HEARING DATE AND TIME: JUNE 29, 2017 AT 3:00 P.M.

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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)**

REPLY BY GENERAL MOTORS LLC TO OPPOSITION BY THE PITTERMAN PLAINTIFFS TO MOTION TO ENFORCE THE PITTERMAN OPINION

General Motors LLC (**"New GM"**), by its undersigned counsel, submits this Reply to the opposition by the Pitterman Plaintiffs ("**Opposition**") to New GM's motion to enforce ("**Pitterman Motion to Enforce**") the Pitterman Opinion.[1]

1. On June 28, 2017, the Connecticut District Court (Judge Hall) ruled, as a matter of Connecticut state law, that the Pitterman Plaintiffs could amend their complaint to allege

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

post-Sale failure to warn or recall claims against New GM under the Connecticut Product Liabilities Act.[2] Significantly, Judge Hall recognized that she was not addressing whether those claims contravened the Sale Order and other relevant bankruptcy rulings concluding that she would leave "for the bankruptcy court, any decision as to whether these claims may be pursued against New GM as a matter of bankruptcy law and [as] a matter of the sale order." June 28, 2017 Connecticut District Court Hr'g Tr., at 6.[3]

2. Plaintiffs' pursuit of Independent Claims and certain conclusions in Judge Hall's ruling violate the governing Sale Order. The June 28, 2017 hearing reveals that plaintiffs' so-called Independent Claims are nothing more than "dressed up" successor liability claims, *In re Old Carco LLC*, 492 B.R. 392, 405 (Bankr. S.D.N.Y. 2013), and are prohibited under the Sale Order for three reasons.

3. *First*, at the June 28 hearing, Judge Hall held that New GM is a product seller or product manufacturer under the Connecticut Product Liabilities Act because: (i) New GM "*bought the assets* of Old GM"; (ii) New GM "manufactures cars . . . *using the GM Chevrolet name*"; and (iii) New GM "*assume[d] certain . . . obligations*" as part of the Sale Agreement.[4] (June 28, 2017 Hrg. Tr. at 22) (emphasis added). Based on this ruling, New GM's liability is thus dependent on the Sale transaction itself – and would not solely be predicated on post-closing wrongful conduct by New GM. In essence, Judge Hall created a form of successor liability that is inconsistent with the Sale Order. *See Call Ctr. Techs., Inc. v. Grand Adventures Tour & Travel Pub. Corp.*, 2 F. Supp. 3d 192, 217 (D. Conn. 2014) (discussing hallmarks of successor liability

[2] Judge Hall noted that the issue concerning whether New GM would be a product seller within the meaning of the Connecticut Product Liability Act was one of first impression and would probably be certified at some point to the Connecticut Supreme Court. *See* June 28, 2017 Connecticut District Court Hr'g Tr., at 12.

[3] A copy of the June 28, 2017 Connecticut District Court Hearing Transcript is annexed hereto as **Exhibit "A."**

[4] The obligations referred to were the so called "glove box warranty" which Judge Hall acknowledged had expired by the time of the Sale as it related to plaintiffs' vehicle. (June 28, 2017 Hrg. Tr. at 22)

claims under Connecticut law). Plaintiffs' cannot properly pursue as Independent Claims successor liability claims or claims not solely based on New GM conduct.

4. *Second*, plaintiffs' Amended Complaint does not state Independent Claims as defined by the Second Circuit Opinion or the Pitterman Opinion. This Court held that "[t]o 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*." Pitterman Opinion at 23; *see also In Matter of Motors Liquidation Co.*, 829 F.3d 135, 157 (2d Cir. 2016). The Amended Complaint does not state claims "based solely on New GM's post-closing wrongful conduct." Instead, it continues to allege the same mix of Old GM conduct and knowledge that this Court found insufficient. (Amended Complaint ¶¶ 15-18, 25)

5. *Third*, in order to assert failure to warn or recall as an Independent Claim, a plaintiff must allege facts that would establish an independent duty based on a post-Sale relationship between New GM and the plaintiff. *See In re Old Carco LLC*, 492 B.R. 392, 405 (Bankr. S.D.N.Y. 2013) (Bernstein, J.) ("the law imposes a duty to warn because the successor has entered into a relationship with the customer and derives an actual or potential economic benefit.") Here, plaintiffs have not alleged a post-Sale relationship between New GM and the plaintiffs. Plaintiffs' claim is instead based on their relationship with Old GM, the entity that designed, manufactured, assembled, delivered, and sold the subject vehicle. (Amended Complaint ¶¶ 15-18) Plaintiffs' duty-to-warn claim is a classic Assumed Liability claim (based on Old GM conduct), not an Independent Claim (based solely on New GM conduct). And contrary to plaintiffs parade of horribles about "immunity" (Dkt. 227 at 7), the result urged by New GM does not foreclose New GM's liability for properly pled failure to warn claims. Plaintiffs' Assumed Product Liability failure-to-warn claims against New GM have passed

through the bankruptcy gate, but their concocted Independent Claim based on failure-to-warn do not.

A. Plaintiffs' Disguised Successor Liability Claims Are Barred By The Sale Order

6. Judge Hall held on June 28, 2017 that plaintiffs properly stated failure-to-warn or recall claims under the Connecticut Product Liabilities Act -- ostensibly as "Independent Claims" because she concluded that New GM was a "product seller" or "product manufacturer of a 2004 vehicle that only Old GM sold and manufactured. When New GM's counsel asked a series of questions "to make sure that I understand what the conduct is that the Court is finding this liability to flow from," the Court's responses vividly demonstrate that plaintiffs' Connecticut state-law claims are, in fact, proscribed dressed-up successor liability claims. (June 28, 2017 Hearing, at 22)

7. In determining that New GM was a product seller under the Connecticut Product Liabilities Act, Judge Hall relied upon the following facts:

- New GM "bought the assets of Old GM" (*Id.* at 22);
- New GM "manufactures cars . . . using the GM Chevrolet name" (*id.*); and
- New GM "assume[d] certain . . . obligations" as part of the Sale Agreement. (*id.*)

Judge Hall explained the basis for her ruling as follows:

> MR. HANSON: So I want to make sure that I understand what the conduct is that the Court is finding this liability to flow from. I heard the Court say that GM bought the assets of Old GM. It manufacturers cars now. Am I right on both of those points?
>
> THE COURT: Using the GM Chevrolet name.
>
> MR. HANSON: So using the GM name now subsequent to this product. And if I understand correctly what the Court just ruled in the latter part of your ruling --
>
> THE COURT: It also bought significant assets of Old GM.
>
> MR. HANSON: Right.

