

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Case No. 09-50026-mg
. Chapter 11
. (Jointly administered)
MOTORS LIQUIDATION COMPANY, .
Et al., f/k/a GENERAL .
MOTORS CORP., et al, . One Bowling Green
. New York, NY 10004
Debtors. .
. Thursday, March 29, 2018
. 10:05 a.m.
.

TRANSCRIPT OF HEARING RE: MOTION TO AUTHORIZE BY GENERAL
MOTORS LLC TO ENFORCE THE BANKRUPTCY COURT'S JULY 5, 2009
SALE ORDER AND THE RULINGS IN CONNECTION THEREWITH,
WITH RESPECT TO THE MOORE, ET AL. PLAINTIFFS [14241, 14242];
MOTION TO AUTHORIZE BY GENERAL MOTORS LLC TO ENFORCE
THE BANKRUPTCY COURT'S SALE ORDER AND COURT-APPROVED
DEFERRED TERMINATION (WIND-DOWN)
AGREEMENT WITH RESPECT TO PAT BOMBARD [14243]

**BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY COURT JUDGE**

APPEARANCES:

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

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1 (Proceedings commence at 10:05 a.m.)

2 THE CLERK: All rise.

3 THE COURT: All right. Please be seated. We're here
4 in Motors Liquidation Company, 09-50026. All right. The first
5 matter we're going to hear is the General Motors, LLC motion to
6 enforce the sale order with respect to Pat Bombard. May I have
7 the appearances, please?

8 MR. STEINBERG: Good morning, Your Honor. Arthur
9 Steinberg and Scott Davidson from King & Spalding on behalf of
10 New General Motors.

11 THE COURT: Okay. Mr. Bombard, you're on the phone?

12 MR. BOMBARD: Yes, Your Honor, I am here.

13 THE COURT: All right. I had given Mr. Bombard
14 permission to appear by telephone today. Let me just make a
15 couple of notes here.

16 MR. STEINBERG: Your Honor, would you mind if I take
17 the lectern or do you want to say something --

18 THE COURT: No. Please do. I'll be with you in just
19 a second.

20 All right. Mr. Bombard, I'm going to allow
21 Mr. Steinberg to -- since it's his motion, to argue first. And
22 then after he's finished, I'll give you an opportunity to
23 respond. So if you would wait until he's done, I would
24 appreciate it. Okay?

25 MR. BOMBARD: Yes, Your Honor.



1 THE COURT: Go ahead, Mr. Steinberg.

2 MR. STEINBERG: Your Honor, as you would appreciate,
3 New General Motors doesn't like to come back to the Court
4 asking to enforce the sale order unless there are no other
5 alternatives to try to deal with the situation. Here, the
6 situation with Bombard & Company is fairly well-explained by
7 just looking at the time line of events that occurred.

8 The bottom line is that we feel that Bombard &
9 Companies and their rights vis-a-vis being a dealer were
10 governed by a court-approved wind-down agreement. And the
11 wind-down agreement clearly provided for this Court's
12 jurisdiction in both the wind-down agreement itself and in the
13 sale agreement itself. But Bombard & Company has not been a GM
14 dealer for the last eight years. The Court approved the
15 wind-down agreement and the wind-down agreement was offered to
16 dealers as an alternative to an outright rejection of their
17 dealership agreement.

18 The wind-down agreement was assigned to New General
19 Motors and the wind-down agreement provided for a payment of
20 \$128,000 to Bombard & Company and allowed them to wind down
21 their inventory so that the dealership would not terminate
22 until October 21, 2010, which was approximately 15 or 16 months
23 after the sale agreement. Under the wind-down agreement, in
24 exchange for that consideration, Bombard & Company agreed to
25 release Old GM and New GM and covenanted not to sue New GM as well



1 with regard to the dealership arrangement. In 2010, there was
2 an opportunity for Bombard & Company to, in effect, get back
3 the dealership and there was a letter of intent that was
4 submitted to Bombard & Company on March 17. The conditions for
5 reinstatement included returning the \$128,000 that had been
6 paid to Bombard & Company, obtaining financing, and maintaining
7 the facilities requirements that New GM requires of its
8 dealers. And they had 60 days to comply with the letter of
9 intent.

