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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11**
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*	:	**Case No.: 09-50026 (REG)**
Debtors.	:	**(Jointly Administered)**
DONNA M. TRUSKY, GAYNELL COLE PATRICIA DICKERSON, on behalf of themselves and all others similarly situated,	:	**Adv. Proc. No.: 12-09803(REG)**
Plaintiffs,	:	
v.	:	
GENERAL MOTORS COMPANY,	:	
Defendant.	:	

REPLY BRIEF OF GENERAL MOTORS LLC IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT OR, AT A MINIMUM, TO STRIKE THE CLASS ALLEGATIONS

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General Motors LLC, f/k/a General Motors Company (**"New GM"**), respectfully submits this Reply Brief in support of its motion ("**Motion**") to dismiss the second amended class action complaint ("**SAC**").[1] Plaintiffs' Memorandum of Law In Opposition To the Motion ("**Plaintiffs' Response**") confirms that the relief Plaintiffs seek is outside the narrow limits of New GM's Assumed Liabilities. Though Plaintiffs claim to premise their liability theory against New GM exclusively on the terms in the Glove Box Warranty, they fail to reconcile that their prayer for monetary damages and injunctive relief is contrary to the exclusive remedy of repair or replacement contained in the Glove Box Warranty. Accordingly, the SAC must be dismissed because there is no available relief that Plaintiffs seek that a court may grant pursuant to the Glove Box Warranty.

Likewise, the Plaintiffs make clear that they seek to assert claims without reference to whether the claimant's vehicle was tendered to a New GM dealer for repair. In other words, Plaintiffs seek to transform the obligation that New GM assumed to honor warranties of repair with clear limitations, into the assumption of liability for an alleged design defect in the subject vehicles. This clearly is not an appropriate claim against New GM.

Plaintiffs' Response likewise fails to rebut New GM's alternative request that, in the event any portion of the SAC survives the Motion, the Court should strike the class action allegations and transfer the matter back to the United States District Court for the Eastern District of Michigan (*Trusky et al., v. General Motors Company*, Case No. 2:11-cv-12815-SFC-LJM (J. Cox)). At most,[2] any remaining claims may be resolved in a court of general jurisdiction

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[1] Capitalized terms are as defined in the Motion.

[2] A vehicle owner who presented a vehicle presently exhibiting a covered defect in materials or workmanship to a New GM dealer subsequent to July 10, 2009 and within the applicable time and mileage limitations, and who was turned away by the dealer, would have a claim to have his or her vehicle repaired. But, although such a claim is theoretically possible, New GM asserts that: i) is not the

consistent with this Court's rulings on the issues presented in the Motion. New GM does not believe it is necessary to call upon the resources of this Court for this case once the relevant issues concerning the scope of liabilities assumed by New GM pursuant to the 363 Sale are resolved. Moreover, striking the class allegations at this stage in the proceedings is proper, and no amount of discovery will cure the deficiencies in the class allegations.

ARGUMENT

A. Plaintiffs' Response Confirms That The Relief They Seek Is Outside Of The Exclusive Remedy Provided In The Glove Box Warranty.

1. The crux of Plaintiffs' Response is that New GM may be found liable for the claims pleaded in the SAC because the relief sought falls within the scope of New GM's Assumed Liabilities. Plaintiffs claim they premise this liability theory exclusively on the written terms of the Glove Box Warranty. *See* Plaintiffs' Response, p. 13 ("[Plaintiffs] rely exclusively on the written glove box warranty that Old GM gave them at the time of the sale. *See* SAC, ¶46-48.").

2. Thus, it stands undisputed that the Glove Box Warranty contains the exclusive terms that govern New GM's warranty obligations.[3] This admission is fatal to Plaintiffs' claims because the relief sought is affirmatively foreclosed under the Glove Box Warranty. Although New GM disputes that the SAC is premised on the Glove Box Warranty given the obvious effort

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type of claim Plaintiffs seek to assert in this lawsuit, and ii) claims of that type would not be suitable for class treatment.

[3] Nor could Plaintiffs dispute this given the Sale Order and the definition of "Assumed Liabilities." The limitations of remedies found in the Glove Box Warranty are valid in each of the states where the named Plaintiffs purchased their vehicles. The Michigan, Pennsylvania and West Virginia versions of the UCC permit sellers to limit warranties only to repair and replacement. *See* Mich. Stat. 440.2719(1)(a) ("the agreement may provide for remedies in addition to or in substitution for those provided in this article and *may limit or alter the measure of damages recoverable under this article*, as by limiting the buyer's remedies to return of the goods and repayment of the price or *to repair and replacement of nonconforming goods or parts*") (emphasis added); W. Va. Code 46-2-719(1)(a) (same); 13 Pa. Cons. Stat. Ann. § 2719(a)(1) (same).

to rely on Old GM's design choices and conduct,[4] and disputes that the individual Plaintiffs could establish a claim for liability under the terms of the Glove Box Warranty for the reasons set forth in the Motion (Motion, pp.18-19), Plaintiffs' claims nevertheless fail because the relief they seek is not available under the language of the Glove Box Warranty.

3. The express intent of the MSPA was for New GM to assume the ordinary course obligation to repair individual vehicles presented for repair post-petition pursuant to the Glove Box Warranty. It was not to assume responsibility for class action and other litigation claims on vehicles sold by the Debtor pre-petition. *Cf. Castillo et al., v. General Motors Co.,* Adv. Proc. Case No. 09-00509, Decision After Trial, dated April 17, 2012, at 13.

