrently

agreeing that holders of at least $90 billion of other unsecured debt at Old GM (including the Bondholders) would receive the same or far better treatment in the Sale than proposed for them in the Exchange Offers, the Government singled out the Personal Injury Claimants to bear the brunt of its pre-filing goal of squeezing out those creditors (like the maimed, the disabled, the widows, the orphans, and other Personal Injury Claimants) that the Government considered marginal because they were not expected to have any ongoing business relationships with New GM.

13. The Government's callous disregard of the health and welfare of these marginalized claimants, advanced under the guise of "commercial necessity," also violated a principal purpose of the Takings Clause, which is to bar 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. These claimants were victims of Old GM's defective products, not the cause of Old GM's problems.

14. Unlike *In re A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1157 (Fed. Cir. 2014), 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 Sale (*i.e.*, "but for the government action"). Here, the Government specifically represented to Old GM's Board of Directors at a meeting held three days before the filing that if the Government decided to assume the "politically sensitive" liabilities (as called by both the Government and Old GM) owing to Personal Injury Claimants as part of the Sale, the Government would still close the deal without any reduction to the purchase price.

15. Consequently, the appropriate "but for" analysis in this case is that but for the Government's arbitrary demand that Personal Injury Claimants' rights to assert successor

liability claims be eliminated through the Sale Order, even though the Government was indifferent to New GM's assumption of these claims, the Personal Injury Claimants' valuable rights to pursue successor liability claims against New GM would have been preserved.

16. The economic impact of the Government's actions on the Personal Injury Claimants has been severe. Instead of receiving full compensation to cover their medical costs (which alone could be astronomical), their pain and suffering, and their losses—in many cases—of limbs, mobility, capacity, livelihood, consortium, or even life itself, the Government deprived them any recompense at the time of the taking and forced them to wait years before distributions on their allowed claims in the GM Bankruptcy might finally trickle down to them.

17. To remedy this wrong, the Government should be ordered to pay all the allowed claims of Personal Injury Claimants in the GM Bankruptcy, less whatever fraction of that amount was actually recovered by them in the case, plus pre- and post-judgment interest and reasonable attorneys' fees and costs.

II.

JURISDICTION

18. 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

19. 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

20. Plaintiff Callan Campbell is a United States citizen and a resident of the Commonwealth of Pennsylvania. She is one of thousands of Personal Injury Claimants holding allowed claims in the GM Bankruptcy. On August 17, 2004, one week before she was to start college, Callan 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 landing on its roof. The defectively designed roof of the car collapsed over Callan's seat. Callan sustained a cervical spinal cord injury at C6-7, which rendered her a quadriplegic. Callan was 18 years old at the time of her accident. 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. Callan 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 the other Personal Injury Claimants holding allowed claims in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government. Callan is engaged to be married on October 10, 2015, after which her name will officially change to Callan Wehry.

21. 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. Kevin was 21 years old at the time of his accident. 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 the other Personal Injury Claimants holding allowed claims in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government.

22. 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 the other Personal Injury Claimants holding allowed claims in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government.

23. 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 the other Personal Injury Claimants holding allowed claims in

the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government.

24. 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 allowed claims 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 wearing their seatbelts, 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. Tyler was 17 years old at the time of his death. 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 the other Personal Injury Claimants holding allowed claims in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government.

25. 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 the other Personal Injury Claimants holding allowed claims in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government.

26. 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 the other Personal Injury Claimants holding allowed claims in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government.

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

28. 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 the Old GM's Restructuring.

29. Old GM was founded in September 1908. It was the global automobile sales leader for 77 consecutive years from 1931 through 2007.

30. On Old GM's one-hundredth anniversary in September 2008, however, Old GM faced significant financial difficulties stemming from its inability to obtain debt or equity financing from private sources or public markets to fund its mounting operational losses.

31. In testimony before the Senate Banking Committee on November 18, 2008, Rick Wagoner, Old GM's Chief Executive Officer ("**Wagoner**"), said that if the domestic auto industry were allowed to fail, the societal costs would be catastrophic. He predicted that three million jobs would be lost within the first year, U.S. personal income would be reduced by $150 billion, tax revenues of more than $156 billion over three years would be lost, and consumer and business confidence would suffer a significant blow.

