Date of Oral Argument: December 14, 2011 at 9:45 a.m.

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)**
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.	:	

REPLY BRIEF OF DEFENDANT GENERAL MOTORS LLC

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PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

This case presents the issue of whether Old GM's liability under a Settlement[1] resolving a vehicle class action "arose under" its express limited warranty ("**standard repair warranty**" or "**Warranty**"). As a matter of law and beyond genuine dispute, it did not. The Warranty is a limited warranty of repair with clear duration and mileage limitations and conspicuous limits on available remedies. Old GM's obligations under the Settlement unambiguously fall outside these express limitations. The class action underlying the Settlement did not seek to enforce the Warranty terms but instead *frontally attacked them* by seeking repairs *outside the clear duration and mileage limitations*. Moreover, removing any conceivable doubt, the MSPA explicitly provided that New GM is ***not*** responsible under any of Plaintiffs' theories for attacking the limitations of Warranty coverage, including, without limitation, implied warranties, statutory warranties, statements other than the express Warranty and other allegations against Old GM.

Nevertheless, at the hearing on the parties' cross motions for summary judgment the Court suggested that section 2.3(a)(vii)(A) was ambiguous and offered Plaintiffs the opportunity to provide, if they could, evidence establishing that New GM intended to assume liability under the Settlement. Transcript of Hearing, May 6, 2010, pp. 81-83. After full discovery, Plaintiffs have not provided the Court with any evidence that the Parties to the MSPA (Old GM and New GM/UST) decided to assign liability under the Settlement to New GM. Any such decision would have been antithetical to Old GM's fundamental objective in selling its assets to New GM "free and clear" of liabilities. Instead, consistent with that objective, the Old GM, New GM and UST personnel who designed and negotiated the 363 Sale deliberately decided to and did limit New GM's assumed warranty liabilities to those arising under the standard repair warranty referenced in MSPA § 2.3(a)(vii)(A) and deliberately "left behind" in Old GM every liability not *commercially necessary* to the future success of New GM, including the *Castillo* and other class action settlements. These decisions aligned perfectly with the central purpose of the 363 Sale:

[1] Capitalized terms not defined here have the same meanings as in New GM's Opening Brief.

creating a leaner, more competitive New GM burdened with as few liabilities as possible so that it could, among other things, return value to the bankruptcy estate via distribution of newly issued stock to creditors. Saddling New GM with liabilities for pre-petition litigation settlements (of any type) would have been completely contrary to this goal.

Thus, it comes as no surprise that Plaintiffs' Opening Brief is devoid of any evidence showing (1) that the Parties to the 363 Sale discussed and agreed that, contrary to the treatment of virtually all other litigation liabilities of Old GM, liability for this particular Settlement should be passed on to New GM, (2) that assumption of the Settlement liability in particular, or broader warranty liabilities in general, was "commercially necessary" for the future success of New GM, or (3) that there was any rational reason at all for Old GM to assign such liabilities to New GM. Thus, any argument that the Parties to the MSPA made a *deliberate* decision to assign the Settlement liability to New GM not only makes no sense, but also has no evidentiary basis.

Plaintiffs thus are left to argue, in effect, that the MSPA Parties made a mutual mistake or agreed *by accident* to burden New GM with the Settlement, whether through alleged sloppy draftsmanship or simply failure to tie up every conceivable linguistic loose end in a massive transaction implemented in approximately 40 days. Plaintiffs ask the Court to focus primarily on an alleged legal meaning of the phrase "arising under" and to ignore both the common English language meaning of those words and all of the probative parol evidence demonstrating what the Parties to the MSPA actually agreed to and documented: (1) the limitation of New GM's assumed warranty liabilities to the four corners of the standard repair warranty, subject to its express conditions and limitations, and (2) the rejection of the Stipulation of Settlement either as an executory contract under Section 365 of the Bankruptcy Code or as a "negative" non-executory Excluded Contract under MSPA § 2.2(b)(vii)(E). *See* Buonomo Decl., ¶¶ 7-15; Supp. Buonomo Decl., ¶¶ 4-10; Lines Decl., ¶¶ 14-16; Wilson Declaration, ¶ 19; Wilson Testimony, p. 111; **GM Exhibits 4-10**.

Of note, Plaintiffs' position makes no sense under their own "dictionary definition" of "arising under"– a definition which New GM accepts – because Plaintiffs' claims in the

underlying case and under the Stipulation of Settlement ***did not*** have their "origin" or "source" in the terms of the standard repair warranty. Again, the standard repair warranty ***expressly excluded*** liability for Plaintiffs' claims. And, finally, it simply cannot be disputed that Old GM made the deliberate decision ***not*** to pass the Settlement liability on to New GM.

ARGUMENT

I. THE SETTLEMENT DOES NOT "ARISE UNDER" THE STANDARD WARRANTY

A. Plaintiffs' Claims Clearly Were Not Covered by the Standard Warranty

Plaintiffs' Brief cites virtually every sentence that the lawyers wrote in the underlying case which contains the word "warranty." PB, pp. 14-15. From this platform, they spring to the conclusion that "[t]here can be no dispute that the Class Judgment *involved* the original glove-box warranties" and therefore "arose under" them. *Id*., p. 15 (emphasis added). This is simply wrong. Plaintiffs' allegations did not "involve" the glove box warranty, which *Old GM put before the Court* in the underlying case precisely to show that Plaintiffs' breach of warranty claims *were not covered by it*. *See* **Joint Exhibits G** and **H** (pp. pp.2, 15-18); Lines Depo, page 12, lines 9-21 ("[Old GM's] position was that the claims advanced by the plaintiffs and the relief sought by the plaintiffs were outside the terms of this warranty. …[T]he purpose of [**Exhibit G**] was to put [the Warranty] before the Court so the Court could consider [its] terms….").

