

Date of Oral Argument: October 20, 2011 at 9:45 a.m.

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re : Chapter 11  
: :  
MOTORS LIQUIDATION COMPANY, *et al.*, : Case No. 09-50026 (REG)  
f/k/a General Motors Corp., *et al.* : :  
: :  
Debtors. : (Jointly Administered)  
-----X  
KELLY CASTILLO, NICHOLE BROWN, : Adv. Proc. No. 09-00509  
BRENDA ALEXIS DIGIAN DOMENICO, : :  
VALERIE EVANS, BARBARA ALLEN, : :  
STANLEY OZAROWSKI, AND DONNA : :  
SANTI, : :  
Plaintiffs, : :  
v. : :  
GENERAL MOTORS COMPANY, F/K/A : :  
NEW GENERAL MOTORS COMPANY, INC., : :  
Defendant. : :  
-----X  
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. : :  
-----X

**OPENING BRIEF OF DEFENDANT GENERAL MOTORS LLC**

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Defendant General Motors LLC (“**New GM**”), formerly known as General Motors Company, sets forth in this opening brief its factual and legal grounds for denying liability under the Stipulation of Settlement and Final Judgment (collectively, the “**Settlement**”) in *Castillo et al. v. General Motors Corp.*, United States District Court, Eastern District of California.

### **PRELIMINARY STATEMENT**

Plaintiffs seek a declaratory judgment that the Settlement is an “Assumed Liability” of New GM under section 2.3(a)(vii)(A) of the Amended and Restated Master Sale and Purchase Agreement (“**MSPA**”) between General Motors Corporation (“**Old GM**”) and New GM (the “**Parties**”). Under the MSPA, New GM acquired Old GM’s business assets free and clear of Old GM’s liabilities (subject to specified narrow exceptions) under Section 363 of the Bankruptcy Code (the “**363 Sale**”). This Court approved the 363 Sale in an order issued on July 5, 2009 (the “**363 Sale Order**”) and the transaction closed on July 10, 2009.

New GM previously moved for summary judgment in this adversary proceeding and Plaintiffs cross-moved for partial summary judgment. On May 6, 2010, the Court denied both motions. The Court stated that denial of GM’s motion was a “closer call” than its ruling on Plaintiffs’ motion, but found that section 2.3(a)(vii)(A) is ambiguous, that GM’s parol evidence while “strong” was not “dispositive,” and that Plaintiffs should be given the opportunity to find evidence that might support their position through discovery limited to six specific issues:

[1] “If there is a document or admission from or on behalf of New GM stating, in substance, that New GM intended to assume the liabilities under the settlement agreement, I’ll give the class action plaintiffs a chance to find it.”

[2] “If there is a document or admission from or on behalf of New GM stating in substance that New GM intended to assume any liability that was alleged to be an express warranty claim, as contrasted to one that had been stated by Old GM to be such or agreed or adjudicated to be such, I’ll give the class action plaintiffs a chance to find it.”

[3] “If there is a document or admission from or on behalf of New GM indicating that New GM offered the five year, 75,000 mile

warranty based on the perception that it regarded itself to be legally obligated to do so as contrasted to doing it for its own business reasons such as customer good will, I'll give the class action plaintiffs a chance to find it.”

[4] “If there’s a reason why ‘obligations’ was used [in] 2.3(a)(vii)(B) in a manner to contrast it from the use of ‘liabilities’ in 2.3(a)(vii)(A) in a fashion that was intended to make the 2.3(a)(vii)(A) liabilities assumed, I'll give the class action plaintiffs a chance to find it.”

[5] “If there's a document or admission from or on behalf of New GM stating in substance 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, I'll give the class action plaintiffs a chance to find it.”

[6] “If there’s any document or admission from or on behalf of New GM with respect to any decision as to whether or not the assume and assign -- excuse me -- whether or not to assume and assign the sale [sic – “settlement”?] agreement or to reject it, I'll give the class action plaintiffs a chance to find it.”

Transcript of Hearing, May 6, 2010, pp. 81-83. “[U]ntil we’ve closed off those possibilities,” the Court stated, “I won’t grant summary judgment to New GM...” *Id.*, p. 84.

Those possibilities now have been closed off. Written and deposition discovery has been completed. Plaintiffs have not found any evidence – because there is none – showing that New GM agreed to assume liability for the Settlement, or for any other claims by class members reaching beyond the four corners of Saturn’s standard limited “repair or replace” warranty (“**standard repair warranty**”). To the contrary, there is now before the Court even more parol evidence than New GM presented previously which demonstrates without room for any genuine dispute that it expressly declined to assume any such liabilities.

This evidence confirms that liability under the Settlement did not “arise under” the standard repair warranty referenced in MSPA § 2.3(a)(vii)(A). The evidence also is clear that New GM only agreed to assume Old GM’s liability for warranty obligations spelled out in, and subject to the conditions and limitations of, the standard repair warranty which plainly does not

cover Plaintiffs' claims under the Settlement for compensation for VTi malfunctions occurring *after the warranty period expired*. See MSPA § 2.3(a)(vii)(A); 363 Sale Order, ¶ 56. To the contrary, the claims settled were not based on the standard repair warranty, sought relief inconsistent with the terms of that warranty and manifestly sought to evade its explicit limitations.

Separately, the settled claims do not “arise under” the standard repair warranty because Plaintiffs and Old GM agreed in the Stipulation of Settlement that Old GM was not admitting *any* liability on Plaintiffs' underlying claims for relief, including *any kind of* warranty liability.

Finally, the undisputed evidence establishes that the Parties to the 363 transaction went to considerable lengths to expressly exclude exactly these types of claims from New GM's assumption of liability

Therefore, New GM is entitled to judgment denying Plaintiffs' request for declaratory relief in all respects and confirming that it has no liability whatsoever under the Settlement.

### **SUMMARY OF ARGUMENT**

The only warranty obligations that New GM assumed under MSPA § 2.3(a)(vii)(A) are those set forth in Saturn's standard repair warranty. This conclusion follows from the plain language of MSPA § 2.3(a)(vii)(A) which states that Assumed Liabilities include:

“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 is *not* a liability “arising under express written warranties . . . specifically identified as warranties and delivered in connection with the sale” of new Saturn VUEs and IONs. Instead, the Settlement created a *contractual* liability of Old GM to class members that is completely independent of the standard repair warranty and, in fact, conferred monetary benefits on class members that the terms of the standard repair warranty expressly excluded – *i.e.*, free-of-charge repairs and monetary reimbursement for repairs occurring *after expiration of the*

*warranty period.* Both the Stipulation of Settlement executed by Plaintiffs' counsel and the Final Judgment entered by the California District Court expressly provide that Old GM, in agreeing to the Settlement, was *not admitting any liability* based on the' allegations in the underlying class action, let alone liability for breach of the standard repair warranty. Indeed, Plaintiffs' class action complaint not only did not seek the exclusive remedies that were available under the terms of the standard repair warranty, but overtly sought to avoid its express limitations on available remedies. Thus, "liability" under the Settlement does not "aris[e] under express written warranties" at all, but instead "arises under" the express terms of the Stipulation of Settlement. Separately, as Plaintiffs themselves argue, the phrase "arising under," given its normal meaning, denotes that the liability must "originate from a source." If liability for a repair is *not covered* by the standard warranty, how can that liability "originate from [that] source"? It does not. Liability for the repair, if it exists at all, must logically originate from a *different* source, *i.e.*, it must spring from another contract, a statute, or some other source of legal obligation, but not the inapplicable standard repair warranty. Here the source is another contract – the Stipulation of Settlement – which never became effective, and which was not assumed by Old GM or assigned or transferred to New GM as part of the 363 Sale.

The Stipulation of Settlement is a contract. The MSPA sets forth a specific regime to govern the assumption of contractual liabilities which operates to exclude the Settlement from the limited universe of "Assumed Liabilities." And, lest the forest be missed by undue focus on the trees, that is exactly what one would expect. The Settlement is an unsecured pre-petition liability of the type that would routinely be impaired in bankruptcy.

All this being said, the Court at the summary judgment hearing concluded that section 2.3(a)(vii)(A) is ambiguous and that its proper construction requires consideration of parol evidence. New GM, consistent with the Court's ruling, has submitted ample parol evidence showing that it clearly did not intend to assume liability under the Settlement. In summary:

1. During discussions between the United States Treasury Department Auto Team (“UST”) and Old GM, UST insisted that New GM would not assume any liability not commercially necessary for the going forward success of its business.

