UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11 Case No.**
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*	:	**09-50026 (REG)**
Debtors.	:	**(Jointly Administered)**
KELLY CASTILLO, NICHOLE BROWN, BRENDA ALEXIS DIGIAN DOMENICO, VALERIE EVANS, BARBARA ALLEN, STANLEY OZAROWSKI, AND DONNA SANTI,	:	**Adv. Proc. No. 09-00509**
Plaintiffs,	:	**Return Date: March 25, 2010**
v.	:	**Time: 9:45 a.m.**
General Motors Company, f/k/a New General Motors Company, Inc.,	:	
Defendant.	:	
GENERAL MOTORS LLC,	:	
Counterclaimant,	:	
v.	:	
KELLY CASTILLO, NICHOLE BROWN, BRENDA ALEXIS DIGIAN DOMENICO, VALERIE EVANS, BARBARA ALLEN, STANLEY OZAROWSKI, DONNA SANTI, LAKINCHAPMAN LLC, ROBERT W. SCHMIEDER, II, AND MARK L. BROWN,	:	
Counterdefendants.	:	

NEW GM'S REPLY MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

New GM submits this memorandum in reply to Plaintiffs' and Counterdefendants' Response in Opposition to New GM's Motion for Summary Judgment ("Opp").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

In a nutshell, plaintiffs' "Assumed Liability" claim fails because the Settlement simply is not a liability that "arises out of" the standard warranty described in ARMSPA § 2.3(a)(vii)(A). Far from "all but ignor[ing]" this provision (Opp., p. 1), New GM's summary judgment motion rests squarely on its express and unambiguous terms: the Settlement *does not* give plaintiffs any rights "arising under express written warranties … ***specifically identified as warranties and delivered in connection with the sale*** of new, certified used or pre-owned vehicles or new or remanufactured motor vehicle parts … (including service parts, accessories, engines and transmissions) manufactured or sold by [Saturn]…." (emphasis added). That plaintiffs in the class action purported to assert breach of warranty claims ***other than*** claims for breach of the standard warranty terms is simply irrelevant, because those claims (alleging a design defect and unconscionability) did not assert liability under the express terms of the standard written warranty that was specifically identified as such and delivered in connection with the ***sale*** of Saturn vehicles or parts. Nor was the Settlement itself "specifically identified" as a "warranty" or delivered "in connection with the sale" of plaintiffs' Saturn vehicles. Thus, section 2.3(a)(vii)(A) provides no reasonable basis for plaintiffs to argue that the Settlement is an Assumed Liability and New GM is entitled to summary judgment on Count I.

Further, GM agrees with plaintiffs (Opp., p. 2), that paragraph 56 "simply does not conflict with the ARMSPA." Despite plaintiffs' attempt to distort GM's position (*id.*), New GM is *not* arguing that paragraph 56 "changed" ARMSPA § 2.3(a)(vii)(A). Instead, paragraph 56 merely reinforces the express terms of that provision by emphasizing the undeniable time and mileage limits of Saturn's standard warranty and its exclusive repair remedy, *i.e.*, that warranty's "conditions and limitations." In reality, section 2.3(a)(vii)(A) and paragraph 56 are saying exactly the same thing, albeit in different words: Because the benefits which the Settlement would have provided were completely outside of and in addition to those provided by Saturn's standard warranty, the Settlement does not fit within the "conditions and limitations" of that

warranty and does not "arise under," *i.e.*, does not have its "origin" or "source" in, that warranty. Thus, under either provision, the Settlement is not an Assumed Liability.

