

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Lead Case No. 09-50026

Adv. Case No. 09-00509

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In the Matter of:

GENERAL MOTORS CORPORATION,

Debtor.

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U.S. Bankruptcy Court
One Bowling Green
New York, New York

November 18, 2009

2:49 p.m.

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

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MOTION for a TRO With Preliminary Injunction.

Transcribed By: Esther Accardi

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A P P E A R A N C E S : (continued)

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P R O C E E D I N G S

THE COURT: Okay, GM. Castillo v. GM. Can I get appearances, please?

MS. YOUNG: Good afternoon, Your Honor. My name is Alyssa Young, I'm with the law firm of Leader & Berkon. And I'm appearing on behalf of plaintiffs. With me, on the phone, is Mark Brown from the firm Lakin Chapman.

And just to let Your Honor know, we did file a pro hac vice motion for Mr. Brown and also fro Mr. Robert Schmieder, late yesterday afternoon.

THE COURT: Okay, fair enough.

MR. KAROTKIN: Good afternoon, Your Honor. Steven Karotkin and Evan Lederman, Weil Gotshal & Manges for Motors Liquidation. And I believe on the phone is Gregory Oxford from the Isaacs Clouse Crose & Oxford firm in California on behalf of New GM.

THE COURT: Right. Mr. Oxford was the lawyer who signed the responding brief that I received.

MR. OXFORD: Good morning, Your Honor.

THE COURT: Okay, Mr. Oxford, thank you.

Mr. Karotkin, am I right that you're appearing for Old GM or what the appropriate word would be, Motors Liquidation?

MR. KAROTKIN: Yes, sir.

THE COURT: Okay. Fair enough.

Okay. I have the TRO application, I've read both

1 sides' papers. Ms. Young or Mr. Brown, who would wish to make
2 the argument?

3 MR. BROWN: Your Honor, this is Mark Brown on behalf
4 of the plaintiffs. Also present on the phone with me, Your
5 Honor, is my colleague Robert Schmieder.

6 THE COURT: Okay.

7 MR. BROWN: Your Honor, thank you for taking the time
8 to hear us on such short notice. We made every effort to try
9 and resolve this with New GM prior to bringing it to the
10 Court's attention. Unfortunately, those efforts were
11 unsuccessful. The relief that we're requesting is relatively
12 limited relief that we think would impose virtually no burden
13 on New GM. But, yet, it's relief that is extremely important
14 to our clients, who we believe face irreparable harm otherwise.

15 And if I may, Your Honor, I'd like to give a brief
16 history of the case so that I can explain why we're before the
17 Court this afternoon.

18 As I mentioned, we represent the plaintiffs who are in
19 this adversary proceeding, who are the core plaintiff class
20 representatives in a class action that was filed against Old GM
21 in the District Court for the Eastern District of California.

22 That class action dealt with defective transmissions
23 in certain Saturn vehicles, and the claims were among others
24 for breach of warranty for those defective transmissions.

25 The parties ultimately reached a settlement agreement

1 which provided for reimbursement for transmission repairs and
2 other expenses, both for past and future transmission failures,
3 add up to about 100 percent reimbursement rate. And the
4 District Court for the Eastern District of California approved
5 that settlement and entered judgment on April 14th of this
6 year. That order became final -- that judgment became final
7 and unappealable in May of this year, prior to Old GM's
8 bankruptcy petition. The --

9 THE COURT: Pause, please, Mr. Brown. Was the
10 California class action fully certified as a class action
11 either before or after the settlement was reached, or when the
12 settlement was reached?

13 MR. BROWN: It was preliminary certified as a class
14 action as part of the preliminary approval process. And then
15 it was given final approval and final certification as a class
16 action on April 14th.

17 THE COURT: Fair enough. Continue, please.

18 MR. BROWN: The nature of the adversary proceeding is
19 the plaintiffs are seeking a declaration from this Court that
20 the class action judgment entered prior to the bankruptcy
21 petition of Old GM became an assumed liability under Section
22 2.3(a)(7) of the sale agreement between Old GM and New GM.
23 That's the ultimate relief we're seeking and it's based on the
24 language of the ARMSPA as it's called in -- I can explain that
25 in more detail in a second, but that is essentially the

1 ultimate relief that we're requested.

2 THE COURT: Now, pause please, Mr. Brown.

3 MR. BROWN: Yes.

4 THE COURT: The adversary that's before me is by about
5 a half a dozen or so, I haven't actually totaled them up,
6 people who I assume were also plaintiffs in your class action,
7 and you're looking for class certification before me but you
8 haven't gotten it yet?

9 MR. BROWN: No, sir, not exactly. The plaintiffs in
10 this adversary proceeding are, in fact, the very same class
11 representatives who were appointed by the court in California
12 as the class representatives. The relief that they seek in
13 this case, a declaration that New GM assumed the liabilities on
14 the class judgment in California, under the ARMSPA is relief
15 that would benefit the entire class that they have been
16 appointed to represent.

17 THE COURT: Well, I take that point. But what I'm
18 groping for is the caption on your brief says individually and
19 on behalf of all other similarly situated. Are you looking for
20 class certification from me?

21 MR. BROWN: Your Honor, I don't think that that is
22 necessary. If the declaratory relief that the class
23 representatives seek is granted then that would benefit the
24 entire class. So, no, we're not seeking certification,
25 although have been already certified class, Your Honor.

1 THE COURT: All right, continue, please.

2 MR. BROWN: So what brings us to the Court today is
3 that we recently learned of what GM has called a new special
4 policy to provide different reimbursement for those class
5 members and their customers who are experiencing transmission
6 failures in the class vehicles.

7 There are two components to that. One of which is
8 relatively not objectionable to us. And the other of which is
9 problematic.

10 First, the new special travel policy proposes to
11 reimburse class representatives at a fifty percent rate, rather
12 than a 100 percent rate. I think our general agreement with GM
13 as to the nature of the relief was beyond that because we
14 agreed that in the event that the Court ultimately rules in our
15 favor on the merits and that the class members are entitled to
16 100 percent relief, then that's relief could be provided at a
17 later date.

18 And so we knew irreparable harm on that point with one
19 exception. And that is we want to confirm that by accepting
20 this fifty percent reimbursement in the -- under the new
21 special policy that the class members wouldn't be waiving any
22 rights in the event that there is ultimate resolution in their
23 favor.

24 THE COURT: I think Mr. Oxford said that in his brief.
25 You want me to do something to have him say that he really

1 means it, or that I got to like nail that down in some kind of
2 order or what?

3 MR. BROWN: Well, Your Honor, I think we can button it
4 down just a bit more than it is. What Mr. Oxford said I
5 believe in the brief, is that plaintiffs can argue that owners
6 who accept fifty percent reimbursement cannot waive their claim
7 to reimbursement at a higher rate. And Mr. Oxford has
8 represented that there would be no releases actually signed by
9 the class members, and of course, we take him as word of that.