> THE COURT: Not all.
>
> MR. HANSON: To make it clear that these are -- that it's because of the purchase of assets that the Court is making that finding.
>
> THE COURT: And it also assumes certain, not these, but certain obligations, yes.

June 28, 2017 Connecticut District Court Hr'g Tr., at 22.

8. The factors upon which Judge Hall based her determination that plaintiff had stated so-called Independent Claims -- New GM's continued manufacturing of cars (albeit not plaintiff's model year vehicle), New GM's use of the GM Chevrolet name, New GM's purchase of "significant assets of Old GM," and New GM's assumption of certain obligations (albeit not obligations owed to plaintiffs) -- are factors routinely cited as *bases for successor liability under Connecticut law*. *See Call Ctr. Techs., Inc. v. Grand Adventures Tour & Travel Pub. Corp.*, 2 F. Supp. 3d 192, 217 (D. Conn. 2014), *aff'd sub nom. Call Ctr. Techs., Inc. v. Interline Travel & Tour, Inc.*, 622 F. App'x 73 (2d Cir. 2015) (discussing elements of continuity of enterprise exception under Connecticut law, including "maintaining the same business," the same "production processes," and the "same products").[5]

9. In concluding that plaintiffs had stated a direct claim under Connecticut law (and not simply Assumed Product Liabilities) against New GM, Judge Hall also relied on "the use of the goodwill accruing to the GM name." (June 28, 2017 Hrg at 12). But the transfer of goodwill is, at best, a *basis for successor liability* under the product-line doctrine in Connecticut -- not a

[5] *See also Peglar & Assocs., Inc. v. Prof'l Indem. Underwriters Corp.*, No. X05CV970160824S, 2002 WL 1610037, at *7 (Conn. Super. Ct. June 19, 2002) (discussing elements of *de facto* merger exception under Connecticut law, including "continuation of the enterprise of the seller corporation so that there is a continuity of management, personnel, physical location, assets and general business operations," and "the purchasing corporation assum[ing] those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation"). New GM does not concede that the Connecticut Supreme Court would adopt the continuity-of-enterprise or product line theories of successor liability, nor that plaintiffs could establish successor liability under Connecticut law.

basis for an Independent Claim that can only be predicated on post-Sale New GM conduct. *See S. Connecticut Gas Co. v. Waterview of Bridgeport Ass'n., Inc.*, No. CV054005335, 2006 WL 1681005, at *1 (Conn. Super. Ct. June 1, 2006) ("Another exception to the general rule is the 'product line' exception, which states that where the successor corporation holds itself out as being the same name or product, operation and sale, *thereby receiving the benefit of past goodwill*, it should likewise bear the burden of past operation.") (emphasis added).

10. Judge Gerber specifically warned plaintiffs not to raise successor liability issues in their complaints. In his Judgment, dated December 4, 2015 [ECF No. 13563] ("**December 2015 Judgment**"), he held that any "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." December 2015 Judgment, ¶ 16.

11. Thus, as in *In re Old Carco*, the Pitterman Plaintiffs' claims are a "typical successor liability case dressed up to look like something else, and [are] prohibited by the plain language of the bankruptcy court's Order." *In re Old Carco LLC*, 492 B.R. 392, 405 (Bankr. S.D.N.Y. 2013). The claims are inconsistent with the Sale Order and are not solely based on New GM post-Sale conduct. The Bankruptcy Court should exercise its gatekeeping function by enjoining the Pitterman Plaintiffs from proceeding on their so-called Independent Claims.

B. The Amended Complaint Does Not State Independent Claims as Defined by the Second Circuit Opinion and the Sale Order.

12. The Second Circuit has held that "independent 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." *In Matter of Motors Liquidation Co.*, 829 F.3d 135, 157 (2d Cir. 2016). Similarly, this Court held on June 7 that "[t]o 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." (Pitterman Opinion at 23).

13. Plaintiffs do not specifically allege any "post-closing wrongful conduct by New GM," as the sole basis for their Independent Claims, as required by this Court's Pitterman Opinion and the Second Circuit Opinion. To the contrary, the only "wrongful conduct" alleged in the Amended Complaint is attributed to Old GM, not to New GM. Plaintiffs allege that their Old GM vehicle was designed, manufactured, assembled, sold, and distributed by Old GM. (Amended Complaint ¶¶ 15-17). Plaintiffs also allege that Old GM issued a 2006 Technical Service Bulletin which allegedly showed awareness of the purported defect. (*Id.* at ¶ 25). Finally, plaintiffs' lawsuit is exclusively predicated on the Connecticut Product Liability statute, and they allege that Old GM (not New GM) was the product seller within the meaning of that statute. (*Id.* at ¶¶ 18-19). These claims -- predicated on *Old GM's* conduct -- are not Independent Claims under the Second Circuit's Opinion or this Court's Pitterman Opinion. *See In Matter of Motors Liquidation Co.*, 829 F.3d 135, 157 (2d Cir. 2016) ("independent claims . . . are not claims . . . that are based on pre-petition conduct.").

14. To comply with this Court's June 7 ruling, the Pitterman Plaintiffs made only one change to their Complaint. Instead of alleging in *one* paragraph that Old GM and New GM had general knowledge of an alleged defect, they now allege in separate paragraphs that Old GM and New GM had such general knowledge. Plaintiffs do not allege what specific knowledge New GM had, nor how New GM obtained that knowledge. This cosmetic change violates both the letter and the spirit of the Court's June 7 ruling, which prohibits Independent Claims based "on generalized knowledge of both Old GM and New GM." Pitterman Opinion, 2017 WL 2457881, at *10.

