

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No.: 1-09-50026, ADV No.: 1-09-00509

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In the Matter of:

MOTORS LIQUIDATION COMPANY,

Debtor.

- - - - -x

KELLY CASTILLO, et al.,

Plaintiffs,

- against -

GENERAL MOTORS COMPANY, f/k/a

NEW GENERAL MOTORS COMPANY,

Defendant.

- - - - -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

May 6, 2010

9:52 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

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Application of Debtors Authorizing the Retention and Employment
of Hamilton, Rabinovitz & Associates, Inc. as Consultants with
Respect to Asbestos Claims

Pretrial Conference (Re: 09-00509)

Hearing on Motions for Summary Judgment (Re: 09-00509)

Motion for Summary Judgment as to Count I, Only, for Express
Assumption of Liability filed by Mark L. Brown on behalf of
Barbara Allen, Nichole Brown, Kelly Castillo, Brenda Alexis
DiGiandomenico, Valerie Evans, Stanley Ozarowski, Donna Santi
(Re: 09-00509)

Motion to Dismiss Adversary Proceeding (Counterclaims Only)
filed by Mark L. Brown on behalf of Barbara Allen, Nichole
Brown, Kelly Castillo, Brenda Alexis DiGiandomenico, Valerie
Evans, Stanley Ozarowski, Donna Santi (Re: 09-00509)

Transcribed by: Dena Page

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A P P E A R A N C E S :

WEIL, GOTSHAL & MANGES LLP

Attorneys for Motors Liquidation Company

767 Fifth Avenue

New York, NY 10153

BY: EVAN S. LEDERMAN, ESQ.

LAKINCHAPMAN, LLC

Attorneys for Plaintiffs

300 Evans Avenue

Wood River, IL 62095

BY: MARK L. BROWN, ESQ.

ROBERT W. SCHMIEDER, II, ESQ.

LEADER & BERKON LLP

Attorneys for Plaintiffs

630 Third Avenue

New York, NY 10017

BY: MICHAEL J. TIFFANY, ESQ.

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KRAMER LEVIN NAFTALIS & FRANKEL LLP

Attorneys for Official Committee of Unsecured Creditors

1177 Avenue of the Americas

New York, NY 10036

BY: JENNIFER R. SHARRET, ESQ.

U.S. DEPARTMENT OF JUSTICE, U.S. ATTORNEY'S OFFICE

Attorneys for State of New York

86 Chambers Street

3rd Floor

New York, NY 10007

BY: JOSEPH N. CORDARO, ESQ.

ISAACS, CLOUSE, CROSE & OXFORD LLP

Attorneys for General Motor Company

429 Santa Monica Boulevard

Suite 550

Santa Monica, CA 90401

BY: GREGORY OXFORD, ESQ.

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

P R O C E E D I N G S

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THE COURT: Mr. Lederman, good morning. I'll hear any undisputed matters that you have, and then we'll take the controversy between New GM and the class action plaintiffs.

MR. LEDERMAN: Good morning, Your Honor. Evan Lederman, Weil, Gotshal & Manges for the debtor.

THE COURT: But first, Mr. Lederman, I'm going to address in a couple of minutes the material concerns I have about the behavior about the class action plaintiffs' counsel and the counsel for New GM. And without a doubt, the concerns I have about Old GM's counsel's activities pale in comparison to those that I have vis-a-vis the other guys. But when I have three separate motions in the controversy between the class action plaintiffs and New GM, why do I get an agenda letter that speaks of a single motion for summary judgment by New GM, does not show the other two disputed matters that are before me, and just shows all of the various briefs on the three motions as related documents?

MR. LEDERMAN: We apologize, Your Honor. That was an error on our part, and we will ensure, going forward, that we pay closer attention and make sure that the agenda accurately reflects what's before Your Honor.

THE COURT: Thank you. I know you don't assign the preparation of the agenda to Harvey Miller.

MR. LEDERMAN: No, I don't, Your Honor.

1 THE COURT: But the agenda's supposed to do me some
2 good, to help me make sure that I know the motions that I have
3 to decide, and to make sure that I have the briefs on each of
4 the three motions so that I can be satisfactorily prepared.

5 MR. LEDERMAN: You're absolutely correct, Your Honor.
6 We take full responsibility. Again, we apologize, but we can
7 assure the Court going forward that it will not happen again.

8 THE COURT: Okay, thanks. Go ahead.

9 MR. LEDERMAN: Your Honor, the debtors have one
10 uncontested motion before Your Honor this morning. It is the
11 uncontested application for the debtor's retention of Hamilton,
12 Rabinovitz & Associates as consultants to the debtors with
13 respect to asbestos claims. As Your Honor's aware, while these
14 cases are clearly not asbestos Chapter 11 cases, asbestos-
15 related issues and claims are certainly a big issue in our
16 cases. As is set forth in our papers, as of the commencement
17 of these cases, approximately 29,000 asbestos-related personal
18 injury cases were pending against MLC and MLC's books and
19 records reflected a reserve in the amount of approximately 650
20 million, with respect to potential liability for both present
21 and future asbestos claims.

22 As Your Honor's also aware, the debtors intend to
23 provide for the treatment of present and future asbestos claims
24 in our forthcoming Chapter 11 plan of reorganization. And
25 accordingly, with respect to putting forward that plan and

1 dealing with the various asbestos claims and issues, the
2 debtors feel that they need to retain an expert consultant with
3 respect to helping them evaluate and work through these
4 asbestos-related issues. And as such, we have sought the
5 retention of Hamilton, Rabinovitz & Associates, a well-known
6 expert in this field, to assist the debtors in that endeavor.

7 We received an e-mail this morning from the U.S.
8 trustee who authorized us to put on the record that they have
9 no objection to this retention. We've received no other
10 objections to the retention, and we'd ask Your Honor for
11 authorization for us to employ Hamilton, Rabinovitz &
12 Associates pursuant to our motion and under 327(a). Happy to
13 go through the particular services they'll provide, but
14 everything is set forth in our paper.

15 THE COURT: No, you don't need to do that. Motion
16 granted. Get the order in floppy to me, if my chambers doesn't
17 already have it, at your earliest reasonable convenience.

18 MR. LEDERMAN: Thank you, Your Honor. We will do so
19 after this hearing.

20 With that, the debtors have nothing else before Your
21 Honor. As you're aware, we're not a named defendant in the
22 Castillo action, so we will turn that over to the appropriate
23 parties.

24 THE COURT: All right. Let me get appearances on the
25 motion, and then I want anybody who would otherwise be standing

1 in the courtroom to sit down. First in my courtroom.

2 MR. SCHMIEDER: Rob Schmieder on behalf of the
3 plaintiffs, Your Honor.

4 THE COURT: Okay. You pronounce that [Shmeeder]?

5 MR. SCHMIEDER: [Shmeeder], yes.

6 THE COURT: Okay. Thank you, Mr. Schmieder.

7 MR. BROWN: Mark Brown, Your Honor, also on behalf of
8 the plaintiffs.

9 THE COURT: Right, I see you on the papers, Mr. Brown.

10 MR. TIFFANY: Your Honor, Michael Tiffany, counsel
11 from Leader & Berkon on behalf of the plaintiffs.

12 THE COURT: All right, fine, thank you.

13 And for New GM? Do I have Mr. Oxford on the phone?

14 MR. OXFORD: That's me. I'm here, Your Honor. I
15 didn't realize someone else was speaking, I think spoke over
16 them. But like I said, I'm having a little trouble hearing Mr.
17 Schmieder.

18 THE COURT: All right, well, when it's his turn to
19 speak, I'll have him speak from the main lectern.

20 MR. OXFORD: Okay.

21 THE COURT: All right. Gentlemen, make your arguments
22 as you see fit, but before you're done, I'm going to want you
23 to address some particular needs and concerns on my part. And
24 based on my review of the papers, I have some tentatives,
25 California-style. But first I have some preliminary

1 observations.

2 Gentlemen, I have material concerns about the behavior
3 of each of you. Mr. Schmieder, Mr. Brown, when you're looking
4 for a declaratory judgment on an agreement that I approved that
5 was affected by an order that I entered, and with the issues
6 permeated by bankruptcy law as they are, and which also raise
7 issues as to one or more injunctions that I entered, how in the
8 world would you have brought this lawsuit in Delaware Chancery
9 Court. I'm not talking about getting in personam jurisdiction
10 or whether you can get venue over a Delaware corporation in
11 Delaware. I'm talking about what talks and walks and quacks
12 like an intentional runaround of something that's properly on
13 the watch of the U.S. Bankruptcy Court for the Southern
14 District of New York.

15 Mr. Oxford, I have never, in my forty years since I've
16 gotten out of law school, thirty as a lawyer, and in fact as a
17 litigator, and ten, now, as a judge, ever seen briefs as nasty
18 and mean-spirited and badly-mannered as those that you filed
19 and those that you signed. I won't tolerate that in my court.
20 I won't tolerate it in briefs before me and I won't tolerate it
21 in oral argument. And I'm not going to burden the record with
22 the reference after reference after reference that got my blood
23 boiling, and after this, I'm going to try to quiet my voice and
24 to try to speak in a very, very soft voice, but make no
25 mistake. I will not tolerate that again and it's going to

1 stop. Starting right now in this oral argument.

2 I'm also going to expect compliance going forward with
3 the case management order that I entered in this case. And
4 that applies to every other litigant in the General Motors
5 case, now called the Motors Liquidation case.

6 MR. OXFORD: Your Honor, as is appropriate for me to
7 apologize this morning; I'll certainly keep my voice down.

8 THE COURT: All right. Let me get into my tentatives,
9 and then the matters that I need you to discuss. My
10 tentatives, subject to your rights to be heard -- and I'm going
11 to look in the oral argument for you folks not to repeat the
12 matters that you set forth in your briefs -- is to grant the
13 12(b)(6) motion to the extent that New GM seeks contemptory
14 (sic) damages for the proceedings before me for an
15 interpretation of the asset purchase agreement of my 363 order
16 and the effect of the steps in Old GM's bankruptcy case that
17 took place before me. But it's going to be denied insofar as
18 it seeks that relief for the class action plaintiff so far
19 inexplicable and very troublesome decision to bring this action
20 in Delaware Chancery Court where it was originally commenced.
21 And my tentative, subject to your rights to be heard, is to
22 deny both of the summary judgment motions. While based on the
23 evidence that I've seen, to date, I continue to believe, as I
24 did at the TRO hearing, that the class action plaintiffs' is
25 still very weak. I still see issues of fact.

1 On the merits, I need both sides to address what seem
2 to me to be double-entendres in the language in Section
3 2.3(a)(vii) sub-paragraph A as to the words "arising under".
4 And I don't think I want either side wasting my time with
5 debate over liabilities. There was much too much discussion in
6 the briefing, especially by the class action plaintiffs on
7 liabilities. Liabilities doesn't exist in a vacuum. It
8 precedes words that describe what kind of liabilities were
9 assumed, which is what this issue is all about. And I have
10 some difficulty seeing how express written warranties of
11 sellers that are specifically identified as warranties and
12 delivered in connection with the sale of new, certified use, or
13 preowned vehicles encompasses liabilities under a settlement.
14 But you can help me with that. And if there is an intention
15 that "arising under" is to be incorporated in the relatively --
16 or, interpreted in the relatively broad way that it has been in
17 Article 3 jurisprudence, or in arbitration law, I need help on
18 that. Ultimately, it seems to me that this is a matter of
19 contractual intent, and I want both parties to address for me
20 the objective manifestations of the parties' intent. Where I
21 think the intent is suggested by paragraph 56 of the sale
22 order, but then I have big problems with Mr. Oxford's position
23 because I was surprised and a little bit annoyed by the seeming
24 efforts to juxtapose the sale agreement, what people referred
25 to as the amended and restated master sale and purchase

1 agreement, or ARMSPA, I guess, and the sale order because
2 they're different documents. And the efforts to put them
3 together in the same sentence strikes me as inappropriate
4 litigation advocacy. Now, the sale agreement, the agreement
5 itself, seems to place limits on the ability to amend it by --
6 except in certain proscribed ways, and I'm not clear if there
7 is a contention that the settlement -- excuse me, the sale
8 order is such a modification. If instead it is, as I'm
9 inclined to believe it is, a species of parol evidence, it
10 turns out that it's very persuasive parol evidence. But it's
11 still parol evidence. And if I'm going to consider parol
12 evidence, I think I have to consider any other parol evidence
13 that's equally applicable.

14 So gentlemen, that's how I want you to focus your
15 arguments. I'll hear from the class action plaintiffs first,
16 Mr. Schmieder, then from Mr. Oxford. Then I'll hear again from
17 Mr. Schmieder, and then any surreply limited to that which was
18 in reply by Mr. Oxford. I want all three motions argued
19 together. I don't want to them seriatim. Okay, come on up to
20 the main lectern, please.

21 MR. SCHMIEDER: Good morning, Your Honor. Rob
22 Schmieder and Mark Brown on behalf of the plaintiffs. I will
23 address the Count I of our first amended complaint, the summary
24 judgment, as to Count I first. And we prepared a presentation.
25 And I'll -- based upon your comment, I'll flip through those

1 slides a little faster. But I think there is some background
2 that we need to cover because I think it will address one of
3 the particular questions that you have which is how does this
4 arise under the express warranties, delivered in connection
5 with the sale of the vehicle.

