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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' AND COUNTERDEFENDANTS' RESPONSE IN OPPOSITION TO NEW
GM'S MOTION FOR SUMMARY JUDGMENT**

New GM has utterly failed to show that it is entitled to summary judgment on any of Plaintiffs' claims or New GM's counterclaims. New GM all but ignores the ARMSPA, which determines whether the Class Judgment is an Assumed Liability. In fact, New GM effectively

admits that the Class Judgment is an Assumed Liability by arguing that paragraph 56 of the Sale Approval Order changed Section 2.3(a)(vii) of the ARMSPA—notwithstanding the fact that the Court had no authority to re-write the ARMSPA, the Court did not indicate any change was made, no party to the ARMSPA requested the change, and there was no pending dispute to resolve any interpretation of Section 2.3(a)(vii) at that time. Regardless, paragraph 56 simply does not conflict with the ARMSPA. Nor does it matter that New GM did not assume the class settlement (*i.e.*, the actual contract, as opposed to the Class Judgment) pursuant to the procedures outlined in Section 6.6 of the ARMSPA. New GM did not follow those procedures to assume responsibility for each customer warranty either—liabilities New GM concedes are Assumed Liabilities under the ARMSPA. Quite simply, the Class Judgment is an Assumed Liability under Section 2.3(a)(vii).

With regard to Count II, New GM argues that plaintiffs failed to allege any communication with class members other than those experiencing “fresh failures.” To the contrary, plaintiffs alleged communications, Doc. 17, ¶¶ 49-50, attached Saturn customer letters, Doc. 17, ¶¶ 49-50, and New GM admitted everything, Doc. 19, ¶¶ 49-50. According to New GM, it was honoring claims under the Class Judgment as “warranty” claims, Doc. 25, ¶ 29, *Exs. O, P, Q and T*, in return for the class members’ goodwill, Doc. 25, ¶ 26, *Ex. M* and *New GM’s Brief in Support of Motion to Dismiss pursuant to Rule 12(b)(6)* (“GM’s now discontinued voluntary continuation of MLC’s customer satisfaction program”).

With regard to Count III, Section 6.6 of the ARMSPA is an alternative basis for New GM’s liability. Even assuming *arguendo* that the Class Judgment were not an Assumed Liability, then New GM still had an obligation to pay all amounts due under the class settlement until it was rejected pursuant to the procedures under the ARMSPA. Under the ARMSPA, MLC

and New GM had to reach joint decisions about whether executory contracts would be assumed or rejected. New GM argues that it had a side deal with MLC that the class settlement would be “rejected later.” Yet, the consequence of deferring any decision is that New GM was responsible for all amounts due until the executory contract was rejected.

With regard to New GM’s contempt claim, Plaintiffs have filed a motion to dismiss New GM’s contempt claim. In the event the Court considers this issue, the Sale Approval Order did not expressly, unequivocally state that the Class Judgment was not an Assumed Liability. Plaintiffs have not violated any terms of the Sale Approval Order—there has been no collection or other efforts. Instead, Plaintiffs simply sought a declaration of the proper interpretation of the ARMSPA—a procedure the Court actually contemplated in the Sale Approval Order. MLC Doc. 2968, ¶ 71. In fact, the Court repeatedly stated that the injunction provision(s) did not apply to Assumed Liabilities. MLC Doc. 2968, ¶¶ 8, 47. The fact that Plaintiffs sought a determination via declaratory judgment of whether the Class Judgment was an Assumed Liability is a diligent effort at reasonable compliance with the injunction. In addition, New GM claims that the first sentence of paragraph 56 of the Sale Approval Order *implies* that apart from the obligations mentioned in that paragraph, no other warranty obligations were assumed. Though plaintiffs believe this interpretation is deeply flawed, even if it were true, contempt cannot be found without an explicit, unequivocal order.

I. The Class Judgment Is An “Assumed Liability” Under The Sale Documents.

New GM’s confuses what it wishes the documents said with what they actually say. Rather than apply the rules of contract construction of the State of New York to the contract as a whole, New GM quotes mere fragments of the provisions being interpreted and substitutes its own, materially different and limited, rewording in place of the broad language used in the

ARMSPA. Having agreed to assume the Class Judgment under the terms of the ARSMPA, New GM now invites this Court to belatedly *interpret* the sale documents to erase its obligation. Per New GM, the Class Judgment “is, after all the underbrush is cleared away, an unsecured liability of MLC to judgment creditors, nothing more and nothing less.” Doc. 20, p.5. With respect, the “underbrush” that New GM invites the Court to “clear away” is the ARMSPA--a written agreement that says otherwise.

Plaintiffs cannot contend that New GM completely failed to analyze the language of Section 2.3(a)(vii) in its brief because New GM did so at page 3 in two sentences:

ARMSPA § 2.3(a)(vii)(A) is very clear. New GM agreed to assume Saturn warranty obligations only under Saturn’s standard limited warranty, i.e., obligations “under express written warranties . . . 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 [Saturn]. . .”

Doc. 20. This is the only place in New GM’s 14 page brief in which the ARMSPA is discussed.

New GM’s comments merely emphasize its desire to avoid the language of the ARMSPA.

Rather than analyzing the language at issue in this case, New GM is only stating the conclusion it wants the Court to reach. New GM’s comments ignore the defined term “all Liabilities” in Section 2.3(a)(vii), which expressly includes “obligations . . . arising under any . . . Order [or] Contract.” New GM’s comments ignore the phrase “arising under,” which has been interpreted by the courts as extraordinarily broad.¹ The actual terms of the contract, as New GM would have

¹ See, e.g., 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”); Intermar Overseas, Inc. v. Argocean S.A., 117 A.D.2d 492, 503 N.Y.2d 736 (N.Y. App. Div. 1986) (referencing a “broad” arbitration clause subjecting all “dispute[s] arising under this Agreement” to arbitration); Hodom v. Stearns, 32 A.D.2d 234, 301 N.Y.S.2d 146 (N.Y. App. Div. 1969) (distinguishing “actions commenced

it, are mere underbrush to be cleared away to get to the ruling it wants.