C. The Complaint Does Not Allege any Post-Sale Relationship Between Plaintiffs and New GM that Would Establish an Independent Duty to Warn or Recall.

15. Plaintiffs' so-called Independent Claims also fail to pass through the bankruptcy gate because plaintiffs have not alleged a post-Sale relationship between New GM and plaintiffs. *See In re Old Carco LLC*, 492 B.R. 392, 405 (Bankr. S.D.N.Y. 2013).

16. In *In re Old Carco*, the Bankruptcy Court addressed a sale agreement in the *Chrysler* bankruptcy that is substantially similar to the Sale Agreement here. In that case, Judge Bernstein held that the would law impose "a duty to warn because the successor has *entered into a relationship* with the customer and derives an actual or potential economic benefit." *In re Old Carco LLC*, 492 B.R. 392, 405 (Bankr. S.D.N.Y. 2013) (Bernstein, J.) (emphasis added). Similarly, in *Holland v. FCA US* LLC, Case No. 1:15 CV 121, 2015 WL 7196197 (N.D. Ohio Nov. 16, 2015), the Court held that knowledge of an alleged defect by the purchaser was insufficient to establish a duty to warn on the purchaser, absent the required "relationship." *See Holland*, 2015 WL 7196197 at *4 ("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."). Here, plaintiffs do not allege that New GM entered into any "relationship" with them, and thus plaintiffs' claims cannot pass through the bankruptcy gate.

17. Indeed, the only "relationship" arguably supported by plaintiffs' allegations is between plaintiffs and *Old GM*, which designed, manufactured, assembled, sold, and distributed their vehicle. (Amended Compl. Par. 15-18). Accordingly, any duty to warn was owed by Old GM, not New GM.

18. Finally, plaintiffs incorrectly assert that if they cannot pursue Independent Claims, New GM will have "immunity." (Document 227 at 7). But New GM assumed Old GM's duty to warn obligation when it assumed Product Liabilities.[6] Thus, even if their Independent Claims are barred, plaintiffs may continue to pursue their Assumed Liability duty-to-warn claims against New GM.

CONCLUSION

WHEREFORE, New GM respectfully requests that this Court enter an order, substantially in the form attached to the Pitterman Motion to Enforce as **Exhibit "C"**, granting the relief sought herein, and such other and further relief as the Court may deem just and proper.

Dated: New York, New York
June 29, 2017

Respectfully submitted,

/s/ Arthur Steinberg

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[6] *See In re Motors Liquidation Co.*, 541 B.R. 104 (Bankr. S.D.N.Y. 2015).

Exhibit A

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

BERNARD PITTERMAN, ET AL,) NO: 3:14CV967(JCH)
Plaintiffs)
)
vs.) June 28, 2017
GENERAL MOTORS, LLC,) 9:10 a.m.
Defendant)

141 Church Street

New Haven, Connecticut

PRETRIAL CONFERENCE

(EXCERPT OF HEARING)

B E F O R E:

THE HONORABLE JANET C. HALL, U.S.D.J.

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

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(Excerpt of hearing)

(Whereupon, a recess was taken at 12:33 p.m. to 12:54 p.m.)

THE COURT: I think my clerk gave you a copy of an order I would sign, if it is all right with everyone.

MR. ADELMAN: Yes.

THE COURT: And think it's sufficient.

MR. HANSON: It is fine. I just have one real technical little question.

THE COURT: Yes, sir.

MR. HANSON: It says serve a copy on Mr. Strauss. I presume that means by any method that would satisfy the federal requirement for service of a subpoena. For example, if he doesn't happen to be sitting in his office right there when we show up, you leave it at his place of business or his residence?

THE COURT: I would be worried about that.

MR. HANSON: What if he isn't there between now and tomorrow?

THE COURT: How does he get notice?

MR. HANSON: I know, but what I'm saying is, is that service, like you can serve a subpoena, you can commence an action by leaving it with a person of age and discretion.

THE COURT: At his home.

MR. HANSON: I think that applies to a business as

well if he's --

THE COURT: Well, am I serving Westport Family Counseling or are you serving Mr. Strauss?

MR. HANSON: Frankly, I think that's actually the answer, that it should be directed to -- specifically to them, to the entity. And then that solves my issue with what happens if he's not there.

THE COURT: Then you leave it with an agent who can accept service under Connecticut law.

MR. HANSON: My only concern is because we have got to get this done by tomorrow. If he's not there --

THE COURT: Well, I'm just trying to give these people an ability to oppose it, you know.

MR. HANSON: We understand.

THE COURT: So I will take out -- I guess related to have to be edited to the treatment of Grant O'Connor from July through the present, by what I say Nicholas Strauss, LCSW. I could say there. In other words, it would read, Westport Family Counseling, address, is hereby ordered to produce all records, including, but not limited to, treatment notes related to the treatment of Grant O'Connor, date of birth, from July through present, by Nicholas Strauss, LCSW. Nobody else treated him at this location.

MR. ADELMAN: Correct. And the office has about half a dozen counselors, so there will be somebody there.

THE COURT: I understand, but it might be helpful for them to know that he's a patient of Mr. Strauss's. That's what I meant by including -- okay. So we'll make that edit, Alex, but otherwise, Diahann, I am going to sign this. It will have to be docketed under seal because it has the date of birth and name. But then if you would redact it and docket it on the public record without the name showing on the date of birth. And then you need to give counsel a copy of the Order, I guess, or you will get it on the CMCF, or do you want a copy from the clerk? Would it be helpful?

MR. HANSON: It would be very helpful just to get a copy so we can immediately arrange to have somebody go serve it.

THE COURT: That's fine. You're attaching that to the subpoena, I assume is what you plan. You've got to serve a subpoena on him, or you think the Order is sufficient? I guess it is.

MR. HANSON: I think the Order. I don't think we need a subpoena with this.

THE COURT: That's fine. But I think I should have you serve it. It's not the plaintiff. I agree with him he doesn't have to do it.