10 There are, however, the issues of accord and
11 satisfaction that could be raised. And I don't believe that
12 they've given a representation that that argument will be made,
13 I assume that that will be non-objectionable to Mr. Oxford.
14 But, of course, I'll allow him to speak to that. That is the
15 most minor point of the relief that we're seeking. And if
16 there's agreement that there would be no accord and
17 satisfaction or waiver or release associated with a class
18 member accepting fifty percent reimbursement, then there's no
19 issue there.

20 The main issues comes in the form of the other
21 component of the new special policy, which is that class
22 members have the option of accepting a 5,000 dollar credit if
23 they trade in their Saturn vehicle, and that 5,000 dollar
24 credit can be applied toward the purchase of the new GM
25 vehicle.

1 We also do not object to that relief being made
2 available to the class members. What's complicating it for us
3 and the reason for our objection is that those class members
4 who accept that relief, the 5,000 dollar credit, in exchange
5 for trading in their vehicles, will forever after be
6 effectively barred from accepting the benefit of the
7 declaratory judgment. And if there's -- if we ultimately
8 prevail, as we expect we will, once class members trade in
9 their vehicles and spend twenty or thirty thousand dollars to
10 get the benefit of that trade-in then there's very little I
11 think that we can do to ask the Court to make them whole if we
12 prevail on the declaratory judgment action. And so we're not
13 asking the Court to prevent them from making this relief
14 available, we're simply asking that class members be informed
15 that the -- that there is still in dispute about whether New GM
16 assumed the liability under the class judgment, and that's the
17 determination that the Court will make at a later date. And if
18 they do accept this 5,000 dollar trade in, as they're free to
19 do, we want to make sure that they do so knowing that they have
20 also the option of waiting and seeing whether the court agrees
21 with our position ultimately. In which case they would have
22 the full range of relief under the class action judgment.

23 So that is essentially the relief we're asking for.
24 The other component that we recently learned of is that we've
25 received some evidence that dealerships are telling class

1 members, or have told some class members -- excuse me, I
2 believe it's the GM Customer and Assistance Center has told at
3 least some customers that the case was thrown out of Court.
4 Meaning that customers were being misled into believing that
5 there is no other relief available to them and will never be
6 other relief available to them but for the 5,000 dollar credit,
7 or the fifty percent reimbursement offered by New GM in the
8 special policy.

9 That, Your Honor, is a summary of the issue and a
10 summary of the relief that we're requesting. I'm happy to
11 answer any questions about that before I move on to the merits
12 of the argument.

13 THE COURT: No. I want you to focus on the basis for
14 me to find a likelihood of success, and the irreparable injury
15 and balance of hardships.

16 MR. BROWN: Yes, Your Honor. You're alluding to the
17 standard for temporary restraining order?

18 THE COURT: Yeah, exactly.

19 MR. BROWN: The Court is doing well for me with that
20 I'm sure. But to recap movant seeking temporary restraining
21 order or injunction relief normally must show the threat of
22 irreparable harm in the absence of an injunction. And either a
23 likelihood of success on the merits or a sufficiently serious
24 question going to the merits to make the merits a fair ground
25 for litigation and in the end that balance tips in the movant's

1 favor. That is the normal TRO or injunctive relief standard.
2 And I think we can easily meet those standards as I'll explain
3 in a moment.

4 There is also law suggesting that movant must make an
5 elevated showing of likelihood of success on the merits or a
6 clear and substantial showing of likelihood on success on the
7 merits when the injunction would alter the status quo or when
8 the injunction would provide the substantial relief that's
9 sought. Neither of those are the case here. I believe that
10 the relief we're requesting preserves the status quo in the
11 sense that it would prevent the class members from altering
12 their current legal status unwittingly and unknowingly. So I
13 believe we can make a showing of for either the regular
14 standard or the heightened standard, I think we satisfy both.
15 But under the circumstances of this case I think the proper
16 approach for the Court is to apply the regular standard because
17 we're not seeking to alter the status quo.

18 In terms of the irreparable harm, again setting aside
19 the issue of the fifty percent reimbursement, we agreed that
20 that would not involve irreparable harm because money damages
21 at the end of the day could address that situation. What we
22 consider to be irreparable harm is the situation where a
23 customer not realizing that this issue was still before the
24 Court and that the Court couldn't determine New GM to have
25 assumed Old GM's obligations under the class settlement if that

1 person, in fact, trades in their vehicle, gets the 5,000 dollar
2 credit, at that point I don't know what the Court could do to
3 make them whole if the Court ultimately determines that New GM
4 sued Old GM's liabilities. Because at that point they will no
5 longer have their Saturn vehicle. We know from the special
6 policy that the dealerships have been instructed not to resell
7 those vehicles and not to repair those vehicles. We suspect
8 that New GM intends to destroy them, although we don't know
9 that. But, in any event, those vehicles will no longer be
10 available. And in order to take advantage of the 5,000 dollar
11 credit, the person would have to spend essentially the price of
12 a new car. And if the Court determines that the -- that we've
13 demonstrated that New GM has assumed the liabilities of Old GM
14 I don't know that we feel comfortable asking the Court to
15 return all of the money. So I don't know that there's any way
16 to make the class members whole at that point. So we simply
17 ask that they be given an opportunity to make an informed
18 decision, because they would have to buy a new GM vehicle in
19 order to take advantage of this relief.

20 In terms of the likelihood of success on the merits,
21 Your Honor, we have submitted in response to the motion to
22 dismiss that was filed by GM, a proposed summary judgment --
23 partial summary judgment motion that lays out in great detail
24 the bases for our claims that New GM has assumed the liability.
25 I understand that the local rules don't allow us to file the

1 actual motion for summary judgment without the Court's
2 permission, but we've given a prelude to what it would look
3 like. And the arguments were laid out in detail there.

4 But, essentially, the argument is this. The sale
5 agreement -- the amended sale agreement between Old GM and New
6 GM, the ARMSPA, has a definition of assumed liabilities. and
7 that definition is in 2. -- Section 2.3(a)(7). That definition
8 is that New GM assumes all liabilities -- and liabilities is
9 also a defined term capitalized. All capital L liabilities
10 arising under express written warranties of sellers that are
11 specifically identified as warranties and delivery in
12 connection with the sale of a new certified used or pre-owned
13 vehicles, or new or remanufactured motor vehicles and
14 equipment, including service parts, accessories, engines,
15 transmissions, manufacturer or sold by sellers the first year
16 prior to or after the closing.