4. New GM explained in its Motion that the Glove Box Warranty does not permit Vehicle owners to recover monetary relief nor to obtain an order forcing a change in the design of the spindles in the subject vehicles. *See e.g.*, Motion, pp. 15-16. Plaintiffs did not address these dispositive points in their Response.

5. Plaintiffs' Response, however, confirms that there are two specific requests for relief at issue in this lawsuit. Plaintiffs state that "[i]n Count I, Plaintiffs seek the cost of repairs." "In Count II, Plaintiffs request injunctive relief to assure future repairs under their warranties for these unique parts." Plaintiffs' Response, p. 10. As explained below, because neither form of relief is available under the Glove Box Warranty, Plaintiffs have failed "to state a claim upon which relief can be granted," and dismissal of the entire SAC is required under Fed.R.Civ.P. 12(b)(6); *see also*, *Hendricks v. DSW Shoe Warehouse Inc.*, 444 F. Supp. 2d 775,

[4] *See*, *In Re: OnStar Contract Litig.*, Case No. 2:07-MDL-01867 (E.D. Mich. January 25, 2011) (*OnStar* plaintiffs sought leave to add New GM to the lawsuit against *OnStar* under an express warranty theory, asserting that New GM was liable to plaintiff ***due to*** Old GM's breaches of the warranties; the Court denied the Motion in part because the "express warranty claims that Plaintiffs seek to assert against New GM appear to be barred by the plain language of the Bankruptcy Court's Sale Approval Order," and expressly rejected plaintiffs' effort to hold New GM liable for Old GM's alleged breaches of the warranties). *OnStar* Opinion at pp. 3, 6.

779-780 (W.D. Mich. 2006) (motion to dismiss on breach of contract claim granted where "Michigan law does not recognize the measure of damages proposed by plaintiff in breach of contract actions" and where plaintiff, on behalf of herself and of a putative class, "simply failed to allege damages of a type cognizable under Michigan common law applicable to contract actions."); *Consolidated Rail Corp. v. Grand Trunk Western R.R. Co.*, 2012 WL 511553, at *4 (E.D. Mich. Feb. 16, 2012) (damages are an element of a breach of contract claim, and if there are no damages, then there can be no breach of contract action); *In re Air Crash Near Peggy's Cove, Nova Scotia*, 2004 WL 2486263, at *8 (E.D. Pa. Nov. 2, 2004) (motion to dismiss granted where plaintiff's claim that it was entitled to indemnification in the form of money damages, premised upon an alleged violation of express warranty, had no contractual basis; a plain reading of the contractual language showed that the parties agreed that the scope of remedial action for providing a defective product or deficient service regarding airplane installation kits "would be replacement or repair, and nothing more.").

1. New GM is not obligated to pay costs or damages to consumers under the Glove Box Warranty

6. Under the Glove Box Warranty, the exclusive remedy available to any Vehicle owner with a covered defect is "repair and replacement" of parts exhibiting defects in material or workmanship, upon tender to a dealer within the time and distance limitations of the warranty. The Glove Box Warranty expressly disclaims payment of the monetary "costs" or "damages" that Plaintiffs seek. *See* 2008 Limited Warranty, p. 9, Ex. C to New GM's Motion ("Economic loss or extra expense is not covered" under the Glove Box Warranty).

7. This means that Plaintiffs are not entitled to a judgment obligating New GM to pay money to the Plaintiffs because such payments are not within New GM's Assumed Liabilities. MSPA § 2.3(a)(vii); Sale Order, ¶ 56; *see also, Castillo supra*, Decision After Trial

dated April 17, 2012, at 13 ("New GM [was] assuming only express warranties that were delivered upon the sale of vehicles" and that the Sale Order "intended to exclude other kinds of warranty-related claims."). Put simply, New GM may not be asked to pay something that is not expressly set forth in the Glove Box Warranty.

2. Plaintiffs' request for injunctive relief is outside the scope of the Glove Box Warranty and impermissibly relies on a latent defect theory.

8. Plaintiffs also seek an injunction to ensure "***future*** repairs under their warranties for these unique parts." Plaintiffs' Response, p. 10 (emphasis added). This ties into the allegation in the SAC that New GM allegedly is liable for failing to replace the ***spindle rods*** with parts of different design "so that premature tire wear and misalignment ***would not*** occur" [in the future] for the class vehicles. SAC, ¶54 (emphasis added). These statements confirm that Plaintiffs want the Court to force New GM to (i) fix the alleged consequences of the defect in a manner Plaintiffs choose, *i.e.*, by changing the design of the spindle rods; and (ii) prevent any potential ***future*** tire wear and tear given the latent nature of the alleged defect.

9. There is no support for Plaintiffs' request against New GM. Nothing in the Glove Box Warranty provides any procedural right to injunctive or other prospective relief at all, let alone for an order that New GM swap out the spindle rods for a different design. The Glove Box Warranty only covers defects in "materials and workmanship," not design defects. *See* 2008 Limited Warranty, p. 4.

10. Even if Plaintiffs could demand an "injunction" forcing New GM to make *some* repair, there is nothing in the Glove Box Warranty vesting Vehicle owners with the right to demand a specific type of change or repair. Plaintiffs want an order that New GM replace all the spindle rods in the Vehicles. Yet, Plaintiffs' own allegations in the SAC illustrate that this is unnecessary to address the harm to their Vehicles allegedly caused by the spindle rod design.