I think the last thing I need to get done, which I'm about to hit the bewitching hour, is to rule on the Motion to Amend Docket Number 219 of the Pitterman plaintiffs, which

follows on the ruling of the bankruptcy court recently, early June, by Judge Glenn -- I got that right, right -- Judge Glenn, in effect, clarifying an issue of what causes of action were possible against New GM as opposed to Old GM on the issue of duty to recall and duty to warn.

And I think when I rule it will address the Defendants' Motion in Limine Number 147-6 to preclude arguments, evidence or statements offered to support claims that violate the General Motors bankruptcy sale order and injunction. Now, this -- by my saying my ruling will resolve 147-6 does not suggest that I'm saying that you cannot go to the bankruptcy court, ask the bankruptcy court whatever questions you think are appropriate for the bankruptcy court. And I leave it to the bankruptcy court to decide if they think they are appropriate what its answer will be. I don't mean to suggest that in any way. I am just saying that from my point of view, the Motion in Limine 147-6 will be addressed by my ruling on the Motion to Amend.

So I have reviewed the Proposed Amended Complaint, General Motors' response and the plaintiffs' Reply as well as the bankruptcy's court ruling of June 7. I had forgotten the date. For ease of reference, the Court -- in this ruling, the Court will refer to the post-bankruptcy sale entity as "new GM" and the pre-sale entity as "old GM". It is New GM that is the defendant in this case.

GM objects to two paragraphs in the Proposed Amended Complaint, Paragraphs 27 and 28. "GM, LLC would not object to an amendment without the offending Paragraphs 27 and 28." That's GM's response to the Motion to Amend at Page 7. As I read those complaints -- those paragraphs, they seek to articulate a product liability claim against New GM sounding in the theory of failure to warn and a theory of failure to recall, respectively. At the outset, the Court notes what it believes its role to be in deciding the pending motion vis-a-vis the bankruptcy court sitting in the Southern District of New York and overseeing the bankruptcy proceedings with respect to Old GM.

This Court is charged with an obligation to decide the very disputed issues of Connecticut state law, as well as whether the pleadings satisfy Rule 8 and Rule 12(b)(6) based on the defendants' objection, while leaving for the bankruptcy court, any decision as to whether these claims may be pursued against New GM as a matter of bankruptcy law and at a matter of the sale order. Again, I'm not exactly sure what further the bankruptcy court needs to do in that respect, if anything. But all I -- what I want to make clear is what I am doing. What I am doing today is ruling on whether a cause of action, a duty to warn and duty to recall may be asserted against New GM for actions arising subsequent to June of 2009 under the Connecticut State Products

Liability Act.

The parties' briefing reflects the agreement with, I think, reflects agreement with my conception of my role here, which is to sit, in effect, as a state court and to decide the state law. And I will just -- I have looked at some cases in this respect. I have looked at -- there was a case In Re: Motors Liquidation, and the bankruptcy decision was from 2015 in the Second Circuit from 2016, you know, where the bankruptcy court opined that it believed it shouldn't leave for a non-bankruptcy court matters that require interpretation of enforcement of the Court's earlier sale order or call for a bankruptcy court's knowledge on the bankruptcy law.

And on appeal, the Second Circuit said, "A bankruptcy court's decision to interpret and enforce a prior sale order falls under this formulation of 'arising in jurisdiction.' An order consummating a debtor sale of property would not exist but for the code, and the Code charges the bankruptcy court with carrying out its orders, hence, the bankruptcy court plainly has jurisdiction to interpret and enforce its own orders."

I hope I am acting in a manner consistent with my recognition of that. And my intention today is to rule solely on the question of state law and the pleading before me. The Court understands General Motors -- new General

Motors to oppose the amendment of the Complaint on four but related grounds. First, that New GM is not subject to suit under the Connecticut Product Liabilities Act because it is not a "manufacturer" or "product seller."

Two, the Connecticut law does not recognize failure to recall claims.

Three, that New GM owes no duties to those in plaintiffs' position.

And Four, that even if such claims could be brought, they are inadequately pled in the Proposed Amended Complaint. The Court will return to each of these arguments in turn.

First is the question of whether New GM is a "product seller" under the Connecticut Products Liability Act, Connecticut General Statute Section 52-572m(a), which provides the definition of product seller. I will start with what the parties agree on. They seem to agree that the Connecticut Product Liability Act is the exclusive remedy for injury allegedly caused by defective products encompassing actions of -- among others, of negligence and strict liability.

The response at Page 3 of the Reply, at 5, and the subpart (b) of the section I just cited all would support that agreement. And of course, Judge Cabranes' decision going back now 25 years, which is really a seminal opinion on the statute, interesting enough, describing the nature of the

Connecticut Product Liabilities Act as the exclusive remedy. It appears to me that the paragraphs in question in the plaintiffs' Complaint seek to articulate legal claims solely under the CPLA. See the Amended Complaint, 291-1 at Page 3, Paragraph 19.

The CPLA recognizes product liability claims only against "product sellers," making, obviously, the first and relevant question whether New GM is a product seller for purposes of this case and this claim.

Now, I think the best place to start is to look at the statutory language. And the definition of product seller in the statute is, "Any person or entity, including a manufacture, wholesaler, distributor or retailer, who is engaged in the business of selling such products whether the sale is for resale or for use or consumption. The term product seller also includes lessors or bailors of products who are engaged in the business of leasing or bailment of products." That's 52-572m(a).

Now, whether a defendant is a product seller under that definition is a question of law for the Court to decide, and thus, appropriate in the context of a motion to amend viewing it really as a motion to dismiss, in effect, the standard. It is the question for the Court. I would cite in support of that a colleague of mine in the case after Svege, S-v-e-g-e, versus Mercedes Benz, 329 F.Supp.2d 272 at 278.

That's a District of Connecticut, 2004. And that Court cited a Superior Court decision known as Stanko versus Bader.

Now, Connecticut case law "Teaches that whether an entity is sufficiently involved in the stream of commerce of a product to be a 'product seller' under the CPLA requires a fact-intensive case-by-case assessment." That Svege at 280.