17 What that means is that under this definition in order
18 for an obligation to be assumed by New GM it must be two
19 things. It must be a liability as defined elsewhere in the
20 ARMSPA, and it must be a liability that arises under the
21 original express warranty. Will clearly be class judgment is a
22 liability, because all liabilities are either retained
23 liabilities or assumed liabilities. And they're more
24 specifically defined to include any and all liabilities and
25 obligations of every kind and description, whatsoever, and

1 those arising under any law, claim, order, contract or
2 otherwise. Obviously, the class judgment arises under an
3 order.

4 So then the question becomes does that order arise
5 under the original express written warranty? The answer is
6 yes, because the concept of the phrase "arising under" is very
7 broadly interpreted by courts as details in our proposed
8 summary judgment brief. And there are a number of cases cited
9 there. The dictionary definition of "arise" is to originate
10 from a source. Which means that if our judgment is one that
11 originates from the original written warranty then this would
12 be an assumed liability. And it certainly did arise from the
13 written warranty.

14 THE COURT: Well, pause please, Mr. Brown, because
15 your opponent contends, as I understand it, that the only
16 reason that this warranty, as you put it, entitlement, exists
17 is because it's supposed to take place after the original
18 warranty expires, either by time or by excessive mileage. And
19 it seems to be a wholly new obligation because you ain't got
20 the original warranty.

21 MR. BROWN: Well, it is an obligation that arises by
22 way of the California court's judgment, that is true. But it
23 is not accurate to say that it only begins where the old
24 original warranty ends. The original warranty, for example,
25 has limitations of -- it's three years thirty-six thousand

1 miles under the original warranty. Old GM agreed to extend
2 that to five years, seventy-five thousand miles, at one point.
3 But neither of those warranties, the three year, thirty six, or
4 five year, 75,000 miles, included, for example, vehicle rentals
5 in the event that someone was experiencing a failed
6 transmission and unable to operate their car. So under our
7 settlement and judgment, someone who was still within five
8 years, 75,000 miles, or even under the original three-year,
9 thirty-six thousand mile warranty, have relief that was in
10 addition to that provided in the original warranty.

11 And, moreover, the settlement agreement and the
12 judgment does not say that the relief starts at 75,000 miles.
13 There are two thresholds. One is for up to 100,000 miles, the
14 other one is up to 125,000 miles. And so our -- for
15 example -- well, I suppose the point is that the relief in the
16 judgment does not begin simply after the original warranty
17 period expired. There is relief provided that would be
18 coextensive with that time.

19 THE COURT: Continue please.

20 MR. BROWN: So back to the question on whether the
21 judgment arises under the express written warranty. I don't
22 think it's in dispute that plaintiffs asserted claims for
23 breach of express written warranty. And as we point out in the
24 summary judgment brief, in the California court GM filed a
25 motion to dismiss. And to the motion to dismiss they attached

1 a copy of the written warranty policy because they thought it
2 was fundamental to the Court's understanding of the case that
3 plaintiffs' claims were based on those written warranties.
4 That is one of the many examples, Your Honor.

5 And in addition to that, in order for the California
6 court to approve the settlement since it was a class settlement
7 the court had to comply with Rule 23 of the Federal rules which
8 requires the settlement to be considered fair, reasonable and
9 adequate. And to do that the Court had to analyze the nature
10 of the claims asserted as compared to the nature of the relief
11 that was awarded. And so the nature of the relief here was
12 essentially an extension of the warranty along with some
13 additional relief that wasn't available originally under GM's
14 warranty. But it is certainly a judgment that arose under the
15 written warranties as the phrase "arising under" has been
16 interpreted by the Courts, because but for the original
17 warranties we would not have -- we would not have that case.

18 THE COURT: Go on.

19 MR. BROWN: And so, Your Honor, that is essentially
20 the summary of the merits. Again, explained in much greater
21 detail in the summary judgment brief. But we would request
22 that the Court issue a TRO which requires -- excuse me. If I
23 can maybe backup for one second and describe a fact that I
24 forgot to mention.

25 And that is originally when this issue first came to

1 our attention we were given a copy of the GM -- New GM special
2 policy which referenced a customer letter which I believe had
3 not gone out yet at that time. So originally we were planning
4 to ask the Court to enjoin GM from sending the customer letter
5 without also including some neutral language -- non-
6 controversial language that would explain to the class members
7 that there was a pending lawsuit, this adversary proceeding.
8 And that their rights under this lawsuit had not yet been
9 determined.

10 We were not able to file that when we originally
11 planned to because the Court was closed on Veterans Day. We
12 learned about this on Monday of last week, Wednesday was
13 Veterans Day. But we were able to reach New GM's counsel and
14 raise the issue with counsel and offer to try to come up with a
15 solution. We were told at that point that GM did not know when
16 the proposed customer letter would be transmitted or whether it
17 had, in fact, already been transmitted. But that outside
18 counsel would share our proposal for a resolution with New GM's
19 inside counsel.

20 We later learned on Friday of that week that the
21 letters had, in fact, gone out on Thursday and Friday of last
22 week. And so we contacted the Court on Monday of this week to
23 arrange for this hearing. Obviously, at this point, we can't
24 un-ring the bell, the letters have gone out, and so I want to
25 clarify that we are not asking the Court to require GM to send

1 any sort of clarifying letters to all of those who are going to
2 receive a letter. And I think the most limited way to fashion
3 the relief and still avoid the irreparable harm to the class
4 members would be simply for those class members who do accept
5 GM's offer to provide a 5,000 dollar credit on the trade-in,
6 that those people at that time before they make the deal, so to
7 speak, that they be informed again, in neutral non-
8 controversial language, that this litigation remains pending.
9 And that they may be waiving rights in the event that they
10 prevail in this adversary proceeding. And that is the summary
11 of our argument, Your Honor.

12 THE COURT: Okay. Mr. Oxford, do you want to be heard
13 next?

14 MR. OXFORD: Yes, Your Honor. Let me start by saying
15 that, you know, what's going on here obviously is New GM not
16 be hindering any obligations that it voluntarily agreed to the
17 customer goodwill program to help Saturn owners.

18 THE COURT: Mr. Oxford, something's getting garbled,
19 I'm having trouble understanding you.

20 MR. OXFORD: Okay. Can you hear me better now, Your
21 Honor?

22 THE COURT: A little. But it's only partly the
23 volume, it's also the clarity of your remarks.

24 MR. OXFORD: Okay. What I was saying, Your Honor, and
25 I'd be happy to move to another phone here if this isn't

1 working satisfactorily.

2 What we have here is a customer goodwill program that
3 New GM has created without being under any obligation to do so,
4 in order to help people who have been hurt by the GM bankruptcy
5 filing.