The alleged potential consequences of the spindle design defect -- "premature tire wear and misalignment" (SAC ¶54) -- can and typically are addressed through tire replacements and/or realignment. Plaintiff Cole purchased her vehicle in June 2008, and it was not until ***three-years later*** in June 2011, that she brought her vehicle in for service to seek a tire change. SAC, ¶38. She does not allege that her vehicle was inoperable before that time or after. Similarly, Ms. Dickerson bought her vehicle in March 2008 and it was not until July 2010 that she "discovered" wear to her tires. SAC, ¶42. Even Ms. Trusky, who alleges that her tires initially were replaced at approximately 6,000 miles (free of charge to her), does not claim that she needed new tires until her vehicle had approximately 24,240 miles. *Id*., at 35. Like Ms. Cole, Plaintiffs Dickerson and Trusky do not allege that their Vehicles are, or would be, inoperative following tire replacements.

11. Because the Glove Box Warranty does not vest the Vehicle owners with the right to select the type of repair, particularly where the allegations show their subjective choice to be unnecessary to render the Vehicle operative, Plaintiffs request for a court order forcing New GM to change all the spindle rods in their Vehicles falls outside the Glove Box Warranty and is not an Assumed Liability. MSPA § 2.3(a)(vii); Sale Order, ¶ 56; *see also*, *Castillo supra*, Decision After Trial, dated April 17, 2012.

12. Moreover, Plaintiffs are not asking the Court to make their vehicles operative ***during*** the warranty period through their desired form of repair. They are seeking to effectuate a change in the design to ***prevent the manifestation of future*** tire wear permanently. Under Plaintiffs' theory, New GM is liable for breach of the Glove Box Warranty if a consumer needed additional repairs ***after*** the warranty expired and New GM had an opportunity to replace the spindle rods before the warranty expired and did not do so. This is the essence of a claim

premised on a latent defect theory.

13. Plaintiffs' contention and reliance on the latent defect theory would turn the concept of a limited Glove Box Warranty on its head. By definition, a warranty that is limited in time and duration recognizes that some defects might arise or manifest after the warranty coverage expires. Courts universally recognize that sellers providing warranties of repair are not responsible to continue to address latent defects or repair conditions which are in vehicles after the warranty expires, even where they arise from circumstances contended to constitute a "known" latent defect that existed prior to the expiration of the warranty. *See* New GM's Motion, pp. 16-17; *Abraham v. Volkswagen of America, Inc.*, 795 F.2d 238, 250 (2d Cir.1986) ("[Manufacturers . . . can always be said to 'know' that many parts will fail after the warranty period has expired. A rule that would make failure of a part actionable based on such 'knowledge' would render meaningless time/mileage limitations in warranty coverage").[5] Put simply, latent defects that cause consequences – such as tire wear – after the warranty expires may not form the basis of a claim under the Glove Box Warranty. And because a seller's knowledge of a latent defect is not sufficient to trigger warranty coverage absent manifestation of

[5] This is consistent with the more general rule that the potential for a future failure is not the basis for a product liability claim. *See, e.g. O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 503-04 (8th Cir. 2009) ("It is not enough to allege that a product line contains a defect or that a product is at risk of manifesting the defect; rather, the plaintiffs must allege that their product actually exhibited the alleged defect"; dismissing claim where buyers of drop-side crib alleged that drop-side was defective because it *could potentially* separate from the crib frame); *Statler v. Dell, Inc.*, 775 F. Supp. 2d 474, 485 (E.D.N.Y. 2011) ("Plaintiff's claim to recover for *possible* safety hazards that have not occurred in the seven years since purchase of his computers, is not plausible."); *Jasper v. Abbott Labs., Inc.* 834 F. Supp. 2d 766, 772 (N.D. Ill. 2011) ("where a product performs satisfactorily and never exhibits an alleged defect, no cause of action lies"); *In re Ford Motor Co. E-350 Van Products Liability Litigation (No. II)*, 2010 WL 2813788, at *57-59 (D.N.J. July 9, 2010) (dismissing claims where vans at issue "only contain a potential defect in handling" and, absent manifestation of the defect, the vehicles "perform[ ] just as [they were] intended, and thus there is no injury and no basis for relief."); *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 889 (Mass. 2008) (dismissing breach of implied warranty claim where plaintiffs failed to show that defendant's conduct caused them a loss or injury); *In re Canon Cameras*, 237 F.R.D. 357, 359 (S.D.N.Y. 2006) (collecting cases noting that "[i]n most jurisdictions, the courts recognize that unless a product actually manifests the alleged defect, no cause of action for breach of express or implied warranty or fraud is actionable.").

an actual injury, (*Abraham*, *supra*, at p. 250), this obviously means that a seller has no inherent duty to prevent manifestation of that defect in the future. Holding New GM responsible for a failure to *prevent* the potential consequences of an alleged latent defect for vehicles sold by Old GM that might not manifest at all, is directly counter to both *Abraham* and its progeny, and to the terms of the 363 Sale. *See* New GM's Motion, pp. 16-17 (listing numerous cases).