2. At the time of Old GM’s bankruptcy filing, the “Effective Date” of the Stipulation of Settlement that would trigger Old GM’s promise to receive and pay Plaintiffs’ eligible claims in exchange for their releases had not occurred. The bankruptcy filing automatically stayed the class action and claims processing under the Settlement. Thus, the key terms of the Settlement never became effective.

3. During a discussion between Lawrence S. Buonomo, Old GM’s chief liaison with UST on litigation issues, and UST’s outside counsel, Mr. Buonomo stated that class action settlements, including specifically the Settlement in the underlying *Castillo* action, would need to be rejected by Old GM since they did not fit within the UST guidelines as to the type of liabilities New GM would assume.

4. Reflecting the Parties’ mutual intent that New GM would not assume responsibility for the Settlement, Old GM did not comply with the procedures set forth in the Sale Procedures Order (as defined herein) for assumption of executory contracts; Plaintiffs were never notified of any decision by Old GM to assume and assign the Settlement to New GM and were never granted access to the contract website in accordance with the mandatory provisions of the Sale Procedures Order

5. Instead, on June 30, 2009 – well before Plaintiffs commenced this litigation – Old GM designated the Stipulation of Settlement for “reject[ion] later.” Old GM later moved for rejection of the Settlement; the Court granted the motion via an agreed order.

6. In order to avoid inadvertent assignment of contracts to New GM that represented net liabilities (“**negative contracts**”), an express provision was added to the MSPA which classified such contracts as “Excluded Contracts,” *i.e.* contracts that would be excluded from the “Purchased Assets.” This permitted Old GM to avoid

assigning negative contracts to New GM without detailed analysis of whether they were, strictly speaking, “executory” in the sense that they were subject to Section 365 of the Bankruptcy Code. Thus, even if the Stipulation of Settlement was not an executory contract subject to rejection under Section 365 (despite the fact that class members’ releases and GM’s promise to pay eligible claims never became effective), the “Excluded Contracts” provisions of the MSPA manifested the clear intent of the Parties to leave the Settlement behind as a Retained Liability of Old GM.

7. MSPA § 2.3(a)(vii)(A) was intended to and did limit New GM’s assumed warranty liability to obligations “arising under” the express provisions of the standard repair warranty, *i.e.*, paying dealers to provide customers with free-of-charge repair or replacement for defects in materials and workmanship during the warranty period, providing the parts necessary to perform the repairs and administering the warranty system. The MSPA also contained a number of express exclusions to reinforce the conclusion that claims of the nature asserted in the underlying *Castillo* action were not assumed. *See, e.g.*, MSPA §§ 2.3(b)(xi), 2.3(b)(xiii)(B), 6.15(b)(ii)(B). After it became apparent that certain third parties nevertheless perceived an ambiguity in MSPA § 2.3(a)(vii)(A), Old GM and UST agreed to propose a clarifying provision, paragraph 56 of the 363 Sale Order, which explicitly stated that New GM was assuming warranty liability “subject to the conditions and limitations” spelled out in the standard repair warranty.

8. Mr. Buonomo, Old GM’s chief liaison with UST on litigation issues, has testified that he never participated in any discussion in which UST representatives or New GM employees agreed that New GM would or should assume warranty liabilities beyond those set forth in the standard repair warranty. To the contrary, Old GM, New GM and UST expressly declined to broaden the assumption of warranty liability in response to requests by representatives of state Attorneys General.

9. Mr. Buonomo also never participated in any discussion in which UST representatives or New GM employees stated or agreed that the use of the term “arising under” in MSPA § 2.3(a)(vii)(A) would or should make the assumption of warranty liability any broader than the assumption of Lemon Law “obligations.” Note, also, that comparison of section 2.3(a)(vii) with the “mirror” language in section 6.15(b) detailing New GM’s obligations to satisfy post-closing warranty and Lemon Law claims *does* apply the phrase “arising under” to *both* warranty *and* Lemon Law obligations, so it appears that the use of this phrase with respect only to warranty obligations in section 2.3(a)(vii) was inadvertent.

10. A \$20 million legal settlement accounting reserve for the *Castillo* action was not transferred to New GM but instead was left behind in Old GM.

11. Shortly after the 363 Sale was approved by this court, New GM discontinued Old GM’s pre-existing goodwill policy of voluntarily reimbursing VTi repairs under the formula set forth in the Stipulation of Settlement. Contemporaneous documents show that New GM made the decision to discontinue Old GM’s voluntary reimbursement policy without any thought that it had somehow assumed the Settlement or otherwise had any legal obligation to continue Old GM’s voluntary program by reason of the unimplemented Settlement.

This evidence is not and cannot be disputed by Plaintiffs, nor have they adduced any probative parol evidence of their own.<sup>1</sup> As a result, and as further explained below, New GM now is entitled to a judgment denying Plaintiffs’ request for declaratory relief in its entirety and confirming that New GM did not assume liability for the Settlement.

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<sup>1</sup> Plaintiffs in their Contentions of Law and Fact ask the Court, in effect, to ignore the parol evidence and hold their position is correct based solely on a supposed canon of construction that ambiguities should be called in favor of the debtor. The debtor, however, has never claimed that liability for the Settlement is the responsibility of New GM, nor could it do so given its rejection of the Settlement, and certainly the general canon asserted by Plaintiffs cannot empower the Court to disregard competent and specific parol evidence that resolves any doubt about the mutual intent of Old GM and New GM that New GM *not* assume liability for the Settlement.

## STATEMENT OF FACTS

### **A. The Underlying Class Action**

Plaintiffs filed the underlying class action in the United States District Court for the Eastern District of California in 2007. **Joint Exhibit D**. They alleged that the continuously variable “VTi” transmissions in certain model year 2002 through 2005 Saturn VUEs and certain model year 2003 and 2004 Saturn IONs had a high failure rate. On behalf of a nationwide class of all current or past owners of these vehicles, they asserted four claims for relief: (1) violation of varying state consumer protection laws; (2) breach of express warranty; (3) breach of implied warranty; and (4) unjust enrichment. **Second Amended Complaint (Joint Exhibit F)**, ¶¶ 69-108; Lines Decl., ¶ 3.

Saturn VUEs and IONs were distributed in the United States through a network of independently owned Saturn Retailers by Saturn Distribution Corporation, a wholly-owned subsidiary of Saturn Corporation which in turn was a wholly-owned subsidiary of Old GM. Both Saturn entities are co-debtors in these proceedings. Lines Decl., ¶ 4.

A booklet containing the terms of Saturn’s standard repair warranty was placed in the glove box of each VUE and ION prior to its initial retail sale or lease. The exclusive remedy under this warranty was free-of-charge repair or replacement of vehicle components found defective in materials or workmanship within specifically defined time and mileage limitations (the “**warranty period**”). Liability for incidental and consequential damages was expressly excluded. **Joint Exhibit G** contains an exemplar of the pertinent warranty booklet. Lines Decl., ¶ 5; *see also Plaintiffs’ Exhibit L, Exhs. H, J, K & I* (model year 2002, 2003, 2004 and 2005 warranty booklets).

Initially the warranty period under Saturn’s standard repair warranty was three years or 36,000 miles from the date of initial purchase or lease of the vehicle, whichever came first. In March 2004, more than three years before the *Castillo* action was filed, Old GM voluntarily extended the warranty period to cover free-of-charge repair or replacement of VTi transmissions

which malfunctioned within five years or 75,000 miles of the initial purchase or lease, whichever came first. *See* **Bulletins 04020, 04020A (Joint Exhibits V and PP)**; Lines Decl., ¶ 6.

Old GM filed a motion to dismiss Plaintiffs' initial complaint (**Joint Exhibit D**). Instead of opposing the motion, Plaintiffs filed a First Amended Complaint (**Joint Exhibit E**). Old GM again moved to dismiss. *See* **Joint Exhibits H, I & ZZ** (moving, opposition and reply papers). Lines Decl., ¶ 7

Plaintiffs' claim for breach of express warranty did not assert violation of Saturn's standard repair warranty, but instead asserted claims for alleged "design defects" and VTi transmission malfunctions that occurred *after* the applicable warranty period had expired. *See* **Second Amended Complaint (Joint Exhibit F)**, ¶¶ 84-91. New GM's Memorandum of Points and Authorities in Support of Motion To Dismiss (**Joint Exhibit H**), pp.2, 15-18; Plaintiffs' Brief in Opposition to Defendant's Motion To Dismiss (**Joint Exhibit I**), pp. 29, 33-34; New GM's Reply Memorandum in Support of Motion To Dismiss (**Joint Exhibit ZZ**), pp. 16-21. Plaintiffs' claims for breach of express warranty did not seek transmission repair or replacement during the warranty period, but instead asked for monetary compensation or free-of-charge repairs for VTi malfunctions that occurred – or might occur in the future – after expiration of the warranty period. **Joint Exhibit F**, ¶¶ 84-85, 89; *id.*, p. 22 (¶¶ B, C). Plaintiffs' claims for violation of state consumer protection statutes, breach of implied warranty and unjust enrichment also sought remedies beyond the exclusive remedy of repair or replacement provided by Saturn's standard repair warranty. *See* **Joint Exhibit F**, pp. 19 (¶ B), 24 (¶¶ B, C), 26 (¶¶ B, C). Lines Decl., ¶ 8. Plaintiffs did not assert any claims for relief under "Lemon Laws."