6 A little background. We filed the lawsuit in October
7 of 2007 and we sued for breach of warranty, breach of implied
8 warranty, unjust enrichment, and statutory consumer fraud.
9 There were some amendments, and there was some motion practice.
10 And as the parties went through that motion practice, the Old
11 GM specifically attacked the breach of warranty count. Now,
12 our plaintiffs, and I'll show this on a later slide, are
13 plaintiffs who are bringing a breach of warranty under the
14 original warranty, which was a three-year, 36,000 mile
15 warranty. And in that warranty, Old GM had promised to correct
16 any vehicle defects, and we'll talk about this more, later, but
17 I think it's appropriate right now to say that the original
18 lawsuit was for breach of that original three-year, 36,000 mile
19 warranty delivered in connection with the sale of the vehicle.

20 When GM filed its motion to dismiss --

21 THE COURT: In the Eastern District of California?

22 MR. SCHMIEDER: -- in the Eastern District of
23 California, they specifically pointed out that although we had
24 quoted from the express warranty, they wanted to attach the
25 whole warranty, and so they pointed that out and they attached

1 the declaration of Mr. Joseph Lyons (ph.), who was in-house
2 counsel for Old GM at the time. And Mr. Lyons attached that
3 warranty and said this is exactly what plaintiffs are relying
4 upon and referring to in their complaint. So the parties --
5 and to give the Court a preview, the parties were disputing --
6 our argument was, in the Eastern District of California, the
7 obligation to correct that vehicle defect does not -- they
8 actually have to correct it. They cannot just simply repair it
9 and hope the vehicle gets out of the warranty period and it
10 will fail again right after the warranty period. So our
11 position was -- and we've always called it this evergreen
12 liability, to use a botanist term -- is that if they can't fix
13 this problem, if they can't correct it, their failure was under
14 the original warranty, and it goes on and on and on. So they
15 were looking at a massive exposure. We engaged in some
16 discovery, we engaged in a mediation, and we ultimately settled
17 that. The settlement replaced everything with a 125,000
18 extension -- or, warranty, basically, some additional bells and
19 whistles in there, and it lasted for seven to eight years.

20 So we -- the judgment -- the Court then -- we had a
21 little glitch in the notice going out to the class. One of the
22 vendors that Old GM had retained had accidentally scrubbed some
23 data, and there were somewhere estimated to be about 4,000
24 class members that may have not received notice. So on April
25 14 of 2009, the district court in the Eastern District of

1 California entered two orders: entered an order creating a
2 subclass for those people who did not receive the notice and
3 set a time to send out notice to them, give them the
4 opportunity to object or opt out, and set a final fairness
5 hearing as to the subclass, but as regarding everyone else,
6 except those who excluded themselves properly who wouldn't be
7 bound by the judgment, entered judgment in favor of the class
8 approving the settlement. And that judgment became final on
9 May 18, 2008. And of course, the Court is well aware then on
10 June 1st, GM then filed for bankruptcy protection.

11 So then they entered into, on, I believe, June 1st,
12 they presented an original master purchase agreement to the
13 Court. The amended that and restated it on June 26th. They
14 filed a first amendment to that, second amendment, and the
15 Court held hearing, and on July 5th, the Court entered its
16 decision -- which I'll talk about a little later -- and then
17 the order, in accordance with that decision. And we then filed
18 the declaratory judgment action.

19 We filed the declaratory judgment action, Your Honor,
20 not with any -- and I'd like to address this as soon as I
21 can -- not with any attempt to avoid this Court. It was more
22 of an attempt to just make sure we had jurisdiction over New
23 GM. Maybe it's pleading ignorance, I don't -- while I'm
24 dangerous when it comes to bankruptcy law -- this is not my
25 specialty -- but we did some research, and I was concerned that

1 while the Court had jurisdiction over Old GM, and maybe
2 disputes between Old GM and New GM, I just wanted to make sure
3 I had jurisdiction over New GM. So we filed it in Delaware,
4 which is where New GM was incorporated, and we knew we had
5 jurisdiction over them. The moment Mr. Oxford contacted us and
6 said we think the Court's got exclusive jurisdiction, we said
7 that's fine. We stipulated to transfer and cross that --
8 probably would have dismissed it right away and filed here
9 because the transfer took quite a while to get here. But there
10 was no -- there was no attempt to avoid this Court. It was
11 more of an attempt to grab New GM as quickly as possible.

12 And one of those reasons is because we had 150,000
13 class members who were expecting thousands of dollars and
14 expecting an extended warranty on their vehicle, who were
15 contacted --

16 THE COURT: Are class members getting money, too, or
17 are they getting promises to fix cars?

18 MR. SCHMIEDER: Both. Anything that happened in the
19 past that they paid out of pocket, they'll get -- there's a
20 form that they fill out. Anything going forward, it will just
21 be handled through the GM dealerships.

22 THE COURT: I know that you've got about four million
23 bucks in fees on the line, or at least it's my belief. What is
24 the monetary interest as contrasted to the future repairs
25 interest of the class in this controversy?

1 MR. SCHMIEDER: I don't know if I can break it down
2 from past and future, but I know that we retained an actuary as
3 part of the final approval process, Mark Johnson, who value --
4 decided to figure out what it would cost GM to sell this
5 liability out on the market to an insurance company or some
6 other company. And he estimated that the total -- what it
7 would cost GM was very conservatively at least sixty million
8 dollars.

9 THE COURT: I'm not talking about what it would cost
10 GM to honor its promises under the settlement agreement, which
11 I assume is an obligation on somebody. What I'm trying to get
12 my arms around is how much money does either Old GM or New GM
13 have to write out a check for to class members?

14 MR. SCHMIEDER: For the past part? I think -- I don't
15 have that precise figure with me, but I thought the estimates
16 were somewhere between eight and twelve million dollars.

17 THE COURT: All right, continue.

18 MR. SCHMIEDER: And just to clarify, that was as of
19 his report back in February of 2009.

20 So the next slide just demonstrates that what happened
21 on April 14th is that we had a class where we -- the Court
22 entered a judgment and that become final, and there are still a
23 subclass with claims pending out in --

24 THE COURT: Pause, Mr. Schmieder. Just so you
25 understand. I wasn't of a mind to refuse your request to use

1 visual aids, but the way I do my job is I listen to the lawyers
2 and I look at them. If there's some demonstrative or exhibit
3 or something where you need me to look at the screen, tell me,
4 because I'm looking at you. I'm not looking over to the side
5 at my screen.

6 MR. SCHMIEDER: Thank you. So when the parties
7 entered into the ARMSPA, as the Court knows, the ARMSPA --
8 well, actually, the sale order and the sales procedure order on
9 June 2nd provided the procedures. They then amended and
10 restated the ARMSPA on June 26th. Then the ARMSPA provides in
11 Section 9.6 that it only may be amended by the parties to the
12 agreement in writing, and the parties did just that on June
13 30th with the first amendment, and July 5th with a second
14 amendment to the ARMSPA. And in both amendments, the parties
15 reviewed and then confirmed and ratified the ARMSPA with
16 respect to all of its remaining terms. Neither one of those
17 amendments affected the provision that we're going to be
18 talking about today.

19 THE COURT: Pause. So you're not contending that the
20 differences between the original master sale agreement and the
21 final form of it are material to this controversy.

22 MR. SCHMIEDER: No, what I'm saying is they're -- the
23 ARMSPA -- what I call the ARMSPA, the amended and restated
24 agreement dated June 26th provided that that could only be
25 amended by the parties in Section 9.6 of that agreement. And

1 the parties did amend the ARMSPA, but not with respect to
2 Section 2.3(a)(vii)(A), which is what we have here before the
3 Court. And as a matter of fact, they twice confirmed and
4 ratified Section 2.3(a)(vii)(A) of the ARMSPA. So they drafted
5 it; they then reviewed it confirmed it with the first amendment
6 and decided they didn't want to change it. Then they did it
7 again with the second amendment. So that's three times that
8 they reviewed and ratified that specific language of
9 2.3(a)(vii) as that's the language that will control. And as
10 between the parties, they said the only people that could amend
11 that were Old GM and New GM in writing, and there's been no
12 writing between those parties that has changed that agreement.

13 So then we get to the concept of liabilities. I won't
14 spend much time on this, other than I think this is an
15 important concept to explain, is that the definition of -- if
16 we can go one more -- the definition of assumed liabilities --
17 and this is a slide that I think is somewhat important -- is --
18 the definition of -- I'm sorry, retained liabilities says
19 that -- it's defined in Section 2.3(b). And retained
20 liabilities is defined as anything other than an assumed
21 liability, and in all cases with the exception of assumed
22 liabilities. So once something falls within the scope of an
23 assumed liability, it, by definition, is not a retained
24 liability. And this is an important part because I know that
25 New GM had argued that we raised multiple theories in our

1 lawsuit. Well, that doesn't matter; if the breach of warranty
2 count is a liability arising under the express written
3 warranty, it's an assumed liability, and by definition, it is
4 not a retained liability.

5 THE COURT: Why do I care, other than in terms of
6 what's going to define the size of your claim against Old GM,
7 what's a retained liability? Isn't the issue what's an assumed
8 liability?

9 MR. SCHMIEDER: That's absolutely correct. But the
10 point is, even if, for example, a statutory fraud claim, which
11 also was a claim that, in our class action lawsuit existed,
12 that that doesn't defeat the fact that the breach of warranty
13 count would fall within the assumed liability provision.
14 That's my point. And there are -- and we know that that's how
15 the parties drafted this agreement, by four different
16 provisions. I put one example up on the screen, but I'll just
17 read them out loud to the Court for reference; 2.3(a)(5),
18 2.3(a)(8), 2.3(a)(9), and 2.3(a)(13) all dealt with the
19 situation where the way assumed liabilities was defined, it
20 would have grabbed all the retained liabilities out of what the
21 parties wanted Old GM to retain so the parties specifically put
22 in language to throw it back over onto the retained liability
23 side. And the example that I have on the slide is one dealing
24 with environmental liabilities arising -- relating to the
25 transferred real property. And the highlighted language points

1 out that it would have swallowed up what they defined in
2 Section 2.3(b)(4) but for the fact that they said other than
3 those liabilities described in 2.3(b)(4) in the assumed
4 liability definition. So four times, they recognized that
5 assumed liabilities would always, by definition, kick anything
6 out of a retained liability.

7 This next slide is just the section that we're here,
8 before -- as I said before, they wrote it once, they reviewed,
9 confirmed, and ratified it two times, and this is the language.
10 I think it's also important that, as the Court recognize that
11 there is somewhat of a counterpart in retained liabilities, and
12 it talks about -- it's Section 2.3(b)(16) that talks about that
13 retained liabilities are implied warranties or other implied
14 obligations arising under statutory or common law without the
15 necessity of an express warranty. So even in the -- this is a
16 rather unique provision in the retained liabilities because
17 it's recognizing that they -- well, they wanted to make it
18 absolutely clear that a liability, even an implied obligation,
19 arising under statutory or common law that required or had the
20 necessity of an express warranty would be considered an assumed
21 liability under 2.3(a)(vii)(A), and it would not be part of a
22 retained liability.

23 So we -- the point is, once something's an assumed
24 liability, by definition, it's not a retained liability, and
25 there is, actually, a rather unique provision of the retained

1 liabilities that provides that you must, not only as the Court
2 correctly said, you must determine whether there's an assumed
3 liability because if it is, it's by definition not a retained
4 liability. But it recognizes that statutory and common law
5 claims implying obligations where there's a warranty necessary
6 or as part of that claim, are not part of the retained
7 liabilities.

8 THE COURT: Well, is it a conceptually possible that a
9 liability of a certain character might not be within the zone
10 or circle of a 2.3(a)(vii)(A) assumed liability nor be one of
11 those that's kicked back under 2.3(b)(16), and therefore, raise
12 issues as to the parties' intent for one that was not expressly
13 covered under either category?

14 MR. SCHMIEDER: I don't believe so, Your Honor.
15 Because of the way liabilities -- the definition of liabilities
16 is so overly broad, it involves not only every obligation,
17 liability of every kind --

18 THE COURT: Liabilities isn't the key word unless you
19 convince me to the contrary, Mr. Schmieder, because the
20 liabilities is followed by modifying language. And for it to
21 pass muster under 2.3(a)(vii), doesn't it have to satisfy the
22 adjective clause that follows the word liabilities?

23 MR. SCHMIEDER: It absolutely does. And all I'm --
24 and maybe I'm not articulating it particularly well, here, but
25 when you -- there's the language, "all liabilities arising

1 under," and then it starts, express warranties, specifically
2 identified warranties and delivered in connection with the sale
3 of a vehicle. We know that it's not limited to the express
4 warranties language because "all liabilities arising under"
5 makes that broader. But you are correct that "all liabilities"
6 followed by "arising under" makes it narrower. So it's
7 somewhere in between -- it's more than the express warranties
8 themselves, but it's less than every single liability as it's
9 defined under the ARMSPA. And that's my only point. And it's
10 figuring out -- how to figure out what falls within that area
11 is, I think, the real issue for the Court.

12 New GM's argument ignores the language "all
13 liabilities arising under". They just keep focusing on this
14 pursuant to, subject to the express warranty language. And my
15 point is, well, I'll make two points to that. Number one, we
16 win, even if the Court ignores the "all liabilities arising
17 under" language. But, that broadens it out. But you're
18 correct that it is something less than "all liabilities," but I
19 also believe the counter is true that it's something more than
20 just the express warranties themselves because of the way
21 liability is defined.

