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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re MOTORS LIQUIDATION COMPANY
f/k/a GENERAL MOTORS CORP., *et al.*,
Debtors,

KELLY CASTILLO, NICHOLE BROWN,
BRENDA ALEXIS DIGIANDOMENICO,
VALERIE EVANS, BARBARA ALLEN,
STANLEY OZAROWSKI, and DONNA
SANTI,

Plaintiffs,

v.

GENERAL MOTORS COMPANY f/k/a NEW
GENERAL MOTORS COMPANY, INC.,
Defendant.

Chapter 11
09-50026 (REG)
Jointly Administered

Adv. Proc. No. 09-00509

PLAINTIFFS' OPENING TRIAL BRIEF

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SUMMARY

In the underlying class action, Plaintiffs alleged that Old GM breached its warranty, the parties settled, and the settlement was approved and became final (the “**Class Judgment**”). For the express assumption claim, the dispute focuses on the meaning of the phrase “arising under” within section 2.3(a)(vii)(A) of the Amended and Restated Master Sale and Purchase Agreement (the “**ARMSPA**”). New GM agreed to be bound by constructions of the ARMSPA under bankruptcy law first, and then New York law if necessary.

According to bankruptcy law, an ambiguity in the ARMSPA “must be construed” against New GM. In re Easton Tire Co. of Kirkwood, 35 B.R. 494, 495 (Bankr. E.D. Mo. 1983). Regardless, the *Safety-Kleen* court definition (origin or basis in) of “arising under,” along with its derivatives used throughout the Bankruptcy Code (gives rise to), are expansive in their meaning.

According to New York law, the dictionary definition (to originate from a source) controls and courts have consistently construed that phrase broadly. In addition, both Old GM and New GM have admitted that section 2.3(a)(vii)(A) covers allegations “based upon” the warranty, and is broad enough to include obligations that were never “specifically identified as warranties” or “delivered in connection with the sale” of the vehicle.

In the event that this Court considers parol evidence, the “best evidence” of New GM’s intent proves New GM processed 1,636 VTi repair claims, 65 towing claims, and 115 car rental claims—spending approximately \$5,857,133 following the terms of the Class Judgment. In fact, New GM’s only two witnesses define “arising under” as arising “by virtue of,” “gives rise to,” or “related to.” Otherwise, there is no evidence of communications between Old GM and New GM regarding section 2.3(a)(vii)(A) or the phrase “arising under.” From the definition of Liabilities, to the specific language choices within section 2.3(a)(vii) (Liabilities vs. obligations;

arising under vs. under), to its mirror provision in the Retained Liabilities (section 2.3(b)(xvi)), section 2.3(a)(vii)(A) was meant to capture everything that originated from the warranty—like the Class Judgment here.

For the implied assumption claim, the evidence establishes that New GM impliedly accepted responsibility for the Class Judgment even if it did not do so expressly under the ARMSPA. The same “best evidence” establishing intent under the ARMSPA applies equally here to prove implied assumption.

FACTS

Beginning with the 2002 model year Saturn Vue, Old GM manufactured and sold continuously variable transmissions known as VTi transmissions. *Ex. D ¶¶ 3-8, 14-16.* In its warranty, Old GM promised to “at no cost, correct any vehicle defect related to materials or workmanship within the warranty period.” *Ex. G.* The warranty period was 3 years or 36,000 miles, whichever occurred first. *Id.*

In March 2004, Old GM issued Special Policy 04020. *Ex. V.* In that Special Policy, Old GM provided coverage of 5 years or 75,000 miles, whichever occurred first, for the VTi transmission in 2002-2004 model year Saturns. *Id.* In January 2005, Old GM issued Special Policy 04020A, which provided that same coverage to 2005 model year Saturns. *Ex. PP.* Old GM mailed the Special Policies to Saturn VTi owners. *Exs. V, PP; Lines depo., p.20:14-17.*

Q. Was any form of Exhibit V or Exhibit PP ever included in the glove box of the vehicle at the time of the initial sale?

A. I think it would have been impossible to do so since the document wasn't created until after the vehicles were sold.

Lines depo., p.21:11-16.

On October 10, 2007, Plaintiffs filed a class action against Old GM regarding the Saturn

VTi transmission (the “**Castillo class action**”). *Ex. D.* Plaintiffs alleged, among other theories, that Old GM had breached its express warranty by failing to “correct” the defect within the warranty period. *Exs. D ¶¶ 69-81; E ¶¶ 82-94; F ¶¶ 81-91.* In the count titled “Breach of Express Warranties,” Plaintiffs alleged:

71. GM expressly warranted the vehicles at issue to be free of defects in factory materials and workmanship at the time of sale and for a period of three years or 36,000 miles and, further, that GM would, at no cost, correct any vehicle defect related to materials or workmanship during the warranty period. Such warranties are express warranties within the meaning of Section 2-313 of the Uniform Commercial Code (UCC) in each of the Class States at issue in the class action and are further governed by the Magnuson-Moss Warranty Act. 15 U.S.C. §§ 2301, *et seq.*

72. More specifically, GM’s ‘New Car Limited Warranty’ promises that GM ‘will provide for repairs to the vehicle’ during the warranty period and that ‘[t]his warranty covers repairs to correct any vehicle defect related to materials or workmanship occurring’ during the warranty period.

* * *

78. As a direct and proximate cause of GM’s breach of express warranties, Plaintiffs and the Class have suffered actual damages and are threatened with irreparable harm by virtue of an elevated and unreasonable risk of serious bodily injury.

* * *

81. Any attempt by GM to repair a defective VTi transmission or to replace one defectively designed VTi transmission with another defectively designed VTi transmission within the warranty period could not satisfy GM’s obligation to correct defects under the warranty. The design defect in the VTi transmission – which unreasonably elevates the risk of premature failure, immobility and/or dangerous loss of operability of the vehicle – cannot be remedied through the continued use of a defective VTi transmission.

Ex. D, Ct. II. The original complaint referenced express warranties in twelve (12) separate paragraphs. *Ex. D ¶¶ 7, 24, 25, 30, 53, 71, 72, 75, 77, 78, 79, 80.* The prayer for relief also sought “specific performance of GM’s express ... warranties.” *See Ex. F, Ct. II, prayer ¶¶ B-C.*

On January 4, 2008, Old GM filed its motion to dismiss, which characterized Plaintiffs’ claim as based upon the express written warranty:

Contrary to Plaintiffs’ allegations (Complaint, ¶¶ 30, 71), the Limited New Vehicle

Warranty for the 2003 Saturn VUE *did not* warrant a ‘defect-free’ vehicle.

* * *

Plaintiffs have chosen not to attach *the Saturn warranty* to their complaint. In ruling on the motion, however, the Court may judicially notice and consider this warranty *because the complaint refers to and relies upon this document* and it is indisputably authentic.”

Ex. H, p. 2 (emphasis added). L. Joseph Lines III (“**Lines**”) was the in-house attorney at Old GM responsible for the *Castillo* class action. *Lines depo., p.9:13-17*. Lines filed a declaration testifying that the warranty referenced in the complaint was, indeed, the express written warranty delivered with the sale of the Saturns. *Ex. G* (attaching warranty booklet “to which plaintiffs refer in their complaint”). Old GM presented six (6) pages of arguments regarding the breach of express warranty count. *Ex. H, pp. 11-12, 23-28*.

On February 19, 2008, Plaintiffs filed their opposition, which, once again, addressed the express warranty claims against Old GM:

Plaintiffs’ Complaint alleges that GM provided an express warranty, states the terms of the warranty, alleges that GM breached it, and claims that Plaintiffs suffered damages.

* * *

GM’s express warranty covers the defects the Plaintiffs allege. . . . Any ambiguity in the scope of the warranty should be construed against GM as the drafter of the written warranty and as the party with superior bargaining power.

Ex. I, pp. 5, 29. See also pp. 36-43. The subsequent amended complaints continued to contain counts for “Breach of Express Warranties” with numerous references to the express written warranties. *Ex. E, ¶¶ 7, 24, 25, 30, 66, 84, 85, 88, 90, 91, 92, 93; Ex. F, ¶¶ 7, 24, 25, 30, 66, 82, 83, 85, 87, 88, 89, 90*.

Thereafter, discovery continued, the parties engaged in mediation, and a settlement was reached. *Ex. B*. Lines negotiated the class settlement on behalf of Old GM. *Lines depo., p.9:10-12*. In the settlement agreement, Old GM expressly acknowledged that the complaint that precipitated the settlement asserted a claim for “breach of warranty.” *Ex. B, ¶1.2*. Indeed, Old GM decided to settle “because it will (i) fully resolve all claims that were or could have been

raised in the Action” *Id.*, ¶1.5. The definition of “Released Claims” included any claim based upon “the factual allegations and legal claims that were made or could have been made in the Action.” *Id.*, ¶II.14.

On September 8, 2008, the district court granted preliminary approval of the class action settlement—noting that the complaint alleged “breach of express warranties.” *Ex. J.* In early January 2009, Old GM issued the court-approved notice advising class members that the lawsuit alleged that Old GM had, among other things, “breached express . . . warranties.” *Ex. K.*

Old GM then agreed to process VTi warranty claims in accordance with the settlement pending final court approval. *Ex. N.* On February 3, 2009, Old GM issued GM Administrative Message G_0000020717, which instructed its authorized dealers to follow the settlement terms “without the delay in waiting for ultimate final settlement approval.” *Ex. MM.*

On April 14, 2009, the district court created a Subclass due to notice issues, *Ex. X*, and with regard to the other class members, signed the final judgment granting approval of the settlement. *Ex. A.* The Class Judgment incorporated the settlement agreement by reference. *Id.* In the Class Judgment, the district court found that “the release is tailored to address the allegations in the case.” *Id.*, ¶3(a). The district court then enjoined class members from filing any lawsuit based on “the claims and causes of action asserted or that could have been asserted” *Id.*, ¶10. Finally, the district court made the requisite finding under Rule 54 to start the time to file an appeal. *Id.*

In May 2009, Lawrence Buonomo (“**Buonomo**”) was an in-house attorney at Old GM who handled bankruptcy work. *Buonomo depo p.9:7-17.* Buonomo was a member of the bankruptcy legal core team “responsible for the contracts group, the contracts function within the whole core team structure that was responsible for executory contracts.” *Id.*, p.19:6-9. During

that time, Old GM was negotiating a 363 transaction with the United States Treasury (“UST”).

