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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11**
	:	
MOTORS LIQUIDATION COMPANY, *et al.*,	:	**Case No.: 09-50026 (MG)**
f/k/a General Motors Corp., *et al.*	:	
	:	
Debtors.	:	**(Jointly Administered)**
	:	

REPLY BRIEF BY GENERAL MOTORS LLC TO OBJECTION TO MOTION TO ENFORCE THE BANKRUPTCY COURT'S JULY 5, 2009 SALE ORDER AND INJUNCTION, AND THE RULINGS IN CONNECTION THEREWITH, WITH RESPECT TO THE REICHWALDT PLAINTIFFS

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General Motors LLC ("**New GM**") submits this reply brief ("**Reply**") in response to the *Objection To Motion By General Motors LLC Pursuant To 11 U.S.C. §§ 105 And 363 To Enforce The Bankruptcy Court's July 5, 2009 Sale Order And Injunction, And The Rulings In Connection Therewith, With Respect To The Reichwaldt Plaintiff*, dated August 18, 2017 [ECF No. 14068] ("**Objection**") filed by Reichwaldt,[1] and in further support of the relief requested in the Reichwaldt Motion to Enforce.

PRELIMINARY STATEMENT

New GM is seeking to enforce important Sale Order limitations because of three infirmities in Reichwaldt's original and proposed amended complaints: (1) the punitive damages claim for assumed product liabilities contravenes the Sale Order, as twice determined by the Bankruptcy Court (most recently in this Court's July 2017 Opinion); (2) the so-called independent claim of failure to warn, including a punitive damages request, violates the Second Circuit Opinion and this Court's June 2017 Opinion because the alleged independent claim is not solely based on alleged wrongful post-Sale New GM conduct; and (3) the proposed amended complaint -- not yet approved by the trial court[2] -- contains successor liability allegations that violate the Sale Order and the Bankruptcy Court's December 2015 Judgment.

As with many of the gate-keeping issues presented to this Court, the dispute between New GM and Reichwaldt primarily centers on improper punitive damages requests.[3]

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[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the *Motion By General Motors LLC To Enforce The Bankruptcy Court's July 5, 2009 Sale Order And Injunction And The Rulings In Connection Therewith, With Respect To The Reichwaldt Plaintiff*, filed by New GM on July 28, 2017 [ECF No. 14016] ("**Reichwaldt Motion to Enforce**"). Capitalized terms not defined in this Preliminary Statement or in the Reichwaldt Motion to Enforce are defined in subsequent sections of this Reply.

[2] The Georgia Court recently gave New GM until September 7, 2017 to respond to Reichwaldt's motion to file the proposed amended complaint, which is nine days after the hearing scheduled by this Court on the Reichwaldt Motion to Enforce.

[3] New GM assumed failure to warn (to the extent viable under state law) as part of assumed product liability claims. As demonstrated herein, this Court ruled that punitive damages cannot be obtained for assumed product

Reichwaldt's claim for punitive damages relating to assumed Product Liabilities cannot be reconciled with this Court's July 2017 Opinion, which held that the punitive damages ruling in the December 2015 Judgment is the "law of the case."[4] Moreover, in the July 2017 Opinion, this Court expressly held that plaintiffs, like Reichwaldt, cannot assert punitive damages based on Old GM conduct. Given Reichwaldt's concession that the July 2017 Opinion is binding on her, she should be precluded from wasteful and repetitive litigation regarding whether punitive damages based on Old GM conduct (the fundamental predicate for an assumed product liability claim) are proscribed.

Reichwaldt fares no better in asserting an independent failure to warn claim against New GM. Essentially, Reichwaldt is distorting the imputation doctrine in an improper attempt to construct an independent claim based on Old GM conduct and Old GM duties. The first step in her flawed allegations is to refer extensively to Old GM conduct. Her next step is to assert the imputation doctrine on a wholesale basis to demonstrate that, pursuant to the 363 Sale, New GM acquired the knowledge of Old GM's conduct. That is where her analysis and the allegations in the complaint end. The only Old GM duties assumed by New GM pursuant to the 363 Sale were the expressly stated Assumed Liabilities. Under the Sale Order, New GM is not generally responsible for Old GM conduct, Old GM knowledge, or Old GM duties; that is a Retained Liability and independent claims cannot be based upon Old GM knowledge, conduct, or duties.

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liabilities. Reichwaldt also seeks to assert the same failure to warn claim as a purported independent claim for the sole purpose of establishing a separate path for punitive damages. As demonstrated herein, Reichwaldt's end-run is improper because she has not stated a viable independent claim.

[4] *In re Motors Liquidation Co*., No. 09-50026 (MG), 2017 WL 2963374, at *7 (Bankr. S.D.N.Y. July 12, 2017) ("**July 2017 Opinion**") ("The Second Circuit Opinion did not review the November Decision, and the November Decision was not appealed. Judge Gerber's ruling therefore remains law of the case and New GM cannot be held liable for punitive damages on a contractual basis. . . . Because a successor corporation may only be liable to the same extent as its predecessor, New GM cannot be held liable for a claim that its predecessor [Old GM] would not have to pay under the Bankruptcy Code.").

Thus, a plaintiff cannot properly assert an independent claim by wholesale and general allegations where broad swaths of Old GM conduct are imputed to New GM. Rather, a plaintiff must have a plausible basis to allege that specific Old GM documents or knowledge were known by particular New GM employees in the context of alleged wrongful post-Sale New GM conduct. Moreover, the claimant must allege that New GM entered into a post-363 Sale relationship with the Old GM vehicle owner that created a separate New GM duty to warn. *See Holland v FCA US LLC*, Case No. 1:15 CV 121, 2015 WL 7196197, at *4 (N.D. Ohio Nov. 16, 2015) ("While the [post-sale] TSB may serve as evidence that FCA had knowledge of the potential existence of rust and corrosion on 2004-2005 Pacificas, knowledge alone is insufficient to establish a duty on the part of FCA to warn Plaintiffs that their vehicles may be affected. Plaintiffs must allege a relationship between FCA and Plaintiffs that gave rise to a duty to warn."). Importantly, in July 2016, the Second Circuit stated that viable independent claims must be based solely on New GM post-363 Sale conduct, and not Old GM conduct.[5] In June 2017, this Court warned plaintiffs (like Reichwaldt) that "[i]t is not acceptable . . . to base allegations on generalized knowledge of both Old GM and New GM. To pass the bankruptcy gate, a complaint must clearly allege that its causes of action are based solely on New GM's post-closing wrongful conduct." June 2017 Opinion, 2017 WL 2457881, at *10. Plaintiffs cannot simply impute Old GM knowledge to New GM on a wholesale basis. If the independent claim pleading (and proof) requirements were otherwise, then the imputation doctrines would eviscerate the definition of an independent claim, as pronounced by the Second Circuit and this Court.

[5] *See In re Matter of Motors Liquidation Co.*, 829 F.3d 135, 157 (2d Cir. 2016) ("independent claims are claims based on New GM's own post-closing wrongful conduct. . . . These sorts of claims are based on New GM's post-petition conduct, and are not claims that are based on a right to payment that arose before the filing of petition or that are based on pre-petition conduct.").

Finally, while Reichwaldt has attempted to cure some of the improper allegations in her original complaint, Reichwaldt is seeking – through her proposed amended complaint – to add improper successor liability allegations in violation of the Sale Order and the Bankruptcy Court's December 2015 Judgment.[6]

In sum, Reichwaldt seems to incorrectly believe that she is not subject to or bound by any of the previous decisions of this Court or the Second Circuit. New GM therefore requests this Court's assistance in enforcing important Sale Order limitations against the unwarranted and improper punitive damages and independent claim in Reichwaldt's original and proposed amended complaints. Until these improper allegations are corrected, Reichwaldt should be stayed from further litigation in the Georgia trial court.

ARGUMENT

I. Reichwaldt's Request for Punitive Damages with Respect To Assumed Product Liabilities Violates the Bankruptcy Court's Rulings and Should Be Stricken

In the July 2017 Opinion, this Court issued two critical rulings that bind Reichwaldt and should lead to an injunction prohibiting the assertion of her punitive damages claim.

First, the Court ruled that "Judge Gerber's ruling that New GM did not ***contractually*** assume liability for punitive damages remains law of the case." July 2017 Opinion, 2017 WL 2963374, at *7 (emphasis added). The Court explained:

> Judge Gerber ruled, as a matter of contract interpretation, that New GM did not assume liability for punitive damages based on Old GM's conduct in the Sale Agreement. The Second Circuit Opinion did not review the November Decision, and the November Decision was not appealed. Judge Gerber's ruling therefore remains law of the case and New GM cannot be held liable for punitive damages on a contractual basis.

[6] Reichwaldt sent New GM a proposed amended complaint ("**Proposed Reichwaldt Amended Complaint**") after the filing of the Reichwaldt Motion to Enforce. A copy of the redlined version of the Proposed Reichwaldt Amended Complaint provided by Reichwaldt to counsel for New GM is attached hereto as **Exhibit "A."**

Id.

Second, the Court ruled that New GM may not be held liable for punitive damages on *any* successor liability theory (whether contractual or otherwise), "[b]ecause a successor corporation may only be liable to the same extent as its predecessor, New GM cannot be held liable for a claim that its predecessor [Old GM] would not have to pay under the Bankruptcy Code." *Id.* at *10. The Court thus concluded that "Post-Closing Accident Plaintiffs [like Reichwaldt] may not assert claims against New GM for punitive damages based on Old GM conduct." *Id.* at *11.

In fact, as shown below, the arguments in Reichwaldt's response were also made to the Bankruptcy Court in 2015 and as part of the 2016 Threshold Issues, and rejected. Reichwaldt should not be allowed to re-litigate them.

A. Reichwaldt is Bound by the Rulings in the July 2017 Opinion

Reichwaldt "***does not dispute*** that she was served with the December 2016 Show Cause Order or ***that she is bound by*** the Court's June and July rulings . . . ." Objection, at 19 n.14 (emphasis added). Based on her admissions, the July 2017 Opinion applies to her, including the rulings that: (i) New GM did not ***contractually*** assume liability for punitive damages based on Old GM conduct; and (ii) New GM cannot ***otherwise*** be held liable for punitive damages as a successor to Old GM, because Old GM would not have been required to pay such damages under the Bankruptcy Code.

Reichwaldt is bound by the court's rulings under the law of the case doctrine. July 2017 Opinion, 2017 WL 2963374, at *7 ("Judge Gerber's ruling that New GM did not ***contractually*** assume liability for punitive damages ***remains law of the case***.") (emphasis added)).

Reichwaldt's claims are *also* barred by *res judicata*. "Under both New York law and federal law, the doctrine of *res judicata*, or claim preclusion, provides that a final judgment on

the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action." *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190, 195 (2d Cir. 2010) (citation omitted). "[T]he mere pendency of an appeal does not deprive a challenged judgment of its res judicata effects." *Antonious v. Muhammad*, 873 F.Supp. 817, 824 (S.D.N.Y. 1995); *see also In re Weinstein*, 173 B.R. 258, 279 (Bankr. E.D.N.Y. 1994) ("The federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel...." (quoting 1B MOORE'S FEDERAL PRACTICE ¶ 0.416[3.—2] & n. 1 (James Wm. Moore ed., 2d ed. 1993)). As this Court held in *In re MF Global Holdings, Ltd*, Case No. 11–15059 (MG), 2014 WL 3536977, at *4 (Bankr. S.D.N.Y. July 17, 2014):

> Res judicata provides that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Under federal law, res judicata "bars later litigation if [an] earlier decision was (1) a final judgment on the merits, (2) by a court of competent jurisdiction, (3) in a case involving the same parties or their privies, and (4) involving the same cause of action." Further, the pendency of an appeal does not affect a decision's finality for res judicata purposes. [Citations omitted]

Here, as conceded by Reichwaldt, the July 2017 Opinion is a final judgment, and she is bound by the rulings therein. It is axiomatic that once Old GM's conduct is eliminated from the punitive damage analysis, the contractual assumption path to punitive damages is permanently blocked.

B. <u>Reichwaldt's Arguments Were Also Made and Rejected in 2015</u>

Furthermore, all of Reichwaldt's arguments regarding the contractual assumption of punitive damages were previously made by Goodwin Procter LLP[7] on behalf of similarly situated personal injury plaintiffs, which were rejected by the Bankruptcy Court in the December

[7] It is not surprising that Butler Wooten is familiar with the Goodwin Procter arguments considering Goodwin Procter represented the clients of Butler Wooten in connection with the 2016 Threshold Issues.

2015 Judgment. Indeed, all but one of the cases cited by Reichwaldt in her Objection were cited in Goodwin Procter's brief on punitive damages filed on September 13, 2015 (**"Plaintiffs' 2015 Punitive Damages Brief**");[8] most of the quotes used in the Objection are taken, verbatim, from the Plaintiffs' 2015 Punitive Damages Brief;[9] and certain other statements in the Objection are lifted, verbatim, from the Plaintiffs' 2015 Punitive Damages Brief.[10]

After an extensive review of the Sale Agreement and the parties' arguments regarding contract interpretation, Judge Gerber concluded that New GM did not contractually assume liability for punitive damages. *In re Motors Liquidation Co.*, 541 B.R. 104, 117-121 (Bankr. S.D.N.Y. 2015) ("both by resort to normal textual analysis and extrinsic evidence, the Court comes to the same conclusion—that New GM did not contractually assume punitive damages claims"); *see also* December 2015 Judgment, ¶ 6. These above-cited rulings were not appealed and, as noted, they are law of the case.[11] New GM cited these rulings in connection with the

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[8] The full title of the Plaintiffs' 2015 Punitive Damages Brief is *Post-Closing Ignition Switch Accident Plaintiffs' Memorandum Of Law With Respect To Punitive Damages Issue*, dated Sept. 13, 2015 [ECF No. 13434], a copy of which is attached hereto as **Exhibit "B."** The one case not cited by Goodwin Proctor was *Moore-Sapp Inv'rs v. Richards*, 522 S.E.2d 739 (Ga. Ct. App. 1999). This case is cited for the unremarkable proposition that, under Georgia law, "[p]unitive damages are awardable only when other damages, compensatory in nature, are awarded." *Id.*, at 742.

[9] For example, *compare* Objection, at 12 ("A contract is only ambiguous if it 'could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.' *Law Debenture Trust Co. of N.Y.* at 466 (quotations omitted)."), *with* Plaintiffs' 2015 Punitive Damages Brief, at 4 ("A contract is only ambiguous if it 'could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.' *Id.* at 466[.]").

[10] For example, *compare* Objection, at 13 ("In nearly all states, there cannot be an award of punitive damages without a threshold award of compensatory damages. *See* PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 14 (W. Page Keeton et al. eds., 5th ed. 1984)"), *with* Plaintiffs' 2015 Punitive Damages Brief, at 12 ("In nearly all states, there cannot be an award of punitive damages without a threshold award of compensatory damages. *See* PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 14 (W. Page Keeton et al. eds., 5th ed. 1984)").

[11] Each of the cases cited by Reichwaldt at page 21 of her brief as to why she is not bound by the July 2017 Opinion either supports New GM's position or are inapposite. *Avita v. Metro. Club of Chi., Inc.*, 924 F.2d 689 (7th Cir. 1991) actually ***supports*** New GM's position that Reichwaldt is bound by the July 2017 Opinion pursuant to *res judicata*. *Id.* at 690 (finding that plaintiff's failure to appeal, while not law of the case, barred

briefing of the 2016 Threshold Issues,[12] and this Court reaffirmed them as part of the July 2017 Opinion. *See* July 2017 Opinion, 2017 WL 2963374, at *6-*7, *10-*11.

C. Reichwaldt's Repetitive Contract Assumption Arguments Are Without Merit

If the Court is inclined to consider Reichwaldt's attempt to re-litigate this issue, New GM restates its position – now supported by two Bankruptcy Court rulings – that Reichwaldt's contract interpretation is wrong. Reichwaldt contends that punitive damages were not specifically mentioned as a Retained Liability.[13] That argument fails for three reasons. *First*, the 16 categories of Retained Liabilities was a non-exclusive list. *See* Sale Agreement, § 2.3(b). The Sale Agreement was structured so that all Old GM Liabilities, other than expressly defined Assumed Liabilities are, by definition, Retained Liabilities. *Id*. *Second*, the definition of Liabilities under the Sale Agreement does not include Damages, which is a separately defined term. *Id.*, § 1.1. *Third,* the definition of assumed product liabilities requires that the Liabilities must "arise directly" from the accident and be based on the "motor vehicles' operation." *Id.*, § 2.3(a)(ix) (as amended). That narrowing language relates to the assumption of compensatory damages, not punitive damages.

Reichwaldt's reference to the *Chrysler* bankruptcy case and its sale agreement is a red herring. *First*, Chrysler is a separate case and it had a differently-worded sale agreement. A

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plaintiffs from relitigating a question on appeal pursuant to issue preclusion). In addition, *New Eng. Ins. Co. v. Healthcare Underwriters Mut. Ins. Co.*, 352 F.3d 599 (2d Cir. 2003) provides that a district court has no authority to depart from the mandate of the Second Circuit and that the law of the case doctrine is not applicable for an issue not addressed by the appellate court. This has nothing to do with the present controversy. Lastly, in *Conrod v. Davis*, 120 F.3d 92 (8th Cir. 1997), the court stated that if a "district court believes that an earlier decision was reached in error, it may revisit the decision 'to avoid later reversal.'" *Id.* at 95. But this Court actually did revisit an earlier decision in the July 2017 Opinion, and ***upheld it***. *See* July 2017 Opinion, 2017 WL 2963374, at *7.

[12] *See Opening Brief By General Motors LLC On The 2016 Threshold Issues Set Forth In The Order To Show Cause, Dated December 13, 2016 (Except For The Late Proof Of Claim Issue)*, dated February 27, 2017 [ECF No. 13865], at 52-53.

[13] *See* Objection, at 16.

contractual interpretation of New GM's Sale Agreement does not start, nor end, with the Chrysler sale document. *Second*, the context in which Chrysler amended its sale agreement to add a specific punitive damages disclaimer actually supports New GM's position. In *Chrysler*, the sale agreement first approved by the bankruptcy court did ***not*** provide that New Chrysler would assume liabilities based on accidents occurring post-sale concerning Old Chrysler vehicles.[14] An amendment to the *Chrysler* Sale Agreement was later approved—in November 2009, ***well after the Old GM Sale Order and Injunction was entered***—that provided New Chrysler would assume liabilities based on post-sale accidents concerning Old Chrysler vehicles.[15] This was done to make the assumed product liability obligations of New Chrysler consistent with the assumed product liability obligations of New GM.[16] It was this amendment, entered four months after the *Old GM* Sale Order and Injunction—that included the language New Chrysler was not assuming any product liability claims that include punitive damages. This language was consistent with what was already in the Sale Agreement with New GM; that only damages directly arising from the accident relating to the operation of the Old GM vehicle (*i.e.*, compensatory damages) were being assumed. Both sale agreements used different language at different times to ultimately achieve the same purpose.

In sum, Reichwaldt's argument that New GM contractually assumed punitive damages should be rejected, for the ***third time*** in this bankruptcy case.

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[14] *See In re Old Carco LLC, et al.*, Case No. 09-50002 (Bankr. S.D.N.Y. June 1, 2009) [ECF No. 3232].

[15] A copy of the amendment to the Chrysler Sale Agreement, dated as of October 29, 2009, is annexed to the Objection as Exhibit "5." This amendment was approved by the Bankruptcy Court on November 19, 2009. *See In re Old Carco LLC*, Case No. 09-50002 (AJG) (Bankr. S.D.N.Y. Nov. 19, 2009) [ECF No. 5988] (*Stipulation And Agreed Order Approving Amendment No. 4 To Master Transaction Agreement*).

[16] *See* http://www.autosafety.org/chrysler-accept-more-product-liability-claims ("John Bozzella, Chrysler Group LLC's senior vice president for external affairs and public policy, said the company was confident 'that the future viability of the company will not be threatened if we accept these claims.' He said the new company's approach was 'consistent with that taken by General Motors as part of its bankruptcy process.'").

