UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11 Case No.**
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*	:	**09-50026 (REG)**
Debtors.	:	**(Jointly Administered)**
KELLY CASTILLO, NICHOLE BROWN, BRENDA ALEXIS DIGIAN DOMENICO, VALERIE EVANS, BARBARA ALLEN, STANLEY OZAROWSKI, AND DONNA SANTI,	:	**Adv. Proc. No. 09-00509**
Plaintiffs,	:	
v.	:	
General Motors Company, f/k/a New General Motors Company, Inc.,	:	
Defendant.	:	
GENERAL MOTORS LLC,	:	
Counterclaimant,	:	
v.	:	
KELLY CASTILLO, NICHOLE BROWN, BRENDA ALEXIS DIGIAN DOMENICO, VALERIE EVANS, BARBARA ALLEN, STANLEY OZAROWSKI, DONNA SANTI, LAKINCHAPMAN LLC, ROBERT W. SCHMIEDER, II, AND MARK L. BROWN,	:	
Counterdefendants.	:	

NEW GM'S MOTION FOR SUMMARY JUDGMENT;
MEMORANDUM OF LAW IN SUPPORT THEREOF

Defendant General Motors LLC ("**New GM**"), formerly known as General Motors Company, hereby moves for summary judgment pursuant to Rule 56 of the Federal Rules of

Civil Procedure, Rule 7056 of the Federal Rules of Bankruptcy Procedure and Local Rule 7056-1 on the ground that there is no triable issue of material fact and that New GM is entitled to judgment as a matter of law on plaintiffs' First Amended Complaint ("**Complaint**") and on New GM's Counterclaims for (a) a declaration that New GM has no liability or responsibility whatsoever for the class action settlement that is the subject of the Complaint ("**Settlement**") and a permanent injunction barring plaintiffs and their counsel, as well as class members, from taking any further action to assert or prosecute against New GM claims arising out of the Settlement or the class action; and (b) for recovery of its attorneys' fees and costs arising out of plaintiffs' and counterdefendants' contumacious violation of the permanent injunction provisions of this Court's order approving the sale of the debtor's assets to New GM free and clear of liens pursuant to section 363 of the Bankruptcy Code ("**Sale Approval Order**") as set forth in the Amended and Restated Master Sale and Purchase Agreement ("**ARMSPA**") between Motors Liquidation Company ("**MLC**"), formerly known as General Motors Corporation, and New GM.

The motion is based on the annexed memorandum of law, the accompanying separate statement of undisputed facts and Declaration of L. Joseph Lines, III, and all other pleadings, papers and evidence on file here, as well as such oral argument as the Court may entertain.

Dated: New York, New York
December 18, 2009

[s] Gregory R. Oxford

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SUMMARY OF ARGUMENT

Plaintiffs claim New GM assumed responsibility for the Settlement as a "warranty" obligation pursuant to section 2.3(a)(vii)(A) of the ARMSPA.

They are wrong.

The only Saturn warranty obligations New GM assumed under ARMSPA § 2.3(a)(vii)(A) are those set forth in Saturn's standard limited warranty, which provides as its exclusive remedy free-of-charge repairs to correct defects related to materials or workmanship during the warranty period. ARMSPA § 2.3(a)(vii)(A) and paragraph 56 of the Sale Approval Order make it absolutely clear that New GM only assumed these warranty obligations "pursuant to and subject to conditions and limitations contained in," the standard warranty. Yet plaintiffs here are attempting to enforce a settlement which *only* compensates class members for repairs performed *outside the warranty period* and other items *not covered by the standard warranty*. Because the Settlement provides benefits completely outside the standard warranty's mileage and durational limits and goes beyond its exclusive repair remedy, the Settlement obviously does not give rise to any obligation "pursuant to and subject to conditions and limitations contained in," the Saturn warranty. Thus, plaintiffs' claims fail as a matter of law and New GM is entitled to judgment on the First Amended Complaint and also on New GM's counterclaims for a declaratory judgment, permanent injunction, costs and attorneys fees.

Lest there be any doubt concerning the liabilities New GM did and did not assume under ARMSPA § 2.3(a)(vii)(A), it is undisputed that MLC did not comply with the applicable Assumption and Assignment Procedures, as would have been necessary for MLC to assume and then assign the executory Settlement to New GM under this Court's Sale Procedures Order. Instead, the Settlement was designated for "reject[ion] later" on June 30, 2009, and plaintiffs now have stipulated that it can be rejected pursuant to an agreed order. As a result, and regardless of whether the Settlement is an executory contract or not, express provisions of the ARMSPA – sections 2.2(b)(vii)(C) and (E) – make the Settlement an "Excluded Contract" which therefore remains an exclusive liability of MLC.

Further, in light of the express Assumption and Assignment Provisions of the Sale Procedures Order, the ARMSPA, and section 365 of the Bankruptcy Code, as well as the searching attention paid early on in the MLC bankruptcy case as to which assets and liabilities were and were not going to pass to New GM, plaintiffs' Count II claim that New GM somehow "impliedly assumed" liability for the Settlement lacks any factual foundation and is legally barred in any event by the lack of evidence of two essential elements for finding an implied contract: (1) mutual assent by New GM and class members and (2) consideration to New GM.

In a final act of desperation, plaintiffs assert in their new Count III that the Settlement became a "Deferred Executory Contract" under ARMSPA § 6.6(c) after the Closing and that ARMSPA § 6.6(e)(ii) therefore obligated New GM "[f]rom and after the Closing" to pay "all amounts due in respect of [MLC's] performance" under the Settlement, *i.e.*, to assume dollar-for-dollar responsibility for all of MLC's pre-petition obligations under the Settlement. This argument fails for the most basic of reasons: because the class action and the Settlement were still stayed after the Closing, ***there were no "amounts due" to plaintiffs from MLC*** under the Settlement "from and after the closing." So even assuming that the Settlement was formerly a "Deferred" Executory Contract (despite MLC's consistent intent and, later, motion to reject it), and assuming further (incorrectly) that section 6.6(e)(ii) could somehow force dollar-for-dollar post-petition payments of pre-petition obligations arising out of a stayed class action, New GM owes plaintiffs nothing because section 6.6(e)(ii) by its terms only applies to "amounts due" from MLC "from and after the closing" and before the Settlement was rejected, *i.e.*, zero.