6 And we've heard Mr. Brown say basically they don't
7 have any substantive problem with that, it's only the issue of
8 disclosure to the subset of people who might want to elect the
9 5,000 dollar credit option.

10 I'd like to address the issue of likelihood of success
11 from the merits first, if I might, Your Honor.

12 And I think there, this isn't a maintaining the status
13 quo situation, it's really a mandatory injunction situation.
14 So in our view the clear and substantial showing of probability
15 of success on the merits is the appropriate of the standard.

16 We don't think the plaintiffs can make -- they
17 certainly haven't made the required showing, the probable
18 success on the merits basically for two reasons.

19 First, and this wasn't addressed by Mr. Brown, a class
20 action settlement is an executory contract. It's true that it
21 was approved in a final judgment, but under the terms of the
22 agreement and the final judgment it never went into effect.
23 And at the time of the bankruptcy filing there was performance
24 due on both sides, so it was a classic executory contract.

25 The debtor basically never assumed the contract, which

1 would have been a prerequisite for it's finding at the New GM.
2 And, in fact, the debtor now has filed a motion just recently
3 to reject it.

4 As Mr. Lederman, who is there, will confirm and my
5 peer, Mr. Karotkin, none of the things that would have had to
6 have been done to assume the contract under the assumption
7 procedures order was ever done. And the reason is because
8 early on, on June 3rd, specifically, the contract was
9 designated as part of the reject away category. There wasn't
10 any real reason to move faster because there was no money, you
11 know, being paid out.

12 So there really isn't any dispute I don't think. New
13 GM agreed that the settlement agreements was not assumed by the
14 debtor or responded to.

15 The second reason the plaintiffs can't demonstrate the
16 probability of success on the merits is that the provision of
17 the purchase agreement, Section 2.3(a)(7)(A) in paragraph 56 of
18 the sale approval order, basically define the only warranty
19 liability that GM -- the only warranty liability that was
20 accepted by New GM was that under the standards of new vehicle
21 warranty. And that warranty has specific time and mileage
22 limitations and also offers if it's only remedy -- the
23 exclusive remedy, repairs for the vehicle during the warranty
24 period.

25 The entire point of Mr. Brown's class action was to

1 impose additional different liability on the debtor for repairs
2 outside the warranty period. Now, he's just told you that,
3 well, the settlement covered things not covered by the
4 warranty, rentals, for example, before the 75,000 miles for
5 five years. And that's true. But the point is that those are
6 not covered by the warranty. If they'd like repairs after
7 75,000 miles in addition to a different liability under the
8 warranty, so -- well, New GM is continuing to provide warranty
9 repairs for people whose warranties haven't expired. That's
10 not what the class action of this case is all about. They're
11 trying to impose liability on New GM for matters that are not
12 covered by the original warranty.

13 Now, Mr. Brown says (a) from the class action we
14 alleged a breach of warranty. And, therefore, the judgment
15 which was a process of consensual settlement agreement, arose
16 out of the warranty.

17 Well, he hasn't said, because he can't, that GM
18 admitted the liability under the settlement agreement for
19 exclude express warranty. And it certainly wasn't any
20 adjudication of such liability. And, in fact, the settlement
21 agreement basically says GM isn't admitting liability at all
22 under the express warranty.

23 And the claim in the class action under the express
24 warranty, it wasn't that the debtor hadn't provided appropriate
25 repairs within the warranty period, instead it was the

1 allegation that the warranty period, itself, was unconscionably
2 short. Now, whether they think that or not, what paragraph 56
3 of the sale approval order says is that New GM is assuming
4 warranty liability only subject to the conditions and the
5 limitations of the second warranty. And, you know, that
6 doesn't include repairs that are not covered by the warranty,
7 which is what essentially the plaintiffs are trying to do here.

8 Now, maybe because the plaintiffs understand that the
9 language of the MDA can and the sale approval order don't
10 really assist their claim, they've taken a stab at arguing
11 something called implied assumption which I don't think there
12 can even be something like that under the Bankruptcy Code.
13 But, in any event as we say in our brief, there's no
14 consideration as to class members. I think that argument
15 ultimately goes nowhere.

16 So in our view, the plaintiffs haven't and can't make
17 any showing of probable success on the merits or even if it's a
18 fair question for litigation without more, TRO ought to be
19 denied.

20 Now, passing to the issue of irreparable harm, you
21 heard Mr. Brown concede that the only thing they're really
22 concerned about, other than about accord and satisfaction, is
23 that these people who might be interested in the 5,000 dollar
24 credit, you know, might somehow be misled into accepting the
25 fifty percent repair option. And I guess what they're saying

1 is that, you know, someone who might, you know, accept the 100
2 percent reimbursement but isn't interested in the fifty
3 percent, you know, might take the 5,000 dollar credit. And if
4 they were, you know, told of that option they might choose to
5 wait and see what happens in this case. But that just seems a
6 little far-fetched to me, Your Honor, that there are apparently
7 people who you know would have the luxury of, you know, parking
8 their inoperable vehicle for weeks, months, you know, until
9 this case is resolved. And beyond that, GM obviously doesn't
10 think that there's a very significant chance that the
11 plaintiffs are going to succeed in this case.

12 And if the customer service reps are going to be told
13 by GM or by the Court to disclose the case, they're going to
14 undoubtedly be asked by customers what they should do. And, of
15 course, that puts the reps in a very uncomfortable position
16 and, you know, maybe exposes New GM to customer anger. The
17 customer thinks that, you know, this suggestion that people
18 ought to waive, and then the suit fails.

19 The other thing is the class members already -- as Mr.
20 Brown I think would acknowledge, had received the notice of the
21 satisfaction of settlement, that includes contact information
22 for plaintiffs' counsel. And, you know, most of them, if they
23 hadn't been out of the country are aware of the GM bankruptcy.
24 So, you know, if these people really have questions about, you
25 know, the settlement, the bankruptcy, and the customer

1 satisfaction offer of GM -- New GM, you know, they know who to
2 call. And, obviously, you know, if they call plaintiffs'
3 counsel, we don't have any problem with them, you know,
4 advising them about the case. But I don't think that there is
5 either irreparable harm or any realistic chance of success on
6 the merits that would warrant the submission of the TRO.

7 THE COURT: Okay. Does that do it for you, Mr.
8 Oxford?

9 (Pause)

10 THE COURT: Mr. Oxford, does that do it for you?

11 MR. OXFORD: Unless Your Honor has questions, I'm just
12 looking at my notes of what Mr. Brown said, to see if there's
13 anything else I want to say.

14 THE COURT: Okay, take a moment to do it and let me
15 know when you're done.

16 MR. OXFORD: Okay.

17 (Pause)

18 MR. OXFORD: I did want to say that as far as the
19 accord and satisfaction is concerned, you know, we wouldn't
20 have any intent, you know, on that score, if any oppose -- you
21 know, since they already paid fifty percent, now whether it was
22 seventy percent, we want a credit for the fifty percent.

