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.	:	

OPPOSITION OF DEFENDANT GENERAL MOTORS LLC TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Defendant General Motors LLC ("**New GM**"), formerly known as General Motors Company, respectfully submits this memorandum in opposition to Plaintiffs' Motion for Temporary Restraining Order ("**Motion**").

Plaintiffs' Motion comes in an action they originally filed in Delaware state court seeking to enforce against New GM an executory pre-petition class action settlement agreement which the Debtors (Motors Liquidation Company and its subsidiaries, collectively "MLC") have not assumed, let alone assigned to New GM, and which MLC now has moved to reject. *See* Docket No. # 4458. The claims underlying the settlement were not assumed by New GM. Plaintiffs allege that they come within the scope of New GM's agreement to assume responsibility for the

Debtors' standard pre-petition express warranties as set forth in section 2.3(a)(vii)(A) of the Master Sale and Purchase Agreement ("**MSPA**"). As this Court's Sale Approval Order clarified, however, New GM's responsibility under that provision was strictly limited to obligations "pursuant to and subject to the conditions and limitations contained in [the Debtors'] express written warranties, which were delivered in connection with the sale of vehicles and vehicle components prior to Closing of the 363 Transaction and specifically identified as a 'warranty.'" Sale Approval Order, ¶ 56. The entire point of plaintiffs' original lawsuit as well as this action is to impose liabilities in addition to and beyond the commitments of Saturn's original warranty.

The relief plaintiffs request in this case, both in their Motion and on the merits, directly contradicts the provisions of section 363 of the Bankruptcy Code and the Sale Approval Order which ensure the ability of a debtor to sell assets for the benefit of its estate free and clear of pre-petition liabilities other than those that the purchaser expressly agrees to assume. As discussed below, the salient facts, unambiguous provisions of the MSPA and Sale Approval Order and well-established legal principles dispatch these groundless claims as a matter of law and certainly preclude plaintiffs from making the showings of irreparable harm and probability of success on the merits that are required to support a temporary restraining order.

STATEMENT OF SALIENT FACTS

1. Saturn's express warranty provides, as its exclusive remedy, repairs to correct defects related to materials and workmanship in vehicle delivered to authorized dealers during this warranty period. Complaint, Exh. G, warranty booklet, pp. 7, 10. There is no dispute that, pursuant to the MSPA, New GM assumed liability under this express warranty, subject to its specific conditions and limitations, *i.e.*, its durational and mileage limits and the exclusivity of its repair remedy. MSPA § 2.3(a)(vii)(A); Sale Approval Order, ¶ 56. New GM is continuing to provide VTi transmission warranty repairs to the relatively few Saturn owners whose limited express warranties have not yet expired.

2. The Class Action settlement is memorialized in a Stipulation of Settlement. Plaintiffs' Complaint, Exh. B ("**Stipulation**"). Plaintiffs made four different types of claims in

the Class Action – breach of multiple state consumer protection statutes, breach of implied warranty, breach of express warranty and unjust enrichment (*see* Stipulation, ¶ I-2; Complaint, Exh. F, ¶¶ 69-80, 81-91, 92-100, 101-08) – but the parties specifically agreed in the settlement that MLC, then known as General Motors Corporation, was not admitting any liability on any of these claims. Stipulation, ¶, 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"); *see also* Final Judgment (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").

3. In the Class Action settlement MLC agreed to provide reimbursement, repairs and other benefits to class members who experienced VTi transmission concerns which necessitated repairs ***after the Saturn warranty had expired***. Specifically, class members who purchased or leased their vehicles new were eligible for reimbursement of either 100 percent or 70 percent of the cost of covered repairs, depending on whether they had accumulated 75,001 to 100,000 miles or 100,001 to 125,000 miles, and class members with used vehicles were eligible for 70 percent or 30 percent of the cost of covered repairs based on the same mileage ranges. Stipulation, ¶ III-1 (pp. 7-10). Importantly, therefore, warranty repairs and benefits under the Class Action were ***mutually exclusive*** remedies –a class member could qualify for benefits under the settlement ***only after the Saturn warranty had expired***.

4. The Class Action settlement at the time MLC filed for bankruptcy protection was an executory contract under which MLC and the class each owed continuing performance: MLC was obligated to provide notice and claim forms to class members, who would then be required to complete and return them before MLC would be required to provide eligible claimants with benefits under the settlement. Stipulation, ¶¶ II-8, II-9, III-1(pp. 8-9).