New GM's characterization of its duties under Section 2.3(a)(vii) of the ARMSPA is untenable in light of the language of the ARMSPA. Per its interpretation, "New GM agreed to assume *Saturn warranty obligations only under Saturn's standard limited warranty.*" Doc. 20, p. 3 (emphasis added). The italicized portion of the preceding sentence has no counterpart in the ARSMPA. It has been substituted in place of "all Liabilities arising under," where Liabilities is expressly defined to mean "any and all liabilities of every kind and description whatsoever, . . . including those arising under any Law, Claim, Order, Contract or otherwise." Doc. 25, ¶ 27; *Ex. C*. The definition of Liability in the ARMSPA expressly includes pre-petition obligations far exceeding "Saturn warranty obligations." Indeed, it *expressly* reaches those obligations that "arise under" Contract (such as a settlement) or Order (such as a final judgment approving such a settlement). Then, Section 2.3(a)(vii) goes on to declare those Liabilities assumed, whether they arise under mere claim of right or Contract or Order, as long as the Liability's origin is in the express written warranty provided at the time of the sale of the vehicle.

In the section of their brief addressing Assumed Liabilities under the ARMSPA, New GM has not provided a single case interpreting similar language in the manner they suggest. On the other hand, the decisions reached in the Safety-Kleen Corp. bankruptcy interpreting the 363 sale documents are very nearly on all four points. In re SAFETY-KLEEN CORP., 331 B.R. 605 (D. Del. Bankr. 2008); In re SAFETY-KLEEN CORP., 380 B.R. 716 (D. Del. Bankr. 2008). In SAFETY-KLEEN, the source of the liability at issue was multiple pre-petition settlements of environmental lawsuits which were reduced to consent decrees. 331 B.R. at 607. Section 1.3 of the Acquisition Agreement in that case included language which defined Assumed Liabilities

under the agreement" from the broader "any dispute arising under the contract" in fraudulent inducement action). The word "arise" means "to originate from a source." *Webster's Ninth New Coll. Dict.* (1989).

similar to that present in Section 2.3(a)(vii) of the ARMSPA in our case. The SAFETY-KLEEN Acquisition Agreement 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 . . .

380 B.R. at 736. Interpreting this provision, the court found that the settlements and consent decrees at issue were Assumed Liabilities under the Acquisition Agreement because they settled direct and third-party claims arising under environmental statutes. Because the actions that precipitated the settlements or consent decrees were brought for violations of environmental statutes, liabilities flowing from those settlements and consent decrees were assumed liabilities. Similarly, in our case the Class Judgment resolved a claim for breach of express warranty—the standard limited warranty described in Section 2.3(a)(vii). As a consequence, the Class Judgment is a Liability (expressly defined as liabilities and obligations arising from Contract or Order) arising under that standard limited warranty.

In describing the “whole point of the class action” as an effort to obtain reimbursement for repairs outside mileage and durational limits of the original warranty, New GM confuses allegations made in the breach of warranty claim with the relief provided in the Class Judgment. New GM would have the Court believe that the only possible breach of warranty claim is an allegation of “violations of the standard warranty terms which promise free-of-charge repairs during the warranty period.” Doc. 20, p. 4. But, the promises MLC made in the original warranty and resulting allegations in the Class Action were very different from what New GM contends. The warranty provides expressly that it “covers repairs to *correct* any defect related to materials or workmanship.” Doc. 25, ¶ 6; *Ex. G, p. 7 (emphasis added)*. Accordingly, the Class Action Complaint alleged that “[a]ny attempt to repair a defective Vti transmission or to replace

one defectively designed Vti transmission with another defectively designed Vti transmission with the warranty period could not satisfy GM's obligation to correct defects under the warranty." Doc. 25, ¶ 3; *Ex. F*, p. 22. Under the allegations of the Class Action, replacement of a failed part with another, similar part that was inherently prone to premature failure (whether within the limits of the express warranty or otherwise) was claimed to be a breach of the express warranty's promise to "correct" defects in materials and workmanship. *Id.* In addition, the mileage and durational limits that New GM relies upon were alleged to be unconscionable pursuant to the Uniform Commercial Code:

89. Any limitation on the duration of GM's express warranties is unconscionable within the meaning of Section 2-302 of the UCC (or the equivalent thereof in each state), 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.

Doc. 25, ¶ 3; *Ex. D*, ¶ 89.

In the Class Action, MLC raised the same issue in their Motion to Dismiss, Doc. 20, ¶ 7, *Ex. H*, p. 14, and plaintiffs refuted it in their Brief in Opposition. Doc. 20, ¶ 8, *Ex. I*, p. 29-35. Rather than seeking a ruling on their Motion to Dismiss, MLC settled the case. Doc. 21, ¶ 3. As a consequence, plaintiffs' breach of express warranty claim was resolved by the Class Judgment, and MLC received a release that would prevent Saturn owners from asserting a similar breach of express warranty claim. Doc. 25, ¶ 10; *Ex. B*, p. 6, 13 ("Released Claims' means any and all past, present, and future claims . . . or liabilities . . . based on or related in any way to . . . the factual allegations and legal claims that were made or could have been made in the Action"). At this late date, New GM apparently wants this Court to "undo" MLC's agreement and rule that despite plaintiffs' breach of express warranty claim existing at the time of settlement, *if* MLC had

obtained a ruling on its Motion to Dismiss and *if* the district court in California had ruled in MLC’s favor, then the Class Judgment would not arise under breach of express warranty. This Court need make no such ruling. It is undisputed that plaintiffs’ breach of express warranty claim was in fact resolved by the Class Judgment, and MLC accepted a release to that effect. Doc. 21, ¶¶ 1-3; Doc. 25, ¶ 10; *Ex. B*, p. 6, 13. Regardless of whether MLC or New GM believes that plaintiffs’ breach of express warranty claim was a good case, the express warranty claim arose under the standard limited warranty and was a claim resolved by the Class Judgment. Consequently, obligations arising under the Class Judgment fall within Section 2.3(a)(vii) of the ARMSPA as an Assumed Liability.