GM's argument essentially consists of assertions that because GM did not "manufacture" or "sell" the product that allegedly injured the plaintiffs and which is the basis for this -- these causes of actions as pled in 27 and 28. They are not claims cognizable under the CPLA because they are not, therefore, a "product seller."

First, I would like to note that I disagree with the plaintiffs' contention in response to that argument that there is an inconsistency with GM's opposition on this point and its admitted assumption of certain other products liabilities. Pursuant to the sale order, at least the portions I have seen and pointed to, New GM expressly assumed "product liability" claims arising out if the conduct of Old GM, which clearly Old GM qualifies as a product seller under the statute. In opposing plaintiffs' motion to amend, GM makes a different argument, namely that New GM is not a product seller. I don't see an inconsistency in New GM's assumption of product liability claims related to the conduct of Old GM, which is clearly a product seller, with their

disputing liability for such claims related solely to the conduct of New GM by contending it is not a product seller.

By saying this, I don't mean to say that the evidence about the assumption of causes of action might not be probative on whether they are a product seller, but I don't think it is an inconsistent position to say that they are not a product seller just because they have assumed some liabilities or, put another way, I don't think it follows that because they assumed certain product liabilities that that bars them from arguing in a different claim -- on an unassumed claim that they are not a product seller.

Turning to General Motors' arguments, however, the Court eventually concludes that it is unavailing on the issue of being a product seller. Here, whether or not New GM is the "successor" as a matter of law to Old GM, the following I believe is undisputed. One, it bought significant portions of Old GM's assets. Two, it manufactures and sells cars under the "GM" or "Chevrolet" name, including Suburbans. And three, it did assume certain obligations for vehicles manufactured by Old GM that were under warranty at the time of sale, including provision of spare parts and service for Old GM manufactured vehicles.

I am relying and I cite to In Re: General Motors, LLC Ignition Switch Litigation, 154 F.Supp.3d 30, at 40, Southern District 2015, by way of what would be otherwise a

footnote in a written opinion, I understand the Ignition Switch Litigation involves an entirely different claim, product liability claim, but I think that the recitation by the Court in that opinion as to the general facts I have just cited are -- to my understanding, are correct and, thus, I cite from that opinion.

Of course, New GM did not manufacture the car that's involved in this case and it doesn't now manufacture the model year at issue. However, New GM continues to manufacture such products, quote unquote, within the meaning of the CPLA by virtue of its ongoing production of Chevrolet Suburbans and the use of the goodwill accruing to the GM name as well as the assumption of some obligations with respect to servicing and provision of parts for the model year in question in this case.

I think it's -- this is a difficult question, and I will just acknowledge that on the record, and I think that defense counsel is quite right. This is a question best answered by the Connecticut Supreme Court. And if I don't in a post-trial motion context certify the question, I'm sure the Second Circuit will certify it. But the fact of the matter is, this issue has been presented to me within -- I don't know, what, 10 days of trial? We are going to have a trial and, therefore, I believe that I can't -- I can't certify it, I guess, is the bottom line.

So my best judgment -- it is my opinion and conclusion that the facts I have just pointed to leads to the conclusion that as a matter of Connecticut state law, as best I can predict the Connecticut Supreme Court, New GM qualifies as a product seller within the meaning the CPLA with respect to these claims -- well, independently with respect to this vehicle. It's based solely -- I'm making this ruling based solely on New GM's own post-sale conduct and business.

I reach this -- as I recognize it's a difficult challenging question, but as I read the Connecticut statute, the language used in the statute which has the word "including" in the definition of product sellers, makes it fairly clear to this Court, anyways, that the list set forth is not exhaustive and, therefore, after a review of all of the circumstances would include those in the position of New GM pursuant to a fact-intensive inquiry.

So based on the pleadings, in any event, it is the Court's conclusion and what I know from what I have cited, based on New GM's own post-sale conduct and operations, that it is within the scope as intended by the Connecticut legislation of Subpart A of the Connecticut Product Liability Act as a product seller.

The second question, of course -- that doesn't end the inquiry here. The second question is: Does Connecticut recognize a duty to recall or a duty to warn? First, I will

note that I do not believe General Motors in their response at this point pointed to any case that had rejected the theory. General Motors' counsel was correct there's not a lot of authority to support the cause of action. We have only a Superior Court decision from 2000, which notes that the CPLA does not state that manufacturers may be liable for failure to recall, although that doesn't state it, the act applies that such a theory is viable given the fact the list is not exhaustive. And similarly, my colleague in the Svege case viewed the breach of a duty to warn as analogous to a failure to recall and found the latter viable under Connecticut law.

Again, I turn to the language of the statute, particularly, in the absence of Connecticut Supreme Court case law interpreting -- or telling me that such a cause of action exists. The CPLA includes -- again uses the words "include" or "including" before enumerating the causes of action that fall within its ambit. That's 52-572m(b). The inclusion of the word "shall include but is not limited to" suggests that the cause of actions that are iterated following some variation of "include" should not be exclusive. For example, the Supreme Court of Connecticut has instructed us in a case called Hurley versus Heart Physicians, P.C., 278 Conn. 305, 325 (2006), "In addition, a product liability claim is defined broadly to include but not

be limited to" and then it lists a series of causes of action.

Similarly, the Connecticut Superior Court last year in Barry versus Greater Hartford Community Foundation had effectively made the same point. Thus, the listing of the causes of action specifically at the time of the adoption of this statute in 1979 was not meant -- clearly was not meant to be exclusive. Certainly, it talks about breach or failure to discharge a duty to warn or to instruct, so I think that's pretty easy. The question is the duty to recall. And again, there's not a lot of precedent, but what there is is supportive of such a claim. I think I'm in agreement with my colleague in analogizing the duty to recall to the duty to warn. And it is my judgment, given the breadth of the definition of the product liability claims in the Subpart B that the Connecticut Supreme Court, if asked, and I may be wrong, but it's my judgment today that if asked, they would conclude that a duty to recall also that -- that that cause of action exists under the CPLA and is cognizable.