Plaintiffs' opposition also distorts New GM's position on their "implied assumption" claim (Count II). While it is true, to be sure, that MLC and New GM sent generalized written communications to Saturn customers, some of whom happened to be class members, assuring them of continued *warranty* protection, there is no evidence that any of these communications promised *out-of-warranty* VTi transmission repairs *other than on a voluntary basis with a smattering of class members who had "fresh failures*." While certainly New GM received new consideration in the form of customer good will *from those class members*, there is no evidence that New GM either received any consideration at all *from plaintiffs or other class members* or had any communications *with them* in which it agreed to pay benefits under the Settlement. Beyond the lack of any evidence of these essential elements – consideration and mutual assent – without which no implied contract could have been formed, the Settlement by its terms did not require MLC (let alone New GM) to pay *any class member* for repairs before the Effective Date of the Settlement. Instead, the decision to provide repairs for "fresh failures" was entirely voluntary. Because the automatic stay prevented the Effective Date from ever occurring, neither MLC nor New GM ever became obligated to provide free-of-charge repairs, and thus New GM was free to discontinue this voluntary program at any time, as it did on September 28, 2009.

Plaintiffs' "Deferred Executory Contract" claim (Count III) that "New GM still had the obligation to pay all amounts due under the class settlement until it was rejected" fails for similar reasons. Because the Settlement did not become effective before the MLC bankruptcy filing, claim forms were never mailed, completed, returned or evaluated, and therefore no amounts ever became "due" before MLC rejected the Settlement. ARMSPA § 6.6(e), the provision plaintiffs rely upon, merely obligated New GM to pay or reimburse MLC for *post-petition* administrative expenses incurred in keeping alive certain executory contracts which New GM did not wish to reject immediately. That provision clearly does not require New GM to "reimburse" MLC for pre-petition claims it hasn't paid, or pay plaintiffs' pre-petition claims which are not due from

MLC, and no post-petition administrative expenses were ever incurred under the Settlement prior to its rejection. Thus, New GM has no obligation to reimburse MLC under ARMSPA § 6.6(e), let alone make any payment to plaintiffs.

Finally, as to New GM's counterclaims, under the clear and unambiguous terms of the ARMSPA and Sale Approval Order, there simply is no reasonable basis for any argument that the Settlement is an Assumed Liability. Nor do the injunctive provisions of the Sale Approval Order provide any exception for declaratory actions. Thus, it is indisputable that plaintiffs and their counsel have knowingly violated clear and unambiguous injunctive provisions and should pay New GM's costs and attorneys fees incurred in defending this contumacious proceeding.

ARGUMENT

Plaintiffs' attempt to impose a huge liability on New GM which it never agreed to accept strikes at the heart of section 363 of the Bankruptcy Code, which authorizes the debtor to sell assets for the benefit of its estate *free and clear of pre-petition liabilities* except those which the purchaser expressly agrees to assume. Plaintiffs' action also contumaciously ignores the clear injunctive prohibitions of the Sale Approval Order, which were put in place to protect New GM from having to defend precisely this type of obviously meritless litigation.

I. THE SETTLEMENT IS NOT AN "ASSUMED LIABILITY"

Plaintiffs continue obdurately to conflate the broad definition of "Liabilities" with the narrowly drawn language of section 2.3(a)(vii)(A) which describes clearly the very limited warranty obligations which New GM has accepted as "Assumed Liabilities." There is obviously no dispute that the Settlement is a Liability. To be an *Assumed* Liability, however, it must fit within one of the subsections of section 2.3(a). For the reasons set forth at length in New GM's motion for summary judgment and its memorandum in opposition to plaintiffs' summary judgment motion, not repeated here, the Settlement clearly is not an Assumed Liability under section 2.3(a)(vii)(A) because it does not have its "origin" or "source" in the standard Saturn warranty which this provision describes. *Webster's Ninth New Coll. Dict.* (1989). And plaintiffs do not argue that the Settlement is an Assumed Liability under any other subpart of section 2.3(a).