II. Reichwaldt's Independent Claim and Punitive Damages in Connection with Such Claim are Improper, and Should Be Stricken

A. Reichwaldt's Independent Claim Violates the Second Circuit's and this Court's Rulings

Reichwaldt's "independent claim" for failure to warn improperly seeks to rely on Old GM conduct—not ***solely*** New GM conduct—and is therefore prohibited by rulings issued by the Second Circuit and this Court. *See In re Matter of Motors Liquidation Co*., 829 F.3d 135, 157 (2d Cir. 2016); July 2017 Opinion, 2017 WL 2963374, at *2 n.2 ("truly Independent Claims" are "claims based solely on wrongful post-closing conduct of New GM . . ."); June 2017 Opinion, 2017 WL 2457881, at *4 (defining "Independent Claims" as "claims against New GM *based solely on New GM's wrongful conduct*" (emphasis in original)); December 2015 Judgment, at 2 n.3 ("'Independent Claim' shall mean a claim or cause of action asserted against New GM that is based solely on New GM's own independent post-Closing acts or conduct.").

Specifically, Reichwaldt does not allege any particular post-Sale New GM conduct to establish her independent failure to warn claim; instead, she relies on the fact that New GM purchased assets from Old GM and that some unspecified alleged duty somehow "arose at the time" of the 363 Sale. *See* Proposed Reichwaldt Amended Complaint, ¶ 85;[17] *see also id.* ("As a result of its purchase of GM Corp.'s assets, GM LLC owed a duty to the consuming public in general, and to Plaintiff in particular . . . ."). Predicating a New GM independent claim based on a duty arising from the purchase of assets is, in reality, either an assumed liability or a successor liability claim; neither of which are independent claims.

The only conduct alleged in the Proposed Reichwaldt Amended Complaint with respect to the vehicle at issue (*i.e.*, a ***1984*** pickup truck, manufactured ***over three decades ago by Old***

[17] The Proposed Reichwaldt Amended Complaint contains two paragraphs that are numbered 85; the quoted reference in the text is the "second" paragraph 85, on page 34 of the Proposed Reichwaldt Amended Complaint.

GM) is Old GM conduct. And this alleged conduct occurred well before the closing of the 363 Sale. Reichwaldt, herself, acknowledges that Old GM ceased manufacturing this type of vehicle in the late 1980s; again, ***decades before New GM came into existence***. The Old GM vehicle was not subject to a safety recall. Reichwaldt is essentially trying to transform a design defect claim against the seller (Old GM) into an independent failure to warn claim against the buyer (New GM) by broad allegations of extensive Old GM conduct. Reichwaldt's insurmountable problem is that she cannot point to any post-363 Sale New GM conduct that established a new duty to the Old GM vehicle owner.[18]

Independent claims are by definition ***not*** Assumed Liabilities or Retained Liabilities.[19] The term "Liabilities" under Section 1.1 of the Sale Agreement includes ***obligations*** owed by Old GM under *Law*. Thus, an independent claim cannot be based on an obligation under state law owed by Old GM to the Old GM vehicle owner. Since New GM did not manufacture or sell the Old GM vehicle, and New GM is not the successor in interest to Old GM, in the absence of any new and independent relationship created with the Old GM vehicle owner after the 363 Sale (there is none), New GM could not be liable to her for any independent failure to warn claim. Knowledge of Old GM conduct through the imputation doctrine is insufficient by itself to establish an independent claim.

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[18] Reichwaldt's purported independent claim is based on the following key allegations: (a) Reichwaldt realleges all of the paragraphs of the proposed amended complaint which are replete with Old GM conduct (*see* Proposed Reichwaldt Amended Complaint, at ¶ 84); that, by itself, is fatal to properly asserting an independent claim; (b) New GM knew of the alleged design defect based on the wholesale, generalized adoption of the imputation doctrine (*see id.*, ¶ 85). This is impermissible; (c) New GM acquired a separate duty to warn because it purchased Old GM assets (*see id.*, ¶ 85). Essentially, this allegation asserts an unexpressed assumed liability which forms the improper basis for Reichwaldt's independent claim; and (d) Improperly calling New GM the successor of Old GM (*see id.*, ¶ 87).

[19] *See* December 2015 Judgment, at 2 n.3 (finding that "Independent Claims do not include (a) Assumed Liabilities, or (b) Retained Liabilities . . . .").

B. Reichwaldt's So-Called Independent Claim Is Impermissibly Based on "Wholesale Imputation," and Violate Previous Decisions Of This Court

Reichwaldt bases her so-called independent claim on conclusory and wholesale imputation allegations. Under the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 681, 129 S. Ct. 1937, 1951, 173 L. Ed. 2d 868 (2009), the Court should afford those allegations no weight. Old GM stopped manufacturing the vehicle in 1987, more than two decades before New GM came into existence. Reichwaldt does not allege that any Old GM employee with knowledge about the subject vehicle was employed by New GM after 2009, much less allege what relevant knowledge they had. Although plaintiffs asserts - as *ipse dixit* - that GM LLC "acquired all specific knowledge about the subject pickup previously possessed by GM Corp." - that allegation is nothing more than an unsupported conclusion. Reichwaldt attempts to defend her wholesale imputation allegation by suggesting that, because they are contained in a complaint, they should be assumed to be true. Not true. As the U.S. Supreme Court explained in *Ashcroft v. Iqbal*, 556 U.S. 662, 681, 129 S. Ct. 1937, 1951, 173 L. Ed. 2d 868 (2009), allegations (like Reichwaldt's) that are "conclusory" are *not* entitled to be assumed to be true." And even assuming *arguendo* that Reichwaldt's allegations were non-conclusory (they are not), they still must "*plausibly* suggest an entitlement to relief." *Id.* But there is nothing inherently "plausible" about an allegation that New GM "acquired all specific knowledge" about a vehicle last manufactured by Old GM more than twenty years before the Sale, and somehow that knowledge created a new and independent duty from New GM to the Old GM vehicle owner.[20] Indeed, it would be no less "conclusory" and no more "plausible" for a plaintiff to allege that

[20] Other courts have afforded no deference to "wholesale imputation" allegations in other contexts. *See, e.g., Wayne Cty. Emps.' Ret. Sys. v. Dimon*, 629 F. App'x 14, 16 (2d Cir. 2015); *F5 Capital v. Pappas*, 856 F.3d 61, 83 (2d Cir. 2017); *In re JPMorgan Chase & Co. Derivative Litig.*, No. 12 CIV. 03878 GBD, 2014 WL 1297824, at *5 (S.D.N.Y. Mar. 31, 2014) (rejecting wholesale imputation allegations and stating: "Plaintiff's conclusory allegations are insufficient.") (citing *Guttman*, 823 A.2d at 499 (courts should not "accept cursory contentions of wrongdoing as a substitute for the pleading of particularized facts.")).

New GM, by hiring Old GM employees, acquired ***all*** of the knowledge about Old GM vehicles that ***any*** Old GM employees ever had. The fact that Reichwaldt alleges wholesale imputation in a complaint does not automatically elevate those allegations to any status that is entitled to deference.

The imputation doctrine does not, by itself, allow Reichwaldt to assert an independent claim. Knowledge without a legal duty does not create a claim. *Holland*, 2015 WL 7196197, at *4. Reichwaldt is essentially attempting to transfer an Old GM obligation under law, based on Old GM conduct, to New GM, which is contrary to the "free and clear" aspects of the Sale Order. In this regard, Reichwaldt is asserting a successor liability claim against New GM dressed up to look like something else. Judge Gerber cautioned other courts dealing with this issue to be wary of this improper litigation tactic. *See In re Motors Liquidation Co.*, 529 B.R. 510, 528 (Bankr. S.D.N.Y. 2015), *aff'd in part, vacated in part, reversed in part*, 829 F.3d 135 (2d Cir.), *cert. denied*, 137 S.Ct. 1813 (2017) ("any court analyzing claims that are supposedly against New GM only must be extraordinarily careful to ensure that they are not in substance successor liability claims, 'dressed up to look like something else'" (*quoting Burton v. Chrysler Grp., LLC (In re Old Carco LLC)*, 492 B.R. 392, 405 (Bankr. S.D.N.Y. 2013)).

Reichwaldt's argument is also contrary to this Court's July 10, 2017 ruling in *Pitterman*. There, this Court, in exercising its gate-keeping function, specifically held that New GM's motion to enforce was granted to the extent that *Pitterman* was relying on a 2006 Technical Service Bulletin to support an alleged "failure to warn" independent claim. The Court precluded *Pitterman* "from relying on conduct of Old GM in support of their alleged Independent Claims

against New GM[.]"[21] The Court stated: "I don't think I should permit you to rely on Paragraph 25 [relating to the 2006 Technical Services Bulletin] in support of an independent claim against New GM." June 29, 2017 Hr'g Tr., at 4:3-5.[22] In response, *Pitterman* argued that "New GM, after 2009, was aware of its existence." *Id.* at 4:13. The Court ruled:

> Mr. Hirsch, I am precluding you from relying on the allegation in Paragraph 25 in support of a failure to warn independent claim against New GM. You can call New GM witnesses and show that they had knowledge of this alleged defect. That's going to be up to Judge Hall. Okay?
>
> But what I'm not going to do is -- this is exactly what I wrote the opinion to prevent you from doing, to bootstrap your independent -- your purported independent claim by relying on conduct of Old GM. If you have witnesses from New GM who are going to testify at your trial that they had knowledge of this alleged defect, you know, Judge Hall will decide whether that testimony is admissible or not, but you're not -- I'm not permitting you -- you're attempting to do exactly what I precluded you from doing. Okay?

Id., at 5:5-18; *see also id.* at 6:11-13 ("What I am precluding is the plaintiff from relying on conduct of Old GM in support of its alleged independent claim against New GM."). The July 2017 Order entered in connection with the *Pitterman* motion to enforce held, in relevant part:

> ORDERED that the Motion is granted with respect to Paragraph 25 of the Amended Complaint to the extent that the Pitterman Plaintiffs are hereby enjoined and may not use the 2006 Technical Service Bulletin to support their alleged Independent Claims against New GM; and it is further
>
> ORDERED that the Pitterman Plaintiffs are precluded from relying on conduct of Old GM in support of their alleged Independent Claims against New GM . . . .

July 2017 Order, at 1-2.

Reichwaldt similarly should be precluded from improperly relying on Old GM conduct to establish an independent claim.

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[21] *Order Granting In Part And Denying In Part General Motors LLC's Motion To Enforce The Ruling In The Bankruptcy Court's June 7, 2017 Opinion With Respect To The Pitterman Plaintiffs*, dated July 10, 2017 [ECF No. 13991] ("**July 2017 Order**"), at 1-2.

[22] A copy of the June 29, 2017 Hearing Transcript is attached hereto as **Exhibit "C."**

C. An Independent Claim Must Be Based on Post-Sale Conduct or a Post-Sale Relationship With New GM, But Reichwaldt Alleges Neither

Moreover, Reichwaldt alleges no new and independent post-363 Sale relationship between the Old GM vehicle owner and New GM. This is not surprising because the Old GM vehicle was, according to Reichwaldt, last manufactured in 1987—20 years before the 363 Sale.[23] The omission of any type of relationship is significant because it illustrates that Reichwaldt has not alleged a permissible independent claim.

To somehow create an independent claim in this context, Reichwaldt identifies three allegations that purportedly establish an "independent claim" based on New GM's conduct. *See* Objection, at 22. Of the three allegations listed, two are directly tied to the 363 Sale (*i.e.*, that New GM purchased assets of Old GM, including its books and records, and New GM employed Old GM employees after the 363 Sale). These allegations do not reflect New GM's post-Sale conduct, as required by law. Instead, they are provisions of the Sale Agreement and constitute improper successor liability allegations.

The third allegation referenced by Reichwaldt is that "New GM profited from entering into service maintenance and repair relationships with purchasers of Old GM products, and from manufacturing and selling parts and accessories for Old GM products (including the subject 1984 CK truck)[.]" *See* Objection, at 22. This general allegation does not relate to New GM's alleged wrongful post-363 Sale conduct, which is the touchstone for an independent claim. It is totally disconnected from any conduct that could support a cause of action against New GM. *First,* Reichwaldt does not allege that New GM provided any parts or accessories to the Old GM

[23] *See* Proposed Reichwaldt Amended Complaint, ¶ 1 ("GM Corp. sold these CK pickups for 15 years, from 1973 to 1987.").

vehicle owner.[24] *Second*, this allegation appears to be tied to the glove-box warranty for the Old GM vehicle, which expired in the 1980s. *Third*, this allegation has nothing to do with the issues involved in the Reichwaldt lawsuit which pertain to an alleged design defect. In short, this allegation does not establish that New GM incurred any new duty to the owner of the Old GM vehicle or that New GM's alleged post-363 Sale conduct was wrongful.

D. As Reichwaldt's Independent Claim Should Be Stricken, So Too Should Her Request for Punitive Damages Based on Such Claim

The only possible way to assert punitive damages against New GM in connection with a post-363 Sale accident involving an Old GM vehicle is through a viable independent claim based solely on alleged wrongful post-Sale New GM conduct. Since Reichwaldt has not done so, her punitive damage request fails.

III. The Proposed Reichwaldt Amended Complaint Improperly Asserts that New GM is the Successor to Old GM

The Proposed Reichwaldt Amended Complaint added ***new*** allegations that violate other rulings in the December 2015 Judgment (rulings that Reichwaldt's counsel was clearly aware of). Specifically, paragraph 16 of the December 2015 Judgment provides:

> Allegations that speak of New GM as the successor of Old GM (e.g. allegations that refer to New GM as the "successor of," a "mere continuation of," or a "de facto successor of" of Old GM) are proscribed by the Sale Order, April Decision and June Judgment . . . .

See also In re Motors Liquidation Co., 549 B.R. 607, 612–13 (Bankr. S.D.N.Y. 2016) ("New GM is *not* a successor in interest to General Motors Corporation ('Old GM'); it is a completely separate legal entity from Old GM." (emphasis in original)).

[24] This is a new allegation that was not in the Reichwaldt Complaint. New GM's letter to Reichwaldt regarding infirmities in the Reichwaldt Complaint was not an invitation for her to amend the complaint to add new allegations. New GM reserves it rights to argue that such new allegations are improper and should be stricken.

Despite the clear and unambiguous ruling in the December 2015 Judgment, the Proposed Reichwaldt Amended Complaint inexplicitly ***added*** the following new allegations:

- "GM LLC, which inherited the specific knowledge of ***its predecessor GM Corp.*** . . . ." Proposed Reichwaldt Amended Complaint, ¶ 2 (emphasis added);

- "Following an asset sale under section 363 of the Bankruptcy Code, ***GM LLC, the company that emerged from the bankruptcy*** . . . ." *Id.*, ¶ 28 (emphasis added); and

- "GM LLC's failure to warn citizens about the dangers of the CK side-mounted gas tanks, while instead professing (***as its predecessor*** GM Corp. did for decades) . . . ." *Id.* ¶ 87 (emphasis added).

These allegations are prohibited by the December 2015 Judgment, and they should be stricken from the Proposed Reichwaldt Amended Complaint.

The other infirmities cited in the Reichwaldt Motion to Enforce would be resolved by the changes made in the Proposed Reichwaldt Amended Complaint.[25] Reichwaldt should be compelled to make those changes and to correct the other Sale Order-related infirmities before continuing with litigation in the Georgia Court.[26]

IV. New GM Timely Raised Bankruptcy Issues

Reichwaldt contends that bankruptcy issues were not raised in the proceedings in the Georgia Court until the discovery dispute that precipitated the New GM July 14 Letter. *See* Objection, at 4. This is incorrect and again reflects a lack of appreciation for the Bankruptcy Court's process. New GM's answer was filed with the Georgia Court on June 29, 2016,[27] less than six weeks after the commencement of the action and less than a week after removal from the Georgia state court. The answer specifically contains an affirmative defense based on the

[25] Reichwaldt did correct references to the generic "GM" by differentiating between Old GM and New GM.

[26] New GM does not consent to any other changes in the Proposed Reichwaldt Amended Complaint.

[27] *See Defendant's Answer And Affirmative Defenses To Plaintiff's Complaint* ("**New GM Answer**"), filed by New GM in the Georgia Court on June 29, 2016, a copy of which is attached hereto as **Exhibit "D."**

Bankruptcy Court's rulings. *See* New GM Answer, at pp. 12, 15-17, 20-21. Reichwaldt was therefore on notice of the bankruptcy issues in the Reichwaldt Complaint approximately a year before the New GM July 14, 2017 Letter.

Moreover, shortly after the New GM Answer was filed, the Second Circuit's July 2016 Opinion was entered, requiring New GM, other parties and the Court to address various issues that arose from the Opinion. That included the 2016 Threshold Issues and the procedures for resolving same. As she admits, Reichwaldt was on notice of the 2016 Threshold Issues and had the opportunity to participate in their resolution. According to Butler Wooten, its bankruptcy counsel (Goodwin Proctor) actively litigated these issues on behalf of Butler Wooten's other client, but not Reichwaldt.[28] Shortly after the July 2017 Opinion was issued, the New GM July 14 Letter was sent. As is its practice, New GM did not seek this Court's intervention until there was a pressing need to do so; that came in July 2017 with respect to Reichwaldt in the form of a significant discovery dispute.

V. The Reichwaldt Lawsuit Should Be Stayed Until All Infirmities Are Addressed

Despite clear rulings from this Court that plaintiffs, like Reichwaldt, (i) cannot seek punitive damages from New GM based on Old GM conduct, (ii) cannot assert independent claims against New GM based on Old GM conduct, and (iii) cannot allege that New GM is the successor to Old GM, Reichwaldt is seeking to disregard these rulings and press forward in the trial court as if these controlling decisions do not exist. The rule is "well-established" that "'persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order.'" *Celotex Corp. v. Edwards* 514 U.S. 300, 306 (1995). Continuation of the Reichwaldt

[28] This contrived distinction was never made clear to New GM or this Court at the time the 2016 Threshold Issues were litigated.

Lawsuit without regard to and in violation of existing and recent Bankruptcy Court rulings constitutes a violation of the Sale Order, and the other Bankruptcy Court rulings. Since Reichwaldt refuses to recognize the previously-issued injunctions, apparently the only way to compel compliance with the Sale Order is to expressly stay Reichwaldt from proceeding with her lawsuit until all bankruptcy-related issues are addressed and resolved.

CONCLUSION

For all of the foregoing reasons, New GM respectfully requests that this Court enter the proposed order attached hereto as **Exhibit "E"** (revised to reflect events that occurred since the Reichwaldt Motion to Enforce was filed) granting the relief sought in the Reichwaldt Motion to Enforce, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
August 25, 2017

Respectfully submitted,

/s/ Arthur Steinberg

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Attorneys for General Motors LLC

Exhibit A

IN THE ~~STATE~~UNITED STATES DISTRICT COURT ~~OF COBB COUNTY~~
~~STATE~~NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

KAITLYN REICHWALDT, *

*

Plaintiff, * CIVIL ACTION FILE NO.

*

vs. *

1:16-CV-02171-twt

*

GENERAL MOTORS LLC, *

* **JURY TRIAL DEMANDED**

Defendant. *

FIRST AMENDED COMPLAINT ~~FOR PERSONAL INJURY AND PUNITIVE DAMAGES~~

James E. Butler, Jr.
Robert H. Snyder
David T. Rohwedder
Joseph M. Colwell

BUTLER WOOTEN ~~CHEELEY~~ & PEAK, LLP
105 13th Street
Post Office Box 2766
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Attorneys for Plaintiff

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Plaintiff Kaitlyn Reichwaldt files this Complaint for Personal Injury and Punitive Damages against Defendant General Motors LLC ("GM LLC"), showing this Honorable Court the following:

I. INTRODUCTION

1.