## **B. The Settlement**

Prior to any ruling on Old GM's motion to dismiss, the parties mediated the case and entered into a **Stipulation of Settlement (Joint Exhibit B)** ("**Stipulation**"). Under the Stipulation, Plaintiffs agreed to release all of their claims against Old GM on the "Effective Date" of the Settlement (as defined in the Stipulation). For its part, Old GM agreed upon occurrence of the Effective Date (subject to required approval by the District Court) to provide

certain relief to class members who submitted valid claim forms for VTi transmission malfunctions that occurred *after* the five-year, 75,000 warranty period had expired, *i.e.*, relief not available under the standard repair warranty. Specifically, the Stipulation provided for Old GM to reimburse purchasers of new VTi-equipped vehicles for 100 percent of the cost of VTi repairs for malfunctions not covered by the original warranty that occurred within 100,000 miles of the vehicle's initial retail sale or lease, and for 75 percent of repair costs for malfunctions between 100,001 and 125,000 miles, in each case within defined time periods corresponding to the model year of the vehicle. Similarly, within the same defined time periods for each model year, Old GM would, following the Effective Date of the Settlement, reimburse purchasers of used VTi-equipped vehicles for 75 percent of VTi repair costs not covered by the original warranty for malfunctions within 100,000 miles of the original retail sale or lease, and for 30 percent of repair costs for malfunctions between 100,001 and 125,000 miles. Following the Effective Date of the Settlement, Old GM also would have provided compensation to certain owners of VTi-equipped vehicles who previously had traded them in rather than seeking repair of VTi malfunctions.

**Joint Exhibit B**, ¶¶ 7-10; Lines Decl., ¶ 9.

The California District Court subsequently certified a settlement class, approved the **Form of Notice** of the proposed Settlement to be mailed to class members (**Joint Exhibit K**), held a hearing, approved the Settlement and entered the **Final Judgment** providing for implementation of the terms of the Settlement (**Joint Exhibit A**). Lines Decl., ¶ 10.

The Stipulation and the Final Judgment both expressly provided, pursuant to the express agreement of Plaintiffs and Old GM, that Old GM was not admitting *any* liability, including liability on Plaintiffs' claim for breach of express warranty. Specifically, Paragraph 12 of the **Final Judgment** provided as follows:

*“Neither this Judgment nor the [Stipulation of Settlement] (nor any document referred to herein or any action taken to carry out this Final Judgment) is, may be construed as, or may be used as an admission by [Old GM] of the validity of any claim, of actual or potential fault, wrongdoing or liability whatsoever.”*

(Emphasis added.) Paragraph 5 of the Stipulation (**Joint Exhibit B**) similarly provided as follows:

“[Old GM] expressly denies any wrongdoing and does not admit or concede *any* actual or potential fault, wrongdoing or *liability in connection with any facts or claims that have been or could have been alleged against it in the Action*, and [Old GM] denies that Plaintiffs or any Class Members have suffered damage or were harmed by the conduct alleged.”

(Emphasis added.) Lines Decl., ¶ 11. Now, however, Plaintiffs are attempting, in direct violation of paragraph 12 of the Final Judgment, to “use” the Settlement as evidence of Old GM’s liability for “breach of warranty.”

After the District Court had issued its **Order Preliminarily Approving the Settlement (Joint Exhibit J)** and notice had been mailed to class members, Old GM decided voluntarily to begin reimbursing Saturn Retailers for VTi repairs in accordance with the formula set forth in the Settlement Agreement. Anticipating that the Settlement would be implemented, Old GM made this decision in the interest of customer satisfaction so that Saturn owners did not either (a) have to pay for VTi repairs out-of-pocket and then wait for reimbursement until after the Effective Date of the Settlement or (b) have to delay repairs until after the Effective Date in order to avoid paying for them out-of-pocket. On February 3, 2009, Old GM issued an **Administrative Bulletin** documenting this voluntary customer satisfaction policy (**Joint Exhibit MM**). These actions by Old GM were completely voluntary because neither the Stipulation nor the Final Judgment obligated Old GM to make any reimbursement payments until after the Effective Date when the claims process would begin. Lines Decl., ¶ 12; **Joint Exh. B**, ¶¶ II-8, II-9, III-12.

To be specific, at the time that Old GM filed its bankruptcy case, the Stipulation of Settlement had been approved by the District Court, but it had not yet become effective, *i.e.*, the Effective Date as defined in the Stipulation had not been reached<sup>2</sup> and therefore Old GM had not

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<sup>2</sup> The term “Effective Date” was defined in ¶ II-6 of the Stipulation of Settlement as “ten (10) business days after ... the date upon which the time for seeking appellate review of the Judgment ... shall have expired....” The deadline for filing an appeal was Monday May 18, 2009 (30 days after the entry of judgment), meaning that the Effective Date given the intervening Memorial

performed, and was not yet obligated to perform, the terms of the Settlement. Instead, as of June 1, 2009, the *Castillo* action was stayed pursuant to Section 362 of the Bankruptcy Code and Old GM was not required to perform – in fact, it was precluded from performing – the terms of the Settlement. Lines Decl., ¶ 13.

**C. The Old GM Bankruptcy and Section 363 Sale**

**1. *Pre-Filing Discussions Between Old GM and UST***

During the Spring of 2009, Old GM as part of its contingency planning for a potential bankruptcy filing had extensive discussions with the UST. Lawrence S. Buonomo, then an attorney on Old GM’s Legal Staff, was Old GM’s primary liaison with the UST regarding product liability and litigation issues. Buonomo Decl., ¶¶ 1-3. In April of 2009, the UST (which was the only available source of financing for a successful bankruptcy reorganization) informed Old GM that in the event of a bankruptcy filing its preference would be a sale to a new company of Old GM’s assets free and clear of its liabilities pursuant to Section 363 of the Bankruptcy Code. Buonomo Decl., ¶ 5.

In discussing the proposed sale with Old GM, UST insisted that only those liabilities of Old GM that were deemed essential to the future successful operations of what would become New GM should be assumed. From its conception, therefore, the fundamental structure of the 363 Sale was that New GM would acquire all of the assets of Old GM except those specifically excluded, but would assume only those liabilities specifically designated for assumption. All other liabilities would be retained by Old GM. These principles were consistent with, and driven by the need for, the creation of the strongest possible New GM going forward in the expectation that the New GM stock to be distributed eventually to Old GM’s creditors would provide them with as much consideration as possible. Buonomo Decl., ¶ 6.

As confirmed by the testimony in this Court of Harry Wilson, a member of the UST Auto Team, the basic stance of the UST was that New GM should not assume Old GM’s liabilities

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Day holiday could not have been earlier than Wednesday, June 3, *i.e.*, ten business days after the first date on which the time to appeal “shall have expired,” *i.e.*, Tuesday, May 19, 2009.

unless there was a specific reason why the assumption of a particular liability or category of liabilities was considered commercially necessary to the future successful operations of New GM. *See* Declaration of Harry Wilson, June 25, 2009 (submitted as direct testimony at the 363 Sale approval hearing), ¶ 19 (“As a purchaser seeking to buy assets that will enable New GM to be as competitive as possible, New GM negotiated the 363 Transaction to limit to the maximum extent its successor liabilities, as advised by counsel. New GM has only voluntarily assumed liabilities *where it sees a necessary and compelling business purpose for doing so.*”) (emphasis added); Testimony of Harry Wilson, 363 Sale Approval Hearing, July 1, 2009, p. 111 (“We focused on which assets we wanted to buy and which liabilities were *necessary for the commercial success of New GM.*”) (emphasis added).