10 When Bombard & Company did not comply, New GM sent
11 them a letter on July 16, 2010, which is attached to our
12 papers, which terminated the letter of intent, thus leaving the
13 wind-down agreement as the operative agreement. By then,
14 Bombard & Company had let its official business certificate
15 lapse as of April 30, 2010. And by November 3, 2010, after the
16 expiration of the dealership pursuant to the wind-down
17 agreement, New GM sent a further letter to Bombard & Company
18 confirming the termination of the dealership as of October 31,
19 2010.

20 Our papers refer to the fact that Pat Bombard himself
21 filed for bankruptcy in the Northern District of New York in
22 August of 2013. In the sworn-to schedules that were filed, the
23 information that referred to Bombard & Company said that it was
24 an inactive franchise, it was closed, no longer operating. It
25 was not listed as an executory contract. No income was



1 associated with Bombard Company. And in the affidavit filed by
2 Pat Bombard, he said the car dealership was no longer
3 operational and that the closing of the dealership had
4 substantially strained his personal and business obligations,
5 thus necessitating the filing for bankruptcy in 2013.

6 The Bombard papers referred to a participation
7 agreement.

8 THE COURT: That's what my main questions relate to.
9 I know you say there never was a participation agreement.
10 Address what a participation agreement is, was intended to do,
11 and whether there were drafts that were circulated with --

12 MR. STEINBERG: The participation agreement was
13 basically given to the dealers that were going to stay in the
14 network. The wind-down agreement were going to be given to the
15 dealers who were out of the network. That's why the terms of
16 the participation agreement provided that the agreement would
17 need to be assigned to New GM and the document needed to be
18 approved by the bankruptcy court.

19 The agreement that is attached to the Bombard papers
20 that Bombard relies on is unsigned by all General Motors and it
21 was a form where someone typed in Bombard's name, not even on
22 the signature line. The signature line just says dealer.
23 That's not the way that GM dealt -- Old GM dealt with dealing
24 with the participation agreement. They didn't have
25 separately-looking font. It was an integrated document. So



1 our position is that it was clear that this participation
2 agreement was doctored.

3 And there are two other extrinsic pieces of evidence
4 that would support that as well, too, other than -- I'm not
5 trying to be a forensic expert to try to do this. One is that
6 Mr. Bombard was trying -- in 2009 was trying to sell his
7 franchise and he had to ask GM for permission to sell his
8 franchise. And GM in a letter dated June 11, 2009, refers
9 to -- says that they are turning down his prospective buyer but
10 refers to the wind-down agreement, not this June -- this June 1
11 unsigned participation agreement, as the basis for the rights
12 of the parties based on the turndown.

13 Also the letter of intent that was signed -- that was
14 submitted in 2010 saying that this is an offer that I'm
15 providing to you in March of 2010, but it is being done in the
16 context of the rights that you presently have under the
17 wind-down agreement, not the participation agreement.

18 THE COURT: Let me just --

19 MR. STEINBERG: So --

20 THE COURT: You indicated -- did the participation
21 agreement have to be -- each one have to be specifically
22 approved by the bankruptcy court?

23 MR. STEINBERG: I think probably not, Your Honor.

24 THE COURT: Okay.

25 MR. STEINBERG: I think it was in the same way that



1 each wind-down agreement wasn't specifically. But they did
2 need to be signed. They did need to be signed by Old GM.
3 There did need to be an acknowledgment by New GM. And the
4 books and records needed to acknowledge the assignment of these
5 executory contracts, none of which was done.

6 Your Honor, I think that is what I would have to say
7 about this matter, other than that as a technical matter,
8 Bombard & Company as a corporation can't be represented pro se
9 by individuals. But I don't have any objection to listening to
10 Pat Bombard and whatever he wants to say.

11 THE COURT: Okay. All right. Thank you very much,
12 Mr. Steinberg.

13 Mr. Bombard, do you want to go ahead and address the
14 issues?

15 MR. BOMBARD: Yes, I do, Your Honor. Thank you for
16 allowing me to call in today, too. With my -- with the Court's
17 understanding, I am asking the Court to dismiss the Old GM's
18 motion here. My case is not with the Old GM. It's with the
19 New GM for my Chevrolet franchise and sales and service
20 agreement. Old GM is just trying to use bankruptcy court to
21 delay and cause me personal and financial harm. They have been
22 aware of my conversation and negotiations with General Motors
23 since 2010 through faxes as well as phone call conversations.