This is yet another case for another victim of ~~GM's~~GM Corp.'s[1] "CK" pickup trucks with gas tanks located *on the side* of the truck outside the frame rails with no protection from side impact. The gas tanks were located in a known "crush zone~~" —~~"—in an area GM Corp. knew was vulnerable to side impact. GM Corp. sold those CK pickups for 15 years, from 1973 until 1987. Hundreds of Americans have burned, most to death, as a result of that design. The design is *indefensible*. As GM Corp. engineer Edward Ivey testified *twenty two years ago*:

[1] ~~All references~~References to "GM~~"~~ Corp." contained herein that discuss conduct occurring before ~~June 1~~July 10, 2009, ~~are referring~~arereferring to the conduct of General Motors Corporation ~~("GM Corp.").~~ References to "GM LLC" contained herein that discuss conduct occurring after ~~June 1~~July 10, 2009 are referring to the conduct of General Motors ~~LLC ("GM~~ LLC~~").~~. As discussed more fully below, GM LLC expressly agreed to be subject to suit for product liability claims for wrecks occurring after ~~June 1~~July 10, 2009 in vehicles built by GM Corp. before that date.

Q: Can you name a worse place to put a fuel tank than outside the frame rail on the side?
A: Well, yes, you could put it on the front bumper.[2]

2.

Despite actual knowledge of the defect and of the danger, despite ~~hundreds of~~countless cases settled by both GM Corp. and GM LLC, despite ~~GM's~~GM Corp.'s own long-concealed crash tests that proved the tanks were vulnerable to rupture and explosion, GM LLC, which inherited the specific knowledge of its predecessor GM Corp. and which has its own knowledge of the defect and of the danger, continues to deny the obvious~~—~~that the design is indefensible~~—~~and continues to refuse to warn Americans of the danger.

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3.

The CK litigation has been fought in courtrooms all across America for decades now, involved the concealment of evidence and the alleged destruction of documents,[3] and embroiled law firms from around the country, including from Atlanta.

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[2] ~~—~~1/9/94 Deposition of Edward Ivey, Bishop v. GM & Cameron v. GM, at 98/11-16.

[3] In a 1992 deposition ~~GM,~~ engineer Theodore Kashmerick testified that documents retrieved from him were "shredded." *Elwell v. GM*, 91-115946-NZ, Circuit Court of Wayne County, Michigan, 12/29/92 at pp. 13/3-7, 24/5-20.

4.

This particular case involves severe burn injuries suffered on January 27, 2015 by then-19-year-old Kaitlyn Reichwaldt as a result of a ~~GM~~1984 CK pickup truck sliding into her 2003 Taurus. The CK pickup had a gas tank mounted *on the side* of the vehicle outside the frame rails, unprotected by anything but body side sheet metal, and affixed to the rigid steel frame rail.

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5.

Kaitlyn Reichwaldt was driving on Salt Creek Roadway, a divided four-lane road near the University of Nebraska in the city of Lincoln, Nebraska, with a raised median separating the lanes going eastbound and the lanes going westbound. A 1984 ~~GM~~ CK pickup truck with a side-mounted gas tank spun out of control and crossed the median. The side of the CK pickup struck the front of Ms. Reichwaldt's vehicle right at the side-mounted gas tank. The gas tank was crushed against the steel frame rail, gas sprayed over Ms. Reichwaldt's vehicle including into the passenger compartment, the gas exploded, and she was severely burned. But for the heroic actions of a bystander who pulled her from her burning car, Kaitlyn Reichwaldt surely would have burned to death. Kaitlyn Reichwaldt did nothing wrong; she was entirely innocent. But for the burns, Ms. Reichwaldt

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would have been uninjured in the wreck.

6.

The first CK pickup sold by GM Corp. was the model year 1973 pickup. GM Corp. knew before that first CK pickup was sold that it posed a singular and unique danger to occupants and to others on the road, because the gas tanks were located on the side of the truck outside the frame rail, *in the crush zone*, and affixed to rigid steel frame rails against which the gas tanks could be crushed if the side of the truck was hit by or hit another car or any other object. That gas tank design is indisputably vulnerable to side impact.

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7.

The risk of post collision fuel fed fire ("PCFFF") is, of course, horrific as the history of ~~GM's~~ CK pickup trucks proves. Far too often people who should not have been seriously injured at all in wrecks have been burned, or have burned to death, because GM Corp. chose to put its gas tanks on the side of the CK pickups.

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8.

That gas tanks located in a known crush zone make occupants and others vulnerable to horrific injuries or death has long been well known in the automotive

industry.[4]

9.

~~GM~~GM Corp. (and now GM LLC) has itself long known that gas tanks must not be located where they are unprotected from impact—and especially should not be located *outside* the frame rail:

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(a) In *1930*, GM Corp. published an ad for a Chevrolet stating the gas "tank is thoroughly protected by the wide rear cross member and heavy frame side members."

(b) In *1932*, the Society of Automotive Engineers ("SAE") published a paper stating that the gas tank "should be protected by the body and the frame."

(c) In *1964*, a GM Corp. Executive Engineer wrote a "Design Directive" stating "the fuel tank must be mounted as near to the center of the vehicle (truck) as practical."

[4] *See, e.g.*, June 3, 2013 NHTSA "recall request letter," sent to Chrysler: "The vulnerability of tanks located behind solid rear axles in rear impacts became well known following a series of fiery crashes involving the Ford Pinto. . . . It was a well-publicized, terrible tragedy that people burned to death in these vehicles." ~~GM's~~GM Corp.'s side-mounted gas tanks were even *more* vulnerable—they were closer to a striking vehicle than most rear-mounted gas tanks, and even less protected. "In June 1978, Ford agreed to recall the Pinto and Bobcat. The defect was that the fuel tanks installed on these vehicles are subject to failure when the vehicles are struck from the rear." *Id*. GM Corp. and GM LLC, by contrast, ~~has~~have never recalled the CK pickups, never admitted the danger, and never warned anyone of the danger.

(d) In *1974* the SAE published another paper stating that truck gas tanks should be located *inside* "rugged *frame* channels."

(e) In *1978*, a "jury" of GM Corp. engineers studying "alternative fuel tank locations" for trucks recommended the inside the frame rails location.

(f) In 1981, ~~GM's~~GM Corp. conducted its own secret and long-concealed vehicle-to-vehicle side-impact collision tests on CK pickups. The results gave GM Corp., and later GM LLC, actual notice and knowledge that gas tanks mounted on the side outside the frame rails were vulnerable to rupture in side impact.

(g) In 1981, GM Corp. advertised about its new S-10 pickups, "fuel tank is located *inside* the left hand *frame rail* for protection from side impacts."

(h) In 1982, a GM Corp. engineer estimated the cost to "relocate" the CK side-mounted gas tanks to an inside the frame rails location would be only $1.33 per tank.

(i) By 1983, GM Corp. was already designing the new 1988 ~~GM~~ pickup with the gas tank located inside the frame rail for "added protection" in side impacts, and a GM Corp. engineer's presentation about the new pickup stated the inside the frame rail location is "much less vulnerable."

(j) In 1985, a GM Corp. engineer made a presentation to the President of

GM~~,~~ Corp., stating that the CK pickup "is subject to intense pressure as a result of litigation due to PCFFF," and noted that the planned new design with an inside the frame rail gas tank will "reduce this concern."

(k) When finally, in 1988, GM Corp. moved the gas tank to the inside the frame rail location, GM Corp. issued a "confidential" directive to its sales staff stating "fuel tank is located *inside the frame rail* to reduce the chance of fuel spillage on side impact."

10.

In May 1972, one of ~~GM's~~GM Corp.'s testifying engineers prepared a memo – before the CK trucks were first sold as model year 1973 vehicles – attesting to the fact that a gas leak "should not occur" unless the impact itself was great enough to cause fatalities.

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11.

GM Corp. put the gas tank on the side of its CK pickups solely for marketing reasons – so GM Corp. could advertise that the pickup had a larger gas tank and greater range.

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12.

It was feasible and practical for GM Corp. to design and build the subject pickups with gas tanks located inside the frame rail.

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13.

~~GM's~~GM Corp.'s awareness of the horrific risk is reflected by its preparation~~,~~ in 1973 – the first model year GM Corp. sold its CK pickups, of a "cost-benefit analysis" which concluded that it was cheaper for GM Corp. to settle PCFFF cases than to eliminate all PCFFFs in GM Corp. vehicles. That "cost benefit analysis" came to be known as the "Ivey memorandum," named after the engineer who prepared it for GM Corp. at the direction of his superiors.[5]

14.

For years GM Corp. actively concealed the "Ivey memorandum" from plaintiffs, courts, and juries. When it was finally discovered, Ivey was deposed. His sworn testimony was totally contrary to what he had told GM Corp.'s lawyers about the memorandum prior to that deposition. That ultimately resulted in a Court Order finding that "GM in fact acted [to] commit crimes and frauds~~,~~"" and that GM Corp. had, by concealing the Ivey memorandum, violated Court Orders in

[5] Ivey calculated that if GM Corp. paid an average of $200,000.00 per claim for those claims alleging death by fire, the cost to GM Corp. would be $2.40 per ~~GM~~ vehicle sold. Ivey calculated it would be worth $2.20 per vehicle for GM Corp. to prevent all deaths by fire in GM Corp. vehicles.

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other cases.[6]

15.

In 1973 – the year they were first sold – GM Corp. claimed its first CK truck fire victim: Ernest Leon Smith of Columbus, Muscogee County, Georgia.

16.

Initially, GM Corp. defended some CK lawsuits, trying a few cases, but settling far more. In 1993, GM Corp. was forced to try the case of *Moseley v. GM*. in Atlanta, Georgia. That trial resulted in a widely- publicized $105 million verdict, including punitive damages.[7] The *Moseley* case arose after seventeen year old Shannon Moseley of Snellville, Georgia was burned to death when his CK pickup was hit in the side. His parents refused to settle. After the $105 million verdict in the trial of *Moseley v. GM*, GM Corp. tried only two ~~other~~ CK cases: both were cases where the impact forces were so great the alternative gas tank location was also severely compromised. Those were cases GM Corp. should not have been able to lose.

17.

[6] *Bampoe-Parry v. GM*~~,~~ *Corp.*, State Court of Fulton County, Ga., Civil Action File Nos. 98V50138297J & 98V50138298J, Sept. 9, 1999.

[7] *Moseley v. GM Corp.* was reversed on appeal and then settled by GM Corp. just before retrial, along with three other CK cases.

For many years in the 1970s and 1980s, ~~GM's~~GM Corp.'s principal testifying in-house engineer for fire cases was Ronald Elwell. He defended the CK truck in depositions. He testified under oath that GM Corp. had conducted no vehicle-to-vehicle crash testing of the CK trucks. Then, in 1983, Elwell was told by GM Corp. Executive Vice President Alexander McKeen that he ought to go out to the GM Corp. proving grounds – that he might find something there interesting. Elwell did so, and found "over 20" CK trucks that had been subjected to vehicle-to-vehicle crash testing. Elwell subsequently testified, in the *Moseley* trial, about the gas tanks on those pickups: "they were badly smashed. There were holes in them as big as melons. They were split open." McKeen told Elwell those crash tests were done starting in 1981 after GM Corp. Assistant General Counsel Babcock told McKeen "they could no longer defend the product." The existence of those crash tests had never been revealed by GM Corp. to any court, jury, or plaintiff.[8]

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18.

After seeing those crashed CKs, Elwell complained to his superior that he might have unintentionally committed perjury. GM Corp. never again had him

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[8] *Moseley v. GM~~,~~ Corp.,* 1-14-93 Trial Transcript Vol. 13 (Elwell) at 126/9-127/1, 127/16-134/20.

testify in a CK fire case.[9]

19.

By 1982 fire cases were causing GM Corp. so much trouble that then-CEO Roger Smith ordered a roundup of all internal ~~GM~~ documents that might be subject to requests for documents in fire cases. Initially the search was for documents relating to passenger cars; by 1983 the search was expanded to include trucks. GM Corp. called upon its various "regional counsel" law firms to send young lawyers to Detroit to review all the collected documents. Internally, GM Corp. staff referred to the young lawyers as the "firebabies."[10]

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20.

GM ~~has~~Corp. and GM LLC have been sued in hundreds of cases as a result of people being burned in PCFFFs involving ~~GM's~~ CK pickups with outside the frame rail gas tanks.

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21.

What happened on January 27, 2015, was not merely foreseeable to GM Corp. and GM LLC; *it was foreseen* ~~by GM~~ – it had happened over and over again, to ~~GM's~~GM Corp's and GM LLC's actual knowledge. Plaintiffs' counsel are

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[9] *Moseley v. GM*, 1-14-93 Trial Transcript Vol. 13 (Elwell) at 135/12-22.
[10] Dep. of GM Corp. lawyer Brian Eyres, 93 1083 CBM, US District Court, Central Dist. of CA, 9/29/93 at pp. 202/21-203/6.

aware of some 957 other incidents involving PCFFF in ~~GM's~~ CK pickups with outside the frame rail gas tanks.[11]

22.

GM Corp. quit making the CK pickups after model year 1987, and for model year 1988, GM Corp. finally moved the gas tank to the alternative location advocated by safety experts for decades – to an inside the frame rail location, where the gas tank is protected from side impacts.

23.

In addition to Kaitlyn Reichwaldt, many other victims who were not even occupants of ~~GM's~~ CK pickups have been burned when a crash ruptured the side-mounted gas tank of a CK. Examples include but are not limited to:

(a) On December 5, 1973, Ernest Leon Smith of Columbus, Georgia was driving a Nash Rambler station wagon when a 1973 CK truck turned left in front of his car, causing Mr. Smith's car to strike the right side of the truck, rupturing the gas tank and causing a fire. The whole left side of

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[11] *See* Exhibit A hereto: Plaintiffs' list of 782 other such incidents, *Byrd v. GM*~~,~~., M.D. Mt, 1998, CV-98-168-M-DWM. In 2015 GM LLC acknowledged another 175 such incidents since the *Byrd* case was settled. *See* Exhibit B hereto, *Williams v. GM*, N.D. Ga. Case No. 1:14-CV-02908. In *Williams v. GM*, GM admitted that it had notice that there was a fire following a CK wreck in 718 of the incidents identified in Exhibit A. *See* Exhibit C hereto.

Mr. Smith's face and torso were burned; he suffered a stroke while in the hospital after seeing himself in the mirror and never fully recovered prior to his death in 1997.

(b) On October 29, 1992, thirty year old Calvin Cockrum of Altoona, Kansas was burned to death when his motorcycle slid and hit the side-mounted gas tank on a CK, dousing him with gas which exploded.

(c) On October 8, 1995, Jerome Dalton of Greene County, Georgia was burned to death when his motorcycle slid and hit the side-mounted gas tank on a CK, dousing him with gas which exploded.

(d) On August 31, 1996, Denise Barnes of Columbia, South Carolina was burned to death when her 1994 Saturn struck the side of a CK.

(e) On May 26, 2000, Corinne Gallagher of Flathead, Montana and all three of her sons, Thomas (8), Anthony (10~~))~~, and Patrick (12), burned to death when the Hyundai she was driving was struck by a CK resulting in gas tank rupture and PCFFF.

24.

Many families have suffered multiple losses as a result of PCFFF after a CK's outside the frame rail gas tank was ruptured. In addition to Corinne Gallagher and all three of her sons, examples include:

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(a) On May 20, 1990, a car ran a stop sign in Elfrida, Arizona and hit Daniel Hannah's CK in the side. Mr. Hannah was severely burned trying to save his two sons, Nathan 16 and Gabriel 17, who were trapped inside the pickup. Mr. Hannah testified that the flames were "as high as trees." He was unable to get his sons out of the vehicle, and saw them burn to death.

(b) On July 15, 1995, Steven Seebeck of Bryan County, Georgia along with his young son Michael Seebeck were traveling in a 1979 CK pickup in Fort Stewart, Georgia when a car crossed the center line and collided with the pickup rupturing the gas tank and causing a PCFFF. Both father and son burned to death.

(c) On December 22, 1997, Darrell Byrd and Angela Byrd along with their two sons, Timothy and Samuel, were traveling from Fortine, Montana to North Carolina to visit family for Christmas. Near Russell, Kansas, the 1985 CK truck they were traveling in collided with a tractor trailer. Darrell, Angela, and Timothy all burned to death. Samuel was burned, but survived.

25.

That the problem with the CK trucks and PCFFF was in fact the gas tank location *was admitted* by the very first witness *GM Corp. itself called* to testify at

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the *Moseley* trial, a professional engineer and Georgia Tech graduate who was then County Engineer for Gwinnett County, George Black.[12] Black investigated the Moseley wreck, which GM Corp. claimed was a "high speed" wreck. Black testified to a wreck involving a CK truck in a parking lot where the gas tank ruptured, and admitted that it was "reasonable to say that when you get failures at high speed and failures at low speed that tends to indicate the problem isn't the speed, the problem is the location of the fuel tank."[13] Mr. Black also confessed that he had told the plaintiffs' accident reconstruction engineer that "you don't have to be a rocket scientist to understand that the fuel tank should not be outside the frame."[14]

26.

Because GM Corp. and GM LLC never warned anyone of the danger, there are still hundreds of thousands of ~~GM's~~ CK pickups on the roads of ~~American,~~America capable of causing the mayhem visited upon Kaitlyn

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[12] Black subsequently was appointed by the President as a member of the National Transportation Safety Board, where he served two terms.
[13] *Moseley v. GM*, 1-22-93 Trial Transcript (Black) Vol. 20 at 112/7-23.
[14] *Moseley v. GM*, 1-22-93 Trial Transcript (Black) Vol. 20 at 107/14-18.

Reichwaldt on January 27, 2015. ~~GM's~~GM Corp. and GM LLC's reckless and wanton failure to warn Americans of the danger has been continuous since the CK pickup that struck Ms. Reichwaldt's car was manufactured in 1984. That failure to warn continues to this day.

27.

The terrible defect of the gas tank location on ~~GM's~~ CK pickups continues to put American citizens at risk of horrible injuries and death, and continues to cause injuries and deaths due to fire.

28.

~~GM~~On June 1 2009, GM Corp. sought bankruptcy protection. Following an asset sale under section 363 of the Bankruptcy Code, GM LLC, the company that emerged from the bankruptcy with most of GM Corp.'s assets, books, knowledge, and personnel, now defends lawsuits such as this by trying to distinguish between what it calls "old GM" and "new GM," which GM calls "GM LLC," despite the fact that GM LLC expressly agreed, with Congress and with the Bankruptcy Court in 2009, that it would be liable for all damages resulting when people were injured post-bankruptcy in vehicles manufactured pre-bankruptcy.

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29.

In the wake of the GM LLC ignition switch scandal, GM LLC CEO Mary Barra appeared before the United States Congress.

30.

On June 5, 2014, the GM LLC CEO Barra told the Congress and the American people "I am guided by two clear principles: First, that we do the right thing for those who were harmed; and, second, that we accept responsibility for our mistakes and commit to doing everything within our power to prevent this problem from ever happening again."

31.

On June 18, 2014, the GM LLC CEO told the Congress "we have a special responsibility to [the families that lost loved ones, and those who suffered physical injury], and the best way to fulfill that responsibility is to fix the problem by putting in place the needed changes to prevent this from ever happening again."

32.

On April 2, 2014, the GM LLC CEO told the Congress "we will not shirk from our responsibilities now or in the future."

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Those statements made by ~~GM's~~GM LLC's CEO speaking for GM LLC[15] are totally and utterly contrary to ~~GM's~~GM LLC's and GM Corp.'s reckless and wanton failure to warn Americans of the danger posed by ~~its~~ CK pickups with side-mounted gas tanks.

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34.

