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,	**:**	**Return Date: March 25, 2010**
v.	**:**	**Time: 9:45 a.m.**
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 MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant General Motors LLC ("New GM") submits this memorandum in opposition to Plaintiffs' Motion for Partial Summary Judgment on Count I of the Amended Complaint.

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PRELIMINARY STATEMENT

No quantum of verbal prestidigitation can obfuscate the plain meaning of ARMSPA section 2.3(a)(vii)(A) and paragraph 56 of the Sale Approval Order: the only Saturn warranty liability which New GM assumed is liability under Saturn's standard warranty "pursuant to and subject to conditions and limitations contained in" that warranty. Sale Approval Order, ¶ 56. These "conditions and limitations" include the warranty's durational and mileage limits (for VTi transmissions, 5 years or 75,000 miles, whichever comes first) and the exclusive remedy of free-of-charge repairs to correct defects related to materials or workmanship during the warranty period. Due to these limitations, the obligations assumed by GM *do not* include transmission repairs after the warranty expires or any other items covered by plaintiffs' Settlement with MLC.

There simply is no room for any reasonable dispute in this regard. All of the Settlement benefits fall outside of the standard limited warranty described in section 2.3(a)(vii)(A). In short, plaintiffs' motion is frivolous because the ARMSPA and Sale Approval Order clearly immunize New GM from any obligation whatsoever under the Settlement.

ARGUMENT

I. PLAINTIFFS' EXPRESS ASSUMPTION ARGUMENTS FALL FLAT

A. New GM Only Assumed Liability Under Saturn's Standard Warranty

Plaintiffs' Memorandum ("Mem.") argues initially that the Court need look no further than the "four corners" of the ARMSPA to decide whether or not the Settlement is an "Assumed Liability" under section 2.3(a)(vii)(A). With the caveat that the Court may also consider the Sale Approval Order,[1] New GM agrees that the Court need not, and should not, consider extrinsic evidence in deciding this purely legal issue. *Ruttenberg v. Davidge Data Systems Corp.*, 215 A.D.2d 191, 192, 193, 626 N.Y.S.2d 174, 175 (1995).

New GM also agrees with plaintiffs that the Settlement is a "Liability" under the ARMSPA and, indeed, that it satisfies multiple sub-parts of the definition of that term. So what?

[1] The Court indisputably can and should take judicial notice of its own order approving the ARMSPA, about which there cannot be any genuine issue of material fact. F.R.Evid. 201.

The issue before the Court is not whether the Settlement is a Liability, but whether it is a Liability *under Saturn's standard warranty, i.e.*, whether under section 2.3(a)(vii)(A) it is a "Liability arising under express written warranties of [Saturn] 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)…." The Settlement clearly is not such a Liability, nor by any stretch of the imagination is it an obligation "pursuant to and subject to conditions and limitations contained in" the Saturn warranty. Instead, New GM's assumed warranty liabilities and MLC's liability under the Settlement are mutually exclusive, and the Sale Approval Order therefore enjoins the assertion of any claim against New GM under the pre-petition Settlement.

The mere fact that the term "Liabilities" includes obligations that are "contingent" or "unmatured" – for example, unproven claims in a lawsuit – does not mean that New GM has assumed liability for such claims *where they fall outside the scope of liability defined by the standard warranty*, which here they clearly do.[2] Plaintiffs' motion does not dispute that MLC never was adjudicated to have, and never admitted to, any liability for breach of the Saturn warranty. Plaintiffs further do not dispute that their class action sought reimbursement for repairs *that are not covered by the standard warranty*. Finally, plaintiffs expressly agreed, in both the Stipulation of Settlement and the stipulated Final Judgment, that MLC was denying liability for breach of express warranty *and that they could never use the Settlement or the Final Judgment as an admission of such liability*. Complaint, Exhibit A, ¶ 12; Exhibit B, ¶ I-5. That, however, is exactly what they are trying to do here, in brazen contempt not only of the Sale Approval Order, but also of the specific terms of the Settlement.

[2] Of course, it is certainly possible, particularly as to 2005 Saturn VUEs, that some class vehicles have unexpired VTi transmission warranties (five years or 75,000 miles, whichever comes first or, in the case of replacement transmissions, 12 months or 12,000 miles). Because these warranties fall squarely within the section 2.3(a)(vii)(A) definition of assumed warranty obligations, New GM continues to provide covered repairs free-of-charge. But the issue here is not enforcement of the standard warranty, but plaintiffs' attempt to expand it by improperly attempting to enforce their pre-petition settlement with MLC against New GM.

