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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re MOTORS LIQUIDATION COMPANY f/k/a GENERAL MOTORS CORP., *et al.*, Debtors,	Chapter 11 09-50026 (REG) Jointly Administered
KELLY CASTILLO, NICHOLE BROWN, BRENDA ALEXIS DIGIANDOMENICO, VALERIE EVANS, BARBARA ALLEN, STANLEY OZAROWSKI, and DONNA SANTI, Plaintiffs, v. GENERAL MOTORS COMPANY f/k/a NEW GENERAL MOTORS COMPANY, INC., Defendant.	Adv. Proc. No. 09-00509

PLAINTIFFS' REPLY TRIAL BRIEF

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The dispute is whether the Class Judgment falls within section 2.3(a)(vii)(A) of the ARMSPA. This Court found that section to be ambiguous and emphasized "[t]hat is what we have to focus on." The focus involves the intent of the language used in section 2.3(a)(vii)(A), and in particular the phrase "arising under." New GM, however, has failed to produce any parol evidence concerning the selection of that language to justify a departure from the ordinary dictionary definition of the phrase. As a result, New GM has struggled repeatedly throughout this adversary proceeding to *redefine* "arising under" in a way that now explains its conduct and supports its legal position. This challenging *ex post facto* effort has set off a chain reaction, requiring New GM to similarly redefine a series of other words and to recast events to fit awkwardly within its broad and self-serving characterizations of "intent" that have nothing to do with section 2.3(a)(vii)(A) whatsoever.

I. NEW GM CONTINUES TO RETREAT FROM THE EXPRESS LANGUAGE OF SECTION 2.3(a)(vii)(A).

The language that this Court found to be ambiguous was "arising under." Other than merely claiming that the Class Judgment does not "arise under" the express written warranty, New GM offers no evidence to define this phrase, even though it promised that Buonomo would submit a declaration explaining that "arising under" means "created by or pursuant to." *Doc. 44, p.16 ¶13.* Not only does Buonomo's subsequently submitted declaration not use those words, but they also do not appear in New GM's brief (nor does any other definition).

The phrase "arising under" appears 12 times in the ARMSPA, *Ex. C, §§ 1.1, 2.2(b)(xi), 2.3(a)(v, vii, viii), 6.15(b), 6.21, 9.19*, and 7 times in the proposed Sale Order, *Ex. OO at ¶¶ AA, 8, 46, 48, 54, 71*. Despite the ubiquity and significance of "arising under" in the ARMSPA, New GM not only fails to offer its own definition, but it also does not contest the *Safety Kleen* definition

(having an origin or basis in), the Bankruptcy Code usage (giving rise to), its own admissions (based upon), or the dictionary definition (originating from a source).

When New GM's witnesses were asked about the phrase "arising under," three things occurred. First, they avoided answering what that phrase meant in section 2.3(a)(vii)(A) or gave unintelligible answers. *See Buonomo Depo., pp. 68:14-69:6, 69:11-24*. Second, they gave one definition in the deposition ("related to") but then substituted a different answer ("created by or pursuant to") later. *Compare Lines Depo., p.65:8-23 with Errata pg*. Third, they used "arising under" in accordance with its common and ordinary meaning when using that phrase outside the context of section 2.3(a)(vii)(A). *See Buonomo Depo., pp. 65:7-21, 72:23-73:12* ("by virtue of"). For instance, Buonomo testified that "the *Castillo* case is one arising from product liability claims," even though he believes it somehow did not also arise under an express warranty claim. *Buonomo Depo., pp. 49:5-51:3* (especially p. 50:10-20). Lines likewise testified that the Class Judgment arose from the *Castillo* litigation. *Lines Depo., p.9:13-17.*

Without a definition of "arising under" to champion, New GM is forced to rely on substitute words that appear nowhere in the ARMSPA. For example, New GM uses quotation marks around specific substitute phrases to argue that the Class Judgment was not a liability "within the conditions and limitations" of the "standard repair warranty," implying that those terms appear in section 2.3(a)(vii)(A) when they do not. *Doc. 45 p.28.* In fact, those precise terms do not appear anywhere in the ARMSPA. As another example, New GM argues that Old GM assumed liability only "for warranty obligations ***spelled out in***" the "standard repair warranty." *Id. p.2* (emphasis added).

New GM's urge to substitute words in place of the *actual* words in the ARMSPA is not new. Although this Court rejected that approach at the summary judgment stage, New GM

continues down that path. For example, Buonomo gave various and sundry explanations for why the Class Judgment should be considered a "Retained Liability," including:

(1) that the settlement was "in process but not consummated";
(2) that the settlement was "unimplemented";
(3) that the settlement was a "litigation-oriented liability";
(4) that the settlement was a liability "arising from product claims";
(5) that the settlement "did not involve a claim against what we contemplated at that time to be a nondebtor affiliate";
(6) "[b]ecause Saturn was going to be a debtor and a seller in the transaction";
(7) that the settlement was not "essential to the successful operations of the new company"; and
(8) that the settlement represented a net liability or was not necessary for successful business operations.

Buonomo Depo. at 49:8-9 and 4-17, 50:6-7, 87:7-14; Ex. LL at 9 ¶ 13 and 11 ¶7. None of these terms or concepts appears in section 2.3(a)(vii)(A), and the need for this many different extra-contractual explanations underscores the lack of support for New GM's position when viewed in light of the actual language of the ARMSPA.

Instead of focusing on section 2.3(a)(vii)(A), New GM spends a considerable amount of its brief trying to demonstrate that the Class Judgment falls within various sections of Retained Liabilities which, according to New GM, "reinforce[s]" that it was not an Assumed Liability. *Doc. 45, p.6.* That position, however, completely disregards the definitions of Assumed Liabilities and Retained Liabilities. The ARMSPA defined Retained Liabilities as Liabilities "other than the Assumed Liabilities" and "in all cases with the exception of the Assumed Liabilities …." *Ex. C, §2.3(b).* So long as the Class Judgment falls within section 2.3(a)(vii)(A), it could ***never*** be a Retained Liability—even if it theoretically fell within a particular paragraph within section 2.3(b). For example, the Class Judgment may seemingly be a "Claim[] based upon Contract" under section 2.3(b)(xi). But that Retained Liability, by definition, excludes Assumed Liabilities such as obligations under section 2.3(a)(vii)(A). As a result, it is of no consequence

that the Class Judgment might also happen to fall generically within a category of Retained Liabilities as long as it "arose under" Old GM's express warranties.