32. In response to this financial crisis facing Old GM, the Government, as the only source of funding to support Old GM's prodigious cash needs, obtained the necessary Congressional authorization under the Troubled Asset Relief Program ("**TARP**") to begin providing funding to Old GM.

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

34. 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**").

35. The Government made its first $13.4 billion advance in December 2008. Like all other advances that followed, this advance was secured by a first priority security interest in substantially all the assets of Old GM.

36. 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.

37. 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:

a. 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;

b. As part of any new labor agreement, the UAW 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 solely through the issuance of Old GM common stock; and

c. Old GM would have to commence the Exchange Offers for the purpose of obtaining the agreement of at least 90% of the Bondholders to exchange their Bondholder Debt for Old GM common stock.

38. 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.

B. <u>The Auto Team Is Formed and Its Influence Over Old GM Is Extended</u>.

39. 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.

40. 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 to evaluate the restructuring plans of GM and Chrysler, negotiate the terms of any further financial assistance, and make day-to-day decisions on behalf of the Auto Task Force.

41. 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.

42. The other two key members of the Auto Team who worked on Old GM's restructuring with Rattner and Bloom were Matthew Feldman ("**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.

43. 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.

44. In addition to Feldman, the Government retained several preeminent law firms as outside counsel to advise the Government on the 363 Sale option and out-of-court restructuring alternatives. None of the Government's outside or in-house counsel, however, provided material advice as to whether the actions of the Government in directing the extinguishment of Personal Injury Claimants' rights to assert successor liability claims against New GM might violate the just compensation requirements of the Takings Clause.

45. It was the absence of such advice that led Wilson, in justifying the Government's decision to leave Personal Injury Products Liability Claims behind with Old GM despite there being "some obvious human sensitivities," to testify that "our 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."

46. 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 plan, none of which mentioned any adverse impact to Old GM from having to pay Personal Injury Claimants in full.

47. 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 the Bondholders.

48. 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.

49. 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 of Old GM through the closing of the 363 Sale.

50. In March 2009, the Auto Team believed that Old GM, under the leadership of then Chief Executive Officer Wagoner was unwilling to move toward bankruptcy.

51. 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 could survive a bankruptcy.

52. On March 27, 2009, Rattner called Wagoner and its then-President and Chief Operating Officer, Fritz Henderson ("**Henderson**"), to separate meetings. At the meeting with Wagoner, Rattner asked for his resignation, which Wagoner tendered. Separately, Rattner asked Henderson to serve as Old GM's CEO, which Henderson accepted.

53. The Auto Team's decision to replace Wagoner with its hand-picked selection, Henderson, sent a clear message to Old GM's 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.

54. 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.

55. Concurrently, the Administration issued a "viability determination fact sheet," which signaled its willingness to work with Old GM to effect an out-of-court restructuring 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.

56. 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.

57. 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.

58. Having determined by late March 2009 that a forced or orderly liquidation of Old GM was, in the words of the Government's team leader, "unthinkable" and an option that it "never seriously considered," the Government advanced an additional $2 billion in first priority secured debt in April 2009.

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

59. Even after Wagoner's removal, Old GM's executives strongly preferred an out-of-court restructuring to a bankruptcy proceeding.

60. 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 the Exchange Offers, which Old GM considered as "Plan A" and a bankruptcy filing as "Plan B."

61. On April 27, 2009, with the Government's express approval, Old GM commenced the Exchange Offers for its $27 billion in unsecured publicly-traded Bondholder Debt. If consummated, the Bondholders would have received a 10% ownership stake in Old GM's common stock.

62. In a press release accompanying the Exchange Offers, approved by the Government, Old GM stated that "[t]he 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."

63. The Government supported Old GM's efforts in obtaining the requisite consents in the Exchange Offers by agreeing to advance an additional $4 billion in first priority secured debt to Old GM in May 2009.

64. 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 entire debt into a majority equity stake in Old GM's common stock, thereby eliminating the need for a bankruptcy filing.

65. Consummation of the Exchange Offers also would have meant that all Personal Injury Products Liability Claims would have been paid in full in the ordinary course.

D. Personal Injury Products Liability Claims Are Classified by the Government and Old GM as "Politically Sensitive" Liabilities.

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

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

68. These liabilities carried sensitivities for Old GM and the Government primarily because the manner in which they were handled in any restructuring had a reputational impact on both Old GM and the Government.