Arguing in a circle, plaintiffs claim that substitution of the full definition of "Liabilities" into the section 2.3(a)(vii)(A) definition of "Assumed Liabilities" (*see* the block quote at page 10 of their memorandum) shows that the Settlement is a "warranty liability." Nonsense. Despite the inclusion of "known or unknown, disclosed or undisclosed, matured or unmatured" obligations in the definition of "Liability," an obligation to be an *Assumed* Liability has to be a Liability of a particular character – in this case a liability "arising under" the standard Saturn warranty, including its conditions and express limitations. Since plaintiffs in the class action did not assert, and MLC in the Stipulation of Settlement did not admit, and the Court in the Final Judgment did not adjudicate, that MLC had any liability under Saturn's standard warranty, the Settlement is not and cannot be an Assumed Liability under section 2.3(a)(vii)(A). The whole point of the class action – and of this case – is the assertion that MLC, and now New GM, is responsible for repairs *not* covered by the standard warranty. If plaintiffs' repairs *had* been covered under the limitations of the standard warranty, they wouldn't have sued in the first place.

B. <u>The Words "Arising Under" Do Not Expand New GM's Warranty Liability</u>

Ignoring the clear language of § 2.3(a)(vii)(A), plaintiffs make the astonishing statement that this provision "did not limit the scope of Assumed Liabilities to the terms of the express warranties themselves." Mem., p. 11. But that is exactly what it did. The phrase "express written warranties … that are specifically identified as warranties and delivered in connection with the sale of new, certified used or pre-owned vehicles" clearly refers to Saturn's standard warranty. As plaintiffs themselves argue (Mem., p. 16), the words "arising under," given their normal meanings, denote that the liability must "originate from a source," here the Saturn warranty. If liability for a transmission repair is *not covered* by the standard warranty, how can that liability "originate from [that] source"? It can't. Liability for the repair if it exists at all must logically originate in a *different* source, *i.e.*, it must "arise under" another contract, a statute, or some other source of legal obligation, not the inapplicable standard warranty.

Backstopping this common sense view of section 2.3(a)(vii)(A), paragraph 56 of the Sale Approval Order indisputably limits New GM's assumed warranty liability to repair obligations

"pursuant to and subject to conditions and limitations contained in" the standard warranty. Once again, there simply is no room for any reasonable dispute in this regard. Plaintiffs therefore are reduced to an overtly extrinsic attempt to broaden the "arising under" language based on case law which construes the "arising under" phrase in two completely different legal contexts that have nothing at all to do with proper construction of the ARMSPA.

Plaintiffs first cite arbitration cases which long have interpreted the "arising under" phrase as a "buzz word" denoting the broadest possible scope for arbitrability. For example, the Appellate Division had this to say in rejecting a lower court's refusal to honor an arbitration clause covering all disputes "arising under" a sales contract for allegedly carcinogenic goods:

> "Despite the expansive wording of the arbitration clause, separate judgments and decisions at Special Term held that appellant's claims were not the kind of controversy contemplated by the commercial arbitration clause and permanently stayed arbitration. Appellant's claims sound in warranty which is an issue of conformity of the goods to the contract. Had there been no contract there would now be no dispute to arbitrate. Thus the dispute arises under the contract within the contemplation of the arbitration clause. Under Federal law, when parties agree to arbitrate any dispute arising under the contract, it matters not whether the dispute was foreseeable at the time of making the contract."

In re Cone Mills Corp., 90 A.D.2d 31, 33, 445 N.Y.S.2d 625, 627 (1982). The proper scope of an arbitration clause containing the "arising under" phrase obviously has nothing to do with the issues presented here. Specifically, it certainly does not follow from *Cone Mills* that liability under a consensual settlement "arises under" a warranty merely because the plaintiff asserts breach of warranty as one several unproven causes of action.