Despite those statements to the United States Congress and the American people, *GM LLC has denied* "that American citizens have a right to know when GM has identified safety concerns with its vehicles."[16] *GM LLC has denied* that "GM was aware there was a safety concern regarding its CK pickup trucks."[17] *GM LLC has refused to admit* "that every human life is worth protecting from preventable injuries caused by design and manufacturing defects."[18] *GM LLC has refused to admit* "that if there is a safety defect in a GM vehicle GM should warn the public."[19] *GM LLC has refused to admit* "that if GM knows it can take action to save a human life from a preventable death, it has a duty to do that."[20] *GM LLC has refused to admit* "that if GM knows it can take action to save a human life

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[15] *Synovus v. GM LLC*, GM LLC Answers to Plaintiffs' Second Requests for Admission, *Williams v. GM LLC*, number 5.
[16] *Id.*, numbers 29, 31.
[17] *Id.*, number 32.
[18] *Id.*, number 34.
[19] *Id.*, number 37.
[20] *Id.*, number 42.

from a preventable death, it has a civic responsibility to do that."[21]

II. PARTIES, JURISDICTION, VENUE, AND SERVICE OF PROCESS

35.

Plaintiff Kaitlyn Reichwaldt resides at 5162 Running Doe Drive, Suwannee, GA 30024, is subject to the jurisdiction of this Court, and is a resident of the State of Georgia.

36.

Defendant GM LLC is a limited liability company organized and incorporated under the laws of Delaware, with a principal place of business located at 300 Renaissance Center, Detroit, Michigan 48265. GM LLC is engaged in the business of designing, manufacturing, marketing, promoting, advertising, distributing, and selling automobiles, trucks, SUVs, and other types of vehicles in the State of Georgia, throughout the United States, and elsewhere.

37.

GM LLC is subject to the jurisdiction of this Court because it transacts business in, has registered as a foreign LLC transacting business in and maintains a registered agent in the State of Georgia. The registered agent for GM LLC is: CSC

[21] *Id.*, number 45.

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of Cobb County, Inc., 192 Anderson Street S.E., Suite 125, Marietta, Georgia 30060, where GM LLC may be served with legal process. By registering to do business and appointing a registered agent for service of process in Georgia, GM LLC has consented to jurisdiction in this state. GM LLC has admitted that it is subject to the jurisdiction of this Court. Doc. 27.

38.

GM LLC also is subject to general personal jurisdiction in the state of Georgia because GM LLC is essentially at home in the State of Georgia. In 2012, GM LLC purchased property and invested more than $25 million in this state to build an Information Technology Innovation Center ("IT Innovation Center") in Roswell, Georgia. The IT Innovation Center, which is one of only four such centers nationwide, coordinates, facilitates and runs information technology services including research and design functions for GM LLC's nationwide and worldwide business operations. In a press release announcing the decision to locate the IT Innovation Center in Georgia, the GM LLC Chief Information Officer, Randy Mott, referred to the IT Innovation Center as "critical to [GM's] overall business strategy." In exchange for selecting Georgia as the home of an IT Innovation Center, GM LLC asked for and received more than $20 million in tax incentives from the state of Georgia. In total, GM LLC employs more than 1,000

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Georgia residents as employees at the IT Innovation Center. As a result of the foregoing, GM LLC has chosen to be essentially at home in the state of Georgia and is subject to general personal jurisdiction in this state.

39.

Venue is proper in ~~Cobb County as to Defendant GM LLC under O.C.G.A. § 14-2-510 and GA. CONST. art. VI, § 2, ¶ VI, because Cobb County is where Defendant GM LLC maintains a registered agent.~~ this Court because the Northern District of Georgia is the federal district Court for Cobb County, Georgia, the county from which this case was removed by GM LLC.

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III. OPERATIVE FACTS

40.

The excruciating thermal burns suffered by Kaitlyn Reichwaldt were the direct and proximate result of the explosion and fire.

41.

Consumed by the fire and smoke engulfing her car, Ms. Reichwaldt consciously suffered and endured shock, terror, fright, physical and mental pain, suffering, and injuries.

42.

The fire and fire-related injuries of Kaitlyn Reichwaldt were caused by design defects in the 1984 ~~GM~~ CK pickup.

43.

Before it designed, built, and sold the subject pickup, GM Corp. knew that the fuel system design of the subject pickup was defective and vulnerable to side impact. GM Corp. also knew that a midship gas tank located inside the frame rails and between the axles would be a much less vulnerable location than the side-mounted gas tank outside the frame rails. GM LLC acquired that same notice. After ~~June 1~~July 10, 2009, GM LLC was independently put on that same notice.

44.

Before it designed, built, and sold the subject pickup, GM Corp. knew that locating the gas tank inside the frame rails and between the axles would provide much greater protection during side impacts, resulting in increased protection for occupants of the pickups and anyone whose vehicle is hit by or hits a CK. GM LLC acquired that knowledge. After ~~June 1~~July 10, 2009, GM LLC independently obtained that same knowledge.

45.

Before and after ~~GM~~it designed, built and sold the subject pickup and before

Kaitlyn Reichwaldt's injuries, GM Corp. knew that a vehicle with a gas tank mounted on the side, *outside* of the frame rail, was more likely to leak gas as a result of a rupture in a side-impact collision than a vehicle with a gas tank mounted *inside* of the frame rail. GM LLC acquired that knowledge. Since ~~June 1~~July 10, 2009, GM LLC has independently obtained that same knowledge.

46.

Before and after ~~GM~~it designed built and sold the subject pickup and before Kaitlyn Reichwaldt's injuries, GM Corp. knew that when a vehicle with a gas tank mounted on the side, outside of the frame rail, was struck during a side-impact collision, a deadly post-collision fuel fed fire was a clear risk. GM LLC acquired that knowledge. Since ~~June 1~~July 10, 2009, GM LLC has independently obtained that the same knowledge.

47.

GM Corp. and GM LLC have affirmatively tried to keep citizens and potential victims ignorant of dangers posed by GM Corp.'s side-mounted gas tanks.

48.

As a direct result of GM Corp.'s and GM LLC's conduct outlined above, Kaitlyn Reichwaldt was severely burned by fire.

49.

In 2009, after GM Corp. filed for Chapter 11 bankruptcy protection, Defendant GM LLC purchased the assets of GM Corp., including GM Corp.'s books and records. After the sale, GM LLC has profited from entering into service maintenance and repair relationships with purchasers of GM Corp. products, and from manufacturing and selling parts and accessories for GM Corp. products (including the subject 1984 CK truck).

50.

As part of its 2009 purchase of GM Corp., Defendant GM LLC expressly assumed liability for product liability claims against GM Corp. arising from wrecks occurring after the sale.

51.

After the bankruptcy sale, Defendant GM LLC employed nearly all of GM Corp.'s employees. In short, GM LLC acquired all specific knowledge about the subject pickup previously possessed by GM Corp.

52.

Defendant GM LLC could have reasonably foreseen and did, in fact, foresee the occurrence of side impact collisions resulting in fires such as the one described in this Complaint.

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53.

Since the bankruptcy sale, Defendant GM LLC has acquired from GM Corp. and obtained on its own actual knowledge that a gas tank located on the side of a pickup in a known crush zone is vulnerable to side impact, and that the result can be, and often has been, fires that seriously burn and/or kill vehicle occupants and others.

54.

Despite knowledge of its duty to warn the public arising from its purchase of GM Corp.'s assets, Defendant GM LLC failed at the time of the bankruptcy sale—and all times since—to warn the public, and Plaintiff in particular, of the dangers in a foreseeable wreck caused by the design of the CK trucks.

55.

Defendant GM LLC's reckless, and wanton conduct constituted disregard for the life and safety of Kaitlyn Reichwaldt and the lives and safety of the motoring public generally. GM LLC's reckless, and wanton conduct also manifests a conscious indifference to the foreseeable consequences of that conduct to people like Kaitlyn Reichwaldt.

III. ASSUMED LIABILITY OF GM LLC

COUNT ONE—NEGLIGENCE & STRICT LIABILITY

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56.

Plaintiff ~~re-alleges~~realleges and reincorporates Paragraphs 1 through 55 as if fully set forth herein verbatim.

57.

The subject pickup was designed, manufactured, marketed, and distributed by GM Corp.

58.

GM Corp. had a duty to exercise reasonable care to design, engineer, test, manufacture, inspect, market, distribute, and sell safe vehicles so as not to subject consumers or motorists to an unreasonable risk of harm. GM Corp. breached its duty to exercise reasonable care with respect to the subject pickup.

59.

The subject pickup, when distributed by GM~~,~~ Corp., had a defectively designed gas system which caused the subject pickup to explode, which explosion and fire engulfed the subject pickup. The defective design of the fuel system proximately caused the injuries to Kaitlyn Reichwaldt.

60.

Despite ~~GM's~~GM Corp.'s knowledge that the gas tank on its pickup trucks must be mounted as near the center of the vehicle as practical, GM Corp. made the

decision to place the gas tank outside the frame rail on the subject pickup for marketing reasons.

61.

GM Corp. violated its own internal design directive by placing the gas tank in a known crush zone.

62.

GM Corp. violated its own internal design directive by not properly eliminating or shielding the gas tank from all objects which could result in cutting or puncturing of the gas tank.

63.

GM Corp. failed to design a fuel system whereby the gas tank was protected from rupture due to side impact or sharp objects, despite the fact it was technologically feasible and economically practicable to so design the fuel system.

64.

GM Corp. elected not to implement technologically feasible, economically practicable, and fundamentally safer alternative designs for the gas tank location and design on the subject pickups.

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65.

GM Corp. instead elected a design and gas tank location that it absolutely knew would result in fires, injuries, and deaths in foreseeable side-impacts.

66.

~~Defendant GM's~~ GM Corp.'s negligence ~~and reckless and wanton misconduct~~ proximately caused the injuries to Kaitlyn Reichwaldt.

67.

GM Corp. is strictly liable in tort for the injuries to Kaitlyn Reichwaldt.

68.

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Defendant GM LLC assumed liability for product liability claims against GM Corp. that arose after the bankruptcy sale. Plaintiff's negligence and strict liability claims against GM Corp. are properly asserted against GM LLC.

COUNT TWO~~—~~—RECKLESS & WANTON MISCONDUCT

69.

Plaintiff ~~re-alleges~~realleges and reincorporates Paragraphs 1 through 68 as if fully set forth herein verbatim.

70.

GM Corp.'s ~~and GM LLC's~~ misconduct was a reckless and wanton

disregard for the lives and wellbeing of the public, and of untold numbers of victims, including Kaitlyn Reichwaldt.

71.

The reckless and wanton misconduct by GM Corp. ~~and by GM LLC~~ proximately caused the burn injuries to Kaitlyn Reichwaldt.

72.

Plaintiff is entitled to recover damages from GM ~~LLC~~Corp. pursuant to O.C.G.A. § 51-1-11(b) (the "statute of repose") and other applicable law.

73.

Defendant GM LLC assumed liability for product liability claims against GM Corp. that arose after the bankruptcy sale. Plaintiff's negligence and strict liability claims against GM Corp. are properly asserted against GM LLC.

COUNT THREE~~——~~FAILURE TO WARN

74.

~~73.~~

Plaintiff ~~re-alleges~~realleges and reincorporates Paragraphs 1 through ~~72~~73 as if fully set forth herein verbatim.

75.

~~74.~~

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As ~~manufacturers~~the manufacturer of vehicles distributed and sold to the public, GM Corp. ~~and GM LLC have~~had a duty to adequately warn the public about dangers ~~they know~~it knew to exist in ~~their~~its vehicles.

76.

~~75.~~

By failing to warn of the danger, GM. Corp. ~~and GM LLC~~ breached ~~their~~its duty and obligations to the public, including Kaitlyn Reichwaldt.

77.

~~76.~~

GM Corp.'s failure to warn citizens about the dangers of its side-mounted gas tanks, but to instead profess for decades that no such danger exists, ~~and GM LLC's similar failure to warn since June 1, 2009,~~ was itself reckless and wanton.

~~77~~78.

GM Corp.'s ~~and GM LLC's~~ election not to warn of the known defective and unreasonably dangerous conditions in the subject pickup proximately caused the injuries to Kaitlyn Reichwaldt.

~~78.~~

79.

Plaintiff is entitled to recover damages ~~from GM LLC as a result of GM~~

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~~LLC's and~~ for GM Corp.'s failure to warn~~.~~ pursuant to O.C.G.A. § 51-1-11(b) (the "statute of repose") and other applicable law.

80.

~~79.~~

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Defendant GM LLC assumed liability for product liability claims against GM Corp. that arose after the bankruptcy sale. Plaintiff's failure to warn claim against GM Corp. is a product liability claim and is properly asserted against GM LLC.

~~80.~~

~~Plaintiff is entitled to recover damages from GM LLC pursuant to O.C.G.A. § 51-1-11 (the "statute of repose") and other applicable law.~~

COUNT FOUR~~—~~—PUNITIVE DAMAGES

81.

Plaintiff ~~re-alleges~~realleges and reincorporates Paragraphs 1 through 80 as if fully set forth herein verbatim.

82.

GM ~~LLC has been~~Corp. is guilty of such willful misconduct, malice, fraud, wantonness, oppression, and an entire want of care that its misconduct is sufficient to raise the presumption of conscious indifference to the consequences.

83.

GM ~~LLC's~~Corp.'s misconduct is so aggravating it authorizes, warrants, *and demands* the imposition of substantial punitive damages against GM LLC pursuant to O.C.G.A. § 51-12-5.1~~.~~ because GM LLC assumed liability for product liability claims against GM Corp. that arose after the bankruptcy.[22]

IV. INDEPENDENT LIABILITY OF GM LLC

COUNT FIVE ~~— EXPENSES OF LITIGATION —~~ FAILURE TO WARN

84.

Plaintiff ~~re-alleges~~realleges and reincorporates Paragraphs 1 through ~~83~~55 as if fully set forth herein verbatim.

85.

At the time that GM LLC purchased substantially all of the assets of GM Corp., and at all times since, GM LLC, like GM Corp., could reasonably have foreseen and did, in fact, foresee the occurrence of a PCFFF such as the one that

[22] Plaintiff contends that GM LLC assumed liability for punitive damages based on the conduct of GM Corp. as part of GM LLC's assumption of liability for product liability claims. GM LLC has contended that it did not assume liability for punitive damages based on GM Corp.'s conduct. Kaitlyn Reichwaldt intends to litigate that issue. Plaintiff will assert at trial those claims, and only those claims, which the Court determines she is legally allowed to assert.

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burned Kaitlyn Reichwaldt, and GM LLC knew or reasonably should have known that the subject CK pickup would fail and cause injuries like those Kaitlyn Reichwaldt suffered.

85.

As a result of its purchase of GM Corp.'s assets, GM LLC owed a duty to the consuming public in general, and to Plaintiff in particular, to warn of the dangers arising from the design of the subject CK pickup. GM LLC's duty to warn arose at the time it purchased substantially all of the assets of GM Corp. and continued up to, and after, the time of Kaitlyn Reichwaldt's injury.

86.

By failing to warn of the danger, GM LLC breached its duty and obligations to the public, including Kaitlyn Reichwaldt.

87.

GM LLC's failure to warn citizens about the dangers of the CK side-mounted gas tanks, while instead professing (as its predecessor GM Corp. did for decades) that no such danger exists, was itself reckless and wanton.

88.

GM LLC's election not to warn of the known defective and unreasonably dangerous conditions in the subject pickup proximately caused the injuries to

Kaitlyn Reichwaldt.

89.

Plaintiff is entitled to recover damages for GM LLC's failure to warn pursuant to O.C.G.A. § 51-1-11(b) (the "statute of repose") and other applicable law.

COUNT SIX—PUNITIVE DAMAGES

90.

Plaintiff realleges and reincorporates Paragraphs 1 through 55 as if fully set forth herein verbatim.

91.

GM LLC, by failing to warn of known dangers, is guilty of such willful misconduct, malice, fraud, wantonness, oppression, and an entire want of care that its misconduct is sufficient to raise the presumption of conscious indifference to the consequences.

92.

GM LLC's misconduct is so aggravating it authorizes, warrants, *and demands* the imposition of substantial punitive damages against GM LLC pursuant to O.C.G.A. § 51-12-5.1.

COUNT SEVEN—EXPENSES OF LITIGATION

93.

Plaintiff realleges and reincorporates Paragraphs 1 through 55 as if fully set forth herein verbatim.

94.

GM LLC has acted in bad faith, has been stubbornly litigious, and has caused the Plaintiff unnecessary trouble and expense, entitling Plaintiff to recover from Defendant all costs of litigation, including attorneys' fees and expenses, pursuant to O.C.G.A. § 13-6-11 and other applicable law.

~~IV~~V. DAMAGES SOUGHT

~~86~~95.

Plaintiff ~~re-alleges~~realleges and reincorporates Paragraphs 1 through ~~85~~94 as if fully set forth herein verbatim.

87.

The damages claimed by Plaintiff were proximately caused by the tortious acts and omissions of ~~Defendant.~~GM Corp. and GM LLC.

88.

Plaintiff Kaitlyn Reichwaldt seeks all damages allowed by law, including the following:

(a) shock, fright, and terror experienced from the time of the incident;

(b) mental and physical pain and suffering endured from the time of the incident;;

(c) past and future medical bills;

(d) punitive damages to punish and deter GM LLC pursuant to O.C.G.A. § 51-12-5.1; and

(e) attorneys' fees and litigation expenses pursuant to O.C.G.A. § 13-6-11 and other applicable law.

V. PRAYER FOR RELIEF

WHEREFORE Plaintiff prays for the following relief:

(a) That summons issue requiring Defendant to appear as provided by law to answer this Complaint;

(b) That service be had upon Defendant as provided by law;

(c) That Plaintiff have and recover all damages for all losses compensable under Georgia law as set forth above;

(d) That the Court award and order punitive damages against Defendant;

(e) That all expenses of litigation, including attorneys' fees, be cast

against Defendant;

(f) That Plaintiff have a trial by jury; and

(g) For such other and further relief as the Court shall deem just and proper.

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY.

This ~~19th~~ ____ day of ~~May, 2016~~August, 2017.

BUTLER WOOTEN ~~CHEELEY~~ & PEAK LLP

BY: _____

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ATTORNEYS FOR PLAINTIFF

Exhibit B

Reply Deadline: September 22, 2015 at 12:00 noon (ET)
Hearing Date and Time: October 14, 2015 at 9:45 a.m. (ET)

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Counsel for Post-Closing Ignition Switch Accident Plaintiffs

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
MOTORS LIQUIDATION COMPANY, et al., f/k/a General Motors Corp., et al.,	:	Case No.: 09-50026 (REG)
Debtors.	:	(Jointly Administered)

POST-CLOSING IGNITION SWITCH ACCIDENT PLAINTIFFS' MEMORANDUM OF LAW WITH RESPECT TO PUNITIVE DAMAGES ISSUE

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CASES

STATUTES

OTHER AUTHORITIES

The plaintiffs in the "Bellwether Cases"[1] and in the post-closing personal injury and wrongful death actions listed on Exhibit A (collectively, the "Post-Closing Ignition Switch Accident Plaintiffs"), by and through the undersigned counsel, hereby submit this Memorandum of Law pursuant to paragraph 1 of this Court's September 3, 2013 Scheduling Order.[2]

Preliminary Statement

Under the Sale Agreement[3] that effectuated the July 10, 2009 sale of substantially all of the assets of Old GM to New GM (the "Sale"), New GM expressly assumed certain liabilities of Old GM. Among the "Assumed Liabilities" were liabilities of Old GM for personal injury, wrongful death, and property damage resulting from post-closing accidents or incidents involving vehicles manufactured by Old GM. Put simply, New GM contracted to be responsible for Old GM's actions and inactions when it assumed liability for post-closing accidents or incidents involving vehicles manufactured by Old GM.

After New GM revealed the existence of the Ignition Switch Defect in 2014 – a safety defect this Court found was sufficiently known to Old GM at the time of the Sale to require Old GM to conduct a recall under applicable federal law – many victims of post-closing accidents involving vehicles with the Ignition Switch Defect filed lawsuits against New GM.