5. MLC was, and is, entitled to assume or reject the executory Class Action settlement under section 365 of the Bankruptcy Code. Although MLC has not yet obtained an order rejecting this executory contract, it has filed a motion to do so [Docket No. # 4458], and it certainly has never assumed this executory contract, which would be a prerequisite for assigning it to New GM, which it therefore also has never done. As a result, the Class Action settlement is an Excluded Contract under the MSPA which falls squarely within MSPA § 2.2(b)(vii)(C). If, contrariwise, MLC had intended to assign, and New GM had agreed to accept, this executory contract, MLC would have followed the provisions of the Court's Assumption and Assignment Procedures Order.[1] The court certainly can take judicial notice that MLC has never done so. Thus, the Class Action settlement agreement remains with MLC pending the Court's ruling on its rejection motion.

6. Following execution of the Stipulation and prior to the required Court approval of the Class Action settlement, MLC voluntarily provided the benefits contemplated by the settlement to class members who experienced so-called "fresh failures," *i.e.*, recent transmission concerns which required repairs. MLC was not required to do so, inasmuch as the settlement had not yet been approved and gone into effect. MLC continued voluntarily to provide the benefits contemplated by the settlement after filing its bankruptcy petition and prior to closing of the sale to New GM pursuant to section 363 of the Bankruptcy Code. New GM continued this "fresh failure" program voluntarily for a period of time, but discontinued it just prior to the anticipated but ultimately aborted closing of its proposed sale of Saturn assets to the Penske interests. *See* Motion, Exh. B.

7. Approximately ten days ago, New GM as a voluntary customer satisfaction measure created a new Special Reimbursement Policy for owners of Saturn vehicles equipped

[1] *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.

with VTi transmissions. Under this goodwill program, Saturn owners who experienced VTi transmission concerns which necessitated repairs on or after the Closing Date (July 10, 2009) and after their Saturn express warranties had expired were offered 50 percent reimbursement for eligible transmission repairs between 75,001 and 100,000 miles and within eight years of the date of the original sale or lease of their vehicle. Motion, Exh. A, pp. 1, 3. As an alternative, these owners were offered the opportunity to trade in their VTi-equipped vehicles for a $5,000 certificate good on the purchase of specified new GM vehicles. *Id.*, pp 2-3. Once again, benefits under this voluntary customer satisfaction program are available only to customers whose Saturn express warranties have expired. *Id*., p. 3. Saturn owners whose vehicles' express warranties have not expired remain eligible for repairs pursuant to, and subject to the conditions and limitations of, the 5 year, 75,000 mile Saturn warranty. *Id*., pp. 1, 3. Importantly, the Special Reimbursement Policy does not include any requirement that class members sign a release in order to receive reimbursement or trade in their vehicles for the $5,000 certificate. *Id*. Also, the Special Reimbursement Policy has no effect on the ability of Saturn owners to remain class members in the now-stayed Class Action against MLC and file appropriate claims in the bankruptcy proceedings.

8. The only plaintiffs in this adversary proceeding are the individual class representatives in the Class Action. None of the class members is a party in this case, and complaint does not plead required elements of a class action. New GM therefore is not and should not be precluded from communicating with these customers concerning the Special Reimbursement Policy. Further, the communications which are the subject of Plaintiffs' Motion are not communications between class members and New GM's lawyers, so the ethical rules cited by plaintiffs do not apply in any event.

ARGUMENT

As plaintiffs' Motion acknowledges (p. 8), they are required to demonstrate at the very least irreparable harm and probability of success on the merits[2] or, alternatively, sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships that tilts decidedly in their favor. As discussed below, they have not made and cannot make any of these showings.

I. PLAINTIFFS DO NOT, AND CANNOT, SHOW IRREPARABLE HARM OR THAT THE BALANCE OF HARDSHIPS TILTS IN THEIR FAVOR

It is important at the outset to focus on exactly the relief plaintiffs are seeking. They are not claiming that New GM cannot offer the 50 percent reimbursement or $5,000 certificate options to the owners of VTi- equipped vehicles. Motion, pp. 13-14. And because the New Special Policy includes no requirement that participants sign a release,[3] plaintiffs cannot argue that owners who accept 50 percent reimbursement could not later claim reimbursement at a higher rate if the Court were to hold (as New GM believes it cannot, *see* discussion *infra*) that they are entitled to reimbursement from New GM under the Class Action settlement.