So, in the end, the Settlement simply is not an Assumed Liability. Instead, it is an Excluded Contract under ARMSPA § 2.2(b)(vii) which remains the exclusive responsibility of MLC. Under ARMSPA § 2.1(a), New GM purchased from MLC only the "Purchased Assets." ARMSPA § 2.2(a) defines nineteen categories of Purchased Assets, each of which is subject to the same express qualification: "but, in every case, excluding Excluded Assets." Under ARMSPA § 2.2(b)(vii), Excluded Assets include "Excluded Contracts":

> "Notwithstanding anything to the contrary contained in this Agreement [MLC and its co-debtors] shall retain all of their respective right, title and interest in and to, and shall not, and shall not be deemed to, sell, transfer, assign, convey or deliver to [New GM], and the Purchased Assets shall not, and shall not be deemed to, include the following (collectively, the "Excluded Assets"):
>
> > (vii) … (C) all pre-petition Executory Contracts … that have not been designated as or deemed to be Assumable Executory Contracts…. (E) all non-Executory Contracts for which performance by a third-party or counterparty is substantially complete and for which [MLC] owes a continuing and future obligation with respect to such non-Executory Contracts (collectively, the "Excluded Contracts")….

The Settlement, if executory, is an Excluded Contract under subsection (vii)(C) that has *not* been designated as an "Assumable Executory Contract" (as plaintiffs admit) and, if not executory, the Settlement is an Excluded Contract under subsection (vii)(E) because MLC "owes a continuing and future obligation with respect to [it]" (as plaintiffs certainly will not dispute). Because the Settlement is an Excluded Contract, New GM has no liability under the Settlement because ARMSPA § 2.3(b)(iii) protects New GM against "all Liabilities arising out of, relating to, in respect of or in connection with the Excluded Assets." Since Excluded Assets include Excluded Contracts, New GM has no liability under the Settlement.

New GM already has responded to plaintiffs' specious arguments based on the "arising under" and *Safety-Kleen* cases in its Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment filed January 22, 2010 (pp. 3-8) and will not repeat those responses here.

Equally speciously, plaintiffs attempt to fabricate alleged liability under the standard warranty based on the theories of "design defect" and "unconscionability." They first argue that the design of the VTi transmission was inherently defective because it was prone to "premature failure." Thus, they say, replacing one transmission which actually failed with another of the

same design which supposedly is "inherently prone to premature failure (whether within the limits of the express warranty or otherwise)" violates the standard warranty's promise to provide repairs which "correct" defects related to materials or workmanship. The "conditions and limitations" of the standard warranty, however, simply do not cover alleged design defects (let alone require repairs to "correct" design defects), nor do they require free-of-charge repairs outside the warranty period or any remedy other than repairs *during the warranty period*. Transmission failures outside the warranty period, whether Saturn anticipated them or not, simply do not fall within the "conditions and limitations" of the standard warranty coverage. Thus, because plaintiffs are seeking relief other than repairs during the warranty period, their claims do not and cannot "arise under" the standard warranty. *See Abraham v. Volkswagen of America, Inc.*, 795 F.2d 238, 250 (2d Cir.1986) ("The general rule is that an express warranty does not cover repairs made after the applicable time or mileage periods have elapsed"). Similarly, plaintiffs' claim that the time and mileage limitations of Saturn's standard warranty are unconscionable based on MLC's alleged knowledge of the short effective life of the VTi transmission is not a claim "arising under" that warranty but one which by definition seeks to reach beyond its "conditions and limitations." *See id.* ("Manufacturers always have knowledge regarding the effective life of particular parts and the likelihood of their failing within a particular period of time. Such knowledge is easily demonstrated by the fact that manufacturers must predict rates of failure of particular parts in order to price warranties and thus can always be said to "know" that many parts will fail after the warranty period has expired. A rule that would make failure of a part actionable based on such "knowledge" would render meaningless time/mileage limitations in warranty coverage.").