Buonomo claims that he specifically referenced the *Castillo* settlement in a May 14, 2009 conference call with UST representatives. *Buonomo depo.*, pp. 44:8-45:7. Incidentally, Buonomo has no notes of any of his conversations with UST. *Id.*, p. 119:22-25. According to Buonomo, he said “[t]hat it was a settlement that was in process but not consummated; that it would be left behind.” *Id.*, p.49:5-11. Yet, Buonomo had neither responsibility for nor involvement in the *Castillo* class action. *Id.*, pp. 10:11-13, 11:12-12:12. Buonomo has never read the *Castillo* settlement, *id.*, p.12:16-20, and his familiarity with it is “very sketchy,” *id.*, p.12:13-15. In fact, Buonomo did not know that Old GM had been paying claims under the *Castillo* settlement at that time. *Id.*, p.101:12-14. According to Buonomo, he mentioned *Castillo* because it was an example of a “litigation-oriented liability arising from product claims that did not involve a claim against what we contemplated at that time to be a nondebtor affiliate.” *Id.*, p.49:12-17. The alleged conversation did not involve section 2.3(a)(vii)(A).

By May 18, 2009, the time to appeal the Class Judgment had expired, and the Class Judgment became final. Old GM was required to mail final notice and claim forms to the class by June 2, 2009. *Ex. A.*

On June 1, 2009, Old GM filed for bankruptcy protection. *Ex. C.* At that time, Old GM submitted to this Court a proposed 363 transaction with New GM. *See In re Old GM, Doc. 92.* In that transaction, New GM was purchasing the Saturn brand and customer goodwill. Because the “customers are the life blood of their business” Old GM obtained court permission to continue warranty programs pending the sale. *Ex. M.* Shortly thereafter, New GM announced its proposed sale of the Saturn brand to Penske Automotive Group (“**Penske**”). *Ex. R.*

In June 2009, Old GM was identifying categories of executory contracts. Old GM listed

the *Castillo* class action as a “reject later” executory contract. *Lines depo.*, pp. 35:17-37:15.

Even though there was a final judgment, Lines “viewed it as a primarily a contract” *Id.*, p.35:24. That decision, however, had nothing to do with section 2.3(a)(vii)(A) or the *Castillo* class action specifically:

[B]ut it really wasn’t a decision because all litigation liabilities of that type were not going to be retained.

And so it fell into a category and so there really wasn’t a decision about this particular case. It just fell into a category and therefore was excluded.

Id., p.37:4-10. Buonomo agreed, “[b]ut I don’t recall any specific discussion of the *Castillo* settlement agreement or whatever the thing was named in that time period.” *Buonomo depo.*, p.57:1-4.

Meanwhile, Buonomo participated in drafting section 2.3(a)(vii)(A). *Buonomo depo.*, p.33:16-25. He confirmed that section 2.3(a)(vii)(A) relies on the definition of Liabilities. *Id.*, p.69:25-70:4. He also specifically recalls that he added the phrase “express written warranties of Seller that are specifically identified as warranties and delivered in connection with the sale of new, certified or pre-owned vehicles.” *Id.*, p.61:7-17. In addition, Buonomo conceived of “the mirror provision”—section 2.3(b)(xvi). *Id.*, pp. 61:18-62:10. Under Section 2.3(b)(xvi),

Retained Liabilities include:

All liabilities arising out of, related to or in connection with any (A) implied warranty or other implied obligation arising under statutory or common law without the necessity of an express warranty or (B) allegation, statement or writing by or attributable to Sellers.

Ex. C §2.3(b)(xvi).

- Q. Conceptually did you envision 2.3(b)(xvi) to be the opposite of 2.3(a)(vii)?
- A. Opposite is not the word I would use, but the intent was to try to foreclose certain arguments that I foresaw out of assuming the express warranty. And particularly with respect to 16, as I’m sure you could discern yourself, I was concerned that people would be making arguments that taking one meant you had responsibility for implied warranty or some sort of the statutory warranty or other common law

or other forms of things that could give rise to claim.
Trying to limit it to our intent which was that we would assume the responsibility to administer the express written Mag Moss warranty going forward.

Q. What did you mean in section 2.3(b)(xvi) by the language, quote, without the necessity of an express warranty?

A. So in other words, if it was a claim that someone could have asserted or a theory that someone could have asserted even if there was no express warranty, implied warranty being a good example, the new company was not assuming.

Buonomo depo., pp. 62:16-17, 65:7-21, 65:23-66:5.

On June 26, 2009, Old GM and New GM signed the ARMSPA. *Ex. C.* On June 30, 2009, the parties executed the First Amendment to the ARMSPA. *Id.*, *1st Amd.*

In response to the proposed 363 transaction, the State Attorneys General pushed for New GM to broaden the Assumed Liabilities to include implied warranties and personal injury litigation. *Buonomo depo.*, p.92:18-24. In fact, some perceived an ambiguity regarding express warranty claims based on something other than the glove-box warranty:

Conceptually it would be an allegation of express warranty based on something other than the formal labeled warranty. So again, use Dex-Cool as an example. The allegation there included an allegation that there was an express warranty created by certain language in the owner's manual. So that was a variety of express warranty claim other than the standard written limited new warranty as an example, but it could be based on advertising, based on a statement by a dealer salesperson, based on claim of warranty vehicle based on the owner's manual, based on advertising. I'm sure you've seen all varieties yourself.

Id., pp. 89:21-90:10. The parties addressed those specific concerns in paragraph 56 of the Sale Order.¹ *Id.*, p.108:12-25. That paragraph was drafted by July 3, 2009, and submitted to this Court a day later. *Id.*, pp. 106:14-107:1; *Ex. OO.*

On July 5, 2009, the parties executed the Second Amendment to the ARMSPA. *Ex. C.*

¹ On May 6, 2010, this Court held that paragraph 56 of the Sale Order did not change or otherwise alter section 2.3(a)(vii)(A).

2d Amd. In the Second Amendment, the ARMSPA “[wa]s hereby confirmed and ratified in all respects and shall be and remain in full force and effect in accordance with its terms.” *Id.* On that same day, this Court approved the 363 transaction. *See In re Old GM, Doc. 2968.* The Sale Order became final, and the Closing occurred on July 10, 2009.

On July 10, 2009, New GM announced that it was “a new legal entity” and began its operations under the GM brand. *Ex. S.* As this Court found, New GM was “a newly-formed Delaware corporation,” *Ex. OO at ¶R*, with its own ownership composition and capital structure, *id. ¶U*. By order of this Court, New GM was not a legal successor to Old GM, had not *de facto* or otherwise merged with Old GM, and was not a mere continuation or substantial continuation of Old GM. *Id. ¶46.* As a new legal entity, New GM did not inherit any policies, practices, or procedures from Old GM. Nor did New GM inherit any obligations from Old GM ... unless New GM had so agreed in the ARMSPA. *Exs. C, OO.* New GM promised GM customers that it “will continue to service GM vehicles and honor GM vehicle warranties.” *Ex. S.*

After the Closing, New GM immediately began to pay for VTi transmission repairs in accordance with the Class Judgment. *Ex. Z.* On August 20, 2009, New GM management requested the “warranty spend on CVT.” *Ex. AA.* In response, a New GM manager said, “I think you know it will be ugly.” *Id.* The next day, a New GM presentation analyzed the “Saturn CVT Warranty Performance” and the increase caused by the class settlement. *Ex. BB.* In that presentation, New GM had paid approximately 225 claims per week during the weeks of July 13, July 20, and July 27, more than 150 claims during the week of August 3, and in excess of 50 claims for the week of August 10, 2009. *Id.*

Other than executing the ARMSPA, New GM never made any business decision about the Class Judgment. *Lines depo., pp. 44:14-46:14.* After the Closing, there was never a New

GM business decision to adopt all of Old GM's practices. *Id.* There was never a New GM business decision to continue Old GM Administrative Message G_0000020717, which had implemented the class settlement until "ultimate final approval." *Id.*; *Ex. MM.* There was never a New GM business decision to continue, adopt, or issue any policy regarding the VTi transmission. *Lines depo., pp. 44:14-46:14.* Nevertheless, New GM reviewed the "warranty spend on CVT," *Ex. AA*, analyzed the "Saturn CVT Warranty Performance," *Ex. BB*, and paid for the repairs by following the terms of the Class Judgment. *Ex. Z.*

Plaintiffs filed this declaratory judgment action on August 26, 2009. *See Adv. Proc. Doc. 1.* By that time, New GM had processed 1,046 VTi repair claims, 38 towing claims, and 75 car rental claims—spending approximately \$3,727,366. *Ex. Z.* New GM then made its first post-Closing business decision about the VTi transmission about a month later. *Ex. QQ.*

On September 1, 2009, New GM field personnel were asking about New GM's "position" regarding "VTi transmission repairs/replacements under the class action settlement." *Ex. CC.*

These repairs total thousands of dollars every month just at two of the Atlanta area Saturn stores I contact. Based on the age of the vehicles involved, I would concur with putting these under the "Old GM" and not covering them, but I am not aware of any changes yet.