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[2] In fact, the mandatory injunctive relief sought by plaintiffs requires the heightened showing of "a clear or substantial" likelihood of prevailing on the merits. *Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 35 (2d Cir.1995). The requested relief does not merely maintain the *status quo*. The *status quo* is that New GM, like any manufacturer, is communicating and is entitled to communicate with customers *who are not parties to any litigation against New GM*. The relief requested is a temporary restraining order squelching this speech by prohibiting new GM from "engaging in *ex parte* communications" with class members "except to the extent they are simultaneously advised of their rights under the Class Judgment and are informed that this Court is reviewing Plaintiffs' claim that New GM assumed Old GM's liability under the Class Judgment." Motion, pp. 8-9. In effect, plaintiffs are asking for a mandatory injunction giving them the right to interfere with and dictate the content of New GM's communications with customers concerning an important customer satisfaction initiative. Aside from the vagueness and the difficulty of administering the relief sought, it certainly cannot masquerade as "preservation of the *status quo*."

[3] New GM's counsel upon receipt of plaintiffs' counsel's letter of November 11, 2009 immediately informed them that New GM was not requiring participants in the new Special Reimbursement Policy to sign releases. *See* Letter from Gregory R. Oxford to Mark L. Brown, November 12, 2009. a copy of which is attached hereto as Exhibit A; *see also* Motion, Exh. A.

Thus, the only supposed "emergency" which plaintiffs say warrants temporary injunctive relief is the possibility that an owner with a "fresh failure" will choose to trade his or her vehicle in rather than await resolution of plaintiffs' claims in this case that *might*, at an undetermined date in the future, result in the availability of repairs at a rate greater than 50 percent. This "irreparable harm" argument cannot survive the intervention of common sense. How many Saturn owners with a "fresh failure" really will have the luxury of waiting weeks or months with an inoperable vehicle to see whether or not plaintiffs succeed on their claims in this case so that they can receive additional reimbursement? If, as New GM assumes, very few will have such luxury, then the "harm" caused by their potential ignorance of plaintiffs' claims in this case is inherently small. Moreover, for class members who prefer transmission repairs to the trade-in alternative, nothing prevents them from electing repairs at the 50 percent reimbursement rate which, in the absence of a release, *would not preclude them from claiming additional reimbursement at a higher rate if plaintiffs were to succeed in this case*.

Finally, the balance of hardships certainly does not tilt "decidedly" in plaintiffs favor, but instead tilts in favor of New GM. Beyond chilling permissible commercial speech to customers, New GM in order to "remedy" a "harm" that is mostly imaginary would be required to put in place a new and costly administrative mechanism for responding directly and through its dealers to those customers who express interest in the $5,000 certificate. There is simply no rational justification for granting such relief.

II. PLAINTIFFS' MOTION DOES NOT, AND CANNOT, DEMONSTRATE THE PROBABILITY OF SUCCESS ON THE MERITS

A. The Class Action Settlement Is an Executory Contract Which MLC Never Assumed or Assigned to New GM and Which It Is Moving To Reject

The Class Action settlement is an executory contract in the classic sense that, on the date of the bankruptcy filing by MLC, performance remained due on both sides of the contract. After June 1, 2009, MLC would have been required to mail notice of the settlement and claim forms to class members. Class members then would have been required to complete and return the claim

forms. Finally, MLC would have been obligated to review claims for eligibility, make eligibility determinations, and provide the settlement benefits to class members based on the information supplied in the claim forms. Stipulation, pp. 7-10.

In order to assign an Executory Contract such as the Class Action settlement to New GM, MLC would first be required to assume it under section 365 of the Bankruptcy Code and comply with the Court's Assumption and Assignment Procedures Order, which MLC never did. To the contrary, MLC has moved to *reject* the settlement. Docket No. # 4458.

In short, there is no dispute between MLC and New GM about the status of the Class Action settlement: it remains with MLC and has not been assumed and assigned to New GM.[4] As a result, plaintiffs have *no* likelihood of prevailing on the merits and their Motion accordingly should be denied.