Thus, Old GM's introduction of the Warranty does not show that the contractual liability created by the Stipulation of Settlement "arose under" that Warranty. It establishes the opposite. The Warranty provides a limited remedy: repair or replacement of vehicle components found defective in materials or workmanship during the Warranty period. **Joint Exhibit G**. Plaintiffs in the underlying action did not claim that their VTi transmissions had not been repaired or replaced when they failed during the Warranty period. *See* New GM's Opening Brief, pp. 27-28, n. 7. Instead, they claimed that they were entitled to repair, replacement and monetary compensation for possible transmission failures *after the Warranty period had expired* because (1) the time and mileage limitations were allegedly "unconscionable" and unenforceable, and (2) the replacement transmissions allegedly had a "design defect" that made them likely to fail again

at some point in the future. *See* **Joint Exhibits H** (pp. 2, 15-18), **I** (pp. 29, 33-34) and **ZZ** (pp. 16-21). These claims did not "arise under," *i.e.*, were not covered by, the Warranty. *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").

Plaintiffs asserted in the underlying case that the conditions and limitations of the Warranty *should not be enforced*. In other words, Plaintiffs' "warranty" claims explicitly *attacked the conditions and limitations* of the Warranty, and the Settlement resolved that attack. But whatever the merits of that attack, New GM's assumption of liability never changed: it was circumscribed by the conditions and limitations of the Warranty, as Paragraph 56 of the 363 Sale Order explicitly provided. *See* **Exhibits B** (pp. 7-10), **G**, **OO**, ¶ 56**.**

B. Plaintiffs' Legal Arguments Regarding the "Arising Under" Phrase All Fail

To circumvent the irreparable logical and factual defects in their position, Plaintiffs advance legal arguments which, they say, dictate or constrain the Court's construction of the "arising under" phrase. As discussed below, none of their arguments or cases is persuasive.[2]

1. Bankruptcy Law Does Not Require Construction Against New GM

Plaintiffs first assert that the Court is "required by bankruptcy law" to proceed immediately from the initial identification of an ambiguity in section 2.3(a)(vii)(A) directly to the canon of construction that (allegedly) requires that section be construed "in favor of the

[2] Plaintiffs implicitly recognized as much when they objected (tardily) to the 363 Sale after concluding that the Settlement was not being assumed. Docket 2760, June 29, 2009. Plaintiffs did not argue their objection at the Sale Hearing, and it was overruled. *See* 363 Sale Order, ¶ 2. Plaintiffs claim they withdrew the objection because based on a later draft of the MSPA they "determined that New GM had assumed the *Castillo* settlement." (Brown Decl., ¶ 11). How that "epiphany" occurred they do not say. There was, in fact, nothing that occurred between the filing of the objection and the withdrawal of the objection that would have caused this abrupt change of view. Further, Plaintiffs did not withdraw their objection until July 28, 2011, three weeks after the 363 Sale Order was entered. Docket 3446. If Plaintiffs had appeared at the Sale Approval Hearing and prosecuted their objection, Old GM would have confirmed the premise of Plaintiff's objection, which is New GM's clear position in this adversary proceeding – that being, New GM did not intend to assume the Settlement, and was not assuming the Settlement.

debtor." PB, pp. 16-17. Even assuming that the MSPA is ambiguous, this argument suffers from three fatal flaws.

First, there is no generally recognized principle that state law rules of contract construction do not apply to debtors in bankruptcy court and Plaintiffs' cases do not hold, or even suggest, that bankruptcy law requires the Court to ignore probative parol evidence in resolving alleged ambiguities in a 363 sale agreement. Canons of construction by definition are invoked only after, or occasionally together with, consideration of parol evidence. One of Plaintiffs' own case authorities says as much in the analogous context of *statutory* construction:

> Having determined that the statutory language is ambiguous *and that the ambiguity is not resolved by reference to context or legislative history*, the question is 'What next?' *With nowhere else to look for assistance in discerning the intent of Congress*, the Court is left *to play the final card in its hand*: the canon of construction that exceptions to discharge are to be construed strictly against the creditor and liberally in the debtor's favor.

In re Barnick, 353 B.R. 233, 246 (Bankr.C.D.Ill.2006) (emphasis added) (*cited at* PB, p. 16). In this case, which involves *contractual* construction, the Court similarly does not need to play "the final card in its hand." Any ambiguity ***is*** "resolved by reference to context" and all of the probative extrinsic evidence. Indeed, if Plaintiffs were right that the Court should bypass all of the parol evidence and that resolution of any ambiguity in section 2.3(a)(vii)(A) should begin and end with the canon that doubts should be construed in favor of the debtor, the bankruptcy court in the *Safety-Kleen* decisions elsewhere cited by Plaintiffs would not have been required to consider extrinsic evidence in determining the scope of assumed liabilities at issue in those cases. *See In re Safety-Kleen Corp.*, 331 B.R. 605, 610-14 (Bankr.D.Del.2005); *In re Safety-Kleen Corp.*, 380 B.R. 716, 738-39 (Bankr.D.Del.2008) (alternative holding).