Id. A New GM manager responded that "there is written direction" to follow the VTi class action settlement, and "[t]hat is what we are doing here" *Id.*

By the next day—September 2, 2009, New GM developed various scenarios and "[a]ll we need is to come up with one common understanding and decision on how to proceed." *Ex.*

DD. New GM considered the following:

- Scenario A: Revert to 5/75 immediately
- Scenario B: Revert to 5/75 immediately and offer a voucher (value t.b.d.) for new car purchase
- Scenario C: revert to 5/100K remedy

Scenario D: keep as is

Ex. EE. New GM then decided that it was “reverting back to the 5/75 special coverage, which would almost eliminate the current spend rate.” *Id.* “Going forward, we should administer the above subject [Saturn CVT Transmission Policy] according to our previously released special policy (5/75) not according to the class action policy.” *Ex. FF.* This change raised questions within New GM:

I wanted to make sure you all saw the “**revised**” Saturn VTi document **that was quietly inserted** into Service Center on Monday of this week. I was unaware of it when I reported on Tuesday (Scott’s staff meeting) that we were continuing to support the parameters of the “proposed” class action settlement. It now appears that **we have reverted** to the originally published “special policy” bulletin as issued years ago by Saturn which provides coverage for 5 years and 75,000 miles. This posture will of course exclude most Saturn VTi owners from receiving any assistance from GM/Saturn.

I plan to raise this in our Site Manager Bi-weekly meeting today **to ask how in the hell we could change course** on such an important topic and not report our doing so other than **to slip it quietly** into Service Center.

Ex. GG (emphasis added).

By September 4, 2009, there were questions about informing the dealers “of the **change** to the CVT warranty strategy.” *Ex. HH* (emphasis added). New GM decided to issue a “revised communiqué,” but it needed “GM Legal’s Joe Lines to approve the wording and bless the document.” *Id.* Its purpose was “to communicate the **new direction** to the field and dealers.” *Ex. II* (emphasis added). By mid-September, there was a concern “with Saturn VTi decision from Penske, etc.” *Ex. JJ.* The new message was not published until after a “discussion with Joe Lines and senior leadership.” *Ex. KK.* On September 29, 2009, New GM issued the “Saturn VTi Transmission Settlement Clarification.” *Ex. W.*

From the commencement of this action through September 28, 2009, New GM had processed an additional 590 VTi repair claims, 27 towing claims, and 39 car rental

claims—spending around another \$2,129,767. *Ex. Z.* In total, New GM spent approximately \$5,857,133 following the terms of the Class Judgment. *Id.*

On September 30, New GM’s CEO announced publicly that it was ending the Saturn brand because the proposed sale to Penske had fallen through. *Ex. CCC.* “Fritz Henderson is not happy with reverting to 5 yrs / 75K mileage coverage (Special Policy) for Saturn CVT owners, and wants to do more.” *Ex. SS.*

On October 21, 2009, Old GM filed a motion to substitute New GM as a party defendant in *Kodsy v. General Motors Corp.*, No. 09-CA-011174 (Palm Beach Cty., Fla.). *Ex. W.* There, Kodsy had alleged claims for fraud, breach of express and implied warranty, bad faith, conspiracy, negligence and strict liability, personal injury, and punitive damages. *Id.*, ¶9. According to Old GM, New GM assumed liabilities under section 2.3(a)(vii)(A) for claims “*based upon* ... breach of [Old GM]’s written warranty.” *Id.*, ¶6 (emphasis added). Old GM stated that New GM was responsible for “the portion of Count II which is based upon an alleged breach of [Old GM]’s written warranty” or “for the breach of written warranty allegations” *Id.*, ¶¶ 10-11, *Prayer.*

To do more for class members, New GM then issued Special Policy 09280 on November 7, 2009. *Ex. RR.* On November 18, 2009, this Court then enjoined New GM from misrepresenting the status of this proceeding in connection with that Special Policy. *See Adv. Proc. Doc. 12.* On January 6, 2010, a member of New GM’s Legal Department sent a letter to class members regarding the “Saturn VTi Transmission Class Action Lawsuit.” *Ex. BBB.* In that letter, New GM summarized its conversation with the class members:

My summation in conversation with Mrs. Rose was that General Motors’ Special Policy 09280A dated December, 2009, would have allowed her a 50% reimbursement for repairs, whereas, the proposed class action settlement, once the case proceeds, the Roses would be qualified for 75% reimbursement for repairs. It would be to the Roses’

advantage to participate in the proposed class action lawsuit.

Id.

On January 8, 2010, New GM filed its answer and affirmative defenses in the *Kodsy* case. *Ex. Y.* New GM admitted that it assumed responsibility for the breach of warranty claim, *id.* ¶3, and then asserted several defenses including: the problems were not defects covered by warranty; the alleged defects were already corrected; the dealer did not have a reasonable opportunity to correct the defects; the problems were the result of misuse and abuse, which the warranty excludes; and the warranty displaces alleged implied warranties. *Id.* ¶¶ 3-6, 11.

ARGUMENT

I. NEW GM EXPRESSLY ASSUMED THE CLASS JUDGMENT BECAUSE IT IS AN ASSUMED LIABILITY UNDER SECTION 2.3(a)(vii)(A) OF THE ARMSPA.

For the express assumption claim, the dispute is whether the Class Judgment falls within the scope of section 2.3(a)(vii)(A). In the ARMSPA, New GM agreed to assume “the following Liabilities of [Old GM]:”

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

Ex. C, §2.3(a)(vii)(A). That Assumed Liability formed part of the purchase price. *Id., §3.2(a)(iv).* As of the Closing, New GM agreed to “assume and thereafter pay or perform as and when due, or otherwise discharge, all of the Assumed Liabilities.” *Ex. C, §2.1(b).*

The language in section 2.3(a)(vii)(A) breaks down into three parts—“all Liabilities,” “arising under,” and the “express written warranties” phrase. Although each part necessarily affects the meaning of the other parts, this dispute centers—much like the language itself—around the phrase “arising under.”

There is no dispute that the Class Judgment falls within the meaning of the first part (“all Liabilities”) of section 2.3(a)(vii)(A). In the ARMSPA, the parties defined Liabilities as broadly as possible—including “any and all liabilities and obligations of every kind and description whatsoever ... and those arising under any Law, Claim, Order, Contract or otherwise.” *Ex. C, §1.1*. New GM has admitted that the Class Judgment is a Liability.² *Doc. 29, p.1*.

The evidence establishes that the Class Judgment involved rights under the third part (the “express written warranties” phrase) of section 2.3(a)(vii)(A). The evidence before this Court includes:

- The complaints in the underlying class action, which contained:
 - a count for “Breach of Express Warranties;”
 - allegations regarding GM’s “New Car Limited Warranty;”
 - allegations quoting or referencing the express written warranty;
 - allegations of a defect “within the warranty period;”
 - allegations of breach by failing “to correct any vehicle defect;”
 - a citation to the Magnuson-Moss Warranty Act; and
 - a prayer for specific performance of the express warranty.
- Old GM’s declaration attaching the warranty booklet “to which plaintiffs refer in their complaint.” *Ex. G*.
- The New Car Limited Warranty itself. *Ex. G*.
- The pleadings filed in the underlying class action, which included:
 - GM’s citation to the warranty “because the complaint refers to and relies upon this document ...” *Ex. H, p.2*;
 - GM’s six pages of argument regarding the warranty claim, *Ex. H, pp. 11-12, 23-28*; and
 - Plaintiffs’ argument regarding the warranty claim, *Ex. I, pp. 5, 29, 36-43*.
- The class action settlement, which:
 - referenced the breach of warranty theory, *Ex. B, ¶1.2*;

² The Class Judgment is not only a liability or obligation generally, but a Claim, Order, and Contract.

- resolved and released all matters raised or that could have been raised in the class action, *Id.*, ¶¶ 1.5, 11.14; and
- released warranty coverage and replaced it with the class relief.
- The class action settlement procedure, in which:
 - the preliminary approval brief cited the warranty claim, *See Castillo v. General Motors Corp., E.D. Cal., 2:07-CV-2142, Doc. 48*;
 - the district court found that the complaint was alleging “breach of express warranties,” *Ex. J, p.3*;
 - the notice advised the class members of the claim that Old GM had “breached express ... warranties,” *Ex. K*;
 - the final approval brief cited and analyzed the warranty claim;
 - the district court found that the release was tailored to address the allegations in the case, *Ex. A, ¶3*; and
 - the district court enjoined class members from filing any lawsuit based on “the claims and causes of action asserted or that could have been asserted” *Id.*, ¶10.

There can be no dispute that the Class Judgment involved the original glove-box warranties, which are “express written warranties of Sellers that are specifically identified as warranties and delivered in connection with the sale of a new, certified used or pre-owned vehicles” *Ex. C, §2.3(a)(vii)(A)*.

It is the second part (“arising under”) of section 2.3(a)(vii)(A) that this Court found to be ambiguous. As this Court stated, “[t]hat is what we have to focus on.” That focus, however, starts in the ARMSPA itself. In there, New GM agreed to be bound by specific rules regarding the construction of the phrase “arising under.”

A. ACCORDING TO BANKRUPTCY LAW, THE CLASS JUDGMENT IS AN ASSUMED LIABILITY UNDER SECTION 2.3(a)(vii)(A).

New GM agreed, and then twice ratified, that the ARMSPA “shall in all respects be governed by and construed (a) to the extent applicable, in accordance with the Bankruptcy Code” *Ex. C §9.12(a), 1st Amd. §4, 2d Amd. §4*. According to bankruptcy law, an ambiguity in a

363 agreement “must be construed” in favor of the *Castillo* class. In addition, the *Safety-Kleen* court defined the phrase “arising under” expansively—meaning everything that has its “origin or basis” in. Not surprisingly, the derivatives of “arise” used throughout the Bankruptcy Code are equally expansive—such as “give rise to.” Because New GM agreed to be bound by the meaning of “arising under” in accordance with bankruptcy law, the Class Judgment easily falls within section 2.3(a)(vii)(A).