69. 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.

70. Old GM's management considered payment of Personal Injury Products Liability Claims in the ordinary course 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.

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

72. 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**").

73. 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.

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

75. 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.

76. 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 of these Personal Injury Products Liability Claims.

77. Old GM management recommended assumption of the "politically sensitive" Personal Injury Products Liability Claims because it was concerned that rejecting such claims would adversely impact the company's reputation.

78. 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.

E. The Exchange Offers Expire, the Sale Agreement Is Finalized Six Days Later, and the GM Bankruptcy Is Commenced.

79. The Exchange Offers failed to garner the requisite acceptances from 90% of the Bondholders and expired on May 26, 2009.

80. As a condition to additional funding, the Government mandated that Old GM file its bankruptcy petition for relief on June 1, 2009, the day that a $1 billion interest payment would have been required to be paid on the Bondholder Debt.

81. By filing bankruptcy, Old GM would be precluded as a matter of law from making this interest payment while the Bondholders would be precluded by the bankruptcy "automatic stay" from taking any action against Old GM on account of the defaulted interest payment.

82. Old GM's Board of Directors met on May 29 and 30, 2009 to approve the bankruptcy filing and the Sale Agreement, which would set the precise terms of the 363 Sale.

83. Before that Board meeting, the Government directed 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.

84. As regards the treatment of the "politically sensitive" Personal Injury Products Liability Claims, however, the Government specifically represented to the Board at the meeting that if the Government decided before the close of the Sale to assume these liabilities, it would still close the Sale without any change in the consideration paid to Old GM.

85. 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.

86. The Government conditioned additional funding for Old GM on a "quick-rinse bankruptcy" (as Rattner called it) that would enable the Government to consummate the outright purchase by New GM of substantially all the operating assets of Old GM within 40 days after the bankruptcy filing.

87. Rattner described the Government's coercive demand that the Sale be consummated within 40 days as "the financial equivalent putting a gun to the heads of the bankruptcy judge, GM's stakeholders, and of course Team Auto itself." By this he meant that everyone involved was left with no choice but to submit to the Government's "quick-rinse" demands or be saddled with blame for precipitating Old GM's liquidation and the consequent demise of the entire domestic auto industry.

88. Left with no option but to comply with the Government's mandate or face certain liquidation, Old GM filed its bankruptcy petition for relief in the bankruptcy court for the Southern District of New York (the "**Bankruptcy Court**") on June 1, 2009.

89. Contemporaneous with its bankruptcy filing, Old GM filed two important motions. One motion (the "**Sale Motion**") sought authority from the Bankruptcy Court to sell, pursuant to the Sale Agreement, substantially all Old GM's operating assets to New GM pursuant to the strict terms of the Sale Agreement.

90. The Government insisted that Sale Motion seek Bankruptcy Court authorization of the Sale under Sections 363(b) and (f) of the United States Bankruptcy Code (11 U.S.C. §§ 363(b), (f)), which together authorize a bankrupt debtor to sell its property outside of a chapter 11 plan of reorganization "free and clear of any interest in such property."

91. The second motion sought approval of a postpetition credit facility that gave the Government the right to advance up to an additional $33.3 billion to Old GM on a first priority secured basis, subject to the limiting condition that the entire facility would terminate if the Bankruptcy Court did not approve the Sale Motion by July 10, 2009, the fortieth day after the bankruptcy filing (the "**DIP Financing Motion**").

92. The DIP Financing Motion was approved by the Bankruptcy Court and the Government made advances in the intervening days that, by the time of the Sale, resulted in the Government having a total of $52.7 billion in first priority secured loans outstanding to Old GM.

93. The $33.3 billion advanced by the Government after Old GM's bankruptcy filing, however, was not needed by Old GM to fund its operations during the 40 day "quick-rinse" cycle mandated by the Government.

94. Rather, its purpose was to give the Government sufficient first priority secured debt to enable it to tender a $48.7 billion credit bid in exchange for substantially all the assets of Old GM.

95. The financial expert for Old GM testified at the Bankruptcy Court's hearing on the Sale Motion that, even under the most optimistic of valuation assumptions, the Government's $48.7 billion credit bid would exceed the value of all assets purchased by the Government in the Sale by $700 million.