14. For the foregoing reasons, the Court should dismiss the case completely pursuant to Rule 12(b)(6). If a complete dismissal is not granted, the Court should at least resolve definitively the core bankruptcy dispute regarding the scope of New GM's alleged warranty obligations. The Court should affirm and rule that:

a. Plaintiffs may not pursue a warranty claim against New GM for "latent defects" in vehicles designed, assembled and sold by Old GM;

b. New GM is not liable for Old GM's conduct or alleged breaches of warranties;

c. New GM's warranty obligations to vehicle owners are limited to honoring the specific terms of the Glove Box Warranty as to vehicles presented for repair to New GM dealers within the mileage and/or duration limitations contained in the Glove Box Warranty; and

d. New GM is not liable for monetary damages or other economic loss under the terms of the Glove Box Warranty, or for injunctive relief to assure future repairs or design changes.

15. New GM believes these principles resolve the entirety of this case. But even if the Court concludes otherwise, what would remain would represent a handful of individual consumer claims unsuitable for class treatment.

B. Plaintiffs' Attempt To Justify The Definition Of The Proposed Class Further Highlights That It Is Not Ascertainable And That Common Proofs Could Never Resolve The Claims Of All Putative Members.

16. To the extent the Court finds any of the claims asserted should survive this Motion, New GM requests that the Court strike the class allegations because, at a minimum, the putative class defined in the SAC is not ascertainable and individual issues would predominate over common ones. *See* Motion, pp. 20-23. Because further evidentiary development would not change this fact, it is proper and efficient for the Court to strike the allegations at this stage in the proceedings.

1. The Court may consider certification at this stage.

17. Plaintiffs' threshold argument is that there are no cases where "courts have employed Rule 12(b)(6) to assess the requirements for class certification" and that New GM's request to strike the class allegations is premature. (Plaintiffs' Response, p. 20).

18. The first assertion is wrong (see below), but is a straw-man argument in any event. New GM moved to *dismiss* the case under Rule 12(b)(6), and in the alternative, moved to strike the class allegations pursuant to Rule 23(d)(1)(D). *See* New GM's Motion, p. 19. New GM properly has sought relief and cited an appropriate court rule.

19. It also is not premature to consider certification at the pleading stage. The Supreme Court has noted that "[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of absent parties are fairly encompassed within the named plaintiff's claim." *General Telephone Co. Of Southwest v. Falcon,* 457 U.S. 147, 160 (1982). Contrary to what Plaintiffs contend, some courts do, in fact, simply dismiss class allegations pursuant to Rule 12 for failure to state a valid claim for class certification. *E.g., John v. National Sec. Fire and Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) ("Where it is facially apparent from the pleadings that there is no ascertainable class, a district court may dismiss the class allegation

on the pleadings [pursuant to Rule 12(b)]."); *Hylaszek v. Aetna Life Ins. Co.*, 1998 WL 381064, at *2 n.1 (N.D. Ill. July 1, 1998) ("Rule 12(c) is an appropriate means by which to adjudicate the Hylaszek's class allegations."). Other courts find authority to dismiss or strike class claims at the pleading stage in Rule 12(f), which provides that a court may strike any "redundant, immaterial, impertinent, or scandalous matter." *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 990-91 (N.D. Cal. 2009) (granting motion to strike class allegations pursuant to Rule 12(f)); *Shah v. Wilco Systems, Inc.*, 126 F. Supp. 2d 641, 656 (S.D.N.Y. 2000) (same).

20. Still, other courts rely on Rule 23(d)(1)(D) (formerly Rule 23(d)(4)), which permits courts to "require that the pleadings be amended to eliminate allegations about representation of absent persons." *Nguyen v. St. Paul Travelers Ins. Co.*, 2009 WL 23677, at *2 (E.D. La. Jan. 5, 2009) ("Courts have routinely applied rule 23(d)(1)(D) or its predecessor rule 23(d)(4) to motions to strike class allegations") (citations omitted); *Terrebonne v. Allstate Ins. Co.*, 251 F.R.D. 208, 209-10 (E.D. La. 2007) (striking class allegations under Rule 23(d)(4)). And, other courts rely on various combinations of these rules and Rule 23(c)(1)(a), which requires courts to determine whether a class may be certified at "an early practicable time." *Hovsepian v. Apple, Inc.*, 2009 WL 5069144, at *2 (N.D. Cal. Dec. 17, 2009) ("Under Rules 23(c)(1)(A) and 23(d)(1)(D), as well as pursuant to Rule 12(f), this Court has authority to strike class allegations prior to discovery if the complaint demonstrates that a class action cannot be maintained."); *see also Clark v. McDonald's Corp.*, 213 F.R.D. 198, 205 n.3 (D.N.J. 2003) (pursuant to Rule 23(c)(1)(a), a defendant may "move to strike class action allegations prior to discovery in those rare cases where the complaint itself demonstrates that the requirements for maintaining a class action cannot be met."); *Read v. Input/Output, Inc.*, 2005 WL 2086179, *2 (S.D. Tex. Aug. 26, 2005) ("The Court has authority to strike class allegations under both

Federal Rules of Civil Procedure 12(f) (as 'immaterial' allegations) and 23(d)(4) [now Rule 23(d)(1)(D).]").

21. Moreover, among New York federal courts, it long has been the practice that "courts may decide the issue of certification based on a review of the complaint prior to a party's motion to certify the proposed class." *Glewwe v. Eastman Kodak Co.*, 2006 WL 1455476, at *2 (W.D.N.Y. 2006) (denying class certification); *Luciano v. Eastman Kodak Co.*, 2006 WL 1455477, at *3 (W.D.N.Y. 2006) (same); *Shah v. Wilco Systems, Inc.*, 126 F. Supp. 2d 641, 656 (S.D.N.Y. 2000) (striking class allegations against some defendants); *Reinsich v. New York Stock Exch.*, 52 F.R.D. 561, 564 (S.D.N.Y. 1971) (denying class certification based on allegations in complaint).