Having concluded that New GM qualifies as a "product seller," or "manufacturer" under the CPLA -- I think that ends the inquiry other than the pleading inquiry because the response of the New GM rests really -- and I'm looking at Page 5 -- that it, therefore, cannot and does not have any legal duties under Connecticut law with regard to Subject

2004 Connecticut Suburban manufactured by Old GM because "New GM is not a product seller or manufacturer." I have already addressed that issue, so I think that that answers that question and no independent argument was made as to why there is no duty.

Also I just look -- cite you to Lawrence versus O&G Industries, 319 Conn. 641, 650 from 2015 about a test for a legal duty. Obviously, that will be something that will be part of the charge and the jury will have to find if that existed here has the plaintiff proved it existed, has it proved that the defendant breached it. But as to the -- I don't want to call at abstract, but the legal question of whether there is a cause of action of duty to recall, duty to warn also, but duty to recall is really what we're arguing about, I think, here, such a cause of action in this Court's opinion is cognizable. And if properly alleged, can be alleged against New GM, and the Court finds to fall within the definition of product seller based solely on conduct arising from and after June 2009.

I also had in my note here -- you know, that case I just cited talks about two parts. One is that whether there's a test for a duty's determination of whether an ordinary person in the defendants' position knowing what the defendant knew or should have known would anticipate that a harm of a general nature suffered was likely to result. And

two, a determination on the basis of public policy analysis of whether the defendants' responsibility for its negligent conduct should extend to the particular consequences of plaintiff in this case. That's citing Ruiz versus Victory Properties, 315 Conn. 320, at 328 through 329.

In addition, I have reviewed and thought about in this context of whether there's such a cause of action an earlier, Monk versus Temple Garage Associates, 273 Conn. 108, at 118, from 2005, which addressed the question of policy issue. We recognize that in considering whether public policy suggests the imposition of a duty, we consider four factors:

One, the normal expectations of the participants involved. Two, the public policy to encourage the participation in the activity while weighing the safety of the participants. Three, the avoidance of increased litigation. And four, the decisions of other jurisdictions.

So I'm mindful of the context of the Supreme Court's decisions in this area of duty and whether a duty to recall exists as a cause of action under product liability claim. While I recognize there is no Connecticut Supreme Court case which has held that such a cause -- such a theory of a cause of action exists under the Connecticut Product Liabilities Act, it is my judgment based on what is before me at this time that if this question were before the Connecticut

Supreme Court they would conclude there was such a theory of liability under the Connecticut Product Liability Act.

So the last question remaining is whether the Amended Complaint is adequate under the Federal Rules, in effect Rule 12, Iqbal and Twombly and that line of cases. I think I already quoted from 27 and 28. I am not going to bother to read it into the record. It is what it is and I've looked at it. It alleges that GM had information and knowledge, including knowledge of numerous roll-away instances caused by defects described, in other words, similar to the one in the Complaint on which numerous people, especially children, were catastrophically injured or killed and ties that to the ignition product that's defective.

It is the Court's conclusion that the Amended Complaint as I read it, plausibly sets forth the plaintiffs' theory of liability, which I have just found to exist in Connecticut, as to the defect in the Suburban. I could not conclude that the amendment would be futile, or put a different way would be dismissed under a Rule 12(b)(6) standard. Taking as true the allegation that New GM after June of 2009, I can't emphasize that enough, that is how I read the Complaint, at least paragraphs, had information and knowledge of incidences resulting in serious physical injury. That has to be taken as true. I don't think it is a conclusory sort of, you know, violative of Iqbal or Twombly

standards. It is a pleading of an allegation, that's not conclusory. And if it's taken as true, in my view, it renders plausible the imposition of a duty on New GM that I have just previously found exists in a cause of action of duty to warn and duty to recall.

There is before me in the -- I think the Amended Complaint, 219-1, at 1 through 3, paragraphs 3 through 4, the Complaint includes the allegation that New GM purchased certain operating assets of New GM and assumed liability for claims, not the ones we're addressing right now, but other claims involving Old GM manufactured vehicles. And at 219-1 at Page 4, Paragraph 25, there's an allegation of the technical service bulletin that Old GM issued in May of '06 drawing all inferences in the favor of the plaintiffs the New GM purchase assets of Old GM, which I would think it is plausible to infer included this bulletin, and thus, that's supportive of the allegation that they had knowledge and information.

Further, I don't really see in the General Motors' opposition beyond the argument that they are not the product seller, but I don't see meaningful argument with Connecticut law regarding the imposition of legal duties. However, if GM had done that, I would be skeptical because based on the allegations in this Fourth Amended Complaint, it is my conclusion, having looked at those cases on my own, that

plaintiffs -- I would be skeptical of the argument that they had not plausibly alleged the existence of the duties and the cause of action that we're discussing.

Therefore, it is the Court's conclusion the plaintiffs have stated a plausible claim in Paragraphs each 27 and Paragraph 28 and that the amendment would not be futile, and therefore the Motion to Amend is granted.

As I have said once I think, I do think -- I will call it a challenging question. I don't know whether it is close or not because I -- it is my decision and I'm not pulling any punches by saying this. I do think it probably will be decided by the Connecticut Supreme Court at some point. But faced with a jury selection tomorrow and a case that would proceeding to a verdict -- to trial anyways, on claims in addition and other than that. And again, I don't mean to suggest that I lack confidence in my conclusion. This is my conclusion. I think this is the right answer.

But I think even if I'm wrong, there will be -- given we're going to try the case, there will be opportunities for someone to suggest, which hadn't been suggested previously, that I certify the question to the Connecticut Supreme Court.

So it is the conclusion of this Court that under Connecticut State law, the plaintiffs have plausibly alleged in their Fourth Amended Complaint, which I direct them now to

docket, in paragraphs particularly as related to 27 and 28, the cause of action for Connecticut Products Liability Act cause of action for a duty to warn, in 27, and a duty to recall, in 28, against New GM based solely on their conduct or lack of conduct from and after June of 2009. I'm finished.