Second, *Barnick* and Plaintiffs' other cases construing exceptions to discharge and ambiguities *in the Bankruptcy Code* in favor of the debtor simply do not apply here. *See Knudsen v. IRS*, 581 F.3d 696, 716 (8th Cir.2009) ("ambiguities in the Code"); *New Neighborhoods, Inc. v. West Virginia Workers' Comp. Fund*, 886 F.2d 714, 719 (4th Cir.1989)

("exceptions to discharge" and "ambiguities in the Code"); *In re Green*, 360 B.R. 34, 42 (Bankr. N.D.N.Y.2007) ("ambiguities in the Code"). Plaintiffs are not arguing here that there is any pertinent ambiguity in the Bankruptcy Code.

Third, Plaintiffs' centerpiece authority, *In re Easton Tire Co. of Kirkwood*, 35 B.R. 494 (Bankr.E.D.Mo.1983), involved a situation completely different from this case. The court there construed a pre-petition letter agreement under which the debtor had agreed that plaintiff would retain title to certain chain products stored at the debtor's business premises. Evidence at trial showed that a secured creditor and members of the creditors' committee may have believed that plaintiff's chain products were part of the debtor's inventory. Without any analysis or case citations, the court held that an ambiguity in the pre-petition letter agreement (as opposed to the post-petition, Court-approved MSPA here) should be construed in favor of the estate and its creditors. Here, no one other than Plaintiffs – not the debtor, not a creditors' committee and not any other creditor – has asserted that liability under the Settlement should be borne by New GM. In fact, Old GM moved to reject the Settlement. So *Easton Tire* is simply inapposite.

2. Plaintiffs' Cases Construing "Arising Under" Are Irrelevant

Plaintiffs' reliance on the "dictionary definition" of "arising under" – *i.e.*, "having its origin or source in" – actually supports New GM's position. *See* Opening Brief, p. 4; *New GM's Reply Memorandum in Support of Motion for Summary Judgment*, pp. 3-4; *New GM's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment*, p. 3. Neither Plaintiffs' claims in the underlying lawsuit nor the repairs and reimbursements they negotiated as part of the Settlement have their "origin" or "source" within the terms, conditions or limitations of the standard repair warranty.

a. The Meaning of "Arising Under" Is a Question of Fact, Not Law

Plaintiffs claim that the "arising under" phrase in section 2.3(a)(vii)(A) is a "term of art" under bankruptcy law and that its construction in *Safety-Kleen* is a legally binding precedent. *See*, *e.g.*, PB, p. 21 ("'where a word has attained the status of a term or art and is used in a technical context (here, a lease) the technical meaning is preferred over the common or ordinary

meaning'"); *id*., p. 22 ("*Safety Kleen* set the bankruptcy definition [of "arising under"] before the ARMSPA"). Plaintiffs' Brief provides neither evidence nor any logical rationale supporting their claim that the "arising under" phrase is a "term of art" or that the drafters of the MSPA ascribed to it anything other than the common English meaning. If the "arising under" phrase is not a term of art here, it is not subject to a uniform legal interpretation. Thus, the *Safety-Kleen* interpretation of that phrase is not a legal precedent at all, still less one binding on this Court.

Instead, which liabilities "arise under" the Warranty is a simple question with a plain answer that is completely consistent with the dictionary definition: the liabilities that "arise under" the standard repair warranty include "reimbursing dealers for performing repairs or replacing vehicle components found defective in materials or workmanship during the warranty period, administering the warranty system and supplying dealers with the parts necessary to complete the repairs or replacements of defective components." Buonomo Decl., ¶ 20. These obligations have their "origin" or "source" in the standard repair warranty. *See also* Buonomo Depo, page 68, line 14 through page 69, line 6 (obligations "arising under" the standard warranty "included providing the repairs or replacement pursuant to the warranty…, paying the dealers…, maintaining a system and infrastructure to fulfill the warranties"); *id.*, page 69, lines 11-24 ("The intent was that the new company would assume the obligation to fulfill the express warranties and would do all the things and meet all the obligations necessary to do that including … providing the actual repairs and replacements, paying the dealers to do the work, maintaining the system and infrastructure and parts bank, and … generally take the actions necessary to fulfill the warranties referenced").[3]

[3] Plaintiffs argue that this construction of "arising under" would render another provision, MSPA § 6.15(b), "meaningless." PB, pp. 36-37. Of course, the two sections both state, among other things, that New GM will "assume" or, synonymously, will be "responsible for payment" of claims under the standard repair warranty. While someone might perhaps argue fairly that the two statements are consistent, and therefore "redundant," that is clearly a far cry from Plaintiffs' erroneous argument that section 2.3(a)(vii)(A) should not be construed as argued by New GM because it somehow would render *the entirely consistent* section 6.15(b) "meaningless." In fact, there are numerous provisions which confirm that New GM's warranty assumption was narrow and limited. The very pendency of this case illustrates the need for such redundancy.