23 THE COURT: So you would be happy with the law of this
24 case being that you're not going to try to have it both ways?

25 MR. OXFORD: That's right, Your Honor. I'm always

1 happy with that.

2 THE COURT: Okay.

3 MR. OXFORD: I think that's about it, Your Honor.

4 THE COURT: Okay. Counsel for Old GM, want to be
5 heard?

6 MR. KAROTKIN: No, sir.

7 THE COURT: Okay. Mr. Brown, reply?

8 MR. BROWN: Yes, thank you, Your Honor. There are a
9 number of points I'd like to respond to, unless the Court has
10 specific points you'd like me to address?

11 THE COURT: I already made you do that part, Mr.
12 Brown, so just go forward with any additional points you wish
13 to make.

14 MR. BROWN: Thank you. Thank you, Judge.

15 Let me try to go in reverse order here. I think one
16 of the last points Mr. Oxford made was that the class members
17 had received notice of the original class settlement judgment,
18 so they knew who to call when they have questions. The part
19 that that disregards, however, is that they're unaware --
20 entirely unaware, unless they happen to hear through the
21 grapevine, that there's this declaratory judgment, this
22 adversary proceeding is pending. So there's certainly not been
23 any formal notice to those people in that regard. So while it
24 is true that people may know how to contact us if they have
25 questions, it's also true that most of them may think or many

1 of them may think well, GM went in bankruptcy there's nothing
2 more that we can do not realizing that they have -- they may
3 have rights in this declaratory judgment action, this adversary
4 proceeding. And, in fact, the -- I think we know, for example,
5 from at least one class member whose told us that the GM
6 customer assistance center is actually telling them that the
7 case was thrown out of court. That certainly sends the
8 impression that there's no need to contact class counsel for
9 questions. Which, of course, we would be happy to answer if
10 they find us to do that. They may know to call us and we would
11 not, of course, require GM to or even ask that GM give advice
12 on how to proceed. We're simply request that any communication
13 they have also includes clarifying language that they may
14 contact us for guidance and that there are additional rights
15 that may be available to them.

16 In terms of irreparable harm, there is one other
17 example of irreparable harm that I didn't mention previously.
18 And that is without class members realizing that this adversary
19 proceeding is being litigated they may choose to accept the
20 5,000 dollar trade-in rather than the fifty percent
21 reimbursement, which wouldn't involve any waiver of their
22 claims. Without knowing about this adversary proceeding, the
23 5,000 dollar trade-in may be more appealing to them than it
24 would otherwise be if they could then choose the fifty percent
25 reimbursement agreement and wait and see what happens with the

1 declaratory judgment action.

2 In terms of the merits and the likelihood of success
3 on the merits, I did not hear Mr. Oxford make any attempt to
4 argue that the words "arising under" are not as broad as we
5 have described in our summary judgment brief. And the language
6 of the ARMSPA, because that's what it is -- that's what it
7 says. If I understood Mr. Oxford correctly, the argument was
8 that somehow the ARMSPA was altered by this Court's subsequent
9 order. However, the ARMSPA itself says that the ARMSPA may not
10 be amended, modified or supplemented, except upon the execution
11 and delivery of a written agreement executed by a duly
12 authorized representative or officer of each of the parties.
13 That is Section 9.6 of the ARMSPA.

14 And, in addition, the sale order that Mr. Oxford
15 referred to in this Court's July 5th order is entitled "Order
16 Authorizing Sale of Assets Pursuant to The Amended or Stated
17 Master Sale and Purchase Agreement." I don't believe that
18 there's anything in the sale order that purports to amend the
19 Section 2.37(a) of the ARMSPA. Nor is it likely that the Court
20 would have done that knowing that it would affect the value
21 received in exchange for the purchase price paid between Old GM
22 and New GM. And I believe that that is detailed, Your Honor,
23 in pages 22 to 26 of our proposed summary judgment brief.

24 The other argument that Mr. Oxford made was that this
25 judgment is simply an executory contract that can be rejected

1 and it has been rejected. Your Honor, this is more than a
2 simple contract, this is a court judgment that became final and
3 unappealable prior to GM's bankruptcy. It's more than a mere
4 contract. But perhaps even more importantly, to the extent the
5 Court were to construe it as a or interpret it as a contract it
6 is not an executory contract.

7 We just yesterday received GM's notice to reject this
8 judgment, so we haven't had an opportunity to thoroughly
9 analyze it, Your Honor. But we have in the short period
10 available to us found a, among others, a case that may be
11 helpful to the Court. It is Columbia Gas Systems Inc. v.
12 Enterprise Energy Corp. A case from the Third Circuit. The
13 cite is 50 F.3d 233. And that case describes that when there's
14 a class action as this one, if there are no obligations that
15 the class members continue to owe to the debtor that that is
16 not executory.

17 THE COURT: Pause there please, Mr. Brown.

18 MR. BROWN: Yes, sir.

19 THE COURT: Suppose it's not an executory contract,
20 it's -- you're contending that it's some obligation that was
21 binding on the debtor. The debtor, if it hadn't gone into
22 bankruptcy, couldn't have walked from your deal, I would
23 assume. So that would simply put it into the category of all
24 of the other obligations that the debtors had stiffed their
25 creditors on. You know, twenty billion dollars in bonds and

1 many other obligations, such as to their tort litigants as
2 well. I have difficulty seeing why it makes a difference
3 whether the contract is executory or not. If it wasn't assumed
4 by and assigned to New GM, which would then let Old GM off the
5 hook, New GM would be liable to your guys for a claim, whether
6 it's a rejected executory contract, or if it's an ordinary
7 garden variety obligation that they had stiffed you on.

8 MR. BROWN: I believe that's correct, Your Honor. And
9 I was responding to Mr. Oxford's argument that because if he
10 characterized it as an executory contract it could be rejected
11 and somehow all liability would be wiped out. I was explaining
12 that we disagree with that characterization as an executory
13 contract. But Your Honor is absolutely correct, that
14 regardless of how it's characterized, the principal issue is
15 whether it is an assumed liability under Section 2.37(a) of the
16 ARMSPA. And that's I think our position on that point as it's
17 been explained, Your Honor.