B. <u>The Class Action Settlement Is Not an Assumed Liability in Any Event</u>

Plaintiffs in an effort to end-run MLC's decision *not* to assume the Class Action settlement and assign it to New GM have attempted to shoehorn liability under the settlement into the MSPA's definition of the limited express warranty liabilities which New GM has agreed to shoulder. That definition is set forth in section 2.3(a)(vii)(A), as follows:

> "all Liabilities arising under express written warranties of [MLC and its subsidiaries] 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 [MLC or its subsidiaries] prior to or after the [Sale] Closing…."

[4] Further, because plaintiffs are not parties to the MSPA, they have no direct rights to enforce the provisions of this agreement, which is why they are only suing as third party beneficiaries. *See* Complaint, ¶ 53. Yet MSPA § 9.11 after identifying a few intended third-party beneficiaries provides that otherwise "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 and assigns, any legal or equitable Claims, benefits, rights or remedies of any nature whatsoever under of by reason of this Agreement." Thus, plaintiffs simply have no standing to challenge or interfere with MLC's and New GM's allocation of rights and obligations under executory contracts, including the Class Action settlement.

To clearly define the narrow scope of warranty liability which New GM was willing to accept, MLC and New GM proposed to the Court the language of paragraph 56 of the Sale Approval Order (emphasis added):

> "[New GM] is assuming the obligations of [Old GM and co-debtors Saturn Corporation and Saturn Distribution Corporation] 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 Closing of the 363 Transaction and specifically identified as a 'warranty.'"

As MSPA § 3 specifically provides, in the event of any inconsistency between the MSPA and the Sale Approval Order, the provisions of the latter shall govern.

The "conditions and limitations contained" in Saturn's standard limited warranty include, most fundamentally, the following very specific and limited commitment: "This warranty covers ***repairs*** to correct any vehicle defect related to materials or workmanship occurring ***during the WARRANTY PERIOD*** [in the case of the VTi transmission, five years or 75,000 miles, whichever comes first]. Needed repairs will be performed using new or remanufactured parts." Complaint, Exh. G, p. 7 (emphasis added). The warranty further provides that "[p]erformance of repairs and needed adjustments is the exclusive remedy under this written warranty." *Id.*, p. 10.

Thus, as paragraph 56 makes unmistakably clear, any express warranty liability which GM did assume with respect to 2002-05 VTi-equipped vehicles included ***only*** the obligation to provide ***repairs*** under the terms of the Saturn warranty and ***only to do so prior to expiration of the applicable warranty period***.

Plaintiffs here are ***not*** seeking repairs within the warranty period. Instead, they are seeking monetary compensation for repairs ***after their Saturn warranties expired***. Responsibility for the specific settlement with its detailed reimbursement schedules, time-frames, attorneys fee provisions and the like is completely different from a claim that MLC or New GM has failed to pay for warranty repairs ***within the applicable warranty period***, which is the only

liability GM agreed to assume under the unambiguous language of section 2.3(a)(vii)(A) and paragraph 56.

It is important to emphasize in this regard that none of the seven individual plaintiffs is making any claim that they did not receive free-of-charge transmission repairs under the Saturn warranty during the warranty period. *See* Complaint, Exh. F (Second Amended Class Action Complaint), ¶¶ 38-61.[5] Nor can they ever make such a claim because all of their warranties now have expired. *Id*. Thus, it is clear that what they are trying to do is fasten on GM liability for a non-assumed and non-assigned settlement that extends far beyond the very limited express warranty liability which GM accepted in MSPA § 2.3(a)(vii). New GM consistent with the MSPA is continuing to honor its warranty obligations by paying dealers to repair VTi transmissions that remain within the express 5 year, 75,000 mile Saturn warranty. But New GM has not assumed MLC's liability under the Class Action settlement to provide monetary reimbursement to class members who experience such concerns ***after their warranties have expired*** – relief which settled law holds is not available under an express warranty. *See, e.g.*, *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").

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[5] 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. 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 (after the warranty period expired), and was replaced free-of-charge by a Saturn dealer except for the cost of a rental car and tow ($323.79). *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 (after the warranty expired) and was replaced in exchange for payment of only a $1,200 labor charge. *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; at 102,459 miles, transmission was replaced at a cost of only $377.26. *Id*., ¶¶ 59-61.