24 In regards to the letter of intent and regards to the
25 participation agreement, all those documents were provided to



1 Old GM when they were in bankruptcy and they would fax you the
2 information. You had one or two days or ten days or 60 days,
3 depending on what was necessary, to send back to them. I have
4 sent back them all the necessary information and documents back
5 to them and as well as of 2013, '14, '15, '16, and in '17.

6 As of this money that they're talking about, the
7 \$128,000 that they were supposedly giving to me, they,
8 according to the bankruptcy court, gave 25 percent to each
9 dealer that was originally a wind-down dealer. I was -- the
10 first time I passed the test and I was not a wind dealer --
11 wind-down dealer.

12 The second test, unfortunately, I was part of the
13 wind down. And then the third test, I was called and said,
14 listen, we changed our mind, you are going to be a
15 participating dealer and your Chevrolet franchise is back, this
16 is what you need to do. I still today do not have the \$128,000
17 that they're talking about. GM has had that money since their
18 bankruptcy started in 2009.

19 I also recognize that I had to build a new
20 dealership. I was in the process of breaking ground and spent
21 thousands of -- hundreds of thousands of dollars with a new
22 facility with their approval. And the letter of intent says
23 that I'll have a new Chevrolet franchise. And I've done all
24 the things that are necessary.

25 My case is with the Department of Motor Vehicle and



1 they -- and the hearing that is supposed to take place on April
2 23rd. We tried under the motor vehicle law Section 471 to talk
3 to them on October 16th with a letter to Doug Pallins
4 (phonetic) requesting mediation. They ignored the letter. On
5 December 19th of 2017, we filed the papers according to the
6 Department of Motor Vehicles for our franchise for a hearing.
7 We waited the necessary time and just in the last few weeks we
8 received the letter that I provided to the Court that we are
9 going to have the hearing on April 23rd.

10 In the interim, General Motors, as one of their
11 tactics, came out and reached out to my attorney and said that
12 if we didn't do something by February 18th or 19th of 2018,
13 they were going to take legal recourse and go back to
14 bankruptcy court and use that as a weapon to try and delay and
15 cause me more problems. And that's why we're here today,
16 because this is a tactic of theirs to hurt me.

17 I've been a Chevrolet dealer since 1992. I've won
18 every Chevrolet award that's possible. And I was in the
19 process of building this state-of-art facility. When General
20 Motors went bankrupt, they caused financial harm to myself and
21 7,000 dealers across America that are no longer with us. I
22 provided and didn't file personal bankruptcy until 2013 because
23 of the harm that they were causing me and there was financial
24 crisis in our business. At that time, I had \$8.9 million worth
25 of assets, property, buildings, and other holdings.



1 I only owed about a million dollars in debt. My
2 Chapter 13 approval was done through bankruptcy court. I was
3 going to be done with that in 12 to 18 months. It was an
4 aggressive, fast time because we were moving forward with our
5 new facility, with business, with a storage business, with a
6 U-Haul franchise and many other properties and interests going
7 on.

8 So I'm asking the Court today to dismiss this motion
9 with the Old GM. I don't have any problem with the Old GM. My
10 case is with the New GM and my Chevrolet franchise with the
11 State of New York, Department of (indiscernible) is coming up
12 this April 23rd. And according to the motor vehicle, there is
13 an automatic stay provision on this and I would like that to be
14 honored today. And that's all I have, Your Honor.

15 THE COURT: Let me ask you a few questions,
16 Mr. Bombard.

17 MR. BOMBARD: Sure.

18 THE COURT: Did you sign the wind-down agreement?

19 MR. BOMBARD: I did.

20 THE COURT: Did New GM sign the participation --

21 MR. BOMBARD: I can address that, Your --

22 THE COURT: Stop just -- did New GM sign a
23 participation agreement?

24 MR. BOMBARD: Your Honor, on the wind-down agreement
25 there is a scribble where it has General Motors' signature.



1 And that was done after I signed it and faxed it back to them.

2 THE COURT: Sure.

3 MR. BOMBARD: On the participation agreement, I
4 signed it and faxed it back to them and that's -- that was done
5 in the time necessary to be done.