Finally, because liability under the Settlement is so clearly not an "Assumed Liability," plaintiffs' and their counsel's initiation and prosecution of this adversary proceeding (initially as a declaratory relief action in Delaware Chancery Court of all places) violates the injunctive provisions of paragraphs 8 and 47 of the Sale Approval Order. New GM therefore is entitled, without more, to summary judgment on its counterclaims for a declaration that it has no liability or responsibility to plaintiffs or class members under the Settlement, a permanent injunction restraining and prohibiting them from taking any further action against New GM based on the

Settlement, and an award of its costs and reasonable attorneys fees incurred in defending this facially meritless case.

ARGUMENT

Plaintiffs' attempt to saddle New GM with a huge liability that it did not assume collides head on with section 363 of the Bankruptcy Code, which authorizes the debtor to sell assets for the benefit of its estate *free and clear of pre-petition liabilities* except those which the purchaser expressly agrees to assume. Plaintiffs' action also contumaciously ignores the clear injunctive prohibitions of the Sale Approval Order, which were put in place to protect New GM from having to defend precisely this type of obviously meritless litigation. Because there is no genuine issue of material fact and New GM is entitled to judgment as a matter of law on both the First Amended Complaint and its counterclaims, *see* Rule 56(c), F.R.Civ.P., "[t]he judgment sought should be rendered forthwith" in New GM's favor.

I. THE SETTLEMENT IS NOT AN "ASSUMED LIABILITY"

ARMSPA § 2.3(a)(vii)(A) is very clear. New GM agreed to assume Saturn warranty obligations only under Saturn's standard limited warranty, *i.e.*, obligations "under express written warranties … that are specifically identified as warranties and delivered in connection with the sale of new, certified used or pre-owned vehicles or new or remanufactured motor vehicle parts and equipment (including service parts, accessories, engines and transmissions) manufactured or sold by [Saturn]…." **Undisputed Fact** ["**UF**"] **12**.[1]

Equally clearly, paragraph 56 of the Sale Approval Order confirms that New GM assumed Saturn warranty obligations *only* "pursuant to and ***subject to conditions and limitations contained in***" Saturn's standard limited warranty. **UF 15** (emphasis added).

The "conditions and limitations" of the Saturn warranty include (1) its definition of the warranty period (in the case of the VTi transmission, 5 years and 75,000 miles, whichever comes first), (2) its requirement that the vehicle be presented to an authorized Saturn Retailer for repair

[1] For the Court's convenience, New GM has attached to this memorandum pertinent excerpts from the voluminous ARMSPA and Sale Approval Order. *See* annexed index of provisions.

during the warranty period, and (3) its exclusive remedy of repair of defects related to materials or workmanship during the warranty period. **UF 13-14** (Complaint, Exh. G, pp. 5, 6, 7; Exh. V).

The whole point of the class action – and of this case – is the assertion that plaintiffs are entitled to compensation that is *not* within the "conditions and limitations contained in [Saturn's] express written warranties," specifically reimbursement for repairs *outside* the mileage and durational limits of the warranty. *See Abraham v. Volkswagen of America, Inc.*, 795 F.2d 238, 250 (2d Cir.1986) ("an express warranty does not cover repairs made after the applicable time or mileage periods have elapsed"). None of the plaintiffs claimed in the class action, and none claims here, that Saturn denied free-of-charge VTi transmission repairs during the warranty period. *See* **UF 1** (Complaint, Exh. F), ¶¶ 38-61.[2]

Thus, while plaintiffs attempted to plead a cause of action for breach of express warranty in the class action, they did not allege violations of the standard warranty terms which promise free-of-charge repairs during the warranty period. Instead, they argued (a) that advertising and promotional materials [*not* Saturn's "express written warranty"] allegedly created warranties-by-description under section 2-313 of the Uniform Commercial Code ("UCC") and (b) that the durational and mileage limits of the Saturn warranty were, allegedly, "unconscionable" under UCC § 2-302. **UF 1** (Complaint, Exh. F, ¶¶ 84, 89). These claims *did not* seek relief "pursuant

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[2] Barbara Allen: transmission failed and was replaced free-of-charge under warranty at approximately 33,000 miles, and overhauled under warranty at 68,000 miles; a third failure did not occur until approximately 107,000 miles. Complaint, Exh. F (Second Amended Complaint), ¶¶ 51-53.

Nichole Brown: purchased her Saturn Vue after it reached 75,000 miles; its transmission failed at approximately 78,000 miles. *Id.*, ¶¶ 41-42.

Kelly Castillo: transmission failed at approximately 80,000 miles. *Id.*, ¶¶ 39-40.

Brenda Alexis Digiandomenico: transmission failed and was replaced free-of-charge under warranty at 52,000 miles; the second failure occurred after 116,000 miles. *Id.*, ¶¶ 46-47.

Valerie Evans: transmission failed at 83,232 miles. *Id.*, ¶ 49.

Stanley Ozarowski: had unspecified transmission parts replaced under warranty at 32,394, 36,651 and 36,878 miles; transmission failed at 83,665 miles. *Id.*, ¶¶ 56-57.

Donna Santi: had transmission repairs performed free-of-charge under warranty at approximately 3,314 and 47,216 miles and had unspecified parts replaced, again apparently free-of-charge, at 77,972 miles; transmission failed again at 102,459 miles. *Id.*, ¶¶ 59-61.

to and subject to conditions and limitations contained in [Saturn's standard] express written warranties." **UF 15** (Sale Approval Order), ¶ 56. Instead, both claims overtly sought to expand Saturn's obligations by demanding compensation and repairs that were *not available* under the express terms of the Saturn warranty.