To avoid the express language of the ARMSPA, New GM argues that paragraph 56 of the Sale Approval Order precludes any examination whatsoever. Issue preclusion, however, bars “successive litigation of an issue of fact or law *actually litigated* and resolved in a valid court determination *essential to* the prior judgment” Taylor v. Sturgell, 128 S.Ct. 2161, 2171 (2008) (emphasis added). MLC and New GM amended the ARMSPA several times—agreeing to the language of section 2.3(a)(vii). There is no record of any pleading, argument, or even dispute—*i.e.*, no actual litigation—regarding the meaning of Section 2.3(a)(vii) prior to the entry of the Sale Approval Order. Without any actual litigation, there was no “full and fair opportunity” to litigate—a requirement generally not satisfied against non-parties like Plaintiffs anyway. Id. Although New GM bears the burden to prove this affirmative defense, id. at 2179-80, it has altogether failed to present any evidence. So New GM then contends that this Court somehow “modified” the ARMSPA, which provides:

This Agreement may not be amended, modified or supplemented except upon the execution and delivery of a written agreement executed by a duly authorized representative of each of the Parties.

Doc. 25, ¶ 27; *Ex. C, Section 9.6, p. 98*. This Court only had the authority to approve or reject the substantive terms of the ARMSPA—not modify or re-negotiate it. In re Adelpia Communications Corp., 364 B.R. 518, 521 (S.D.N.Y. Bankr. 2007) (J. Gerber: “Though I would readily approve a settlement with these monetary terms . . ., I cannot unilaterally rewrite the Settlement”); *See also, In re Arkoosh Produce, Inc.*, 2003 WL 25273746 *9-10 (Bankr. D. Id. 2003) (settlement agreement implicating § 363 asset sale must be approved or disapproved as a whole; court should not “effectively rewrite” such terms). In fact, the ARMSPA states that it was “subject to *approval* by the Bankruptcy Court and the consideration by Sellers and the Bankruptcy Court of higher or better competing Bids with respect to an Alternative Transaction.” Doc. 25, ¶ 27; *Ex. C, Section 6.4, p.61 (emphasis added)*. Like most contracts, the ARMSPA recognizes that some of its terms and conditions “may be limited by applicable bankruptcy, reorganization, insolvency, moratorium, fraudulent transfer and other similar Laws” Doc. 25, ¶ 27; *Ex. C, Section 5.2(b), p.52, Section 9.8, p. 98*. There, of course, is no such Law that required any such limitation on or modification of Section 2.3(a)(vii). Regardless, the circumstances surrounding entry of the Sale Approval Order reveal no intent by this Court to modify Section 2.3(a)(vii) of the ARMSPA. Apart from the redline changes, *see MLC Bankruptcy Doc. 2968*, this Court entered the proposed Sale Approval Order. Nowhere did this Court cite section 2.3(a)(vii) or otherwise call any attention to this alleged modification to the ARMSPA.

Even the language of paragraph 56 itself shows that the Court did not change Section 2.3(a)(vii) of the ARMSPA. Initially, the first sentence of paragraph 56 is inclusive rather than exclusive, particularly when read with the second sentence. “Fundamental contract law requires the parties’ intent to be discerned by reading the contract as a whole, and by considering all its

clauses together to determine if and to what extent one may modify, explain or limit another.” Allendale Mut. Ins. Co. v. Excess Ins. Co., 992 F.Supp. 271, 274 (S.D.N.Y. 1997). According to paragraph 56, “[t]he Purchaser is assuming” one particular type of express warranty liability and “[t]he Purchaser is not assuming” liabilities arising under implied warranties. By its express terms, paragraph 56 does not address every single type of warranty liability.² When New GM rewords paragraph 56 to say “New GM assumed Saturn warranty obligations *only* ‘pursuant to and subject to conditions and limitations contained in’ Saturn’s standard limited warranty,” it is adding the limiting term “only” that is completely absent from paragraph 56. Doc. 20, p. 3 (emphasis added).

In the insurance context, more than one court has concluded that it makes no sense to find that one sentence does the “double duty” of indicating both inclusion and exclusion. Pullen v. Employers’ Liability Assur. Corp., 230 La. 867, 89 So.2d 373, 376 (La. 1956) (“Since it is illogical to suppose that it was designed to do the double duty of describing both the inclusions and exclusions of policy coverage, it is reasonable to conclude that it was intended to extend coverage only”); Maryland Cas. Co. v. New Jersey Mfrs., 48 N.J.Super. 314, 322-323, 137 A.2d 577 (N.J.Super.A.D. 1958) (quoting Pullen). The first sentence of paragraph 56, which begins

² New GM is really arguing that the first sentence of paragraph 56 *impliedly* excludes all other warranty obligations because it expressly includes a more narrow type, namely those warranty obligations subject to the terms and conditions of the written warranty. Of course, this argument is fatal to its counterclaims for contempt in that it renders the order insufficiently definite to support contempt. Aison v. Hudson River Black River Regulating, 54 A.D.3d 457, 862 N.Y.S.2d 642 (N.Y. App.Div. 2008) (contempt should not be granted unless the order allegedly violated is “explicit”). Further, the argument fails because paragraph 56 goes on to specify exactly the types of warranty obligations it intends to exclude without need of resorting to inference. Applying New GM’s tacit reasoning to the second sentence of paragraph 56 implies, with equal force, that those warranty obligations not specifically excluded were intended to be assumed. In context, the only credible interpretation is that the order means what it says expressly, and only that. While accurately restating whether certain particular obligations are Assumed or Retained Liabilities under the ARMSPA, paragraph 56 does not purport to address every single type of warranty liability. Specifically, it does not “by implication” modify the ARMSPA.