In sum, under the "dictionary definition," a claim that is not even covered by the standard repair warranty clearly cannot have its "origin" or "source" in that warranty. Thus, there is no reason to reject the straightforward definition supplied by Mr. Buonomo, who helped write section 2.3(a)(vii)(A). Moreover, this definition dovetails with his testimony and Mr. Wilson's testimony that the Parties did not intend for New GM to assume unnecessary liabilities. *See* PB, p. 27 ("'[T]here could be no more compelling evidence of intent than the sworn … affidavits of both parties to the contract,'" *citing T.L.C. West, LLC v. Fashion Outlets of Niagara, LLC*, 60 App.Div.2d 1422, 1424, 875 N.Y.S.2d 367 (2009) (citation omitted)).

b. Safety-Kleen and Vine Street Are Distinguishable on Their Facts

The 363 sale agreement in *Safety-Kleen* provided for the purchaser, Clean Harbors, to assume all "liabilities and obligations arising under Environmental Laws (or other Laws) that relate to violations of Environmental Laws." 380 B.R. at 736. Prior to filing for bankruptcy protection, the debtor had entered into (1) consent decrees with the federal and state governments under which it *accepted* liability for violation of environmental laws and (2) settlement agreements which, together with the consent decrees, allocated the *admitted* environmental liabilities among the numerous defendants, and protected them against further litigation with the federal and state governments and contribution claims by other defendants. 380 B.R. at 721-22. Thus, the subject matter of the settlement agreements in *Safety-Kleen* indisputably was the allocation among the defendants and their payment of environmental liabilities to the state and federal governments.

Following the 363 transaction, Clean Harbors filed an adversary proceeding seeking a declaration that it had not assumed the debtor's liabilities under the settlement agreement because those liabilities were "contractual" rather than "environmental" liabilities. 380 B.R. at 719, 724. The Delaware Bankruptcy Court (Judge Walsh) ultimately held that the 363 sale order and sale agreement unambiguously imposed the environmental liabilities on Clean Harbors.

Safety-Kleen would be relevant here if, contrary to the facts, New GM had assumed all "warranty" related liabilities. It supports the proposition that a settlement of an assumed liability

is, in turn, a liability arising from the assumed liability. However, since New GM did not assume the liabilities asserted in the underlying *Castillo* case for repairs outside the Warranty period, *Safety-Kleen* is essentially irrelevant to the issue before this Court. The consent decrees and settlement agreement in *Safety-Kleen* broadly included liability under *all* environmental laws, not just a particular kind of environmental law, and there was no other category of liability in dispute. Here, in contrast, other types of alleged liabilities *were* in dispute in the class action (*i.e.*, alleged violations of consumer protections statutes, breach of implied warranties and unjust enrichment), all of which were expressly excluded from New GM's assumption of liability in the MSPA. Moreover the *Safety-Kleen* parties *agreed* in the relevant consent decrees that they were liable under environmental laws. Here, in contrast, the parties agreed to the exact opposite: the Stipulation of Settlement and the Final Judgment provide that Old GM *did not* admit liability *of any kind* on plaintiffs' claims for relief, let alone liability of the type that New GM later agreed to assume in section 2.3(a)(vii)(A).

Plaintiffs further assert that *Vine Street, LLC v. Keeling*, 460 F.Supp.2d 728 (E.D.Tex. 2006) stands for the proposition "that a contractual assumption of warranty liabilities depends upon whether there was a theory of recovery based upon warranty" in the underlying case. PB, p. 19. But that was not the issue in *Vine Street*, in which the court addressed whether Fedders had assumed Borg-Warner's CERCLA liabilities stemming from a Superfund site in an agreement that pre-dated CERCLA's enactment. 460 F.Supp.2d at 741. Under one provision of the purchase agreement which the court was asked to construe, Fedders had agreed to assume specified "warranty" liabilities. *Id*. at 741-42. Regarding that provision, the 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. Thus, *Vine Street* supports New GM's position that an analysis of the scope of the underlying assumption is essential. Here, the assumption implemented in the MSPA simply does not encompass the claims asserted by Plaintiffs.

c. Plaintiffs' Arbitration and Article III Cases Are Irrelevant

At the summary judgment hearing, the Court asked Plaintiffs, in essence, to provide evidence, if they could, "that 'arising under' was intended in 2.3(a)(vii) to incorporate the definition or meaning as those words are used in Article 3 jurisprudence or in arbitration law or in some other case law apart from that consistent with New GM's contentions." Transcript of Hearing, May 6, 2010, p. 82. Plaintiffs' Brief provides no such evidence. Thus, while it is certainly true that the "arising under" phrase has a specialized meaning in the arbitration context and at least two, different specialized meanings in the law of federal jurisdiction,[4] the specialized meanings of the phrase in these unrelated contexts simply have nothing to do with the meaning of the "arising under" phrase in the MSPA.

3. The Alleged Judicial Admissions Are Not Probative of New GM's Intent

Lacking direct evidence that Old GM intended to assign, or that New GM intended to accept, liability under the Settlement, Plaintiffs cite alleged "judicial admissions" by Old GM and New GM. However, none of the alleged "admissions" is even relevant here.