2. Plaintiffs' Response highlights the ascertainably problem.

22. New GM explained in its Motion that a class must be defined so that its members are ***objectively*** identifiable based on the definition alone. *See* Motion, pp. 20-21; *Rose v. Saginaw County*, 232 F.R.D. 267, 271 (E.D. Mich. 2005); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2007); *Ronat v. Martha Stewart Living Omnimedia, Inc.*, 2008 WL 4963214 (S.D. Ill. 2008). A class is not ascertainable where "it would be impossible to definitively identify class members prior to individualized fact-finding and litigation." *Cunningham Charter Corp. v. Learjet, Inc.*, 258 F.R.D. 320, 327 (S.D. Ill. 2009) (*quoting Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 446 (E.D. Pa. 2000)); *accord, e.g., Haynes v. Dart*, 2009 WL 2355393, * 4 (N.D. Ill. 2009) (class was not ascertainable where plaintiffs could offer no assurance that class members could be determined "without conducting time-consuming individual litigation"). "If the court is required to conduct individual inquiries to determine whether each potential class member falls within the class, the court should deny certification." *Pastor v. State Farm Mut.*

Auto. Ins. Co., 2005 WL 2453900, *2 (N.D.Ill. 2005).

23. Plaintiffs originally attempted to satisfy this requirement by defining the putative class as consisting of "all purchasers" of 2007 and 2008 Impalas. *See* Revised Amended Class Action Complaint, ¶5, dkt #3, (dated April 3, 2012). While based on objective criteria, this definition was impermissibly overbroad because it included individuals who never had a problem manifest with their tires, and individuals who never presented their Vehicles to New GM for repairs for any reason. Courts routinely deny class certification of "all purchaser" class actions because they include uninjured persons.[6]

24. Plaintiffs' proposed solution to this problem in the SAC – to define the class only to individuals who encountered a manifestation of the defect and who notified a GM dealer of the issue – is no solution at all because it would require the Court to conduct individual fact-inquiries just to determine who was a member. The decision in *Ronat v. Martha Stewart Living Omnimedia, Inc.*, *supra*, is on point and illustrates the fundamental fallacy in Plaintiffs' simplistic approach. In that case, plaintiffs sought to represent a class of people who purchased Martha Stewart glass-top patio dining tables *and* who "experienced the spontaneous shattering of the glass table top." Noting that the class definition "must be definite enough that the class can be ascertained," the court denied class certification: "The class definition itself defeats the predominance requirement of Rule 23(b)(3) because it requires individualized proof related to spontaneous shattering—that is subsumed in the definition. . . . If the Court were to certify this case, how could class members "whose tables have spontaneously shattered" possibly be

[6] *See e.g., In re Canon Cameras*, 237 F.R.D. 357, 360 (S.D.N.Y. 2006) ("[P]laintiffs' proposal to certify the class of all camera owners, then determine which few suffered malfunctions, and then determine which few of those few even arguably can attribute the malfunctions to the design defect here alleged, would render the class action devise nothing more than a facade for conducting a small number of highly individualized cases").

identified?" *Ronat*, p. 5; *see also*, *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 454 (Tex. Sup. Ct 2000) (class definition was not ascertainable because it presumed the merits of the defect theory underlying the case). The same rationale applies in this case.

25. Plaintiffs' Response illustrates the point. They assert that New GM's dealers should have records of people who have "***complained***" and that a membership list could be compiled based on such complaints. *See* Plaintiffs' Response, p. 24, 25. Ignoring for the moment that dealerships generally do not keep records of repairs that they do not make, and ignoring also that searching for such records from thousands of third-party dealers is also a highly individual exercise, a class definition premised on "complaints" raises a host of subjective and individual questions. Consider:

a. "Complained" of what exactly? Of tire wear and tear? This tells us nothing – any number of issues can cause tire wear and tear (including just driving one's vehicle normally). Or must the complaint specifically mention spindle rods?

b. "Complained" how? Must the notice to New GM be set forth in dealer records? What if the Vehicle owner "complained" but it was not written down by the dealer? What if a complaint was recorded incorrectly or incompletely? Is a person's class membership to be decided by how well they and an individual dealer employee communicated with each other?

c. What is sufficient to constitute a "complaint" in the first place? What must a consumer say? Or mean? Is it enough for the issue of tire wear to be discussed at a dealer, with no demands by a consumer that the dealer address it?

d. Finally, any discussion of "complaints" carries with it a corollary requirement to assess their merits. A class must be defined by objectively determinable criteria.

> By definition, a "complaint" that puts at issue an unlimited (at least looked at prospectively) number of issues for individual determination is not susceptible for class treatment.

26. The list of questions could go on and on.[7] The very concept of a "complaint," which presumes a level of intent and knowledge by a consumer, is subjective. Subjective elements in a class definition render it unascertainable. *Zapka v. Coca-Cola Co.*, 2000 WL 1644539, at *3 (N.D. Ill., Oct. 27, 2000) (declining to certify a class where definition referred to state of mind – "all individuals who consumed diet Coke *deceived* by marketing practices . . . into *believing* that . . ."); *see also, Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 454 (Tex. Sup. Ct. 2000) (the use of state of mind in a class definition was not proper). The need to evaluate the nature of a person's "complaint" necessarily means there will be individual fact-finding. This obviates the purpose of having representative litigation in the first place.