Plaintiffs next attempt to refute an "issue preclusion" argument that New GM simply has not made. Opp., p. 8. The Sale Approval Order, specifically its paragraphs 3 and 56, stands on its own in providing that the liabilities assumed by New GM under Saturn's standard warranty are "pursuant to, and subject to conditions and limitations of" that warranty. Regardless of any issue preclusion issue, plaintiffs lack standing to challenge MLC's and New GM's division of MLC's liabilities as approved by the Sale Approval Order because they are not parties to the

ARMSPA and because ARMSPA § 9.11 expressly bars their claim as purported third party beneficiaries which they acknowledge is the sole basis for their claim. But even if it were necessary for New GM to rely on a theory of non-party preclusion (which it isn't) the very authority plaintiffs cite, *Taylor v. Sturgell*, ___ U.S. ___, 128 S.Ct. 2161, 171 L. Ed. 2d 155, 2008 U.S.LEXIS 4885 (2009), expressly recognizes bankruptcy proceedings as an exception to the general rule against non-party preclusion. 128 S.Ct. at 2173.

Finally, despite the parties' agreement that the ARMSPA and Sale Approval Order are not in conflict, plaintiffs argue pointlessly and at length that the Court was without power to modify the ARMSPA. Beyond the fact that ARMSPA § 2.3(a)(vii)(A) standing on its own limits New GM's assumed warranty obligations to those arising under Saturn's standard warranty, plaintiffs' attempt to undermine paragraph 56 is utterly without merit.

For starters, neither of the cases plaintiffs cite has any application here. *In re Adelphia Communications Corp.*, 364 B.R. 518 (Bankr.S.D.N.Y.2007), insofar as pertinent here, reflects this Court's conclusions that (a) it could not approve a proposed settlement of an insurance coverage dispute where one of the settlement terms – issuance of a "channeling injunction" that would restrain third parties from laying claim to insurance proceeds outside the bankruptcy case – would run contrary to binding Second Circuit precedent and (b) without the injunction, which seemingly was key to some of the parties, the Court could not approve unilaterally the other monetary terms of the Settlement. 364 B.R. at 521 ("[I]t is up to the Settlement parties to determine whether they would agree to it or a variant without th[e] protection" of the channeling injunction). This ruling has nothing at all to do with New GM's alternative argument (which the Court never need reach since paragraph 56 worked no "change") that the Court *could* properly insist on a change in the ARMSPA *to which the parties agreed* as a condition of approving a sale "free and clear of liens" under section 363. Obviously, even assuming paragraph 56 could be viewed as a "change," no party with standing to object to it – not MLC, not New GM and not any other party to the 363 transaction – so much as hinted at any objection to paragraph 56.

In re Arkoose Produce, Inc., 2003 Bankr. LEXIS 2222, 2003 WL 25273746 (Bankr.D. Idaho), also has nothing to do with this case and, indeed, "implicated" section 363 (to use plaintiffs' word) only in passing. There, Judge Pappas merely evaluated a proposed settlement of litigation under the familiar "business judgment rule" and case law which required him to consider four factors in evaluating the overall settlement. The only mention of section 363 arose out of the separate requirement, applicable to settlements which involve the sale of estate assets, to determine whether a higher bid might be obtained for the assets in question. Once again, the Court's statement in dictum that it could not unilaterally "rewrite" the settlement terms merely reflected the need for agreement by the parties to any material change in the settlement, as well as the need to give appropriate deference to the business judgment of the trustee under the business judgment rule. In rejecting the proposed settlement, the Court did nothing more than apply the required four factor test, perform the alternative analysis required by section 363 procedures governing the sale of estate assets, and suggest, at the end of its opinion, that the parties should continue to try to reach an agreement on a settlement which the Court could approve. Here, again, there is no question that the parties to the section 363 transaction did not disagree with the terms of paragraph 56, whether it "changed" ARMSPA § 2.3(a)(vii)(A) or not.