1. BANKRUPTCY LAW REQUIRES THAT THIS COURT RESOLVE THE AMBIGUITY AGAINST NEW GM.

There is a federal policy of maximizing estate assets. *In re Ames Dept. Stores, Inc.*, 136 B.R. 357, 359 (Bankr. S.D.N.Y. 1992). Consequently, “ambiguities in the Code are generally resolved in favor of the debtor.” *Knudsen v. IRS*, 581 F.3d 696, 716 (8th Cir. 2009). *See also New Neighborhoods, Inc. v. West Virginia Workers’ Comp. Fund*, 886 F.2d 714, 719 (4th Cir. 1989); *In re Green*, 360 B.R. 34, 42 (Bankr. N.D.N.Y. 2007); *In re Barnick*, 353 B.R. 233, 246 (Bankr. C.D. Ill. 2006). Because 363 transactions foster that policy of maximizing estate assets, “an ambiguity in an agreement which affects the bankruptcy estate must be resolved in favor of the best interests of all creditors” *In re Easton Tire Co. of Kirkwood*, 35 B.R. 494, 495 (Bankr. E.D. Mo. 1983).

New GM agreed to assume liabilities defined by section 2.3(a)(vii)(A) of the ARMSPA. In light of this Court’s finding of an ambiguity in that section, it “must be resolved” against New GM and in favor of the *Castillo* class (creditors of Old GM). *In re Easton Tire Co. of Kirkwood*, 35 B.R. at 495. The only interpretation that favors Old GM’s estate and its creditors is a finding that New GM assumed the Class Judgment and pending claims of the Subclass.

Any other interpretation would reduce the value of the ARMSPA and increase the number of creditors of Old GM, thereby diminishing the assets of the estate.

2. BANKRUPTCY LAW HAS DEFINED THE PHRASE “ARISING UNDER” VERY BROADLY.

New GM agreed that the phrase “arising under” shall be construed in accordance with the Bankruptcy Code” *Ex. C §9.12(a)*. The bankruptcy case law interpreting “arising under” in a 363 transaction, along with its usage throughout the Code, confirms that the Class Judgment is an Assumed Liability. Before New GM entered into the ARMSPA, there was clear precedent regarding the meaning of the phrase “arising under” in a 363 bankruptcy transaction. In its Order, this Court agreed with the *Safety-Kleen* rulings but inquired whether *Safety-Kleen* was distinguishable. It is not.

In *Safety-Kleen*, the source of the liability at issue was multiple pre-petition settlements of environmental contribution lawsuits which were reduced to consent decrees. In re Safety-Kleen Corp., 331 B.R. 605, 607 (D. Del. Bankr. 2008). In the underlying litigation, there was a third-party claim for contribution against a subsidiary of Safety-Kleen, SK Bridgeport formerly Rollins Environmental Services. In re Safety-Kleen Corp., 380 B.R. 716, 720 (D. Del. Bankr. 2008). In exchange for entering the consent decrees and settlement agreements, SK Bridgeport received a covenant not to sue from the governmental entities and protection from contribution liability. Id. at 722. Safety-Kleen then filed for bankruptcy protection, and sold its Chemical Services Division (which included SK Bridgeport) to Clean Harbors in a 363 transaction. Id. at 719-20.

After approval of the 363 transaction, a dispute arose as to whether Clean Harbors assumed liability for the consent decrees and settlement agreements. In the Acquisition

Agreement, section 1.3 defined Assumed Liabilities as:

liabilities and obligations, whether arising before or after the Closing Date, in connection with . . . the operation of the Business (including liabilities and obligations *arising under* Environmental Laws (or other Laws) that relate to violations of Environmental Laws. . . .

In re Safety-Kleen Corp., 380 B.R. at 736 (emphasis added). Clean Harbors argued that the liabilities which were resolved in the underlying settlement agreements were contractual liabilities and, therefore, not statutory environmental liabilities. Id. at 724. The court rejected that argument and concluded that:

[t]he Consent Decrees and the Settlement Agreements evidence obligations *arising under* CERCLA and the Spill Act, and settle direct and third-party claims *arising under* or with respect to such statutes. As such, they are “liabilities and obligations . . . *arising under* Environmental Laws (or other Laws) that relate to violations of Environmental Laws....”

Id. at 736 (emphasis added). Indeed, the court held that “the *origin* or *basis* of those two Settlement Agreements is the federal and state environmental actions identified above which produced the subsequent Consent Decrees.” Id. at 724 (emphasis added). The court then found that, even if the two settlement agreements were the product of contractual indemnity rights as argued by Clean Harbors, “they would have also arisen out of environmental liabilities to governmental agencies.” Id. at 725.

Well over a year before New GM agreed to the language in section 2.3(a)(vii)(A), there was clear bankruptcy precedent defining the scope of the phrase “arising under.” The *Safety-Kleen* court held that the phrase “arising under” included everything that it had its “*origin* or *basis*” in. In re Safety-Kleen Corp., 380 B.R. at 724 (emphasis added).

The *Safety-Kleen* definition is not surprising given the numerous uses of derivatives of “arise” throughout the Bankruptcy Code. For example, the Code uses “gives rise to” in the definition of claim. 11 U.S.C. § 101(5)(B) (meaning “right to an equitable remedy for breach of performance if such breach *gives rise to* a right to payment . . .”). The Code does not use any

synonymous derivative of “arise” to limit—as opposed to expand—the scope of the words that it preceded.

There is no doubt that the Class Judgment had its “origin or basis” in the glove-box warranty. Stated differently, Old GM’s alleged breach of the glove-box warranty “gave rise to” the *Castillo* class action, which involved an alleged breach of that very glove-box warranty. *Exs. B, D-L; Vine Street, LLC v. Keeling*, 460 F. Supp.2d 728 (E.D. Tex. 2006) (holding that a contractual assumption of warranty liabilities depends upon whether there was a theory of recovery based upon warranty). Old GM conceded this point on page 25 of the glove-box warranty booklet itself:

We encourage you to use this program before, or instead of, resorting to legal action. We believe it offers advantages over legal avenues in most jurisdictions because it is fast, free of charge, and informal (lawyers are not usually present, although you may retain one at your expense if you choose). If you wish to pursue legal action, however, we do not require that you first file a claim with BBB Auto Line unless state law provides otherwise.

Whatever your preference may be, remember that if you are unhappy with the results of BBB Auto Line, you can still pursue legal action because an arbitrator’s decision is binding on Saturn but not on you unless you accept it.

Ex. G. In other words, the warranty concedes that it may be the origin of, be the basis for, or otherwise give rise to “legal action”—precisely what the *Safety-Kleen* court held and exactly what resulted in the *Castillo* class action. Under bankruptcy law’s meaning of “arising under,” the Class Judgment is a “Liabilit[y] arising under the express written warranties that are specifically identified as warranties and delivered in connection with the sale of” the Saturns. As a result, the Class Judgment is an Assumed Liability under section 2.3(a)(vii)(A).

B. ACCORDING TO NEW YORK LAW, THE CLASS JUDGMENT IS AN ASSUMED LIABILITY UNDER SECTION 2.3(a)(vii)(A).

Where bankruptcy law is not applicable, New GM agreed, and twice ratified, that the ARMSPA shall be construed “in accordance with the Laws of the State of New York” *Ex. C, §9.12(b)*. According to New York law, the dictionary definition (to originate from a source) controls and courts have consistently construed that phrase broadly. In addition, both Old GM and New GM have admitted that section 2.3(a)(vii)(A) covers allegations “based upon” the warranty, and is broad enough to include obligations that were never “specifically identified as warranties” or “delivered in connection with the sale” of the vehicle. In the event that this Court considers parol evidence, the “best evidence” is New GM processing 1,636 VTi repair claims, 65 towing claims, and 115 car rental claims—spending approximately \$5,857,133 following the terms of the Class Judgment. From the definition of Liabilities, to the specific language choices within section 2.3(a)(vii) (Liabilities vs. obligations; arising under vs. under), to its mirror provision in the Retained Liabilities (section 2.3(b)(xvi)), section 2.3(a)(vii)(A) was meant to capture everything that originated from the warranty—like the Class Judgment here.

1. UNDER NEW YORK LAW, “ARISING UNDER” THE EXPRESS WARRANTIES SHOULD BE INTERPRETED EXPANSIVELY TO MEAN “ORIGINATING FROM” OR “DERIVING FROM” THE EXPRESS WARRANTIES.

When interpreting a contract under New York law, “words and phrases used by the parties must be given their plain meaning.” DDS Partners, LLC. V. Celenza, 775 N.Y.S.2d 319, 320 (N.Y. App. Div. 2004) (adopting dictionary definition); *accord* American Express Bank Ltd. v. Uniroyal, Inc., 562 N.Y.S.2d 613, 614 (N.Y. App. Div. 1990) (same); Brennan v. Murphy & Walsh Assoc., Inc., 650 N.Y.S.2d 464, 465 (N.Y. App. Div. 1996) (same). Unless the contract defines a term, “it is common practice for the courts of [New York] to refer to the dictionary to determine the plain and ordinary meaning of words to a contract.” F.S. Assoc., Inc. v. Jandi Realty, LLC, 831 N.Y.S.2d 359 at *3 (N.Y. City Civ. Ct. 2006) (adopting dictionary definition

of “i.e.”). Nowhere did the ARMPSA define “arising under.”

Applying the dictionary definition here, the plain and ordinary meaning of the word “arise” is “to originate from a source.” *Webster’s Ninth New Coll. Dict.* (1989); *Merriam-Webster Online Dict.* (www.m-w.com/dictionary/arising). To “originate” from means “to take or have origin” in. *Id.* (/originate). An “origin” is “the point at which something begins or rises or from which it derives <the *origin* of the custom>; *also*: something that creates, causes, or gives rise to another <a spring is the *origin* of the brook> or rise, beginning, or derivation from a source.” *Id.* (/origin). Under these plain and ordinary dictionary definitions, the Class Judgment “arises from” Old GM’s express written warranties because it originates from them; the express written warranties were the “beginning” from which this Liability derived, much like a spring is the origin of the brook.