27. The definition proposed by Plaintiffs is not ascertainable, and the class allegations should be stricken for this reason alone.

3. Certification would be improper given the need for individual proofs.

28. New GM also explained that individual questions and proofs would predominate over any common issues. *See* Motion, pp. 21-22. This would be the case for numerous issues,

[7] Repair records for Ms. Dickerson illustrate the point. See Service Records, Exhibit "A" to this Reply Brief. One cannot even determine whether Ms. Dickerson is part of the class based on her vehicle's service records. A service invoice from Al Serra Chevrolet shows that on July 7, 2010, Ms. Dickerson had a "wheel alignment inspection," that the tires were "worn on the inside," and that the dealer replaced two tires at no charge to her and that she purchased two other tires herself. Her vehicle had 31,558 miles on it at the time of this service. The records do not mention any statements or "complaints" by her at all, let alone related to the spindle rods or any alleged defects with her vehicle. There is no indication of what caused the "worn tires" and no way to determine it. Ms. Dickerson's service record does not, as Plaintiffs promise, resolve whether she even falls within the class. More individualized fact-finding would be needed.

but is particularly true as it relates to causation.

29. Even assuming that all Vehicles share a common "defect" in the form of an improper spindle rod design, a fact-finder would need to determine whether a given class member suffered a manifestation of injury from the defect, *i.e.*, premature tire wear and tear caused by spindle deficiencies (and not by ordinary usage or something else). Plaintiffs themselves acknowledge in their SAC that the issue of manifestation is an open issue. In paragraph 20(b) of the SAC, they allege that one of the questions in this case is "***[w]hether*** all Class members' 2007 and 2008 Impalas suffered damage from a defective spindle rod?" SAC, ¶20(b) (emphasis added). In paragraph 20(c), they similarly allege that an open question is "***[w]hether*** the defect failure manifested during the warranties' durational terms?" *Id*., at ¶20(c) (emphasis). These are, indeed, questions that must be answered in order for any given Vehicle owner to recover under Plaintiffs' theory. There is no common proof available – and nothing at all suggested by Plaintiffs – that could answer these threshold causation questions on a class wide basis.

30. Moreover, even if a consumer presented its Vehicle to a New GM dealer with tire wear and tear, the precise cause of the wear and tear would need to be determined. Many things cause wear and tear on tires including duty cycles, driving habits, improper inflation, alignment, tire defects and terrain. Plaintiffs do not deny this. Nor could they. The Glove Box Warranty itself makes this plain by virtue of the fact that it covers defects to a Vehicle's tires but does not cover normal wear and tear to them through use. *See* Glove Box Warranty, p. 7 ("Normal tire wear or wear-out is not covered.").

31. Rather than explain how common *proofs* could resolve the causation and other merits issues for all putative members, Plaintiffs avoid the debate altogether and argue instead

that they have defined their class in a way that each member will, by definition, have established the elements of the claims. *See* Plaintiffs' Response, p. 27 (asserting that the class only includes individuals who have a defect, presented their vehicle to a dealership, within the warranty duration and mileage limits, and [improperly] were denied recovery). According to Plaintiffs, someone is in the class only if they can satisfy causation and other elements in the first place.

32. Plaintiffs' argument is circular and violates the rule that putative classes may not be defined in a "fail safe" manner, where membership is limited to those who will, by definition, be entitled to relief. Classes are "fail safe" when either the putative class members win, or by virtue of losing, were not in the class from the onset and are not bound by a judgment. *See e.g.*, *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347 (6th Cir. 2011) (affirming trial court's denial of certification because the proposed class only included those "entitled to relief"); *Ford Motor Co. v. Sheldon*, 22 S.W.3rd 444, 454 (Tex. Sup. Ct 2000) (affirming denial of class certification in part because the definition assumed a positive determination of the merits and created a "fail-safe class").

33. Defining the class in a manner effectively to "those who will win" is improper; it is not a substitute for Plaintiffs' burden of showing how a class can be formed and litigated with common proofs. The Court should strike the class allegations for this reason too.

C. The Court Should Transfer The Case Back To The Eastern District Of Michigan To Resolve Plaintiffs' Individual Claims, If Any, That Survive This Motion.

34. When this case was filed in the Eastern District of Michigan, the Complaint raised a number of core bankruptcy issues regarding the scope of New GM's Assumed Liabilities. New GM asserted that such threshold issues must be resolved by this Court. Plaintiffs initially disagreed but ultimately acquiesced, and the parties stipulated to the Transfer Order (Ex. H to New GM's Motion).

35. Plaintiffs now argue that the case must remain in this Court for final resolution of the claims, even if the Court resolves all core bankruptcy issues such that the case continues only as an individual garden-variety warranty action. Plaintiffs even imply that there was universal agreement all along that only this Court would have jurisdiction for ***all*** purposes. This is simply not true, and begs the question why Plaintiffs started the proceeding in Michigan if this Court had jurisdiction for all purposes.