“[t]he Purchaser *is* assuming,” cannot be credibly interpreted to exclude liabilities, either individually or particularly in context with the next sentence beginning “[t]he Purchaser *is not* assuming.” (emphasis added).

The language of the documents presents too many obstacles to reach New GM’s suggested interpretation:

- Section 2.3(a)(vii) says “all Liabilities” and expressly includes obligations arising under Contracts and Orders, but New GM and MLC *intended* to say “Saturn warranty obligations only;”
- Disregard the language of the ARMSPA because paragraph 56 of the Sale Approval Order changed the definition of Assumed Liabilities, despite failure to follow procedures in the ARMSPA for amendment, despite the fact no one asked the Court to change Section 2.3(a)(vii), despite the fact the Court made no indication it intended to change Section 2.3(a)(vii) in the Sale Approval Order;
- Find that the Court’s Sale Approval Order excludes obligations that were Assumed Liabilities in the ARMSPA via a sentence that, by its own terms, describes an obligation that “the Purchaser *is* assuming.”

New GM’s interpretation goes far beyond “clearing away underbrush” and requires the Court to ignore the presence of broadly inclusive language and assume the presence of limiting language completely absent from the documents.

II. MLC’s Rejection Of The Settlement Agreement Under Section 365 Is Irrelevant To Whether The Class Judgment Is An Assumed Liability.

When New GM argues that its failure to follow the ARMSPA’s Section 6.6(a) procedures for assumption of executory contracts is an indication that it did not intend for the Class Judgment to be an Assumed Liability under Section 2.3(a)(vii), it takes a position entirely inconsistent with its treatment of other Liabilities arising under express warranty. New GM admits that it assumed MLC’s obligations to make warranty repairs on vehicles sold prior to the Closing by MLC by virtue of Section 2.3(a)(vii). Doc. 20, p. 3 (“ARMSPA § 2.3(a)(vii)(A) is very clear. New GM agreed to assume Saturn warranty obligations only under Saturn’s standard

limited warranty”). Yet, New GM has not followed the procedures set forth in ARMSPA Section 6.6(a) prior to performing standard limited warranty repairs for other customers who purchased vehicles from MLC. As a consequence, its failure to follow Section 6.6(a) with regard to the Class Judgment is meaningless. New GM did not have to follow the procedures under Section 6.6(a) in order to assume liability for making warranty repairs under Section 2.3(a)(vii), and, therefore, did not have to follow Section 6.6(a) procedures in order to assume liability for other obligations arising under express written warranty such as the Class Judgment.

Further, New GM disregards the fact that the Class Judgment was more than a mere contract between MLC and the class members. It was and is a judgment of the United States District Court for the Eastern District of California. Doc. 25, ¶ 3, *Ex. A*. Though Section 365 of the Bankruptcy Code provides that the trustee without court approval may “assume or reject any executory contract or unexpired lease of the debtor,” it provides no mechanism for “rejecting” a judgment. 11 U.S.C. ¶ 365. Though the class had a settlement contract with MLC that could be acted upon pursuant to Section 365, the class also holds a judgment which provides rights that are beyond the scope of Section 365. There are many reasons addressed elsewhere in this brief why New GM’s failure to assume and MLC’s rejection of the settlement agreement are irrelevant to the issues before the Court, but chief among them is that the class holds a judgment in addition to its contractual rights.

New GM’s characterization of Section 2.3(a) of the ARMSPA as the “back door” is beyond disingenuous. Section 2.3(a) is, after all, the ARMSPA’s definition of Assumed Liabilities—those liabilities that New GM promised to “assume and thereafter pay or perform as and when due.” ARMSPA Section 2.1, *Ex. C*, p. 23. New GM’s disparagement of Plaintiffs’ attention to the ARMSPA’s definition of Assumed Liabilities is particularly misleading in light

of New GM's claim that the ARSMPA's provisions governing Purchased Assets and Excluded Assets somehow control New GM's Assumed Liabilities under the ARMSPA. After purporting to show that the Class Judgment is an Excluded Asset under the ARMSPA, New GM leaps to the conclusion that it, "therefore," has "no liability or responsibility with respect to or on account of such assets." Doc.20, p. 7. This conclusion is without support in logic, law, or, most importantly, the sale documents.

In particular, New GM's citation to Section 2.3(b)(iii) is dangerously misleading because it suggests, incorrectly, that all liabilities arising under Excluded Assets are Retained Liabilities under the ARMSPA. Even though a liability falls within Section 2.3(b)(iii), if a liability also falls within the definition of the Assumed Liabilities (pursuant to Section 2.3(a)(vii) for instance), then it is deemed an Assumed Liability. Assumed Liabilities always "trump" Retained Liabilities under the ARMSPA. Doc. 25, ¶ 27; *Ex. C, Section 2.3(b), p. 30*. Retained Liabilities are defined as those liabilities "other than the Assumed Liabilities," and the Assumed Liabilities are expressly exceptions to the list of liabilities of which Section 2.3(b)(iii) is a part. Id. Assuming *arguendo* that the Class Judgment did fall within Section 2.3(b)(iii) as arising out of an Excluded Asset, it remains an Assumed Liability pursuant to the limitation placed on the definition of Retained Liabilities in Section 2.3(b).

III. New GM Has Failed To Show Facts Or Law Entitling It To Summary Judgment As To Plaintiffs' Claims Of Implied Assumption Of Liability Asserted In Count II.