Absent evidence that “arising under” is a term of art,³ the dictionary definition controls. “While words are generally assigned their ordinary meaning, where a word has attained the status of a term of art and is used in a technical context (here, a lease), the technical meaning is preferred over the common or ordinary meaning.” *Madison Ave. Leasehold, LLC. v. Madison Bentley Assoc. LLC*, 811 N.Y.S.2d 47, 52-53 (N.Y. App. Div. 2006) (holding that the “law is so well settled with respect to both the meaning and the legal ramifications of a ‘default’ under a lease that plaintiff bears an insurmountable burden to demonstrate that the parties to the guaranty intended to ascribe a different meaning to the term”). To prove a term of art, the parties “must furnish [the court] with the dictionaries they have used.” *Law Debenture Trust Co. of NY*, 595

³ A term of art exists where terms are “in common use in a business or art’ and have ‘a definite meaning understood by those who use them,’ but which ‘convey no meaning to [t]hose who are not initiated into the mysteries of the craft[.]’” *Law Debenture Trust Co. of New York v. Maverick Tube Corp.*, 595 F.3d 458, 466 (2nd Cir. 2010) (quoting *Film Corp. v. Springer*, 8 N.E.2d 23 (1937)).

F.3d at 466. New GM has presented no evidence of any particularized meaning within its industry, and it is not entitled under the law to its own set of secret definitions. In short, New GM has offered no basis for departing from the dictionary definition.

The dictionary definition (to originate from a source), not surprisingly, matches the *Safety Kleen* bankruptcy precedent involving assumed liabilities under a 363 transaction (the origin or basis of). To the extent the phrase “arising under” has acquired term of art status, *that* is it. Moreover, New GM is bound by it because *Safety Kleen* set the bankruptcy definition before the ARMSPA. Madison Ave. Leasehold, LLC., 811 N.Y.S.2d at 52 (“Parties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents”).

Even outside the bankruptcy 363 sale context, New York courts have interpreted the phrase “arising under” extremely broadly and consistently with the dictionary definition. *See, e.g., In re Cone Mills Corp.*, 455 N.Y.S.2d 625, 627 (N.Y. App. Div. 1982) (interpreting “controversy arising under” a contract broadly because “[h]ad there been no contract there would now be no dispute to arbitrate. Thus the dispute arises under the contract within the contemplation of the arbitration clause”); Intermar Overseas, Inc. v. Argocean S.A., 503 N.Y.S.2d 736, 737 (N.Y. App. Div. 1986) (referencing a “broad” arbitration clause subjecting all “dispute[s] arising under this Agreement” to arbitration); Hodom v. Stearns, 301 N.Y.S.2d 146, 148 (N.Y. App. Div. 1969) (distinguishing “actions commenced under the agreement” from the broader “any dispute arising under the contract”). Construing “arising under,” the Supreme Court of the United States has likewise recognized its expansive function. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 492-94 (1983) (describing it as broad); American Nat. Red Cross v. S.G., 505 U.S. 247, 264 (1992) (same); United States Dept. of Energy v. Ohio, 503 U.S. 607, 626 (1992) (describing it as a broad and “expansive phrase”); Aetna Health, Inc. v.

Davila, 542 U.S. 200, 207 (2004) (stating that “arising under” jurisdiction “must be determined from what necessarily appears in the plaintiff’s statement of his own claim”).

The ordinary meaning of “arising under” confirms that the Class Judgment, which originated from the glove-box warranty, falls within section 2.3(a)(vii)(A). It is not even necessary to invoke the common canon of contract construction that in “cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language.” Jacobson v. Sassower, 66 N.Y.2d 991, 993 (N.Y. 1985). As a result, the Class Judgment is an Assumed Liability.

2. BOTH OLD GM AND NEW GM HAVE ADMITTED THAT SECTION 2.3(a)(vii)(A) INCLUDES LIABILITIES BEYOND THE EXPRESS WRITTEN WARRANTIES THAT ARE SPECIFICALLY IDENTIFIED AS WARRANTIES AND DELIVERED IN CONNECTION WITH THE SALE OF THE VEHICLES.

The glove-box warranty, as discussed above, concedes that liabilities “arising under” the warranty extend to lawsuits. *Ex. G* (“you can still pursue legal action”). In a series of judicial admissions, both parties to the ARMSPA have likewise admitted that “all Liabilities arising under” expands the third part (“express written warranties ...”) of section 2.3(a)(vii)(A)—which is consistent with the ordinary meaning of “arising under.”

In its motion to continue warranty progress, Old GM admitted that even voluntary obligations “that arise from but are not covered by the written warranties, ... are nevertheless considered part of” the warranty. *Ex. M*, ¶40. After Plaintiffs commenced this action, Old GM then declared that an unproven claim for breach of warranty, which preceded the bankruptcy, was an Assumed Liability under Section 2.3(a)(vii)(A). *Ex. W*. In October 2009, Old GM moved to substitute New GM as a party defendant because New GM assumed liabilities under section 2.3(a)(vii)(A) for claims “*based upon* ... breach of [Old GM]’s written warranty.” *Id.*,

¶6 (emphasis added). Old GM repeated that New GM was responsible for “the portion of Count II which is *based upon* an alleged breach of [Old GM]’s written warranty” or “for the breach of written warranty allegations” *Id.*, ¶¶ 10-11, *Prayer* (emphasis added).

Old GM’s understanding of section 2.3(a)(vii)(A) is significant. According to Old GM, a claim or mere allegation “based upon” the glove-box warranty is a “Liabilit[y] arising under the express written warranties” *Ex. W*.

What’s more, New GM has agreed with Old GM’s understanding. *Ex. Y*. New GM not only admitted that it had assumed responsibility for the allegations in the *Kodsy* case pursuant to section 2.3(a)(vii)(A), but also asserted defenses contesting the very existence of the warranty claim. *Id.*, ¶¶ 3-6, 11. Quite simply, the warranty claim in *Kodsy* is not distinguishable from the warranty claim in the *Castillo* class action. Like *Kodsy*, the *Castillo* class action involved an alleged breach of the glove-box warranty. *Exs. B, D-L*. To date, New GM cannot explain why its defense of *Kodsy* falls within section 2.3(a)(vii)(A) while the Class Judgment and pending warranty claims of the *Castillo* Subclass do not.

Along with interpreting “arising under” as “based upon,” New GM has admitted that “all Liabilities arising under” expands the remainder of section 2.3(a)(vii)(A). The third part of section 2.3(a)(vii)(A) requires that the express written warranties be: (1) “specifically identified as warranties,” and (2) “delivered in connection with the sale of” the vehicle. *Ex. C*, §2.3(a)(vii)(A). New GM has referred to the third part as the “standard repair warranty” or glove-box warranty. *See Proposed Pre-Trial Order ¶IV(B)(2)*. According to New GM, section 2.3(a)(vii)(A) extends beyond those two requirements of the third part of that section.

The standard repair warranties “specifically identified as warranties” and “delivered in connection with the sale” of the Saturns provided 3 years/36,000 miles of coverage. *Ex. G; L pt*

2 at Exs. H-K. That was the glove-box warranty that was alleged to have been breached in the *Castillo* class action. Ex. D ¶71 (“GM expressly warranted the vehicles ... for a period of three years or 36,000 miles and, further, that GM would, at no cost, correct any vehicle defect ... during the warranty period”). Old GM’s attorneys⁴ even submitted the warranty booklet “to which plaintiffs refer in their complaint,” Ex. G, and “because the complaint refers to and relies upon this document.” Ex. H, p.2.

In this adversary proceeding, New GM has admitted that “all Liabilities arising under” expands section 2.3(a)(vii)(A) beyond the terms of the glove-box warranty (3 years/36,000 miles). New GM confessed to this Court:

Of course, it is certainly possible, particularly as to 2005 Saturn VUEs, that some class vehicles have unexpired VTi transmission warranties (five years or 75,000 miles, whichever comes first or, in the case of replacement transmissions, 12 months or 12,000 miles). Because these warranties *fall squarely within* the section 2.3(a)(vii)(A) definition of assumed warranty obligations, New GM continues to provide covered repairs free-of-charge.

Doc. 29, p.2 n.2 (emphasis added). New GM has admitted that the Special Policies “fall squarely within” section 2.3(a)(vii)(A).

Old GM issued Special Policy 04020 and Special Policy 04020A, which created VTi transmission coverage of 5 years or 75,000 miles. Exs. V, PP. Those Special Policies not only provided relief beyond the glove-box warranty period, but were never “specifically identified as warranties” or “delivered in connection with the sale” of the Saturns—both requirements under the ARMSPA. Ex. C, §2.3(a)(vii)(A). Indeed, Old GM mailed those Special Policies to Saturn VTi owners well after the sale of the vehicles. Exs. V, PP; *Lines depo.*, pp. 20:14-17, 21:11-16. By admitting that the Special Policies (which lack the requirements of the third part of section

⁴ Gregory R. Oxford and L. Joseph Lines III represented Old GM in the *Castillo* class action. Now, both represent New GM in this adversary proceeding.

2.3(a)(vii)(A)) “fall squarely within” that section, New GM has confirmed that “Liabilities arising under” was used to expand—not limit—the third part of section 2.3(a)(vii)(A).

In addition to those admissions, a member of New GM’s Legal Department sent a letter to certain class members regarding the “Saturn VTi Transmission Class Action Lawsuit.” *Ex. BBB*. The letter was sent in January 2010, during the summary judgment briefing in this very adversary proceeding. *Id.* In that letter, New GM determined that, “once the case proceeds,” it would be to the class members’ “advantage to participate in” the class action. *Id.* That summarizes it all—New GM knows that the Class Judgment is an Assumed Liability.