Moreover, there obviously was never any adjudication in the class action that MLC was liable for breach of express warranty and, indeed, plaintiffs expressly agreed in the Stipulation of Settlement, and the Final Judgment expressly provided, that MLC was *not* admitting liability on any of plaintiffs' underlying claims, including their claims for breach of express warranty. **UF 17** (Complaint, Exh. B, ¶ I-5) ("[MLC] expressly denies any wrongdoing and does not admit or concede any actual or potential fault, wrongdoing or liability in connection with any of the claims that have been or could have been alleged against it in the Action"). Indeed, the Final Judgment *flatly prohibits* the precise argument plaintiffs are making here – that the Settlement somehow constitutes or evidences an admission of warranty liability by MLC. **UF 17** (Complaint, Exh. A., ¶ 12) ("Neither this Judgment nor the Agreement (nor any document referred to herein or any action taken to carry out this Final Judgment) is, or may be construed as, or may be used as an admission by [MLC] of the validity of any claim, or actual or potential fault, wrongdoing or liability whatsoever").

Because MLC did not admit liability on plaintiffs' underlying claims in the class action, but instead explicitly disclaimed such liability, and because plaintiffs' underlying claims were not, in any event, claims "pursuant to" Saturn's standard warranty, liability under the Settlement is not a "warranty liability" at all, but is instead a liability under a judgment implementing a consensual settlement between plaintiffs and MLC. It is, after all the underbrush is cleared away, an unsecured liability of MLC to judgment creditors, nothing more and nothing less.

The mere fact that plaintiffs in the Class Action ***alleged*** as one of their multiple unproven claims that MLC/Saturn breached the Saturn express warranty does not magically transform the resulting negotiated settlement into a "liability arising under express written warranties" that could possibly be construed as an "Assumed Liability" under ARMSPA § 2.3(a)(vii)(A).

Plaintiffs' position simply proves too much, as it would lead inevitably to the absurd result of obligating New GM for every pre-petition MLC settlement of litigation in which the plaintiff made even a single unproven claim for breach of express warranty.

II. THE SETTLEMENT WAS AN EXECUTORY CONTRACT WHICH MLC DID NOT ASSUME OR ASSIGN TO NEW GM

Lest there be any doubt that New GM did not assume responsibility for the Class Action settlement through the "back door" of ARMSPA §2.3(a)(vii)(A), the detailed provisions of the ARMSPA and the Assumption and Assignment Procedures contained in the Sale Procedures Order[3] created a clear path for MLC and New GM to follow if – as was not the case – New GM had decided to assume responsibility for the Settlement. That the parties did not follow these "front door" procedures confirms New GM's and MLC's intent and agreement that exclusive liability under the Settlement was to remain with MLC.

Specifically, the assumption of Executory Contracts is governed by ARMSPA § 6.6, which provides for an Assumable Executory Contract Schedule listing "Executory Contracts entered into by [MLC and its co-debtors] that [they] may assume and assign to [New GM]…." **UF 8**. Far from being placed on the list of "Assumable" contracts, the Settlement on June 30, 2009 was designated for "reject[ion] later." **UF 9-10** (Declaration of L. Joseph Lines, III, ¶¶ 4-5 & Exh. 1).[4]

If contrariwise, the intent had been for MLC to assume the Settlement and assign it to New GM, it would have been designated as an Assumable Executory Contract and MLC would have complied with the Assumption and Assignment Procedures contained in the Sale

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[3] *I.e.*, the Court's "Order Pursuant to 11 U.S.C. §§ 105, 363, and 365 and Fed. R. Bankr. P. 2002, 6004, and 6006 (I) Approving Procedures for Sale of Debtors' Assets Pursuant to Master Sale and Purchase Agreement, etc., (II) Scheduling Bid Deadline and Sale Hearing Date; (III) Establishing Assumption and Assignment Procedures; and (IV) Fixing Notice Procedures and Approving Form of Notice" entered on June 2, 2009. Docket No. 274.

[4] The "reject later" designation was used when there was no reason to act immediately in order to avoid continuing payment or other obligations under the contract. Here, of course, MLC had no immediate payment or other obligations to class members due to the automatic stay. **UF 4-5**.

Procedures Order.[5] Under these procedures, MLC would have been required to notify plaintiffs as counterparties to the contract, give them the opportunity to log on to a secure website for information about Cure Amounts and other relevant matters, and advise them of their right to file an objection for hearing by the Court. **UF 8** (Sale Procedures Order, Finding F, ¶ 10 & Exh. D). None of this ever occurred. **UF 9** (Declaration of L. Joseph Lines, III, ¶ 5).

Instead, MLC moved to reject the Settlement on November 16, 2009 and plaintiffs stipulated that the motion could be granted, which it was via an agreed order on December 18, 2009. **UF 11** [Docket Nos. 4458, 4680]. As explained below, MLC's successful motion to reject the Settlement and the express provisions of the ARMSPA bar any argument in this case that New GM has assumed responsibility for the Settlement – even if plaintiffs are correct that it is a non-executory contract (which they are not[6]).

Under ARMSPA § 2.1(a), New GM at the Closing purchased from MLC the "Purchased Assets." ARMSPA § 2.2(a) defines nineteen categories of Purchased Assets, each of which is subject to the same express qualification: "but, in every case, excluding Excluded Assets." Thus, Excluded Assets were *not* purchased by New GM and it therefore has no liability or responsibility with respect to or on account of such assets.

ARMSPA § 2.2(b)(vii) provides that Excluded Assets include certain "Excluded Contracts":

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[5] ARMSPA § 6.6(f) required MLC and New GM to "comply with the procedures set forth in the Sale Procedures Order with respect to the assumption and assignment or rejection of any Executory Contract…," including the procedures set forth in paragraph 10 of that Order.