---

[1] The following actions constitute the Bellwether Cases, for which trials are scheduled to commence on a rolling basis beginning in January 2016: (i) *Cockram v. General Motors, LLC* (Case No. 14-cv-08176) (S.D.N.Y.); (ii) *Scheuer v. General Motors, LLC* (Case No. 14-cv-08176) (S.D.N.Y.); (iii) *Norville v. General Motors, LLC* (Case No. 14-cv-08176) (S.D.N.Y.); (iv) *Barthelemy v. General Motors, LLC* (Case No. 14-cv-05810) (S.D.N.Y.); (v) *Reid v. General Motors, LLC* (Case No. 14-cv-05810) (S.D.N.Y.); and (vi) *Yingling v. General Motors, L.L.C.* (Case No. 14-cv-05336) (S.D.N.Y.). *See* Memo Endorsed Letter Request Regarding Proposed Bellwether Trial Sequence and Replacement Protocol, entered July 28, 2015, *In re General Motors LLC Ignition Switch Litigation*, Case No. 1:14-md-02543 (JMF) (the "MDL") [MDL ECF No. 1217].

[2] *See* Scheduling Order Regarding Case Management Order Re: No-Strike, No Stay, Objection, and GUC Trust Asset Pleadings, entered September 3, 2015 [ECF No. 13416] (the "September 3 Scheduling Order").

[3] Capitalized terms not otherwise defined herein shall have the meanings assigned to them in this Court's (i) Judgment, entered on June 1, 2015 [ECF No. 13177] (the "Judgment") and (ii) Decision on Motion to Enforce Sale Order, entered on April 15, 2015 [ECF No. 13109], *In re Motors Liquidation Co.*, 529 B.R. 510 (Bankr. S.D.N.Y. 2015) (the "Decision").

In addition to seeking damages from New GM to compensate for the deaths, injuries, and property damage they suffered, many of these plaintiffs also seek punitive damages. These punitive damages requests seek to hold New GM responsible for the reprehensible and illegal act of allowing these preventable deaths and injuries to occur by failing to conduct a timely recall despite having ample knowledge of the Ignition Switch Defect and its deadly implications. As will be demonstrated below, the Post-Closing Ignition Switch Accident Plaintiffs have at least three pathways to recover punitive damages from New GM.

First, under the plain and unambiguous language of the Sale Agreement, punitive damages for post-closing accidents are "Assumed Liabilities" for which New GM is liable. New GM contractually bound itself to be responsible for all liabilities for wrongful death or personal injury for which Old GM would have been liable without limiting such liabilities to compensatory damages.

Second, the moment the Sale closed, New GM inherited the books, records, files, databases (including the TREAD database Old GM used to monitor safety matters as required under the Safety Act), reports, and analyses of Old GM. Moreover, once the Sale closed, the knowledge of transferred Old GM employees regarding the Ignition Switch Defect became the knowledge of New GM regarding the Ignition Switch Defect. Regardless of when it came into existence or its source, that knowledge was known to New GM and is an element of New GM's post-closing conduct that can be considered as part of a punitive damages case against New GM. Under this second path, the Post-Closing Ignition Switch Accident Plaintiffs are not attempting to hold New GM liable for Old GM acts; they seek only to hold New GM liable for its own independent actions and inactions, which were undertaken with the knowledge of the Ignition Switch Defect that New GM acquired at the moment the Sale closed and thereafter.

Third, even if all of Old GM's files and records were metaphorically destroyed and the brains of all transferred employees wiped clean of any memory of Old GM at the time of the closing of the Sale, New GM nevertheless has independent liability for punitive damages for its own post-Sale conduct based on the knowledge of the Ignition Switch Defect that New GM continuously accumulated and ignored after the Closing Date.

New GM's attempt to sidestep liability for the tragic and preventable deaths and injuries inflicted on the Post-Closing Ignition Switch Accident Plaintiffs should fail and these plaintiffs should be permitted to try all aspects of their cases, including punitive damages.

ARGUMENT

I. Punitive Damages for Post-Sale Personal Injuries and Wrongful Deaths Are Liabilities New GM Assumed Under the Sale Agreement

New GM expressly assumed all liabilities and obligations of Old GM for post-closing injuries and wrongful death claims involving vehicles manufactured by Old GM. The Sale Agreement does not carve out punitive damages from "Product Liabilities" and no amount of linguistic legerdemain can rewrite the plain language of the operative definitions that describe the scope of the "Product Liabilities" assumed by New GM. Specifically, because the unambiguous language of section 2.3(a)(ix) (as amended) and the defined terms used therein do not exclude punitive damages from the assumed "Product Liabilities," New GM has assumed any and all liability for punitive damages that could have been asserted against Old GM for these types of injuries. Accordingly, punitive damages may be imposed against New GM after trial based on both Old GM's pre-Sale conduct and New GM's post-Sale conduct.

A. *Governing Principles of Contract Interpretation*

To determine whether the punitive damages are "Assumed Liabilities," the threshold question is "whether the contract is unambiguous with respect to the question disputed by the

parties." *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 465 (2d Cir. 2010) ("*Maverick Tube*") (quoting *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir. 2002)). A contract is only ambiguous if it "could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Id.* at 466 (quoting *Int'l Multifoods*, 309 F.3d at 83). However, "[l]anguage whose meaning is otherwise plain does not become ambiguous merely because the parties urge different interpretations in the litigation, unless each is a 'reasonable' interpretation." *Id.* at 467. Moreover, a "court should not find [a] contract ambiguous where the interpretation urged by one party would 'strain[] the contract language beyond its reasonable and ordinary meaning,'" *id.* (quoting *Bethlehem Steel Co. v. Turner Constr. Co.*, 2 NY2d 456, 459 (1957)), and any doubt about whether the contract provision at issue is unambiguous should be construed strongly against the drafters. *Jacobson v. Sassower*, 66 N.Y.2d 991, 993 (1985) ("In cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language").

When the terms of a contract are unambiguous – as they are here – "the obligations it imposes are to be determined without reference to extrinsic evidence." *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir. 1989) ("*Hunt*"). *See also Seiden Assocs. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992) (same). "[T]he objective of contract interpretation is to give effect to the expressed intentions of the parties." *Maverick Tube*, 595 F.3d at 467 (quoting *Hunt*, 889 F.2d at 1277) (emphasis in original). "[T]he best evidence of what parties to a written agreement intend is what they say in their writing" and "[e]vidence

outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." *Id.* at 466, 467 (quoting *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002) and *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990)). Finally, "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." *Id.* at 468.

As shown below, the language of section 2.3(a)(ix) of the Sale Agreement unambiguously provides that New GM expressly assumed all direct[4] liability for post-Sale accidents in Old GM vehicles without any exclusion for punitive damages. Nothing in the operative language limits the "Assumed Liabilities" to compensatory damages. Rather, the operative definitions are broad and all-inclusive. Guided by the above-quoted principles of contract interpretation, the Court should reject New GM's attempts to manufacture ambiguity where none exists by referencing defined terms not used the operative section of the agreement and on matters outside the contract's four corners.

B. *The Sale Agreement Unambiguously Provides that New GM Assumed All Liabilities for Post-Sale Accidents Without Carving Out Punitive Damages*

Under the plain language of section 2.3(a)(ix) of the Sale Agreement, included among the "Assumed Liabilities" (*i.e.*, Old GM liabilities for which New GM would be held responsible after the Closing Date) were:

> (ix) all Liabilities to third parties for death, personal injury, or other injury to Persons or damage to property caused by motor vehicles designed for operation on public roadways or by the component parts of such motor vehicles and, in each case, manufactured, sold or delivered by [Old GM] ("Product Liabilities"), which arise directly out of death, personal injury or other injury to Persons or damage to property caused by accidents or incidents first

[4] Section I.C.1 below addresses New GM's incorrect argument that punitive damages are not "directly" related to the Post-Closing Ignition Switch Accident Plaintiff's accidents.

> occurring on or after the Closing Date and arising from such motor vehicles' operation or performance ….

First Amendment to Sale Agreement, dated as of June 30, 2009 (the "First Amendment") at § 2.3(a)(ix) (emphasis added). In order to know what was included in the assumed "Product Liabilities," one must look to the definition of "Liabilities," which broadly reads as follows:

> "Liabilities" means any and all liabilities and obligations of every kind and description whatsoever, whether such liabilities or obligations are known or unknown, disclosed or undisclosed, matured or unmatured, accrued, fixed, absolute, contingent, determined or undeterminable, on or off-balance sheet or otherwise, or due or to become due, including Indebtedness and those arising under any Law, Claim, Order, Contract or otherwise.

Sale Agreement at § 1.1 (Defined Terms) (emphasis added). Punitive damages are not excluded from the definition of Liabilities and, thus, are not excluded from the "Product Liabilities" that New GM assumed pursuant to section 2.3(a)(ix). Accordingly, the plain language of the Sale Agreement provides that New GM has expressly assumed liability for punitive damages that were recoverable against Old GM based upon Old GM's conduct.

There can be no question that the authors of the Sale Agreement knew how to carve out punitive damages from "Assumed Liabilities." In fact, they explicitly carved punitive damages out of the definition of "Damages." However, although the defined term "Damages" is used elsewhere in the Sale Agreement, it does not appear anywhere in section 2.3 or in the defined terms "Liabilities" or "Product Liabilities" used therein.[5] This is fatal to New GM's argument and should be the end of the inquiry.

New GM attempts a shell game by arguing that liabilities to post-Sale accident plaintiffs relate to "Losses" and the defined term "Losses" includes "damages" (with a lower case "d")

[5] Specifically, "Damages" is used in section 2.4(c) of the Sale Agreement in connection with New GM's indemnification obligations towards Old GM for liabilities relating to "Non-Assignable Assets." *See* Sale Agreement at § 2.4(c). The word "damage" (with a lower case "d") appears in the definition of "Product Liabilities," however, it is clearly limited to "property damage" and the context makes clear there was no intent to use the defined term "Damages."

and, in turn, the defined term "Damages" (which is not used in "Losses" or "Liabilities") excludes punitive damages. *See* Application By General Motors LLC, Pursuant to the Judgment Dated June 1, 2015, In Support of an Order Directing Plaintiffs In the Bavlsik Lawsuit to Withdraw Their Punitive Damages Request In Their Complaint, filed August 28, 2015 [ECF No. 13407-1] (the "Bavlsik Pleading") at ¶¶ 3-4, 25. This argument is wishful thinking and must fail because the only relevant operative definitions that appear in section 2.3(a)(ix) are ''Assumed Liabilities," "Product Liabilities," and "Liabilities"; none of these definitions use the defined terms "Loss," "Losses," or "Damages." New GM's attempt to rely on definitions not used in section 2.3(a)(ix) is, at its core, an unabashed request for this Court to insert terms into the plain and unambiguous language of that section. Guided by the above-quoted authorities, the Court should refuse to rewrite clear and unambiguous language.

As New GM points out in its Bavlsik Pleading, "[i]f parties to a contract omit terms – particularly, terms that are readily found in other, similar contracts – the inescapable conclusion is that the parties intended the omission. The maxim *expression unis est exclusion alterius*, as used in the interpretation of contracts, supports precisely this conclusion." *See* Bavlsik Pleading at ¶ 36 (quoting *Quadrant Structured Prods. Co.*, 23 N.Y.3d 549, 560 (2014)). *See also Goldberg & Connolly v. N.Y. Cmty. Bancorp, Inc.*, 565 F.3d 66, 72 (2d Cir. 2009) (in ruling that a security agreement conveyed an interest in monies recovered from a legal dispute and did not constitute an assignment of particular judgment, the Second Circuit held that by specifically referencing the judgment in a related agreement but omitting reference to the judgment from the operative security agreement language, the parties evidenced the intent not to assign the judgment). Here one does not even need to look to another similar contract. The Sale Agreement itself reflects the drafter's intent not to use the term "Damages" (and its embedded

carveout for punitive damages) in connection with New GM's assumption of Product Liabilities for post-closing accidents.

Another clear indication that punitive damages were not meant to be excluded from Assumed Liabilities is that section 2.3(a)(ix) itself expressly excludes certain liabilities (but not punitive damages) from the Product Liabilities being assumed. Specifically, the parenthetical in that section states:

> (for the avoidance of doubt, Purchaser shall not assume , or become liable to pay, perform or discharge, any Liability arising or contended to arise by reason of exposure to materials utilized in the assembly or fabrication of motor vehicles manufactured by Sellers and delivered prior to the Closing Date, including asbestos, silicates or fluids, regardless of when such alleged exposure occurs).

Sale Agreement at § 2.3(a)(ix). Had the parties to the Sale Agreement wished to exclude punitive damages from the universe of assumed Product Liabilities, a logical way to do so would have been to include a reference to punitive damages in this parenthetical. Their failure to do so speaks volumes. *See Pathmark Stores, Inc. v. United Food & Commercial Workers Local 342-50, AFL-CIO*, 204 F. Supp. 2d 500, 505-06 (E.D.N.Y. 2002) ("[T]he CBA does not expressly exempt employer-initiated disputes from arbitration. In contrast, there is one specific category of exclusion in the arbitration article, demonstrating that the parties knew how to expressly exclude certain disputes from arbitration when they so intended…. '[I]f the parties had wished to limit the arbitration clause to employee-initiated grievances, they could have done so explicitly' as they did elsewhere in the arbitration provision.") (quoting *Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers*, 242 F.3d 52, 57 (2d Cir. 2001)). *See also Vysyaraju v. Mgmt. Health Solutions, Inc.*, 2013 U.S. Dist. LEXIS 118056, *21-22 (S.D.N.Y. Aug. 10, 2013) (where explicit contract language contained a "consistent with past practices" exception to strict GAAP compliance for calculation of "Net Working Capital" but not for the definition of "Qualifying

Revenue," court held that "[w]here the parties wanted revenue calculated through procedures other than those provided by GAAP they knew how to do that, and that is precisely what they did in Schedule G of the Agreement. It is therefore an unreasonable interpretation of the contract to add the qualification that GAAP be applied "consistent with past practice" where that has not been specified.").[6]

In addition, not only are punitive damages not excluded from Assumed Liabilities, it is equally clear that they are not a "Retained Liability." First, as set forth above, punitive damages are included under the definition of "Assumed Liabilities" and "Assumed Liabilities" are expressly excluded from the definition of "Retained Liabilities." *See* Sale Agreement at § 2.3(b). Second, the illustrative list of sixteen categories of liabilities retained by Old GM contained in the definition of "Retained Liabilities" does not include punitive damages. Listing punitive damages as a seventeenth category of Retained Liability would have been another easy and logical manner of excluding punitive damages from the Assumed Liabilities. *Castillo v. General Motors Co. (In re Motors Liquidation Co.)*, 2012 WL 1339496, *10 (Bankr. S.D.N.Y. Apr. 17, 2012) ("*Castillo*") ("[T]he matters for which New GM took on liability under the Sale Agreement are stated with great specificity – in several lines of text following the words 'arising under.' Additionally, while strictly speaking, 'Retained Liabilities,' the subject of the next relevant section, are Old GM's problem, and not New GM's concern, they shed light on the liabilities that former GM and the Auto Task Force determined that New GM would not assume."). And, third, in the context of evaluating liability for post-closing accidents, it would make no sense to bifurcate liability for post-Sale accidents into two claims, one for compensatory damages that are assumed and the other for punitive damages that are retained.

[6] Also of note is that section 2.3(a)(ix) was amended after the Sale Agreement was first executed. *See* First Amendment at § 2(b). This shows that section 2.3(a)(ix) was not ignored by the parties, but rather was under some amount of scrutiny. Yet, the assumption of punitive damages remained untouched.

The retention of liability for punitive damages by Old GM for post-Sale accidents would be a nonsensical dead-end, especially for punitive damages that are wholly independent claims for purely New GM conduct. Regardless, the Sale Agreement contains no such bifurcation for "Product Liabilities."

It is not relevant if the assumption of punitive damages in the Sale Agreement was not the result New GM intended or desired. The parties to a contract have the responsibility to ensure their lawyers are doing their jobs. *See* Order Regarding Benjamin Pillar's No Stay Pleading and Related Pleadings, entered July 29, 2015 [ECF No. 13328] at Corrected Tr. 27:2-5 (New GM held responsible for what its lawyer wrote in a pleading even though it did not accurately reflect provision of the Sale Agreement at issue; "Obviously GM has the ability to ensure that its counsel do their jobs, and it's not too much to hold GM [sic] for the consequences of what its counsel, who is plainly an agent, did.").[7] New GM was represented by experienced lawyers in connection with the Sale. Assuming for argument's sake that those lawyers failed to carve out punitive damages from the Product Liabilities being assumed, that is an issue between those lawyers and New GM. It is not a reason for this Court to rewrite the contract to read the way New GM would like it to read over six years after the Closing Date.

C. *New GM's Flawed Attempts to Create a Carveout for Punitive Damages Where One Does Not Exist*

New GM makes several specious arguments in an effort to create an exception for the assumption of punitive damages that does not exist. These arguments fall well short of the mark.

[7] In the *Pillar* matter, New GM's attorney cited the incorrect version of the Sale Agreement. Here there is no question that all of the parties are looking at the correct version of the Sale Agreement.

1. The Word "Directly" Does Not Bifurcate Punitive Damages and Compensatory Damages

New GM focuses on the word "directly" in section 2.3(a)(ix) and tries to argue that punitive damages are not "direct" damages because of the broader societal implication of deterrence associated with punitive damages. Thus, New GM argues that punitive damages are independent of the particular incident at the core of a compensatory award. *See* Bavlsik Pleading at ¶¶ 6-7, 23-24, 28. As a threshold matter, there is no textual or contextual basis to elevate a single word – "directly" – to the status advanced by New GM. If punitive damage claims against New GM were to be barred or excluded from Assumed Liabilities, the contract must say so in clear and unambiguous language. It does not. To the contrary, what was assumed was "any and all liabilities and obligations of every kind and description whatsoever."

As the District Court for the Southern District of New York has recognized, using the term "all" without further limiting language is about as certain an indication of total conveyance as you can get. Specifically, in a litigation over whether the assets sold pursuant to an asset purchase agreement included certain antitrust litigation claims of the seller, that court stated:

> "All," of course, means "every", "the whole amount or quantity of." It is "one of the least ambiguous [words] in the English language," and one that leaves "no room for uncertainty." The word "all" cannot be read to exclude certain large, unforeseen causes of action -- like the pending antitrust suit -- in one provision yet stand for its plain meaning in every other. … [Seller] could have negotiated a clause that would protect its right to unforeseen, complex causes of action like antitrust suits, or at least excluded certain general types of actions from being transferred to [buyer]. Instead, [seller] excluded one specific cause of action and unambiguously conveyed all of its other stakes to litigation, known and unknown, including the Claims at issue here, to [buyer].

Am. Home Prods. Corp. v. CAMBR Co., 2001 U.S. Dist. LEXIS 716, *7-9 (S.D.N.Y. Jan. 29, 2001). Just as the seller in the *American Home Products* case developed "seller's remorse" after selling potentially valuable causes of action, New GM appears to have "buyer's remorse."

Buyer's remorse, however, is no reason for this Court to rewrite the Sale Agreement for New GM; New GM must live with the contract to which it agreed to be bound.

Moreover, there is a direct connection between these plaintiffs' claims for post-Sale incidents and the punitive damages sought. Contrary to the picture New GM wishes to paint, punitive damages arise directly from the injury suffered by a plaintiff notwithstanding that one aspect of punitive damages is their societal purpose of deterrence. Punitive damages are also a well-recognized form of retribution to the victim for the defendant's reprehensible conduct toward the plaintiff. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) ("*State Farm*") (collecting cases and stating "punitive damages serve a broader function; they are aimed at deterrence and retribution"). Indeed, the Supreme Court has recognized in the context of punitive damages, that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 423 (emphasis added).