18 THE COURT: Very well.

19 MR. OXFORD: May I respond just briefly, Your Honor.

20 THE COURT: Well, let's take a minute to pause and see
21 if Mr. Brown's done.

22 MR. OXFORD: Oh, I'm sorry, I apologize.

23 THE COURT: I don't know if -- maybe Mr. Brown is
24 done, but I'm going to give him a chance to let me know.

25 MR. BROWN: Thank you, Your Honor. I appreciate the

1 Court's indulgence. I'll review my notes as well.

2 THE COURT: Okay. Take a minute to do that, please.

3 MR. BROWN: Thank you.

4 (Pause)

5 MR. BROWN: Yes, Your Honor, if I may?

6 THE COURT: Go ahead.

7 MR. BROWN: One of the points that Mr. Oxford made is
8 that GM -- Old GM, in having judgment entered against it, never
9 actually admitted liability. And, certainly, that is true.
10 But I think it confuses the issue of liability, small l, versus
11 liability, capital L, which is a defined term in the ARMSPA.
12 And the issue there is whether the liability, capital L, which
13 it in this case is the judgment and arises under the written
14 warranty, which was the basis for plaintiffs' underlying
15 claims.

16 THE COURT: Okay. Mr. Oxford, I will give you sur
17 reply so long as it's real short.

18 MR. OXFORD: It's going to be real short. Mr. Brown
19 reminded me first, that I meant to say something of "arising
20 under." My only point there, Your Honor, is that if you look
21 at the cases he cites there are a few types. The first are
22 arbitration cases, where the word "arising under" is a buzz
23 word that denotes the broadest possible scope of arbitrarily,
24 it has nothing at all to do with this case.

25 The second group of cases are Article 3 arising under

1 in Section 1331, arising under cases which also has nothing to
2 do with this situation here. And amusingly, in fact, the words
3 "arising under" are given a host of instructions by the U.S.
4 Supreme Court under Article 3 and under Section 1331 the latter
5 being held to be much narrower.

6 As far as the claim that the Court somehow lacks the
7 power to "modify" the sale agreement under paragraph 56 of the
8 sale approval order, I think obviously the Court's inherent
9 power to insist upon modification as a condition of approval,
10 and I'd like to see these modification. And moreover if you
11 look at Section 3 of the sale approval order it expressly
12 contemplates such modification and expressly provides the
13 conflict between the sale approval order and the purchase
14 agreement it's the sale approval order in which controls.

15 On the executory contract point, you know, if it's an
16 executory contract and it isn't assumed that New GM's test
17 their liability under it. If it is an executory contract it's
18 still the case so that if New GM doesn't assume that liability
19 it bears no liability under it. And, actually, if you trace
20 through the language of the sale agreement, an executory
21 contract that is not assumed but becomes an excluded contract,
22 an excluded asset under Section 2.2, and then there's basically
23 a provision in 2.3(b), I believe, which says that, you know,
24 retaining liability is not assumed liability. Retained
25 liability by the debtors includes liabilities under excluded

1 assets, particularly excluded contracts.

2 THE COURT: All right. Gentlemen, I have a question
3 to each of you.

4 Mr. Oxford, in your reply you quote Section
5 2.3(a)(7)(A) of the sale and purchase agreement. Is the sale
6 approval order also quoted in any of the motion papers that
7 were given to me on this TRO application?

8 MR. OXFORD: Yes, Your Honor. If you look at -- I'm
9 scrolling through on my laptop right now, and will give you a
10 page site. At page 9 at the top there's a law quote which
11 contains the relevant language in paragraph 56.

12 THE COURT: Okay. And that's in the sale approval
13 order?

14 MR. OXFORD: Yes. Paragraph 56 of the sale approval
15 order.

16 THE COURT: And is there agreement between both sides
17 that if there's a conflict the sale order trumps the purchase
18 agreement, or is it the other way around?

19 MR. OXFORD: Certainly, our position, Your Honor, --
20 paragraph 3 of the sale approval order basically says that if
21 and not the purchase agreement comes.

22 THE COURT: Well, your reply says, "As the sale
23 agreement Section 3 specifically provides if there's an
24 inconsistency the provisions of the sale order shall govern."

25 MR. OXFORD: That's a typo if that's what it says,

1 Your Honor, it should be Section 3 -- yes, I'm looking at the
2 typo right. Sorry, this is thrown together pretty fast.

3 THE COURT: Well, what should it be?

4 MR. OXFORD: It should say as paragraph 3 of the sale
5 approval order for us. So if you look at the sale approval
6 order and looked at paragraph 3 you would find the provision
7 saying that the sale approval order governs over the purchase
8 agreement. I apologize for the error, Your Honor.

9 THE COURT: Okay. Now, Mr. Brown, do you agree with
10 him on that point? That the sale approval order trumps the
11 agreement?

12 MR. BROWN: Not on material terms, Your Honor, and
13 certainly not without the Court -- if the Court is going to
14 amend and modify the ARMSPA the Court would presumably make it
15 clear that that's what it's doing. The sections that Mr.
16 Oxford are relying on do not purport to amend the contract in
17 any way. There's really no conflict between them in the sense
18 that -- I'll say this -- I just lost my train of thought.

19 (Pause)

20 MR. BROWN: I think that the portion of the sale order
21 that Mr. Oxford is referring to is one that it says that to the
22 extent that -- let's see, I believe it's paragraph 56 of the
23 order, Your Honor.

24 It says, "That the purchaser is assuming the
25 obligations of the sellers pursuant to and subject to

1 conditions and limitations contained in their express written
2 warranties which were delivered in connection with the sale of
3 the vehicles. The vehicle components are the closing of the
4 363 transaction as specifically identified as a warranty."
5 However, that phrase definitely declares that New GM will be
6 responsible for certain obligations, and then defines that
7 obligation without purporting to exclude other obligations.

8 And so to the extent that GM is -- New GM is assuming
9 direct obligations for the ongoing express warranties that it
10 would be governed by paragraph 56 and subject to those
11 limitations. But that does not purport to limit the breadth of
12 liabilities -- assumed liabilities, as defined in Section
13 2.3(a)(7). And apart from the language of paragraph 60 of the
14 order Mr. Oxford is refereeing to, and uses the term assumed
15 the liability at least sixteen times, not just in the section
16 that he's quoting.

17 MR. OXFORD: Well, Your Honor, if Section 56 doesn't
18 address the conditions of the limitations of the warranty
19 liability that GM's assuming under Section 2.3(a)(7)(A) of the
20 purchasing agreement, I don't know what it does address.

21 And I think the issue of whether or not there's a
22 modification here or not really doesn't matter, it's really a
23 red herring. Whether it's an additional supplementation of
24 verification, paragraph 3 clearly states, I'm looking at it
25 right now, "If there's any conflict within the MPA, in the

1 sales procedures order, and this order this order shall
2 govern."

3 THE COURT: All right. Okay, gentlemen, I think we've
4 had enough back and forth on this. We're going to take a
5 recess and then I'll dictate something as quickly as I can.
6 You guys who are on the phone should keep your phones live.
7 For those people who are in the courtroom, I can't tell you how
8 quickly I will be back, but I'd like you back by 4 o'clock, by
9 the clock up there. We're in recess.