The conspicuous absence of analysis in New GM's brief concerning the actual language of section 2.3(a)(vii)(A), coupled with the heavy reliance on terminology appearing nowhere in the ARMSPA, suggests that the parties to the ARMSPA would have used different language had they not intended for New GM to assume Old GM's obligations under the Class Judgment.

II. TO AVOID THE LANGUAGE OF SECTION 2.3(a)(vii)(A), NEW GM RECASTS THE UNDERLYING WARRANTY CLAIM, THE DUTY UNDER THE WARRANTY, THE WARRANTY PERIOD, AND OTHER TERMS OF THE SETTLEMENT UNDER WHICH THE CLASS JUDGMENT AROSE.

As is obvious and as Lines admitted, the Class Judgment arose from the *Castillo* litigation. *Lines Depo., p.9:13-17.* Grappling with the fact that there was a claim for breach of the glove-box warranty, New GM attempts to re-characterize that claim because Buonomo admitted that section 2.3(a)(vii)(A) involved "the express written Mag Moss warranty," *Buonomo Depo., p.65:20*, and that "you could probably make a Mag Moss claim on that, and I think we would be responsible for that." *Id. p.67:1-15.* Consequently, New GM is left to argue that the warranty claim was for something "*other than a breach of the standard repair warranty*." *Doc. 45, p.28* (emphasis original). The *Castillo* class, however, explicitly asserted that Old GM had breached the glove-box warranty and claimed rights under the Magnuson-Moss Warranty Act. *Ex. D ¶ 71* ("GM expressly warranted the vehicles … for a period of three years or 36,000 miles and, further, that GM would, at no cost, correct any vehicle defect … during the warranty period"). Back when representing Old GM, New GM's attorneys agreed that the *Castillo* class action "refers to and relies upon" the glove-box warranty. *Exs. G, H.*[1]

[1] The *Castillo* class sought to enforce the glove-warranty, but it also certainly asserted any rights under the Magnuson-Moss Warranty Act or other available remedies. *Ex. F. ¶82.*

Stuck with this admission, New GM next attempts to re-characterize its duty under the glove-box warranty. According to New GM, Old GM was only required "to provide free-of-charge repairs …." *Doc. 45, p.28*. But the warranty actually required Old GM "to correct" the defect. *Ex. G, p.7*. That was the duty that was alleged to have been breached. *Ex. F ¶¶ 87, 88, 90* ("Any attempt by GM to repair a defective VTi transmission or to replace one defectively designed VTi transmission with another ... within the warranty period could not satisfy GM's obligation to correct defects under the warranty"). The *Castillo* class even provided examples of certain Plaintiffs (*e.g*., Allen, Santi, and Ozarowski) whose VTi transmissions Old GM failed to "correct," even though they first presented their vehicles during the glove-box warranty period. *Ex. E ¶¶ 50-61* (showing multiple transmission failures). Any additional theories, remedies, or rights asserted by the *Castillo* class do not erase the claims for breach of the express glove-box warranty.

Unable to shake its warranty obligation to "correct" the VTi defect,[2] New GM nevertheless continues to insist that it only agreed to assume liability for "the standard repair warranty which plainly does not cover Plaintiffs' claims ... for VTi malfunctions occurring ***after the warranty period expired***." *Doc. 45, pp. 2-3* (emphasis original). This argument requires New GM to redefine "standard repair warranty" in a way inconsistent with the ARMSPA (which,

[2] The Class Judgment provided extended warranty coverage, like the Special Policies, because the issue in the *Castillo* class action was the scope of GM's liability (*i.e*., its failure "to correct any vehicle defect") under the glove-box warranty. There was the possibility of an evergreen warranty obligation—in other words, GM would have had to continually replace VTi transmissions for the life of the vehicles because GM could never "correct" the defect within the warranty period. The Class Judgment resolved that warranty dispute by aligning GM's warranty obligation with the consumers' reasonable expectations of a transmission life (up to 125,000 miles). This also explains why New GM, once it "reverted" its position, tried to buy back as many Class vehicles as possible under Special Policy 09280 starting in November 2009. *Ex. RR*.

incidentally, does not use the term "standard repair warranty"). It is undisputed that the original warranty delivered in connection with the sale of the vehicles was 3 years/36,000 miles. Subsequent to all the sales at issue, Old GM provided coverage of 5 years/75,000 miles through the issuance of "Special Policies." In a judicial admission, New GM confessed that these Special Policies (which were never "specifically identified as warranties" or "delivered in connection with the sale" of the vehicles) ***fall squarely*** within section 2.3(a)(vii)(A). *Doc. 29, p.2 n.2*. New GM cannot explain how the Special Policies—which were not "subject to the conditions and limitations of" the glove-box warranties delivered with the vehicles—could somehow "arise under" the glove-box warranties if the Class Judgment does not.

New GM glosses over this issue by simply stating that Old GM "voluntarily extended the warranty period" to 5 years/75,000 miles, *Doc. 45, pp. 8-9*, implying that the Special Policies somehow ***became*** the express written warranties delivered in connection with the sale of the vehicles. Even Lines admitted that this would be impossible, since the Special Policies were not issued until after the sales. *Lines Depo., p.21:11-16*. But the problem with this argument is even bigger than that. If it is true that the Special Policies supplanted the glove-box warranty, then it is equally true that the Class Judgment had supplanted the Special Policies.