22 And I want to take this somewhat backwards. I want to
23 ignore for this next part of the argument the "all liabilities
24 arising under" language, and I want to just argue and point out
25 to the Court how the underlying class judgment actually

1 satisfies the express written warranty language, the remaining
2 language of 2.3(a)(vii)(A). It's got to be -- according to
3 that language, it's got to be specifically identified as a
4 warranty and it's got to be delivered in connection with the
5 sale of the vehicle. Well, we know that that is the new car
6 limited warranty that Mr. Lyons put forth in his declaration.
7 That warranty provided that it covers -- and, Your Honor, this
8 is the language that I'm referring to as the evergreen, sort of
9 the battle that we were talking about on the slide -- the
10 warranty covers repairs to correct any vehicle defect related
11 to materials or workmanship. And it's very clear that this
12 warranty, the one that was delivered in connection with the
13 sale of the vehicle, was for three years or 36,000 miles. So
14 that's precisely what I'll call the second half of Section
15 2.3(a)(vii) provides. If you look at the allegations in our
16 complaint, for example -- and I pulled up three examples
17 here -- Ms. Allen, we allege she had a failure at 33,000 miles.
18 That was within the warranty. They didn't correct it. If we
19 go to Mr. Ozarowski, he had a failure at 32,000 miles. That
20 was within the warranty. If we go to Ms. Santi, she had a
21 failure at 3300 miles. All those were within the original
22 three year, 36,000 mile warranty, and we brought a breach of
23 contract count -- or, I'm sorry, so getting back to the
24 language of the warranty itself, it actually recognizes. And I
25 think this is -- there's a Latin phrase, I believe, ubi jus ibi

1 remedium: where there's a right, there's got to be a remedy,
2 is sort of the colloquial way of saying it. But it recognizes
3 that if you aren't satisfied with our performance under this
4 warranty, that you can sue us, and we understand that there may
5 be interpretation, actually, in one of the provisions, it talks
6 about a voluntary mediation program, and it specifically talks
7 about the mediator has the ability to interpret this policy.
8 Well, that's exactly what our lawsuit was about; we were
9 arguing over what it meant right there in our breach of
10 contract. We alleged that they did not correct the vehicle
11 defect when people brought their vehicles in for repairs during
12 the warranty period. We may have been right, we may have been
13 wrong. I don't know. We never got that far because the
14 parties ultimately resolved it. But I also think it's
15 important that we recog -- that we sat there in paragraph 82 of
16 the complaint specifically provided that this was a warranty
17 pursuant to the Uniform Commercial Code, Section 2.313. We
18 brought 2.302 claims under the UCC and 2.719 claims, which are
19 2.302 is unconscionability. They had knowledge that wasn't
20 disclosed, and so their limitations in their expressed warranty
21 were unconscionable based upon the circumstances, and 2.719
22 which was that the exclusive remedy, which was one of the
23 arguments that Old GM put forward was, well, the exclusive
24 remedy was repair. And we said, well, of course, it's repair,
25 but it's a repair to correct. And if you breach that, we can

1 sue for money damages. And of course, we had -- we also
2 brought it under the Magnuson-Moss Warranty Act for any rights
3 or remedies pursuant to that. So the original lawsuit involved
4 that very express warranty, and we put all this in our briefing
5 how we alleged that they failed to adequately repair it,
6 they -- or, adequately corrected. It wasn't corrected. And
7 this was part of the concept which we believe drove settlement,
8 was this idea that somebody has a failure within the original
9 warranty period, they don't correct, and it fails again, and
10 many of these class members -- or, I'm sorry, class
11 representatives, had multiple failures, some three or four,
12 where the transmission just kept failing, failing, failing over
13 and over again, so it was our contention that, well, obviously,
14 they didn't correct it -- they didn't correct that defect like
15 they promised to under the warranty. And we think that that
16 evergreen liability, that exposure that this could go on
17 forever, as long as somebody owned a vehicle which is what
18 drove the parties to reach what we think was a very good
19 settlement for the class. So it most definitely did.

20 And here is the -- this is the slide where Old GM's
21 counsel, which was actually Mr. Oxford, specifically pointed
22 out that the complaint refers to and relies upon the warranty.
23 So we know that the complaint relies upon that warranty which
24 means that it's certainly not that -- doesn't fall under that
25 retained liability provision, even if it's imposing implied

1 obligations under common or statutory law because as Mr. Oxford
2 put in his brief, the complaint necessitates this warranty. It
3 relies upon it. And Mr. Lyons did the same thing. And so the
4 class action was a lawsuit to enforce rights under the express
5 warranty delivered in connection with the sale of the vehicle.
6 It was a fight over "to correct" -- that "to correct" language
7 of the express warranty. We had specific performance in our
8 prayer for relief. It was pay people money damages for
9 anything they paid out of pocket, and we wanted specific
10 performance as one of the possible remedies that was in our --
11 in our underlying class action complaint. So even to coin the
12 language of paragraph 56, which I'll get to in a second,
13 "pursuant to and subject to the terms and conditions," this
14 lawsuit was an effort to enforce those terms and conditions on
15 GM. It was to force them to correct that defect. So there's
16 no doubt that when you just look at the latter part of
17 2.3(a)(vii)(A), that the underlying lawsuit required the
18 warranty, relied upon the warranty, and not just the warranty,
19 the warranty delivered in connection with the sale of the
20 vehicle, because that's another issue that I'm going to need to
21 clarify with the Court.

22 So then we move on to the next part of the language,
23 having established that we know that there's the underlying
24 lawsuit involved a judgment involving the express written
25 warranties. Well, is that a liability arising under the

1 express written warranties? When you just look at the language
2 in Section 2(a)(7), and you compare subpart A and subpart B --
3 and I'll go through this rather quickly -- subpart A uses the
4 language, "all Liabilities," capital L. Subpart B uses
5 "obligations," little O. So there's a definition of
6 liabilities; it's rather expansive. It includes anything
7 arising under law, claim, order, contract or otherwise, all
8 separately defined terms, some of which talked about, for
9 example, claims talk about rights, claims, choses (sic) in
10 action, investigations, and then all rights and remedies with
11 respect thereto, which would include statute, common law,
12 contract agreements. But there was a clear -- there was a
13 deliberate choice of language here where they were making it
14 broader what they were assuming under subpart A, compared to
15 with what they were agreeing to assume under subpart B.

16 I'll just flip through those slides real quick. All
17 those slides just go through each definition of liabilities.
18 They're, I guess, what I'd call subdefinitions. There are
19 definitions within the definition of liabilities. Just by way
20 of an example, just to show how broad this concept is.

21 THE COURT: Mr. Schmieder, I'm not going to put a sock
22 in your mouth, but I'd much rather that you spend time on
23 "arising under" rather than liabilities.

24 MR. SCHMIEDER: Thank you, Your Honor. So we know
25 if -- this is actually a slide that I would direct the Court to

1 look at. What we have here at the top and bottom are
2 statements by New GM and briefing on this matter. And I think
3 this will demonstrate the issue that we're talking about. At
4 the very top, there's an argument that because plaintiff's
5 underlying claims were not in any event claims pursuant to
6 Saturn's standard warranty, liability under the settlement is
7 not a liability at all. I think I just dispelled that.
8 Obviously, it was exactly that. But the next section that I
9 haven't read is "but is instead a liability under a judgment
10 implementing a consensual settlement." And just worried
11 differently, there's the next argument at the bottom, of
12 course, the parties argued about warranty issues in the case,
13 but that has nothing to do with the character of the liability
14 created by the consensual settlement. Well, what these
15 arguments are -- if you could back up one -- what these
16 arguments are talking about, all they are doing is conceding
17 that a liability arising under a judgment, which is defined --
18 is the definition of an order, or a liability arising under a
19 consensual settlement, he's admitting that it's capital L
20 Liability. The real issue is does that liability, does that
21 judgment, does that agreement arise under the express written
22 warranties. And I think he answers that question in the exact
23 same arguments, because -- if you could back up one -- because
24 when you look at what it says there, he's admitting that
25 plaintiff's underlying claim -- you've got to look at the

1 underlying claims. We know that it's a Liability, capital L,
2 but where did that capital L Liability stem from? Where did it
3 originate from? Where did it arise from? It arose from the
4 lawsuit. And in this particular situation, it's a class action
5 judgment, settlement.

6 Under Federal Rule 23(e), we cannot compromise a class
7 settlement without Court approval, and the Court has to go
8 through a very detailed analysis of what's fair, reasonable,
9 and adequate. And part of determining what's reasonable is for
10 the class to compare the relief sought with the relief obtained
11 in the settlement. And we briefed this extensively. And
12 there's no doubt the judge had to analyze those claims and
13 determine that yes, this does arise out of the express warranty
14 claim in Count II. He did that for each one. He did that for
15 each one in order to give approval.

16 THE COURT: Well, did he need to do that? Or did he
17 merely need to ascertain that the settlement was fair to the
18 class you represented?

19 MR. SCHMIEDER: No, it required him to compare the
20 allegations of the complaint to the relief and to the release.
21 And so he had to see what are they getting, what are they
22 giving up, and what are the claims -- what could they have
23 gotten?

24 THE COURT: Did he issue any determination other than
25 signing an order that had been submitted to them on consent by

1 the two parties?

2 MR. SCHMIEDER: No. No, I mean, that was --

3 THE COURT: So he did what a lot of us judges do when
4 approving consensual settlements. He signed an order that you
5 and your opponent gave him to implement the deal you had made.

6 MR. SCHMIEDER: Except in a class settlement, it's
7 something more. Rule 23 requires Court approval; it requires
8 notice to the class describing what those claims are, which in
9 there, we described, they are breach of express warranty
10 claims. It required to give them the opportunity to object, to
11 be heard about it, to opt out.

12 THE COURT: Mr. Schmieder, I was a lawyer for thirty
13 years before I went on the bench, and I was a general purpose
14 litigator in class actions and otherwise for the first nineteen
15 of that. I know what 23(e) requires; I know what judges do
16 when they approve class action settlements.

17 MR. SCHMIEDER: The other evidence of that, Your
18 Honor, is in the settlement agreement itself. The settlement
19 agreement itself says it was intended to fully, finally, and
20 forever resolve the lawsuits and all claims asserted therein.
21 So the settlement itself points to, as one of them, the express
22 warranty claim.

23 THE COURT: And do you contend that that's something
24 different than the desire that every defendant settling with
25 the plaintiff is looking for, which is that after he writes out

1 a check, he's getting peace?

2 MR. SCHMIEDER: No, not at all. But it's clearly
3 defining what that peace is, and what the parties were fighting
4 over, and whether or not those claims arose under or that
5 settlement arose under the express warranties. That's my
6 point, is that because of that -- that's precisely what they're
7 doing, but because of that's what they're doing, that's an
8 acknowledgement that this claim arises under, necessitates
9 from, stems from these claims. It doesn't have to be as -- I
10 think, which is what New GM's argument, it doesn't have to be a
11 finding of actual liability, small L, it just has to be a
12 Liability, capital L, which could include a claim. As they
13 defined it, it could be an investigation. I'm not really sure
14 what that is, but that's how they defined it. It could be any
15 undertaking whatsoever, the way it's defined.

16 And so we all agree, I think, as the Court recognizes,
17 of course this is a capital L Liability, but the real question
18 is does it arise under the express written warranties? New GM,
19 I think, agrees with our position: to do that, you've got to
20 look at what were the issues in the claims below. And we -- I
21 won't repeat all this here, but in our reply brief, we did, on
22 page 7 and going over onto 8, we did quote a number of what we
23 think are -- I don't know if they're admissions or confessions
24 about how to interpret this language from GM because they're
25 all -- they all are saying, well, plaintiffs did assert a

1 breach of warranty claim. And so while plaintiffs can say that
2 their legal action did, in part, arise under warranty law,
3 that's what we're here over, is does this arise under. But
4 that's on page 6 and 7 of our reply brief.

5 This is the argument that New GM continues to say that
6 it's got to be pursuant to and subject to the terms and
7 conditions. I think I've addressed that already, and we still
8 win. It was. It was a lawsuit to enforce the agreement to
9 correct this problem. So we win. But even if we don't prevail
10 there, the ARMSPA doesn't use that language anywhere, the
11 "subject to conditions and limitations" language. It just
12 doesn't exist.

13 THE COURT: No, that appears only in 56 of the sale
14 order.

15 MR. SCHMIEDER: Correct.

16 THE COURT: And that's why I want both you and
17 especially your opponent to express the extent, if any, to
18 which I should regard this sale order as an attachment to the
19 agreement as compared and contrasted to being one of the
20 various types of parol evidence that one of you might advance.

21 MR. SCHMIEDER: And if I can do that, I actually have
22 a slide exactly on that point that I will get to.

23 And so the next point is, this argument ignores the
24 definition of liabilities as opposed to just small O
25 obligations, ignores the analysis of comparing within the same

1 section subpart A and subpart B, which we talked about. It
2 also ignores the language of "arising under" law. This
3 language, "pursuant to and subject to the conditions and
4 limitations contained in the warranty" doesn't recognize the
5 UCC or Magnuson-Moss Warranty Act as imposing any statutory
6 requirements. We know that they specifically carved those out
7 as retained liabilities. And the definition of Liabilities,
8 capital L, on all Liabilities arising under express warranties,
9 defines as anything arising under law, which would include the
10 UCC. So even this argument that it was pursuant to and subject
11 to the terms, does not -- it basically rewrites the whole part
12 of it.