[6] The Settlement is executory in the classic sense that material performance remains due on both sides. *See* **UF 5-6**. As of June 1, 2009, MLC in order to implement the Settlement still would have had to mail claim forms to class members, class members still would have had to complete and return them, and MLC still would have had to evaluate each claimant's eligibility, make eligibility determinations, resolve any disputes and then provide settlement benefits to eligible class members for past *and future* VTi transmission concerns, *extending for several years into the future*. *See* **UF 4** (Complaint, Exh. B, ¶ III-1(C), p. 9) (permitting claims for future reimbursable repair expenses through 2010, 2011 or 2012 depending on the affected vehicle's model year).

> "Notwithstanding anything to the contrary contained in this Agreement [MLC and its co-debtors] shall retain all of their respective right, title and interest in and to, and shall not, and shall not be deemed to, sell, transfer, assign, convey or deliver to [New GM], and the Purchased Assets shall not, and shall not be deemed to, include the following (collectively, the "Excluded Assets"):
>
> > (vii) … (C) all pre-petition Executory Contracts … that have not been designated as or deemed to be Assumable Executory Contracts…. (E) all non-Executory Contracts for which performance by a third-party or counterparty is substantially complete and for which [MLC] owes a continuing and future obligation with respect to such non-Executory Contracts (collectively, the "Excluded Contracts")….

Under these provisions, New GM did not purchase, and therefore assumed no liability under, any "Excluded Contracts," whether they were executory or not.

Thus, as the Court hinted during oral argument on plaintiffs' Motion for Temporary Restraining Order, plaintiffs' argument that the Settlement somehow is not executory simply doesn't matter. It clearly is an Excluded Contract under subsection (vii)(C) if it is executory because it was never "designated or deemed to be" an Assumable Executory Contract. But even if the Settlement was not an Executory Contract, it still is an Excluded Contract under subsection (vii)(E) because, according to plaintiffs, their performance is "substantially complete" and MLC "owes [them] a continuing and future obligation with respect to" the Settlement.

Reinforcing this conclusion is ARMSPA § 2.2(a)(x), which makes it undeniably clear that the Purchased Contracts that passed to New GM as "Purchased Assets" only include "Contracts, *other than Excluded Contracts* (collectively, the 'Purchased Contracts')…." (emphasis added). Because the Settlement is an Excluded Contract, New GM has no liability under the Settlement because ARMSPA § 2.3(b)(iii) protects New GM against "all Liabilities arising out of, relating to, in respect of or in connection with the Excluded Assets." Since Excluded Assets include Excluded Contracts, and the Settlement is an Excluded Contract under ARMSPA §2.2(b)(vii), New GM has no liability under the Settlement.

III. THE "IMPLIED ASSUMPTION" CLAIM HAS NO LEGAL OR FACTUAL BASIS

In a nutshell, Count II of the First Amended Complaint asserts that GM's temporary continuation of MLC's "fresh failure" customer satisfaction program created an implied obligation to provide all of the benefits of the Settlement to all class members, whether they have

a "fresh failure" or not. Complaint, ¶ 56. As explained below, however, plaintiffs have offered no cognizable legal theory that would support this "implied assumption" claim.

Although a contract can be implied from the parties' conduct in an appropriate case, an implied contract has the same essential elements as an express contract. *Matter of Boice,* 226 A.D.2d 908, 910, 640 N.Y.S.2d 681, 682 (1996) (a contract implied from conduct "does not differ from an express agreement except in the manner by which its existence is established"). Thus, formation of an implied contract, just like an express contract, requires both consideration and "an indication of a meeting of the minds" of the parties. *Berlinger v. Lisi*, 288 A.D.2d 523, 524, 731 N.Y.S.2d 916 (1996); *Maas v. Cornell University*, 94 N.Y.2d 87, 93-94, 699 N.Y.S.2d 716 (1999) (implied contract "still requires such elements as consideration [and] mutual assent").

New GM's voluntary decision to provide reimbursement to individual class members with "fresh failures" may constitute an "agreement" with *those* customers to pay for repair of their VTi transmissions, the consideration for which, as plaintiffs have suggested, could be the potential for enhanced goodwill towards New GM on the part of those individual customers. But, importantly, *other* customers (the vast majority of class members) who did not have "fresh failures" during the brief period following the Closing in which New GM was offering to pay dealers for out-of-warranty VTi transmission repairs have not supplied New GM with any consideration whatsoever. In fact, plaintiffs do not allege that New GM had any communication at all *with these customers*, much less a "meeting of the minds," concerning benefits under the Settlement. Accordingly, New GM's repair offers to owners with "fresh failures" did not by any stretch of the imagination create an enforceable "implied" obligation to class members to honor the settlement agreement, particularly in light of MLC's express *rejection* of that agreement.[7]

Indeed, as the Court observed during the hearing on plaintiffs' motion for temporary restraining order, any such implied obligation clashes directly with the explicit attention that all

[7] Plaintiffs in this non-class action also lack standing to pursue declaratory relief on behalf of class members in the California class action. Moreover, their own claims as purported third-party beneficiaries (*see* Complaint, ¶ 53) are barred by ARMSPA § 9.11 which bars any action by any non-party to the contract not specifically identified as a third-party beneficiary. **UF 18**.

concerned paid early on in the MLC bankruptcy case to the specific assets and liabilities that were or were not going to pass to New GM. And, in fact, an express decision was made that New GM was *not* going to assume liability under the Settlement. **UF 9-11**.

IV. PLAINTIFFS' "DEFERRED EXECUTORY CONTRACT" THEORY IS ABSURD

Sensing defeat on Counts I and II, plaintiffs in their new Count III have seized upon an inapplicable subsection of ARMSPA § 6.6 that requires New GM to reimburse MLC's post-Closing, *i.e.*, post-petition, administrative expenses incurred in continuing to perform Deferred Executory Contracts. This provision, they say, obligates New GM to perform MLC's *pre-petition* obligations under the Settlement, which they claim is a Deferred Executory Contract.

This argument is nonsense *whether or not* the Settlement, prior to its rejection, was a Deferred Executory Contract.