Joint Exhibit M is the "first day" motion by Old GM seeking authorization to continue vehicle warranties and voluntary customer programs. As noted in New GM's Opening Brief (p. 33), the Court's order granting the motion authorized GM "in its business judgment" to continue a wide variety of "customer programs." **Docket No. 167**. Paragraph 40 of the motion contains the following statement on behalf of Old GM:

> "In addition to [warranty repair] reimbursements to Dealers, in order to maintain customer satisfaction, the Debtors sometimes reimburse customers for out-of-pocket expenses or inconvenience in connection with informal claims consumers send to the Debtors alleging individual problems with the quality of performance of the GM vehicles purchased or leased, *or with the purchased*

[4] *See Intermar Overseas, Inc. v. Argocean S.A.*, 503 N.Y.S.2d 736, 737 (App.Div.1969) ("arising under" denotes a broad scope for arbitrability); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494-95 (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….").

> *automotive parts and accessories that arise from but are not covered by the written warranties*, but that are nevertheless considered part of the Debtors' Warranty and Service Programs for Consumers and Fleet Customers. On occasion, the Debtors repair or repurchase such vehicles as part of consumer satisfaction efforts."

The phrase "individual problems … with the purchased automotive parts and accessories that arise from but are not covered by written warranties" by definition covers matters other than the written "glove box" warranty. And the term "Debtors' Warranty and Service Programs for Consumers and Fleet Customers," which is specifically defined in paragraph 38 of the motion, clearly reaches far beyond the terms of the standard repair warranty:

> Ultimately, retail customers and Fleet Customers obtain a wide range of after-sale vehicle services and products through the Dealer network, such as maintenance, light repairs, collision repairs, vehicle accessories, courtesy transportation, road-side assistance and extended service warranties (collectively, the "Warranty and Service Programs for Consumers and Fleet Customers").

Such matters as "maintenance," "collision repairs" and "vehicle accessories" are not covered by the standard repair warranty, so this defined term obviously is much more expansive than the Warranty. Accordingly, the statement that customer satisfaction offers in response to "informal claims" by vehicle owners "are considered part of the Debtor's 'Warranty and Service Programs for Consumers and Fleet Customers" cannot transform Old GM's VTi goodwill policy into a formal claim under the standard repair warranty that New GM assumed under section 2.3(a)(vii)(A) of the MSPA.

Kodsy v. General Motors Corp., No. 09-CA-011174 (Palm Beach County, Florida), was originally a "Lemon Law" arbitration involving a Hummer H2 (not a Saturn equipped with a VTi transmission). When Old GM filed bankruptcy, the plaintiff had suffered an adverse arbitration award and was requesting a trial *de novo* in state court. **Exhibit Y**, ¶¶ 1-2. The Hummer H2 came with Old GM's standard New Vehicle Limited Warranty, *i.e.*, the standard repair warranty. **Exhibit W-2**, ¶¶ 1-3. Since plaintiff initially was asserting a claim under the standard repair warranty and the Florida Lemon Law, Old GM filed a motion requesting substitution of New

GM as the proper defendant on those claims, consistent with section 2.3(a)(vii)(A) & (B). **Exhibit Y**. On October 7, 2009, the plaintiff in *Kodsy* filed an amended pleading in which he elected ***not*** to pursue his request for *de novo* review of the Lemon Law arbitration award but instead pleaded new claims, including fraud (Count I), breach of express and implied warranty (Count II), and numerous other non-warranty claims. **Exhibit Y**, ¶ 9. Old GM in its motion stated that the only claims for which New GM was the proper defendant was "the portion of Count II which is based on an alleged breach of General Motors Corporation's written warranty." New GM subsequently filed an answer denying liability for breach of warranty on various grounds, including the lack of any breach of the standard repair warranty. **Exhibit W-2**, pp. 2-4. All of this is consistent with New GM's position here, and none of it has any bearing on whether the claims at issue in this case actually "arise under" the standard repair warranty.

Plaintiffs' **Exhibit BBB**, an unauthenticated document which bears no production number, purports to be a January 6, 2010 letter from Paula Maggard of the "General Motors Legal Department" to Michael and Pam Rose regarding the "Saturn VTi Transmission Class Action Lawsuit." As explained in the Declaration of Steven J. Cernak of the New GM Legal Staff (submitted herewith), Ms. Maggard was a former contract employee who worked as a Customer Assistance Agent ("**Agent**") in GM's Austin, Texas Customer Assistance Center ("**CAC**") (¶ 2). She was not a lawyer or legal assistant (¶ 2), had no authority to give legal advice or comment on class action litigation (¶ 3), and violated applicable policies by using the words "General Motors Legal Department" beneath her signature (¶ 3).

The letter is dated more than three months after New GM issued the VTi Settlement Clarification (**Exhibit QQ**) ending Old GM's voluntary VTi goodwill program (**Exhibit MM**). Ms. Maggard and other Agents had access to **Exhibit QQ** and to the newly-established Special Policy # 09280 (**Exhibit RR**) which is referenced in the final paragraph of her letter. Based on this information, she should have advised Mr. and Mrs. Rose of this Special Policy and not referenced the class action litigation. Cernak Decl., ¶¶ 3-4. The "Special Policy" information that was available to Agents at the time did not indicate that the class action settlement would

ever "proceed," and, as a contract employee, Ms. Maggard obviously was in no position to speak about what New GM management intended – that the class action would ***not*** "proceed" (¶¶ 3-5).