13 The other thing is, when we came before the Court
14 because they -- on the TRO hearing, one of the arguments that
15 they made -- and I disagree with their conclusion, but again, I
16 think it's revealing -- the claims underlying the settlement
17 were not assumed by New GM. We're -- so it's another
18 confession that you need to look -- "all liabilities arising
19 under" means you need to look at the underlying claim, where
20 did this stem from. It's right there on page 1 of their
21 opposition to the TRO brief. And so basically, what they're
22 doing is they're rewriting the ARMSPA and ignoring another
23 provision, 2.3(b)(16), of the retained liabilities to come up
24 with this argument. And again, even under that language, I
25 think we still win. It was -- that's exactly what we did. We

1 sued on that. They make some -- and I'll try to get through
2 this pretty quickly, because they make some arguments about how
3 they were unproven and disputed, and there was no admission of
4 small L liability. Well that's irrelevant unless the Court has
5 any questions about that. You know, it's capital L Liability
6 that we're concerned about. And we did cite as one of the
7 exhibits, which I think can be taken as an admission, the
8 Florida case: Exhibit W, and then I believe it was Exhibit Y,
9 which was their answer and affirmative defense. Down in
10 Florida, a gentleman went through arbitration and then I guess
11 lost the arbitration, and there was a procedure for him to file
12 a trial de novo. And so he did that, and New GM substituted
13 itself in that case because among all the other claims that
14 this gentleman asserted down in Florida, there was an alleged
15 brief of warranty claim. No actual liability determined, still
16 an unproven claim, but they say that because under
17 2.3(a)(vii)(A), they had assumed this even though it was an
18 alleged breach. They were responsible. So I think that
19 directly contradicts the language that they keep talking about
20 is "pursuant to and subject to the terms" or that there needs
21 to be an actual finding of liability.

22 And I did a little comparison here. When you compare
23 what the arguments were in our underlying class action and the
24 arguments that they've brought forward, and we'll just kind of
25 go through these quickly, but they argue that they weren't

1 defects within the warranty. Well, in both situa -- they made
2 both that argument to us. They said, well, design defects
3 aren't covered. We said, well, yeah, they are, but it also
4 covers manufacturing defects, and they conceded that we had
5 alleged manufacturing defects, as well. In addition to the
6 fact that they paid for the warranty claims to begin with. So
7 now to come back and say well, we shouldn't have paid, that was
8 nonsense. But a lot of these same defenses were brought up
9 over and over and over again. And I think what this shows,
10 they even brought up the fact that it may not have been brought
11 to them within the warranty period. They may not have been
12 given a chance to repair the defects. This is what they said
13 in Florida, and then this is what they said in our case,
14 underlying that, you know, it's not breached unless and until
15 they refuse to repair the vehicle. Of course, that wasn't the
16 issue. The issue was, was it corrected.

17 And then, here in Florida, they actually made the
18 allegation which they denied on our case, there has been no
19 breach of the written new vehicle limited warranty because the
20 subject's vehicle alleged defects have been corrected. So
21 there's a dispute about that, and it's still an assumed
22 liability. And the point is, the existence of defenses in the
23 underlying case aren't what determine whether it's an assumed
24 liability or not. New GM entered into or substituted itself
25 into this case specifically under Section 2.3(a)(vii).

1 So another thing I do want to address before I get to
2 paragraph 56 is that one of the arguments is that this
3 settlement was somehow mutually exclusive from the underlying
4 warranty. And to be clear, the warranty delivered in
5 connection with the sale of the vehicle provided three years,
6 36,000 miles. Sometime later, New GM -- or, I'm sorry, Old GM
7 issued a special policy extending that to five years, 75,000
8 miles. That was not delivered in connection with the sale of
9 the vehicle. Sometime after our lawsuit, the then amended or
10 issued another special policy extending that to cover
11 additional classes of vehicles. And again, that was not
12 delivered in connection with the vehicle.

13 So what we have here is the class judgment applied to
14 all VTI repairs. As a matter of fact, there are two specific
15 things we can point to. We also got GM to pick up towing and
16 vehicle rental as a mandatory requirement, and this particular
17 slide which is part of the settlement agreement, chart B, shows
18 unequivocally, and Mr. Oxford made the argument that this only
19 kicked in after 75,001 mile. That's not true. It's 125,000
20 miles or less. It covers the whole gambit. It basically, as
21 I'll show you in a second, it replaced. Because -- it replaced
22 all the other warranties. It became the warranty. Because in
23 exchange, the class released all of their claims. And this is
24 a particularly important point which they talk about released
25 claims, it's a defined term in the settlement, includes future

1 claims based upon the warranty. So they're releasing future
2 claims under 336 of the warranty. The reason why that's
3 important, that gets back to this concept of evergreen
4 liability. GM could have been having to repair these
5 transmissions for a particular class member for as long as it
6 didn't correct the defect. And so to bite off of that huge
7 chunk of liability, they released that --

8 THE COURT: Well, pause, please, Mr. Schmieder. I'm
9 not sure if I follow that. If Old GM breaches its obligation
10 to deliver the settlement consideration, then that releases --
11 the class member's issue goes down the tubes.

12 MR. SCHMIEDER: I'm sorry, I didn't, there was
13 something that --

14 THE COURT: If GM stiffes the class, Old GM, the party
15 that entered into the contract, unless it's assumed in full by
16 a new obligor such as New GM, if Old GM fails to provide the
17 class with the consideration to which the class bargained for,
18 the class members aren't bound by the releases they gave,
19 right? I mean, if you fail to honor a material obligation of
20 your contract, it excuses performance by the other side. Isn't
21 that the law of New York and most states? Yours may be
22 governed by California law, but I'd be surprised if California
23 law's any different.

24 MR. SCHMIEDER: No, that is true. I mean, the
25 complication here is we do have a final judgment. Now, I

1 understand that we can lift that final judgment for failure --

2 THE COURT: Well, the judgment approves your
3 settlement, but your underlying settlement is a contract,
4 right, governed by contract law, isn't it?

5 MR. SCHMIEDER: That's true, but the judgment became
6 final, and as of that judgment, the judgment released all those
7 claims and it enjoined class members from pursuing any of those
8 claims against GM, any of those old claims.

9 THE COURT: So you're saying I would have to do the
10 additional step of sending something to the Eastern District of
11 California judge and say, hey, Judge, I just want you to know
12 that GM hasn't delivered to the class what they promised, so
13 maybe you want to let the class members off the hook for what
14 they gave up in exchange for getting their consideration of the
15 settlement.

16 MR. SCHMIEDER: Well, I think we would just resolve
17 that with claims against the estate -- the bankruptcy estate.
18 I'm not so sure --

19 THE COURT: Well, as a matter of bankruptcy law, I
20 have held -- and I'm not sure if your opponent is a bankruptcy
21 law, and I think you said you're not, but I do not allow
22 debtors to avail themselves of the benefits of rejected
23 contracts. If you reject the contract, that's a court-
24 authorized breach, and you have to live with the consequences
25 of that breach.

1 MR. SCHMIEDER: That -- well, then --

2 THE COURT: I'm not sure if that's executory contract.
3 One thing I want you to -- I know, we've been going on for over
4 an hour. I want you and your opponent to tell me whether you
5 guys think it's an executory contract because I don't think
6 it's an executory contract or ever was. But assuming that it
7 was, I know a rejection order was entered without anybody
8 bringing this issue to my attention as to whether I should
9 enter it. A debtor can't have it both ways. It can't reject
10 an agreement and avail itself of the benefits of it.

11 MR. SCHMIEDER: I think I tend to agree with the
12 Court. It clearly wasn't an executory contract, and this is
13 why I talked about the subclass. As to the subclass, there was
14 no notice, there was not judgment entered. So the contract as
15 to the subclass, I believe, was executory, as to --

16 THE COURT: What was the subclass obligated to do?

17 MR. SCHMIEDER: The subclass, well, it was obligated
18 to provide a release in exchange, and that release has never
19 been provided because notice had not gone out, and by the
20 time -- the bankruptcy stay stayed the Court from entering
21 judgment as to the subclass. So that truly was -- there were
22 obligations on both sides to provide, and the subclass did not
23 provide the release. The class did provide that release. So
24 this is sort of another twist to the -- so it probably was
25 executory -- it -- I -- the in re: Stone and Webster case, 558

1 F.3d 234 (3d. Cir, 2009) opinion seems to address this issue
2 and talks about -- it would involve a class almost identical
3 facts as ours, except for the subclass concept. And there,
4 they found, just as the Court said, as to that class, it was
5 not an executory contract because the release -- the judgment
6 had been entered and the releases had been given. We just have
7 this additional twist to the case where there's a subclass out
8 there. So I think it executory as to the subclass, but I don't
9 think it is executory. But I know courts have sort of been,
10 based upon the case law I've read, have been all over the place
11 about whether it's an administrative or it's a condition versus
12 a requirement and duty. But I don't disagree with the Court's
13 assessment there, other than to clarify about the subclass.

14 So we know that the class -- and I'm just talking
15 about the class, not the subclass -- we know the class released
16 the future claims, and specifically, in paragraph 12, again,
17 talked about any claims or theories coming into existence in
18 the future based upon the matters raised. So the settlement
19 became the sole agreement with regard to warranties issues
20 related to the VTI transmission. Right there in paragraph 9 --
21 and I flashed it up on the screen for the Court -- of the
22 settlement agreement, it says that the settlement is the sole
23 agreement between the parties regarding the subject matter,
24 which was the VTI transmission, and there are no other
25 agreements. Those agreements have been released.

1 We actually clarified for purposes of this, and I
2 think this is another important point. We clarified that if a
3 class member were to avail itself of these benefits, and have a
4 failure and take it in within the 125,000, seven to eight year
5 time period, and it was replaced, that that -- let's say it
6 happened at 125,000 miles exactly, so it's covered, but now
7 this is the last repair they're going to get. Actually, it's
8 not. We actually provided for, because all of these were
9 released as well, we provided for an additional twelve months
10 or 12,000 miles which was the GM service parts operation
11 warranty. When you look back at the Section 2.3(a)(vii)(A), it
12 talks about warranties in connection with the sale of vehicles
13 or the sale of replacement parts. This is the warranty that's
14 reference in there. It's right there in our settlement, and it
15 provides that that one is not released. So theoretically,
16 somebody could -- there was an element of this evergreen
17 liability, except it was just shortened to twelve-twelve. So
18 if you had a failure at 125,000 miles and another failure at
19 130 within the next year, you've got a hundred percent covered
20 repair. If you had another one at 136, it would just keep
21 going until you got outside of that twelve-twelve additional
22 warranty coverage. And again, that section, paragraph 3, is
23 directly right out of Section 2.3(a)(vii)(A).

24 The actions of the district court and the -- found
25 that the release -- specifically found that the release was

1 tailored to the allegations in the complaint and approved an
2 order the settlement to be implemented -- and I'll just flip
3 through this -- enjoined the class -- this is what I was
4 talking about -- enjoined the class from pursuing any of those
5 warranty claims. So there's nothing left except for this
6 agreement that replaced the warranty.

7 This is the case that I think provides the best
8 guidance. I know, having read the Court's decision in this
9 case, it's -- I can't remember how many pages it was. It's
10 part of the reason why I became dangerous as knowing bankruptcy
11 law because I thought it was a very detailed opinion. But one
12 of the things I know the Court expressed is the importance of
13 predictability in commercial bankruptcy, is to find cases in
14 this district or in other bankruptcy courts with similar facts
15 and to make sure that stare decisis, that this predictability
16 exists for all parties involved. Well, we cited this case in
17 our brief, and I think this case is dead on point. It's the In
18 re: Safety-Kleen Corporation case, 380 B.R. 716. It was 2008
19 opinion, so it's well before this bankruptcy. And in this
20 situation, it involved -- actually, it -- to back up one
21 second, there was a prior opinion where they wanted attorneys
22 held in contempt because they had filed a claim in New Jersey
23 to enforce it, and the Court rejected that and said, no, I'm
24 not going to hold anybody in contempt; they had good faith
25 reason and they're here now. So it's a lot like our situation.

1 But in that case, the purchaser had agreed -- had then brought
2 a counter-DJ action in the bankruptcy court to hold that they
3 did not assume these liabilities. And what happened was Clean
4 Harbors had purchased a division that had entered into two
5 settlement agreements. A chemical division, including a
6 subsidiary, SK Bridgeport. SK Bridgeport was a third party
7 defendant. There were no direct claims, environmental law
8 violations against this entity. But they entered into -- there
9 was a big superfund case. They entered into two settlement
10 agreements which then ultimately became three consent orders or
11 decrees. And by entering into that, they did receive some -- I
12 don't want to call it immunity, but a covenant not to sue from
13 the government and a waiver, or immunity from additional
14 contribution liability. And the argument by the purchaser was
15 well, that is a settlement agreement. It doesn't arise under
16 the environmental laws. And the provision of their acquisition
17 agreement in In re: Safety-Kleen, it used similar language.
18 It didn't use capital L Liabilities as ours did, but it used
19 liabilities and obligations arising under environmental laws.
20 They said, can't be. That's the environmental laws,
21 themselves, is what controls it. And the bankruptcy court
22 disagreed with everyone of their factual and legal arguments
23 and found that the consent decrees and settlement decrees
24 evidence obligations arising under CIRCLA and the spill act,
25 and settled direct and third-party claims arising under or with

1 respect to such statutes. As such, they are liabilities and
2 obligations arising under environmental laws. This is -- I
3 don't want to represent to the Court that this is the only
4 bankruptcy case that uses the term "arising under", but it
5 certainly is the only one we were able to find that had similar
6 language. And so this case, and New GM's response to that was,
7 well, it was simply -- these are matters of contractual
8 indemnity. And the Court addressed that as well and said, but
9 even if they were a product of contractual indemnity, they
10 would have also arisen out of environmental liabilities to
11 governmental agencies. So this ties up my argument earlier
12 about how retained liabilities were defined. Once it's by
13 definition, once it's an assumed, it's an assumed. It's sort
14 of the old saying, "you can't be a little bit pregnant; you
15 either are or you aren't". You're either an assumed liability
16 or you're not.