10 (Recess from 3:44 p.m. until 4:38 p.m.)

11 THE COURT: Have your seats, please.

12 I apologize for keeping you all waiting. I'm granting
13 the TRO to the extent of enjoining GM from telling customers
14 that this adversary proceeding has been dismissed, pending any
15 further order of the Court that might actually do so, and the
16 TRO is otherwise denied. The following are the bases for this
17 decision:

18 There is no dispute as to the applicable standards for
19 issuance of the TRO in this district and circuit. A court must
20 find a likelihood of success on the merits and irreparable
21 injury, or, alternatively, serious issues going to the merits
22 and a material tipping of the balance of hardships in favor of
23 the movant. I think there's been a clear failure to show a
24 likelihood of success, and though the matter by definition is
25 closer, I think that there's also been a failure to show

1 serious issues going to the merits. And I'll discuss that
2 momentarily. But I think that we first need to discuss matters
3 of injury and standing to assert it.

4 In the adversary proceeding before me we have a non-
5 class action brought by seven named litigants who are seeking a
6 declaratory judgment as to the meaning of the sale approval
7 order and the underlying sale agreement entered into in July of
8 this year. It's not a class action in this Court. The stated
9 injury is that class members in the Eastern District of
10 California action won't know that this declaratory judgment
11 action is ongoing and might be giving up their rights without
12 knowing all of the facts. But New GM is committed to me that
13 it won't take the position that if consumer class members take
14 advantage of the new deal that New GM is offering them, such
15 would be deemed to be in accord and satisfaction or other
16 release of their rights under the Eastern District of
17 California settlement.

18 So what we're left with is the prospective injury of
19 some other kind of injury resulting from consumer ignorance;
20 namely trading in their old broken cars for a new one taking
21 advantage of the allowance New GM is willing to give them.

22 But the plaintiffs in this adversary proceeding; the
23 seven plaintiffs before me, aren't going to suffer that injury
24 either as they, or at least their agent; their counsel, whose
25 knowledge is imputed to them, know the true facts. So they

1 don't have any injury. It's only those who aren't parties in
2 this adversary proceeding before me, and we don't here have a
3 class action, so it's not at all clear to me that people who
4 aren't going to be injured, that is the seven plaintiffs before
5 me, have standing to assert injury to non-parties who aren't
6 here, or that those seven individuals would be satisfactory
7 representatives for the absent people, if the seven litigants
8 before me were to seek some kind of class certification as to
9 this issue.

10 But assuming without deciding that there's still
11 standing to assert injury to people who aren't before me, I
12 still have problems with the claim of injury as to whether or
13 not it's irreparable and how material it is in any
14 determination of the balance of hardships.

15 If New GM had reserved the right to argue accord and
16 satisfaction or some other kind of relief, I think I would find
17 irreparable injury. And I think telling consumers the
18 affirmative falsehood that I've dismissed this adversary
19 proceeding when I haven't done that would result in irreparable
20 injury. Frankly, I find that allegation, which apparently is
21 uncontested, to be shocking and I cannot for the life of me
22 figure out how or why GM would tell that to consumers.

23 ELLEN

24 But beyond that, I don't think there is much, if any,
25 injury and I certainly don't think of it as irreparable. The

1 parties we're talking about helping have inoperable or
2 potentially unsafe vehicles. I don't think that offering them
3 a means to help themselves causes them any injury. In fact, I
4 wonder whether if they were to delay in exercising any
5 available opportunities in the hope that the seven litigants
6 before me here would prevail, they'd be injuring themselves
7 more than they would if they were to take the offer New GM is
8 offering them.

9 I don't know if I have to express any final view as to
10 the latter issue. It's enough for my purposes to hold that any
11 injury to the absent class members will be very modest at best
12 and not irreparable.

13 I also think that the balance of hardships tips
14 against the request. Granting the requested relief interferes
15 with new GM's business of selling cars and indeed interferes
16 with helping consumers whose cars may not run or at the least
17 run reliably and safely.

18 I'm not of a mind to interfere with that except to
19 enjoin a clear and unambiguous false statement. For that
20 reason, I'll enjoin making statements that this adversary
21 proceeding has been dismissed when we all know that it hasn't
22 been; but I won't go further.

23 I also want to talk about likelihood of success on the
24 merits and serious issues going to the merits. I've read the
25 key language in the sale agreement and the sale order and I

1 think that the seven plaintiffs' arguments are attenuated at
2 best.

3 Section 2.3(a)(7)(A) of the sale agreement defines the
4 warranty obligations to be assumed by New GM as all liabilities
5 arising under the express written warranties of Old GM or its
6 subs that are specifically identified as warranties and
7 delivered in connection with the sale of new, certified, used
8 or pre-owned vehicles or new or remanufactured motor vehicle
9 parts and equipment, including service parts, accessories,
10 engines and transmissions, manufactured or sold by Old GM or
11 its subs prior to or after the closing. I don't think it's
12 particularly close that this settlement agreement, whether or
13 not converted into a judgment by the California court, can
14 remotely be thought of as a warranty obligation of the type
15 there described.

16 The obligations and the settlement agreement provide
17 benefits that customers would care about because they're not
18 covered under those customers express warranties which only
19 covered repairs prior to the warranty expiration period and
20 their warranties had mileage and time duration limits. And I
21 regarded as highly unlikely that I'd find that the quote,
22 "arising under", quote, language can be stretched so far as to
23 convert the settlement agreement into that kind of a warranty.

24 And to the extent that there is doubt, I think that
25 the sale order makes it even harder for the seven plaintiffs to

1 prevail. As Section 56 of the sale order provides that New GM
2 is assuming the obligations of Old GM and the Saturn debtors
3 pursuant to and subject to conditions and limitations contained
4 in their express written warranties which were delivered in
5 connection with the sale of vehicles and vehicle components
6 prior to closing of the 363 transaction and specifically
7 identified as a, quote, "warranty". And it will be harder
8 still for the seven plaintiffs to prevail since paragraph 3 of
9 the sale approval letter provides that in the event of any
10 inconsistency between the sale agreement and the sale order,
11 the sale order trumps the sale agreement.

12 I also think that I can't find a likelihood of success
13 on an implied assumption of liabilities given the very major
14 attention given earlier in this case to what liabilities would
15 be assumed or not assumed and the very tough standards for an
16 establishing an implied assumption of a contract or liability
17 in this district.

18 Though the serious issues going to the merits test is
19 obviously less demanding than the likelihood of success
20 requirement, I think that the weaknesses in the seven
21 plaintiffs contentions here are so profound that even the
22 serious issue standard can't be found here to have been
23 satisfied and that even if it could be the seven plaintiffs
24 haven't shown me that the tipping of the equities is in their
25 favor.