Plaintiffs' argument begins with ARMSPA § 6.6(c), which defines the term "Deferred Executory Contract" as follows:

> "Immediately following the Closing, each Executory Contract entered into by [MLC] and then in existence that has not previously been designated as an Assumable Executory Contract, a Rejectable Executory Contract or a Proposed Rejectable Executory Contract, and that has not otherwise been assumed or rejected by [MLC] pursuant to Section 365 of the Bankruptcy Code, shall be deemed to be an Executory Contract subject to subsequent designation by [New GM] as an Assumable Executory Contract or a Rejectable Executory Contract (each a "Deferred Executory Contract")."

Plaintiffs say the Settlement fits this definition because, allegedly, it was never designated formally prior to the Closing as an Assumable Executory Contract, a Proposed Rejectable Executory Contract or a Rejectable Executory Contract.[8] Springing from this dubious premise, plaintiffs leap to the conclusion that ARMSPA § 6.6(e) required New GM following the Closing to shoulder MLC's pre-petition obligations to pay plaintiffs and their counsel "all amounts due in respect of [MLC's] performance" under the Settlement.

[8] While it is true that the Settlement never appeared on the Assumable Executory Contract Schedule, as of the Closing Date it *had* "otherwise been … rejected" after it was decided *not* to designate it as an Assumed Executory Contract but instead designate if for "reject[ion] later." **UF 9-10**. From and after the date of this designation (June 30, 2009), it makes no practical sense to describe the assumption/rejection status of the Settlement as "deferred."

Plaintiffs badly misread section 6.6(e). All it requires is that New GM reimburse MLC for post-Closing (and therefore, by definition, post-petition) administrative expenses incurred by Old GM in continuing performance under executory contracts that New GM did not want to reject immediately. An illustrative example would be ongoing post-Closing rent obligations for leased premises that New GM intends to vacate, but needs to keep until it can move out. Under those circumstances, it makes sense for New GM to pay the post-petition rent for premises *it* is using after the Closing. But, importantly, section 6.6(e), deals *only* with required reimbursement for post-Closing and, therefore, *post-petition* performance obligations of MLC that are *currently* due and/or payable under Deferred Executory Contracts:

> "***From and after the Closing*** and during the applicable period specified below, Purchaser shall be obligated to pay or cause to be paid ***all amounts due in respect of [MLC's] performance*** … (ii) under each Deferred Executory Contract, for so long as such Contract remains a Deferred Executory Contract…." (Emphasis added.)

Plaintiffs argue that this provision means that New GM following the Closing was obligated to fully perform MLC's pre-petition obligations under the Settlement, including reimbursement for covered transmission repairs, trade-in benefits, attorneys fees and plaintiffs' incentive awards. *See* First Amended Complaint, ¶¶ 65-72.

This simply makes no sense. Because the Final Judgment in the Class Action and the pre-petition Settlement it approved were still stayed on the Closing Date under section 362 of the Bankruptcy Code, and remain stayed today, there were and are no amounts or other performance due to plaintiffs from MLC "from and after the Closing." Thus, section 6.6(e) could not possibly impose any present obligation on New GM to pay, or reimburse MLC for, pre-petition amounts which are not currently "due" from MLC.

The language of section 6.6(e) clearly supports this common sense conclusion. MLC's obligations under the Settlement were *pre-petition* and therefore obviously were *not* "due in respect of [MLC's] performance" under the Settlement at any time "[f]rom and after the Closing" and prior to the granting of MLC's rejection motion. The whole point of the automatic stay is that "performance" of MLC's obligations under the Settlement is *not* due, short of the

ultimate processing and expected cents-on-the dollar payment of pre-petition claims. Moreover, under the ARMSPA § 6.6(c) definition, the Settlement could not possibly become a "Deferred Executory Contract" until "immediately after the Closing," so any "amounts due in respect to [MLC's] performance" under a Deferred Executory Contract that *would* be subject to section 6.6(e) would, by definition, be post-petition obligations, which the pre-petition Settlement benefits obviously are not. Thus, New GM owes plaintiffs nothing under section 6.6(e) even if the Settlement could somehow have been viewed as a Deferred Executory Contract before the Court approved its rejection.

V. GM IS ENTITLED TO SUMMARY JUDGMENT ON ITS COUNTERCLAIMS

This action is an improper attempt to fasten MLC liabilities on New GM which it clearly did not assume. Plaintiffs and their counsel therefore have violated and are continuing to violate the injunctive provisions of the Sale Approval Order, including paragraph 8 (emphasis added):

> "Except as expressly permitted or otherwise specifically provided by the [ARMSPA] or this Order, … ***all*** … ***litigation claimants, and other creditors***, ***holding liens, claims, encumbrances, and other interests of any kind or nature whatsoever*** … ***against*** … ***[MLC]*** … arising under or out of, in connection with, or in any way relating to, [MLC], the Purchased Assets, the operation of the Purchased Assets prior to the Closing, or the 363 Transaction, ***are forever barred, estopped, and permanently enjoined*** … ***from asserting against [New GM]*** … ***such persons' or entities' liens, claims, encumbrances, and other interests***…."

UF 19. Plaintiffs clearly are "litigation claimants" who are asserting against New GM, in flagrant violation of paragraph 8, a pre-petition "claim" or "other interest" against MLC.

Equally clearly, plaintiffs and their counsel are violating paragraph 47 of the Sale Approval Order, which provides in pertinent part as follows (emphasis added):

> "Effective upon the Closing …all persons and entities are forever prohibited and enjoined from … (a) commencing or continuing any action or other proceeding pending or threatened against [MLC] as against [New GM]…[or] (b) enforcing … any judgment against [MLC] as against [New GM]…."

UF 20. Plaintiffs and their counsel are directly violating this provision by (a) commencing and continuing this action against New GM and (b) attempting to enforce the pre-petition judgment in the class action against New GM.

Plaintiffs can hardly claim ignorance of these prohibitions following their receipt, on or about September 10, 2009, of a letter from New GM's counsel advising them that the filing and continued prosecution of this case, then pending in Delaware Chancery Court, violated the Sale Approval Order, and specifically violated the injunctive provisions quoted above. **UF 21**. Nor can plaintiffs deny that New GM has repeated this advice and warning on multiple occasions in its filings in the Delaware Chancery Court, in the United States Bankruptcy Court for the District of Delaware and in this Court. Finally, plaintiffs' counsel received a second warning letter from New GM's counsel after the case reached this Court. **UF 22** (November 12, 2009).