17 And so this in re: Safety-Kleen case deals directly
18 with the issue before this Court. We think -- it clearly
19 doesn't -- the Court's not bound to follow it, I don't want to
20 say that. But it certainly governs this and provides guidance
21 to this Court. And it's very persuasive, and of course, I
22 would say it's correct. So that is something I think that
23 really hits head on the "all liabilities arising under"
24 language.

25 The other point I want to make is in footnote 2 of New

1 GM's opposition to our summary judgment motion, they make this
2 argument, and you'll notice throughout their briefs, they use
3 "standard warranty," and then they'll say that standard
4 warranty's five/seventy-five. It's just simply not. It's the
5 standard warranty was delivered in connection with the sale of
6 the vehicle was three/thirty-six. But they admit that
7 five/seventy-five, the special policy that they delivered after
8 the sale, falls squarely within Section 2.3(a)(vii).

9 THE COURT: They admit which falls within 2.3(a)(vii)?

10 MR. SCHMIEDER: They admit when -- if I can -- I'll
11 just flip these up real quick -- one more -- back it up one
12 more. The new limited warranty provided three years, 36,000
13 miles. That was at the time of sale. They admit that the
14 special policy, 04020, which took it out to five/seventy-five,
15 and as to certain vehicles was implemented in March 2004, after
16 the sale -- well after the sale. And this is the one that
17 they, after we filed our lawsuit, they entered special policy
18 04020A which extended five/seventy-five out to additional
19 models and model years in January 2008. These vehicles at
20 issue, Your Honor, 2002 to 2005 vehicles. So they admit that
21 these fall squarely within Section 2.3 and -- if you can just
22 go to the next one -- right there, in the special policy, it
23 actually points out that it's being delivered via first class
24 mail, so it wasn't delivered in connection with the sale and
25 the vehicle.

1 Go ahead. And I think this is also important, as the
2 Court wanted me to address if the Court considers parol
3 evidence, what other parol evidence. Well, we've submitted a
4 number of exhibits where New GM was paying this class judgment
5 as to people who had failures, and they were paying them as
6 warranty claims. And we've submitted a few examples, and when
7 you look at the --

8 THE COURT: Paying for those who were beyond their
9 three years, 36,000 miles?

10 MR. SCHMIEDER: Yes, Your Honor. And I apologize. I
11 just -- I can't see the exact mileage on this exhibit that I
12 have up before. But there are examples. For example, it
13 says -- if you can back up one -- for example, it identifies as
14 a warranty policy, but then it has customer -- seventy percent
15 customer pay. Well, if you look at charts A and chart B of the
16 settlement agreement, that was the category of second owners or
17 not original owners who bought it used, over -- between 100 and
18 125,000 miles, GM had agreed to pay thirty percent for that
19 group. And so that reference to seventy percent pay -- and we
20 got examples of -- it was either a hundred percent if you were
21 a new owner under 100,000 miles, and then it went down to
22 seventy-five percent, I believe it was seventy-five percent for
23 used owners under 100,000 miles, and then it went down to
24 thirty percent, over 100,000 miles. And all of these are dated
25 after the closing.

1 And this is, I think, relates to another question that
2 the Court asked me earlier which is well, was it money, was
3 there cash going to these class members, or was it future
4 obligations, and I said it was both. When you do a direct
5 comparison -- I apologize -- I talk too much with my hands; I
6 apologize for that, too. When you compare the special policy,
7 the five/seventy-five, with the class judgment, neither one was
8 delivered in connection with the sale vehicle, the special
9 policy was delivered by mail, the class judgment -- and we've
10 attached all this as exhibits -- this is the sample letter
11 dated March 2004 going out to people. The class judgment,
12 obviously, was delivered by mail as part of the notice.
13 Special policy expanded the warranty period. Here's chart A
14 and chart B of the special policy taking it from three/thirty-
15 six to five/seventy-five -- if you go to the next one. The
16 class judgment did the same thing. Here's chart A and chart B
17 of the class judgment taking it out -- taking, actually, the
18 whole thing over and providing that 125,000 and less, this is
19 what you get. And this is the chart I was talking about, the
20 hundred percent, seventy-five percent, seventy-five and thirty,
21 those quadrants. Those are the ones that when you look at
22 those exhibits, New GM was paying precisely according to that
23 chart after the closing. This is another -- these are
24 indistinguishable. The special policy had a reimbursement
25 claim form. So when they mailed out this letter, they said if

1 you paid for anything outside of your warranty period, here's a
2 claim form you fill out. Now this, according to them, this
3 claim form falls squarely within Section 2.3(a)(vii)(A). Well,
4 if you go to the class judgment, of course, there was a
5 reimbursement claim form for the class judgment as well. And
6 then the last thing that it did was the special policy provided
7 discretion to provide rental coverage; it's beyond the original
8 three/thirty-six warranty. And our settlement took that
9 discretion away and just said no, you're going to pay rental,
10 towing, and we actually had a category of if somebody had
11 traded in their vehicle at a loss, they would get compensated
12 for that as well. So when you compare the special policy with
13 the judgment, according to New GM, one's an assumed liability,
14 it falls squarely within it, and the other one somehow doesn't.
15 And I think that answers the "all liabilities arising out of"
16 language.

17 And this is something that was in our brief. I won't
18 go over it again. We sort of charted their admissions and --

19 THE COURT: Yes, it was in your brief. And apropos
20 that, Mr. Schmieder, you've now gone on almost an hour and a
21 half. How much more do you have?

22 MR. SCHMIEDER: I have just a few more slide, Your
23 Honor.

24 THE COURT: I care more about your points than your
25 slides.

1 MR. SCHMIEDER: Okay, if you could --

2 THE COURT: No, tell me the points you want to make,
3 and use visual aids if and only if you need them.

4 MR. SCHMIEDER: I'm at the point where I want to talk
5 about -- address the Court's questions about the sale order --

6 THE COURT: Okay.

7 MR. SCHMIEDER: -- paragraph 56. I just want to
8 emphasize again, even under paragraph 56, we still prevail
9 because we did bring a lawsuit pursuant to and subject to the
10 terms of the warranty. As a matter of fact, we were trying to
11 impose those terms upon GM. But I do want to point out that,
12 as I said before, according to the Section 9.6, only the
13 parties may amend the ARMSPA. It's got to be a signed writing.
14 There are two exceptions, 5.2(b) and 9.8, where if something's
15 illegal or invalid or in violation of the law, the Court
16 obviously can strike it out and place an equitable provision in
17 there. I don't think there's anything about a warranty that
18 this provision of assumption violates any law whatsoever.

19 The Court's role, as the Court recognized, the Court's
20 role was to determine if this was an appropriate sale, to see
21 if this maximized or got the best consideration for the
22 bankruptcy estate. And then this is the point that -- I went
23 back and I read the Court's decision, which the cite is 407
24 B.R. 463, which is, oh, I don't need to tell you what it is, I
25 apologize. But in that decision, the Court quoted Section

1 2.3(a)(vii)(A), right on page 483. Didn't use the language in
2 the sale order. It said, I'm approving this, and by the way,
3 as an additional point, I just want to point out, they're
4 assuming all liabilities arising under express written
5 warranties. There was no further discussion, other than to use
6 basically the same language that was in the ARMSPA. The Court
7 approved the transaction, entered an order in accordance with
8 its decision, and in footnote 143, identified three spots in
9 the sale order that the Court was going to -- in the proposed
10 sale order that the Court was going to amend. Those three
11 spots, none of which discussed paragraph 56, I don't -- and --

12 THE COURT: Well, time out. I have some difficulty
13 seeing how, when I issued that decision on the 4th of July
14 weekend, the sale order implementing that decision was already
15 in existence. I would have thought that I issued that after
16 deciding the written decision. I think I issued it either that
17 same night or the next night, but I had first done the judging
18 in the order implemented in my ruling.

19 MR. SCHMIEDER: That's exactly right. You entered it
20 both on July 5th. And my point is, on page 483, the only
21 reference to the section that we're talking about said --
22 repeated the language in the ARMSPA. Didn't say it was going
23 to be changed, didn't say that there was a controversy before
24 the Court. And that's the other thing, and we briefed this,
25 and I won't -- but there's no issue of preclusion, here. There

1 was no actually litigation there.

2 But then I think -- this is an important part -- one
3 of the things that the Court did address was a different
4 provision. There were some objectors, and I can't recall
5 specifically who -- I think -- I don't know if it was a New
6 York Attorney General and an Indian tribe about some
7 environmental law concerns. And when you contrast paragraph 56
8 with paragraph 62 -- and we'll flash it up here -- paragraph 62
9 specifically points out that this is what the parties had said
10 they were going to do. They were going to change a few things.
11 And the order details it. It says the definition of
12 environmental laws in the MPA shall be amended to delete and
13 then quote specific language. And then for purposes of
14 clarity -- there was some ambiguity about insurance coverage
15 matters -- and specifically references the section, Section
16 2.3(b)(10) and provides an analysis of what it means. That
17 didn't happen in paragraph 56.

18 THE COURT: So your point being that when I wanted my
19 order to trump the sale agreement, I knew how to do it.

20 MR. SCHMIEDER: Yes, and either you or the parties who
21 prepared the proposed order, because I don't think this is one
22 of the -- I think this is one of the things that you may have
23 discussed with them, from what I gathered from reading your
24 decision, and that you said you were -- I don't want to
25 misquote you, but I think you said you were pleased with the

1 progress they had made in amending certain parts of the sale
2 order. And this was -- but this was a specific reference to
3 that, and that didn't happen in paragraph 56.

4 And then there was -- as, you know, there's no mention
5 of any modification in paragraph 56 of 2.3(a)(vii), but here's
6 the other point. Section 6.15(b) uses the identical language
7 as 2.3(a)(vii)(A). And what it does is it imposes an immediate
8 obligation upon New GM that from and after the date of the
9 closing, they've got to perform and pay -- administer, perform,
10 and pay -- there's some specific language -- all liabilities
11 arising under express written warranties, delivered in
12 connection with the sale. That exact language is in Section
13 6.15(b). So if paragraph 56 was going to modify one section,
14 let alone two, it would have referenced them. And that brings
15 me to another point, which is, earlier, I had said that the
16 parties had read and reviewed and clarified and ratified three
17 times, Section 2.3(a)(vii). They did it six times, because the
18 exact same language is in 6.15(b), and they never altered that
19 language either. And so when you read paragraph 56, and it's
20 difficult for me because I didn't draft it, but when you read
21 it, it says they are assuming certain things and they're not
22 assuming other things, and there's a big hole. There's a big
23 hole. There's things that can fall into a hole that isn't
24 addressed there. Why that's there, I believe I understand.
25 The reason is because they said they were spending 273 million

1 dollars a month on warranty claims, and I think that was a
2 specific point of why this was a fair deal -- fair 363
3 transaction, was because they were taking this enormous
4 obligation, and they were going to pay immediately and do it.
5 But that doesn't purport in any way to limit the ARMSPA. As a
6 matter of fact, throughout -- and I believe in paragraph 67, it
7 says the ARMSPA, the failure to mention a specific term of the
8 ARMSPA does not mean it is not in full force unless modified
9 herein. There was a clear modification of the provision in
10 paragraph 62 that we talked about. I don't think there's a
11 modification here.

12 It just -- and, the result of this would
13 be -- and this is what I can't explain -- but the result of
14 this would be, as New GM says we're trying to shift a huge
15 liability on them, well if we're right, the only way paragraph
16 56 comes into play is if we're right about the ARMSPA language.
17 I mean, if we lose on the ARMSPA, there's no need to even
18 consider paragraph 56. But if we win, New GM has to argue that
19 the sale order somehow effects that is outcome determinative.
20 It affects that outcome in that it would shift back a liability
21 that would otherwise be assumed; sixty to a hundred million
22 dollar liability is what was estimated in the Eastern District
23 of California. And, you know, this was -- some of my briefing
24 on this was -- the whole point is that purports to say that the
25 Court was giving them a sixty to a hundred million dollar

1 discount at the very end, if this is outcome determinative.