Within these parameters, there were numerous discussions between UST and Old GM representatives regarding specific categories of potentially litigation-related liabilities, including (a) Old GM’s commitment to compensate dealers for repairing customer vehicles under standard repair warranties, (b) contingent litigation exposures, (c) product liabilities related to vehicles manufactured by Old GM, and (d) outstanding contracts (executory and otherwise) to which Old GM was a party but which on a net basis represented liabilities rather than assets. Old GM’s liability under the *Castillo* settlement fell into each of the last three categories of litigation-related liabilities, all of which were classified as “Retained Liabilities” of Old GM as defined in the **June 1, 2011 version of the Master Sale and Purchase Agreement submitted to the Court** (pertinent excerpts of which are included in **GM Exhibit 2**).

While Plaintiffs seem to be arguing that there was something unique about the *Castillo* settlement that distinguishes it from virtually all of the other litigation liabilities in these three categories which remained with Old GM, the intent underlying the entire structure of the 363 transaction, as detailed more fully below, was that only specifically identified liabilities would be assumed, and the *Castillo* settlement was never identified – either specifically or by specific category – as a liability to be assumed by New GM. Buonomo Decl., ¶ 7.

The discussions with UST concerning Old GM's liabilities began at a conceptual level in early April 2009. At that time, it was assumed that all litigation liabilities on the balance sheet, including the reserve GM had established for the *Castillo* case, would be left behind in Old GM. Then, in early May, after the UST team had shifted its focus back to GM from Chrysler, UST and its counsel, Cadwalader, Wickersham & Taft ("CWT"), began detailed reviews of all categories of Old GM liabilities. On May 14, 2009, Mr. Buonomo, Old GM's primary contact with UST on litigation issues, participated in a telephone conference call concerning litigation liabilities with CWT's Greg Patti and others in which he pointed out that Old GM had several class action settlements that would need to be rejected and/or left behind in Old GM, consistent with UST established guidelines. As examples, he specifically mentioned the *Castillo* case and two other class action settlements (*Dexcool* and *Soders*).<sup>3</sup> Buonomo Decl., ¶ 8.

Mr. Buonomo also participated in a subsequent conference call with Mr. Patti and other CWT lawyers (and members of the UST team) in which the topic was "negative" executory contracts (*i.e.*, contracts representing a net liability to Old GM) that could be rejected in bankruptcy. Again, litigation settlements were mentioned during this call as one type of negative executory contract that would need to be rejected. Mr. Buonomo does not recall that the *Castillo* case came up specifically; but it certainly fell within this category. It was, therefore, the Parties' intent to reject executory contracts like the unconsummated Stipulation of Settlement; this was clear in the context of all of the Parties' relevant discussions. Buonomo Decl., ¶ 8.

From the onset of discussions, Old GM recommended and UST agreed that New GM's assumption of Old GM's obligations under its standard repair warranties was necessary in order

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<sup>3</sup> As the Court is aware, the dispositions of both the *Dexcool* and *Soders* settlements were the subject of motion practice in the underlying bankruptcy case, resulting in allowed unsecured claims against Old GM for uncompensated members of the relevant settlement classes. *See* Docket No. 10172 (Order dated May 3, 2011, approving resolution of the *Dexcool* claim); Docket No. 6622 (Order dated August 10, 2010, approving resolution of *Soders*-related claims). New GM has no liability under these other prepetition class action settlements.

to retain customer goodwill and support New GM's vehicle sales business going forward. This agreement is reflected in MSPA § 2.3(a)(vii), which provided in pertinent part as follows:

“The “Assumed Liabilities” shall consist only of the following Liabilities of Sellers:

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

(Emphasis added.) Buonomo Decl., ¶ 9. Old GM did not recommend and UST did not agree that New GM would assume any responsibilities beyond the very specific obligations set forth in the standard repair warranties. Thus, the assumption of warranty liabilities only included obligations arising under documents “specifically identified as warranties delivered in connection with the sale” of vehicles and parts, with the intent to exclude all other sources of actual or alleged vehicle-linked obligations. *See also* MSPA § 6.15(b)(ii)(B) (“For avoidance of doubt, [New GM] shall not assume Liabilities arising under the law of implied warranty or other analogous provisions of state law, other than Lemon Laws, that provide consumer remedies in addition to or different from those specified in [Old GM’s and Saturn’s] express warranties”); MSPA § 2.3(b)(xiii)(B) (excluding “all Liabilities arising out of, related to or in connection with any allegation, statement or writing by or attributable to Sellers”); MSPA § 2.3(b)(xi) (excluding “all Liabilities to third parties for Claims based upon contract, tort or any other basis”). Each of these provisions illustrates and clarifies that the Parties to the MSPA did not intend that New GM would assume liabilities associated with pre-petition litigation. Buonomo Decl., ¶ 10.

In contrast with New GM's limited assumption of standard repair warranties, Old GM, New GM and UST agreed that New GM's assumption of ongoing litigation and other product liabilities would negatively affect its future business. Accordingly, the initial MSPA as executed on June 1, 2009 provided that liabilities falling into these categories would be Retained

Liabilities, *i.e.*, liabilities that would stay with Old GM and would not be assumed by New GM. *See GM Exhibit 2.* Thus, to the extent that any ambiguity could be perceived in individual provisions of the MSPA, the clear intent of the Parties based on their discussions was that liabilities falling within these categories would not be assumed by New GM. Indeed, until the **First Amendment to the Master Sale and Purchase Agreement (GM Exhibit 3)**, it was understood that *all* product and litigation liabilities were to be retained by Old GM, since it was common ground between the Parties to the MSPA that, as a conceptual matter, litigation exposures were not in any sense positive for the future business of New GM and assuming them was fundamentally inconsistent with the entire premise for pursuing a bankruptcy-based restructuring. This was certainly the case for the *Castillo* settlement which, like other class action settlements, the UST and Old GM explicitly understood would remain with Old GM. Buonomo Decl., ¶ 11.

## **2. Rejection of the Settlement by Old GM**

Old GM believed that the Stipulation of Settlement was an executory contract in the classic sense: the agreed exchange of class members' releases in return for Old GM's promise to pay their eligible claims had not become effective on June 1, 2009 because the Effective Date of the Stipulation of Settlement had not yet occurred at that time. The assumption and rejection of Old GM's executory contracts and the assignment of any assumed executory contracts to New GM were governed by MSPA § 6.6 (**Joint Exhibit C**) and this 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 ("**Sale Procedures Order**") (**Joint Exhibit AAA**). Lines Decl., ¶ 14; Buonomo Decl., ¶ 12.

These provisions, approved by this Court, established a process for individual decisions to be made with respect to the assumption or rejection of executory contracts, *i.e.*, contracts

subject to Section 365 of the Bankruptcy Code. *See* MSPA § 6.6 (**Joint Exhibit C**); Sale Procedures Order, ¶ 10 & Exh. D (**Joint Exhibit AAA**). To implement these provisions, Old GM created a database as a means of managing and communicating the assumption/rejection decisions for the hundreds of thousands of contracts at issue. This database was the basis of the Assumable Executory Contracts Schedule provided for in the MSPA. It also was the source for the data utilized to populate the website (“**Contract Website**”) that contained information, including proposed cure amounts, concerning contracts that New GM proposed to assume. As provided by the Sale Procedures Order (**Joint Exhibit AAA**), counterparties to such contracts received notices with information that enabled them to access the website.

It was not by accident that the Stipulation of Settlement was never designated as an Assumable Executory Contract, that no assumption notice was ever issued to Plaintiffs or their counsel, that no cure amount was ever communicated to them or that no person affiliated with Plaintiffs was ever afforded access to the Contract Website with respect to Plaintiffs’ claims under the Stipulation of Settlement. Buonomo Decl., ¶ 12.

Old GM did not follow the assumption and assignment procedures clearly outlined in the Sale Procedures Order precisely because neither Old GM nor New GM ever intended that New GM would assume liability under class action settlements generally or the Stipulation of Settlement in particular. To the contrary, Old GM decided to reject the Settlement, as evidenced by its June 30, 2009 designation of the Stipulation of Settlement for “reject[ion] later” and its subsequent motion to reject the Settlement, which this Court granted via an agreed order. Lines Decl., ¶¶ 15-16; Buonomo Decl., ¶ 13 & **GM Exhibit 4**; Docket Nos. 4458 and 4680.