36. The parties stipulated in the Transfer Order that there was disagreement regarding the scope of New GM's Assumed Liabilities and which court had jurisdiction to resolve it. *Id*., ¶3. That was the "*Dispute*." *Id*. Plaintiffs expressly disagreed with New GM's position on the Dispute but agreed that it would serve judicial economy for this Court to "address and resolve the Dispute," which meant addressing and resolving the scope of New GM's Assumed Liabilities. If there is no outright dismissal following this Motion, but the Court addresses the fundamental bankruptcy issues, *i.e.*, what claims Plaintiffs may assert and what relief Plaintiffs may seek consistent with the scope of Assumed Liabilities, then there no longer is a "Dispute" within the meaning of the Transfer Order. Any remaining portion of the case would appropriately be sent back to the Eastern District of Michigan where any surviving claims could be litigated to conclusion. There is no particular reason why this Court need oversee a garden-variety action once the scope of Assumed Liabilities is adjudicated.

WHEREFORE, New GM respectfully requests that this Court:

(1) Enter an Order dismissing the case with prejudice substantially in the form attached to New GM's Motion as Exhibit "J," or, alternatively,

(2) Enter an Order as follows:

(i) resolving the core bankruptcy issues in the case by ruling that:

a. Plaintiffs may not pursue a warranty claim against New GM for "latent defects" in Vehicles designed, assembled and sold by Old GM;

b. New GM is not liable for Old GM's conduct or alleged breaches of warranties;

c. New GM's warranty obligations are limited to honoring the specific terms of the Glove Box Warranty as to vehicles presented for repair to New GM dealers within the mileage and/or duration limitations contained in the Glove Box Warranty; and

d. New GM is not liable for monetary damages or other economic loss under the terms of the Glove Box Warranty, or for injunctive relief to assure future repairs or design changes.

(ii) striking the class allegations pursuant to Civil Rule 23(d)(1)(D), and

(iii) to the extent required, transferring the case back to the originating Court (Eastern District of Michigan) for adjudication of the Plaintiffs' individual claims consistent with the Court's rulings.

Dated: September 21, 2012

Respectfully submitted,

____/s/ Arthur Steinberg_____

Arthur Steinberg
Scott Davidson
KING & SPALDING LLP
1185 Avenue of the Americas
New York, New York 10036
Telephone: (212) 556-2100
Facsimile: (212) 556-2222

Attorneys for General Motors LLC f/k/a General Motors Company

EXHIBIT A

AL SERRA AUTO PLAZA

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SERVICE INVOICE

SERVICE DEPT. HOURS
MONDAY-FRIDAY
7:00 AM - 7:00 PM
SATURDAY 7:00 AM - 3:00 PM

G6167 S. SAGINAW
GRAND BLANC, MI 48439
(810) 694-5440
Email: info@alserra.com
www.alserra.com

STATE REGISTRATION # F134251

CUSTOMER NO.	ADVISOR	TAG NO.	INVOICE DATE	INVOICE NO.
235853	MARY R BROWN	1937	07/26/10	CVCS411937
PATTY DICKERSON 5330 JAMESTOWN RD GRAND BLANC, MI 48439-7704	LABOR RATE / LICENSE NO. 314 / MILEAGE 31,558	COLOR	STOCK NO.	
	YEAR / MAKE / MODEL 08/CHEVROLET/IMPALA/4-DOOR SEDAN	DELIVERY DATE	DELIVERY MILES	
	VEHICLE I.D. NO. 2G1WB58K281268208	SELLING DEALER NO.	PRODUCTION DATE	
	F.T.E. NO. / P.O. NO.	R.O. DATE 07/26/10		
RESIDENCE PHONE 517-303-0129	BUSINESS PHONE	COMMENTS		

LABOR & PARTS

J# 1 06CVZ01 *4 WHEEL ALIGNMENT TECH(S):421 79.95
PERFORM 2 WHEEL AND 4 WHEEL ALIGNMENT INSPECTION
ALL 4 TIRES ARE WORN ON THE INSIDE,DOES ROTATION FAITHFULLY
COMPLETED
COMPLETED

PARTS	QTY	FP-NUMBER	DESCRIPTION	UNIT PRICE	
			JOB # 1 TOTAL PARTS		0.00
			JOB # 1 TOTAL LABOR & PARTS		79.95

J# 2+14CVZTIRES WHEELS AND TIRES TECH(S):330 0.01
Added Operation (MBROWN @ 07/26/2010 11:45)
CHECK WHEELS AND TIRES
REPLACE 2 FRONT TIRES INTREGRITY P225/60R16
REPLACED ALL 4 TIRES
511

PARTS	QTY	FP-NUMBER	DESCRIPTION	UNIT PRICE	
JOB # 2	2	19143613	GOODYEAR P225/60R16	85.80	171.60
			JOB # 2 TOTAL PARTS		171.60
			JOB # 2 TOTAL LABOR & PARTS		171.61

J# 3+07CVZ08 WHEELS AND TIRES TECH(S):330 WARRANTY
Added Operation (TKEELIN @ 07/26/2010 12:22)
7-26-10 GOODWILL BOTH REAR TIRES DUE TO CUST. SATISFACTION C
UST IS BUYING TWO FRONT AND GETTING 4-WHEEL ALGN. PER TATE
TPC# 1298MS
DOT: M6X0E6DR1008
INTERGITY
TIRE WEAR UNEVEN DID DUE REGULAR TIRE ROTATIONS
COMPLETED
511

PARTS	QTY	FP-NUMBER	DESCRIPTION	UNIT PRICE	
JOB # 3	2	19143613	GOODYEAR P225/60R16		WARRANTY
			JOB # 3 TOTAL PARTS		0.00
			JOB # 3 TOTAL LABOR & PARTS		0.00