Plaintiffs next cite cases in which the United States Supreme Court has interpreted the "arising under" phrases in Article III of the Constitution and the "federal question" jurisdictional statute, 28 U.S.C. § 1331. These cases, too, have nothing to do with the proper construction of section 2.3(a)(vii)(A) of the ARMSPA. Amusingly, however, plaintiffs' cases clearly refute their plea for a universally expansive interpretation of the "arising under" phrase because, as demonstrated by plaintiffs' lead case, the Supreme Court has construed this phrase *differently* under Article III and section 1331. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494-95, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983) ("Although the language of § 1331 parallels that

of the 'Arising Under' Clause of Art. III, this Court never has held that statutory 'arising under' jurisdiction is identical to Art. III 'arising under' jurisdiction. Quite the contrary is true…. Art. III 'arising under' jurisdiction is broader than federal-question jurisdiction under § 1331….").

The other Supreme Court cases plaintiffs cite are simply irrelevant to the issues presented here. *American Nat. Red Cross v. S.G.*, 505 U.S. 247, 264, 112 S.Ct. 2465, 120 L.Ed.2d 201 (1992), merely held that Art. III "arising under" jurisdiction is "broad enough" to encompass statutory grant of federal jurisdiction of actions against federally-chartered corporations). *United States Dept. of Energy v. Ohio*, 503 U.S. 607, 626, 112 S.Ct. 1627, 118 L.Ed.2d 255 (1992), held that the "arising under" phrase in 28 U.S.C. § 1323(a) is *not* "broad enough" to cover actions involving violations of state statutes merely because the statutes were approved by the federal government. Finally, and equally irrelevant to the issues in this case, the statement in *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 207, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004), that the existence of "arising under" jurisdiction "must be determined from what necessarily appears in the plaintiff's statement of his own claim" is nothing more than an early statement of the "well-pleaded complaint" rule that excludes cases from federal jurisdiction where the only issue of federal law is raised by way of defense. *See* Mem., p. 12, *quoting without attribution Taylor v. Anderson*, 234 U.S. 74, 75-76, 58 L.Ed. 1218, 34 S.Ct. 724 (1914). It obviously does not follow from this rule, as plaintiffs seem to argue, that their claim under the Settlement "arises under" Saturn's warranty merely because their complaint says it does.

Passing from irrelevance to startling *non sequitur*, plaintiffs argue next (Mem., pp. 12-13) that the Settlement is a Liability "arising under" the Saturn warranty because the warranty booklet "offers a number of methods to resolve warranty disputes, including non-binding arbitration." Then, reaching past *non sequitur* to pointless tautology, plaintiffs say that the booklet "states the obvious—a *legal action* involving the warranty 'arises under' the warranty." *Id*. (emphasis added). The booklet, of course, says no such thing. But even if it did, this conclusion, even if "obvious," leads nowhere. Plaintiffs' "legal action" did assert a *claim* for breach of the express warranty, but there was never any adjudication of warranty *liability* and,

indeed, the "sources" of the liability in question, the Stipulation of Settlement and Final Judgment, expressly disclaim liability on all of plaintiffs' underlying claims, including breach of express warranty. So, while plaintiffs can say that their "legal action" did, in part, "arise under" warranty law, liability under the Settlement clearly did not, particularly given the lack of any prayer for relief on their unproven claims that would have been available under the "conditions and limitations" of Saturn's standard warranty.

Plaintiffs next trumpet *Vine Street, LLC v. Keeling*, 460 F.Supp.2d 728 (E.D.Tex.2006), as supposedly "holding that a contractual assumption of warranty liabilities depends upon whether there was a theory of recovery based upon warranty." Mem., pp. 12-13. This statement totally mischaracterizes the actual holding of the case. The pertinent issue there was whether Fedders had assumed Borg-Warner's CERCLA liabilities stemming from a Superfund site in an agreement that pre-dated CERCLA's enactment. This issue turned on the breadth of certain provisions of the agreement. 460 F.Supp.2d at 741. Under one provision, Fedders had agreed to assume certain "warranty" liabilities. *Id*. at 741-42. The district court merely held (1) that none of the parties in the underlying litigation had asserted any theory of recovery under CERCLA based on Borg-Warner's warranty liability and (2) that the warranty assumption language was "far too narrow" to serve as a basis for imposing successor liability on Fedders under CERCLA. *Id*. at 742. These holdings obviously do not support in any way plaintiffs' illogical argument that merely because a litigant as one of four "theories of recovery" asserts a claim for breach of express warranty the consensual settlement of that litigation is a liability that "arises under" an express warranty.