It was the position of the UST, voiced repeatedly and monitored by UST personnel, that Old GM should be vigilant in identifying contracts that represented net liabilities, should decline to assume such contracts, and should designate them for rejection. Not surprisingly, in discussions with the UST, litigation settlements were identified as net liabilities which should be designated for rejection. The fundamental tenant of the MSPA that New GM should not undertake obligations to perform under any contract representing a net liability is illustrated by,

among other things, an express provision of the MSPA which provided that non-executory contracts (*i.e.*, contracts not subject to assumption or rejection under Section 365 of the Bankruptcy Code and the Sale Procedures Order) which represented a net liability were to be excluded from the “assets” to be purchased by New GM. Buonomo Decl., ¶ 14.

Specifically, under MSPA §§ 2.1(a) and (b), New GM agreed to purchase the “Purchased Assets” and to assume, pay and perform the “Assumed Liabilities.” Under MSPA § 2.2(a)(x), Purchased Assets included “all Contracts, other than Excluded Contracts (the ‘Purchased Contracts’).” Under MSPA § 2.2(b)(vii)(E), “Excluded Assets” included “all *non-Executory* Contracts for which performance by a third-party or counterparty is substantially complete and for which [Old GM or Saturn] owes a continuing or future obligation with respect to such non-Executory Contracts (collectively, the ‘Excluded Contracts’)” (emphasis added).

As Mr. Buonomo explains more fully in his declaration (¶¶ 14-15), the overall intent of the MSPA’s provisions regarding contracts was to assign to New GM contracts which were assets, but to avoid assigning negative contracts which effectively constituted liabilities *without* having to separately resolve the issue of whether each individual contract was “executory” within the meaning of Section 365 of the Bankruptcy Code. Thus, the Assumption and Assignment Notice, which the Court approved as, part of the Sale Procedures Order, provided that the Debtors’ designation of a contract as an Assumable Executory Contract did not mean that the contract was an executory contract within the meaning of the Bankruptcy Code. *See* Sale Procedures Order (**Joint Exhibit AAA**), Exhibit D, ¶ 15. This permitted the Parties to designate a contract for transfer to New GM without negative consequence even if it later was adjudicated not to be executory. This process also accurately reflected New GM’s intent as to which contracts (executory or not) it intended to assume.

Conversely, Old GM designated negative contracts for rejection without devoting substantial resources to evaluating whether they were executory or not. In close cases, Old GM could never be certain, and the critical objective was to avoid inadvertently assuming unwanted liabilities. In this regard, Old GM’s designation of the Stipulation of Settlement for rejection

constituted a clear expression of Old GM's intent to reject the Stipulation of Settlement as a negative contract – whether or not the Court ultimately were to determine that it is executory under Section 365 of the Bankruptcy Code.

Consistent with the clear intent of the Parties to the MSPA that liability under the Stipulation of Settlement – whether it was executory or not – was to be retained by Old GM, Mr. Buonomo, after the closing of the 363 transaction and as part of his new responsibilities regarding New GM's accounting reserves for contingent litigation liabilities instructed New GM's Assistant Controller, Laura Phillips, that the litigation reserve that Old GM had booked for the *Castillo* action should not be reflected on the books of New GM as of July 10, 2009, and in fact it was not. Buonomo Decl., ¶¶ 4, 16.

### **3. *Post-Filing Discussions Concerning the MSPA and 363 Sale Order***

After Old GM's bankruptcy filing on June 1, 2009 and its simultaneous motion for Bankruptcy Court approval of the MSPA, there were various discussions involving, *inter alia*, representatives of the UST, Old GM, the Old GM Unsecured Creditors Committee and the National Association of Attorneys General (“**NAAG**”) regarding various provisions of the MSPA and the proposed 363 Sale Order. As the result of these discussions, Old GM and the UST agreed that the MSPA would be amended to provide for New GM's assumption of liabilities for personal injury or property damage claims related to accidents involving Old GM vehicles that occurred subsequent to consummation of the Section 363 transaction. *See* MSPA § 2.3(a)(ix); First Amendment to MSPA (**GM Exhibit 3**); Buonomo Decl., ¶ 17.

In and around the same period (June and early July 2009), Old GM participated in discussions with UST and the same third parties regarding other consumer liabilities, including implied warranties, express warranties *other than* the standard repair warranties issued at point of sale, statutory remedies (other than Lemon Laws), and actual and potential litigation relating to these categories of liabilities. Despite requests by NAAG and others, the Parties to the MSPA (New GM-UST and Old GM) declined to amend the MSPA to assume these liabilities, including warranty liabilities falling outside the conditions and limitations of the standard repair

warranties. UST, New GM and Old GM representatives briefly considered expanding the assumption of warranty liability to include implied warranties. However, Mr. Buonomo expressed the view during a conference call during the week of June 25, 2009 that doing so could result in assumption of liabilities that might encompass Old GM's entire existing and future class action docket. Harry Wilson of the UST agreed with this concern and the decision was made not to expand New GM's assumption of "warranty liability" beyond the four corners of Old GM's (and Saturn's) standard repair warranty. Buonomo Decl., ¶ 18.

Nevertheless, it became clear to Mr. Buonomo in his discussions with representatives of NAAG and the state Attorneys General that, despite the express language of the provisions that ultimately became MSPA §§ 2.3(a)(vii)(A), 2.3(b)(xi), 2.3(b)(xiii)(B) and 2.3(b)(xvi), these representatives and other third parties perceived an ambiguity in New GM's agreement and intent to assume liability only within the four corners of Old GM's and Saturn's standard repair warranties. This potential ambiguity indisputably arose from the many different ways that the word "warranty" is used in both common and legal parlance. For that reason, Mr. Buonomo suggested, and the Parties to the MSPA agreed to, the inclusion of the clarifying provision which appears in the final 363 Sale Order in paragraph 56. It provides, in pertinent part, that:

*“[New GM] is assuming the obligations of [Old GM and Saturn] pursuant to and subject to conditions and limitations contained in their express written warranties, which were delivered in connection with the sale of vehicles and vehicle components prior to the Closing of the 363 Transaction and specifically identified as a ‘warranty.’ [New GM] is not assuming responsibility for Liabilities contended to arise by virtue of other alleged warranties, including implied warranties and statements in materials such as, without limitation, individual customer communications, owner’s manuals, advertisements, and other promotional materials, catalogs, and point of purchase materials.”*

(Emphasis added.) The specific purpose of this language was to clarify the agreement of the Parties to the MSPA, *i.e.*, New GM-UST and Old GM, set forth in section 2.3(a)(vii)(A) of that contract, that New GM was not assuming liability for claims like those asserted in the litigation underlying the Stipulation of Settlement, *i.e.*, claims that Old GM was responsible for alleged

vehicle defects under any theory *other than* the obligations spelled out in Old GM's and Saturn's standard repair warranties, subject to the express conditions and limitations contained therein.

Buonomo Decl., ¶ 19.

Plaintiffs' argument that the non-parallel usage of the phrase "arising under" in MSPA section 2.3(a)(vii)(A) [re express written warranties] but not in section 2.3(a)(vii)(B) [re Lemon Laws] somehow reflects an intent that New GM's assumption of warranty liability was to be broader than its assumption of liability under Lemon Laws has no basis in the discussions and negotiations between or among Old GM, New GM, the UST, NAAG and other interested parties. At no time was there any discussion or agreement between or among Old GM and New GM that liabilities "arising under" the express written warranties reached any liability or should reach any liability other than those involved in complying with the strict terms of those warranties, *i.e.*, 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. And, although the representatives of some state Attorneys General initially argued that New GM should assume a broader scope of liability, they ultimately accepted the terms of the transaction as negotiated between Old GM and UST and confirmed in the clarifying language of Paragraph 56 of the 363 Sale Order. Buonomo Decl., ¶ 20.

Moreover, MSPA § 6.15(b), which required New GM after the closing of the 363 transaction to commence administering and paying standard repair warranty and Lemon Law claims includes parallel usage of the "arising under" phrase for both of these types of claims:

"(b) From and after the Closing, [New GM] shall be responsible for the administration, management and payment of all Liabilities ***arising under*** (i) express written warranties of [Old GM and 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) manufactured or sold by [Old GM, Saturn or New GM] prior to or after the Closing ***and (ii) Lemon Laws.***"

(Emphasis added.) Thus, despite the apparently inadvertent absence of the same construction found in section 6.15(b), section 2.3(a)(vii) was not intended to create any fundamental difference in the scope or treatment of assumed express warranty and Lemon Law obligations. Buonomo Decl., ¶ 20.

