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March 25, 2010 at 9:45 a.m.

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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' STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT
AS TO COUNT I, ONLY, FOR EXPRESS ASSUMPTION OF LIABILITY**

1. Plaintiffs here are also the plaintiffs and certified class representatives in a class action in the United States District Court for the Eastern District of California, No. 2-07-CV-02142 WBS GGH (the “Class Action”). The defendant in the Class Action is General Motors Corporation, now known as Motors Liquidation Company (“Old GM”). These facts are admitted in the Answer of Defendant General Motors LLC to First Amended Complaint, with Counterclaim (“New GM’s Answer”), ¶¶ 1-2, 5-11.

2. Plaintiffs alleged in the Class Action that the continuously variable “Variable Transmission with intelligence” (“VTi”) transmissions in model year 2002 through 2005 Saturn VUEs and model year 2003 and 2004 Saturn IONs were defective; their complaints asserted a claim for, among other things, breach of express warranty. Copies of plaintiffs’ complaints filed in the Class Action are attached to the First Amended Complaint as Exhibits D, E and F¹. Authenticity of those exhibits is admitted in New GM’s Answer, ¶20.

3. The count entitled “Breach of Express Warranties” (*Ex. D, pp. 14-16*), alleged that Old GM breached the express written warranty delivered in connection with the sale of the Saturn vehicles at issue:

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

¹ Exhibits A through V were attached to plaintiffs’ First Amended Complaint for Declaratory Judgment and, to avoid an additional filing of voluminous exhibits, have not been attached to this pleading.

correct any vehicle defect related to materials or workmanship occurring' during the warranty period.

* * *

77. At the time of sale and forward, GM has *breached these express warranties* by selling to Plaintiffs and the Class vehicles equipped with defective VTi transmissions that are, by design, unsafe, subject to extreme premature wearing and failure, and likely to cause serious injury to Plaintiffs and Class members – if the vehicles are even operable at all—and/or by refusing to adequately repair or replace their transmissions.

* * *

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.

* * *

79. Any *limitation on the duration of GM's express warranties* is unconscionable within the meaning of Section 2-302 of the UCC, and therefore is unenforceable in that, among other things, vehicles with VTi transmissions contain a latent defect of which GM was actually or constructively aware at the time of sale, and purchasers lacked a meaningful choice with respect to the terms of the warranty due to unequal bargaining power and a lack of warranty competition.

* * *

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, pp. 14-22 (emphasis added).

4. 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.*
5. On January 4, 2008, Old GM filed its motion to dismiss, which characterized

plaintiffs' claim as based on the Saturn Express Limited Warranty provided with the sale of a new vehicle, specifically:

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). Authenticity of this exhibit is admitted in New GM's Answer, ¶ 23.

6. In fact, Old GM's attorney, Joe Lines, filed a declaration averring that the express warranty was, indeed, the Saturn Express Limited Warranty. *Ex. G*. Under oath, a representative of Old GM stated that "[a]ttached hereto is a true and correct copy of the Saturn Express Limited Warranty Booklet for the 2003 VUE to which plaintiffs refer in their complaint." *Id.* Authenticity of this exhibit is admitted in New GM's Answer, ¶ 22.

7. In more than six (6) pages of its memorandum, Old GM presented arguments regarding the breach of express warranty count. *Ex. H, pp. 11-12, 23-28*. Authenticity of this exhibit is admitted in New GM's Answer, ¶ 23.

8. 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 (emphasis added). *See also pp. 36-43.* Authenticity of this exhibit is admitted in New GM's Answer, ¶ 24.

9. 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.* Authenticity of those exhibits is admitted in New GM's Answer, ¶ 20.

10. Thereafter, discovery in the matter continued, the parties engaged in mediation, and a settlement between the parties was reached. *Ex. B.* Authenticity of this exhibit is admitted in New GM's Answer, ¶ 2.

11. According to the class settlement agreement:

The Agreement is intended to fully, finally and forever resolve, discharge and settle *the lawsuit* styled Kelly Castillo, et al. v. General Motors Corporation, Case No. 2:07-CV-02142 WBS-GGH, pending in the United States District Court for the Eastern District of California (the "Action") *and all matters raised or that could have been raised therein*, subject to the terms and conditions hereof and approval by the Court.

Ex. B, p.2 Opening para. (emphasis added). Authenticity of this exhibit is admitted in New GM's Answer, ¶ 2.

12. Immediately thereafter, Old GM expressly acknowledged that the complaint that precipitated the settlement agreement asserted a claim for breach of warranty: "[plaintiffs] claim that GM is liable to alleged class members for damages under state consumer protection statutes and *on breach of warranty* and unjust enrichment theories." *Ex. B, ¶I.2* (emphasis added). Authenticity of this exhibit is admitted in New GM's Answer, ¶ 2.