According to New GM, Count II of plaintiffs' Complaint fails for lack of consideration and a meeting of the minds. But genuine issues of material fact preclude such a ruling at this time. While Count I presents an issue of law to be determined by the Court, Count II is a different matter in that it asserts an implied contract based on the conduct of New GM. As a consequence, further discovery must be done prior to a determination on the merits as to Count

II. At this time, plaintiffs have had no opportunity to discover the complete scope of the communications New GM has made to class members, and are forced to rely on those letters and conversations that class members, by chance, have contacted class counsel regarding. New GM's false *claim* that it made no communications to class members is central to its argument in favor of dismissal, and demonstrates the necessity of discovery on the communications and internal decision-making regarding the class. Pursuant to Bankruptcy Rule 7056 and F.R.Civ.P. 56(f), for lack of discovery plaintiffs cannot present complete facts to the Court essential to oppose New GM's Motion as to Count III.³

There is no doubt, however, that a contract may be implied under the laws of New York. "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., 20 A.D.3d 731, 732, 800 N.Y.S.2d 228, 229 (N.Y. App. Div. 2005). "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, 226 A.D.2d 908, 910, 640 N.Y.S.2d 681, 682 (N.Y. App. Div. 1996). For example, the performance and acceptance of services can give rise to the inference of an implied contract. Berlinger v. Lisi, 288 A.D.2d 523, 525, 731 N.Y.S.2d 916 (N.Y. App. Div. 2001).

As alleged in the complaint, the outward manifestations of intent to the class were such that New GM has impliedly accepted responsibility for the settlement and final judgment even if there were no express language in the ARMSPA. MLC began honoring the settlement shortly after preliminary approval and months prior to bankruptcy. Doc. 25, ¶ 29. Then MLC, pursuant

³ To the extent Rule 56(f) requires a sworn statement, the facts stated in the above-referenced paragraph are sworn to be true under penalty of perjury by the undersigned attorneys, who have personal knowledge of the facts declared therein.

to the notice mailed to class members, advised the class of the settlement terms, including among other things, the percentages of repair cost according to which class members would be compensated. Doc. 25, ¶ 17. Following notice of the settlement to the class, class members began submitting claims to Old GM and Old GM continued to pay them under the terms of the settlement. Doc. 25, ¶ 29. The class reimbursements were clearly made pursuant to the settlement in that they were made according to the percentages of reimbursement required by the settlement. Id.

When Old GM or New GM paid for these repairs, the repairs were characterized as made under “warranty.” Doc. 25, ¶ 29, particularly, *Exs. P, O, and Q*. The repairs continued to be made and characterized as “warranty” after Old GM filed for bankruptcy, during the time customers or class members could have objected to the 363 sale, and following the 363 sale while it could have been appealed. Id. Meanwhile, Old GM and New GM wrote directly to customers, including class members, discussing the customers’ “trust,” “confidence,” and “loyalty” to the brand, and advising those class members that warranty coverage would continue unchanged. Doc. 25, ¶ 31. Having courted the class members’ trust and loyalty with promises of continued warranty coverage, New GM now claims to have “discontinued [its] voluntary continuation of MLC’s customer satisfaction program.” *New GM’s Motion to Dismiss*, p. 13-14.

New GM’s assertion that an implied contract is without consideration under these circumstances is completely inconsistent with the law and inconsistent with Old GM’s arguments to the bankruptcy court. Of course, New GM has provided no authority to support its assertion that additional consideration is required under the circumstances. In the bankruptcy proceeding itself, when Old GM sought permission to continue warranty coverage during the bankruptcy proceeding, its customers were described as the “lifblood of the business,” and continued

warranty service was deemed “absolutely essential to maintaining customer loyalty.” Doc. 25, ¶ 26; *Ex. M*. For New GM to suggest in its Motion to Dismiss that it got nothing in return for reimbursing class members for the repairs at issue is absurd. New York recognizes customer goodwill as an asset that can be bought and sold like any other. Riedman Corp. v. Gallager, 48 A.D.3d 1188, 1190, 852 N.Y.S.2d 510 (N.Y. App. Div. 2008) (“Neither the HFC agreement nor any of the documents relating to it refers to the purchase of assets from HFC, such as customer accounts, customer lists or goodwill”); Frank May Associates Inc. v. Boughton, 281 A.D.2d 673, 674, 721 N.Y.S.2d 154 (N.Y. App. Div. 2001) (covenant not to compete part of consideration for sale of business with its goodwill).

New GM’s argument that it only communicated with those customers who experienced a “fresh failure” is factually wrong, disregards the presence of a certified class, and the practical realities of the settlement. In their brief, New GM asserts that “plaintiffs do not allege that New GM had any communication at all with these customers [meaning class members who did not have a fresh failure].” Doc. 20, p. 9. Of course that is completely inaccurate, as easily shown via reference to the Plaintiffs’ First Amended Complaint⁴:

49. 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 sale of the Saturn brand to Penske Automotive Group and Old GM’s sale of assets to New GM. Correspondence on Saturn letterhead and GM letterhead are attached as Exhibits R and S, respectively.

50. Via this correspondence, Old GM and New GM have assured Class Members that New GM would honor their obligations under new vehicle warranties:

- a. “Saturn has always been a brand you can trust and I want you to be assured your vehicle’s Saturn warranty is absolutely safe and sound.

⁴ Plaintiffs’ initial Complaint for Declaratory Judgment also contained the same allegations at paragraphs 49 and 50.

There is no change in the new vehicle warranty for any Saturn.”
Exhibit R.

- b. “We would like to remind you that dealers of GM vehicles will continue to service vehicles and honor GM vehicle warranties.”
Exhibit S.
- c. “This email is being sent by New GM on behalf of both General Motors Corporation and New GM.” Exhibit S.

Despite denying “any communication at all with these customers” in its brief, New GM admitted the allegations of paragraphs 49 and 50 of Plaintiffs’ First Amended Complaint in its answer thereto. Doc. 19.