In summary, the *Castillo* Stipulation of Settlement and underlying litigation (and other product litigation claims typically bundled as class actions) do not “arise under” Old GM’s express limited warranty within the intended meaning of the Parties as expressed in section 2.3(a)(vii). To the contrary, the fundamental underlying allegation in product litigation cases like *Castillo* is that there exists a product defect from which the claimant is *not* adequately protected by the express limited warranty and by reason of which the limitations of the express warranty should *not* be enforced. Such claims “arise” independently of the express limited warranty, are not premised on the express limited warranty and were not intended to be assumed by New GM through the 363 transaction. In documenting the 363 transaction, the Parties included a number of provisions that were intended to make this clear. Specifically,

- a. In MSPA §2.3(a)(vii), the basis for the liability to be assumed was defined as “express written warranties” that were “specifically identified as warranties and delivered in connection with the sale of” the relevant products. The intent was not to include all of the other myriad liability theories that sometimes are asserted by plaintiffs in product litigation.
- b. MSPA §2.3(b)(xvi)(A) confirms that the assumption of liability did not include “implied warranty or other implied obligation arising under statutory or common law without the necessity of an express warranty.” The intent of this provision was to confirm that the assumption of liability implemented pursuant to §2.3(a)(vii) did **not** extend to other legal doctrines typically raised in product litigation. If a claim could be asserted without reference to the existence of the express limited warranty, it was not assumed.

- c. MSPA §2.3(b)(xvi)(B) states that the Assumed Liabilities did not encompass any “allegation, statement or writing by or attributable to [Old GM]” The intent underlying this provision was to confirm that New GM would not assume liability claims premised on Old GM’s pre-petition conduct.
- d. MSPA §2.3(b)(xi) states that New GM would not assume liability for “Liabilities to third parties for Claims based upon Contract, tort or any other basis.” Again, the intent was to make clear the general principle that New GM was not assuming the prepetition litigation liabilities of Old GM.
- e. Paragraph 56 of the 363 Sale Order clarifies that “[New GM] is not assuming responsibility for Liabilities contended to arise by virtue of other alleged warranties, including implied warranties and statements in materials such as, without limitation, individual customer communications, owner’s manuals, advertisements, and other promotion materials, catalogs and point of purchase materials.” Again, the purpose was to confirm that the Parties’ intent in assuming the express limited warranties was very specific and targeted, and did not include all the other potential bases for product litigation claims based on alleged conduct, actions and omissions of Old GM.
- f. Also, paragraph 56 of the 363 Sale Order clarified that New GM’s express limited warranty assumption was “subject to conditions and limitations contained in [Old GM’s] express written warranties.” Those conditions and limitations effectively disclaim any obligation of repair outside the warranty period and also exclude money damages, and inclusion of this language was intended to confirm that the obligation that New GM had agreed to assume was the obligation to fulfill Old GM’s repair obligations going forward.

Buonomo Decl., ¶ 21.

**D. Post-363 Sale Events**

Following this Court's order approving the Section 363 transaction in which New GM acquired the business assets of Old GM free and clear of the liabilities of Old GM as delineated in the MSPA (**Joint Exhibit C**) and 363 Sale Order (**Joint Exhibit OO**), New GM continued for a short time Old GM's voluntary policy of reimbursing Saturn Retailers for VTi repairs in accordance with the formula set forth in the Stipulation of Settlement. New GM did not immediately discontinue this goodwill policy after the closing of the 363 Sale because of the intense activity, and the need to prioritize dealing with numerous issues, related to the commencement of New GM's operations. Specifically and not by way of limitation, the Professional-in-Charge of the *Castillo* action, L. Joseph Lines, III, was engaged personally during this period in the historic restructuring of the GM dealer network and the phase-out or potential sale of four vehicle brands operated by Old GM (Pontiac, Hummer, Saab and Saturn). This required, among other things, repeated trips to Washington D.C. to meet with Congressmen and Senators and their staffs and representatives of dealer organizations and trade groups who all were concerned about the effect of the dealer network restructuring and brand phase-outs or sale on dealers. Lines Decl., ¶ 17.

On September 28, 2009, New GM issued the "**VTi Settlement Clarification**" (**Joint Exhibit QQ**) which instructed GM and Saturn employees to discontinue Old GM's voluntary policy of providing goodwill adjustments pursuant to the February 3, 2009 Administrative Bulletin and to revert to handling VTi malfunction claims under Saturn's five-year, 75,000 mile standard repair warranty (**Joint Exhibit G**). New GM thus discontinued Old GM's voluntary customer satisfaction policy a little more than two months after completing its purchase of Old GM's assets free and clear of Old GM's liabilities. Contrary to Plaintiffs' apparent assertion that this discontinuation had something to do with their commencement of this litigation in Delaware state court, New GM made the decision to discontinue Old GM's policy because it concluded that it was under no legal obligation to continue this voluntary policy. This issue rose to a higher priority in September 2009 because it was anticipated that Saturn owners would soon become

customers of the Penske-owned Saturn as a result of the Penske organization's proposed purchase of the Saturn brand. Lines Decl., ¶ 18.

Subsequently, after Penske's proposed purchase of the Saturn brand failed to close, New GM decided in the interests of satisfying Saturn owners, who now remained as GM customers, to implement an additional and different voluntary outreach to owners of VTi-equipped vehicles. Under a new "Special Reimbursement Policy" issued on November 5, 2009 (**Joint Exhibit RR**), New GM agreed to reimburse customers who experienced VTi malfunctions not covered by the original warranty that occurred within 100,000 miles and eight years of the date of the original retail sale or lease of the vehicle for one-half of their eligible VTi repair costs or, in the alternative, permit them to trade in their vehicles for a \$5,000 credit good on the purchase of specified new GM vehicles. Lines Decl., ¶ 19.<sup>4</sup>

Contemporaneous business records that relate to New GM's decisions to issue the VTi Settlement Clarification and the Special Reimbursement Policy (**Exhibits QQ and RR**, respectively) reflect New GM's internal understanding that it had not assumed, and had intended not to assume, any liability under the Stipulation of Settlement or Final Judgment and that any such liability was "left behind" in Old GM. These documents include the following:

- "Saturn VTI (CVT) Transmission, Customer Satisfaction Assurance Review, August 04, 2008" [sic – should be 2009] (**GM Exhibit 5**), p. 10858 ("Class Action Settlement ... has been assigned to Old GM"); *id.*, p. 10859 ("Settlement has been assigned to old GM – Obligation no longer exists").
- "Saturn VTI (CVT) Transmission, Customer Satisfaction Assurance Review, August 04, 2008" [sic – should be 2009] (**GM Exhibit 6**), p. 10865 ("Accrual that

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<sup>4</sup> Any argument that the Special Reimbursement Policy was an expression of New GM's intent to assume the Settlement is simply wrong. First, the terms of this policy are completely different from the terms of the Settlement. Second, Plaintiffs' argument is inconsistent with the relief requested in Old GM's motion to reject the Settlement, which was filed during the same time period. The Special Reimbursement Policy was issued on November 5, 2009 and the motion to reject the Settlement was filed on November 16, 2009. Old GM's *assumption* of the Stipulation of Settlement obviously was a necessary antecedent to any assignment of it to New GM.

was set up for Class Action Settlement was eliminated when liability was transferred to Old GM”).

- E-mail, Lori Hamilton to Susan Tuohy, re Saturn CVT Legal Settlement Reserve, August 6, 2009 (**GM Exhibit 7**), p. 10964 (“I found the information on the CVT reserve. Yes, there was \$20M in an 00 5442 account (legal settlement liability) put on the books in Aug 2008. However, I understand that ALL Legal Settlement Reserves were left in OldCo.”).
- “Saturn CVT Review, August 24, 2009” (**GM Exhibit 8**), p. 00005 (“Settlement assigned to Motors Liquidation Company”).<sup>5</sup>
- E-mail attaching draft Administrative Message, September 16, 2009 (**GM Exhibit 9**), p. 10931 (“When it emerged from bankruptcy proceedings, General Motors Company ... did not assume liability under the settlement or otherwise for any reimbursement obligations with respect to the VTi transmission. The Bankruptcy Court’s order approving the 363 sale of MLC assets to [New] GM specifically provides that such sale was free and clear of any MLC liabilities unless expressly assumed by [New] GM. Therefore, the responsibility, if any, to provide reimbursement to customers remains with MLC subject to the normal procedures of the Bankruptcy Court.”)
- “Saturn CVT Field Actions, October 6, 2009” (**GM Exhibit 10**), p. 11141 (“The prior U.S. Class Action settlement has not been assumed by ‘New’ GM”).