In that series of judicial admissions, the understandings of both Old GM and New GM regarding the meaning of “all Liabilities arising under” leaves no ambiguity whatsoever. A claim or mere allegation “based upon” the glove-box warranty is a “Liabilit[y] arising under” the express written warranties. *Exs. W, Y*. Moreover, a Liability may still “arise under” the glove-box warranty (the third part) even though it is not the glove-box warranty itself. These admissions underscore that “Liabilities arising under” was used to expand—not restrict—the scope of the third part of section 2.3(a)(vii)(A). Based upon these admissions, the Class Judgment, which was “based upon” the glove-box warranty, “falls squarely within” section 2.3(a)(vii)(A).

3. IN THE EVENT THAT THIS COURT CONSIDERS PAROL EVIDENCE, NEW YORK LAW PROVIDES THAT THE “BEST EVIDENCE” OF THE INTENT OF THE PARTIES IS THEIR CONDUCT AFTER THE CLOSING.

When confronting an ambiguity, New York law provides that “‘parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning.’” Gulf Ins. Co. v. Transatlantic Reins. Co., 886 N.Y.S.2d 133, 143 (N.Y. App. Div. 2009) (quoting Restatement (Second) of Contracts § 202). Hence, evidence regarding a party’s

performance under a contract is “powerful evidence of their intention,” Fireman’s Fund Ins. Cos. v. Siemens Energy & Automation, Inc., 948 F. Supp. 1227, 1234 (1996), is afforded “great, if not controlling weight in construction of the contract,” In re Dayton Seaside Assoc. #2, L.P., 257 B.R. 123, 144 (Bankr. S.D.N.Y. 2000); In re The Bennett Funding Group, Inc., 220 B.R. 743, 760-761 (Bankr. N.D.N.Y. 1997); Gulf Ins. Co., 886 N.Y.S.2d at 144; Webb, 851 N.Y.S.2d at 836; Federal Ins. Co. v. Americas Ins. Co., 691 N.Y.S.2d 508, 512 (N.Y. App. Div. 1999), and is considered the “most persuasive evidence of the agreed intention of the parties.” Webster’s Red Seal Publ’n, Inc. v. Gilberton World-Wide Publ’n, Inc., 415 N.Y.S.2d 229, 230 (N.Y. App. Div. 1979); Gulf Ins. Co., 886 N.Y.S.2d at 143; Federal Ins. Co., 691 N.Y.S.2d at 512. In summary, the “best evidence of the intent of parties to a contract is their conduct after the contract is formed.” Waverly Corp. v. City of New York, 851 N.Y.S.2d 176, 179 (N.Y. App. Div. 2008); T.L.C. West, LLC v. Fashion Outlets of Niagara, LLC, 875 N.Y.S.2d 367, 369 (N.Y. App. Div. 2009); Webb v. Webb, 851 N.Y.S.2d 828, 836 (N.Y. Sup. Ct. 2007). “[T]here is no surer way to find out [the intent of the parties to a contract] ... than to see what they have done.” New York Marine & Gen. Ins. Co. v. Lafarge N. Am., 599 F.3d 102, 119 (2d Cir. 2010).

“[A]t the Closing, [New GM] shall ... assume and thereafter pay or perform as and when due, or otherwise discharge, all of the Assumed Liabilities.” *Ex. C, §2.1(b)*. Thus, New GM was responsible for the Assumed Liabilities defined within section 2.3(a)(vii)(A) as of July 10, 2009. Immediately on that date, New GM began to pay for VTi transmission repairs in accordance with the Class Judgment. *Exs. O, P, Q, T, Z; Aff. of Reba Sherman, Kathy Taylor, Carl Hisiro, Brian W. LeCloux, Kenneth Scott, Diana Eysel, Brian Molnar, Anthony Fusco, and Dawnette Archer*. New GM continued to pay for those repairs until it issued an urgent message

with the subject “Saturn VTi Transmission Settlement Clarification” on September 29, 2009.⁵

Exs. W, QQ.

From July 10 through September 28, 2009, New GM had processed 1,636 VTi repair claims, 65 towing claims, and 115 car rental claims under the terms of the Class Judgment. *Ex. Z.* New GM had spent approximately \$5,857,133 following the terms of the Class Judgment. *Id.* Even if this Court only considers a narrower window of time,⁶ New GM still spent approximately \$3,727,366 following the terms of the Class Judgment—processing 1,046 VTi repair claims, 38 towing claims, and 75 car rental claims. *Ex. Z.*

This “best evidence” of New GM’s intent is significant for several reasons. First, the number of VTi claims and amount spent are sizeable. So much so that a New GM manager described it as “ugly.” *Ex. AA.* Second, the number of VTi claims and amount spent were consistent throughout the relevant time. These payments were not isolated incidents—there were no fewer than 121 claims per week after the Closing. *Ex. BB; Appendix 1.* Third, New GM repeatedly referred to the payments as “warranty.” For example, New GM business records discuss the “warranty spend on CVT,” *Ex. AA,* and the “Saturn CVT Warranty Performance,” *Ex. BB.* In fact, New GM analyzed the increase on warranty costs caused by the Class Judgment. *Id.* There are at least 16 references to “warranty” in New GM business records

⁵ Because New GM’s urgent clarification message occurred after this action, this Court on May 26, 2010 correctly found that it was self-serving, and “self-serving conduct is not entitled to weight.” In re First Cent. Fin. Corp., 269 B.R. 481, 498 (Bankr. E.D.N.Y. 2001).

⁶ To avoid self-serving evidence, courts generally only review the parties’ conduct “prior to litigation.” In re Actrade Fin. Tech., 424 B.R. 59, 74 (Bankr. S.D.N.Y. 2009); In re Oneida, LTD., 400 B.R. 384, 389 (Bankr. S.D.N.Y. 2009); In re Market Holdings Corp., 336 B.R. 39, 60 (Bankr. S.D.N.Y. 2006). While New GM’s decision to stop paying pursuant to the Class Judgment is self-serving, its continued payments following the Class Judgment even after this adversary proceeding was filed are highly probative. Nonetheless, the “best evidence” of New GM’s intent is still overwhelming from July 10 through August 26, 2009 (the date this action was filed).

when discussing the Class Judgment. *Exs. AA-KK*. Likewise, New GM business records reveal that New GM authorized dealers requested payment from New GM for these “warranty” repairs:

- “WARRANTY POLICY DUE TO VTI SETTLEMENT”
- “WARRANTY POLICY 75%/CUSTOMER PAY 25%”
- “ok wp 75/25% split with cst as per the extended vti special policy warranty”
- “adjustment for customer participation in 75/25 warranty repair”
- “WARR POL W/25% OWNER PARTIC PER CLASS ACTION SUIT”
- “REPAIRS COVERED UNDER WARRANTY DUE TO CLASS ACTION LAWSUIT”
- “POLICY COVERED UNDER TRANS EXTENDED WARRANTY – FIRST OWNER 100% COVERAGE”
- “should be covered under the vti warranty of 125000 miles”
- “approved. This vehicle is still owned by the original buyer and has less than 100,000 miles. According to the class action VTI lawsuit, vehicles still owned by the original purchaser with less than 100,000 miles, qualifies for 100% payment from GM warranty.”
- “WARRANTY PER CLASS ACTION 25% CUSTO PARTICIPATION”
- “OK WARRANTY – CLASS ACTION”
- “vti warranty per lawsuit”

*Ex. Z.*⁷

New GM tried to run from this “best evidence” after this action was filed. By September 1, 2009, New GM field personnel were asking about New GM’s “position” regarding the Class Judgment. *Ex. CC*. One New GM employee stated, “I would concur with putting these under the ‘Old GM’ and not covering them, but I am not aware of any changes yet.” *Id.* By the next

⁷ These are just a few examples from New GM’s database of references to the Class Judgment by settlement, class action, lawsuit, or the terms of the Class Judgment (*i.e.*, percentage, mileage, or

day, New GM developed various scenarios and “[a]ll we need is to come up with one common understanding and decision on how to proceed.” *Ex. DD*. In other words, New GM wanted to move the Class Judgment from an Assumed Liability to a Retained Liability—almost two months after the Closing. As a New GM manager stated, “I plan ... to ask how in the hell we could change course ...” *Ex. GG*.

The evidence regarding New GM’s “decision” about the Class Judgment concedes everything. For example, New GM business records mention “revert,” “reverted,” “reverting back,” “change,” “changing,” “changed,” “revised,” “new direction,” “clarify,” “new policy,” and “clarification.” *Exs. W-1, BB-CC, EE-II, KK, QQ-SS*. That, of course, means that New GM had already made a decision about the Class Judgment beforehand. Before then, New GM had only executed the ARMPSA. After the Closing, New GM never made any other business decision regarding VTi transmission repairs. *Lines depo., pp. 44:14-46:14*. In fact, the self-serving clarification⁸ in late September was the first post-Closing New GM business decision regarding the VTi transmission. *Ex. MM*.

It is also clear that New GM’s attempted re-characterization of the Class Judgment, in apparent response to this proceeding, was not well received. There was a concern “with Saturn VTi decision from Penske, etc.,” *Ex. JJ*, the sale to Penske fell through, *Ex. CCC*, and New GM’s CEO was “not happy with reverting” away from the terms of the Class Judgment, *Ex. SS*. So then New GM issued another Special Policy. *Ex. RR*.

ownership status). *Compare Ex. Z with Ex. K, p.4* (charts detailing class relief).

⁸ In the clarification, New GM claims that it was stopping Old GM Administrative Message G_0000020717. *Ex. QQ*. But New GM, as a new company, was never bound by nor ever adopted that Old GM message. *Lines depo., pp. 44:14-46:14*. In addition, Old GM had implemented the class settlement until “ultimate final approval”—so it already had expired by its own terms. *Ex. MM*.