Plaintiffs attempt to give their claims the character of a "warranty liability" by arguing that the underlying Class Action asserted claims for breach of express warranty. Because MLC settled the case, they argue, the settlement "arose under" the express warranty. This argument ignores the indisputable facts that there was never any adjudication in the Class Action that MLC was liable for breach of express warranty, that MLC denied such liability in its answer, and that plaintiffs and MLC *agreed* in the settlement that MLC was ***not*** admitting liability on any of plaintiffs four claims for relief in the case, including their claim for breach of express warranty. Thus, MLC simply does not have any "liability arising out of express written warranties" by reason of the Class Action settlement.

The mere fact that plaintiffs in the Class Action ***alleged*** as one of their multiple claims that MLC/Saturn breached the Saturn express warranty does not magically transform the resulting negotiated settlement and Final Judgment into a "liability arising under express written warranties" that could possibly be an "Assumed Liability" under MSPA § 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.

III. PLAINTIFFS' "IMPLIED ASSUMPTION" CLAIM HAS NO LEGAL BASIS

Prior to its bankruptcy filing, MLC as a customer goodwill gesture voluntarily made the benefits of the Class Action settlement available to class members experiencing "fresh failures" of their VTi transmissions, *i.e.*, the need for repairs originating after the settlement was negotiated but before it was approved and became effective. *See* Complaint, ¶¶ 41- 43. MLC was not required to do so under the settlement terms, but elected this course voluntarily in the interests of customer satisfaction notwithstanding the fact that customers receiving this benefit were not required to sign releases or otherwise forego any of their other rights under the Class

Action settlement if and when it went into effect which, ultimately, it didn't. Complaint, ¶ 33.[6] In the wake of the bankruptcy filing and the 363 sale, New GM continued this voluntary customer satisfaction program for a time despite, again, not receiving releases or any other consideration from class members who received the benefits of this program. Complaint, ¶ 46. As plaintiffs acknowledge, New GM now has discontinued this program. Motion, p. 7 & Exh. B.

In a nutshell, plaintiffs claim that GM's temporary continuation of MLC's "fresh failure" program created an implied obligation to provide all of the benefits of the Class Action settlement to all class members, whether their transmissions 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.

To be sure, a contract can be implied from the parties' conduct in an appropriate case. The acceptance of services, for example, may imply an agreement to pay for them, as was held in *Berlinger v. Lisi*, 288 A.D.2d 523, 731 N.Y.S.2d 916 (1996), which plaintiffs cite in their proposed motion for summary judgment. But, as another of plaintiffs' cases holds, "an [implied] agreement by conduct does not differ from an express agreement except in the manner by which its existence is established." *Matter of Boice*, 226 A.D.2d 908, 910, 640 N.Y.S.2d 681, 682 (1996). Thus, just like an express contract, an implied contract requires both consideration and "an indication of a meeting of the minds" of the parties. *Berlinger*, 226 A.D.2d at 524; *Maas v. Cornell University*, 94 N.Y.2d 87, 93-94, 699 N.Y.S.2d 716, 720 (1999) (the formation of implied-in-fact 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 class members to pay for repair of their VTi transmissions, the consideration for which, as plaintiffs suggest, could be the potential for enhanced goodwill towards New GM on the part of those individual customers. *See*

[6] Under the settlement terms, the settlement was to become effective, at the earliest, ten business days after the time for appeal of the Final Judgment had expired, which would have been after the MLC bankruptcy filing.

Response, pp. 4-5. 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 repairs have not supplied New GM with any consideration whatsoever. In fact, plaintiffs do not allege that New GM had any communication at all, much less a "meeting of the minds" with *these customers*. Accordingly, New GM's repair offers did not create any enforceable obligation as to class members generally – or, indeed, as to any plaintiff or class member who did not actually accept a "fresh failure" repair offer (in which case, of course, the agreement was limited to the "fresh failure" repairs rather than the full panoply of benefits that would have been available under the Class Action settlement).

Thus, regardless of what the detailed facts may be concerning New GM's temporary continuation of MLC's voluntary "fresh failure" program, there is no need for "discovery" of those facts or any other proceedings on Count II of plaintiffs' complaint because they very simply have advanced no legal theory that would warrant implication of a contractual obligation that would require GM to provide any of the Class Action settlement benefits to plaintiffs or class members generally. Thus, plaintiffs have not demonstrated, and cannot demonstrate, any likelihood of success on the merits, or even that there are serious questions going to the merits that provide a fair question for litigation.