Critically, New GM seems to disregard that the customers at issue were part of a certified class represented by appointed class counsel. Every class member who presented a fresh failure was treated in accordance with the settlement, Doc. 25, ¶ 29, and due to the fact that the settlement’s remedies for past failures were interrupted by the bankruptcy process, there was no outward manifestation of intent from New GM that the Class Judgment was not being honored. In determining whether there was mutual assent to enter into a contract, an objective test is to be applied. Four Seasons Hotels Ltd. v. Vinnik, 127 A.D.2d 310, 317, 515 N.Y.S.2d 1 (N.Y. App. Div. 1987). This means that the manifestation of a party’s intention rather than the actual or real intention is ordinarily controlling, for a contract is an obligation attached by the force of law to certain acts of the parties. Id. New GM cannot claim there was no mutual assent when its actions as viewed by the class members said otherwise—that is the nature of an implied contract. Having conflated its obligations under the settlement with “warranty” repairs and advised every class member that warranty repairs were continuing unchanged, New GM cannot say it had no communications at all with class members. When the class representatives of the certified class filed their Complaint for Declaratory Judgment on August 26, 2009, which indicated the class members’ position that the Class Judgment was New GM’s responsibility, New GM continued to

respond to class members by compensating them according to the Class Judgment through September 28, 2009. Doc. 25, ¶ 32.

Under the facts in the record, New GM has failed to show that it is entitled to summary judgment as to Count II for implied assumption.

IV. Having Delayed Rejection Pursuant To Section 365 Until Months After The Closing, New GM Cannot Avoid Pay The Amounts Due On The Settlement As A Deferred Executory Contract.

In Section 6.6, the ARMSPA allowed MLC and New GM to follow certain procedures to accept or reject executory contracts. In doing so, it even allowed them to wait until months after the Closing to accept or reject an executory contract. Delaying acceptance or rejection came with a simple consequence: New GM is required to pay amounts due on the contract until such time as the contract is rejected. The settlement was, either expressly or by implication, assumed by New GM as set forth *supra*. Alternatively and at a bare minimum, the ARSMPA requires New GM to satisfy all obligations due on the settlement until it was rejected.

If an Executory Contract was not designated as (1) an Assumable Executory Contract, (2) a Rejectable Executory Contract, (3) a Proposed Rejected Contract, or (4) actually accepted or rejected prior to Closing, the ARMSPA designates that contract as a Deferred Executory Contract:

Immediately following the Closing, each Executory Contract entered into by Sellers and then in existence that has not previously been designated as an Assumable Executory Contract, a Rejectable Executory Contract or a Proposed Rejectable Executory Contract, and that has not otherwise been assumed or rejected by Sellers pursuant to Section 365 of the Bankruptcy Code, shall be deemed to be an Executory Contract subject to subsequent designation by Purchaser as an Assumable Executory Contract or a Rejectable Executory Contract (each a “Deferred Executory Contract”).

Ex. C, Section 6.6(c). In footnote 8 of its brief, New GM admits that the settlement was never designated as an Assumable Executory Contract, a Rejectable Executory Contract or a Proposed

Rejectable Executory Contract. Instead, New GM claims that “as of the Closing it *had* ‘otherwise been . . . rejected’” by virtue of having been designated “for ‘reject[ion] later’” via e-mail between MLC and New GM. But the settlement cannot be rejected by e-mail between debtor and purchaser because rejection under Section 365 is “subject to the court’s approval.” It was not until November 17, 2009 that MLC sought to reject the Class Judgment, MLC Doc. 4458, and it was not until December 18, 2009 that this Court entered its order approving the rejection effective November 31, 2009.⁵ MLC Doc. 4680. The side agreement between MLC and New GM to take action *at a later date* to reject the contract is not the same as the settlement having been “rejected by Sellers” prior to the Closing. As a consequence, the settlement is a Deferred Executory Contract within the meaning of the ARSMPA.

As a Deferred Executory Contract, New GM became responsible for all amounts due on the contract until such time as it was rejected pursuant to Section 6.6(e) of the ARMSPA:

From and after the Closing and during the applicable period specified below, Purchaser shall be obligated to pay or cause to be paid all amounts due in respect of Sellers’ performance . . . under each Deferred Executory Contract, for so long as such Contract remains a Deferred Executory Contract . . .

Doc. 25, ¶ 27; *Ex. C*. The phrase “[f]rom and after the Closing” describes when the obligation to pay became New GM’s rather than MLC’s—and that makes sense given that New GM would have no reason to pay any of MLC’s contracts unless and until the sale was completed. The phrase “during the applicable period specified below” further describes the duration of the obligation—and that makes sense because New GM would not continue to pay MLC’s contract liability after it had been rejected. But those phrases *do not*, by the terms of the ARMSPA, limit

⁵ The order, agreed to between MLC and plaintiffs, expressly acknowledged this adversary proceeding and noted that the rejection should not be construed as a decision on the merits raised in this adversary proceeding.

the amount to be paid to only those obligations that accrue post-Closing or post-petition. To the contrary, the ARMSPA requires New GM to pay “all amounts due in respect of Sellers’ performance . . . under each Deferred Executory Contract.” At the time of the Closing, performance on the part of MLC was due in many respects under the settlement, including the cost of notice of final approval to class members, class representatives’ incentive awards, attorneys’ fees and expenses, Past Reimbursable Expenses, Past Trade-In With VTi Transmission Malfunction Reimbursement, and certain Future Reimbursable Expenses. Doc. 25, ¶¶ 10, 20, 21; *Exs. A and B*.