Moreover, as Mr. Cernak explains (¶ 6), if New GM had assumed liability for the Settlement, its normal policies and procedures would have required issuance of a policy authorizing Agents to follow the Settlement terms and advise customers of this policy. The fact that, as Mr. Cernak confirms (¶ 6), New GM did not issue such a policy constitutes further compelling evidence that it did not intend to assume liability for the Settlement.

Finally, it is simply illogical to argue that Ms. Maggard's statement shows New GM's intent to assume the Settlement ***many weeks after*** the Court ordered its rejection. Docket 4680.

II. ALL AVAILABLE PAROL EVIDENCE SUPPORTS NEW GM'S POSITION

New GM will not repeat here the facts established by the direct testimony declarations of Messrs. Buonomo and Lines. *See* Opening Brief, pp. 8-27. In sum, these senior members of the GM Legal Staff testified to their personal knowledge of Old GM's decisions to reject the Stipulation of Settlement rather than assign it to New GM, and to limit New GM's assumed warranty liabilities to those contained within the four corners of the standard repair warranty.

Plaintiffs' attempt to discredit or minimize this testimony with various hearsay and foundational objections is addressed in New GM's *Response to Plaintiffs' Objections to Defendant's Testimony and Other Evidence* and in the *Supplemental Declaration of Lawrence S. Buonomo* which are being submitted simultaneously herewith, and which are incorporated herein by reference.

III. THE FEW WEEKS IT TOOK TO END OLD GM'S VOLUNTARY GOODWILL PROGRAM DOES NOT PROVE NEW GM ASSUMED THE SETTLEMENT

A. New GM's Consideration and Discontinuance of Old GM's Voluntary Goodwill Program Defeats Plaintiffs' "Assumption by Conduct" Claim

The Court at the summary judgment hearing afforded Plaintiffs the opportunity to find evidence supporting their claim that New GM intended to assume liability under the Settlement. The evidence Plaintiffs have uncovered, however, demonstrates that exactly the opposite is true. To be sure, there is no dispute that the CACs continued "business as usual" after July 10, 2009

and continued to perform under Old GM's customer programs, including the Administrative Bulletin (**Exhibit MM**) which authorized *goodwill* payments in accordance with the time and mileage formula set forth in the Settlement. The missing link in Plaintiffs' "interpretation by conduct" argument, however, is the lack of any evidence that New GM, by failing to discontinue Old GM's voluntary goodwill program immediately, was agreeing to be *bound* by that voluntary policy, let alone agreeing to assume the Settlement *as a liability of New GM*.

In fact, Plaintiffs acknowledge – indeed, they affirmatively argue – that New GM, after signing the MSPA, did not make any business decision on the VTi goodwill program until September 2009. In other words, New GM's decision to discontinue Old GM's goodwill policy was ***delayed for a few weeks***, which is not surprising in light of everything else that was going on at New GM during the summer of 2009.

Importantly, the e-mail traffic cited by Plaintiffs and other evidence demonstrates clearly that the GM executives who were involved in this decision did not feel "bound" to continue the voluntary program, and did not intend to assume the Settlement as a New GM liability. For example, **Exhibit CC** (cited at pages 29-30 of Plaintiffs' Brief), includes a September 1, 2009 request for New GM's "position" on VTi transmission repairs. The next day, Thomas Simon, a senior GM executive, concluded that there was a "need to come up with one common understanding and decision how to proceed." **Exhibit DD**. A response from Jeff Setting, another executive, mentioned the desire to provide [senior GM Powertrain executive] Jamie [Hresko] with "*options* outlined" in order to "seek direction" from senior management. *Id*. (emphasis added). Almost simultaneously, a September 2, 2009 communication from Mr. Simon to GM Powertrain's Assistant Chief Transmission Engineer, Mark Gilmore (**Exhibit EE**), commented as follows:

> I had discussions with Jamie [Hresko] last week, following our review [of VTi issues].
>
> I have directed Derek Marshall to prepare the scenarios for review and approval … next week.

> Scenario A: Revert to 5/75 immediately.
> Scenario B: Revert to 5/75 immediately and offer a voucher (value t.b.d.) for new car purchase
> Scenario C: revert to a 5/100K remedy
> Scenario D: keep as is
>
> My preference goes with Scenario B, thus offering an alternative to customers.
>
> We will close the loop with the details.