96. In crafting the Sale Agreement, the Government unilaterally determined which liabilities of Old GM would be assumed by New GM (and paid in full) and which liabilities would be left behind with Old GM (and receive whatever distributions, if any, would be paid to general unsecured creditors in the GM Bankruptcy).

97. In cherry-picking which liabilities to assume as successor or leave behind with Old GM, the Government went well beyond the agreements reached with Old GM in the Exchange Offers regarding the acceptable aggregate amount of liabilities for assumption by the restructured enterprise.

98. Not only did the Government leave behind the Bondholder Debt (as contemplated by the Exchange Offers), it also left behind the Personal Injury Products Liability Claims that the Government agreed only five days earlier would be paid in full in the event the Exchange Offers were successfully consummated.

99. In choosing which additional liabilities to exclude from the Sale Agreement in addition to the Personal Injury Products Liability Claims, however, the Government did not similarly exclude the vast majority of other unsecured claims, aggregating approximately $41.7

billion (excluding Bondholder Debt), that also were scheduled to be paid in full if the Exchange Offers were successfully consummated.

100. Instead, the Government provided in the Sale Agreement that, notwithstanding the dramatically worse treatment afforded Personal Injury Claimants in the Sale compared with the treatment contemplated for them in the Exchange Offers, New GM would assume these other $41.7 billion in liabilities and pay them in full following the closing of the Sale. The $41.7 billion in liabilities to be assumed by New GM in the Sale were represented by:

a. $15.5 billion in dealer obligations, warranty obligations, customer deposits, deferred revenues, and marketing liabilities;

b. $8.4 billion in post-employment benefits to union and non-union retirees;

c. $5.4 billion in estimated future pension cash contributions (at present value);

d. $5.4 billion in trade payables;

e. $3.8 billion in payroll, post-employment benefits and training, and pension obligations owing to Delphi Automotive, a former division of Old GM that had been spun-off in 1999; and

f. $3.1 billion in various other operating liabilities, including rent, taxes, and capital leases.

101. In the Sale, the Government also showed special favor to $18 billion in prepetition unsecured claims owed by Old GM to the VEBA Trust, a retiree benefits trust maintained by Old GM's most powerful labor union, the UAW. Specifically, the Government agreed that, at the closing of the 363 Sale, New GM would issue to the VEBA Trust $6.5 billion in New GM preferred stock along with 17.5% of New GM common stock. The equity interests granted the VEBA Trust by New GM were valued as of the closing of the Sale at between $13.15 billion and $14.9 billion, representing a projected 73%-82% recovery to the VEBA Trust on account of its $18 billion in unsecured claims against Old GM.

102. As such, after the Exchange Offers failed and the Sale Agreement was filed with the Bankruptcy Court six days later, the Government did not change the proposed payment in full for treatment of approximately $60 billion in prepetition unsecured liabilities described above.

103. Nor did the Government propose a worse treatment for Bondholders in the Sale Agreement despite the fact that the Bondholders' rejection of the Exchange Offers directly precipitated Old GM's bankruptcy filing. In fact, Old GM was projecting that recoveries to Bondholders would nearly double compared with what had been offered them in the Exchange Offers.

104. In stark contrast to the same or improved treatment given the nearly $90 billion of combined general unsecured and Bondholder Debt described above compared with the treatment proposed for these claims in the Exchange Offers, the Government inexplicably slashed the projected recoveries to Personal Injury Claimants by 80%-90% from the full payout proposed for them in the Exchange Offers.

105. The Government's rationalization for this disparate treatment of liabilities having the same priority was that it only would assume those liabilities that it determined were "commercially necessary" for New GM to succeed, with one Government official testifying in support 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."

106. But this attempt to rationalize the grossly disproportionate treatment of Personal Injury Products Liability Claims fails because only five days before the Sale Agreement was executed by Government and Old GM, the Government had been willing to consummate an out-

of-court restructuring pursuant to the Exchange Offers that guaranteed full payment to Personal Injury Claimants in the ordinary course.

107. More than not agreeing to assume the Personal Injury Products Liability Claims in the Sale Agreement, however, the Government went the extra step of conditioning the closing of the Sale on inclusion of a provision within the Sale Order that expressly extinguished the rights of any Personal Injury Claimant to assert successor liability claims against New GM.