Though it seems obvious that contractual obligations owed by MLC which have not been timely paid, pre-petition or otherwise, are “due,” New GM disputes this notion based on the automatic stay under Section 362 of the Bankruptcy Code. This is patently incorrect in that the automatic stay, by the terms of the statute, merely prevents creditors from taking action to *collect* on the obligations of the debtor:

Generally, the automatic stay prevents entities from taking action to commence or continue a proceeding to collect a pre-petition debt, 11 U.S.C. § 362(a)(1), interfere with property of the estate, 11 U.S.C. § 362(a)(2), (3), (4), or, in some cases, interfere with property of the debtor. 11 U.S.C. § 362(5), (6). Conversely, the automatic stay does not toll or restrain the mere passage of time.

In re Margulis, 323 B.R. 130, 133, 44 Bankr.Ct.Dec. 172 (S.D.N.Y. Bankr. 2005). Id. (debtor’s option terminated with the passage of time and, thus, did not implicate the automatic stay). While the stay prohibits plaintiffs from taking steps in court to *collect* the amounts due on the settlement from MLC, the stay does not prevent *accrual* of the debt. If amounts were not due under the settlement, via contract and as a judgment, why would plaintiffs have a claim against MLC’s estate?

MLC’s performance under the settlement was due at the time of the Closing and it

remains due currently. Because MLC and New GM decided to wait until months after closing to seek rejection of the settlement, New GM became responsible for “all amounts due” on the settlement.

VI. Contempt Is Not Available Because The Sale Approval Order Did Not Explicitly Prohibit A Declaratory Judgment Action To Interpret The Sale Documents.

New GM has not, and cannot, prove that it is entitled to summary judgment on the counterclaims for contempt asserted in this case. Initially, plaintiffs’ motion to dismiss New GM’s counterclaims for contempt remains pending and is incorporated by reference into this pleading. Doc. 26. With no decision as to whether New GM’s counterclaims state a legally cognizable claim, a decision on the merits is premature. Further, though New GM has named the attorneys for the Plaintiffs as parties to its counterclaims for contempt, no attempt has ever been made to serve the attorneys.

To the extent the merits must be discussed, Plaintiffs’ mere filing of a declaratory judgment action seeking an interpretation of the sale documents--documents which by their very nature require interpretation in that they do not describe the Class Action by name—falls demonstrably short of contempt. Though plaintiffs have a judgment, they have not filed any action to collect the judgment. Good sense and caselaw suggest that litigants should not be held in contempt for merely asking what an order or contract means: “a contempt order is a ‘potent weapon,’ that is inappropriate if ‘there is a fair ground of doubt as to the wrongfulness of the defendant’s conduct.’” Latino Officers Association City Of New York, Inc. v. New York, 558 F.3d 159, 164 (2d Cir. 2009). Viacom Outdoor Group, Inc. v. McClair, 62 A.D.3d 864, 878 N.Y.S.2d 785 (N.Y. App. Div. 2009).

In order to make its case for contempt, New GM “must establish that (1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is

clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner.” Id. “Any ambiguity in the Court’s mandate should be resolved in favor of the would-be contemnor.” In this case, the order, which required application of facts and interpretation of the ARMSPA and the Sale Approval Order, did not clearly and unambiguously enjoin the action filed by plaintiffs. Indeed, the Sale Approval Order expressly contemplates not only interpretation of the ARMSPA, but litigation over interpretation of its terms. In paragraph 71 of the Sale Approval Order, the Court retained jurisdiction to “resolve any disputes arising thereunder or related to the MPA” and to “interpret, implement, and enforce the provisions of this Order.” By describing its authority to interpret the sale documents to resolve disputes arising under, the Court acknowledged the complexity of the issues addressed in the sale documents and the potential for ambiguity. Plaintiffs’ declaratory judgment action seeking an interpretation contemplated by the Court, itself, cannot subject Plaintiffs to contempt of court.

Further, the actions of Plaintiffs, by seeking only a declaration of the rights of the parties, is a diligent attempt at reasonable compliance. Accordingly, New GM has not, and cannot, prove its case. As set forth throughout this brief, the Class Judgment is an Assumed Liability under the terms of the sale documents, and, therefore, no violation of the injunction occurred because Assumed Liabilities are exceptions to the injunction in every case. If decided in Plaintiffs’ favor, it is outcome determinative of the contempt claims because enforcement of the Assumed Liabilities is an exception to each injunction relied upon by New GM. Paragraph 8 of the Sale Approval Order, for example, bars claims against New GM based on liabilities of Old GM “[e]xcept as expressly permitted or otherwise specifically provided by the MPA or this Order.” The ARMSPA, which the Sale Approval Order refers to as the “MPA,” expressly states that New GM will be responsible for the Assumed Liabilities in Section 2.1. Moreover, the sale

order, itself, repeatedly exempts Assumed Liabilities from those obligations for which New GM was not responsible. ¶¶ AA, DD, 7, 9, 10, 46, 47, 48. Paragraph 47, also relied by New GM, excludes pursuit of Assumed Liabilities from any injunction protecting New GM: persons are prohibited from commencing any action against New GM “with respect to any (i) claim against the Debtors other than Assumed Liabilities. . . .” But even assuming *arguendo* that Plaintiffs are incorrect on the merits, contempt is not warranted.

New GM claims that Plaintiffs’ action violates injunctions in paragraphs 8 and 47 of the Sale Approval Order, but a declaratory judgment action seeking only an interpretation of the ARMSPA is not contrary to the spirit or the terms of either paragraph. Neither the ARSMPA nor the Sale Approval Order expressly names the Class Judgment as an Assumed Liability or a Retained Liability. Instead, the sale documents required interpretation to determine whether the Class Judgment fell within a broad definition set forth in Section 2.3(a)(vii) of the ARMSPA. Given that Plaintiffs hold a settlement agreement and a judgment from a claim that included breach of express warranty, it was not “free from doubt” or “without ambiguity” that their claims were not Contracts or Orders “arising under express written warranties” as required by the ARMSPA. Indeed, the opposite seems true.