Upon the filing of the *Castillo* complaint, all claims for breach of the glove-box warranty were tolled for the class members. American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974). Upon entry of the Class Judgment, all claims for breach of the glove-box warranty "shall be deemed to have, and by operation of law shall have, fully, finally, and forever [been] settled, released, and discharged …." *Ex. B, ¶¶ 12, 14.* In other words, the relief under the Class Judgment supplanted the obligation "to correct" the defect under the glove-box warranty (the very obligation that GM could not fulfill). Thus, the Class Judgment ***became*** the warranty. That is

why both Old GM and New GM continued to make payments consistent with the Class Judgment post-bankruptcy. But for the tolling of glove-box warranty claims and the Class Judgment, the glove-box warranties already would have expired for all Class vehicles (2005 was the latest model year) by the time New GM signed the ARMSPA.

In addition to re-characterizing the warranty language and the claims in the class action, New GM similarly recasts certain provisions of the Class Judgment. In an effort to convert the Class Judgment into an executory contract, New GM first contends that the Class Judgment was not "effective" by giving the defined term "Effective Date" a new meaning. *Doc. 45, p.4*. Once the Class Judgment became effective legally (*i.e.*, final and non-appealable), the Effective Date simply defined the amount of time (*i.e.*, ten business days) in which New GM had to comply with certain terms of the Class Judgment. *Ex. B, p. 5 ¶ 6.* The settlement agreement did not say—nor was it ever discussed—that the settlement agreement would be somehow "ineffective" before that date. *See M. Brown Decl. ¶ 2.* How could a final and non-appealable judgment ever be "ineffective"? Regardless, "the automatic bankruptcy stay does not toll or restrain the mere passage of time." In re Margulis, 323 B.R. 130, 133 (S.D.N.Y. Bankr. 2005). Not only was the Class Judgment legally effective, but its performance date (Effective Date) lapsed—the *Castillo* class simply could not enforce it because of the Old GM bankruptcy … until New GM assumed it.

Finally, New GM further substitutes a strange meaning for the settlement provision dealing with Old GM's general denial of liability. *Doc. 45, pp. 3-4*. New GM argues that its express denial of liability affects whether the Class Judgment falls within section 2.3(a)(vii)(A) because it did not admit any liability for "any kind of warranty liability" or "for breach of the standard repair warranty." *Id.* But actual liability is irrelevant here because "Liabilities" include "undetermined" liabilities and Claims, which are defined to include "all rights, claims, … causes

of action, choses in action, … suits, … demands, … rights of recovery, … litigation, … and all rights and remedies with respect thereto." *Ex. C, §1.1*. The boilerplate denial of liability in the settlement agreement did not erase the origin of the Class Judgment. Rather, New GM's contention contradicts the glove-box warranty itself, which concedes that litigation may "arise under" the warranty. *Ex. G* ("you can still pursue legal action").

The need for New GM to recast so many terms of the Class Judgment and the underlying warranty underscores once again the incongruity between section 2.3(a)(vii)(A) and New GM's position.

III. NEW GM CANNOT ESCAPE THE "BEST EVIDENCE" OF ITS OWN CONDUCT AFTER THE CLOSING.

With regard to parol evidence, New GM spent $5,857,133—processing 1,636 VTi repair claims, 65 towing claims, and 115 car rental claims under the terms of the Class Judgment. *Exs. Z, O, P, Q, T, Z; Aff. of Sherman, Taylor, Hisiro, LeCloux, Scott, Eysel, Molnar, Fusco, Archer*. Under New York law, that evidence is "the strongest evidence," is "powerful evidence," is afforded "great, if not controlling weight," is the "most persuasive evidence," and is the "best evidence" of New GM's intent regarding section 2.3(a)(vii)(A). *See, e.g.,* Waverly Corp. v. City of New York, 851 N.Y.S.2d 176, 179 (N.Y. App. Div. 2008); Gulf Ins. Co. v. Transatlantic Reins. Co., 886 N.Y.S.2d 133, 143 (N.Y. App. Div. 2009); Fireman's Fund Ins. Cos. v. Siemens Energy & Automation, Inc., 948 F. Supp. 1227, 1234 (1996); In re Dayton Seaside Assoc. #2, L.P., 257 B.R. 123, 144 (Bankr. S.D.N.Y. 2000); In re The Bennett Funding Group, Inc., 220 B.R. 743, 760-761 (Bankr. N.D.N.Y. 1997); Federal Ins. Co. v. Americas Ins. Co., 691 N.Y.S.2d 508, 512 (N.Y. App. Div. 1999); Webster's Red Seal Publ'n, Inc. v. Gilberton World-Wide Publ'n, Inc., 415 N.Y.S.2d 229, 230 (N.Y. App. Div. 1979). In response, New GM attempts to substitute a new reason for its performance under the Class Judgment.

To minimize the import of this best evidence, New GM paints the straw-man argument that Plaintiffs are suggesting New GM assumed the Class Judgment obligations "by accident" or "inadvertently." *Doc. 45, pp. 28, 33.* To the contrary, there was nothing accidental or inadvertent about the nearly $6 million that New GM spent when it started (and then stopped) honoring the Class Judgment. Section 2.3(a)(vii)(A) required it.

New GM next argues that it consciously followed and then "discontinued" Old GM Administrative Message G_0000020717 to reimburse VTi repairs under the formula set forth in the Class Judgment. *Doc. 45, pp. 7, 33*. What was there to follow? What was there to discontinue? New GM was not bound by any Old GM policy … unless it was a "Liabilit[y] arising under the express written warranties …." *Ex. C., §2.3(a)(vii)(A)*. Lines injected that argument into the self-serving "clarification" distributed on September 29, 2009. *Ex. W*. In that document authored by Lines, New GM acted as though it was bound by Old GM Administrative Message G_0000020717. *Id*. But that Administrative Message had already expired upon "ultimate final approval"—the entry of the Class Judgment back in April of 2009. *Ex. MM*.