In light of this Court’s finding of an ambiguity, the “best evidence” of New GM’s intent is its conduct after the Closing—which was following the terms of the Class Judgment. Waverly Corp., 851 N.Y.S.2d at 179; T.L.C. West, LLC, 875 N.Y.S.2d at 369; Webb, 851 N.Y.S.2d at 836. When New GM “reverted” after this action was filed, it did so to the Old GM Special Policies (not the glove-box warranty)—further evidence that “arising under” is expansive. And then New GM had to change back to something more, a new Special Policy that closely resembles the Class Judgment. “[T]here is no surer way to find out [the intent of the parties to a contract] ... than to see what they have done.” New York Marine & Gen. Ins. Co., 599 F.3d at 119. The Class Judgment is an Assumed Liability under section 2.3(a)(vii)(A)—exactly as New GM intended and its conduct confirms.

4. APART FROM THE ADMISSIONS AND “BEST EVIDENCE,” THERE IS NO EVIDENCE OF THE PARTIES’ INTENT REGARDING THE MEANING OF SECTION 2.3(a)(vii)(A).

Even if New GM’s post-Closing conduct were not controlling, there simply is no other evidence regarding the meaning of section 2.3(a)(vii)(A). Although Buonomo was its co-drafter, he testified that there were no communications from Cadwalader or anyone else on behalf of UST regarding the concept of section 2.3(a)(vii)(A). *Buonomo depo.*, p.39:5-9. Buonomo never had any discussions with Matt Feldman, his main contact at UST, about the very issues underlying this adversary proceeding. *Id.*, p.74:20-25. When asked if there was ever a discussion about whether settlements and judgments that resulted from lawsuits in which claims for breach of express warranty were asserted (like the Class Judgment here) would fall within section 2.3(a)(vii)(A), Buonomo testified:

There was general discussion to the effect that as a set forth in Section 2.3(b)(xvi), that the new company would not assume claims based on – and I’ll just use the language of the provision for clarity – allegations, statements, or writings by or attributable to sellers,

sellers being General Motors Corporation and Saturn. *However, I don't recall a discussion that got as specific as your question.*

Id., pp. 90:13-91:2 (emphasis added). He acknowledged that “[v]ery little; very, very little” of the negotiations with UST dealt with which liabilities would be assumed by New GM. *Id.*, pp. 25:25-26:5. “There was no discussion, negotiation, controversy about what we were trying to implement” because, according to him, the “business deal” was “understood.” *Id.*, p.39:9-13.

Without any discussion between Old GM and New GM regarding the meaning of section 2.3(a)(vii)(A), Buonomo’s testimony “is immaterial in construing the terms of a contract.” In re Actrade Fin. Tech., 424 B.R. at 73. “For parol evidence to be probative, it must reflect the *communicated* understanding between the parties.” In re Bellevue Place Assoc., 173 B.R. 1009, 1017 (Bankr. N.D. Ill. 1994) (emphasis added). *See also* Compania Embotelladora Del Pacifico, S.A. v. Pepsi Cola Co., 650 F.Supp.2d 314, 323 (S.D.N.Y. 2009) (holding that even a unilateral expression is inadmissible). New GM has utterly failed to present any evidence of communications between Old GM and New GM regarding section 2.3(a)(vii)(A) or its terms.

5. PLAINTIFFS’ CONSTRUCTION OF SECTION 2.3(a)(vii)(A) IS CONSISTENT WITH THE ORDINARY MEANING OF THE WORDS AND THE ARMPSA AS A WHOLE.

When reading section 2.3(a)(vii)(A), the starting point is the third part—the express written warranties. A liability falls within this section if the glove-box warranty is involved somehow. That is necessarily so because of the preceding language—“all Liabilities arising under.” Words gather meaning from the company they keep. Bobrow Palumbo Sales, Inc. v. Broan-Nutone, LLC, 549 F.Supp.2d 249, 273 (E.D.N.Y. 2008).

The combination of the term Liabilities, which is defined in extraordinarily broad terms within the ARMSPA, and the phrase “arising under” was meant to capture everything that originated from the glove-box warranty. By substituting the definition of Liabilities into section

2.3(a)(vii)(A), it reads:

all ... liabilities and obligations of every kind and description whatsoever, whether such liabilities or obligations are known or unknown, disclosed or undisclosed, matured or unmatured, accrued, fixed, absolute, contingent, determined or undetermined, on or off-balance sheet or otherwise, or due or to become due, including Indebtedness and those **arising under** any Law, Claim, Order, Contract or otherwise **arising under** express written warranties of Sellers that are specifically identified as warranties and delivered in connection with the sale of new, certified used or pre-owned vehicles or new or remanufactured motor vehicle parts and equipment (including service parts, accessories, engines and transmissions) manufactured or sold by Sellers or Purchaser prior to or after the Closing

Ex. C, §2.3(a)(vii)(A) (emphasis added). The language itself contemplates that a “Law, Claim, Order, Contract or otherwise” may “arise under” the glove-box warranty. Any other interpretation would render the defined term Liabilities meaningless—a result New York law abhors. Shaw Group Inc. v. Triplefine Int’l Corp., 322 F.3d 115, 124 (2nd Cir. 2003). And it would be inconsistent with Buonomo’s testimony that section 2.3(a)(vii)(A) relied upon that definition of Liabilities. *Buonomo depo.*, pp. 69:25-70:4. As a result, New GM assumed more than just the glove-box warranties themselves.

Under New York law, courts attempt to construe particular phrases within a contract in a manner consistent with surrounding sentences, neighboring paragraphs, other sections, and the structure of the contract as a whole. In re Young Broadcasting Inc., 430 B.R. 99, 116-117 (Bankr. S.D.N.Y. 2010). The specific choice of language within section 2.3(a)(vii)(A) confirms Plaintiffs’ interpretation.

In subpart (A), section 2.3(a)(vii) states “all **Liabilities** arising under express written warranties” *Ex. C, §2.3(a)(vii)* (emphasis added). In subpart (B), it states “all **obligations** under Lemon Laws” *Id.* While subpart (A) uses the broadly-defined term Liabilities, subpart (B) employs just the word obligations—a mere subset of Liabilities. Just as New GM used the broader term Liabilities in subpart (A) versus “obligations” in subpart (B), it followed

Liabilities with a broader phrase—“arising under”—as well. In subpart (A), the ARMSPA includes “all Liabilities **arising under** express written warranties” *Ex. C, § 2.3(a)(vii)* (emphasis added). In subpart (B), the ARMSPA includes only “all obligations **under** Lemon Laws.” *Id.* Subpart (B) omits the word “arising” and only utilizes the term “under.” In that the word “arise” means “to originate from a source,” its omission in subpart (B) is significant. These deliberate choices by New GM evince a specific intent to expand section 2.3(a)(vii)(A) beyond the terms of the glove-box warranties alone.

Apart from the language within section 2.3(a)(vii) itself, its counterpart in the Retained Liabilities section is significant. Buonomo conceived of “the mirror provision”—section 2.3(b)(xvi). *Buonomo depo., pp. 61:18-62:10.* Under Section 2.3(b)(xvi), Retained Liabilities include:

All liabilities arising out of, related to or in connection with any (A) implied warranty or other implied obligation arising under statutory or common law **without the necessity of an express warranty** or (B) allegation, statement or writing by or attributable to Sellers.

Ex. C, §2.3(b)(xvi) (emphasis added). In other words, New GM had agreed to assume “all Liabilities arising under” the glove-box warranty, but not implied warranties that did not necessitate involvement of the glove-box warranty. That was the only limit that New GM placed on section 2.3(a)(vii)(A).

While there were no discussions regarding section 2.3(a)(vii)(A), Buonomo testified that “[t]here was general discussion to the effect that as set forth in Section 2.3(b)(xvi)”

Buonomo depo., pp. 90:13-91:2.

Q. Conceptually did you envision 2.3(b)(xvi) to be the opposite of 2.3(a)(vii)?

A. Opposite is not the word I would use, but the intent was to try to foreclose certain arguments that I foresaw out of assuming the express warranty. And particularly with respect to 16, as I’m sure you could discern yourself, I was concerned that people would be making arguments that taking one meant you had responsibility for

implied warranty or some sort of the statutory warranty or other common law or other forms of things that could give rise to claim.

Trying to limit it to our intent which was that we would assume the responsibility to administer the express written Mag Moss warranty going forward.

Q. What did you mean in section 2.3(b)(xvi) by the language, quote, without the necessity of an express warranty?

A. So in other words, if it was a claim that someone could have asserted or a theory that someone could have asserted even if there was no express warranty, implied warranty being a good example, the new company was not assuming.

Id., pp. 62:16-17, 65:7-21, 65:23-66:5.

Section 2.3(b)(xvi) is significant for several reasons. First, it is the “mirror” provision to section 2.3(a)(vii)(A). New GM intended for this section to be the backstop to section 2.3(a)(vii)(A). Second, it only excludes any implied warranty claim “without the necessity of an express warranty.” Conversely, anything that involved an express warranty was assumed by New GM. Third, there is parol evidence regarding its meaning (*i.e.*, there were actual discussions about it, unlike section 2.3(a)(vii)(A)). That testimony confirms that the Class Judgment did not fall within section 2.3(b)(xvi)—so it necessarily fell within section 2.3(a)(vii)(A). Fourth, section 2.3(b)(xvi) used the phrase “arising under” just like its mirror provision. The testimony proves that New GM was using that phrase as broadly as possible. Finally, section 2.3(b)(xvi) involved Retained Liabilities, which New GM defined as anything “other than the Assumed Liabilities” and “in all cases with the exception of the Assumed Liabilities” *Ex. C*, §2.3(b). So if any part of a Liability fell within section 2.3(a)(vii)(A), it could never fall within the definition of any Retained Liability, even section 2.3(b)(xvi). Once again, section 2.3(b)(xvi) was the backstop or final clarification to section 2.3(a)(vii)(A).