2 And I just don't think it is.

3 But, the last point I want to make, is under this
4 language in paragraph 56, and this, I think, brings it full
5 circle, and I'm going to end on this point unless the Court has
6 any additional questions, it doesn't address the special
7 policy. Pursuant to and subject to the terms and conditions of
8 the express written warranty delivered in connection with the
9 sale of the vehicle does not include the special policy
10 five/seventy-five coverage. Yet New GM has substituted itself
11 in a Florida case and has admitted to this Court that that
12 special policy five/seventy-five falls squarely within
13 2.3(a)(vii)(A). And so I believe that that answers all of your
14 questions. And I did mention that if the Court does
15 consider -- I don't think this is parol evidence. I don't
16 think it has any binding effect. I believe that even if the
17 parties drafted this, they needed to sign it to be effective
18 under the ARMSPA, if that's really what they wanted to do, but
19 I think there's other parol evidence of them paying claims,
20 their entry into the Florida case, and their admissions in this
21 case that establish that there's no difference between the
22 class judgment here and the special policy that they say falls
23 squarely within that language.

24 For those reasons, we ask the Court to enter judgment
25 in our favor on Count I of our amended complaint.

1 THE COURT: All right. We'll take a ten-minute
2 recess, and I'll hear from Mr. Oxford.

3 (Recess from 11:25 a.m. until 11:34 a.m.)

4 THE COURT: All right, Mr. Oxford.

5 MR. OXFORD: Yes, Your Honor. Thank you. The issue
6 here, really is whether Old GM and New GM intend to transfer
7 this liability under the settlement agreement. Your Honor
8 inquired, I think, at the start about manifestations of intent.
9 I think there are three manifestations of intent that basically
10 show that this liability was to remain with Old GM. The first
11 there's Section 2.3, itself, with or without paragraph 56.

12 Second, there's the fact that instead of assigning
13 this asset to New GM, the debtor, in fact, rejected it and
14 leaving aside the issue Your Honor raised about whether it was
15 appropriate to approve that rejection or not, the parties
16 manifested that intent.

17 And the third is the settlement, whether it's an
18 executory contract or not. It fits the definition of an
19 excluded contract. It's therefore an excluded asset and the
20 specific provisions in the agreement save GM of any liability
21 under any excluded contracts. I would like to address those
22 three elements, if I can.

23 Starting with Section 2.3(a)(vii)(A), that provision
24 refers to the standard warranties I think Mr. Schmieder
25 acknowledged this morning. And that document has four corners,

1 very specific terms. There's a period of time and a mileage,
2 of which GM, in this case, extended. It's the same warranty,
3 just extended the terms. And there's an exclusive repair
4 remedy; if the customer brings that in during the warranty
5 period, we will fix the vehicle or like repairs.

6 THE COURT: Pause, Mr. Oxford. Does that mean fix or
7 does it mean fix and solve the problem, so by way of example,
8 if they fix it but it turns out not to have been a satisfactory
9 fix, is it still covered under the warranty?

10 MR. OXFORD: Yes, it is, if the warranty period is not
11 expired and/or if the additional twelve month, 12,000 mile
12 warranty for the new part hasn't expired.

13 THE COURT: Suppose the -- it's brought in within the
14 warranty period but they don't get it right within the warranty
15 period?

16 MR. OXFORD: Well, as I said -- I'm not sure I follow
17 the question, Your Honor, but if it's within the twelve months
18 after the repair, it's covered. If it's not, it's not, if the
19 original warranty period is expired.

20 THE COURT: Um-hum.

21 MR. OXFORD: And that leads sort of to my point, here,
22 Your Honor, about the four corners of that document. They made
23 some arguments that are different kinds of warranty arguments.
24 They said the limitations are unconscionable. Okay, well, they
25 either are or they aren't. That is not a claim that originates

1 in the express warranty; it's an argument whether the warranty
2 ought to apply and whether they ought to be able to, you know,
3 enforce some other kind of a liability. They argue warranty by
4 description was in Section 2.313 of the UCC, that I think Mr.
5 Schmieder cited. That would be, for example, an advertising
6 brochure that said it had an eight cylinder engine that's only
7 six. You know, that advertising statement is a warranty. But
8 it's not -- a claim under that kind of a warranty is not a
9 claim within the four corners of a standard issue warranty.

10 So in the class action, what they were arguing was not
11 that, you know, their clients, what they brought in, what they
12 were going to fix, leaving aside whether the fix ultimately was
13 effective. What they were saying, basically, is we want
14 something, conditions even different than that which is
15 provided by the four corners of the warranty. We want monetary
16 compensation, which isn't provided by the standard warranty.
17 We want a fix after the warranty is expired, which isn't
18 provided by the warranty. We want towing, which isn't provided
19 by the warranty.

20 To use their own definition which they even used in a
21 brief, and I think heard repeated this morning, "arising under"
22 means to originate from source. A claim that is not covered
23 under the four corners of a standard warranty has to arise from
24 something else, from a different source, not under the
25 warranty. Now, the fact that the plaintiffs pleaded and

1 litigated these different warranty claims in the underlying
2 class action doesn't cause the settlement liability to be a
3 liability on any kind of warranty, either the standard or the
4 additional warranty periods that they argued. The settlement
5 says GM doesn't admit any liability. And of course, there are
6 four different claims, here; the warranty claim, the non-
7 standard warranty claim they made was only one of them. So
8 these plaintiffs agreed with Old GM -- you know, Old GM was not
9 admitting liability. And now they're arguing, basically,
10 contrary to the terms of the settlement agreement, that that
11 settlement agreement constitutes an additional liability; just
12 isn't right.

13 Now, that takes me to paragraph 56. I think, Your
14 Honor, paragraph 56 and (vii)(A) are basically saying the same
15 thing. And I say that because, as I said, the standard
16 warranty has four corners. Within those four corners are
17 conditions and limitations. And they are there, whether or not
18 paragraph 56 ever exists. So with respect to 56, in a sense,
19 it doesn't matter because, you know, the standard warranty
20 language gets us to exactly the same place.

21 Now, just pausing for a minute to consider the
22 question of amendment. Remember, the parties to this agreement
23 were Old GM and New GM. And they basically presented to Your
24 Honor, I believe, a form of agreement which included paragraph
25 56 which either says the same thing or is a clarification of

1 (vii)(A) of Section 2.3(a). And it doesn't say this is an
2 amendment; it doesn't say it's a clarification. It just says
3 what it says. But none of the parties of the agreement stood
4 up and said, well, you know, this is a change in the agreement;
5 we don't agree to it, Your Honor. In fact, they did agree to
6 it because they presented it to Your Honor for signature. And
7 you know, without speculating about your own thought process,
8 my guess is, Your Honor, you had a lot of things you were
9 thinking about when you were going through this order. The
10 agreement does say, basically, that anything here that is
11 contrary to the ARMSPA, the agreement controls, and I assume
12 that was done for a purpose.

13 Whether this is parol evidence or not, I'm not sure,
14 Your Honor. But as I said, I think, you know, even if you say
15 this is parol evidence and we're not going to consider it, the
16 standard warranty language gets us to exactly the same place.
17 And to the extent that the language and the manifestations of
18 the parties, objectively, are sufficient to show that Old GM
19 and New GM did not intend to transfer this liability, then it's
20 inappropriate to consider any parol evidence, including the
21 dealership records that Mr. Schmieder talked about or someone
22 at the dealership writes on an invoice warranty, as opposed to
23 customer paid doesn't say anything at all about whether that
24 liability is a liability in the standard warranty.

25 So again, I think the language is very clear that what

1 they are -- what they tried to get in the class action and
2 achieved with the settlement are things that simply do not fall
3 within the four corners of the standard warranty.

4 That leads to the second manifestation of the intent
5 (indiscernible), Your Honor, and that is again, the debtor and
6 New GM -- actually, it was the debtor -- the debtor presented a
7 motion to Your Honor saying we would like to reject this
8 executory contract in the settlement. And leaving aside
9 whether there's an issue about whether the contract's
10 executory, and I think it is --

11 THE COURT: Why?

12 MR. OXFORD: -- the intent clearly --

13 THE COURT: Why, Mr. Oxford?

14 MR. OXFORD: I'm sorry, I didn't hear you.

15 THE COURT: Why do you contend that it's executory?

16 MR. OXFORD: The construction of the settlement
17 basically was here's a judgment and the judgment calls for two
18 parties to basically implement the settlement. Old GM was to
19 send out claim forms in order to ascertain from the class
20 members whether or not they had a claim, decide what the nature
21 of the claim was, and look if the class member is indeed
22 intending to claim. That never happened. The class member was
23 out probably about sending the claim form in, and then GM would
24 have had to have evaluated whether or not it was a proper
25 claim, argued with the plaintiffs' lawyers if there was a

1 dispute, and finally make a determination against
2 (indiscernible) point. So there was material performance on
3 both sides. The class members had to submit a claim, telling
4 GM what they thought they had to pay, while Old GM had to
5 evaluate the claim.

6 THE COURT: Do you contend that New GM could have sued
7 a class member to require them to put in a claim?

8 MR. OXFORD: I don't know why they'd want to do that,
9 Your Honor.

10 THE COURT: Well, isn't that what the Countryman test
11 requires? If it's a material obligation, as compared -- you
12 understand the difference between a covenant and a condition?

13 MR. OXFORD: Yes.

14 THE COURT: Okay, well, I think everybody in the room
15 would agree that if you don't file a claim form, you can't
16 secure the benefits of the settlement, but there wasn't
17 anything in the deal that required the class member to put in a
18 claim form, was there?

19 MR. OXFORD: That's correct, Your Honor.

20 THE COURT: So it seems to me that what the class
21 member was going to do would be a condition to recovery as
22 contrasted to a covenant on the part of the class member.

23 MR. OXFORD: I think that's right, Your Honor, but
24 again, my point is, regardless of whether this is properly
25 analyzed as an executory contract, the debtor, filing the

1 motion for rejection, clearly manifested its attempt that this
2 liability was to stay within Old GM. That's my only point.

3 THE COURT: So your point is that the debtor was right
4 or wrong in believing it to be an executory contract, it still
5 evidenced an intent that it was to not perform obligations
6 under the settlement agreement.

7 MR. OXFORD: It expressed the intent that the
8 obligations of the settlement agreement were obligations of the
9 debtor. And just to drop the other shoe, Your Honor, what I'm
10 talking about here is filing a motion for rejection was
11 basically an interpretation of the contract by conduct. In
12 other words, by doing that, New GM confirmed that its intent
13 all along had been that this was an obligation of Old GM, not
14 to return to New GM with the asset purchase agreement.

15 THE COURT: Go on.

16 MR. OXFORD: And that leads directly, Your Honor, to
17 my third manifestation of intent. If you look at the language
18 starting on Section 2.1, basically, you have a description of
19 what assets New GM is going to purchase and what assets New GM
20 is not going to purchase. So if you go to Section 2.2(a),
21 there's a list of a whole bunch of different kinds of purchased
22 assets. And in each case, the purchased asset is modified by a
23 clause that appears, I think, at the start of Section 2.2(a),
24 which basically says, here are all the categories of purchased
25 assets; in each case, it excludes something called capital

1 (indiscernible); it excludes the capital (indiscernible)
2 assets.

3 Then if you go to Section 2.2(b)(vii)(C) and (E), we
4 find that excluded assets includes two different kinds of
5 contracts. Under C, I think I have it right -- under C, we
6 have executory contracts, and under E, we have contracts that
7 are not executory but under which material performance is still
8 due. So whether or not there is an executory contract, the
9 definition of Section 2.2(b)(vii)(C) and (E) characterize this
10 settlement agreement as an excluded asset.

11 And if you go on past 2.3(a) --

12 THE COURT: Pause. Pause, please, Mr. Oxford.

13 MR. OXFORD: Yes.

14 THE COURT: You're saying that the settlement
15 agreement was expressly identified as an excluded asset?

16 MR. OXFORD: No, I'm saying it fit the definition
17 either in 2.2(b)(vii)(C) or 2.2(b)(vii)(E), not specifically
18 identified, you know, the settlement agreement between Castillo
19 (ph.) and Old GM. But it was either an executory contract or
20 it was a contract -- perhaps it would be better for me to get
21 the exact language so I don't misstate it. Just a sec, here.
22 Just one second. Under C, all prepetition executory contracts
23 that are not designated or deemed to be assumable, which this
24 one is not. And then E is all nonexecutory contracts for which
25 performance by a third party or counterparty is substantially

1 complete, and for which a seller owes a continued or future
2 obligation (indiscernible) nonmonetary executory contracts. So
3 basically, under the settlement, Old GM pulled the money and
4 would fit that definition, even -- or, actually, in the case in
5 which the Court were to find that it was not an executory
6 contract, under letter C.

7 So once you get there, Your Honor, we have a category
8 in which the settlement falls: excluded assets and excluded
9 contracts. And if you go to Section 2.3(b)(vii), that protects
10 GM against liability arising out of excluded assets, which the
11 definition includes excluded contracts.

12 And that's basically our argument, Your Honor. This
13 was not the type of warranty liability, if it's a warranty
14 liability at all, which it isn't, that fits within the four
15 corners of 2.3(a)(vii)(A).

16 I'd also like to say, Your Honor, just in terms of
17 where we are with our three motions. I'm also a bit on the
18 tentative on the 12(b)(6) that you mentioned at the outset. We
19 believe that we're entitled to summary judgment on all of the
20 plaintiffs' causes of action, and we believe we're entitled to
21 a declaration that New GM has no liability whatsoever on the
22 settlement.

23 THE COURT: Um-hum. You want to address Mr.
24 Schmieder's point that when the warranty was increased from
25 three years, 35 or 36,000 miles up to five years and 75,000

1 miles, by definition, that wasn't provided to the consumer at
2 the time of the purchase of the vehicle?