MR. HANSON: I need just for the sake of record -- I'm not arguing with you or asking you to change your ruling, just a couple of things I need to be clear on. I suggest, respectfully, that it is error to find that a seller can be -- that any product liability can arise from the sale of other products subsequently. I think it is fundamental tenet of product liability law that the liability flows from the manufacturer or sale of the product in question. And I think the Court has misconstrued what the words "such products" mean in the CPLA.

I would suggest that that language is there to distinguish a sale by an individual private seller, a person who is not in the business of selling the products, because otherwise anybody and everybody who sells a used car would be a product seller under that reasoning. So I think that's error, and that's my record for the State Court here.

Second --

THE COURT: I would agree with you that the reseller would be probably not within the scope, but I will -- we'll

agree to disagree. And I'm sure the issue will be get readdressed if --

MR. HANSON: The remaining thing there is New GM has no warranty obligation of any kind with respect to this vehicle.

THE COURT: I'm aware of that, sir.

MR. HANSON: It was over. So I want to make sure that I understand what the conduct is that the Court is finding this liability to flow from. I heard the Court say that GM bought the assets of Old GM. It manufacturers cars now. Am I right on both of those points?

THE COURT: Using the GM Chevrolet name.

MR. HANSON: So using the GM name now subsequent to this product. And if I understand correctly what the Court just ruled in the latter part of your ruling --

THE COURT: It also bought significant assets of Old GM.

MR. HANSON: Right.

THE COURT: Not all.

MR. HANSON: To make it clear that these are -- that it's because of the purchase of assets that the Court is making that finding.

THE COURT: And it also assumes certain, not these, but certain obligations, yes.

MR. HANSON: Right. Then lastly, what I need to

clarify here is, as I understand it, what the Court is finding to be GM's sole conduct as alleged is merely having knowledge of incidents.

THE COURT: Well, I'm not sure I want to be -- have you wrap me up with a bow on that one, sir, because I don't think you really argued it. So I'm not sure I need to address it at all. What I have said is what I have said and I am going to let the record rest on that.

MR. HANSON: Right. And I'm just asking for clarification. And in part, this is because I am going to be asking the reporter for your ruling, not the whole hearing --

THE COURT: I understand.

MR. HANSON: -- with the hope that then we can get it to the bankruptcy counsel in time so they can decide what, if anything, they wish to do in the Court in New York tomorrow.

THE COURT: Okay.

MR. HANSON: So I'm just trying to make sure that the record is as clear as I can help make it, which is not suggesting that you didn't do your dead-level best to be clear, but there are aspects of it that are not clear to me. And that's why I was asking for that clarification.

THE COURT: Okay. And what's not clear to you?

MR. HANSON: What's not clear to me is what is the conduct of New GM after July of 2009, right, that is alleged

here to constitute a duty or breach of duty to warn or recall.

THE COURT: I think it is that knowledge, notice, anticipation of harm that would flow from the circumstance which is their similar claims, not facts proven, but notice of circumstances resulting in harm. That knowledge, if they prove it. And that it's, I think, a matter of law, not fact or evidence, but that it is my conclusion rests on a finding that Connecticut public policy would be that when a manufacturer, assuming a product seller which I know you contest you aren't, but if you are one, knows of a risk and knows of possible consequences from that de facto situation with the product, that -- that they would be responsible for damages that flow from that.

MR. HANSON: And the last point of clarification is this knowledge that was acquired as of July 2009 or later or is it inclusive of knowledge that came from Old GM?

THE COURT: That could be an evidentiary question, but my -- I think my inclination right now is to permit evidence that was in the possession of New GM or the knowledge of New GM employees, regardless of when the information was created. But it can only be based on what New GM would know from and after June of '09.

MR. HANSON: Okay. Those were -- I think that's the rest of what I had to try to make this as clear as we can

make it be so now the bankruptcy guys can do their --

THE COURT: That's fine.

MR. HANSON: Okay.

THE COURT: And tell them to say I told the judge hello, and I apologize to him if I have not made it clear. I guess the bottom line is my ruling is a ruling that, under Connecticut State law, New GM would be viewed as a product seller and that Connecticut would recognize a cause of action under the Connecticut Product Liabilities Act for the duty to warn and a duty to recall. And that such causes of action will go forward against New GM, but it is -- but I understand that that cause of action -- no evidence is relevant to that cause of action -- I'm sorry. Strike that. Let me start that again.

That that cause of action against New GM must be proven based upon evidence that shows, or tends to show, that New GM, after June of '09, had knowledge of certain situations and claims of what the consequences of what those situations were and took no action. That's a very -- taking no action is a summary part of it. It is the first part I want the bankruptcy judge to understand. I don't intend to stray into pre-June of '09. There may be things that happened before June of '09, but they are only relevant to this cause of action if it is shown that New GM knew of those from and after June of '09.

Is that the plaintiffs' understanding of the claim it wishes to pursue?

MR. ADELMAN: Exactly, Your Honor.

THE COURT: All right.

MR. ADELMAN: Mr. Sultze, who is that deposition, he was an employee way back and he's an employee now.

THE COURT: I mean I'm sure he'll test it on a motion for directed verdict whether you have shown this post-'09, but I just want you to understand that I have granted your motion, but this is what I understand your Amended Complaint is seeking. And it's also -- if understood that way, I believe I have followed the bankruptcy court in its pronouncements of bankruptcy law and this bankruptcy's controlling agreements, et cetera. And of course, we leave it to another day whether I correctly anticipated the Connecticut Supreme Court law -- I'm pretty confident on the duty to recall. I think Judge Arterton is right. It is so analogous to warning. The question of the product seller, I think -- I think there's sufficient basis there to conclude New GM is, and in many respects may depend upon the evidence that gets developed at trial, whether that rich factual basis to make that finding is still there.

So I suspect that this will be the subject of further motion practice by defendants even as properly limited to post-'09, but that's my ruling for today as far as

what we're going to go to the jury on.

MR. HANSON: Thank you, Your Honor.

MR. ADELMAN: Your Honor, I have one question tomorrow because we may be down in New York in bankruptcy. Are we going to pick the jury and then go back to pretrial motions or are we just going to pick the jury tomorrow?

THE COURT: I think just pick the jury. I need time to look at a lot of the --

MR. ADELMAN: That's better for us, Your Honor. And in that regard --

THE COURT: But I don't know how long it is going to take.