Despite the fact that Old GM Administrative Message G_0000020717 had expired and there was an intervening bankruptcy and arms-length 363 transaction, New GM basically asks this Court to consider it a mere continuation of Old GM. As this Court found, New GM is a separate legal entity and only assumed obligations defined as Assumed Liabilities in the ARMSPA. Unless a "policy" was an Assumed Liability, there was nothing to discontinue because New GM had never made a business decision (apart from the ARMSPA) to adopt or continue any Old GM policy. *Lines Depo. pp 44:14-46:14*. Because the ARMSPA is the only business decision by New GM regarding the VTi transmission, New GM's plea essentially to ignore the whole bankruptcy process should be rejected.

New GM then implies that it exercised its business judgment to adopt a similar policy independent from the ARMSPA, and then discontinued it in its discretion once this adversary proceeding was filed. *Doc. 45, p.33*. There is no evidence of that whatsoever. After the ARMSPA, there was no business decision about the VTi transmission until ***after*** this adversary proceeding. *Lines Depo., pp. 44:14-46:14*. The only business decision by New GM about the Class Judgment was the ARMSPA, and New GM followed the terms of the Class Judgment immediately upon the Closing. In other words, the ARMSPA presented the only possible requirement for honoring the Class Judgment at the time of the so-called "clarification."

New GM's next explanation for why it paid according to the Class Judgment is that New GM was too busy, and discontinuing the policy was "not a priority." *Lines Decl. ¶ 17*. Again, unless the "policy" was an Assumed Liability, there was nothing to discontinue because New GM had never made a business decision (apart from the ARMSPA) to adopt or continue any Old GM policy. *Lines Depo., pp. 44:14-46:14*. Apart from ignoring the whole bankruptcy process, this "not a priority" argument also strains credulity, given that New GM spent nearly $6 million honoring the Class Judgment. Why would any company view the loss of $6 million as "not a priority"?

The "not a priority" argument also clashes with New GM's extra-contractual claim that the Class Judgment was not assumed because it was a "negative contract" representing a "net liability." *Doc. 45, p.5*. Yet, both Old GM and New GM took the opposite position about the Class Judgment before this adversary proceeding.

Old GM explicitly represented that it agreed to the *Castillo* settlement because doing so would, among other things, "promote customer satisfaction with Saturn vehicles." *Ex. B, ¶5.* In Administrative Message G_0000020717, Old GM likewise stated: "We believe this will enhance

customer satisfaction without the delay in waiting for ultimate final settlement approval." *Ex. MM, p.2.* On June 1, 2009, the same day it filed its bankruptcy petition, Old GM filed a motion requesting authorization to continue honoring its "Customer Programs," including its warranty programs. *Ex. M, p.1.* In that motion, Old GM pleaded that the "Debtors' customers are the lifeblood of their business," and "customer satisfaction is the key to survival." *Id., ¶30.* According to Old GM, "The objective of the Customer Programs is to maximize revenues and profitability, generate customer loyalty and goodwill, ensure customer satisfaction, and maintain a competitive position in the marketplace." *Id., ¶34.* "Maintenance of the Customer Programs is essential to the ability of Debtors to effectively compete in the market and to the continued viability of the Debtors' business enterprise." *Id., ¶36.*

Accordingly, New GM paid nearly $6 million under the Class Judgment from the Closing until late September 2009. Only then did New GM issue its so-called "clarification," drafted by Lines, instructing authorized dealers to no longer honor the Class Judgment. *Ex. QQ; Lines Depo., pp. 37:21-38:17.* This pronouncement followed a concern "with [the] Saturn VTi decision from Penske, etc." in mid-September, *Ex. JJ*, and it closely preceded the September 30 announcement that the sale to Penske had fallen through. *Ex. CCC.* It was acknowledged shortly thereafter that CEO "Fritz Henderson is not happy with reverting to 5 yrs / 75K mileage coverage (Special Policy) for Saturn CVT owners, and wants to do more." *Ex. SS.*

All of this evidence regarding the conduct and statements of Old GM and New GM underscores the implausibility of New GM's non-ARMSPA "net liability" defense. New GM submits so-called parol evidence that Buonomo and Lines concluded that the Class Judgment was a "net liability" which should not be assumed by New GM. That, however, is not valid parol evidence because it has nothing to do with section 2.3(a)(vii)(A), and even if it had, it still was only

a conversation between two Old GM employees—there was no communication to New GM. *Buonomo Depo., 95:4-22*. Regardless, Buonomo admitted that the so-called decision involved no analysis:

> Q. Was there ever an analysis to your knowledge of whether the Castillo settlement would be considered a net liability or something that was -- versus something that was essential to the business?
>
> A. Not sure exactly what you meant by analysis, but was concluded that it was a net liability.
>
> Q. Who came to that conclusion?
>
> A. Mr. Lines and myself, I guess.
>
> Q. And when did you come to that conclusion?
>
> A. Late May, early June. I can't recall.
>
> Q. What was the basis for that conclusion?
>
> A. It was an obligation that we did not believe was a net desirable one to assume. So that's the conclusion and the answer, but I'm not sure there's much more than that.
>
> Q. What specific factors did you consider in arriving at that conclusion?
>
> A. Joe Lines' knowledge of settlement.

Buonomo Depo., 95:4-22. It is curious that Lines and Buonomo would conclude—without any analysis and without creating any documents—that the terms of the Class Judgment represented a net liability, but yet Old GM would pay claims under Court permission, and then New GM would start to pay until it spent nearly $6 million by the time the Penske sale failed.