Lines Decl., ¶ 20.

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<sup>5</sup> Of course, the lay statements like this had the legal technicalities reversed. New GM did not “assign” the Settlement *to* Old GM, but merely declined to accept an assignment of this liability *from* Old GM. In any event, these documents clearly show that New GM understood it had no obligations whatever under the Settlement precisely because it remained an obligation of Old GM. Despite full discovery, Plaintiffs do not and cannot identify any documents evidencing any contrary understanding or intent on the part of New GM.

Plaintiffs' argument that GM treated VTi repairs after the 5 year/75,000 mile express written warranty expired as "warranty" claims is simply incorrect. First, all of the VTi reimbursement payments were made voluntarily on a customer satisfaction basis for repairs performed *outside* the time and mileage limits of Saturn's standard repair warranty. Thus, they were not and could not be "warranty" payments.<sup>6</sup> More specifically, they were not payments under or for the purpose of honoring the express written warranty. All that Plaintiffs' evidence shows is that the payments were processed *through GM's warranty payment system*. It is undisputed, however that this payment system is used to administer and pay a wide variety of reimbursement claims from dealers including, among other, Special Policy claims, product recalls, goodwill adjustments, and customer satisfaction payments. These types of claims are clearly not claims under and/or within the conditions or limitations of the standard repair warranty. This system is simply the payment mechanism that New GM uses to reimburse dealers for both warranty *and non-warranty* claims. Therefore, using this system to make voluntary goodwill payments did not admit, or even imply, that these payments were for "warranty claims" within the meaning of MSPA § 2.3(a)(vii)(A) or paragraph 56 of the 363 Sale Order. Lines Decl., ¶ 21.

### ARGUMENT

Section 363(f) of the Bankruptcy Code authorizes the debtor to sell assets for the benefit of its estate free and clear of pre-petition liabilities *except those which the purchaser expressly agrees to assume*. Since the scope of assumed liabilities is contractual, the Court's task is to determine the intent of the contracting parties based on the relevant language and, if necessitated by ambiguity, explanatory parol evidence. Here, Old GM and New GM-UST decided explicitly – as they had every right to do as Parties to the MSPA – that New GM would *not* assume responsibility for the Settlement. Plaintiffs – who did not and had no right to participate in negotiating the MSPA – therefore are reduced to arguing, in essence, that the Parties to the

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<sup>6</sup> This is exactly the type of imprecise and inconsistent use of the word "warranty" which prompted the inclusion of paragraph 56 in the 363 Sale Order.

MSPA caused New GM to assume liability for the Settlement by accident, based on language which Plaintiffs struggle to characterize as ambiguous in the face of the overwhelming parol evidence of the Parties' intent. That evidence and the language of the MSPA and 363 Sale Order now require enforcement of the Parties' decision that New GM would have no responsibility for the Settlement by entry of a judgment denying Plaintiffs' request for declaratory relief.

**I. THE SETTLEMENT IS NOT AN "ASSUMED LIABILITY"**

The mere fact that Plaintiffs in the class action *alleged* as one of their multiple unproven claims an alleged breach of express warranty – *other than a breach of the standard repair warranty* – does not magically transform the resulting negotiated settlement into a “liability arising under express written warranties,” let alone a liability “within the conditions and limitations” of the standard repair warranty as would be required for the Settlement to an “Assumed Liability” under MSPA § 2.3(a)(vii)(A) and paragraph 56 of the 363 Sale Order.

The whole point of this case is Plaintiffs' assertion that they are entitled to be paid *the Settlement compensation* which is indisputably *not* within the “conditions and limitations contained in [Saturn's] express written warranties” because such payments were intended to reimburse the cost of repairs *outside* the mileage and durational limits of the warranty. *See Abraham v. Volkswagen of America, Inc.*, 795 F.2d 238, 250 (2d Cir.1986) (“an express warranty does not cover repairs made after the applicable time or mileage periods have elapsed”).

Thus, while Plaintiffs attempted to plead a cause of action for breach of express warranty in the class action, they did not allege there – and do not allege here – that Old GM failed to provide free-of-charge repairs during the warranty period.<sup>7</sup> Instead, they argued (a) that

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<sup>7</sup> 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 Digiamdomenico: transmission failed and was replaced free-of-charge under warranty at 52,000 miles; the second failure occurred after 116,000 miles. *Id.*, ¶¶ 46-47.

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

advertising and promotional materials [*not* Saturn’s “express written warranty”] allegedly created warranties-by-description under Section 2-313 of the Uniform Commercial Code (“UCC”); (b) that the durational and mileage limits of the Saturn warranty were, allegedly, “unconscionable” under UCC § 2-302; and (c) that an alleged “design defect” made it more likely that a replacement VTi transmission would fail *in the future*. **Joint Exhibit F**, ¶¶ 84, 89, 90. These claims *did not* seek relief “pursuant to and subject to conditions and limitations contained in [Saturn’s standard] express written warranties.” 363 Sale Order, ¶ 56. *See Abraham v. Volkswagen of America, Inc., supra*, 795 F.2d at 250 (“A rule that would make failure of a part actionable based on [the manufacturer’s alleged] ‘knowledge’ [that the part would fail at some time in the future] would render meaningless time/mileage limitations in warranty coverage.”). Instead, Plaintiffs “breach of express warranty” claims overtly sought to expand Old GM’s warranty obligations to encompass compensation and repairs that were *not available* under the standard repair warranty.

Moreover, there obviously was never any adjudication in the class action that Old GM was liable *at all* for breach of *any* express warranty. To the contrary, Plaintiffs in the Stipulation of Settlement *agreed to the exact opposite*: that Old GM was *not* admitting liability on any of Plaintiffs’ underlying claims, including their claims for breach of express warranty. **Joint Exhibit B**, ¶ I-5; *see Joint Exhibit A*, ¶ 12.

Because Plaintiffs agreed that Old GM was not admitting liability on any of Plaintiffs’ claims in the class action, and because Plaintiffs’ claims were not, in any event, claims “arising under” Saturn’s standard repair warranty, liability under the Settlement is not a “warranty liability” at all, but is instead a pre-petition unsecured liability of Old GM, nothing more.

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

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

Indeed, Plaintiffs' counsel appear to have understood that MSPA § 2.3(a)(vii)(A) in its final version included in the Amended and Restated MSPA impaired class members' claims under the Settlement. In a tardy objection to the 363 Sale filed on June 29, 2009, Plaintiffs stated as follows: "[O]n June 27, 2009, two days ago, [Old] GM filed its Amended Master Sale and Purchase Agreement which significantly altered the language affecting warranties, *diminishing the scope of covered warranties.*" Limited Objection of Class of Saturn Consumers to Debtors' 363 Motion for Sale of "Purchased Assets," ¶ 13 (Docket No. 2760) (emphasis added). As a remedy, Plaintiffs suggested "a clear inclusion of the warranty extension [to Plaintiffs]," which of course was never added to the MSPA. *Id.*, ¶ 16. Despite this explicit recognition that their clients' claims under the Settlement would be impaired in bankruptcy, Plaintiffs' counsel never took any action to present a class-wide claim in Old GM's bankruptcy case as was done in several other class actions pending against Old GM. *See* Buonomo Decl., ¶ 8, n. 1.

## **II. OVERWHELMING PAROL EVIDENCE CONFIRMS THE PARTIES TO THE MSPA DID NOT INTEND FOR NEW GM TO ASSUME THE SETTLEMENT**

As detailed above, testimony from those directly involved in negotiating and drafting the MSPA and 363 Sale Order confirms that UST did not approve, and New GM did not accept, any transfer of Old GM's liabilities under the Settlement.

As Mr. Wilson explained at the 363 Sale approval hearing, the guiding principle of the 363 Sale was to prevent the new company from assuming *any* Old GM liabilities except those deemed necessary for the commercial success of New GM's business going forward. Simply put, shedding as many liabilities as possible obviously was the precise goal of the 363 Sale. Thus, the MSPA sought to achieve the narrowest possible definition of those few liabilities – including warranty obligations – which New GM would be permitted to assume. The Settlement's requirement of free-of-charge repairs beyond the time and mileage limits of the standard repair warranty clearly does not fall within the narrowly-defined warranty liabilities assumed in MSPA § 2.3(a)(vii)(A). This conclusion is bolstered by New GM-UST's late June

2009 rejection of a request by state Attorneys General to broaden New GM's assumption of warranty obligations. That request led directly to the clarifying language of paragraph 56 of the 363 Sale Order which confirms that New GM assumed warranty liabilities "subject to the conditions and limitations of" the standard repair warranty.