Thus, New GM has established all three elements for a finding of civil contempt against plaintiffs and their counsel: "(1) that a valid order of the court existed; (2) that the defendants [here, plaintiffs and their counsel as counterdefendants] had knowledge of the order; and (3) that [they] disobeyed the order." *Roe v. Operation Rescue*, 54 F.3d 133, 137 (3d Cir.1995) (citation and internal quotations omitted). The validity of the Sale Approval Order is not, and cannot, be challenged. Plaintiffs and their counsel cannot deny they knew of the order and, specifically, its injunctive provisions. And certainly their willful commencement and continued prosecution of this case violated the Order and can and should be punished as a civil contempt.

To bring plaintiffs' and their counsel's violations of the Sale Approval Order to an end, New GM urges that the Court grant summary judgment on its First Counterclaim (1) declaring that New GM has no responsibility or liability whatsoever for the Settlement or on any other claim arising out of the class action and (2) permanently enjoining and retraining plaintiffs and their counsel from asserting or prosecuting any claim against New GM arising out of the Settlement or class action.

GM also is entitled to summary judgment on its Second Counterclaim for an award of its costs and reasonable attorneys' fees incurred in defending this contumacious proceeding. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S.Ct. 497, 93 L.Ed. 599 (1949) (courts have inherent authority to use the civil contempt power "to enforce compliance with an order of the court *or to compensate for losses or damages sustained by reason of*

noncompliance") (emphasis added); *New York State NOW v. Terry*, 159 F.3d 86, 96 (2d Cir. 1998) ("A finding that a contemnor's misconduct was willful strongly supports granting attorney's fees and costs to the party prosecuting the contempt").

CONCLUSION

Plaintiffs' attempt to enforce against New GM a pre-petition Settlement which it never agreed to assume strikes at the very heart of section 363 of the Bankruptcy Code. The Court therefore should preclude plaintiffs and their counsel from pursuing New GM with pre-petition claims that appropriately should be addressed to the debtor. For this and all the foregoing reasons, New GM respectfully urges that the Court grant New GM's motion for summary judgment, deny plaintiffs' cross-motion for summary judgment, and set a hearing for determination of the exact amount of New GM's attorneys' fees and costs to be awarded as a result of counterdefendants' continuing contumacious violation of the Sale Approval Order.

New York, New York
Dated: December 18, 2009

[s] Gregory R. Oxford

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APPENDIX OF PERTINENT ARMSPA AND SALE APPROVAL ORDER PROVISIONS

EXHIBIT 1

ARTICLE II
PURCHASE AND SALE

Section 2.1 *Purchase and Sale of Assets; Assumption of Liabilities.* On the terms and subject to the conditions set forth in this Agreement, other than as set forth in **Section 6.30**, **Section 6.34** and **Section 6.35**, at the Closing, Purchaser shall (a) purchase, accept and acquire from Sellers, and Sellers shall sell, transfer, assign, convey and deliver to Purchaser, free and clear of all Encumbrances (other than Permitted Encumbrances), Claims and other interests, the Purchased Assets and (b) assume and thereafter pay or perform as and when due, or otherwise discharge, all of the Assumed Liabilities.

EXHIBIT 2

Section 2.2 Purchased and Excluded Assets.

(a) The "Purchased Assets" shall consist of the right, title and interest that Sellers possess and have the right to legally transfer in and to all of the properties, assets, rights, titles and interests of every kind and nature, owned, leased, used or held for use by Sellers (including indirect and other forms of beneficial ownership), whether tangible or intangible, real, personal or mixed, and wherever located and by whomever possessed, in each case, as the same may exist as of the Closing, including the following properties, assets, rights, titles and interests (but, in every case, excluding the Excluded Assets):

(x) subject to **Section 2.4**, all Contracts, other than the Excluded Contracts (collectively, the "Purchased Contracts"), including, for the avoidance of doubt, (A) the UAW Collective Bargaining Agreement and (B) any Executory Contract designated as an Assumable Executory Contract as of the applicable Assumption Effective Date;

EXHIBIT 3

(b) Notwithstanding anything to the contrary contained in this Agreement, Sellers shall retain all of their respective right, title and interest in and to, and shall not, and shall not be deemed to, sell, transfer, assign, convey or deliver to Purchaser, and the Purchased Assets shall not, and shall not be deemed to, include the following (collectively, the "Excluded Assets"):

(vii) (A) all Contracts identified on Section 2.2(b)(vii) of the Sellers' Disclosure Schedule immediately prior to the Closing, (B) all pre-petition Executory Contracts designated as Rejectable Executory Contracts, (C) all pre-petition Executory Contracts (including, for the avoidance of doubt, the Delphi Transaction Agreements and GM Assumed Contracts) that have not been designated as or deemed to be Assumable Executory Contracts in accordance with **Section 6.6** or **Section 6.31**, or that are determined, pursuant to the procedures set forth in the Sale Procedures Order, not to be assumable and assignable to Purchaser, (D) all Collective Bargaining Agreements not set forth on the Assumable Executory Contract Schedule and (E) all non-Executory Contracts for which performance by a third-party or counterparty is substantially complete and for which a Seller owes a continuing or future obligation with respect to such non-Executory Contracts (collectively, the "Excluded Contracts"), including any accounts receivable arising out of or in connection with any Excluded Contract; it being understood and agreed by the Parties hereto that, notwithstanding anything to the contrary herein, in no event shall the UAW Collective Bargaining Agreement be designated or otherwise deemed or considered an Excluded Contract;

EXHIBIT 4

Section 2.3 Assumed and Retained Liabilities.