In an apparent attempt to bolster their claim that the Settlement "arises under" the Saturn warranty merely because they say it does, plaintiffs next engage in an extended review of the class action proceedings, seemingly quoting every sentence they wrote in which they used the word "warranty," as well as GM's statements concerning the lack of any proper warranty claim. Mem., pp. 13-14. All of this totally misses the point. *Of course* the parties argued about warranty issues in the case, but that has absolutely nothing to do with the character of the

liability created by the consensual settlement of a case in which multiple claims and theories were asserted, denied, and analyzed by the Court collectively in determining the "fairness" of the settlement. In the end, plaintiffs' claim for breach of express warranty was only that – an unproven and disputed claim for breach of warranty, not a warranty "liability," let alone a warranty liability "pursuant to and subject to conditions and limitations contained in" Saturn's standard warranty.

Plaintiffs' citation of another CERCLA case, *In re Safety-Kleen Corp.*, 380 B.R. 716 (Bankr.D.Del.2008), sails equally wide of the mark. There, the bankruptcy court held that liabilities under private settlement agreements which resolved claims for contribution among defendants on claims by the EPA and a state environmental agency were claims "arising under" environmental laws and therefore were "assumed liabilities" under the specific terms of a section 363 sale agreement. The dispute concerning assumption of liabilities turned on the language of the contribution agreements and was resolved on the basis that *all* of the liabilities in question were assumed environmental liabilities under CERCLA and a state environmental statute, rather than non-assumed contractual liabilities. In contrast to this case where the Stipulation of Settlement and Final Judgment both disclaimed liability for breach of warranty and plaintiffs made three other types of claims, the *Safety-Kleen* Consent Decrees and settlement agreements involved *only* environmental liabilities to federal and state governments which the parties did not disclaim but instead *admitted* and which the settlement agreements proceeded to allocate among the parties. *See* 380 B.R. at 720-25. The fact that the claims in *Safety-Kleen* "arose under" environmental laws that created acknowledged liabilities in no way supports the conclusion that the Settlement was a warranty liability despite the presence of three other theories of liability and plaintiffs' explicit agreement – now breached – that MLC was *not* admitting any liability for breach of warranty and that they would not try to use the Settlement as evidence of such liability.

Dredging the depths of desperation, plaintiffs next pretend to find in the differing phrases used in subparts (A) and (B) of section 2.3(a)(viii) "a specific intent to expand all obligations relating to express written warranties." Mem., pp. 16-17. Leaping past the dispositive fact that

the Settlement is *not* an "obligation[] relating to express written warranties," plaintiffs say that subpart (A) of subsection (vii) uses the broader term "Liabilities" in describing Assumed Liabilities under express written warranties whereas subpart (B) uses the narrower term "obligations" to describe Assumed Liabilities under Lemon Laws. Even indulging the hypothesis that the intended assumption of warranty liabilities was somehow *broader* than the assumption of Lemon Law liabilities (a hypothesis which finds no support in the text of the ARMSPA), this premise logically does not support the conclusion sponsored by plaintiffs that the assumption of warranty liability is *broad enough* to include the Settlement in which MLC neither admitted, nor was adjudicated to have, any liability under the Saturn warranty. More likely the differing phraseology in section 2.3(a)(vii)(B) stems from the fact that Lemon Law "obligations" include non-monetary items – manufacturer duties to arbitrate, make disclosures, provide repairs and even replace defective vehicles in kind come to mind[3] – that quite correctly could be described as "obligations" rather than monetary "liabilities" in the accounting sense. In any event, there is simply nothing in the ARMSPA that suggests in any way that the motivation for the use of these different phrases was, as hypothesized by plaintiffs, to broaden warranty liability to include non-warranty liabilities, which simply makes no sense.