3 MR. OXFORD: Yeah, I think my basic answer to that
4 argument is that it doesn't matter, but let me tell you how I
5 get there. First off, I believe the mechanics of the special
6 policy were simply that we increase the time and mileage limits
7 of the standard warranty. Certainly, that was functionally
8 what happened. And I think where Mr. Schmieder's argument
9 leads, basically, is that New GM, now, could, if it wanted to,
10 only honor warranty claims within the three years and 36,000
11 miles. The fact that we've chosen not to do that, but instead
12 honor the five/seventy-five, and most recently, with New GM to
13 provide an additional benefit for people to go beyond those
14 mileage limits doesn't speak at all to the question whether
15 liability under the settlement, which again, is not a liability
16 that arises out of the four corners of the standard warranty,
17 whether it's three/thirty-six or five/seventy-five, fits within
18 the confines of 2.3(a)(vii)(A) because that settlement simply
19 doesn't fit within the four corners of the standard warranty
20 regardless of what the time or mileage limits might be.

21 THE COURT: All right.

22 MR. OXFORD: I think I'd just like to say a little bit
23 more, too, Your Honor, about this kind of "arising under". You
24 know, I -- there's a lot of discussion this morning about that
25 and in the briefs, but I sort of -- I leave a lot, but I think

1 the issue is decided once you accept the plaintiffs' definition
2 of originate from the source. This settlement liability is
3 originally for many obligations of Old GM encompassed within
4 the four corners of the standard warranty.

5 And the Safety-Kleen case is a different contract. In
6 that case, I believe it was a consent decree where, basically,
7 liability under the environmental laws that was admitted.
8 Here, GM did not admit liability under warranty or, let alone,
9 the four corners of the standard warranty. And what happened
10 on the Safety-Kleen case was, basically, when one of the
11 parties decided cleverly, gee, this isn't really environmental
12 because we signed a contract, basically, agreeing to accept
13 part of the environmental liability. There wasn't any question
14 about the character of the liability, Your Honor, but here,
15 there clearly is.

16 THE COURT: All right. Anything else? Anything else,
17 Mr. Oxford?

18 MR. OXFORD: Not that I can think of, Your Honor. If
19 Mr. Schmieder gets up and says something new, of course, you
20 said I had an opportunity to respond to that. And of course,
21 if you have any -- if Your Honor has any questions, of course,
22 I'd sure like a chance to answer them.

23 THE COURT: All right, I asked them as I went along.

24 MR. OXFORD: Okay.

25 THE COURT: Mr. Schmieder, I'll give you a chance for

1 a brief reply, limited in scope and time to what we heard from
2 Mr. Oxford. And obviously, I'm talking about much briefer than
3 your initial remarks.

4 MR. SCHMIEDER: Yes, Your Honor. If I take his
5 arguments in reverse order, he talks about this being an
6 excluded asset. That just doesn't pass the smell test. This
7 is a liability. I don't know how this could ever be -- this
8 judgment could ever be --

9 THE COURT: Please don't use the same kind of ad
10 hominem expressions that I criticized Mr. Oxford for.

11 MR. SCHMIEDER: I apologize. It's just simply not an
12 asset as contemplated by the ARMSPA. It is a liability.

13 As far as being an executory contract, I just wanted
14 to correct a cite that I gave the Court earlier. I believe I
15 misspoke and gave the wrong case cite. The case I was
16 referring to was the In re: Columbia Gas System, Inc. case, 50
17 F.3d 233, 1995 Third Circuit case where it involved the class
18 action case that I discussed earlier that said the release had
19 already been given and it was not executory.

20 Clearly, with regard to what it meant for Old GM to
21 cancel the contract, I think if the Court recognizes the time
22 line, Old GM didn't move to reject, I guess is the proper term,
23 that contract until after the closing, after our declaratory
24 judgment action was filed, and after New GM said it was
25 fighting us and claimed it did not assume these liabilities.

1 That left Old GM in a position, well, if they hadn't -- if New
2 GM hadn't assumed it, they better reject it quick just to the
3 extent they could to cut off their liability. I don't think it
4 implies anything more than that. I think that was just having
5 good representation at the time to make sure that if for some
6 reason it was construed that New GM was correct, then it would
7 be a liability against the bankruptcy estate instead of letting
8 that continue to tick along, why not reject if they could.

9 As far as the special policy, it doesn't matter, that
10 somehow this was a voluntary undertaking by New GM that's
11 directly contrary to footnote 2, which I brought up to the
12 Court where they admitted that the special policy falls
13 squarely within Section 2.3(a)(vii)(A).

14 Unless the Court has any questions, I believe I
15 answered all the points that Mr. Oxford raised without
16 repeating my arguments from earlier.

17 THE COURT: Okay. Thank you.

18 MR. SCHMIEDER: Thank you, Your Honor.

19 MR. OXFORD: If I may, Your Honor, two or three
20 points.

21 THE COURT: Yes.

22 MR. OXFORD: First, Mr. Schmieder's right about the
23 timing of the rejection motion, but there's evidence before
24 you -- I think it's uncontradicted -- that Old GM, long before
25 that, indicated its intent to "reject later" this particular

1 settlement agreement.

2 And the reason this is an excluded asset, Your Honor,
3 if you go back to the ARMSPA -- let me make sure I have the
4 right thing here, yeah -- under Section 2.2(a), the purchased
5 assets exclude the excluded assets. Under 2.2(b), there's a
6 definition of "excluded assets" which includes in (b)(vii) -- I
7 got the wrong one -- which includes, yes, in (b)(vii)(C) and
8 (E), executory contracts and nonexecutory contracts. After
9 all, as Your Honor observed before, there's a judgment here,
10 but the underlying settlement is a contract. And so it's an
11 excluded contract, and it's an excluded assets, and therefore,
12 under the other provision I cited, New GM is protected from any
13 and all liability under that contract.

14 THE COURT: All right, anything else? All right. I
15 hear nothing else.

16 All right, sit in place for a second, both sides.

17 All right, gentlemen, I'm going to rule in accordance
18 with my tentatives on all issues. And I will provide you with
19 the high points of the reasons for that in a couple of hours,
20 perhaps 2 o'clock eastern time, if I can get it done by then,
21 or whatever it takes thereafter, if that's insufficient,
22 reserving the right to supplement them further if either of you
23 thinks you want to go for leave to appeal.

24 Arrange for a continued call-in at 2 o'clock or be
25 back at the courthouse by 2 o'clock. Those in the courtroom

1 have the ability to call in if they prefer. We're in recess.

2 MR. OXFORD: Thank you.

3 (Recess from 12:01 p.m. until 2:49 p.m.)

4 THE COURT: Be seated, please. All right, I apologize
5 for keeping you all waiting. Mr. Oxford, you're on the line,
6 also?

7 MR. OXFORD: I am, Your Honor.

8 THE COURT: All right.

9 In this adversary proceeding under the umbrella of the
10 Chapter 11 cases of Motors Liquidation Company, which I'll call
11 Old GM, seven individual plaintiffs, who were class
12 representatives in a prepetition lawsuit in California against
13 Old GM that was certified as a class action for settlement
14 purposes, who I'll call the class action plaintiffs, seek a
15 declaratory judgment from me that the entity that acquired Old
16 GM's assets, now called General Motors Corporation and that
17 I'll call New GM assumed Old GM's liabilities under the
18 settlement. Those liabilities include undertakings to provide
19 warranty coverage for Saturn vehicles beyond those that were
20 expressly provided on the original sale of the vehicles, and it
21 appears paying an estimated eight to twelve million dollars to
22 class members for repair costs where they had to shell out cash
23 for repairs and approximately four million dollars in legal
24 fees to the class action plaintiffs' counsel.

25 On the merits of the underlying assumption of

1 liability issue, each side moves for summary judgment against
2 the other. Additionally, the class action plaintiffs move
3 under FRCP 12(p)(6) to dismiss New GM's counterclaims against
4 the class action plaintiffs and their counsel for contempt and
5 damages for allegedly violating two provisions of the sale
6 order which variously enjoined proceeding against New GM on
7 certain types of claims which should have been asserted against
8 Old GM and for commencing or continuing litigation to do so.

9 The two summary judgments in each direction are
10 denied. Issues of fact make summary judgment inappropriate at
11 this point. The 12(b)(6) motion is granted to the extent New
12 GM seeks contempt or damages for proceedings before me for an
13 interpretation of the asset purchase agreement, my 363 order,
14 and the effects of the steps in Old GM's bankruptcy case that
15 took place before me. But it's denied insofar as it seeks that
16 relief from the class action plaintiffs' decision to bring this
17 action in Delaware Chancery Court where this action was
18 initially commenced.

19 The principal bases for my decision may be summarized
20 as follows. If either side wishes to go for leave to appeal on
21 these determinations, and not to put on its evidence before me
22 at trial, which of course would be a bench trial on these
23 issues, I'll consider then if I want to supplement this
24 summary. As is widely known, Old GM sought to sell most of its
25 business to an entity now known as New GM with New GM assuming

1 some but quite a bit less than all of Old GM's liabilities.
2 The sale was under a so-called amended master sale and purchase
3 agreement, which the parties have referred to in their briefs
4 as the ARMSPA to contrast it to an original master sale and
5 purchase agreement referred to in the briefs as the MSA. They
6 differ in respects that don't yet appear to be material to this
7 controversy, if they ever will. For ease of understanding, I'm
8 going to refer to the ARMSPA instead of by its acronym, as the
9 sale agreement, except where I have to contrast it with the
10 original MSA.

11 Section 2.3 of the sale agreement provided in relevant
12 part, subsection a, the "assumed liabilities" shall consist
13 only of the following liabilities of sellers, (vii) in the
14 whole, it's lower case, (A) all liabilities arising under
15 express written warranties of sellers that are specifically
16 identified as warranties and delivered in connection with the
17 sale of new, certified used, or preowned vehicles or new or
18 remanufactured motor vehicle parts or equipment (including
19 service parts, accessories, engines and transmissions)
20 manufactured or sold by sellers or purchaser prior to or after
21 the closing, and (B) all obligations under lemon laws.

22 The sale order provided, in its paragraph 56, the
23 purchaser is assuming the obligations of the sellers pursuant
24 to and subject to conditions and limitations contained in their
25 express written warranties which were delivered in connection

1 with the sale of vehicles and vehicle components prior to the
2 closing of the 363 transaction and specifically identified as a
3 "warranty." The purchaser is not assuming responsibility for
4 liabilities contended to arise by virtue of other alleged
5 warranties including implied warranties and statements in
6 materials such as, without limitation, individual customer
7 communications, owners manuals, advertisements, and other
8 promotional materials, catalogs and point-of-purchase
9 materials. Notwithstanding the foregoing, the purchaser has
10 assumed the seller's obligations under state "lemon law"
11 statutes which require a manufacturer to provide a consumer
12 remedy when the manufacturer is unable to conform the vehicle
13 to the warranty as defined in the applicable statute under a
14 reasonable number of attempts, as further defined in the
15 statute, and other further regulatory obligations under such
16 statutes.

17 I note in that connection, that is in connection with
18 my reading to paragraph 56, that contrary to New GM's
19 paraphrase of paragraph 56 on page 3 of its opening brief on
20 its own motion for summary judgment and perhaps in other
21 places, as well, paragraph 56 does not precede the quoted
22 language by saying that New GM assumed Saturn warranty
23 obligations "only" in accordance with the language in the first
24 sentence that I quoted.

25 Also, the sale agreement provides expressly that it

1 "may not be amended, modified or supplemented except upon the
2 execution and delivery of a written agreement executed by a
3 duly authorized representative or officer of the parties." And
4 while it's thus agreed that the sale agreement provides that it
5 can't be amended without complying with specified formalities,
6 those formalities weren't complied with in any respects
7 relevant here. And while it's also agreed that the sale order
8 can, in the case of any inconsistency with the sale agreement,
9 trump the sale agreement, the record is clear that in one or
10 more other instances when the sale order did do so, it did so
11 in very explicit terms. It's undisputed, or should be, that if
12 New GM didn't assume liability under the settlement agreement,
13 there's still liability on the part of Old GM, and that the
14 class action plaintiffs would have a good claim, subject only
15 to fixing its amount, against Old GM. But of course, such a
16 claim would be far less valuable than a claim against New GM.
17 Other facts may appear in connection with the legal discussion
18 that follows. The sale agreement contained a choice of law
19 provisions specifying that the Bankruptcy Code and New York law
20 would govern the interpretation of the contract. I construe
21 the contract accordingly under New York law, though what we're
22 really talking about is fundamental contract law principles
23 which, so far as I'm aware, wouldn't be different if any other
24 law applied. Likewise, I construe my sale order which was
25 entered under my authority as a core matter under 28 U.S.C.

1 Section 157 under federal law, but once more, I'm talking about
2 fundamental principles, and I don't know any other law that
3 would cause me to come to any different approach. Ultimately,
4 this is a matter of classic contract interpretation. If the
5 contract is unambiguous, I'll enforce it as written. Is it is
6 ambiguous in a material respect, I need to consider parol
7 evidence. Here, there's no way that I could or should grant
8 summary judgment in favor of the class action plaintiffs, and
9 though the matter is closer, I don't think that I can or should
10 grant it in favor of New GM, either. If the contract were
11 unambiguous, I might have to construe it in accordance with
12 those unambiguous terms as covering something, even if that
13 hadn't been the party's intent. But if it isn't clear, I think
14 it's a classic issue of divining the party's intent. Here,
15 each side argues that the contract is unambiguous in its favor.
16 I don't agree. I don't conclude that simply because the two
17 sides take opposing views. Rather, it's because I myself find
18 such ambiguity. And while I think I have a sense of what Old
19 GM and New GM were driving at when they crafted Section
20 2.3(a)(vii), I'm not of a mind to conclude now that the view
21 they might espouse and what I thought they might be driving at
22 is the only meaning.