6 THE COURT: Yeah. But my --

7 MR. BOMBARD: I did.

8 THE COURT: -- my question to you is whether you have
9 a copy of the participation agreement signed by or on behalf of
10 New GM.

11 MR. BOMBARD: I do not, Your Honor. I never received
12 one back during this -- the time they were faxing back things
13 back all -- between June and -- of 2009 and March of 2010.
14 There were other requirements that we had to fax them, Your
15 Honor: your license, your insurance, your -- all that, which I
16 provided to them. And if you look at the original wind-down
17 agreement, there's a scribbled signature. I cannot tell you
18 who signed that or when it was signed or if it was ever signed
19 by them. And the second time either.

20 THE COURT: All right. Mr. Steinberg, Mr. Bombard
21 says he never received the \$128,000. Do you have any evidence
22 that he did?

23 MR. STEINBERG: Your Honor, when I sat down,
24 Mr. Davidson corrected me. The wind-down payments were paid in
25 installments so there -- Mr. Bombard did receive \$32,000. And



1 the evidence that I would have is that the letter of intent
2 agreement that was sent references the \$32,000 that he's been
3 received -- that he received.

4 THE COURT: Was he supposed to receive 32,000 or
5 128,000?

6 MR. STEINBERG: They were supposed to receive
7 128,000; 32- was the first installment. And then he was
8 supposed to receive more as and when he performed the wind-down
9 agreement. And that wasn't fully performed. So but he did
10 receive 32,000.

11 MR. BOMBARD: Your Honor, if I may interject?

12 THE COURT: Just stop, Mr. Bombard.

13 MR. BOMBARD: With the new --

14 THE COURT: Mr. Bombard? Mr. Bombard, stop. I'll
15 give you a chance to respond. I have some more questions for
16 Mr. Steinberg first. Okay? I'll --

17 MR. BOMBARD: Thank you. I'm sorry.

18 THE COURT: I do want to hear your response, but I
19 want to -- I have some questions for Mr. Steinberg.

20 Where do I look to see that he was to receive an
21 initial payment of 32,000 and that the remaining payments
22 totaling 128,000 were contingent on Mr. Bombard doing certain
23 steps?

24 (Counsel confer)

25 MR. STEINBERG: It's in the wind-down agreement



1 itself, Your Honor. They're staged payments.

2 THE COURT: And what is it that he failed to do that
3 you believe meant that he wasn't going to receive the further
4 payments?

5 MR. STEINBERG: I would have to ask Mr. Davidson. I
6 don't know the answer offhand.

7 THE COURT: Okay.

8 (Counsel confer)

9 MR. STEINBERG: Your Honor, Mr. Davidson says that he
10 doesn't know the answer. And it may be that he did receive
11 more money, but neither one of us know at this point in time.

12 THE COURT: Okay. Mr. Bombard, go ahead. What else
13 do you want to tell me?

14 MR. BOMBARD: Your Honor, as part of the moving
15 forward participation agreement, there were approximately 13
16 things that we had to provide to the New GM. One of those was
17 insurance, DMV license, and all that. And also, it was to give
18 back the \$32,000 to General Motors, and which I did. They
19 never, ever paid me \$128,000. They did advance me the 32-. We
20 paid it back as part of the 13 requirements that General Motors
21 had to do. And they still have my money today with the Old GM
22 and we provided everything that was necessary to participate
23 with the franchise with Chevrolet and move forward.

24 THE COURT: Let me ask you, when did you return the
25 \$32,000 and do you have any documents that show you did that?



1 If you did it by check, do you have a canceled check back,
2 anything --

3 MR. BOMBARD: It was an electric transfer that was
4 provided to GM and to the Court.

5 THE COURT: I haven't -- when you say provided to the
6 Court, I certainly haven't seen that. What is the --

7 MR. BOMBARD: Well, it was --

8 THE COURT: Stop, stop. No, let me finish my
9 question. Okay?

10 MR. BOMBARD: Uh-huh.

11 THE COURT: Tell me what it is you have that shows
12 that you repaid the \$32,000.

13 MR. BOMBARD: I have a deposit slip that was done
14 with the bank that we were using at that time. And everything
15 done with General Motors was electronically transferred, so we
16 have a copy of that receipt.