The curiousness of this position is compounded by the rebuttal declaration of New GM manager Dale Hall (**"Hall"**). Hall identified four types of claims paid through New GM's warranty payment system: (1) "standard repair warranties," (2) "special policies," (3) recall

claims, and (4) goodwill repairs. *Hall Decl. ¶5.* The first three are all Assumed Liabilities.[3] So New GM suggests that the nearly $6 million in post-Closing payments under the terms of the Class Judgment were "goodwill" payments. In addition to contradicting the statements of authorized New GM dealers (*e.g.*, "WARRANTY PER CLASS ACTION"),[4] it directly conflicts with the testimony that the Class Judgment was a "net liability." Hall claims that the nearly $6 million was paid pursuant to Old GM Administrative Message G_0000020717 (which had expired by its own terms prior to the bankruptcy and which was never adopted by New GM), an admission that the payments were according to the Class Judgment formula. *Hall Decl. ¶6; See also Exs. Z, O, P, Q, T, Z; Aff. of Sherman, Taylor, Hisiro, LeCloux, Scott, Eysel, Molnar, Fusco, Archer*. That raises another problem for New GM. Goodwill payments, of course, address individual circumstances and the amounts vary on a case-by-case basis. But goodwill payments cannot involve a formula without becoming a secret warranty—which is illegal. *See, e.g.*, Cal. Civ. Code § 1795.90 *et seq.*; Conn. Gen. Stat. Ann. § 42-227; Md. Code Com. Law § 14-1402 *et seq.*; Va. Code § 59.1-207.34 *et seq.*; Wis. Stat. § 218.0172. New GM is now on the verge of confessing that it operated a secret warranty to explain why it paid nearly $6 million according to the Class Judgment formula.[5]

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[3] Section 2.3(a)(vii)(A) covers the "standard repair warranties." New GM has judicially admitted that the "special policies" fall squarely within section 2.3(a)(vii)(A). *Doc. 29, p.2 n.2.* Under the ARMSPA, New GM also assumed recall obligations in section 6.15(a).

[4] New GM attempts to distance itself from those dealer statements, but the dealers were "authorized" agents of New GM acting within the scope of their agency. FRE 801(d)(2)(D).

[5] A manufacturer avoids running afoul of the "secret warranty" statutes by providing notice to all customers of available warranty coverage. Old GM provided this notice to customers when it issued the Special Policies extending coverage to 5 years / 75,000 miles. Old GM further satisfied this requirement by issuing notice of the settlement to the Class, as authorized by the district court following preliminary approval of the settlement. It was the class notice that allowed Old GM to begin honoring the settlement without violating these statutes. However, as a new entity, New GM would not be entitled to rely on the notice previously issued by Old GM if its honoring of the

In the end, the "best evidence" of New GM's intent regarding section 2.3(a)(vii)(A) is New GM's conduct—not how New GM attempts to explain that conduct. New GM spent $5,857,133—processing 1,636 VTi repair claims, 65 towing claims, and 115 car rental claims under the terms of the Class Judgment. *Exs. Z, O, P, Q, T, Z; Aff. of Sherman, Taylor, Hisiro, LeCloux, Scott, Eysel, Molnar, Fusco, Archer*. That evidence is "the strongest evidence," is "powerful evidence," is afforded "great, if not controlling weight," is the "most persuasive evidence," and is the "best evidence" of New GM's intent regarding section 2.3(a)(vii)(A).

IV. NEW GM CANNOT DIVORCE THE LANGUAGE OF SECTION 2.3(a)(vii)(A) FROM WHETHER THE CLASS JUDGMENT IS AN ASSUMED LIABILITY.

"Very little; very, very little" of the negotiations dealt with which liabilities would be assumed by New GM. *Buonomo Depo., pp. 25:25-26:5, 39:9-13*. Without any parol evidence concerning the meaning of section 2.3(a)(vii)(A), New GM relies entirely on supposed evidence of the parties' intent having nothing to do with section 2.3(a)(vii)(A). "[L]est the ambiguity inquiry degenerate into an impermissible analysis of the parties' subjective intent, such an inquiry appropriately is confined to 'the parties linguistic reference.' ... [T]he parties' expectations, standing alone, are irrelevant without any *contractual hook* on which to pin them" (emphasis in original). *Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc.*, 247 F.3d 79, 93 (3d Cir. 2001)

Class Judgment formula were simply a matter of voluntary goodwill. Only by assuming the Class Judgment under the ARMSPA could New GM rely on the previous notice. Otherwise, if it truly were exercising independent business judgment and voluntarily (and coincidentally) following the Class Judgment formula, it would have needed to issue a separate notice to customers (as it ultimately did when it changed direction after the filing of this declaratory judgment action; *see* Ex. RR).

(quoting *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001, 1011 n.12 (3d Cir. 1980)).

Because there was no discussion about whether settlements and judgments that resulted from lawsuits in which claims for breach of express warranty were asserted would fall within section 2.3(a)(vii)(A), *Buonomo Depo., 90:13-91:2*, New GM points to three events somewhat involving the *Castillo* class action. Not one of those events, however, involved any consideration, reference, or analysis of section 2.3(a)(vii)(A) at all.

First, New GM references a May 14, 2009 call between Buonomo and representatives of UST in which he allegedly referenced *Castillo* as one of "several class action settlements" that should be "left behind in Old GM." *Buonomo Sept. 2, Decl. ¶ 8.* There was at that time no discussion of section 2.3(a)(vii)(A), which had not yet been drafted, and no discussion of "arising under." There was no greater understanding than that *Castillo* was one of "several" class action settlements. Indeed, Buonomo admits that he *still* has not read the *Castillo* settlement agreement, *Buonomo Depo., p. 81:4-17*, so he certainly could not have been expected to understand in May of 2009 that the Class Judgment involved Old GM's glove-box warranties.