These communications are completely inconsistent with any understanding on the part of New GM that it was *obligated* to retain Old GM's goodwill policy, let alone *assume the Settlement*.[5]

To the contrary, pending a final decision, Scott Lawson, an executive in the Customer Assistance organization, *see* Lines Depo, p. 53, issued the instruction that "[g]oing forward, we should administer the above subject according to our previously released special policy (5/75) *not according to the class action policy*." **Exhibit FF** (emphasis added). **Exhibits GG** and **HH** show that implementation of Mr. Lawson's interim decision to revert to the five-year, 75,000 mile extended warranty began immediately. *See also* **GM Exhibit 5**, entitled "Saturn VTI (CVT) Transmission, Customer Satisfaction Assurance Review, August 04, 200[9]," proposing four "Customer Satisfaction/Retention Options":

> **Option 1: Do Nothing**
> - Settlement has been assigned to old GM – Obligation no longer exists….
>
> **Option 2: Honor the Provisions of the "Proposed" Class Action Settlement**
>
> **Option 3: Re-write Existing Special Policy To Further Extend the Warranty Time/Mileage**
> - Currently Parameters of Special Policy Are 5 YR / 75,000 Miles
>
> **Option 4: Provide Owners With a Voucher (or Owner Loyalty Certificate) Towards the Purchase of a New GM Vehicle**

[5] Plaintiffs suggest (PB, pp. 10, 28 n. 6, 29) that New GM's actions were influenced by their filing of this adversary proceeding, originally in Delaware Chancery Court, on August 26, 2009. But New GM's agent for service of process in Delaware was not served ***until September 2, 2009***, *see* Lines Depo, p. 42, the same day as the very latest e-mail communications quoted above. So the executives who wrote these e-mails were not aware of Plaintiffs' filing when they did so.

This early consideration of "options" is flatly inconsistent with any argument that New GM management felt bound by the terms of the Settlement in early August 2009.

Subsequently, the issuance of a formal communiqué reflecting the decision to revert to the 5/75 warranty policy was assigned and the communiqué was drafted, but a few more weeks elapsed before the final version of the VTi Settlement Clarification was approved and received legal clearance. The document was revised several times, its possible impact on the proposed Penske transaction was considered and it was finally issued on September 28, 2009. **Exhibits HH**, **II**, **JJ**, **KK** and **QQ**.

Plaintiffs appear to argue that the decision to "revert" to the 5-year, 75,000 mile extended warranty shows that New GM was reverting *from* – or backing away from – an alleged decision to accept liability under the Settlement. *See* PB, pp. 29-30. But there is no evidence that New GM ever intended to accept liability for the Settlement, nor was there any rational reason for it to do so. The e-mail traffic and other documents discussed above prove conclusively that New GM instead was "reverting" from Old GM's voluntary goodwill policy after having concluded that liability for the Settlement had been left behind in Old GM.[6]

After the proposed sale of the Saturn brand to Penske failed to close (*see* **Exhibit CCC**), New GM's senior management made another decision. As reflected in **Exhibit RR**, it instituted a new goodwill program, a "Special Reimbursement Policy," under which New GM agreed to reimburse customers for 50 percent of eligible VTi transmission repair costs incurred within eight years and 100,000 miles. Once again, adoption of this policy obviously was inconsistent

[6] Plaintiffs also argue that New GM's decision to honor claims under the extended 5-year, 75,000 mile terms of the standard repair warranty shows that the scope of warranty liabilities assumed under section 2.3(a)(vii)(A) was broader than the warranty delivered in the "glove box" at the point of sale. Of course, GM's Special Policies which adopted this extension merely amended the time and mileage limits of the existing standard repair warranty which *was* in the glove box at the point of sale. But even assuming *arguendo* that section 2.3(a)(vii)(A) did not require New GM to assume liability under the extended warranty, it was certainly free to do so voluntarily, and by doing so it would not have been required to accept the additional obligation to pay claims under the Settlement, all of which fall outside the time and mileage limits of even the extended warranty.

with the Settlement terms and therefore inconsistent with any belief on New GM's part that it had assumed the conflicting obligations spelled out in the Settlement.

Plaintiffs' case authorities confirm that the short time it took New GM to discontinue Old GM's voluntary reimbursement program defeats any claim that it admitted liability for the Settlement. Plaintiffs cite *New York Marine & Gen. Ins. Co. v. Lafarge North America, Inc.*, 599 F.3d 102 (2d Cir.2010), as providing the relevant general rule:

> There is no surer way to find out [the intent of the parties to a contract] … than to see what they have done. When the parties to a contract of doubtful meaning, guided by self-interest, *enforce it for a long time by a consistent and uniform course of conduct*, so as to give it a practical meaning, the courts will treat it as having that meaning.

Id. at 119 (emphasis added; citations, internal quotations and punctuation omitted). Under this test, the factual question is what did the Parties to the MSPA – Old GM and New GM – do with respect to the Settlement? First, Old GM indicated its intent to reject the Settlement on June 30, 2009. **GM Exhibit 4**. It later moved, successfully, for formal rejection. **Docket Nos. 4458 and 4680**. For its part, New GM began to discontinue Old GM's voluntary goodwill policy on September 2, 2009, less than two months after the 363 Sale closed, and it completed the process of discontinuing that policy on September 28, 2009 when it issued the VTi Settlement Clarification (**Exhibit QQ**). Nowhere during the period between July 10, 2009 and September 28, 2009 is there any evidence showing that any New GM employee, much less New GM management, believed there was a legal obligation to continue Old GM's goodwill policy or assume liability for the Settlement. New GM continued to implement Old GM's February 3, 2009 Administrative Bulletin (**Exhibit MM**) which authorized *goodwill* repairs and reimbursements *on a voluntary basis* in the interests of customer satisfaction. The continuation of a voluntary policy does not, in any sense, demonstrate the existence of a legal obligation.