From the definition of Liabilities, to the specific language choices within section 2.3(a)(vii), to its mirror provision in the Retained Liabilities, the Plaintiffs’ construction of

section 2.3(a)(vii)(A) is the only one in harmony with the ARMSPA as a whole and its sections specifically. The Class Judgment asserted a claim for breach of the glove-box warranty. It was not a claim “without the necessity of an express warranty”—as evidenced by Lines’ sworn testimony regarding the warranty upon which the *Castillo* class action “relies.” *Exs. G, H*. As a result, the Class Judgment falls within section 2.3(a)(vii)(A).

6. NEW GM HAS STRUGGLED TO ARTICULATE A DEFINITION FOR “ARISING UNDER” BECAUSE ITS CONTENTIONS REQUIRE THIS COURT TO REWRITE SECTION 2.3(a)(vii)(A).

Within the ARMSPA, New GM used the phrase “arising under” 12 times. *Ex. C*, §§ 1.1, 2.2(b)(xi), 2.3(a)(v), 2.3(a)(vii), 2.3(a)(viii), 6.15(b), 6.21, 9.19. The phrase “arising under” also appears seven times in the Sale Order, *Ex. OO at ¶¶ AA, 8, 46, 48, 54, 71*, and three times in the decision to approve the 363 sale, *In re Old GM*, Doc. 2976 pp. 18, 20, 52 *fn*. In the Proposed Pre-trial Order, New GM drafted the jurisdiction section using that phrase. *See Proposed Pre-trial Order ¶II*.

Despite all of that, New GM has never attempted to define “arising under”—it has simply retreated from the *Safety Kleen* definition (origin or basis in), the Bankruptcy Code usage (give rise to), its own admissions (based upon), and the dictionary definition (originating from a source). New GM’s only two witnesses similarly struggled to offer any alternate definition that has meaning or finds support in any source. When the co-drafter was asked what he meant in section 2.3(a)(vii) by the term “arising under,” Buonomo gave the following unintelligible answer:

Q. What did you mean [in section 2.3(a)(vii)] by the term “arising under”?

A. What they provided for in.

Q. Pardon me?

- A. Provided for in or arising by reason of us fulfilling our obligation. So it would have included providing the repairs or replacement pursuant to the warranty. It would include paying the dealers. It would include maintaining a system and infrastructure to fulfill the warranties. There's a lot that goes with having a warranty system and we're trying to catch that in relatively high-level language.

Buonomo depo., pp. 68:14-69:6. When asked the question again, he gave this answer:

Q. In 2.3(a)(vii), what did you mean by the language arising under express written warranties?

- A. The intent was that the new company would assume the obligation to fulfill the express warranties and would do all the things and meet all the obligations necessary to do that including, for example, providing the actual repairs and replacements, paying the dealers to do the work, maintaining the system and infrastructure and parts bank, and all those things and generally take the actions necessary to fulfill the warranties referenced. And of course a lot of things, to use that word, arise from an obligation to do that.

Id., p.69:11-24. Those answers not only failed to define “arising under,” but would render another section of the ARMSPA meaningless.

It turns out that Buonomo's attempted definition of “arising under” is a separate obligation set forth in a different section of the ARMSPA. The language of section 6.15(b) imposes upon New GM a new responsibility—the administration and managerial responsibilities required to fulfill the duties arising under Old GM's warranties:

From and after the Closing, Purchaser shall be responsible for the administration, management and payment of all Liabilities arising under (i) express written warranties of Sellers that are specifically identified as warranties and delivered in connection with the sale of new, certified used or pre-owned vehicles or new or remanufactured motor vehicle parts and equipment (including service parts, accessories, engines and transmissions) manufactured or sold by Sellers or Purchaser prior to or after the Closing

Ex. C, §6.15(b) (emphasis added). Thus, section 2.3(a)(vii)(A) has nothing to do with Buonomo's testimony—section 6.15(b) does.

When Lines was asked how he understood the phrase “arising under,” he testified, “I guess if you used it in context, it would be something that would be, I would say, *related to* perhaps.” *Lines depo.*, p.65:8-23 (emphasis added). After his deposition, Lines changed his answer, via errata sheet: “‘Related to’ should be ‘created by or pursuant to.’” *Id.* (errata sheet). Perhaps not so coincidentally, this *ex post facto* testimony matches contentions recently submitted by New GM’s outside counsel:

As the co-draftsman of this provision, Lawrence S. Buonomo (then an attorney on Old GM’s Legal Staff), has testified and is submitting a declaration stating that the intent of this provision was to limit New GM’s assumption of express warranty obligations to *only* those created by or pursuant to (*i.e.*, ‘arising under’) the standard repair warranty.

Joint Proposed Pretrial Order, p.16 ¶13 (emphasis original). Despite this promise of counsel, Buonomo’s declaration offers no such definition—which would be inconsistent with his deposition testimony. Most importantly, “the unexpressed subjective intent of one party is immaterial . . .” *In re Actrade Fin. Tech.*, 424 B.R. at 73. Unless it was communicated and understood between the parties, the testimony is not parol evidence. *In re Bellevue Place Assoc.*, 173 B.R. at 1017; *Compania Embotelladora Del Pacifico, S.A.*, 650 F.Supp.2d at 323.

Regardless of New GM’s failed attempts to rewrite a definition for “arising under,” the testimony of Buonomo and Lines evince their understanding that “arising under” is an expansive phrase. Buonomo uses “arising under” interchangeably with arising “by virtue of” or “gives rise to.” *Buonomo depo.*, pp. 72:23-73:12, 65:7-21. In addition, Buonomo believes that “the *Castillo* case is one arising from product liability claims” even though it somehow did not arise under an express warranty claim. *Buonomo depo.*, pp. 49:5-51:3 (especially p.50:10-20). Furthermore, Lines acknowledged that the *Castillo* settlement arose from the *Castillo* litigation. *Lines depo.*, p.9:13-17. In the end, both Buonomo and Lines used “arising under” in accordance with its common and ordinary meaning.

If New GM had truly intended to assume only the obligations pursuant to and subject to the conditions in the glove-box warranty, then it would have said so. U.S. v. 0.35 of an Acre of Land, 706 F. Supp. 1064, 1072 (S.D.N.Y. 1988) (“language to give it effect was readily available had it been the intention of the parties to include this added provision”). That, of course, would not have changed the outcome here—because the *Castillo* class action involved an alleged breach of that glove-box warranty. It is also notable that the Saturn original glove-box warranty had expired by the bankruptcy. If it was New GM’s intent to limit section 2.3(a)(vii)(A), then it would not have admitted that the Special Policies “fall squarely” within that section. Finally, New GM’s immediate performance in accordance with the Class Judgment is the “best evidence” of its intent.

II. EVEN IF THE CLASS JUDGMENT WERE NOT AN ASSUMED LIABILITY UNDER SECTION 2.3(a)(vii)(A), NEW GM IMPLIEDLY ASSUMED THE CLASS JUDGMENT BY ITS CONDUCT.

At a minimum, New GM has impliedly accepted responsibility for the Class Judgment. “It is well established that a contract may be implied in fact where inferences may be drawn from the facts and circumstances of the case and the intention of the parties as indicated by their conduct.” Pache v. Aviation Volunteer Fire Co., 800 N.Y.S.2d 228, 229 (N.Y. App. Div. 2005); Berlinger v. Lisi, 731 N.Y.S.2d 916 (N.Y. App. Div. 2001). “Thus, an agreement by conduct does not differ from an express agreement except in the manner by which its existence is established.” Matter of Boice, 640 N.Y.S.2d 681, 682 (N.Y. App. Div. 1996). Immediately on July 10, 2009, New GM started following the terms of the Class Judgment.

By the Closing, the glove-box warranty had expired. Nonetheless, New GM started paying for “warranty” VTi repairs in accordance with the terms of the Class Judgment. *Ex. Z*. Throughout this time, New GM wrote directly to class members discussing the customers’

“trust,” “confidence,” and “loyalty” to the Saturn brand, and advised those class members that warranty coverage would continue unchanged. *Adv. Proc. Doc. 17*, ¶¶ 49-50; *Doc. 19* ¶¶ 49-50. Like any other asset, customer goodwill can be bought and sold. Riedman Corp. v. Gallager, 852 N.Y.S.2d 510 (N.Y. App. Div. 2008); Frank May Assoc. Inc. v. Boughton, 721 N.Y.S.2d 154 (N.Y. App. Div. 2001). Indeed, New GM was attempting to sell that very customer goodwill to Penske. *Ex. R.*

There is no doubt about New GM’s assent to undertake the Class Judgment. Four Seasons Hotels Ltd. v. Vinnik, 515 N.Y.S.2d 1 (N.Y. App. Div. 1987) (applying objective test). The same “best evidence” establishing intent under the ARMSPA applies equally here. From July 10 through September 28, 2009, New GM processed 1,636 VTi repair claims, 65 towing claims, and 115 car rental claims—spending approximately \$5,857,133 following the terms of the Class Judgment. *Ex. Z.*

CONCLUSION

For all of the reasons set forth above, the Class Judgment is a “Liabilit[y] arising under the express written warranties ...” of Old GM. In the alternative, New GM impliedly assumed the Class Judgment through its conduct. As a result, New GM assumed all obligations under the Class Judgment.

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Respectfully submitted,

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HEARING DATE AND TIME:
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re MOTORS LIQUIDATION COMPANY
f/k/a GENERAL MOTORS CORP., *et al.*,
Debtors,

KELLY CASTILLO, NICHOLE BROWN,
BRENDA ALEXIS DIGIANDOMENICO,
VALERIE EVANS, BARBARA ALLEN,
STANLEY OZAROWSKI, and DONNA
SANTI,

Plaintiffs,

v.

GENERAL MOTORS COMPANY f/k/a NEW
GENERAL MOTORS COMPANY, INC.,

Defendant.

Chapter 11
09-50026 (REG)
Jointly Administered

Adv. Proc. No. 09-00509

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2011, I electronically filed Plaintiffs' Opening Trial Brief with the Clerk of Court using the CM/ECF system, which will send notification of such filings(s) to the following:

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By: /s/ Mark L. Brown

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