II. NEW GM DID NOT ASSUME ANY LIABILITY UNDER THE SETTLEMENT BY CONTINUING MLC'S VOLUNTARY "FRESH FAILURE" PROGRAM

Plaintiffs contend that New GM's voluntary continuation of MLC's "fresh failure" program, under which MLC reimbursed certain class members for VTi transmission repairs performed prior to the Effective Date of the Settlement, shows that New GM assumed liability to all class members under the Settlement. Once again, plaintiffs' argument rests on a faulty premise. Plaintiffs do not and cannot dispute that the Settlement did not require MLC to provide the "fresh failure" program and that MLC instead implemented it *entirely voluntarily* prior to the

[3] *See, e.g.*, Cal. Civ. Code § 1793.2(d)(2) (obligation to replace non-conforming vehicle and pay related charges or make restitution to the purchaser); *id*., § 1793.22(c)–(d) (duty to notify complaining customer of the existence of qualified third-party dispute resolution procedure); *id*., §§ 1793.23, 1793.24 (duty to provide specified notices to purchasers of vehicles reacquired in response to "Lemon Law" claims).

Settlement's Effective Date, which would have been June 2, 2009.[4] The Stipulation of Settlement only required MLC to provide Settlement benefits to class members after they submitted claim forms. Complaint, Exhibit B, ¶¶ III-1-A, -B and -C (pp. 7-10). Because the MLC bankruptcy filing preceded the Effective Date of the Settlement, claim forms were never mailed to or returned by class members, and therefore MLC's payment obligations under the Settlement never ripened. Because MLC's voluntary offer of repair reimbursements under the "fresh failure" program prior to the Effective Date was *not required* by the Settlement, New GM by briefly continuing the program did not assume any liability under the Settlement, let alone liability for providing the full panoply of Settlement benefits to all class members, whether they had "fresh failures" or not. Instead, like MLC, New GM merely engaged in a voluntary customer satisfaction program which it later chose, as was its right, to discontinue.

Plaintiffs' citation of ARMSPA § 6.15(b) in this regard is nothing but bootstrapping. That provision merely makes New GM responsible for the "administration, management and payment" after the Closing of liabilities under Saturn's standard warranty which it chose to assume in section 2.3(a)(vii)(A) – a category of liabilities which for the reasons stated above clearly did not include liability under the pre-petition Settlement. As a matter of logic, New GM's agreement to administer, manage and pay a set of assumed liabilities does not support the conclusion that it agreed to expand the set of assumed liabilities. Yet that, in a nutshell, is what plaintiffs appear to be arguing.

The other fatal flaw in plaintiffs' argument, detailed in New GM's memorandum in support of its own motion for summary judgment, is the lack of any evidence of (1) mutual assent by class members (other than those experiencing "fresh failures") or (2) any new

[4] Under paragraph II-6 of the Stipulation of Settlement, the "Effective Date" was defined in pertinent part as "ten (10) business days after … the date upon which the time for seeking appellate review of the Judgment … shall have expired…." The Judgment was entered on Thursday, April 16, 2009 and the time for appeal under Rule 4(a)(1), F.R.A.P. therefore expired on Monday, May 18, 2009, so the Effective Date ten business days thereafter (not including Memorial Day) would have been June 2, 2009, the day after MLC's bankruptcy filing automatically stayed enforcement of the Final Judgment approving the Settlement.

consideration flowing from class members to New GM. These elements are required, as a matter of law, to create a binding contractual obligation, whether the contract is express or implied. *See Maas v. Cornell University*, 94 N.Y.2d 87, 93-94, 699 N.Y.S.2d 716 (1999).

The decision by independent GM dealerships to describe "fresh failure" repairs as "warranty" on their invoices is simply irrelevant. A third party's decision about what to call something provides no basis for assigning liability to New GM in the total absence of evidence of any binding contractual obligation. Plaintiffs have provided no foundational evidence explaining the meaning of the word "warranty" as used by dealership personnel on these invoices. Without further foundation (which New GM believes does not exist), the subjective misunderstanding of some dealership employees about the nature of New GM's reimbursement for the subject repairs is not probative in any event of New GM's acceptance or non-acceptance of liability under the MLC Settlement. And, of course, the dealership invoices are in any event extrinsic evidence which plaintiffs themselves argue should not be considered.

III. PLAINTIFFS' ATTACK ON THE SALE APPROVAL ORDER IS GROUNDLESS

In a final fit of desperation, plaintiffs ascribe to New GM an argument it simply doesn't make: "New GM argues that his Court changed the status of the Class Judgment as an Assumed Liability." Mem., p. 21. To be clear, for the reasons already stated, the ARMSPA itself limits New GM's assumed warranty liability to obligations under Saturn's standard limited warranty. Paragraph 56 of the Sale Approval Order provides, at most, a clarification of this limitation. So plaintiffs' argument that the Sale Approval Order improperly "changed" the ARMSPA is dead in the water *ab initio*.