1 As I said or implied before, if New GM had tried to
2 reserve a right to weasel out of its commitment, that there
3 would be no accord and satisfaction or other release of class
4 member rights if any accepted the deal New GM wants to offer
5 them; that would be troublesome to me. And I likely, if not
6 certainly, would have then found irreparable injury under those
7 circumstances. But New GM has told me that it won't do so and
8 in the unlikely event that this becomes a matter of controversy
9 I'll hold it to its word.

10 So long as New GM doesn't tell consumers that
11 obviously false statement that this action has been dismissed,
12 that will meet my needs and concerns.

13 New GM is enjoined from telling consumers that this
14 adversary proceeding is dismissed. That will be without
15 prejudice to New GM's right to come in for a lifting of such an
16 injunction in the event that this adversary proceeding ever
17 really is dismissed. In other respects, the TRO is denied. I
18 am so ordering the record, unless anybody wants a written order
19 from which it can appeal or seek leave to appeal.

20 All right. Anybody on the phone wish to be heard, not
21 be way of re-argument but by way of anything I failed to
22 address or any remaining open issues?

23 MR. BROWN: Thank you, Your Honor. This is Mark
24 Brown. The only remaining question that I have, Your Honor,
25 actually under the Local Rules parties seeking summary judgment

1 are required to set a motion in Court to request a telephone
2 conference to discuss whether the summary judgment would be
3 appropriate to file. I understand the Court's comments about
4 likelihood of success on merits and nevertheless we would
5 appreciate an opportunity to continue pressing those issues on
6 behalf of our clients and would request that we be given
7 permission to file our motion of parties' summary judgments
8 that that be adjudicated.

9 THE COURT: Mr. Oxford, forgive me.

10 MR. OXFORD: Your Honor, there is and I'm not sure
11 whether this has come to your attention yet or not, there's a
12 pending 12(b)(6) motion filed by New GM. The plaintiffs had
13 filed an opposition which incorporates memorandum of law, the
14 proposed files motion for summary judgment. And Mr. Brown, I
15 don't know whether he's aware of this yet or not, but the Court
16 has also set a date for an answer and a motion on December 18th
17 and a pretrial conference on January 20th.

18 I'm not actually partial to any particular way of
19 getting this, I think, purely legal issue before your Court --
20 before Your Honor, but I think it would be useful even to
21 proceed on a motion to dismiss where we'd still want to put our
22 reply that would be fairly briefed and then perhaps allow Mr.
23 Brown the opportunity to file a summary judgment motion in the
24 event that motion is not granted.

25 THE COURT: Mr. Oxford, I don't like your two bites of

1 the apple approach. What I would prefer to do and try to put
2 more money into the pockets of people who have been injured in
3 this case, is to have New GM respond by an answer and then for
4 you guys to make cross motions for summary judgment so that all
5 the issues are teed up at the same time and that -- and
6 implicit in this, of course, is I'm granting Mr. Brown's
7 request that he be permitted to file a summary judgment motion.
8 And I'm assuming that, Mr. Oxford, you can do by summary
9 judgment pretty much the same stuff you would have done by a
10 12(b)(6) and maybe even a little bit more.

11 MR. OXFORD: If I don't get anything, I'll try to
12 seek, and I wonder whether it would be appropriate for Mr.
13 Brown and I, who actually get along well together, to try to
14 work out a briefing schedule.

15 THE COURT: Well, you're reading my mind again because
16 the next thing I was about to tell you is I want you guys to
17 put your noodles together to prepare a stip or consent order
18 that establishes a mutually agreed upon schedule for the
19 briefing on your cross motions. And maybe even on an agreed
20 upon statement of facts, but if you want to do separate Rule
21 56- whatever it is statements, I don't care. Actually, I'm
22 showing my age. They're now called 7056- something affidavits.

23 And I have only one other comment about that stip. If
24 it's reasonable, I'm going to approve it. But I also want you
25 to know that, and I say this partly by way of apology and

1 partly by way of a reality check on you people, you can allow
2 yourselves as much time as you want during your Christmas
3 season because other obligations on me on the other cases on my
4 watch are going to be such that there's no way that I could
5 take oral argument on this matter or read your briefs before
6 the end of this year given other stuff that I have. So allow
7 yourselves enough time to make your arguments on each side as
8 best you can and to see your loved ones because I wouldn't be
9 in a position to consider them at an earlier time anyway.

10 MR. OXFORD: We really appreciate that, Your Honor.
11 My expectation is Mr. Brown and I probably will be able to
12 agree to stipulate certain underlying facts.

13 THE COURT: Okay.

14 MR. BROWN: I expect that's true and I appreciate that
15 as well, Your Honor.

16 THE COURT: Very good.

17 MR. OXFORD: Your Honor, I wanted to say one other
18 thing just so I don't leave the record, I understood Mr.
19 Brown's papers with respect to this alleged statement by
20 someone at GM and I don't want it left by silence that if we
21 agree that happened we simply weren't able to confirm whether
22 that it happened or not. And I agree with Your Honor that if
23 it did happen, it shouldn't have happened and under the TRO you
24 have granted will certainly communicate to our people that that
25 kind of statement is out of bounds.

1 THE COURT: Okay. I'm glad that you folks have a
2 cooperative working relationship, Mr. Oxford and Mr. Brown.

3 I would hope that my so ordering the record is enough
4 for you to convey to your customer assistance center, or
5 whatever you call it, that I won't tolerate that kind of stuff.

6 MR. OXFORD: Absolutely, Your Honor.

7 THE COURT: If it's necessary to have a written order
8 that says that in baby talk, Mr. Brown's entitled to it.

9 MR. OXFORD: I think -- but don't speak to my contact
10 on the GM legal staff which will result in an unmistakable
11 message being sent swiftly and effectively, Your Honor.

12 THE COURT: Okay. And being conveyed to each and
13 every person who might answer the phone.

14 MR. OXFORD: Right.

15 THE COURT: Okay. All right. I think we're done for
16 the day then. Have a good evening, folks. We're adjourned.

17 MR. OXFORD: Thank you, Your Honor.

18 (Proceedings concluded at 4:56 p.m.)
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I N D E X
R U L I N G

PAGE LINES

TRO granted to the extent of enjoining 37 12-16
GM from telling customers that this
adversary proceeding has been dismissed,
pending any further order of the Court
that might actually do so,
and the TRO is otherwise denied

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C E R T I F I C A T I O N

I, Esther Accardi, certify that the foregoing transcript is a true and accurate record of the proceedings.

ESTHER ACCARDI (CET**D-485)

AAERT Certified Electronic Transcriber

Veritext

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Date: November 20, 2009