(a) The "Assumed Liabilities" shall consist only of the following Liabilities of Sellers:

(vii) (A) all Liabilities arising under express written warranties of Sellers that are specifically identified as warranties and delivered in connection with the sale of new, certified used or pre-owned vehicles or new or remanufactured motor vehicle parts and equipment (including service parts, accessories, engines and transmissions) manufactured or sold by Sellers or Purchaser prior to or after the Closing and (B) all obligations under Lemon Laws;

EXHIBIT 5

(b) Each Seller acknowledges and agrees that pursuant to the terms and provisions of this Agreement, Purchaser shall not assume, or become liable to pay, perform or discharge, any Liability of any Seller, whether occurring or accruing before, at or after the Closing, other than the Assumed Liabilities. In furtherance and not in limitation of the foregoing, and in all cases with the exception of the Assumed Liabilities, neither Purchaser nor any of its Affiliates shall assume, or be deemed to have assumed, any Indebtedness, Claim or other Liability of any Seller or any predecessor, Subsidiary or Affiliate of any Seller whatsoever, whether occurring or accruing before, at or after the Closing, including the following (collectively, the "Retained Liabilities"):

(iii) all Liabilities arising out of, relating to, in respect of or in connection with the Excluded Assets, other than Liabilities otherwise retained in this **Section 2.3(b)**;

EXHIBIT 6

Section 6.6 Assumption or Rejection of Contracts.

(a) The Assumable Executory Contract Schedule sets forth a list of Executory Contracts entered into by Sellers that Sellers may assume and assign to Purchaser in accordance with this Section 6.6(a) (each, an "Assumable Executory Contract"). Any Contract identified on Section 6.6(a)(i) of the Sellers' Disclosure Schedule and Section 6.6(a)(ii) of the Sellers' Disclosure Schedule shall automatically be designated as an

Assumable Executory Contract and deemed to be set forth on the Assumable Executory Contract Schedule. Purchaser may, until the Executory Contract Designation Deadline, designate in writing any additional Executory Contract it wishes to designate as an Assumable Executory Contract and include on the Assumable Executory Contract Schedule, or any Assumable Executory Contract it no longer wishes to designate as an Assumable Executory Contract and remove from the Assumable Executory Contract Schedule; provided, however, that (i) Purchaser may not designate as an Assumable Executory Contract any (A) Rejectable Executory Contract, unless Sellers have consented to such designation in writing or (B) Contract that has previously been rejected by Sellers pursuant to Section 365 of the Bankruptcy Code, and (ii) Purchaser may not remove from the Assumable Executory Contract Schedule (v) the UAW Collective Bargaining Agreement, (w) any Contract identified on Section 6.6(a)(i) of the Sellers' Disclosure Schedule or Section 6.6(a)(ii) of the Sellers' Disclosure Schedule, (x) any Contract that has been previously assumed by Sellers pursuant to Section 365 of the Bankruptcy Code, (y) any Deferred Termination Agreement (or the related Discontinued Brand Dealer Agreement or Continuing Brand Dealer Agreement) or (z) any Participation Agreement (or the related Continuing Brand Dealer Agreement). Except as otherwise provided above, for each Assumable Executory Contract, Purchaser must determine, prior to the Executory Contract Designation Deadline, the date on which it seeks to have the assumption and assignment become effective, which date may be the Closing Date or a later date (but not an earlier date). The term "Executory Contract Designation Deadline" shall mean the date that is thirty (30) calendar days following the Closing Date, or if such date is not a Business Day, the next Business Day, or if mutually agreed upon by the Parties, any later date up to and including the Business Day immediately prior to the date of the confirmation hearing for Sellers' plan of liquidation or reorganization. For the avoidance of doubt, the Executory Contract Designation Deadline may be extended by mutual agreement of the Parties with respect to any single unassumed and unassigned Executory Contract, groups of unassumed and unassigned Executory Contracts or all of the unassumed and unassigned Executory Contracts.

(b) Sellers may, until the Closing, provide written notice (a "Notice of Intent to Reject") to Purchaser of Sellers' intent to designate any Executory Contract (that has not been designated as an Assumable Executory Contract) as a Rejectable Executory Contract (each a "Proposed Rejectable Executory Contract"). Following receipt of a Notice of Intent to Reject, Purchaser shall as soon as reasonably practicable, but in no event later than fifteen (15) calendar days following receipt of a Notice of Intent to Reject (the "Option Period"), provide Sellers written notice of Purchaser's designation of one or more Proposed Rejectable Executory Contracts identified in such Notice of Intent to Reject as an Assumable Executory Contract. Each Proposed Rejectable Executory Contract that has not been designated by Purchaser as an Assumable Executory Contract during the applicable Option Period shall automatically, without further action by Sellers, be designated as a Rejectable Executory Contract. A "Rejectable Executory Contract" is an Executory Contract that Sellers may, but are not obligated to, reject pursuant Section 365 of the Bankruptcy Code.

(c) Immediately following the Closing, each Executory Contract entered into by Sellers and then in existence that has not previously been designated as an Assumable

Executory Contract, a Rejectable Executory Contract or a Proposed Rejectable Executory Contract, and that has not otherwise been assumed or rejected by Sellers pursuant to Section 365 of the Bankruptcy Code, shall be deemed to be an Executory Contract subject to subsequent designation by Purchaser as an Assumable Executory Contract or a Rejectable Executory Contract (each a "Deferred Executory Contract").