13. Indeed, Old GM decided to settle "because it will (i) fully resolve all claims that were or could have been raised in the Action" *Ex. B, ¶I.5.* Authenticity of this exhibit is

admitted in New GM's Answer, ¶ 2.

14. As a result, the definition of "Released Claims" in the settlement included any claims based upon "the factual allegations and legal claims that were made or could have been made in the Action." *Ex. B, ¶ II.14.* Authenticity of this exhibit is admitted in New GM's Answer, ¶ 2.

15. On September 8, 2008, the district court preliminarily approved the settlement agreement and ordered that GM issue notice to the class members. *Ex. J.* Authenticity of this exhibit is admitted in New GM's Answer, ¶ 29.

16. In its order, the district court specifically noted that the complaint was alleging "breach of express warranties." *Ex. J, p.3.* Authenticity of this exhibit is admitted in New GM's Answer, ¶ 29.

17. In early January 2009, the notice was mailed to the class members. *Ex. K.* These facts and the authenticity of this exhibit is admitted in New GM's Answer, ¶ 30.

18. Under the heading "DESCRIPTION OF THE LAWSUIT," the notice advised the class members that the lawsuit alleged that Old GM had, among other things, "breached express . . . warranties." *Ex. K.* Authenticity of this exhibit is admitted in New GM's Answer, ¶ 30.

19. On February 27, 2009, plaintiffs filed their Memorandum In Support of Final Approval of the Class Settlement, wherein the obligations created by the Agreement and Final Judgment were explained in terms of the original warranty provided with the vehicles. *Ex. L.* Though New GM denies this characterization, the authenticity of this exhibit is admitted in New GM's Answer, ¶ 31.

20. On April 14, 2009, the district court signed an order—the final judgment—granting final approval of the settlement and certifying the class. *Ex. A.* These facts

and the authenticity of this exhibit is admitted in New GM's Answer, ¶ 2.

21. The final judgment incorporated the settlement agreement by reference. *Ex. A.*

Authenticity of this exhibit is admitted in New GM's Answer, ¶ 2.

22. In the final judgment, the district court made the following findings:

(a) the settlement ... has been entered into in good faith and was concluded after Class Counsel had conducted an extensive investigation *concerning the issues raised by Plaintiffs' claims*; ... (c) the settlement delivers benefits to the Class in a timely manner while *resolving complex issues* that would require expensive and long-lasting litigation; (d) the Agreement was the result of extensive arms' length negotiations among highly experienced counsel, *with full knowledge of the risks inherent in this litigation*; ... (g) *the case raised complex and vigorously contested issues of law and fact* that would result in complex, expensive, and lengthy litigation; ... (i) the release is tailored to address *the allegations in the case*.

Ex. A. ¶3 (emphasis added). Authenticity of this exhibit is admitted in New GM's Answer, ¶

2.

23. 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" *Ex. A.* ¶10.

Authenticity of this exhibit is admitted in New GM's Answer, ¶ 2. Authenticity of this exhibit is admitted in New GM's Answer, ¶ 2.

24. Pursuant to the final judgment, Old GM was required to mail final notice and claim forms to the class on June 2, 2009. *Ex. A.* Authenticity of this exhibit is admitted in New GM's Answer, ¶ 2.

25. On June 1, 2009, Old GM filed for bankruptcy protection under chapter 11 of the Bankruptcy Code. *Ex. C, p. 1.* Authenticity of this exhibit is admitted in New GM's Answer, ¶

3.

26. In conjunction with its bankruptcy, Old GM filed a motion seeking leave to

continue warranty service during the bankruptcy. *Ex. M.* These facts and the authenticity of this exhibit is admitted in New GM's Answer, ¶ 34.

27. On July 5, 2009, this Court approved a sale of Old GM's assets to New GM under section 363 of the Bankruptcy Code pursuant to an Amended and Restated Master Sale and Purchase Agreement² between Old GM and New GM (the "ARMSPA") which is attached to the order approving the sale ("Sale Approval Order"). *See, In re Old GM*, Doc. #2968. The Sale Approval Order became final, and the sale was consummated, on July 10, 2009. A copy of the ARMSPA is attached to the First Amended Complaint as Exhibit C. Authenticity of this exhibit is admitted in New GM's Answer, ¶ 3.

28. Via the ARMSPA, New GM accepted responsibility for certain various liabilities of Old GM defined by the ARMSPA as the Assumed Liabilities. *Ex. C.* Authenticity of this exhibit is admitted in New GM's Answer, ¶ 3.