But even indulging *arguendo* the false premise of plaintiffs' semantic fantasy – that the Sale Approval Order somehow worked a material "change" in section 2.3(a)(vii)(A) – they are dead wrong in claiming that such a "change" would be invalid. Simplistically, they argue that the ARMSPA could be amended only via a writing signed by all Parties which, they say, does not exist. Yet it is axiomatic that the ARMSPA could never even have gone into effect without this Court's approval under section 363 of the Bankruptcy Code. So the Court, independent of

any written agreement among the "Parties," certainly had the power to approve a "change" as a condition of granting its approval. Because the alleged "change" made its way into paragraph 56 of the Sale Approval Order *without so much as a hint of any objection by any of the Parties*, it is absurd for anyone to argue, and still more absurd for a non-Party to the ARMSPA to argue,[5] that the Sale Approval Order is *pro tanto* a nullity merely because the Parties did not sign a writing agreeing to the Court's "change." *See* Sale Approval Order, ¶ 67, which expressly contemplates modification of the ARMSPA by the Court: "The failure to specifically include any particular provisions of the [ARMSPA] in this Order shall not diminish or impair the effectiveness of such provision, it being the intent of the Court that the MPA be authorized and approved in its entirety, ***except as modified herein***" (emphasis added). Moreover, again assuming *arguendo* plaintiffs' claim that paragraph 56 "changed" ARMSPA § 2.3(a)(vii)(A), the Sale Approval Order expressly provides in paragraph 3 that in the event of any conflict between the two documents, the Sale Approval Order "shall govern."

Thus, to the extent paragraph 56 provides either a "change" to or clarification of section 2.3(a)(vii)(A) – whether necessary or not – it not only has full force and effect but under

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[5] Plaintiffs, as non-parties to the ARMSPA, have no direct right to sue GM or, for that matter, MLC for breach of that agreement. Instead, their standing to bring this action rests entirely on their allegation that they are "intended to be third-party beneficiaries" of the agreement. Amended Complaint, ¶ 53. This legal conclusion collides head on with the unambiguous language of ARMSPA § 9.11, which provides in pertinent part as follows:

> "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 the Agreement and (b) for purposes of [specified sections of the Agreement], 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***." (Emphasis added.)

This paragraph obviously shows that the draftsmen of the ARMSPA knew how to identify intended third-party beneficiaries and did so. Accordingly, section 9.11 conclusively deprives plaintiffs of any right to invoke section 2.3(a)(vii)(A) as the basis for any legal or equitable claim against New GM. Without more, plaintiffs' motion for summary judgment must be denied.

paragraph 3 of the Sale Approval Order it trumps any arguably contrary provision of the ARMSPA. So even if, as plaintiffs suggest (Mem, p. 22), New GM's position implies that that "an activist bankruptcy court unilaterally rewrote the ARMSPA" and "materially changed" its terms, it gets them nowhere.

In reality, plaintiffs have things exactly backwards in arguing that the Court could not have "changed" the Settlement's alleged status as an "Assumed Liability" because doing so would, in effect, reduce the section 363 purchase price for MLC's assets by millions of dollars. If (contrary to the clear provisions of the ARMSPA and the mutual understanding of the Parties), New GM had been told that it would have to assume liability under the Settlement which, according to plaintiffs, is "at least $60 million," can there be any doubt that it would have reduced its offer by an equivalent amount, to the obvious prejudice of the MLC estate.

In the end, plaintiffs' argument is downright silly. Why would New GM, as a purchaser trying to plan for future profitability with a sounder balance sheet unburdened by litigation filed against MLC somehow reach out *sub silentio* to assume a claimed $60 million liability under the Settlement which it obviously had no obligation to accept and which the debtor quite clearly could reject under section 365 of the Bankruptcy Code. If New GM had intended to assume the Settlement, it surely would have done so expressly and with the cooperation of MLC, which instead of assuming the Settlement and assigning it to New GM has rejected it under section 365.

CONCLUSION

For all the foregoing reasons, New GM respectfully urges that the Court deny plaintiffs' motion for partial summary judgment.

New York, New York
Dated: January 22, 2010

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