In an ongoing, unrelated case in Florida, MLC has moved to substitute New GM as a party defendant in MLC’s place for breach of written warranty claims by virtue of the sale documents:

As a result, ***General Motors Company assumed liabilities for*** claims against General Motors Corporation based upon Florida’s Lemon Law or ***breach of General Motors Corporation’s written warranty.***

See, Plaintiffs’ Response to New GM’s Statement of Undisputed Facts and Statement of Additional Undisputed Facts, *Ex. W, [MLC’s] Motion for Substitution of Party and Motion for*

Extension of Time to Respond to Amended Trial De Novo Pleading, p. 3. In that the Florida motion is for substitution of parties rather than merely to stay or dismiss, it would appear that New GM acquiesces to this interpretation. With MLC, and apparently even New GM, interpreting the sale documents to mean that New GM assumed liability for breach of written warranty claims, it cannot be contemptuous for plaintiffs to ask the Court, via declaratory judgment action, whether the very same thing is true of Plaintiffs' breach of warranty claims. At the very least, it was not "free from doubt" or "without ambiguity" that Plaintiffs' interpretation was wrong.

Once again, the decisions reached in the Safety-Kleen Corp. bankruptcy are instructive in that the purchaser of Chapter 11 assets sought contempt against the creditor claiming obligations were assumed in the 363 sale. 331 B.R. at 605. The language in that case was very similar to Section 2.3(a)(vii) of the ARMSPA in this case, stating that liabilities "arising under Environmental Laws" were assumed. 380 B.R. at 736. On these facts, the court "easily" found that the language was ambiguous such that contempt did not lie:

Contrary to Clean Harbors' assertions, the language in the Agreement and Sale Order is not unambiguous on whether Clean Harbors has successor liability to the Defendants. Indeed, Clean Harbors concedes that even the parties to the Agreement had different interpretations as to the successor liability provision. Consequently, on the record before me, I conclude that no reasonable person could find that Clean Harbors could demonstrate by convincing evidence that the Agreement was not susceptible to more than one meaning as to Clean Harbors' successor liabilities.

In the future there may be legitimate debate as to whether Clean Harbors assumed the Rollins obligations; but based solely on the record at this time, this Court easily concludes that the Defendants did not act unreasonably in pursuing Clean Harbors in the New Jersey Court with respect to those obligations.

331 B.R. 614. The same conclusion has to be reached in this case. Even if the Court ultimately concludes that the Class Judgment is not an Assumed Liability, it cannot be said that Plaintiffs'

interpretation is unreasonable. As a consequence, the filing of the declaratory judgment was not contemptuous.

Further, the filing of a declaratory judgment action, rather than an action to enforce the Class Judgment, is a diligent attempt to comply in a reasonable manner with the Sale Approval Order. As New GM would have it, merely inquiring whether the Class Judgment is an Assumed Liability is contemptuous. Had Plaintiffs attempted to execute on the judgment, perhaps a different conclusion would be in order, but, in this case, the declaratory judgment action merely asks the Court to determine whether the Class Judgment is an Assumed Liability. By its nature, a declaratory judgment is intended:

to afford a *speedy and inexpensive* method of adjudicating legal disputes without invoking the coercive remedies of the old procedure, and to settle legal rights and *remove uncertainty* and insecurity from legal relationships *without awaiting a violation of the rights* or a disturbance of the relationships.

In re Quigley Co., Inc., 361 B.R. 723, 736 (S.D.N.Y. Bankr. 2007) (emphasis added). Plaintiffs' declaratory judgment action was filed to establish the rights of the parties in lieu of a "coercive remedy" that might have violated New GM's rights.

Under paragraphs 8 and 47, Plaintiffs were not expressly barred from seeking an interpretation of the sale documents. Paragraph 8 only prohibits all persons and entities from asserting "liens, claims, encumbrances, and other interests, including rights or claims based on any successor or transferee liability" and even those are prohibited only unless "expressly permitted," such as when an obligation is an Assumed Liability. Under the circumstances, a declaratory judgment action to determine whether or not the Class Judgment is in fact an Assumed Liability does not assert any lien, claim or encumbrance. To the contrary, it merely asks the Court for a determination of the rights of the parties under the ARMSPA. Paragraph 47

similarly enjoins only “(a) commencing or continuing any action . . . pending . . . against the Debtors as against the Purchaser, . . . [or] (b) enforcing, attaching collecting, or recovering in an manner any judgment . . . against the Debtors.” The declaratory judgment is related to but materially different from any action Plaintiffs ever had against MLC, in that the meaning of the ARMSPA was never a dispute between MLC and Plaintiffs. Further, the declaratory judgment is patently not an action to enforce or collect or recover under the judgment. By its very nature, it seeks only an interpretation of the parties’ rights under the sale documents. If Plaintiffs prevail in this case, it will not cause New GM to pay a dime until some other step, a “coercive remedy” as described in Quigley, is taken.

In the hundreds of pages that make up the 363 sale documents, neither MLC nor New GM nor the Court referenced the Class Judgment by name to explain whether it was an Assumed Liability or a Retained Liability. Instead, Plaintiffs were left to interpret the documents to discern whether their settlement and judgment for breach of express warranty “arose under” the original written warranty provided with Saturn vehicles. In other cases, such as the Florida case cited *supra*, even MLC and New GM seem to agree that breach of express warranty claims are Assumed Liabilities. Under the circumstances, the order was not sufficiently clear to justify contempt. Even when proceeding, what was filed was only a declaratory judgment action seeking an interpretation of the ARMSPA rather than an action to collect on the Class Judgment.

As a consequence, New GM’s request for summary judgment on its counterclaims must be denied.

WHEREFORE, Plaintiffs and Counterdefendants respectfully pray that this Court enter an Order denying New GM’s Motion for Summary Judgment in all respects.

Dated: January 22, 2010

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,
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 January 22, 2010, I electronically filed Plaintiffs' and Counterdefendants' Response in Opposition to New Gm's Motion for Summary Judgment 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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