Second, New GM argues that it could not have intended to assume the Class Judgment because ***Old GM*** designated it as an executory contract to be "rejected later." Not only was this act by Old GM inconsistent with New GM's conduct post-Closing, but it also was done completely without regard to whether the Class Judgment "arose under" Old GM's express warranties. As Lines testified, "it really wasn't a decision because all litigation liabilities of that type were not going to be retained. And so it fell into a category and so there really wasn't a decision about this particular case. It just fell into a category and therefore was excluded." *Lines Depo., p. 36:24-37:10.*

Third, New GM argues that the "contingent litigation reserve" that Old GM had booked for the Class Judgment was "left on Old GM's books," and that "no corresponding reserve" was booked by New GM. *Doc. 45, p. 32-33.* This sheds no light on whether the Class Judgment arose under Old GM's warranties for several reasons. First, New GM would not carry over a contingent litigation reserve for the Class Judgment because, at the time of the bankruptcy, it was neither "contingent" nor even "litigation." Second, New GM has produced no evidence that the Class Judgment was not accounted for elsewhere in New GM's books, such as in its warranty spend projections. That, of course, would be the logical place to account for the Class Judgment under section 2.3(a)(vii)(A). In fact, other evidence confirms that it was accounted for in the warranty spend. *Exs. Z, O, P, Q, T, Z; Aff. of Sherman, Taylor, Hisiro, LeCloux, Scott, Eysel, Molnar, Fusco, Archer*. Finally, like the "reject later" non-decision, a categorical choice not to carry over *any* contingent litigation reserves involved no consideration of section 2.3(a)(vii)(A). As Lori Hamilton relayed in the sole document New GM has produced on the subject, "I found the information on the CVT reserve. Yes, there was $20M in an 00 5443 account (legal settlement liability) put on the books in Aug 2008. However, I understand that ALL Legal Settlement Reserves were left in OldCo." *Ex. 7, p.3* (emphasis original).

Fourth, although New GM has now backed away from the position that Paragraph 56 of this Court's Sale Order somehow modified section 2.3(a)(vii)(A) of the ARMSPA, New GM continues to claim that Paragraph 56 was drafted as a "clarification to" address an ambiguity perceived by third parties. *Doc. 45, pp. 6, 20.* But this perceived ambiguity had nothing to do with whether a settlement or judgment would be considered to arise under Old GM's express warranty if it arose under an action for breach of express warranties. That issue was never discussed. *Buonomo Depo., pp. 92:25-93:2*. Rather, the perceived ambiguity had to do with

implied warranties, express warranties based on communications other than the glove-box warranty (*e.g.*, advertising materials) and Lemon law claims. *Id., 92:18-24*. Thus, Paragraph 56 provided that New GM "is not assuming responsibility for Liabilities contended to arise by virtue of ***other*** alleged warranties, including implied warranties and statements in materials such as" advertisements, etc. *Ex. OO* (emphasis added). So even if this Court considers paragraph 56 of the Sale Order some form of parol evidence, it simply does not address the dispute here.

Finally, New GM relies on a "Customer Satisfaction Assurance Review" ostensibly dated August 4, 2008 (but which New GM says really should have been 2009), *Exs. 5 and 6*, a "Saturn CVT Review" dated August 24, 2009, *Ex. 9*, in which the unidentified author makes the unsubstantiated claim that the Class Judgment had been "assigned to" Old GM. We do not know the author's position within the company, but one thing we know for sure is that he or she misunderstood a great deal about the Class Judgment. The most obvious is that if the Class Judgment truly were a Retained Liability, there would be no reason to have "assigned" it to anyone. As another example, these documents refer to the Class Judgment as the "Proposed" Class Action Settlement (a fallacy the author seems to acknowledge by using quotation marks), even though the Class Judgment had become final and non-appealable. Another example is the claim that the "Class Action Settlement was in [the] appeal process when GM filed for bankruptcy," when in fact the deadline for appealing had long since expired. *Ex. 6, p.3.* Not only do these errors demonstrate a fundamental lack of understanding on the part of the phantom author, and not only do these documents lack the most basic of foundation as to their author, but there is no evidence that they were ever distributed or used in any way. They may simply have been drafts that never saw the light day, from a low-level employee with no understanding of—and no ability to influence—New GM. Contrast these documents to Exhibits AA (August 20, 2009

email from GM FPE Manager Greg Hall indicating that he was gathering the "warranty spend on CVT" and predicting "I think you know it will be ugly") and BB (August 21, 2009 email from Jeff Setting attaching "Saturn CVT Field Action" summary of VTi "spend totals" as of August 17, 2009), both of which were actually communicated beyond the author. All other documents referenced in New GM's opening brief post-date the filing of this declaratory judgment and are self-serving and entitled to no weight.

In addition, the testimony by Buonomo and Lines (both New GM employees now) regarding Old GM's general intent contradicts two significant pieces of evidence regarding Old GM's understanding. In its motion to continue warranty programs, Old GM admitted that even voluntary obligations "that arise from but are not covered by the written warranties, … are nevertheless considered part of" the warranty. *Ex. M, ¶40*. In addition, Old GM declared that an unproven claim for breach of warranty, which preceded the bankruptcy, was an Assumed Liability under Section 2.3(a)(vii)(A). *Ex. W*. There just needed to be a claim "based upon" breach of Old GM's written warranty. *Id.*, ¶¶ *6, 10-11, Prayer*. Old GM's understandings of "arising under" and section 2.3(a)(vii)(A) are significant.

New GM altogether failed to present any testimony of New GM's intent regarding section 2.3(a)(vii)(A), but New GM's actions after the Closing reveal it all. There is, of course, the best evidence—the performance of New GM under the Class Judgment after Closing. In addition, New GM has agreed that allegations involving the glove-box warranty, even if refuted, fall within section 2.3(a)(vii)(A). *Ex. Y*. Furthermore, New GM's Legal Department recognized that it would be to the class members' "advantage to participate in" the Class Judgment "once the case proceeds …." *Ex. BBB*. While New GM now argues that its "Agent" was not authorized to make that particular statement (implicating FRE 801(d)(2)(C)), *Cernak Decl. ¶ 4*, it is still an

admission under Rule 801(d)(2)(D). In any event, the statement by New GM's Agent is important for another reason—she gave the language in dispute its plain, ordinary meaning.

There is ample other evidence that New GM considered the Class Judgment an Assumed Liability. New GM's attempted re-categorization of the Class Judgment, in apparent response to this proceeding, raised a concern "from Penske, etc.," *Ex. JJ*, the sale to Penske fell through, *Ex. CCC*, and New GM's CEO was "not happy with reverting" away from the terms of the Class Judgment, *Ex. SS*. That is just it—New GM attempted to "revert" or "change" or "revise" the ARMSPA by moving the Class Judgment over *ex post facto* to the Retained Liabilities. *Exs. W-1, BB-CC, EE-II, KK, QQ-SS*.