In nearly all states, there cannot be an award of punitive damages without a threshold award of compensatory damages. *See* PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 14 (W. Page Keeton et al. eds., 5th ed. 1984); *Virgillo v. City of N.Y.*, 407 F.3d 105,117 (2d Cir. 2005) ("A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action") (quoting *Rocanova v. Equitable Life Assurance Soc'y of U.S.*, 83 N.Y.2d 603, 616 (1961)).[8] This "parasitic" string connects the award of

[8] It is odd that New GM cites *Virgillo* in support of its arguments. *See* Bavlsik Pleading at ¶ 23. In *Virgillo*, the Second Circuit ruled that under a federal statute, plaintiffs who filed claims with the 9/11 Victim Compensation Fund waived the right to sue to certain defendants for compensatory and punitive damages. Victims that made claims to the fund tried to argue they could still sue for punitive damages because the waiver only applied to "damages sustained," which they argued only covered compensatory damages. Acknowledging that punitive damages serve a different purpose from compensatory damages, the Second Circuit ruled that the plain language of the statute barred plaintiffs from suing for both punitive and compensatory damages because the phrase "damages sustained" includes both compensatory and punitive damages. The latter is impossible without the former. *Virgillo*, 407 F.3d at 115-18. Thus, *Virgillo* supports the Post-Closing Ignition Switch Accident Plaintiffs' argument that punitive and compensatory damages are linked and that absent a specific reference to punitive damages, an assumption of all "Liabilities" for a particular injury constitutes an assumption of both punitive and compensatory

punitive damages to the victim. Moreover, the plaintiff must be the target or subject of the misconduct that underlies or supports the award of punitive damages, forging yet another direct connection. *See Phillip Morris USA v. Williams*, 549 U.S. 346 (2007) (prohibiting juries from awarding punitive damages based on harm defendant inflicted on parties other than the plaintiff). Here, each Post-Closing Ignition Switch Accident Plaintiff was directly harmed by the reprehensible conduct of both Old and New GM: failing to recall vehicles that they each knew contained a deadly safety defect, which resulted in these plaintiffs or their loved ones to unknowingly continue to drive unsafe vehicles until those vehicles failed and they were injured, maimed, or killed. Thus, the punitive damages at issue do arise directly from the incidents.

New GM puts the cart before the horse. It is well-established that there must be a proportional relationship between the severity of the harm suffered by the plaintiff (as reflected in the compensatory damages) and the amount of punitive damages awarded. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1996) (overturning punitive damages award as grossly excessive and instructing that punitive damages awards must be proportional to the degree of reprehensibility of the defendant's conduct). *See also State Farm*, 538 U.S. at 419 (applying *Gore* and overturning punitive damage award that "bore no relation" to the harm suffered by the plaintiffs). This is yet another direct connection between the incident, compensatory damages, and punitive damages. Although there has been no award here yet to challenge, if there is an award that lacks sufficient nexus to these plaintiffs' injuries, New GM would have the post-verdict litigation rights available to all defendants to overturn a grossly excessive punitive damages award (the same rights successfully employed by defendants in *Gore* and *State Farm*).

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damages. If the statutory language at issue in *Virgillo* was construed to implicitly bar punitive damages because compensatory damages were barred, the converse should also be true: if compensatory damages are not barred, there should be a presumption that punitive damages are not barred unless the bar is explicit and clear.

The *Molzof* case on which New GM relies is especially instructive. *See* Bavlsik Pleading at ¶ 24 (quoting *Molzof v. U.S.*, 502 U.S. 301, 307 (1992)). *Molzof* involved a dispute over whether a damages award against the U.S. Government contained "punitive damages," which are explicitly prohibited by the Federal Tort Claims Act ("FTCA"). The FTCA provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under the circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Molzof, 502 U.S. at 305 (quoting 28 U.S.C. § 2674) (emphasis in original). Unlike section 2.3(a)(ix) of the Sale Agreement, which has no exclusion for punitive damages, the FTCA specifically excluded punitive damages (which is implicit recognition that punitive damages would be included among the liabilities of the United States absent the exclusion). The Supreme Court in *Molzof* also rejected the Government's argument that "punitive damages" included damages for future medical expenses and loss of enjoyment of life. The Court stated:

> the Government's interpretation of § 2674 appears to be premised on the assumption that the statute provides that the United States "shall be liable only for compensatory damages." But the first clause of § 2674, the provision we are interpreting, does not say that. What it clearly states is that the United States "shall not be liable . . . for punitive damages." The difference is important. The statutory language suggests that to the extent a plaintiff may be entitled to damages that are not legally considered "punitive damages," but which are for some reason above and beyond ordinary notions of compensation, the United States is liable "in the same manner and to the same extent as a private individual."

Id. at 308. Just as the Government unsuccessfully argued in *Molzof*, New GM argues that the language of section 2.3(a)(ix) contains an unwritten limitation to compensatory damages beyond the contract's plain language. It does not, and that argument should be similarly rejected here.

2. A Professed Goal of Only Assuming "Commercially Necessary" Liabilities Does Not Override the Clear and Unambiguous Language of the Sale Agreement

Also unavailing is New GM's focus on statements in prior decisions of the Court that one of the goals of the Sale was that New GM would "take on only those liabilities that would be necessary for the commercial success of New GM." Those cases involved plaintiffs seeking damages from New GM for claims against Old GM relating to warranties that did not fall under the limited "Glove Box Warranty" claims New GM expressly assumed in the Sale Agreement. See *Castillo*, 2012 WL 1339496, at *9-10; *Trusky v. General Motors Co. (In re Motors Liquidation Co.)*, 2013 WL 620281, *7-8 (Bankr. S.D.N.Y. Feb. 19, 2013).

Those cases are inapposite for several reasons. First, general statements about the goal of the Sale expressed by the parties and understood by the Court at the time of the Sale which make no mention of punitive damages cannot trump the plain language of the contract which clearly provides that New GM assumed all Liabilities for these post-closing accidents.

Second, reliance on parol evidence is inappropriate in the face of unambiguous contractual language in conjunction with an explicit integration clause barring reliance on evidence outside the four corners of the agreement. Indeed, the Sale Agreement contains an integration clause at section 9.17, which provides that:

> This Agreement (together with the Ancillary Agreements, the Sellers' Disclosure Schedule and the Exhibits) contains the final, exclusive and entire agreement and understanding of the Parties with respect to the subject matter hereof and thereof and supersedes all prior and contemporaneous agreements and understandings, whether written or oral, among the Parties with respect to the subject matter hereof and thereof. Neither this Agreement nor any Ancillary Agreement shall be deemed to contain or imply any restriction, covenant, representation, warranty, agreement or undertaking of any Party with respect to the transactions contemplated hereby or thereby other than those expressly set forth herein or therein, and none shall be deemed to exist or be inferred with respect to the subject matter hereof.

Sale Agreement at § 9.17. By including this provision, the parties to the Sale Agreement (including New GM) instructed the world that the explicit language of the contract should control, not arguments or evidence about the parties' understandings or goals that were not included in the written document. *Soroof Trading Dev. Co. v. GE Fuel Cell Sys. LLC*, 842 F. Supp. 2d 502, 512 (S.D.N.Y. 2012) ("Parol evidence is properly excluded where, as here, a contract is clear, unambiguous, complete on its face and, moreover, contains an explicit integration clause.") (citing *Morgan Stanley High Yield Sec., Inc. v. Seven Circle Gaming Corp.*, 269 F. Supp. 2d 206, 214-15 (S.D.N.Y. 2003)).

And third, the Court's prior decisions in *Castillo* and *Trusky* arose in much different contexts. The plaintiffs in those actions were trying to expand the meaning of the words "arising under express written warranties" in section 2.3(a)(vii)(A) of the Sale Agreement to include settlement and other monetary obligations of Old GM that fell outside of the performance-only obligations assumed by New GM under the Glove Box Warranties. There, the Court was correctly unwilling to expand and strain the contractual language and common usage of the English language to force New GM to assume obligations it clearly did not assume. To the contrary, here it is New GM that is asking the Court to strain the contractual language and the English language to create a carveout to Assumed Liabilities that does not exist.

The Second Circuit's decision in *Maverick Tube Corp.* is directly on point. In that case, certain notes issued by an obligor ("Maverick") were convertible to cash or stock upon acquisition of Maverick by a "Public Acquirer," which was defined as an acquiring entity that "has a class of common stock traded on a United States national securities exchange." *Maverick Tube*, 595 F.3d at 463. A dispute arose as to whether a foreign acquirer, whose ordinary shares did not trade on a United States exchange, fell within the definition of "Public Acquirer." *Id.* at

462-63. Judge Sullivan of the Southern District of New York and the Second Circuit Court of Appeals agreed that, although certain depository shares ("ADS" shares) of the acquirer have similar characteristics to common shares, they are not the same thing, and, therefore the acquiring entity was not a "Public Acquirer." Under the unambiguous terms of the indenture, because the acquirer's depository shares traded on a U.S. exchange but its ordinary shares did not, the noteholders' Public Acquirer conversion rights were not triggered. *Id.* at 464 and 472. The Second Circuit stated as follows:

> The parties could easily have included in the Indenture a definition of common stock in general with a parenthetical phrase expressly including ADSs, such as the parenthetical in the definition of "Capital Stock"; or they could have included such a parenthetical after "common stock" in the "a class of common stock traded on a United States national securities exchange" clause of the Public Acquirer definition. They did neither. Given that the parties defined more than 100 terms in the Indenture and made explicit reference to ADSs in the "Capital Stock" definition that informs the rights of noteholders to require Maverick to purchase their notes, the Indenture as a whole does not suggest that the undefined term "common stock," in the Public Acquirer definition that informs noteholders' conversion rights, includes ADSs implicitly.

Id. at 469. The Court also rejected the invitation to include the depository shares in the undefined term "common stock" because to not do so would not be "commercially reasonable." Specifically, the Second Circuit wrote:

> Any suggestion that the Indenture should be read to accomplish what the Trustee views as "commercial[ly]" "reasonable" essentially asks us to rewrite the Indenture's Public Acquirer definition. Instead, we are required to give effect to the intentions expressed in the agreement's own language. Given the pains taken by the parties to have the Indenture set out detailed definitions of numerous terms and to have its definition of Capital Stock make explicit reference to ADSs--a reference we are not entitled to regard as superfluous--we conclude that the district court properly declined to read ADSs into the undefined term "common stock," as used in the clause "common stock traded on a United States national securities exchange" without elaboration.

Id. at 472 (internal citations omitted). New GM is requesting this Court do exactly what the Second Circuit refused to do in *Maverick Tube*: read or imply a term into a section of a contract that is not present in that section (but is present elsewhere in the contract) because to not do so would be "commercially unreasonable." New GM and the other parties to the Sale Agreement are sophisticated commercial parties who knew full well how to place a carveout for punitive damages in the section of the Sale Agreement in which New GM assumed Product Liabilities. In fact the drafters of the Sale Agreement did create such a carveout in the definition of "Damages" and used that definition in section 2.4(c) of the Sale Agreement but not in section 2.3(a)(ix). It would be improper for this Court to read the defined term "Damages" into section 2.3(a)(ix). Regardless of New-GM's hindsight assertions that assuming punitive damages for post-Sale accidents was not "commercially necessary" at the time of the Sale, the reality is that they assumed liability for punitive damages under the contract and this Court should not rewrite that contract to enable New GM to renege on that commitment.[9]

3. The Subordination of Punitive Damages In Bankruptcy Has No Bearing on the Fact That New GM Assumed Them as a Liability

New GM also argues that because punitive damages are subordinated to general unsecured claims under section 726(a) of the Bankruptcy Code, New GM only assumed liability to pay claims in the amounts that were actually payable by Old GM. *See* Bavlsik Pleading at ¶¶ 30-35. According to New GM, because Old GM was insolvent, punitive damages claims would not have received any distribution in the chapter 11 case. Therefore, New GM assumed the obligation to pay nothing. This argument is nonsensical and equates assumption of liability

[9] It has also not been established that New GM's assumption of punitive damage claims against Old GM for post-Sale accidents was not "commercially necessary." It is irrelevant – and now susceptible to convenient revisionism or gamesmanship – whether parties to the Sale Agreement and the Auto Task Force may have viewed it as a commercial necessity for New GM to fully (rather than partially) stand behind damages for accidents involving Old GM-manufactured vehicles. This is not a point that should be litigated, however, because the plain language of the Sale Agreement provides that New GM did assume punitive damages and that language is what controls, not what New GM, years after the fact, now argues was "commercially necessary."

with distributions on claims. Not getting a distribution on a claim due to insolvency or subordination does not mean the debtor is not liable. The liability still exists but, due to the debtor's bankruptcy, the Bankruptcy Code treats the priority and payment of the claim against the debtor in a limiting manner. This has no impact on the level of the assuming party's obligation. Assumed liabilities are not limited to the amount distributed on allowed claims.

Under New GM's "no distribution" logic, New GM's liability for compensatory damages would be capped at $0.30 (or zero if this was a zero recovery case). Indeed, "assumption of liability" would vary from case to case depending on the degree of the debtor's insolvency and every guaranty would become a guaranty of bankruptcy dollars. Nothing in the Sale Agreement, the Sale Order, applicable law, or the rules of common sense allow New GM to limit its liability for Assumed Liabilities to the amount such creditors would have received in the chapter 11 case.

D. *Post-Closing Ignition Switch Accident Plaintiffs Are Permitted to Rely on Old GM Acts in Their Complaints*

References to Old GM in the Post-Closing Ignition Switch Accident Plaintiffs' complaints are entirely appropriate. Putting aside punitive damages for the moment, New GM assumed the liability of Old GM for Product Liabilities for post-closing accidents involving vehicles manufactured by Old GM, which means New GM has agreed that it is liable for whatever Old GM is or would have been liable for. Unlike the successor liability claims addressed in the Decision, there is no issue with the Post-Closing Ignition Switch Accident Plaintiffs seeking to hold New GM responsible for Old GM acts; New GM expressly assumed that responsibility. Indeed, how else could the Post-Closing Ignition Switch Accident Plaintiffs show that Old GM was liable to accident victims for the liabilities of Old GM that New GM has undeniably assumed? The way to hold New GM liable for the liabilities that it assumed in section 2.3(a)(ix) of the Sale Agreement is to demonstrate at trial that Old GM designed a

defective car and then failed or refused to disclose the defect or recall the vehicle. This led the Post-Closing Ignition Switch Accident Plaintiffs to unknowingly purchase defective vehicles and unknowingly drive those vehicles until the incident occurred. Old GM is or should be liable for such pre-Sale conduct, and New GM has assumed that liability. Therefore, while the Post-Closing Ignition Switch Accident Plaintiffs will review and respond to the marked complaints that New GM is preparing in accordance with this Court's September 3 Scheduling Order, they continue to wonder what New GM can credibly argue was improperly pled.

II. New GM Can Be Held Independently Liable for Punitive Damages for its Own Post-Sale Actions and Inactions Without Regard to New GM's Assumption of Old GM's Liability

The Post-Closing Ignition Switch Plaintiffs also seek to hold New GM liable for its own independent, post-closing misconduct with respect to the delayed recall, not as the party that assumed Old GM's liability but purely as "Independent Claims." As the relevant complaints allege, following the Sale, New GM continued the concealment of the Ignition Switch Defect begun by Old GM, even though New GM inherited Old GM's knowledge of the defect and hired its employees and (subsequent to the Closing Date) developed its own information about the Ignition Switch Defect. By delaying the recall for so many years, New GM may have caused a plaintiff to purchase a used vehicle that he or she never would have purchased if he or she had known it contained a life-threatening safety defect. Even if the defective vehicle was purchased pre-Sale, the delayed recall by New GM caused the plaintiff to unknowingly continue to drive that defective vehicle until the occurrence of the incident. New GM's failure or refusal to perform a recall when it had knowledge of the Ignition Switch Defect was wanton and reckless, regardless of whether New GM's knowledge was inherited from Old GM's books and records, or from the minds of Old GM's employees, or was separately developed by New GM.

A. ***New GM Can Be Held Liable for Punitive Damages Based On the Knowledge of the Ignition Switch Defect it Acquired From Old GM on the Closing Date***

The second path to punitive damages is to hold New GM liable for punitive damages for its own independent, post-closing breaches, actions and inactions, which were done with the knowledge of the Ignition Switch Defect that it acquired from Old GM on the Closing Date. As this Court knows, at the moment the Sale closed, New GM inherited the books, records, files, databases (including the TREAD database Old GM used to monitor safety matters as required under the Safety Act), reports, and analyses of Old GM,[10] and the minds of the employees that were transferred from Old GM to New GM (and all of the pre-Sale knowledge in those minds). Regardless of when it came into existence, that knowledge is an element of New GM's post-closing conduct that can be considered as part of a punitive damages case against New GM.

As will be more fully briefed in connection with the "Imputation Issue," this Court has already held that New GM is responsible for its own independent, tortious, and illegal conduct following the Closing Date. *See* Decision, 529 B.R. at 583 ("And to the extent, if any, that New GM might be liable on claims based solely on any wrongful conduct on its own part (and in no way relying on wrongful conduct by Old GM), New GM would be liable not because it had assumed any Old GM liabilities (or was responsible for anything that Old GM might have done wrong), but only because New GM had engaged in independently wrongful, and otherwise actionable, conduct on its own."); *id.* at 598. Moreover, this Court has instructed the parties to this litigation that the knowledge New GM personnel had post-closing regarding the Ignition Switch Defect would be "fair game" "even if those personnel acquired that knowledge while acting for Old GM." *In re Motors Liquidation Co.*, 2015 Bankr. LEXIS 2406, *8 n.16 (Bankr. S.D.N.Y. July 22, 2015) ("*Bledsoe*"). Thus, the allegations in the Post-Closing Ignition Switch

[10] *See* Sale Agreement at § 2.2(a)(xiv).

Accident Plaintiffs' complaints regarding the knowledge of the Ignition Switch Defect that was already possessed by New GM employees at the Closing Date do not violate this Court's prior rulings (even though that knowledge came into being prior to the Closing Date).

This Court also held in its Decision that:

> [t]he Court has based its conclusion that the Plaintiffs were known creditors here on the fact that at least 24 Old GM engineers, senior managers, and attorneys knew of the Ignition Switch Defect--a group large in size and relatively senior in position. The Court has drawn this conclusion based not (as the Plaintiffs argue) on any kind of automatic or mechanical imputation drawn from agency doctrine (which the Court would find to be of doubtful wisdom), but rather on its view that a group of this size is sufficient for the Court to conclude that a 'critical mass' of Old GM personnel had the requisite knowledge--i.e., were in a position to influence the noticing process.

Decision, 529 B.R. at 558 n.154. Whether a court will ultimately reach the same conclusion for New GM as this Court did regarding Old GM's knowledge of the Ignition Switch Defect and resulting responsibilities, is a determination for another day. Here, the question is not whether New GM had the same awareness of the Ignition Switch Defect as Old GM. Rather, the issue is whether these plaintiffs can seek to prove New GM had sufficient awareness by making reference to knowledge and information that was indisputably transferred (or available) to New GM. Indeed, if zero information was inherited by New GM, it would not even be capable of manufacturing an automobile. Raising this issue as part of the prosecution of an Independent Claim for punitive damages is not barred by the Sale Order, Decision, or Judgment.

B. *New GM Can Be Held Liable for Punitive Damages Solely Based On Knowledge of the Ignition Switch Defect Accumulated By New GM Post-Sale*

Even if this Court were to attempt to distinguish the punitive damages issue from the above-quoted statements from the Decision and from *Bledsoe* and hold that the triers of fact for the Bellwether Cases must assume that New GM did not inherit any knowledge of the Ignition Switch Defect from Old GM, New GM could still be held liable for punitive damages. This is

true even if the jury is instructed to pretend that immediately prior to the Sale, all Old GM employees with knowledge of the Ignition Switch Defect (including the "at least 24 Old GM engineers, senior managers and attorneys" this Court referenced in its Decision) were brainwashed of any knowledge of the Ignition Switch Defect and all books and records reflecting the Ignition Switch Defect were destroyed. Because the complaints at issue have ample allegations that (i) after the Closing Date, New GM continuously acquired and developed knowledge of the deadly crashes involving the Subject Vehicles and the cause of those crashes and (ii) that New GM failed or refused for years to recall these vehicles, New GM can be held liable for compensatory and punitive damages as "Independent Claims," based solely upon its own post-closing conduct. *Cf. Holland v. FCA US LLC*, 2015 U.S. Dist. LEXIS 117643, *13-14 (N.D. Ohio Sept. 3, 2015) (denying purchaser of Chrysler's assets' request to transfer litigation to the bankruptcy court because the complaints at issue – even though they used the phrase "successor liability" – only alleged liability against the purchaser for knowledge acquired and acts taken post-sale). Simply put, the fact that New GM acquired its business through a 363 sale does not place it above the law or absolve it from liability (including punitive damages) for its own reprehensible conduct.