Plaintiffs' argument that the first sentence of paragraph 56 is inclusive, not exclusive, also does not advance their position. To be sure, as plaintiffs suggest, that sentence makes a statement about a particular kind of warranty – the standard Saturn warranty described in section 2.3(a)(vii)(A) – and not about any other kind of warranty. Thus, it is "inclusive" of that kind of warranty liability and does not *by itself* "exclude" any other kind of warranty liability. Instead, other liabilities, whether sounding in warranty or not, are "excluded" by their absence from the list of Assumed Liabilities in section 2.3(a), as discussed above, and/or their inclusion in the list of Excluded Assets (including Excluded Contracts) in section 2.2(a), as also discussed above, and/or by the *second* sentence of paragraph 56 which provides that New GM "is not assuming responsibility for Liabilities contended to arise by virtue of ***other*** alleged warranties…." (emphasis added). Thus, New GM's statement that it accepted liability "only" under the

standard Saturn warranty is indisputably correct even though this word is not found in the first sentence of paragraph 56. So, in the end, there is simply no need for paragraph 56 to do the "double duty" of inclusion and exclusion as decried by plaintiffs' inapposite insurance coverage cases (Opp., p. 10).

II. PLAINTIFFS' ANALYSIS OF ARMSPA § 6.6 PROCEDURES IS INCORRCT

Plaintiffs argue that it was not necessary for MLC to assume the Settlement and assign it to New GM under ARMSPA § 6.6 because that section's assumption and assignment procedures were not followed with respect to Saturn's standard warranty. This argument, however, proves nothing because New GM had *already* accepted responsibility for Saturn's standard warranty liability in ARMSPA § 2.3(a)(vii)(A). Since the Settlement did not include any benefits that would have been available under the standard warranties, New GM did not accept responsibility for the Settlement under section 2.3 and therefore the only way in which it could have done so was pursuant to the assumption and assignment procedures of section 6.6. MLC, of course, *did* follow those procedures, but elected to reject rather than assume the Settlement.

Plaintiffs' throwaway argument that MLC was not entitled to reject the Settlement because the District Court for the Eastern District of California entered a judgment is not only erroneous,[1] but simply doesn't get them anywhere. Even assuming *arguendo* that MLC could not "reject" the judgment under section 365 of the Bankruptcy Code, that judgment would only give class members an unsecured claim in the MLC bankruptcy case, not the dollar-for-dollar payment of the Settlement benefits which plaintiffs are seeking here.

[1] The judgment approved and required MLC to implement the terms of a contract – the Stipulation of Settlement – after its Effective Date, which did not occur until after the MLC bankruptcy filing. When MLC commenced its bankruptcy case, substantial performance remained due on both sides. MLC would have been required to mail Claim Forms to Class members, class members would have been required to complete and return them, and MLC then would have been required to evaluate and pay valid claims. Thus, despite the judgment, the underlying contract remained executory and subject to rejection under section 365. And, even if it was not executory, the Settlement was an Excluded Contract under ARMSPA § 2.2(b)(vii)(E) for which MLC retained exclusive liability. *See* ARMSPA § 2.3(b)(iii).

III. THE IMPLIED ASSUMPTION CLAIM HAS NO FACTUAL OR LEGAL BASIS

Plaintiffs in this non-class action cannot advance any claim on behalf of the other Saturn owners who were class members in the California class action but are not parties to this case. Plaintiffs also do not, and cannot, allege that they personally had any communication with MLC after its bankruptcy filing, or with New GM, in which they were promised that New GM would assume responsibility for the Settlement. Instead, plaintiffs erroneously claim that an implied contract was formed between them and New GM because New GM agreed to provide free-of-charge repairs to *other* Saturn owners who had experienced "fresh failures."

Plaintiffs argue initially that they need discovery in order to provide needed affidavits and therefore New GM's motion should be denied under Rule 56(f), F.R.Civ.P., and Bankruptcy Rule 7056(f). Beyond plaintiffs' failure to propound such discovery during the months this proceeding has been pending, the cited rules only apply where it "appear(s) from the affidavits of a party opposing the [summary judgment] motion that the party cannot *for reasons stated* present by affidavit facts *essential* to justify the party's opposition…." (emphasis added).