That none of the supposed evidence on which New GM relies has anything to do with section 2.3(a)(vii)(A) illustrates, once again, the extremely awkward fit between the words used in the ARMSPA and the legal position New GM now takes.

V. SUMMARY OF THE QUALITY AND QUANTITY OF THE EVIDENCE.

New GM argues that the "debtor . . . has never claimed that liability for the Settlement is the responsibility of New GM." *Doc. 45, p. 7 n.1*. But this double-edged sword slices even more forcefully in the other direction. Likewise, no one from Old GM has accepted responsibility for the Class Judgment, which underscores the lack of objectivity of New GM's witnesses, all of whom are current New GM employees. If Old GM wanted to retain liability for the Class Judgment, then where is the affidavit from Old GM saying so? If UST insisted that the Class Judgment be retained, then where is the affidavit from UST? Certainly New GM has superior access to these entities, and presumably it could ascertain what the witnesses employed by those entities would say even before issuing subpoenas. If this evidence existed and were favorable to New GM's position, then surely New GM would have shared it.

New GM references supposed conversations with UST and Cadwalader—who at the time stood in the shoes of what would become New GM—but presents no testimony from them. The only witness involved in drafting section 2.3(a)(vii)(A) (*i.e.*, Buonomo) was an Old GM employee at the time but currently is an employee of New GM. In other words, there is no testimony from anyone who represented New GM at the time of negotiations, and the sole witness who negotiated for Old GM cannot be considered a disinterested witness. The absence of testimony from independent, objective witnesses to corroborate New GM's self-serving, conclusionary, *ex post facto* assertions concerning its intent only serves to heighten the significance of what is already the best evidence—New GM's honoring of the Class Judgment until after this declaratory judgment action was filed.

CONCLUSION

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

Dated: October 10, 2011

Respectfully submitted,

/s/ Mark L. Brown

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REVISED HEARING DATE AND TIME:
December 14, 2011 at 9:45 (Eastern Time)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re MOTORS LIQUIDATION COMPANY f/k/a GENERAL MOTORS CORP., *et al.*, Debtors, KELLY CASTILLO, NICHOLE BROWN, BRENDA ALEXIS DIGIANDOMENICO, VALERIE EVANS, BARBARA ALLEN, STANLEY OZAROWSKI, and DONNA SANTI, Plaintiffs, v. GENERAL MOTORS COMPANY f/k/a NEW GENERAL MOTORS COMPANY, INC., Defendant.	Chapter 11 09-50026 (REG) Jointly Administered Adv. Proc. No. 09-00509

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2011, I electronically filed Plaintiffs' Reply Trial Brief with the Clerk of Court using the CM/ECF system, which will send notification of such filings(s) to the following:

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DECLARATION OF MARK L. BROWN

Declarant, Mark L. Brown, pursuant to 28 U.S.C. § 1746, hereby attests as follows:

1. I am one of the attorneys representing the Plaintiffs in this adversary proceeding and who represented the Class in the underlying class action. I was one of the lawyers who negotiated the terms and the language of the underlying class action settlement with counsel for Old GM. I have personal knowledge of the facts stated herein.

Meaning of "Effective Date"

2. The "Effective Date" in the settlement agreement was nothing more than a trigger date by which certain deadlines would be calculated. Because there turned out to be no appeal of the district court's judgment, the Effective Date was ten business days after the April 16, 2009 judgment became final and non-appealable. *See Ex. B ¶ 6.* This happened to be after Old GM's bankruptcy filing on June 1, 2009, but the settlement agreement does not say—nor was there ever an intention communicated during our negotiations—that the settlement agreement would be somehow "ineffective" prior to the Effective Date.

3. The 10-day period referenced in the definition of Effective Date was requested by Old GM in order to give them sufficient time to work out the mechanics of mailing claim forms to approximately 150,000 class members. This provision simply addressed the period of time in which it would be feasible for New GM to send claim forms, not that the agreement would be ineffective before that date.

4. In other words, Old GM had certain obligations whose performance deadlines had not yet passed at the time of the bankruptcy petition, but mutuality of obligations was immediate once the district court judgment became final and non-appealable on May 18, 2009. For example, Paragraph 12 of the Settlement Agreement provides that "each Plaintiff and Class Member, ***upon entry of the Judgment***, shall be deemed to have, and by operation of law shall have, fully, finally, and forever settled, released and discharged any and all Released Claims. . . ." (emphasis added). *Ex. B.* Old GM received the benefit of this release prior to the filing of the bankruptcy petition.

5. The district court's Judgment neither relies on nor references the Effective Date.

Plaintiffs' Withdrawn Objection

6. On June 29, 2009, counsel for Plaintiffs filed a "Limited Objection of Saturn Consumers to Debtors' 363 Motion for Sale of 'Purchased Assets'" but withdrew it shortly thereafter. To suggest (as New GM's opening brief does) that Plaintiffs' counsel "understood that MSPA § 2.3(a)(vii)(A) in its final version included in the Amended and Restated MSPA impaired class members' claims under the Settlement" is simply incorrect.

7. On June 1, 2009, Old GM filed for bankruptcy protection and filed a proposed Master Sale and Purchase Agreement. Because the bankruptcy affected the *Castillo* class action, we (as class counsel) reviewed the MSPA and related motion to honor warranty programs.

8. During that time I also communicated with Old GM's (and now New GM's) attorney, Greg Oxford, about the bankruptcy proceedings. It was then announced that the company had begun negotiations to sell the Saturn brand to Penske, and I forwarded a copy of the *Castillo* settlement agreement to in-house counsel for Penske on June 11, 2009. We were aware, based upon communications and documents that class members forwarded to us, that Old GM was still paying VTi transmission claims under the terms of the *Castillo* settlement, despite the bankruptcy filing.