MR. ADELMAN: I was going to ask your guidance on that just as an estimate. Do you have --

THE COURT: Well, you know to be here at 8:30.

MR. ADELMAN: Yes.

THE COURT: You know they are going to bring them in at 9:00.

MR. ADELMAN: Yes.

THE COURT: I have picked a jury by 11:00, but it would not be my judgment I'm going to pick this jury by 11:00. We are going to have people, you know, had a lemon from GM. We're going to have people in accidents with GM cars. We're going to have people who don't want to be involved in a case involving the death of an eight year old

girl. Hopefully, everybody's been screened for summer vacation, but our experience lately is most people don't read the instructions. So we're going to get some people who have booked vacations. I don't know. I hope I can get it picked by lunchtime.

MR. ADELMAN: Okay.

THE COURT: That would be my best guess, but I can't promise. It is going to be what it is. I will say if we're stuck, just so -- if anybody objects, you'll let me know. But if we are down to picking a jury and I can't seat those last two. I mean, before you go to pick you will know this, but it may be I am going to drop it back to eight because we don't have enough people for you to have strikes to do a 10, if that happens, rather than lose the jury and start this whole thing all over again.

MR. HANSON: Hopefully, we'll cross that bridge and we won't have to.

THE COURT: I think we are going to have a lot brought in. So I've got -- I think we're calling in over 90, so we should have 70, 75. Should be plenty.

MR. HANSON: I do have a logistical issue just we have some consultants that are going to help us. They need to bring the computers. Is that a problem?

THE COURT: No, that's not a problem. And if --

MR. HANSON: Sometimes the --

THE COURT: I understand. Right.

MR. HANSON: That's why I'm asking.

THE COURT: No, no, you are going to have a problem when they come in, but I don't know, maybe you can go tell the CSO that -- are they going to come in with you or how are they going to know --

MR. HANSON: I think they will come with me.

THE COURT: If they are with you, tell them that any staff can bring in their computers. The problem is CSOs rotate, but actually if I can have -- the officer in the back, could you let the front know there's going to be people coming in tomorrow with lawyers who are authorized to bring in their computers. Those people aren't lawyers, but I'm saying it's all right for them to have computers with the lawyers. Just for tomorrow for this case. Thanks very much. And if there's any question, I will be here, you can ask. Thanks very much.

(Off-the-record discussion.)

THE COURT: The only thing I ask about people with computers, Attorney Hanson -- this applies to the plaintiffs too. We have had problems with noisy keyboards. A lot of laptops have noisy keyboards. And if that happens, I am going to tell you, I know I told you you could have a computer, but you can't have that computer.

MR. HANSON: I will tell them they need to be really

careful about being noisy.

THE COURT: I mean, if they're pounding away, Terri is going to be having trouble, let alone me and everybody else. Okay. That's fine.

I explained about jury selection. I don't know if you are going to introduce everybody at your table? Without saying why they are here, I guess, but you do need --

MR. HANSON: Who is there tomorrow, I may mention a few people who I know will be here.

THE COURT: And then in addition -- right who will be here from time to time.

MR. HANSON: That reminds me you had said before to have a list of people from Howd and Ludorf who live in this district.

THE COURT: Yes.

MR. HANSON: Howd and Ludorf will not be present at the trial. Do we still need this list?

THE COURT: No, because nothing will go to the jury that mentions them, right, Attorney Adelman?

MR. ADELMAN: No. They would never know.

THE COURT: So they'll never know. That's fine as long as they are not going to show up and walk in the courtroom.

MR. ADELMAN: I thought of one thing. Well, after I found out today that the defendant is withdrawing the claims

of comparative negligence against Maggie and Grant, the minors, I think I'm going to submit as a statement of a party a couple of paragraphs of the defendants' Answer where they did allege that Maggie and Grant were negligent because I think it is inconsistent with their new claim that Rose O'Connor is solely negligent. It is a statement of a party and it is admissible, but I have to think about that. If I do, I will do it on Friday. But that has a Howd and Ludorf --

THE COURT: Just white it out, cut it off.

MR. ADELMAN: Okay.

THE COURT: And cut and paste their signature up to where they -- I assumed that they signed it, or do we have a situation --

MR. ADELMAN: It was signed by Mr. Hanson.

THE COURT: Then just cut it out. That's all.

MR. HANSON: Respectfully, withdrawn claims don't get to the jury. They are not evidence. It doesn't matter what's in the pleading. That is not a statement of client, it's a statement of counsel.

MR. ADELMAN: I disagree on the law on that, Your Honor. If I do it, I'll submit something on Friday.

MR. HANSON: It is a tactical strategic decision. They don't get to say that we changed our mind about it any more than we can start talking about claims that they've

withdrawn.

MR. ADELMAN: Your Honor, there's a case right on point.

THE COURT: Well, you'll brief it for me.

MR. HANSON: I disagree.

THE COURT: I'm not deciding it right now. We'll stand in recess. Adjourned.

MR. HANSON: Thank you, Your Honor.

THE COURT: And you don't -- by the way, I appreciate you saying thank you, but I have a government lawyer that does it every time I leave the bench. And I've been yelling at him. He thinks I'm picking on him. This is my job. I took an oath to do my duty. I don't need to be thanked. You know, once in a while it is nice if somebody says something in public about thank you for your service, but from a party telling me thank you, it just -- I sentenced a guy the other day and the defense lawyers thanked me. It's like I just want to cringe. It doesn't feel right, you know. It's kind of like the money is in the mail. You know, I don't know, it just doesn't feel right. So it is fine. I know you appreciate my efforts, I'm sure, even when I rule against me. So you don't have to tell me.

Adjournment, Diahann.

(Whereupon, the above hearing adjourned at 1:45 p.m.)

COURT REPORTER'S TRANSCRIPT CERTIFICATE

I hereby certify that the within and foregoing is a true and correct transcript taken from the proceedings in the above-entitled matter.

/s/ Terri Fidanza

Terri Fidanza, RPR

Official Court Reporter