Because plaintiffs cannot assert claims in this non-class action on behalf of other Saturn owners who are not parties here, the only issue is whether New GM formed an implied contract *with plaintiffs*, and the only communications that are relevant to that issue are communications *with them* (if any) which either do or do not show the essential elements of consideration and mutual assent. *Maas v. Cornell University*, 94 N.Y.2d 87, 93-94, 699 N.Y.S.2d 716 (1999). Certainly plaintiffs know whether they individually had any communications with New GM, yet they have not submitted any affidavits showing "for reasons stated" why they cannot adduce evidence of those communications in their opposition, let alone why evidence of those communications *which they do not have* is "essential to justify [their] opposition." Thus, while it is theoretically possible that New GM or MLC could have documents reflecting communications with plaintiffs which plaintiffs do not have, it would be incumbent on plaintiffs, if such were the case, to provide the Court with some evidentiary basis for believing (1) that the communications took place and (2) that such documentation may exist in New GM's or MLC's records. This

they simply have not done. Absent such a showing of "essential" missing information, and given plaintiffs' choices not to propound discovery and not to submit the affidavits required by Rule 56(f), their request for a continuance should be denied.

The Court therefore should focus on the existing record which defeats plaintiffs' "implied assumption" argument for at least four separate reasons.

First, as detailed in New GM's Memorandum in Opposition to Plaintiffs' summary judgment motion, pp. 8-9, MLC adopted the "fresh failure" program *entirely voluntarily*. As a result, plaintiffs do not (and cannot) argue that MLC was required to do so by the terms of the Settlement. Instead, class members' entitlement to Settlement benefits depended on their return of Claim Forms that MLC was to mail to them on the Effective Date which, as a result of the MLC bankruptcy filing, never came before MLC rejected the Settlement.

Second, while it is undisputed that customer goodwill provided adequate consideration for MLC's and, later, New GM's agreements to provide free-of-charge repairs to individual Saturn owners with "fresh failures," there is no evidence that New GM ever received any consideration from plaintiffs or other Saturn owners whose VTi transmissions *did not* experience "fresh failures." In the absence of any evidence of this essential element for formation of an implied contract, there is no genuine issue of material fact for trial, and GM therefore is entitled to judgment as a matter of law.

Third, regardless of the various generalized customer communications which MLC and/or New GM sent to plaintiffs and other Saturn customers assuring them of the continued coverage of their (unexpired) warranties, none of these communications promised to honor, or even mentioned, the Settlement. Thus, plaintiffs in their opposition have presented no evidence that would support a finding that New GM ever manifested its assent to assume responsibility for the Settlement – either to plaintiffs or, for that matter, to other Saturn owners who did not have "fresh failures." *Berlinger v. Lisi*, 288 A.D.2d 523, 524, 731 N.Y.S.2d 916 (1996) (formation of an implied contract, just like an express contract, requires "an indication of a meeting of the

minds" of the parties). Given plaintiffs' failure to provide any evidence of mutual assent, this essential element, too, dooms plaintiffs' implied assumption claim as a matter of law.

Fourth, consistent with the Court's observation at the hearing on plaintiffs' motion for a temporary restraining order, it simply strains credulity given the intense scrutiny early on in the MLC bankruptcy case as to which assets and liabilities New GM would or would not accept, that New GM would "impliedly" accept *sub silentio* what plaintiffs claim is a $60 million liability.

IV. PLAINTIFFS' "DEFERRED EXECUTORY CONTRACT" THEORY IS ABSURD

Even accepting *arguendo* plaintiffs' premise that the Settlement prior to its rejection was a Deferred Executory Contract, plaintiffs' own words conclusively defeat their claim that New GM was required to pay claims under the Settlement which arose prior to the rejection date. At page 18 of their opposition, plaintiffs say this: "Delaying acceptance or rejection came with a simple consequence: New GM is required to pay amounts ***due*** on the contract until such time as the contract is rejected…. [A]t a bare minimum, the ARSMPA required New GM to satisfy all obligations ***due*** on the settlement until it was rejected." (Emphasis added.)