108. This additional condition deprived the Personal Injury Claimants of their manifest right under the laws of the State of Michigan (where New GM could be sued by any one of these claimants) to assert successor liability claims against New GM based on the seamless transition of operations from Old GM to New GM after the 363 Sale, as illustrated by the following incontrovertible facts:

a. Four of Old GM's eight brands were assumed by New GM (the remainder were discontinued);

b. Old GM's management and employees continued in their same roles with New GM;

c. New GM marketed its operating business under the identical "GM" brand name and trademarks;

d. Most of Old GM's tangible and intangible assets were purchased and used by New GM (including Old GM's goodwill);

e. New GM continued to sell cars through dealers who were dealers of Old GM;

f. New GM continued to purchase the same materials from the same suppliers under the same contractual terms available to Old GM;

g. Service relationships with dealers continued under New GM;

h. 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;

i. 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";

j. The Government effected a "loan to own" strategy that enabled it, as Old GM's only viable lender, to obtain majority control over Old GM prepetition on a fully dilute basis and to direct a "quick-rinse" bankruptcy sale of Old GM to the Government; and

k. In furtherance of its "loan to own" strategy, the Government maintained tight control over New GM's board and senior management after the close of the Sale, including the right to appoint 10 of the 13 members of New GM's board of directors (with no more than 5 directors being legacy directors of Old GM) and to implement any corporate action by majority written consent.

109. In *Foster v. Cone-Blanchard Mach Co.*, 597 N.W.2d 509 (Mich. 1999), the Michigan Supreme Court held that the "continuity of enterprise" doctrine is a well-established doctrine for asserting successor liability claims and "provide[s] a remedy to an injured plaintiff in those cases in which the [seller] corporation 'legally and/or practically becomes defunct' . . . and the injured plaintiff 'has no place to turn for relief except to the second corporation.' " *Id*. at 511 (citing *Turner v. Bituminous Cas. Co.*, 244 N.W. 2d 873, 879 (Mich. 1976)).

110. Based on *Foster*, it is evident that in the absence of the Sale Order's injunctions against initiation of successor liability claims against New GM, all Personal Injury Claimants could have successfully brought such claims against New GM under the "continuity of enterprise" doctrine, as established by the following indisputable facts:

a. There was a continuation of the enterprise from Old GM to New GM based on the continuity of management, personnel, physical location, assets and general business operations;

b. Old GM ceased operating and liquidated following the Sale;

c. New GM assumed those liabilities and obligations that it believed were commercially necessary for the uninterrupted continuation of normal business operations of Old GM; and

d. New GM held itself out to the world as the effective continuation of Old GM.

111. *Foster* further held that the "continuity of enterprise" doctrine would not be negated where, as here, there was no continuity of ownership between the predecessor and successor corporation.

112. As such, it was only the unique ability under federal bankruptcy law to execute sales "free and clear" of successor liability claims that enabled the GM Bankruptcy Court to hold, purely as a matter of bankruptcy law, that—facts aside—New GM would not be deemed the legal successor to Old GM.

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

113. 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 overseeing that case.

114. In the GM Bankruptcy, however, the Government faced stiffer political winds than it had faced in Chrysler's regarding the treatment of Personal Injury Products Liability.

115. 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.

116. 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 refused to authorize their assumption by New GM.

117. Within a few days after the commencement of the GM Bankruptcy, the Government agreed to change the Sale Agreement so that New GM would indemnify the entire GM dealer network for any Personal Injury Products Liability Claims asserted against them.

118. The Government and Old GM projected that this indemnity obligation to dealers would result in the effective assumption by New GM of approximately $434 million (or 46%) of the Personal Injury Products Liability Claims represented by the $934 million Products Liability Loss Reserve as of March 31, 2009.

119. 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 the original estimate of $100 million per year for the first five years following consummation of the 363 Sale to approximately $54 million per year.

120. 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.

121. 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 neither attempted to renegotiate a downward adjustment to the purchase price nor threatened to walk from the deal.

G. 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.

122. On July 5, 2009, following three full days of hearing, the Bankruptcy Court approved the Sale Agreement. The order approving the Sale is attached hereto as **Exhibit 1** (the "**Sale Order**"). The Bankruptcy Court's Memorandum Opinion accompanying the Sale Order is attached hereto as **Exhibit 2** (the "**Sale Opinion**").