(d) All Assumable Executory Contracts shall be assumed and assigned to Purchaser on the date (the "Assumption Effective Date") that is the later of (i) the date designated by the Purchaser and (ii) the date following expiration of the objection deadline if no objection, other than to the Cure Amount, has been timely filed or the date of resolution of any objection unrelated to Cure Amount, as provided in the Sale Procedures Order; provided, however, that in the case of each (A) Assumable Executory Contract identified on Section 6.6(a)(i) of the Sellers' Disclosure Schedule, (2) Deferred Termination Agreement (and the related Discontinued Brand Dealer Agreement or Continuing Brand Dealer Agreement) designated as an Assumable Executory Contract and (3) Participation Agreement (and the related Continuing Brand Dealer Agreement) designated as an Assumable Executory Contract, the Assumption Effective Date shall be the Closing Date and (B) Assumable Executory Contract identified on Section 6.6(a)(ii) of the Sellers' Disclosure Schedule, the Assumption Effective Date shall be a date that is no later than the date set forth with respect to such Executory Contract on Section 6.6(a)(ii) of the Sellers' Disclosure Schedule. On the Assumption Effective Date for any Assumable Executory Contract, such Assumable Executory Contract shall be deemed to be a Purchased Contract hereunder. If it is determined under the procedures set forth in the Sale Procedures Order that Sellers may not assume and assign to Purchaser any Assumable Executory Contract, such Executory Contract shall cease to be an Assumable Executory Contract and shall be an Excluded Contract and a Rejectable Executory Contract. Except as provided in **Section 6.31**, notwithstanding anything else to the contrary herein, any Executory Contract that has not been specifically designated as an Assumable Executory Contract as of the Executory Contract Designation Deadline applicable to such Executory Contract, including any Deferred Executory Contract, shall automatically be deemed to be a Rejectable Executory Contract and an Excluded Contract hereunder. Sellers shall have the right, but not the obligation, to reject, at any time, any Rejectable Executory Contract; provided, however, that Sellers shall not reject any Contract that affects both Owned Real Property and Excluded Real Property (whether designated on **Exhibit F** or now or hereafter designated on Section 2.2(b)(v) of the Sellers' Disclosure Schedule), including any such Executory Contract that involves the provision of water, water treatment, electric, fuel, gas, telephone and other utilities to any facilities located at the Excluded Real Property, whether designated on **Exhibit F** or now or hereafter designated on Section 2.2(b)(v) of the Sellers' Disclosure Schedule (the "Shared Executory Contracts"), without the prior written consent of Purchaser.

(e) From and after the Closing and during the applicable period specified below, Purchaser shall be obligated to pay or cause to be paid all amounts due in respect of Sellers' performance (i) under each Proposed Rejectable Executory Contract, during the pendency of the applicable Option Period under such Proposed Rejectable Executory Contract, (ii) under each Deferred Executory Contract, for so long as such Contract remains a Deferred Executory Contract, (iii) under each Assumable Executory Contract,

as long as such Contract remains an Assumable Executory Contract and (iv) under each GM Assumed Contract, until the applicable Assumption Effective Date. At and after the Closing and until such time as any Shared Executory Contract is either (y) rejected by Sellers pursuant to the provision set forth in this **Section 6.6** or (z) assumed by Sellers and subsequently modified with Purchaser's consent so as to no longer be applicable to the affected Owned Real Property, Purchaser shall reimburse Sellers as and when requested by Sellers for Purchasers' and its Affiliates' allocable share of all costs and expenses incurred under such Shared Executory Contract.

(f) Sellers and Purchaser shall comply with the procedures set forth in the Sale Procedures Order with respect to the assumption and assignment or rejection of any Executory Contract pursuant to, and in accordance with, this **Section 6.6**.

(g) No designation of any Executory Contract for assumption and assignment or rejection in accordance with this **Section 6.6** shall give rise to any right to any adjustment to the Purchase Price.

(h) Without limiting the foregoing, if, following the Executory Contract Designation Deadline, Sellers or Purchaser identify an Executory Contract that has not previously been identified as a Contract for assumption and assignment, and such Contract is important to Purchaser's ability to use or hold the Purchased Assets or operate its businesses in connection therewith, Sellers will assume and assign such Contract and assign it to Purchaser without any adjustment to the Purchase Price; provided that Purchaser consents and agrees at such time to (i) assume such Executory Contract and (ii) and discharge all Cure Amounts in respect hereof.

EXHIBIT 7

Section 9.11 Parties in Interest. This Agreement shall be binding upon and inure solely to the benefit of each Party hereto and their respective permitted successors and

assigns; provided, that (a) for all purposes each of Sponsor, the New VEBA, and Canada shall be express third-party beneficiaries of this Agreement and (b) for purposes of Section 2.2(a)(x) and (xvi), Section 2.2(b)(vii), Section 2.3(a)(x), (xii), (xiii) and (xv), Section 2.3(b)(xv), Section 4.6(b), Section 4.10, Section 5.4(c), Section 6.2(b)(x), (xv) and (xvii), Section 6.4(a), Section 6.4(b), Section 6.6(a), (d), (f) and (g), Section 6.11(c)(i) and (vi), Section 6.17, Section 7.1(a) and (f), Section 7.2(d) and (e) and Section 7.3(g), (h) and (i), the UAW shall be an express third-party beneficiary of this Agreement. Subject to the preceding sentence, nothing express or implied in this Agreement is intended or shall be construed to confer upon or give to any Person, other than the Parties, their Affiliates and their respective permitted successors or assigns, any legal or equitable Claims, benefits, rights or remedies of any nature whatsoever under or by reason of this Agreement.

EXHIBIT 8

Approval of the MPA

3. The MPA, all transactions contemplated thereby, and all the terms and conditions thereof (subject to any modifications contained herein) are approved. If there is any conflict between the MPA, the Sale Procedures Order, and this Order, this Order shall govern.

EXHIBIT 9

56. The Purchaser is assuming the obligations of the Sellers pursuant to and subject to conditions and limitations contained in their express written warranties, which were delivered in connection with the sale of vehicles and vehicle components prior to the Closing of the 363 Transaction and specifically identified as a "warranty." The Purchaser is not assuming responsibility for Liabilities contended to arise by virtue of other alleged warranties, including implied warranties and statements in materials such as, without limitation, individual customer communications, owner's manuals, advertisements, and other promotional materials, catalogs, and point of purchase materials. Notwithstanding the foregoing, the Purchaser has assumed the

Sellers' obligations under state "lemon law" statutes, which require a manufacturer to provide a consumer remedy when the manufacturer is unable to conform the vehicle to the warranty, as defined in the applicable statute, after a reasonable number of attempts as further defined in the statute, and other related regulatory obligations under such statutes.