Very simply, because the Settlement never became effective and class members never submitted claim forms, no amounts ever became "due" under the Settlement between the Closing – the first time the Settlement could have become a Deferred Executory Contract, *see* ARMSPA § 6.6(c) – and the date the Court issued its order approving MLC's rejection of the Settlement.

ARMSPA § 6.6(e), the provision upon which plaintiffs attempt to rely, only requires New GM to pay or reimburse MLC for its post-Closing (and therefore, by definition, post-petition) expenses incurred in continuing performance under executory contracts that New GM did not want to reject immediately. Because the Settlement never became effective, however, MLC did not incur any expenses related to the Settlement between the Closing and the rejection date, so New GM had no obligation to reimburse MLC for such expenses, let alone pay directly MLC's pre-petition liabilities to plaintiffs under the Settlement.

V. GM IS ENTITLED TO SUMMARY JUDGMENT ON ITS COUNTERCLAIMS

As plaintiffs acknowledge, liability for contempt turns initially on whether the Settlement is an Assumed Liability under ARMSPA § 2.3(a)(vii)(A). Because it so obviously is not for all the reasons previously stated, and because plaintiffs do not and cannot deny receiving notice of the valid Sale Approval Order, the only remaining issue is whether their action for declaratory relief fits within an implied exception to the injunctive provisions of paragraphs 8 and 47. Those provisions, however, are clear in this regard. Paragraph 8 permanently enjoins plaintiffs and all others holding claims against MLC "from asserting against [New GM] … [their] liens, claims, encumbrances, and other interests…." There is no express exception for actions for declaratory relief, and any implied exception would plainly "swallow the rule" of the injunction in view of 28 U.S.C. § 2202 which permits the Court to award coercive relief after entry of a declaratory judgment. Permitting such circuitous tactics would defeat the central purpose of paragraph 8 and section 363 of the Bankruptcy Code: protecting New GM from *any and all* litigation claims by MLC's creditors. Equally as clearly, paragraph 47 prohibits plaintiffs from "commencing or continuing ***any*** action or other proceeding" against New GM or "enforcing … ***any*** judgment against [MLC] as against [New GM]…." (Emphasis added.) None of this language so much as hints at the implied exception for declaratory relief actions which plaintiffs are attempting to fashion.

Thus, New GM has established indisputably all three of the elements for a finding of civil contempt against plaintiffs and their counsel: "(1) that a valid order of the court existed; (2) that the defendants [here, plaintiffs and their counsel as counterdefendants] had knowledge of the order; and (3) that [they] disobeyed the order." *Roe v. Operation Rescue*, 54 F.3d 133, 137 (3d Cir.1995) (citation and internal quotations omitted).

GM also is entitled to summary judgment on its Second Counterclaim for an award of its costs and reasonable attorneys' fees incurred in defending this contumacious proceeding. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S.Ct. 497, 93 L.Ed. 599 (1949) (courts have inherent authority to use the civil contempt power "to enforce compliance with an

order of the court *or to compensate for losses or damages sustained by reason of noncompliance*") (emphasis added); *New York State NOW v. Terry*, 159 F.3d 86, 96 (2d Cir. 1998) ("A finding that a contemnor's misconduct was willful strongly supports granting attorney's fees and costs to the party prosecuting the contempt").

CONCLUSION

For all the foregoing reasons, New GM respectfully urges that the Court grant New GM's motion for summary judgment, deny plaintiffs' cross-motion for summary judgment, and set a hearing for determination of the exact amount of New GM's attorneys' fees and costs to be awarded as a result of counterdefendants' contumacious violation of the Sale Approval Order.

New York, New York
Dated: January 29, 2010

[s] Gregory R. Oxford

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