III. Imposition of a Shield Against Punitive Damages Would Violate the Post-Closing Ignition Switch Accident Plaintiffs' Due Process Rights

In addition to the foregoing, there are due process issues that drive whether punitive damages can be sought from New GM that are distinct from the question of whether punitive damages are an "Assumed Liability" or can be asserted against New GM as an Independent Claim. Although the result is the same for the assertion of punitive damages claims against New GM, the analysis is slightly different depending upon whether the subject vehicle was acquired by personal injury plaintiff before or after the date of the closing of the Sale.

For vehicles acquired before the closing of the Sale, each plaintiff in this category was a known creditor of Old GM because each of these plaintiffs (i) owned a vehicle that was known to Old GM to contain a safety defect, and (ii) was capable of being identified and notified by Old GM. As this Court has held, all of these vehicles should have been recalled by Old GM prior to the Sale, but were not. *See* Decision, 529 B.R. at 524-25. Plaintiffs in this category were denied the notice required by due process and were subsequently prejudiced when, unaware of the safety defect or their potential future claims, they (i) may have lost their full panoply of claims (*i.e.*, the right to recover punitive damages) if the Sale Order is now enforced against them, and (ii) unknowingly continued to operate their vehicles and such vehicles failed causing death, injury, and/or property damage. But for the failure to initiate a recall or otherwise alert these plaintiffs to the dangerous condition in their vehicles, the incidents that injured (or killed) these plaintiffs would not have occurred. Consistent with this Court's Decision, the successor liability shield in the Sale Order cannot be applied against these plaintiffs to impose any supposed limit on the assertion of claims for punitive damages against New GM.

For vehicles acquired after the closing of the Sale, each plaintiff in this category lacked any connection to Old GM at the time of the Sale.[11] Apart from Old GM's inability to predict who might acquire one of its defective vehicles after the closing of the Sale, and despite the fact that had the vehicle been recalled before the Sale, the harm caused by the defect in the vehicle would have been avoided, the publication notice given by Old GM was ineffective to bar punitive damages claims by future creditors such as these plaintiffs. It is indisputable that actual notice could not have been given to persons that did not yet own a Subject Vehicle. It is also indisputable that publication notice could never be sufficient notice to persons with no

[11] Of the six Bellwether Cases, four involve situations where the plaintiff acquired the subject vehicle after the Closing Date: the *Yingling*, *Norville*, *Reid*, and *Barthelemy* actions.

connection to Old GM and no reason to read the notice or ability to comprehend its import. This is especially true here because the generic form of notice given did not mention the Ignition Switch Defect. Under these circumstances, these plaintiffs are no different than the plaintiffs in *Grumman Olson*. *See* Decision, 529 B.R. at 572 n.203 (citing *Morgan Olson L.L.C. v. Frederico (In re Grumman Olson Indus., Inc.)*, 445 B.R. 243 (Bankr. S.D.N.Y. 2011), *aff'd* 467 B.R. 694, 706-07 (S.D.N.Y. 2012) (finding due process concerns made bar of successor liability unenforceable against claimants who were unknown, future, claimants at the time of the sale). These plaintiffs are true future creditors and cannot be bound by any limiting aspects of the Sale Order, which includes any supposed limit on the assertion of punitive damages.

Conclusion

For the foregoing reasons, the Post-Closing Ignition Switch Accident Plaintiffs respectfully request entry an order (i) deeming their requests for punitive damages against New GM permissible under this Court's Sale Order, Decision, and Judgment and (ii) permitting them to pursue such punitive damages against New GM in the MDL or other trial courts with jurisdiction over their respective lawsuits.

Dated: September 13, 2015

Respectfully submitted,

/s/ *William P. Weintraub*

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Counsel for Post-Closing Ignition Switch Accident Plaintiffs

Exhibit A

Bellwether Cases

1. *Cockram v. General Motors, LLC* (Case No. 14-cv-08176) (S.D.N.Y.)
2. *Scheuer v. General Motors, LLC* (Case No. 14-cv-08176) (S.D.N.Y.)
3. *Norville v. General Motors, LLC* (Case No. 14-cv-08176) (S.D.N.Y.)
4. *Barthelemy v. General Motors, LLC* (Case No. 14-cv-05810) (S.D.N.Y.)
5. *Reid v. General Motors, LLC* (Case No. 14-cv-05810) (S.D.N.Y.)
6. *Yingling v. General Motors, L.L.C.* (Case No. 14-cv-05336) (S.D.N.Y.)

Non-Bellwether Post-Sale Ignition Switch Accident Cases[12]

1. *Altebaumer v. General Motors, LLC* (Case No. 14-cv-04142) (S.D.N.Y.)
2. *Bendermon v. General Motors, LLC* (Case No. 15-cv-01354) (S.D.N.Y.)
3. *Fleck v. General Motors, LLC* (Case No. 14-cv-08176) (S.D.N.Y.)
4. *Hayes v. General Motors, LLC* (Case No. 14-cv-10023) (S.D.N.Y.)
5. *Stevens v. General Motors, LLC* (Case No. 2015-04442) (Dist. Ct. of Harris County, Tx.)

[12] The actions listed under the category of "Non-Bellwether Post-Sale Accident Cases" are personal injury and wrongful death actions against New GM arising from post-Sale incidents other than the Bellwether Cases in which the plaintiffs are represented by law firms Goodwin Procter, LLP represents in these chapter 11 cases and for which New GM has served demand letters referencing the punitive damages issue pursuant to the Judgment.

Exhibit C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	.	Case No. 09-50026-mg
	.	Chapter 11
	.	
MOTORS LIQUIDATION COMPANY, et al., f/k/a GENERAL MOTORS CORP., et al,	.	(Jointly administered)
	.	One Bowling Green
	.	New York, NY 10004
Debtors.	.	
	.	Thursday, June 29, 2017
. . . . .	.	3:10 p.m.

TRANSCRIPT OF HEARING RE: ORDER TO SHOW CAUSE
BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor:	King & Spalding LLP By: ARTHUR STEINBERG, ESQ. 1185 Avenue of the Americas New York, New York 10036-4003 (212) 556-2158

TELEPHONIC APPEARANCES:

For Bernard Pitterman:	Adelman Hirsch & Connors LLP By: JORAM HIRSCH, ESQ. 1000 Lafayette Boulevard Bridgeport, CT 06604 (203) 331-8888
Audio Operator:	Jonathan, ECRO
Transcription Company:	Access Transcripts, LLC 10110 Youngwood Lane Fishers, IN 46038 (855) 873-2223 www.accesstranscripts.com

Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

(Proceedings commence at 3:10 p.m.)

THE COURT: Motors Liquidation Company, 09-50026. I'm sorry, Mr. Steinberg.

Is anybody on the phone for this?

MR. HIRSCH: Yes, Your Honor. It's Attorney Joram Hirsch.

THE COURT: Okay, Mr. Hirsch. Hang on. I apologize about the time. Let me just write myself a note here.

Let me ask first, Mr. Steinberg, was there a hearing before Judge Hall today?

MR. STEINBERG: Yes.

THE COURT: And when --

MR. STEINBERG: We went yesterday.

THE COURT: Was it yesterday?

MR. STEINBERG: Yes, sir.

THE COURT: Okay. I wasn't in the country. What did she do?

MR. STEINBERG: Your Honor, we filed a reply this morning. I'm not sure if you've had a chance to read it or not. Attached to that reply was the transcript of yesterday's hearing as it relates to this issue. Judge Hall determined that the plaintiffs can assert a direct post-sale duty to warn and duty to recall claim against New GM, but Judge Hall said that she was only ruling on that matter as a matter of Connecticut state law --

THE COURT: Right.

MR. STEINBERG: -- which she deemed as something of first impression and she recognized that somewhere along the line it may get very well certified to the Connecticut Supreme Court, all of which is contained in the transcript. But she expressly acknowledged that Your Honor would have a hearing today and would be exercising your gatekeeping function with regard to whether the amended complaint that was filed is in compliance with bankruptcy court rulings.

THE COURT: All right. And let me -- Mr. Hirsch, let me tell you what my problem with your amended complaint is. It's -- I agree with you that it's Judge Hall, and only Judge Hall, who is going to determine whether your amended complaint states a cause of action under Connecticut law. The once piece of your amended complaint that gives me pause is Paragraph 25, which refers to the technical bulletin that Old GM issued when -- I think it was in 2006 -- I don't have it in front of me -- in 2006.

I can't tell from reading the amended complaint whether you're seeking to rely on Paragraph 25 for purposes of your claim against New GM. That would seem to completely run afoul of my prior ruling. I think you can properly rely on -- and here's what gave me the confusion. I think because the duty to warn is an assumed liability, I think you can rely on Paragraph 25 for purposes of the assumed liability claim,

failure to warn, because that focuses on conduct of Old GM.

What I couldn't tell, and I don't know what you -- what, if anything, you told Judge Hall, I don't think I should permit you to rely on Paragraph 25 in support of an independent claim against New GM. Whether your complaint states a claim without it, that's for Judge Hall to determine.

So what's your position, Mr. Hirsch?

MR. HIRSCH: My position is, Your Honor, that New -- that that paragraph and that piece of evidence is clearly relevant to the duty to warn as against Old GM. My --

THE COURT: We agree. I agree with you.

MR. HIRSCH: Of course. And my second position is that New GM, after 2009, was aware of its existence.

THE COURT: Okay. I'm -- Mr. Steinberg, let me hear you.

MR. STEINBERG: Your Honor, in connection with your June 7th ruling, you had said that the plaintiffs had actually not properly pled an independent claim, and therefore those claims did not get through the gate, and they moved to amend their complaint. Vis-à-vis the New GM allegations, they were originally contained in one paragraph, and all that happened is that they broke out that one paragraph and put it into two paragraphs, essentially saying the same words, but saying that Old GM had knowledge available to it or was aware of a defect creating a duty to warn, and then saying the same thing for New

GM separately. We believe just doing that doesn't set forth an independent claim.

THE COURT: Well, let me cut through this because I know you're getting ready for trial.

Mr. Hirsch, I am precluding you from relying on the allegation in Paragraph 25 in support of a failure to warn independent claim against New GM. You can call New GM witnesses and show that they had knowledge of this alleged defect. That's going to be up to Judge Hall. Okay?

But what I'm not going to do is -- this is exactly what I wrote the opinion to prevent you from doing, to bootstrap your independent -- your purported independent claim by relying on conduct of Old GM. If you have witnesses from New GM who are going to testify at your trial that they had knowledge of this alleged defect, you know, Judge Hall will decide whether that testimony is admissible or not, but you're not -- I'm not permitting you -- you're attempting to do exactly what I precluded you from doing. Okay?

MR. HIRSCH: Your Honor, if I --

THE COURT: No, stop. Don't. Stop.

MR. HIRSCH: Okay.

THE COURT: Okay. Just so the rule --

Mr. Steinberg, you can prepare an order that, having read the briefs and heard argument, the Court determines that the allegation contained in Paragraph 25 of the amended

complaint may not be used to support an independent claim against New GM for duty to warn. Whether Mr. Hirsch can offer testimony about New GM's knowledge, that's not before me. Okay? But it's not going to be that 2006 technical bulletin.

MR. STEINBERG: Your Honor, I appreciate that ruling, but we do have other arguments as to why we think Paragraphs 27 and 28 should be stricken.

THE COURT: The objection is overruled. Okay? It seemed to me that Judge Hall will have to determine whether those additional paragraphs are sufficient to state a claim under Connecticut law. What I am precluding is the plaintiff from relying on conduct of Old GM in support of its alleged independent claim against New GM. So the motion is granted in part and denied in part.

MR. STEINBERG: Your Honor, there is something about how Judge Hall ruled on this matter which we think is important and important for the gatekeeping function that we'll be asking Your Honor to exercise. Judge Hall determined that New GM was a product seller under the Connecticut Product Liability Act because of three facts. All of those facts have nothing to do with establishing an independent claim. Those facts are intended to establish a successor liability.

THE COURT: Mr. Steinberg, your objection is sustained in part and overruled in part. You've heard my ruling.

Judge Hall is the trial judge. She will determine -- I understand the importance under Connecticut law of is New GM a product seller with respect -- this is an old vehicle. I've read some of those cases. Judge Hall is presiding. She's going to determine, and maybe she already has, and we'll see what -- you'll see what the outcome of the trial is. I may be right; I may be wrong.

I've read the three paragraphs at issue. The only one that runs afoul of my earlier ruling is Paragraph 25. If Judge Hall thinks that the additional paragraphs are sufficient to state a claim, you know, she'll hear the evidence. What I'm saying is that Paragraph 25, it can be used -- and the evidence in support of it can be used in support of the assumed duty to warn claim. It can't be used in connection with the independent claim.

That's my ruling. Prepare an order accordingly. We're adjourned.

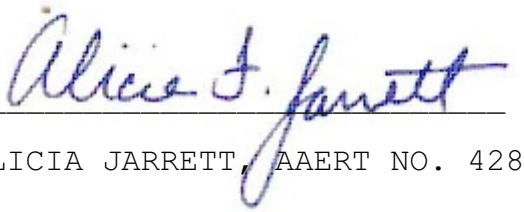
MR. STEINBERG: Thank you.

(Proceedings concluded at 3:19 p.m.)

* * * * *

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

I, Alicia Jarrett, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



ALICIA JARRETT, AAERT NO. 428 DATE: June 30, 2017

ACCESS TRANSCRIPTS, LLC

Exhibit D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KAITLYN REICHWALDT,

Plaintiff,

Civil Action
File No.: 1:16-cv-02171-TWT

v

GENERAL MOTORS LLC,

Defendant.

[ON REMOVAL FROM STATE COURT OF COBB COUNTY CIVIL ACTION FILE NO. 16A 1405-2]

DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT

Defendant General Motors LLC ("GM LLC," also sometimes referred to as "New GM"), by its attorneys, hereby answers Plaintiff's Complaint as follows:

I. INTRODUCTION

1. GM LLC denies the allegations in paragraph 1 of the Complaint as untrue. GM LLC denies, in particular, that Edward Ivey, who never participated in any aspect of the design or production of the 1973-1987 C/K pickups, testified that the fuel storage systems of those vehicles were defective or "indefensible." In response to footnote 1, GM LLC did not design, manufacture, or sell the 1984 pickup truck ("subject vehicle") described in the Complaint; GM LLC did not exist when the subject vehicle was designed, manufactured, and sold. GM LLC admits that, before July 10, 2009, General Motors Corporation ("GMC") designed in part,

manufactured in part, marketed and distributed motor vehicles, including the subject vehicle, to independent authorized dealers. GM LLC admits that GMC filed for bankruptcy protection on June 1, 2009 in the United States Bankruptcy Court for the Southern District of New York ("New York Bankruptcy Court.") GM LLC admits that the New York Bankruptcy Court issued the Sale Order and Injunction approving the sale of substantially all of Motors Liquidation Company f/k/a GMC's assets to NGMCO, Inc., as successor in interest to Vehicle Acquisition Holdings LLC (defined in the Sale Order as the "Purchaser"). The sale was consummated on July 10, 2009. GM LLC admits it ultimately did acquire substantially all of Motors Liquidation Company f/k/a GMC's assets, free and clear of all liens, claims, and encumbrances, except for certain limited exceptions. GM LLC otherwise denies the allegations of footnote 1 and denies Plaintiff's attempt to collectively refer to General Motors LLC and General Motors Corporation as "GM."

2. GM LLC denies the allegations in paragraph 2 of the Complaint, including the allegations of defect, danger, and concealment related to C/K pickup trucks, as untrue. GM LLC further denies that the settlement of lawsuits proves defect.

3. GM LLC denies the allegations in paragraph 3 of the Complaint, including the mischaracterization of Kashmerick's deposition testimony in footnote 3, as untrue.

4. GM LLC lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 4 of the Complaint regarding the underlying collision or Plaintiff's alleged injuries. GM LLC denies the remaining allegations in paragraph 4, including that the subject vehicle's fuel storage system was "unprotected" when the vehicle left GMC's control.

5. GM LLC lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 5 of the Complaint.

6. GM LLC admits that GMC sold newly designed C/K model full-size pickup trucks in the 1973 model year. GM LLC denies the remaining allegations in paragraph 6 of the Complaint as untrue.

7. GM LLC denies the allegations in paragraph 7 as untrue.

8. GM LLC admits that it has not recalled the 1973-9187 C/K pickups for fuel storage system defects and that any cited NHTSA letter to Chrysler speaks for itself. GM LLC denies the remaining allegations in paragraph 8 of the Complaint, including the allegations of footnote 4, as untrue.

9. GM LLC denies that the fuel storage systems in the 1973-1987 C/K pickups, as produced by GMC, were unprotected from impact and should not have been located outside the frame rail. GM LLC admits only that documents referenced in subparts (a) through (k) of paragraph 9 of the Complaint speak for themselves. GM LLC denies the allegations in subparts (a) through (k) of paragraph 9 to the extent they are incomplete, out of context, and/or misleading references to the cited documents, and GM LLC denies the remaining allegations of paragraph 9 of the Complaint as untrue.

10. GM LLC objects to the allegations in paragraph 10 of the Complaint to the extent that they contain protected attorney work product and/or attorney-client communications. Without waiving its objections, GM LLC admits that the quoted language is contained in a document dated in May 1972 that Mr. Elwell claims to have contributed to in part. GM LLC denies the remaining allegations of paragraph 10 of the Complaint as untrue.

11. GM LLC denies the allegations in paragraph 11 of the Complaint as untrue.

12. GM LLC admits that it may have been feasible for GMC to locate a fuel tank in various positions on a full-size pickup truck. GM LLC denies that a fuel tank located inside the frame rails was practical for the 1973 C/K design and

denies that such a location would improve the overall safety of the vehicle. GM LLC denies the remaining allegations in paragraph 12 of the Complaint as untrue.

13. GM LLC admits that Edward Ivey authored a 1973 memorandum and that the document speaks for itself. GM LLC denies that the memorandum related to the 1973-1987 C/K pickups and denies the remaining allegations of paragraph 13 of the Complaint as untrue.

14. GM LLC objects to the allegations in paragraph 14 of the Complaint to the extent that they purport to be based on information contained in protected attorney work product and/or attorney-client communications. GM LLC admits only that, to the extent the allegations purport to quote from a document, the document speaks for itself. GM LLC otherwise denies the allegations of paragraph 14 as untrue.

15. GM LLC denies the allegations in paragraph 15 of the Complaint as untrue.

16. GM LLC admits the trial and verdict in *Moseley v. GM*, and that GMC and/or GM LLC have tried and settled lawsuits involving 1973-1987 C/K pickups. GM LLC denies the remaining allegations in paragraph 16 as untrue.

17. GM LLC objects to the allegations in paragraph 17 of the Complaint to the extent that they purport to reference protected attorney work product and/or

attorney-client communications. Without waiving its objections, GM LLC admits only that Mr. Elwell's testimony speaks for itself. GM LLC denies the remaining allegations in paragraph 17 as untrue.

18. GM LLC admits only that Mr. Elwell's testimony speaks for itself. GM LLC denies the remaining allegations in paragraph 18 as untrue.

19. GM LLC objects to the allegations in paragraph 19 of the Complaint to the extent that they purport to be based on information contained in protected attorney work product and/or attorney-client communications. Without waiving its objections, GM LLC admits that GMC, with the assistance of counsel, collected and reviewed certain documents in the early 1980s related to passenger car fuel systems, to assist GMC in responding to litigation regarding passenger car fuel systems. GM LLC admits those documents were collected from various persons and groups within GMC. GM LLC otherwise denies the allegations of paragraph 19 of the Complaint as pled.