IV. NEW GM IS NOT VIOLATING ANY ETHICAL PROHIBITIONS

Plaintiffs are prosecuting this case in their individual capacities. They have not pleaded their complaint as a class action, and members of the class in the California Class Action are not parties plaintiff here. Moreover, New GM, not its lawyers, is communicating with these customers. So, leaving aside the lack of any sound basis for the requested temporary injunctive relief, ethical rules governing communications between lawyers and adverse parties known to be represented by counsel simply do not come into play here.

V. PLAINTIFFS' INITIATION AND CONTINUED PROSECUTION OF THIS ACTION VIOLATES THE SALE APPROVAL ORDER

For all the reasons discussed above, this action represents a transparent attempt to fasten on New GM liabilities of MLC which New GM clearly did not assume. Accordingly, plaintiffs have violated and are continuing to violate the injunctive provisions of the Sale Approval Order, *see* Sale Approval Order, ¶¶ 8, 47, on account of which they should be ordered to pay New GM's costs and attorneys' fees herein incurred.

CONCLUSION

Plaintiffs' attempt to enforce against New GM a pre-petition settlement agreement which it never agreed to assume strikes at the very heart of section 363 of the Bankruptcy Code. For the reasons set forth above, it therefore is especially appropriate for the Court to preclude plaintiffs and other pre-petition litigants from pursuing section 363 purchasers such as New GM with claims that appropriately should be addressed to the debtor and which threaten to chill future section 363 purchase and sale transactions free and clear of liabilities which the purchaser does not expressly agree to assume. Denial of plaintiffs' groundless motion for temporary restraining order should be the first but not the last step in sending out that message.

Dated: New York, New York
November 17, 2009

*[s]*_____
Gregory R. Oxford

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VIA FACSIMILE AND ELECTRONIC MAIL

November 12, 2009

Mark L. Brown
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Re: Castillo et al v. General Motors Co. (Declaratory Relief Action)

Dear Mark:

As you know, I represent General Motors, LLC ("GM"), formerly known as General Motors Company, in the above-referenced Action. This will respond to your letter of November 11, which I received late yesterday afternoon. With all respect, GM disputes virtually every statement in your letter.

First, and most obviously, GM is not, and never has been, a party to plaintiffs' class action against Motors Liquidation Company, formerly known as General Motors Corporation, in the United States District Court for the Eastern District of California (the "Class Action"), and GM has not assumed any liability whatsoever for the settlement which MLC negotiated in that case. Your claim that I am "aware from the Complaint currently pending before the Bankruptcy Court" that GM "has assumed the liability of its predecessor, General Motors Corp., with respect to the California judgment" ignores the plain language of the Master Sale and Purchase Agreement and the Sale Approval Order, as well as GM's pending motion to dismiss the subject complaint on the precise ground that GM did not assume this liability.

Second, because GM is not a party to the Class Action and class members are not parties to the above-referenced action, there is no ethical prohibition which restricts its communications with class members in that case. Like any normal business, GM is entitled to communicate with customers and to take whatever customer satisfaction measures it deems appropriate. The mere facts that seven of your individual clients have sued GM based on the claim that GM has assumed the Class Action settlement and that GM has hired lawyers to defeat your meritless suit hardly precludes GM from

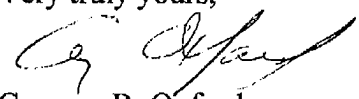
communicating with customers who presently are not parties to any pending action against GM.

Third, the central premise of your letter and the accompanying draft motion that GM's new special policy is intended to persuade class members to compromise their claims against MLC, or against GM if they have any such claim (which they don't), is simply false. To accept the benefits of the special policy, Saturn owners are not required to execute a release or surrender any of their rights against MLC under the Class Action settlement – or any claimed rights against GM for that matter. In substance, therefore, Saturn owners have simply been given an additional choice which is not inconsistent in any way with whatever rights they may have in the future pursuant to the terms of the Class Action settlement.

Fourth, GM rejects your claim that any aspect of Special Reimbursement Policy #09280 is misleading.

Finally, as you previously have been advised in my letter of September 10, 2009, your continued prosecution of this action, including the threatened TRO proceeding, violate the clear injunctive provisions of the Sale Approval Order and GM intends to hold your clients and your firm accountable for its attorneys fees and costs in resisting same.

Very truly yours,



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