123. In conjunction with the 363 Sale, the Government refused to yield one iota in its demand that the Sale Order contain broad language extinguishing all rights to assert successor liability claims against New GM, including on account of Personal Injury Products Liability Claims not explicitly assumed in the Sale Agreement.

124. To that end, the Government insisted that the Sale Order provide that:

a. 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";

b. "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"; and

c. "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."

See Sale Order, Ex. 1, at p. 13, ¶ AA; p. 24, ¶ 10; p. 40, ¶ 46; p. 41, ¶ 47.

125. In pressing its case before the Bankruptcy Court for an injunction barring the assertion of successor liability claims against New GM, the Government agreed that such rights are "interests in property" that could be extinguished in a "free and clear" sale under section

363(f) of the Bankruptcy Code. Further, its attorneys expressly concurred on the record with the assessment that rights to assert successor liability claims are "interests in property."

126. The Bankruptcy Court agreed, stating in the Sale Opinion it would follow the holding of the Second Circuit in *In re Chrysler, LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009), *aff'd*, 576 F.3d 108 (2d Cir. 2009), that the Personal Injury Claimants' rights to assert successor liability claims against the buyer of Chrysler's assets constitute "interests in property" because these claims "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 of a broader definition [of "interests in property"] that encompasses other obligations that may flow from ownership of the property")).

127. New GM paid approximately $91.1 to $93.5 billion for substantially all the assets of Old GM in the 363 Sale, broken down as follows:

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

b. $48.4 billion of assumed liabilities that would be paid in full, including the $41.7 billion in liabilities described above and $6.7 billion additionally owed to the Government; plus

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

d. $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.

128. Based on the various agreements described above and reflected in the Sale Agreement and the record of the proceedings before the Bankruptcy Court, the post-closing ownership of New GM was as follows:

- 60.83% by the Government on account of its credit bid;

- 11.67% by the Canadian Government (in exchange for $9.5 billion in debt to the Canadian Government assumed by New GM and immediately converted to common stock);

- 17.5% by the VEBA Trust; and

- 10% by the Old GM bankruptcy estate (having an estimated value at the Sale closing of $3.8-$4.8 billion).

129. The Old GM bankruptcy estate also received two tranches of warrants that gave it the right to purchase up to 15% of New GM common stock, which Old GM's financial expert testified had an estimated value at the closing of the 363 Sale of $3.6-$5.0 billion.

130. 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 of any other general unsecured claims.

131. Stripped of all rights to assert successor liability claims against New GM, the Personal Injury Products Liability Claims were relegated to the bottom of Old GM's barrel and limited to a *pro rata* share of whatever recoveries, if any, Old GM would pay to its general unsecured creditors.

132. Although Old GM was projecting that total allowed general unsecured claims for distribution purposes in the GM Bankruptcy, including Bondholder Debt, would be between $31 billion and $35 billion, recoveries to general unsecured creditors at the time of the Sale were neither determinable nor guaranteed. No bar date for the filing of proofs of claim had been set as of the Sale closing, and when it finally was set about four months later, over 70,000 proofs of claim were filed having an aggregate face value of approximately $270 billion.

133. 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 New GM common stock transferred to

Old GM in the Sale, which represented the only projected source of distributions to Old GM's creditors based on their relative priorities.

134. As such, on the July 10, 2009 closing date of the Sale, representing the time of the taking of the Personal Injury Claimants' rights to assert successor liability claims, these claimants had nothing more than a contingent interest in an indeterminate portion, if any, of the consideration paid over by New GM in the Sale to Old GM's bankruptcy estate.

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

136. The effective date of the Plan was the earliest possible time that any Personal Injury Claimant would have been eligible to receive on account of their "Allowed" claims any of the consideration paid to Old GM's bankruptcy estate in the Sale.

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

VI.

CLASS ALLEGATIONS

138. 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.

139. 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**").

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

141. 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.

142. 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.

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

144. 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 are 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.

145. 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.

146. WTC is believed to have separately categorized all Allowed Personal Injury Claims, thereby allowing identification of all such claims.

147. 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.

148. 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.

149. As such, the principal question of law and fact in this case, common to all 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, in violation of the Takings Clause.