23 First, I can't agree with the class action plaintiffs'
24 contention that the broad definition of "liabilities" has
25 anything significant to do with this controversy. Of course

1 it's broad. But the definition of liabilities isn't the point.
2 Liabilities is followed by many words in the contract that
3 define the types of liabilities that are covered. The words
4 that follow start with the words, "arising under," and then
5 continue, as relevant here -- I quoted the full language
6 earlier -- with express written warranties of sellers that are
7 specifically identified as warranties and delivered in
8 connection with the sale of new, certified, used or pre-owned
9 vehicles. That's what we have to focus on.

10 "Arising under" is subject to a double-entendre or
11 perhaps triple or quadruple entendres. In the Article 3 sense,
12 it may have one meaning. Some of the case law that was brought
13 to my attention is in that context. In the arbitration sense,
14 it may have another meaning, perhaps broader. Other authority
15 that was put to me is in that context. And in the contractual
16 sense, it can have those or other meanings, ultimately
17 depending on the intent of the parties, including as argued by
18 New GM, having their "origin" or "source" in the standard
19 Saturn warranty, which the provision, in New GM's view,
20 describes. It's not clear to me, as a matter of law, that Old
21 GM and New GM intended to use one of those alternate "arising
22 under" meanings over another. Once we have that ambiguity, the
23 task, as with any contract, is to ascertain the parties'
24 intent. I certainly can't consider the class action
25 plaintiffs' contention as to the intent underlying that

1 expression as justifying summary judgment in their favor, nor
2 can I accept New GM's contentions as to the very different
3 meaning of "arising from" in the absence of a more developed
4 record concerning Old GM's and New GM's intent as to whether or
5 not 2.3(a)(vii) was to cover the settlement agreement
6 obligation.

7 Now, New GM points to three things that it contends
8 require denying summary judgment in the class action
9 plaintiffs' favor and granting summary judgment in New GM's
10 favor. I agree that two of those things -- the third I find a
11 little circular -- require denying summary judgment to the
12 class action plaintiffs, and I agree that they tend to support
13 New GM's ultimate argument that it didn't assume liability
14 under the settlement in the sense that they could be argued in
15 a summation after trial on the issue, but they're not part of
16 the contract, don't make it less ambiguous, and ultimately are
17 simply species of parol evidence. The first is the sale order
18 and paragraph 56 of the sale order in particular. In oral
19 argument today, New GM did not, as it did in its briefs,
20 juxtapose the sale order with the sale agreement so that it
21 would look like the sale order was part of or amended the sale
22 agreement. New GM argued instead that the sale order is
23 consistent with its take on the meaning of Section 2.3(a)(vii)
24 and makes the intent for which New GM contends Section
25 2.3(a)(vii) has even clearer. That may be so, but it doesn't

1 make the sale agreement ambiguous. It's clear to me, and I
2 rule that the sale order is not part of the sale agreement.
3 And instead, I rule that the sale order, which I believe but am
4 not sure by way of evidence, was submitted to me for approval
5 with the nonobjection and also asset of both Old GM and New GM
6 is simply a species of parol evidence bearing on the intent of
7 Old GM and New GM. And of course, if there's any debate over
8 whether each of Old GM and New GM agreed to that language, that
9 can be brought to my attention, as well.

10 The language of paragraph 56 is fairly strong evidence
11 and is more than sufficient by itself to defeat the class
12 action plaintiffs' motion for summary judgment. But it is not
13 necessarily dispositive, nor does it include the consideration
14 of evidence to the contrary. Thus, it will not, either by
15 itself or with the other evidence, support summary judgment in
16 New GM's favor.

17 The second of the matters upon which New GM relies is
18 the action by Old GM in November 2009 to reject the settlement
19 agreement in the Section 365 executory contract sense, all in
20 the context of an earlier document describing a "reject later"
21 intent with respect to the settlement agreement. As I
22 indicated in oral argument, on this record, except arguably for
23 a small aspect of the settlement agreement involving a
24 subclass, I don't think the sale agreement is or was an
25 executory contract. While Old GM, of course, had many

1 obligations under the settlement agreement, most significantly
2 the duty to fix cars upon request and under the conditions set
3 forth in the sale agreement, to pay class members for repair
4 costs that they might have previously shelled out, and to pay
5 the class action plaintiffs' lawyers' fees, the class had no
6 material duties and none have been identified to me so far.
7 Filing a claim form, a matter identified to me in the TRO
8 argument and again today, was not such a duty. A class member
9 could not be sued for failing to file a claim form. Filing a
10 claim form was merely a condition to getting the benefits of
11 the deal. We all know the difference between a covenant and a
12 condition. So the better way to look at it, in my view, is not
13 so much that the sale agreement was or was not an executory
14 contract in fact and law, and then was ultimately rejected, but
15 how it was perceived by New GM and Old GM. That, again, does
16 not make that action a part of the contract. It is another
17 species of parol evidence. If Old GM and New GM had agreed to
18 assume and assign the sale agreement, even if it wasn't
19 assumable and assignable, that might be evidence of an intent
20 on their part that New GM take on the obligation. Conversely,
21 if they had agreed that it should be rejected, even if
22 rejection was unnecessary, that might be evidence that New GM
23 wasn't taking on the obligation. Of course, we all know that
24 Old GM ultimately rejected it. That, of course, helps New GM
25 as it's inconsistent with the idea of assuming and assigning

1 it. But since, especially by the time the action was taken,
2 the rejection action was a little self-serving, I regard it as
3 probative but not dispositive.

4 The third is a distinction that New GM would ask me to
5 draw between purchased assets and excluded assets in accordance
6 with Sections 2.2(a) and (b) of the settlement agreement and a
7 further contention that excluded assets includes certain
8 "excluded contracts." That, in turn, defined excluded assets
9 as those prepetition executory contracts that weren't
10 designated as or deemed to be assumable executory contracts.
11 Maybe that will have some probative value at trial if it can be
12 shown to me that it isn't circular and that it doesn't assume
13 the fact to be decided. For now, it's sufficient for me to
14 rule that this, too, doesn't support summary judgment in favor
15 of New GM.

16 Now, if there's a document or admission from or on
17 behalf of New GM stating, in substance, that New GM intended to
18 assume the liabilities under the settlement agreement, I'll
19 give the class action plaintiffs a chance to find it. If
20 there's a document or admission from or on behalf of New GM
21 stating in substance that New GM intended to assume any
22 liability that was alleged to be an express warranty claim, as
23 contrasted to one that had been stated by Old GM to be such or
24 agreed or adjudicated to be such, I'll give the class action
25 plaintiffs a chance to find it.

1 If there is a document or admission from or on behalf
2 of New GM indicating that New GM offered the five year, 75,000
3 mile warranty based on the perception that it regarded itself
4 to be legally obligated to do so as contrasted to doing it for
5 its own business reasons such as customer good will, I'll give
6 the class action plaintiffs a chance to find it. The fact that
7 New GM provided such a warranty and considers itself bound to
8 provide it even though that type of warranty wasn't given to
9 the consumer at the original time of purchase and at least
10 seemingly was provided to consumers in the mail thereafter may
11 or may not be factually relevant as we move forward. But the
12 ambiguities as to its significant further result in my denial
13 of summary judgment to either side.

14 If there's a reasons why "obligations" was used in
15 2.3(a)(vii)(B) in a manner to contrast it from the use of
16 "liabilities" in 2.3(a)(vii)(A) in a fashion that was intended
17 to make the 2.3(a)(vii)(A) liabilities assumed, I'll give the
18 class action plaintiffs a chance to find it. If there's a
19 document or admission from or on behalf of New GM stating in
20 substance that "arising under" was intended in 2.3(a)(vii) to
21 incorporate the definition or meaning as those words are used
22 in Article 3 jurisprudence or in arbitration law or in some
23 other case law apart from that consistent with New GM's
24 contentions, I'll give the class action plaintiffs a chance to
25 find it.

1 If there's any document or admission from or on behalf
2 of New GM with respect to any decision as to whether or not the
3 assume and assign -- excuse me -- whether or not to assume and
4 assign the sale agreement or to reject it, I'll give the class
5 action plaintiffs a chance to find it.

6 My uncertainties as to what the evidence may show in
7 this area bolster my conclusion not to grant summary judgment
8 either side.

9 I already indicated why I'm not granting summary
10 judgment to the class action plaintiffs, and until we've closed
11 off those possibilities, I won't grant summary judgment to New
12 GM, either.

13 On this record, I can't definitively determine whether
14 this case is distinguishable from Safety-Kleen or not, though I
15 certainly agree with Judge Walsh's rulings in that case.
16 Parties can once more argue the relevance of Safety-Kleen and
17 whether it's distinguishable or not after we have the full
18 evidentiary record I need.

19 The "implied assumption" issue requires only slightly
20 different analysis. I certainly can't grant summary judgment
21 on either side on that issue because there's a disputed fact as
22 to whether New GM provided benefits because it was obligated to
23 or because it was good business. If there's evidence of the
24 character that I said I'd consider when I listed five or six
25 separate areas where I would permit the class action plaintiffs

1 to inquire, that too may be relevant to any implied assumption
2 contentions, and there may be evidence of New GM's intention in
3 the implied assumption respect. So I won't grant summary
4 judgment dismissing those claims, yet, either.

5 The class action plaintiffs may, of course, have
6 discovery on any of the matters where I've indicated that I'll
7 give them a chance to produce evidence. But for the avoidance
8 of doubt, I'm authorizing discovery on intent to include or
9 exclude the assumption of liability under the settlement
10 agreement. I'm not authorizing now, and doubt if I ever will,
11 discovery on Old GM's and New GM's decisions as to whether New
12 GM would assume any other liabilities or classes of liability
13 such as tort liability to those injured in car wrecks or for
14 injuries or illness resulting from asbestos.

15 Now, turning to the motion to dismiss the contempt
16 claims. As I indicated, I'm dismissing them insofar as they
17 seek to punish the class action plaintiffs for their efforts to
18 get a declaratory judgment here, but I'm allowing those claims
19 to survive with respect to acts by the class action plaintiffs
20 in Delaware. Paragraph 8 of the sale order enjoined litigation
21 claimants holding claims against Old GM from asserting those
22 claims against New GM. And perhaps even more clearly,
23 paragraph 47 of the sale order enjoined the class action
24 plaintiffs and others from commencing any action against Old GM
25 against New GM. But asking me in a declaratory judgment action

1 to determine whether the claims at issue were or were not
2 remaining with Old GM on the one hand or assumed by New GM on
3 the other cannot, consistent with interest of fairness, be
4 deemed to be violative of those provisions of the sale order.
5 They could only be violative if they were brought somewhere
6 else. The matter can be analogized to what we permit and do
7 not permit when litigants are barred by the automatic stay. As
8 I noted in the Adelpia case, see 325 B.R. 346, an action that
9 would be enjoined by the automatic stay if brought elsewhere is
10 permissible if commenced in the bankruptcy court where the
11 bankruptcy case is pending. See also Judge Schwartzberg's
12 decision in In re: Marceca, 127 B.R. 331, one of the several
13 decisions I cited in Adelpia. Getting a ruling from me as to
14 the interpretation of the sale agreement I approved, of the
15 effect of the sale order I entered, and of the effect of the
16 bankruptcy matters that took place on my watch was both
17 permissible and appropriate. I certainly won't hold anyone in
18 contempt based on activities of that character, and I'll
19 dismiss the counterclaims to the extent they were based on any
20 such proceedings before me.

21 On the other hand, this matter was originally
22 commenced in the Delaware Chancery Court which was not the
23 appropriate place and where neither the facts which would
24 justify getting a decision from me or law, which by analogy to
25 the automatic stay, would permit litigation before me would

1 apply. If proceeding in Delaware was, as the class action
2 plaintiffs argued today, quite innocent, of course I won't
3 issue a contempt order or other sanctions. But with respect to
4 that portion of the proceedings that was initiated in Delaware,
5 I can't dismiss the claims upon a 12(b)(6). So we're going to
6 proceed with this adversary proceeding. If either side wishes
7 to seeks leave from the district court to pursue an
8 interlocutory appeal from this decision, it should tell me, and
9 I'll issue an order, and if I regard it as desirable, a more
10 formal opinion from which the prospective appellant can seek
11 leave to appeal. The time to seek leave to appeal will run
12 from the time of the resulting order, and not from the time of
13 this dictated decision.

14 We're adjourned.

15 (Proceedings concluded at 3:23 PM)

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I N D E X

RULINGS

	Page	Line
Motion to Retain	7	16
Hamilton, Rabinovitz & Associates Granted		
Motions for Summary	72	8
Judgments by Plaintiff And by New GM Denied		
12(b)(6) Motion Granted	72	10
In Part, With Regard to Proceedings in the Delaware Chancery Court		

1
2
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C E R T I F I C A T I O N

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

Dena Page

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: May 10, 2010