9. Old GM filed the ARMSPA apparently on Friday, June 26, 2009, though it was docketed by the court clerk on Saturday, June 27. We learned of the ARMSPA on Monday, June 29, and noticed that there were changes to the agreement involving warranties generally. For example, the phrase "specifically identified as warranties" was added in section 2.3(a)(vii)(A), and the phrase "Liabilities for negligence, strict liability, design defect, manufacturing defect, failure to warn or breach of the express or implied warranties of merchantability or fitness for a particular purpose)" was deleted in section 2.3(a)(ix). The

Castillo class, of course, had asserted several different warranty theories (express based upon the glove-box warranty, express based upon advertisements, implied warranty of merchantability and fitness for a particular purpose). The attorneys representing Old GM had never told us that the *Castillo* settlement was not going to be honored by New GM, and we were surprised to learn of a new sale agreement. Because the approval hearing was scheduled for the next morning (Tuesday, June 30), I sent the June 29 e-mail message attached as Exhibit 1 to attorneys Joe Lines and Greg Oxford requesting to be "apprised immediately of GM's intentions concerning the VTi transmission class action settlement and judgment." No response was received.

10. In the absence of a response confirming that New GM would continue honoring the settlement, we knew that we had a very limited amount of time to prepare and file an objection (if one was necessary) prior to the scheduled hearing the next morning. This left insufficient time to thoroughly review and analyze the ARMSPA, and we had to quickly weigh the perils of waiving an objection on behalf of the entire Class against the risks of objecting with a less-than-complete understanding of the ARMSPA. In less than half a day, we exercised our best abbreviated efforts to digest the 100+ page ARMSPA and the more than 1000 pages filed therewith, attempted to contact GM's counsel concerning the company's intentions, identified local counsel, engaged and negotiated terms with local counsel, researched certain aspects of bankruptcy law and got up to speed on this Court's local rules and procedures, and drafted an objection to be filed before the next morning's scheduled hearing. As Plaintiffs said in their withdrawal of the objection (Doc. No. 2446):

> Because of Debtors' late amendment and the impending sale hearing less than 24 hours after Class Counsel learned of the amendment, there was inadequate time for a thorough analysis of the more than 100 page amendment and related exhibits prior to the submission of the Limited Objection filed on behalf of the Class on the eve of the sale hearing. As a result . . . of this delay and communications with Debtors' counsel, the Limited Objection was filed on the basis of what was

> subsequently revealed to be an incomplete understanding of the Amended Master Sale and Purchase Agreement.
>
> In light of more the more thorough analysis afforded by subsequent review of the Amended Master Sale and Purchase Agreement, the Class Representatives, individually and on behalf of all others similarly situated, hereby withdraw their Limited Objection.

We simply wanted to preserve any rights of the Class until we could fully analyze the ARMSPA.

11. Shortly after filing the objection, we determined that New GM had assumed the *Castillo* settlement under the ARMSPA. By that time, we had fully analyzed the ARMSPA and comprehended the significance of its definitions and structure. For example, we understood the breadth of the definition of "Liabilities" in section 1.1 of the ARMSPA, the interplay between Retained Liabilities and Assumed Liabilities, and the significance of section 2.3(b)(xvi).

12. By July 8, 2009, we already had completed a first draft of a declaratory judgment action seeking a declaration that New GM had assumed Old GM's *Castillo* obligations pursuant to the ARMSPA. We then learned that New GM was paying VTi claims under the settlement terms after the Closing on July 10.

13. The withdrawn objection was an example of cautious counsel, squeezed for time, attempting to protect their clients' interests until a complete analysis could be undertaken. That was our intent in filing the objection. When we filed the objection, we largely were focused on the additions and deletions in the Assumed Liabilities. We did not focus on the meaning of "arising under," or the other issues in this adversary proceeding.

New GM's Document Production

14. On May 14, 2010, Plaintiffs served New GM with document requests that included (in Paragraph 2) the following: "All documents concerning the Class Action which

were (a) in your possession before the Closing; (b) received by you after the closing; (c) created by you before the Closing; and/or (d) created by you after the Closing."

15. Plaintiffs also requested (in Paragraph 21) the following: "All documents concerning any analysis, discussion, and/or decision of whether you should assume, pay (in whole or in part), defend, and/or compromise any alleged warranty claim (whether threatened or actually asserted).

16. I or assistants acting under my direction have reviewed all the documents produced by New GM in response to our document requests. This review did not reveal any excerpt of the general ledger or other accounting records referencing an accounting reserve for the *Castillo* settlement.

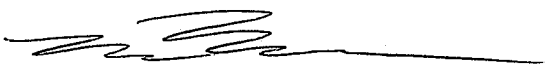
17. New GM did produce an e-mail from Lori Hamilton to Susan Tuohy dated August 6, 2009 in which she indicated: "I found the information on the CVT reserve. Yes, there was $20M in an 00 5543 account (legal settlement liability) put on the books in Aug 2008. However, I understand that ALL Legal Settlement Reserves were left in OldCo." *Ex. 7* (emphasis in original). Thus, New GM has produced information generically concerning *all* legal settlement reserves but has produced no other documentation regarding any decision specific to the *Castillo* reserve.

18. Our review of New GM's document production is consistent with the testimony of Mr. Lines that the decision in late September, 2009 to stop making payments in accordance with the *Castillo* settlement was New GM's first business decision concerning the settlement (other than the ARMSPA). Our document review revealed no evidence of earlier official decisions concerning the settlement.

Miscellaneous

19. New GM's opening brief states that "Plaintiffs' counsel never took any action to present a class-wide claim in Old GM's bankruptcy case. . . ." *New GM brief at 30.* To the contrary, on November 28, 2009, we submitted Claim No. 62908 on behalf of all "Class Members, U.S.D.C. E.D.Ca. 2:07-cv-02142." In the description of the claim, we incorporated an attachment which specifically referenced this adversary proceeding and stated that the bankruptcy claim against Old GM was filed in the alternative.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 22, 2011.



Mark L. Brown