150. As required by RCFC 23(a)(3), Plaintiffs' claims are typical of the claims of the Class members, as 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.

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

152. 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 Products Liability Claims, the recoveries of the Personal Injury Claimants were limited to whatever fractional recoveries would be paid to general unsecured creditors in the GM Bankruptcy. At the time of the Sale, the distributions to these claimants were neither made nor capable of certain determination.

153. 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 the Class members. Plaintiffs have retained counsel experienced in the litigation of class actions, 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.

154. 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, thus making the subject of this action a course of conduct involving documents, regulations, policies, and actions applicable to the Class members as a whole.

155. 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 constituted a taking without just compensation.

156. 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 the allowed amount of each member's prepetition Personal Injury Products Liability Claim in the GM Bankruptcy and the actual recoveries on that claim in the GM Bankruptcy.

157. 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, each Class member also 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, including the "continuity of enterprise" doctrine for imposition of successor liability claims under Michigan law.

158. 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. The unnecessary cost to the court system of adjudicating such individualized litigation also would be substantial, if not prohibitive.

159. 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.

160. 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 Products Liability Claims in the case.

VII.

FIRST CLAIM FOR RELIEF

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

161. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 160.

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

163. 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.

164. 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 *per se* taking for which just compensation was not paid.

165. 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.

166. 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.

167. The Government itself benefited when it directed 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% equity ownership stake in New GM.

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

169. The Government's demand that Personal Injury Claimants' rights to assert successor liability claims against New GM be extinguished in the Sale Order violated the Takings Clause because there was no essential nexus—as is required when the Government so drastically extinguishes valuable property rights—between that demand and the Government's previously acknowledged indifference to assumption of the Personal Injury Products Liability Claims left behind.

170. The Government's callous disregard of the health and welfare of these marginalized claimants, advanced under the guise of "commercial necessity," also violated a principal purpose of the Takings Clause, which is to bar 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. These claimants were victims of Old GM's defective products, not the cause of Old GM's problems.

171. None of the consideration paid to Old GM in the 363 Sale was either distributed or guaranteed to be distributed to the Personal Injury Claimants at the time of the Government's taking of their rights. The Personal Injury Claimants had nothing more at the time of the Sale than a contingent interest in an indeterminate portion, if any, of the consideration paid over by New GM in the Sale to Old GM's bankruptcy estate.

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

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

174. Plaintiffs, for themselves and on behalf of the Class, have incurred and will incur attorneys' fees, 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.

175. These damages represent the just compensation due the Plaintiffs and other Class members under the Fifth Amendment as a result of the Government's actions in directing the extinguishment of their rights to assert successor liability claims against New GM following the 363 Sale.

VIII.

SECOND CLAIM FOR RELIEF
(Pleaded in the Alternative)

CATEGORICAL REGULATORY TAKING
OF THE RIGHT TO ASSERT SUCCESSOR LIABILITY CLAIMS

176. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 160.

177. 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.

178. A violation of the Takings Clause may occur when a governmental regulation denies a property owner all economically beneficial use of the property.

179. 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.

180. 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 reduce the consideration paid 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 Order.

181. 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. Rather, the Government singled out this group of claimants to unjustly bear the burden of a broader problem not of their making that, in all fairness and justice, should be borne

by the public as a whole. These claimants were victims of Old GM's defective products, not the cause of Old GM's problems.

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

183. None of the consideration paid to Old GM in the 363 Sale was distributed, or guaranteed to be distributed, to the Personal Injury Claimants at the time of the Government's taking of their rights. The Personal Injury Claimants had nothing more at the time of the Sale than a contingent interest in an indeterminate portion, if any, of the consideration paid over by New GM in the Sale to Old GM's bankruptcy estate.

184. The Government's actions in directing that the Sale Order extinguish the Plaintiffs' and other Class members' rights to assert successor liability claims against New GM was a categorical regulatory taking within the meaning of the Takings Clause.

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

186. 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 Sale (*i.e.*, "but for the government action"). Here, the Government specifically represented to Old GM's Board of Directors at a meeting held three days before the filing that if the Government decided to assume the "politically sensitive" liabilities owing to Personal Injury Claimants as part of the Sale, the Government would still close the deal without any downward adjustment to the purchase price.