Beyond the clear intent to narrow assumed liabilities as much as possible that emerges from evidence of the negotiations between Old GM and New GM-UST, Mr. Buonomo's testimony shows that litigation liabilities, specifically including class actions, were viewed uniformly by UST and New GM as having a negative impact on New GM's future business. Thus, consistent with the general rule that contracts representing net liabilities, whether executory or otherwise, should be left behind in Old GM, there was an express decision that New GM would *not* assume liability for class action settlements, including the *Castillo* Settlement. While there appears to be a difference of opinion on the issue of whether the Settlement represents an executory contract within the meaning of Section 365 of the Bankruptcy Code, it is undisputed that Old GM viewed the Stipulation of Settlement as an executory contract and made a conscious decision not to take the various steps that would have been necessary to assume the Settlement under the executory contract provisions of MSPA § 6.6 and the Sale Procedures Order (**Joint Exhibit AAA**, ¶ 10 & Exh. D). If the intent had been for Old GM to assume the Settlement and assign it to New GM, it would have been designated as an Assumable Executory Contract and Old GM would have complied with the Assumption and Assignment Procedures contained in the Sale Procedures Order.<sup>8</sup> Under these procedures, Old GM would have been required to notify Plaintiffs as counterparties to the contract, give them the opportunity to log on to a secure website for information about Cure Amounts and other relevant matters, and advise them of their right to file an objection for hearing by the Court. Sale Procedures Order (**Joint Exhibit AAA**), Finding F, ¶ 10 & Exh. D). None of this ever occurred, and for good reason.

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<sup>8</sup> MSPA § 6.6(f) required Old GM and New GM to "comply with the procedures set forth in the Sale Procedures Order with respect to the assumption and assignment or rejection of any Executory Contract..." including the procedures set forth in paragraph 10 of that Order.

Instead, Old GM promptly designated the Stipulation of Settlement for “rejection later” (GM Exhibit 4) and then sought an order rejecting it which the Court granted via an agreed order on December 18, 2009 [Docket Nos. 4458, 4680].

Even if the Settlement was not executory, MSPA § 2.2(b)(vii) provides that “Excluded Assets,” *i.e.*, assets to remain behind in Old GM, include certain “Excluded Contracts”:

“Notwithstanding anything to the contrary contained in this Agreement [MLC and its co-debtors] shall retain all of their respective right, title and interest in and to, and shall not, and shall not be deemed to, sell, transfer, assign, convey or deliver to [New GM], and the Purchased Assets shall not, and shall not be deemed to, include the following (collectively, the “Excluded Assets”):

(vii) ... (C) all pre-petition Executory Contracts ... that have not been designated as or deemed to be Assumable Executory Contracts.... (E) *all non-Executory Contracts for which performance by a third-party or counterparty is substantially complete and for which [MLC] owes a continuing and future obligation with respect to such non-Executory Contracts (collectively, the “Excluded Contracts”)*....”

(Emphasis added.) Under these provisions, New GM did not purchase, and therefore assumed no liability under, any “Excluded Contracts,” whether they were executory or not. The exclusion clearly included the Settlement because, even assuming *arguendo* that performance of class members was substantially complete at the time of the bankruptcy filing, Old GM still owed “a continuing and future obligation” to pay class members’ eligible claims under the Settlement.

Reinforcing this conclusion is MSPA § 2.2(a)(x), which makes it undeniably clear that the Purchased Contracts passing to New GM as “Purchased Assets” only included “Contracts, *other than Excluded Contracts* (collectively, the “Purchased Contracts”)....” (emphasis added). Because the Settlement, if it was not an executory contract, was nevertheless an Excluded Contract, New GM has no liability because MSPA § 2.3(b)(iii) protects New GM against “all Liabilities arising out of, relating to, in respect of or in connection with the Excluded Assets.” Since Excluded Assets include Excluded Contracts, and the Settlement is an Excluded Contract under MSPA §2.2(b)(vii), New GM has no liability under the Settlement.

Finally, as Mr. Buonomo has testified, consistent with the intent of the Parties that New GM would *not* assume liability under the Settlement, the contingent litigation reserve that Old

GM had booked for the Settlement was left on Old GM's books and no corresponding reserve was booked by New GM.

Accordingly, there is considerable parol evidence that demonstrates that Old GM did not intend to assume the liabilities set forth in the Stipulation of Settlement and assign them to New GM. In contrast, Plaintiffs have been unable through discovery or otherwise to uncover any document relevant to the six specific issues identified by the Court that would tend to support their position herein. They have been unable to uncover any admissible evidence that would indicate that Old GM intended to assume the Settlement; they have been unable to uncover any admissible evidence that would indicate that New GM intended to be bound by the Settlement. Thus, judgment should be entered in favor of New GM and against the Plaintiffs.

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

Plaintiffs appear to assert that New GM's temporary continuation of Old GM's customer satisfaction program created an implied obligation to provide all of the benefits of the Settlement to all Saturn owners on an ongoing basis. Plaintiffs, however, have offered no cognizable legal theory supporting this "implied assumption" claim.

The linchpin of their argument is that New GM, by not discontinuing immediately Old GM's voluntary goodwill offer that provided repair reimbursements to some Saturn owners, somehow impliedly agreed to offer such reimbursements to *all* Saturn owners in the future. As a matter of logic, this conclusion simply doesn't follow. First, the parol evidence clearly shows that New GM did not intend to assume such a liability. Second, acting voluntarily, Old GM was free to provide reimbursements to some customers, and not others, in accordance with its business judgment. In fact, the first-day "Customer Programs" motion which this Court granted ("**Customer Programs Order**," *see* **Joint Exhibit M** and **Docket No. 167**) authorized, but did not direct, New GM "in its business judgment" to continue specific programs in Old GM's discretion "without further application to or order of the Court..." New GM, operating outside bankruptcy, certainly had at least the same degree of discretion. Plaintiffs' theory requires a finding that New GM inadvertently assumed a substantial contractual liability, a conclusion that

is supported by no legal doctrine and that is contrary to this Court's express holding that "nothing in [the Customer Programs] Order shall be deemed to constitute an assumption of any executory contract pursuant to Section 365 of the Bankruptcy Code...."

For Saturn owners who did not receive repair reimbursement under the Settlement formula, the normal principles of contract formation apply. Those rules apply not only to express contracts, but also to implied contracts. *Matter of Boice*, 226 A.D.2d 908, 910, 640 N.Y.S.2d 681, 682 (1996) (a contract implied from conduct "does not differ from an express agreement except in the manner by which its existence is established"). Thus, formation of an implied contract, just like an express contract, requires both consideration and "an indication of a meeting of the minds" of the parties. *Berlinger v. Lisi*, 288 A.D.2d 523, 524, 731 N.Y.S.2d 916 (1996); *Maas v. Cornell University*, 94 N.Y.2d 87, 93-94, 699 N.Y.S.2d 716 (1999) (implied contract "still requires such elements as consideration [and] mutual assent").

Here Plaintiffs do not and cannot offer any evidence that New GM received any *quid pro quo* whatsoever from Saturn owners who did not receive repair reimbursements under the Settlement formula. Thus, Plaintiffs' implied contract claim as to those owners fails, without more, for lack of consideration. Independently, Plaintiffs do not and cannot offer any evidence of a "meeting of the minds" between these owners and New GM concerning the availability of future repair reimbursements.

Simply put, Saturn owners who did not experience transmission failures before New GM discontinued Old GM's voluntary customer satisfaction program by definition have no agreement with New GM – express or implied – beyond the express terms of any unexpired standard repair warranty. Indeed, as the Court observed initially during the hearing on Plaintiffs' motion for temporary restraining order, and as further evidenced by the Wilson and Buonomo testimony, the implied obligation asserted by Plaintiffs clashes directly with (a) the explicit attention that all concerned paid early on in the underlying bankruptcy case to the specific assets and liabilities that were or were not going to pass to New GM and (b) the entire premise for Old GM's attempt to seek a bankruptcy-related restructuring and New GM's agreement to pay

substantial consideration for Old GM's assets, free and clear of most of Old GM's liabilities (including those associated with the Stipulation of Settlement).

**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 permitted Old GM to sell its assets to a third-party free and clear of its 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. Without more, New GM is entitled to entry of judgment denying Plaintiffs' request for declaratory relief in all respects.

Dated: New York, New York  
September 12, 2011

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