20. GM LLC admits only that GMC and GM LLC have been sued by Plaintiffs alleging that persons were burned in post-collision fires in 1973-1987 C/K pickups. GM LLC denies the remaining allegations in paragraph 20 as untrue.

21. GM LLC admits only that its discovery responses in *Williams v GM* speak for themselves. GM LLC lacks knowledge or information sufficient to form

a belief about the truth of the allegations in paragraph 21 of the Complaint regarding what Plaintiff's counsel claims to be "aware of." GM LLC denies the remaining allegations of paragraph 21 as untrue.

22. GM LLC denies the allegations in paragraph 22 of the Complaint as untrue.

23. GM LLC admits only that the circumstances of the cited motor vehicle crashes speak for themselves and denies the allegations in paragraph 23 of the Complaint that are contrary to those circumstances. GM LLC denies that persons sustained injury as the result of a design defect in the fuel storage systems of 1973-87 C/K pickups and denies the remaining allegations of paragraph 23 of the Complaint as untrue.

24. GM LLC admits only that the circumstances of the cited motor vehicle crashes speak for themselves and denies the allegations in paragraph 24 of the Complaint that are contrary to those circumstances. GM LLC denies that persons sustained injury as the result of a design defect in the fuel storage systems of 1973-87 C/K pickups and denies the remaining allegations of paragraph 24 of the Complaint as untrue.

25. GM LLC admits only that witness testimony in *Moseley v GM* speaks for itself and denies the allegations in paragraph 25 of the Complaint that are

incomplete, out of context, or erroneous citations to that testimony. GM LLC denies the remaining allegations in paragraph 25 as untrue.

26. GM LLC denies the allegations in paragraph 26 of the Complaint as untrue.

27. GM LLC denies the allegations in paragraph 27 of the Complaint as untrue.

28. GM LLC incorporates by reference its averments and admissions provided in Paragraph 1 above. GM LLC denies the allegations in paragraph 28 of the Complaint as untrue.

29. GM LLC admits that its CEO Mary Barra appeared before the House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, and the Senate Committee on Commerce, Science, and Transportation, Subcommittee on Consumer Protection, Product Safety and Insurance related to GM Recall Nos. 13454 and 14063. GM LLC denies the remaining allegations of paragraph 29 as pled.

30. GM LLC denies that CEO Mary Barra testified before Congress on June 5, 2014. GM LLC admits that on June 5, 2014, Ms. Barra addressed GM LLC employees in connection with GM Recall Nos. 13454 and 14063 and that Ms. Barra's statements speak for themselves.

31. GM LLC admits that paragraph 31 accurately quotes a portion of Ms. Barra's statement made to Congress related to GM Recall Nos. 13454 and 14063 on June 18, 2014, the contents of which speak for themselves.

32. GM LLC admits that Paragraph 32 accurately quotes a portion of its CEO Mary Barra's April 1, 2014 Congressional testimony related to GM Recall Nos. 13454 and 14063.

33. GM LLC denies the allegations in paragraph 33 as untrue.

34. GM LLC admits only that its discovery responses in *Williams v GM* and *Synovus v. GM* speak for themselves. GM LLC denies the incomplete, out of context, and mischaracterized citations to those responses and denies the remaining allegations of paragraph 34 of the Complaint as pled.

II. PARTIES, JURISDICTION, VENUE, AND SERVICE OF PROCESS

35. GM LLC lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 35 of the Complaint and, therefore, denies the same.

36. GM LLC admits that it is a Delaware limited liability company with its principal place of business in Michigan, and that it does business in Georgia. GM LLC admits that since July 10, 2009, it designs in part, assembles in part, and

sells motor vehicles to authorized dealers throughout the United States. The remainder of the allegations in Paragraph 36 are denied.

37. GM LLC admits that its registered agent in Georgia is set forth in paragraph 37 of the Complaint. GM LLC denies the remaining allegations and legal conclusions in paragraph 37 of the Complaint to the extent that they are inconsistent with the applicable law.

38. GM LLC admits it operates an Information Technology Center in Roswell, Georgia. GM LLC denies that it is subject to general personal jurisdiction in Georgia or that it is "at home" in Georgia. GM LLC denies the legal conclusions of paragraph 38 of the Complaint to the extent that they are inconsistent with the applicable law.

39. GM LLC admits that venue is proper in this Court. GM LLC denies that venue is convenient and appropriate in this Court.

III. OPERATIVE FACTS

40. GM LLC lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 40 of the Complaint and, therefore, denies the same.

41. GM LLC lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 41 of the Complaint and, therefore, denies the same.

42. GM LLC denies the allegations in paragraph 42 of the Complaint as untrue.

43. GM LLC incorporates by reference its averments and admissions as provided in paragraph 1 above. GM LLC admits many individuals who had been employed by GMC became employees of GM LLC following GMC's bankruptcy. GM LLC denies the remaining allegations in paragraph 43 of the Complaint as untrue.

44. GM LLC incorporates by reference its averments and admissions as provided in paragraph 1 above. GM LLC admits many individuals who had been employed by GMC became employees of GM LLC following GMC's bankruptcy. GM LLC denies the remaining allegations in paragraph 44 of the Complaint as untrue.

45. GM LLC incorporates by reference its averments and admissions as provided in paragraph 1 above. GM LLC admits many individuals who had been employed by GMC became employees of GM LLC following GMC's bankruptcy.

GM LLC denies the remaining allegations in paragraph 45 of the Complaint as untrue.

46. GM LLC incorporates by reference its averments and admissions as provided in paragraph 1 above. GM LLC admits many individuals who had been employed by GMC became employees of GM LLC following GMC's bankruptcy. GM LLC denies the remaining allegations in paragraph 46 of the Complaint as untrue.

47. GM LLC denies the allegations in paragraph 47 of the Complaint as untrue.

48. GM LLC denies the allegations in paragraph 48 of the Complaint as untrue.

49. GM LLC incorporates by reference its averments and admissions as provided in paragraph 1 above. GM LLC denies the remaining allegations of paragraph 49 of the Complaint as untrue.

50. GM LLC admits that its assumed the liability as provided in Section 2.3(a)(ix) of the First Amendment to the Sale Agreement. Imposition of liability upon GM LLC, if any, is limited by the terms of this Agreement and the orders and judgments of the New York Bankruptcy Court. To the extent the allegations of

paragraph 50 of the Complaint are contrary to the Agreement, GM LLC denies the allegations as untrue.

51. GM LLC admits that it employed certain GMC employees and that GM LLC and its employees have knowledge regarding the fuel storage systems of the 1973-1987 C/K pickups.

52. GM LLC denies the allegations in paragraph 52 of the Complaint as untrue.

53. GM LLC denies the allegations in paragraph 53 of the Complaint as untrue.

54. GM LLC denies the allegations in paragraph 54 of the Complaint as untrue.

55. GM LLC denies the allegations in paragraph 55 of the Complaint as untrue.

III. LIABILITY OF GM LLC [SIC]

COUNT ONE— NEGLIGENCE & STRICT LIABILITY

56. GM LLC incorporates by reference its answers to paragraphs 1 through 55 of the Complaint.

57. GM LLC admits that GMC designed in part, assembled in part, and originally sold 1984 C/K pickups. GM LLC denies the allegations of paragraph 57 of the Complaint to the extent that they are directed to GM LLC.

58. GM LLC denies the legal conclusions in paragraph 58 of the Complaint to the extent they are contrary to the applicable law. GM LLC denies the remaining allegations in paragraph 58 of the Complaint as untrue.

59. GM LLC denies the allegations in paragraph 59 of the Complaint as untrue.

60. GM LLC denies the allegations in paragraph 60 of the Complaint as untrue.

61. GM LLC denies the allegations in paragraph 61 of the Complaint as untrue.

62. GM LLC denies the allegations in paragraph 62 of the Complaint as untrue.

63. GM LLC denies the allegations in paragraph 63 of the Complaint as untrue.

64. GM LLC denies the allegations in paragraph 64 of the Complaint as untrue.

65. GM LLC denies the allegations in paragraph 65 of the Complaint as untrue.

66. GM LLC denies the allegations in paragraph 66 of the Complaint as untrue.

67. GM LLC denies the allegations and legal conclusions in paragraph 67 of the Complaint as untrue.

68. GM LLC incorporates by reference its averments and admissions as provided in paragraphs 1 and 50 above. Imposition of liability upon GM LLC, if any, is limited by the terms of this Agreement and the orders and judgments of the New York Bankruptcy Court. To the extent the allegations of paragraph 68 of the Complaint are contrary to the Agreement, GM LLC denies the allegations as untrue.

COUNT TWO — RECKLESS & WANTON MISCONDUCT

69. GM LLC incorporates by reference its answers to paragraphs 1 through 68 of the Complaint.

70. GM LLC denies the allegations in paragraph 70 of the Complaint as untrue.

71. GM LLC denies the allegations in paragraph 71 of the Complaint as untrue.

72. GM LLC denies the allegations in paragraph 72 of the Complaint as untrue.

COUNT THREE — FAILURE TO WARN

73. GM LLC incorporates by reference its answers to paragraphs 1 through 72 of the Complaint.

74. GM LLC denies the legal conclusions in paragraph 74 of the Complaint to the extent they are contrary to the applicable law.

75. GM LLC denies the allegations in paragraph 75 of the Complaint as untrue.

76. GM LLC denies the allegations in paragraph 76 of the Complaint as untrue.

77. GM LLC denies the allegations in paragraph 77 of the Complaint as untrue.

78. GM LLC denies the allegations in paragraph 78 of the Complaint as untrue.

79. GM LLC incorporates by reference its averments and admissions as provided in paragraphs 1 and 50 above. . Imposition of liability upon GM LLC, if any, is limited by the terms of this Agreement and the orders and judgments of the New York Bankruptcy Court. To the extent the allegations of paragraph 79 of the

Complaint are contrary to the Agreement, GM LLC denies the allegations as untrue.

80. GM LLC denies the allegations in paragraph 80 of the Complaint as untrue.

COUNT FOUR — PUNITIVE DAMAGES

81. GM LLC incorporates by reference its answers to paragraphs 1 through 80 of the Complaint.

82. GM LLC denies the allegations in paragraph 82 of the Complaint as untrue.

83. GM LLC denies the allegations in paragraph 83 of the Complaint as untrue.

COUNT FIVE — EXPENSES OF LITIGATION

84. GM LLC incorporates by reference its answers to paragraphs 1 through 83 of the Complaint.

85. GM LLC denies the allegations in paragraph 85 of the Complaint as untrue and contrary to applicable law.

IV. DAMAGES SOUGHT

86. GM LLC incorporates by reference its answers to paragraphs 1 through 85 of the Complaint.

87. GM LLC denies the allegations in paragraph 87 of the Complaint as untrue.

88. GM LLC denies that Plaintiff is entitled to an award of damages from GM LLC as alleged in paragraph 88 of the Complaint, including subparts (a) through (e).

V. PRAYER FOR RELIEF

WHEREFORE, GM LLC requests that Plaintiff's Complaint be dismissed in its entirety with prejudice and requests entry of a judgment with no cause of action together with its costs and attorneys' fees incurred in the defense of this matter, and for such other and further relief at law or in equity to which GM LLC may show itself justly entitled.

RELIANCE ON JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38, GM LLC demands a jury trial on all issues triable of right of jury.

AFFIRMATIVE DEFENSES

GM LLC has not yet had the opportunity to complete discovery or its investigation of this matter; therefore, GM LLC relies upon such of the following defenses as may prove applicable after discovery or at trial.

1. Plaintiff's Complaint, in whole or part, fails to state a claim on which relief can be granted and GM LLC is entitled to a judgment of no cause of action as a matter of law.

2. Plaintiff's Complaint is barred, in whole or in part, by the applicable statutes of repose or other law.

3. Plaintiff's Complaint is barred, in whole or in part, by the applicable statutes of limitations or other law.

4. Plaintiff's allegations of injuries or expenses relating to the alleged injuries were caused, in whole or in part, by Plaintiff's own acts or omissions.

5. Plaintiff's allegations of injuries or expenses relating to the alleged injuries were caused, in whole or in part, by the acts or omissions of another or others for whose conduct GM LLC is not responsible and over whose conduct GM LLC has no control.

6. Plaintiff's allegations of injuries or expenses relating to the alleged injuries were caused, in whole or in part, by Plaintiff's assumption of the risk and/or contributory negligence.

7. The subject vehicle, when produced, complied with all applicable federal, state and local laws and regulations.

8. Plaintiff's injury claims may have resulted from the abuse/misuse of the subject vehicle.

9. Plaintiff's injury claims may have resulted from a substantial modification of the subject vehicle.

10. Plaintiff's injury claims may have been due to failure to use the vehicle occupant restraint system.

11. GM LLC asserts all defenses available to it under Federal Rules of Civil Procedure 8(c).

12. Plaintiff's claims are or may be barred, in whole or in part, by the doctrines of contributory and/or comparative negligence.

13. GM LLC did not design, manufacture, or sell the subject vehicle.

14. GM LLC's assumption of liability for General Motors Corporation, now known as Motors Liquidation Company, is governed by the Amended and Restated Master Sale and Purchase Agreement entered in *In re Motors Liquidation*

Co.. Chapter 11 Case No. 09-50026 (Bankr. S.D.N.Y. 2009). Imposition of liability on GM LLC, if any, is limited by the terms of this Agreement. Some of Plaintiffs' claims and requests for damages may be barred, preempted and/or precluded by applicable federal law and/or Orders, Judgments and/or Decisions of the United States Bankruptcy Court for the Southern District of New York ("New York Bankruptcy Court") entered in the bankruptcy case captioned *In re Motors Liquidation Co.*, Case No. 09-50026, which is pending before the New York Bankruptcy Court.

15. An award of punitive or exemplary damages in this action would violate GM LLC's rights to protection from "excessive fines" as provided in the VIII Amendment of the United States Constitution and Paragraph 17 of Section I of the Constitution of the State of Georgia.

16. Plaintiff fails to plead with particularity any alleged fraud or the circumstances constituting recovery of punitive damages as related to this Plaintiff.

17. Plaintiff's claims for punitive damages cannot be sustained because the standard for determining liability for punitive damages under Georgia law is vague and arbitrary and does not define with sufficient clarity the conduct or mental state which gives rise to such a claim. Therefore, any award of punitive

damages would violate GM's due process rights under the United States and Georgia Constitutions.

18. An award of punitive or exemplary damages in this case would constitute a violation of GM's right to due process of law under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, equal protection under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, and due process and equal protection under the Equal Protection Clause of the Fourteenth Amendment and to protection under Paragraphs 1 and 2 of Article I of the Constitution of the State of Georgia.

19. Plaintiff's claim for punitive damages cannot be sustained because there are no meaningful standards for determining the amount of any punitive award under Georgia law, and because Georgia law does not state with sufficient clarity the consequences of conduct giving rise to a claim for punitive damages. Therefore, any award of punitive damages would violate GM's due process rights under the United States and Georgia Constitutions.

20. Plaintiff's claim for punitive damages cannot be sustained because an award of punitive damages under Georgia law without proof of every element beyond a reasonable doubt would violate GM's rights under Amendments IV, V, VI, and XIV to the United States Constitution.

21. Plaintiff's claim for punitive damages cannot be sustained because an award of punitive damages under Georgia law without proof of every element by clear and convincing evidence would violate GM's rights under the due process clause of the United States and Georgia Constitutions and would be improper under the common law and public policies of the State of Georgia.

22. Plaintiff's claim for punitive damages cannot be sustained because the substantive, procedural and evidentiary prerequisites to recovery of such damages do not afford GM the protections outlined in *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996) and *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003).

23. For the convenience of the parties and witnesses, in the interests of justice, venue of this matter should be transferred to another district, including the District of Nebraska or the Eastern District of Michigan.

RESERVATION OF RIGHT

Defendant GM LLC hereby reserves its right to file such amended answers and such additional defenses as may be appropriate upon completion of their investigation and discovery.

This 29th day of June, 2016.

Respectfully submitted,

GENERAL MOTORS LLC

/s/ Ashley Webber Broach
By: _____
C. Bradford Marsh
Georgia Bar No. 471280
Ashley Webber Broach
Georgia Bar No. 083593
Attorneys for General Motors LLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY the foregoing document was prepared in Times New Roman 14-point font in conformance with Local Rule 5.1(C), and that I have this day served a true and correct copy of the within and foregoing **DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT** upon all parties to this matter via electronic service through ECF filing system as follows:

James E. Butler, Jr.
Robert H. Snyder
David T. Rohwedder
105 13th Street
Post Office Box 2766
Columbus, Georgia 31902

Respectfully submitted this 29th day of June, 2016.

SWIFT, CURRIE, MCGHEE & HIERS, LLP

/s/ Ashley Webber Broach
By: _____

C. Bradford Marsh
Georgia Bar No. 471280
Ashley Webber Broach
Georgia Bar No. 083593
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Exhibit E

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11**
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*	:	**Case No.: 09-50026 (MG)**
Debtors.	:	**(Jointly Administered)**

ORDER GRANTING MOTION BY GENERAL MOTORS LLC TO ENFORCE THE BANKRUPTCY COURT'S JULY 5, 2009 SALE ORDER AND INJUNCTION AND THE RULINGS IN CONNECTION THEREWITH, WITH RESPECT TO THE REICHWALDT PLAINTIFF

Upon the Motion, dated July 28, 2017 ("**Motion**"), of General Motors LLC ("**New GM**"),[1] seeking the entry of an order enforcing the Sale Order and Injunction and the Bankruptcy Court's related rulings by enjoining Reichwaldt from asserting (a) claims that New GM assumed punitive damages when it assumed Product Liabilities (as defined in the Sale Agreement); (b) independent claims or punitive damages relating thereto that are based on Old GM conduct, , and (c) allegations that improperly treat Old GM and New GM interchangeably, all as set forth in the Motion; and due and proper notice of the Motion having been provided to counsel for Reichwaldt and the other parties set forth in the Motion and it appearing that no other or further notice need be given; and Reichwaldt having filed an objection to the Motion on August 18, 2017, and New GM having filed its Reply on August 25, 2017; and a hearing ("**Hearing**") having been held with respect to the Motion, on August 29, 2017; and upon the record of the Hearing, the Court having found and determined that the legal and factual bases set

[1] Capitalized terms used and not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

forth in the Motion establish just cause for the relief requested; and after due deliberation and sufficient cause appearing therefore; it is therefore:

ORDERED that the Motion is GRANTED as set forth herein; and it is further

ORDERED that Reichwaldt and her counsel are enjoined and restrained from seeking punitive damages against New GM in the Reichwaldt Lawsuit that are based on New GM's assumption of Product Liabilities (as defined in the Sale Agreement); and it is further

ORDERED that Reichwaldt and her counsel are enjoined and restrained from asserting an Independent Claim (failure to warn) alleged against New GM in the Reichwaldt Lawsuit, or any other Independent Claim based on Old GM conduct, and punitive damages relating to any of the foregoing; and it is further

ORDERED that Reichwaldt shall amend the complaint filed in the Georgia Court to remove all punitive damages requests, independent claim allegations based on Old GM conduct and New GM as successor to Old GM allegations, all as more particularly described in the Motion and the Reply filed by New GM; and it is further

ORDERED, that Reichwaldt shall, within three (3) business days of the entry of this Order, file with the Georgia Court an amended pleading so that it fully complies with this Order; and it is further

ORDERED that within ten (10) business days after the entry of this Order, Reichwaldt shall file with the Clerk of this Court evidence of the filing of her amended pleading with the Georgia Court; and it is further

ORDERED that this Court shall retain exclusive jurisdiction to hear and determine all matters arising from or related to this Order.

Dated: August __, 2017
New York, New York

UNITED STATES BANKRUPTCY JUDGE