B. <u>The Imprecise Use of the Word "Warranty" Does Not Aid Plaintiffs' Case</u>

Plaintiffs assert that the imprecise use of the word "warranty" by New GM and dealership employees to describe payments under Old GM's goodwill policy reflects an intent or

understanding on the part of New GM that it had assumed liability under the Settlement. *See* PB, pp. 28-29. Plaintiffs' Brief primarily quotes from the "comments" field of **Exhibit Z**, a spreadsheet summarizing New GM business records detailing goodwill payments made for VTi repairs between July 10, 2009 and the September 28, 2009 discontinuance of Old GM's goodwill program (**Exhibit QQ**).

As explained in the Declaration of Dale Hall (submitted herewith), who supervised GM's Global Warranty Management System ("**GWMS**"), New GM briefly continued Old GM's practice of using GWMS, colloquially known as the "**warranty payment system**," to reimburse dealers for VTi repairs under Old GM's voluntary goodwill program. But the warranty payment system was used to pay dealers for a wide variety of items that included not only reimbursement for repairs performed under the terms of the standard repair warranty, but also Special Coverage claims (*i.e.*, claims for the performance of repairs not covered by the standard repair warranty, but provided under "special policies" issued by GM), corrections pursuant to recalls, and goodwill claims such as those presented by customers who experienced VTi malfunctions. Hall Decl., ¶¶ 4-5. As Mr. Hall explains, the mere fact that a dealer was reimbursed through the warranty payment system does not support Plaintiffs' argument that the claim in question was covered by the standard repair warranty:

> This is plainly incorrect as the claims referenced on **Exhibit Z** were for repairs ***after*** the time and/or mileage limits set forth in the standard repair warranty, and therefore were made pursuant to the February 3, 2009 Administrative Bulletin (**Exhibit MM**), not the expired standard repair warranty. Moreover, these comments are input primarily by personnel of independently owned and operated GM dealerships and in some instances GM field service personnel who are not concerned with, and may not even be aware of, the difference between how the GWMS system categorizes payments for repairs performed under the standard repair warranty, a special policy or customer goodwill. Instead, what dealership and field service personnel are concerned with in my experience is, first and foremost, whether the dealer will be paid to perform the repairs by New GM, on the one hand, or, on the other hand, whether the dealer will have to obtain payment in whole or in part from the customer. In the vernacular, therefore, it is common for dealership

> and field service personnel to split repairs into two basic types: "customer pay" repairs and "warranty" repairs for which the dealer can look to New GM for payment. In this context, use of the term "warranty" obviously does not refer exclusively or specifically to the standard repair warranty, **but can encompass any repair reimbursable by GM on any basis, including customer goodwill**.

Hall Decl., ¶ 6 (bold underscore emphasis added; bold italics in original). Thus, as Mr. Hall goes on to explain (¶ 7), "a statement by a dealership employee or field service representative that a VTi repair is covered as 'Warranty Per Class Action' or the like … does not imply in any way that these claims 'arise under' the standard repair warranty. Rather it simply denotes that the repairs had been or would be paid by New GM as opposed to the customer."

A similar analysis defeats Plaintiffs' argument referencing a GM executive's request for the "total warranty spend" on VTi issues, including sums expended to reimburse repairs under Old GM's voluntary goodwill program. *See* **Exhibits AA**, **BB**. Here, too, the imprecise use of the term "warranty" does not reflect any intent or understanding on the part of New GM that it had assumed or was assuming liability for the Settlement. In fact, **Exhibit BB**, which includes the requested "warranty spend" data, breaks the payments down into three discrete categories on page 10888: "0 – 36,000 Base Warranty," "36,001-75,000 Special Coverage" and "75,000 – UP." These categories obviously correspond to payments under the original standard repair warranty, payments under the extended standard repair warranty and payments for customer goodwill, including Old GM's voluntary program reflected in **Exhibit MM**. And the next page provides weekly claims data based on "All Claim Types," again indicating New GM's differentiation of these three types of claims.

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

As Plaintiffs acknowledge, "'an agreement by conduct does not differ from an express agreement except in the manner in which its existence is established.'" PB, p. 39 (*citing Matter of Boice*, 226 App.Div.2d 908, 910, 640 N.Y.S.2d 681, 682 (1996)). The normal principles of contract formation apply, including the necessity of 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").

Simply put, Plaintiffs' Brief does not provide any evidence of consideration flowing to New GM from Saturn owners who did ***not*** have their VTi transmissions repaired, nor any evidence of a "meeting of the minds" between New GM and those owners. As a result, and without more, no implied contract has been formed.

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, which expressly permitted Old GM to sell its assets, and allowed New GM to buy them, free and clear of Old GM's liabilities. There is, simply put, no evidence that Old GM intended to transfer, or that New GM or UST intended to accept, liability under the Settlement or warranty liability outside the four corners of the standard repair warranty. New GM therefore is entitled to entry of judgment denying Plaintiffs' request for declaratory relief in all respects, and declaring that New GM has no liability whatsoever to Plaintiffs under the Settlement.

Dated: New York, New York
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[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

[s] Gregory R. Oxford

Gregory R. Oxford
ISAACS CLOUSE CROSE & OXFORD LLP
21515 Hawthorne Boulevard, Suite 950
Torrance, California 90503
Telephone: (310) 316-1990
Facsimile: (310) 316-1330

Attorneys for General Motors LLC