187. Consequently, the appropriate "but for" analysis in this case is that but for the Government's arbitrary demand that Personal Injury Claimants' rights to assert successor

liability claims be eliminated through the Sale Order, even though the Government was indifferent to assumption of these claims by New GM, the Personal Injury Claimants' valuable rights to pursue successor liability claims against New GM would have been preserved.

188. 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 Sale (*i.e.*, "but for the government action"). Here, the Government specifically represented to Old GM's Board of Directors at a meeting held three days before the filing that if the Government decided to assume the "politically sensitive" liabilities owing to Personal Injury Claimants as part of the Sale, the Government would still close the deal without any downward adjustment to the purchase price.

189. Consequently, the appropriate "but for" analysis in this case is that but for the Government's arbitrary demand that Personal Injury Claimants' rights to assert successor liability claims be eliminated through the Sale Order, even though the Government was indifferent to assumption of these claims by New GM, the Personal Injury Claimants' valuable rights to pursue successor liability claims against New GM would have been preserved.

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

191. Plaintiffs, for themselves and on behalf of the Class, have incurred and will incur attorneys' fees, 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.

192. 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

193. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 160.

194. 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.

195. 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.

196. 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.

197. 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.

198. The economic impact of the Government's actions on the Personal Injury Claimants has been severe. Instead of receiving full compensation for their liquidated and undisputed claims to cover their medical costs, their pain and suffering, and their losses—in many cases—of limbs, mobility, capacity, livelihood, consortium, or even life itself, the Government deprived these claimants of all recompense at the time of the taking, forcing them to wait years until marginal recoveries on their allowed claims in the GM Bankruptcy finally began to trickle down to them.

199. 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.

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

201. 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).

202. 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.

203. 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 have changed the consideration

payable to Old GM under the Sale Agreement, the Government demanded that the Personal Injury Claimants' rights to assert successor liability claims against New GM be extinguished in the Sale Order.

204. In treating Personal Injury Claimants markedly worse in the Sale than was proposed for them in the Exchange Offers, while at the same time giving holders of at least $90 billion of other unsecured debt at Old GM (including the Bondholders) the same or far better treatment than they would have received in the Exchange Offers, the Government singled out the Personal Injury Claimants to bear the brunt of its campaign on the eve of the bankruptcy filing to squeeze from the deal liabilities owed to creditors (like the maimed, the disabled, the widows, the orphans, and other Personal Injury Claimants) that the Government considered marginal players because they were not expected to have any ongoing business relationship with New GM.

205. The Government's callous disregard of the health and welfare of these marginalized claimants, advanced under the guise of "commercial necessity," also violated a principal purpose of the Takings Clause, which is to bar 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. These claimants were victims of Old GM's defective products, not the cause of Old GM's problems.

206. The Government's actions in demanding 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.

207. Because approximately $434 million of the $934 million representing Old GM's Products Liability Loss Reserve as of 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.

208. 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%).

209. Assumption by New GM of the Personal Injury Products Liability Claims, therefore, represented a mere fraction 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 downward adjustment to the purchase price), the Government's action went too far.

210. 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.

211. 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 Sale (*i.e.*, "but for the government action"). Here, the Government specifically represented

to Old GM's Board of Directors at a meeting held three days before the filing that if the Government decided to assume the "politically sensitive" liabilities owing to Personal Injury Claimants as part of the Sale, the Government would still close the deal without any downward adjustment to the purchase price.

212. Consequently, the appropriate "but for" analysis in this case is that but for the Government's arbitrary demand that Personal Injury Claimants' rights to assert successor liability claims be eliminated through the Sale Order, even though the Government was indifferent to assumption of these claims by New GM, the Personal Injury Claimants' valuable rights to pursue successor liability claims against New GM would have been preserved.

213. As a direct and proximate result of the Government's actions, Plaintiffs and the Class have been damaged in the amount of at least $200 million, plus pre- and post-judgment interest thereon at a rate to be established by this Court.

214. Plaintiffs, for themselves and on behalf of the Class, have incurred and will incur attorneys' fees, expert witness fees, 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.

215. 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 138 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 plus pre- and post-judgment interest thereon at a rate to be established by this Court, and any and all further costs, disbursements, and reasonable attorneys' 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 30, 2015

By: s/ Steve Jakubowski

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