MISC	CODE	DESCRIPTION	CONTROL NO	
JOB # A	SS	SHOP SUPPLIES & HAZ WASTE REMOVAL		4.00
JOB # 2	WW	WHEEL WEIGHTS		2.50
JOB # 2	CWD	100.00 WARRANTY DEDUCT	411937	-20.00
			TOTAL - MISC	-13.50

ESTIMATE
CUSTOMER HEREBY ACKNOWLEDGES RECEIVING
ORIGINAL ESTIMATE OF $21.00 (+TAX)
APPROVED REVISED ESTIMATE (# 1) OF $250.00 (+TAX) ON 07/26/10 AT 05:19pm
BY PATTY DICKERSON COMMENTS
TECHNICIAN CERTIFICATION

WE GUARANTEE OUR SERVICE LABOR FOR 90 DAYS OR 4,000 MILES, PARTS WARRANTY FOR 12 MONTHS OR 12,000 MILES OR WHICHEVER COMES FIRST. IF OUR REPAIR OR REPLACEMENT FAILS IN NORMAL SERVICE WITHIN THAT PERIOD WE'LL FIX IT FREE OF CHARGE, EXCEPT FOR ABUSE.

POWER OF ATTORNEY - KNOW ALL MEN THESE PRESENTS. That the undersigned does hereby constitute and appoint AL SERRA CHEVROLET-BUICK-GMC-CADILLAC my (our) true and lawful attorney to sign name, place and stead of the undersigned on any Insurance Checks or Drafts issued by Insurance Company covering any repairs to my (our) automobile authorized by myself (ourselves) in whatever manner is necessary to place check or draft in a cashable position.
I (we) hereby ratify and confirm whatever action said attorney shall or may take by virtue hereof in the premises.
THE ABOVE WORK HEREBY AUTHORIZED AND CONDITIONS AGREED TO AS OUTLINED ABOVE:

Signed _____

ALL PARTS ARE NEW UNLESS SPECIFIED OTHERWISE.

REPAIRS PROPERLY COMPLETED & CHECKED BY:
All repairs and parts listed were furnished in compliance with the Michigan Motor Vehicle Service and Repair Act (P.A. 300)

X

THE ONLY WARRANTIES APPLYING TO THIS PART(S) ARE THOSE WHICH MAY BE OFFERED BY THE MANUFACTURER. THE SELLING DEALER HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND NEITHER ASSUMES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR IT ANY LIABILITY IN CONNECTION WITH THE SALE OF THIS PART(S) AND/OR SERVICE. BUYER SHALL NOT BE ENTITLED TO RECOVER FROM THE SELLING DEALER ANY CONSEQUENTIAL DAMAGES, DAMAGES TO PROPERTY, DAMAGES FOR LOSS OF USE, LOSS OF TIME, LOSS OF PROFITS, OR INCOME OR ANY OTHER INCIDENTAL DAMAGES.

THE SELLER, AL SERRA, HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND AL SERRA NEITHER ASSUMES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR IT ANY LIABILITY IN CONNECTION WITH THE SALE OF THE VEHICLE.

THANK YOU

AL SERRA AUTO PLAZA

CHEVROLET • BUICK • GMC • CADILLAC

SERVICE INVOICE

SERVICE DEPT. HOURS
MONDAY-FRIDAY
7:00 AM - 7:00 PM
SATURDAY 7:00 AM - 3:00 PM

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STATE REGISTRATION # F134251

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RESIDENCE PHONE: 517-303-0129	BUSINESS PHONE	COMMENTS		

TECHNICIAN CERTIFICATION----------
421 MATTHEW CHITTICK M250177

TOTALS----------

****

[ ] CASH [ ] CHECK [ ] CREDIT CARD [ ] CHARGE
[ ] OTHER PAY METHOD

FACILITY REGISTRATION NUMBER F134251

!!!!!!!!!!!!CASH FOR YOUR VEHICLE!!!!!!!!!!!!!!!!!!

AL SERRA AUTO PLAZA HAS A NEED FOR ANY TYPE OF VEHICLE FOR OUR USED VEHICLE INVENTORY. WE WILL PAY (TOP DOLLAR) WHETHER YOU PURCHASE FROM US OR NOT.
CALL OR EMAIL NATE COTTRILL AT NCOTTRILL@ALSERRA.COM FOR AN IMMEDIATE CASH OFFER.!!!!!!!!!!!!!!!

TOTAL LABOR....	79.96
TOTAL PARTS....	171.60
TOTAL SUBLET...	0.00
TOTAL G.O.G....	0.00
TOTAL MISC CHG.	6.50
TOTAL MISC DISC	-20.00
TOTAL TAX.....	10.54
TOTAL INVOICE $	**248.60**

CUSTOMER SIGNATURE

********** DUPLICATE INVOICE **********

WE GUARANTEE OUR SERVICE LABOR FOR 90 DAYS OR 4,000 MILES, PARTS WARRANTY FOR 12 MONTHS OR 12,000 MILES OR WHICHEVER COMES FIRST. IF OUR REPAIR OR REPLACEMENT FAILS IN NORMAL SERVICE WITHIN THAT PERIOD WE'LL FIX IT FREE OF CHARGE. EXCEPT FOR ABUSE.

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I (we) hereby ratify and confirm whatever action said attorney shall or may take by virtue hereof in the premises.

THE ABOVE WORK HEREBY AUTHORIZED AND CONDITIONS AGREED TO AS OUTLINED ABOVE:

Signed _____

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THANK YOU