29. Following preliminary approval of the class action settlement, first Old GM and then, following the 363 sale, New GM began honoring the settlement as to fresh failures experienced by class members. These facts are admitted in New GM's Answer, ¶¶ 44 and 46.

² On June 1, 2009, the day it filed for bankruptcy protection, Old GM filed a Master Sale and Purchase Agreement ("MSA") between Old GM and New GM. Section 2.3(a)(vii) of the original MSA provided that the Assumed Liabilities included:

(A) all Liabilities arising under express written emission and limited new vehicle warranties, certified used vehicle warranties and pre-owned vehicle warranties delivered in connection with the sale of new, certified used or pre-owned vehicles manufactured or sold by Seller or Purchaser prior to or after the Closing and (B) all Liabilities arising under express written emission and limited warranties and warranties with respect to new or remanufactured motor vehicle parts and equipment (including service parts, accessories, engines and transmissions), manufactured or sold by Sellers or Purchaser.

On June 26, 2009, Old GM filed the ARMSPA that was subsequently approved and executed. On June 30, 2009, Old GM filed the First Amendment to the ARMSPA, which did not modify Section 2.3(a)(vii). On July 5, 2009, Old GM filed the Second Amendment to the ARMSPA, which also did not affect Section 2.3(a)(vii).

See also, invoices from class members attached to the First Amended Complaint as exemplars. *Exs. O, P, Q and T.* See also, correspondence from attorney Greg Oxford describing as much. *Ex. N.* Authenticity of this exhibit is admitted in New GM's Answer, ¶ 43.

30. Before the class action was filed in California, Old GM adopted Special Policy 04020. *Ex. V.* These facts and the authenticity of this exhibit are admitted in New GM's Answer, ¶ 19.

31. During Old GM's bankruptcy, Old GM and New GM have communicated with their customers, including Class Members, via direct mail or e-mail regarding the proposed sale of the Saturn brand to Penske Automotive Group and Old GM's sale of assets to New GM. *Exs. R and S.* Authenticity of this exhibit is admitted in New GM's Answer, ¶ 49.

32. On September 28, 2009, after the present declaratory judgment was filed, New GM ceased compensating class members in accordance with the terms of the settlement. These facts admitted in New GM's Answer, ¶ 46. See also, the Declaration of class member Mr. Dan Richardson describing his experience. *Ex. U.*

Dated: December 18, 2009

Respectfully submitted,

By: /s/ Mark L. Brown

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re MOTORS LIQUIDATION COMPANY,
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Debtors,

KELLY CASTILLO, NICHOLE BROWN,
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Defendant.

Chapter 11
09-50026 (REG)
Jointly Administered

Adv. Proc. No. 09-00509

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2009, I electronically filed Plaintiffs' Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment as to Count I, Only, For Express Assumption of Liability with the Clerk of Court using the CM/ECF system, which will send notification of such filings(s) to the following:

Gregory Oxford
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By: /s/ Mark L. Brown

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Tana Burton

From: Docket
Sent: Friday, December 18, 2009 4:43 PM
To: Tana Burton
Subject: FW: 09-00509-reg Statement

From: nysbinfo@nysb.uscourts.gov[SMTP:NYSBINFO@NYSB.USCOURTS.GOV]
Sent: Friday, December 18, 2009 4:43:00 PM
To: courtmail@nysb.uscourts.gov
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U.S. Bankruptcy Court
Southern District of New York

Notice of Electronic Filing

The following transaction was received from Mark L. Brown entered on 12/18/2009 at 5:43 PM and filed on 12/18/2009

Case Name: Castillo et al v. General Motors Company
Case Number: 09-00509-reg
Document Number: 25

Docket Text:

Statement of *Undisputed Facts in Support of Motion for Partial Summary Judgment as to Count I, Only, for Express Assumption of Liability* (related document(s)[23]) filed by Mark L. Brown on behalf of Barbara Allen, Nichole Brown, Kelly Castillo, Brenda Alexis DiGiandomenico, Valerie Evans, Stanley Ozarowski, Donna Santi. with hearing to be held on 3/25/2010 (check with court for location) (Brown, Mark)

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:J:\LLF\Saturn Transmission(Product Defect)\Drafts\2009-12-18 MSJ Docs\2009-12-18 Statement of Undisputed Facts.pdf

Electronic document Stamp:

[STAMP NYSBStamp_ID=842906028 [Date=12/18/2009] [FileNumber=7501365-0]
[28f41a42e94918360c3064382b871f952f80627dd590b60b8a832b159ea339504601
c169fd665226a1ea8a7885b7c76b106b675991eeadeb5b4d2128158a559f]]

09-00509-reg Notice will be electronically mailed to:

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Gregory Oxford on behalf of Counter-Claimant General Motors Company
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