17 THE COURT: And when did you do that?

18 MR. BOMBARD: It would have been -- it was --

19 THE COURT: When did you repay the 32,000?

20 MR. BOMBARD: It was in March of 2010, I believe
21 around the 17th or 18th. I apologize, Your Honor. I don't
22 have it in front of me. But there was 13 other things at that
23 time that --

24 THE COURT: Sure.

25 MR. BOMBARD: -- we had to provide through fax to



1 them, which we did. And I can provide the 13 things, if you'd
2 like.

3 THE COURT: And to whom did you electronically
4 transfer the \$32,000? To which entity?

5 MR. BOMBARD: To the Old GM.

6 THE COURT: All right. Mr. Steinberg, we need to get
7 to the bottom of this. I need the -- you represented that he
8 received \$128,000 and he didn't pay it back. And now you've
9 said, no, you received 32,000 and you never repaid it. And he
10 says he did repay it.

11 MR. STEINBERG: Your Honor, we're prepared to submit
12 an affidavit to Your Honor and to supplement this record as to
13 what was paid and not paid. What I think Mr. Bombard is
14 referring to when he says the participation agreement, he's
15 really talking about performance of the letter of intent.

16 THE COURT: I'm focused right now, Mr. Steinberg --
17 you had indicated that one of the conditions under the letter
18 of intent was his return of \$128,000. Now you acknowledge that
19 he didn't receive \$128,000. And he said he did pay back the
20 28,000 (sic). There's a material --

21 MR. STEINBERG: We'll --

22 THE COURT: Stop. There is a material difference
23 that -- what you're arguing now from what you represented
24 before.

25 MR. STEINBERG: Your Honor, that's correct. And the



1 answer is I don't know whether he received the full 128- or
2 whether he received only 32-. The letter of intent that was
3 sent in March of 2010 acknowledges \$32,000 that was paid.

4 THE COURT: Acknowledges what, that he was paid
5 32,000?

6 MR. STEINBERG: That he was paid \$32,000.

7 THE COURT: Okay. And he says he paid it back.

8 MR. STEINBERG: I'm not aware of him paying back. I
9 would have to check with the client. I don't have the client
10 here.

11 THE COURT: All right. I can't decide this until
12 I -- this is a material issue of fact with respect to, you
13 know, first you tell me he was paid 128- and now you tell me he
14 was paid 32-. He says he paid it back. You don't know whether
15 it was paid back. He indicated he thinks he paid it back
16 around March 17th or 18th, 2010. That may not be the precise
17 date, but when is the hearing before the Motor Vehicle Board?

18 MR. STEINBERG: I think it's the third week of April,
19 but we would be able to submit an affidavit by Tuesday of next
20 week.

21 THE COURT: Mr. Bombard, when can you submit the
22 additional papers to me?

23 MR. BOMBARD: Your Honor, I can put all that
24 together. Today is Thursday. I could have it to your court no
25 later -- by Monday. I could FedEx it or deliver it mail-wise



1 that way.

2 THE COURT: Just bear with me. When you returned the
3 payment, why -- tell me why you returned the payment,
4 Mr. Bombard.

5 MR. BOMBARD: Because by being awarded my franchise
6 back -- because part of the participation agreement, you had to
7 provide them 13 things: a DMV license, your driver's license, a
8 surety bond, a garage liability, a payment back on the amount
9 of money that they advanced of the 31,000 or 32,000 back. That
10 was all part of the -- and continued to be in the New GM or the
11 Chevrolet dealer. I never received \$128,000 from them. They
12 still have the money today. They've never paid me.

13 THE COURT: Let me ask you, did you --

14 MR. BOMBARD: I've not --

15 THE COURT: Let me just --

16 MR. BOMBARD: Sure.

17 THE COURT: Did you do the other 12 things that
18 were -- that you say were required of you? You know, they say
19 there were --

20 MR. BOMBARD: I did.

21 THE COURT: -- 13 things, one of which was the
22 \$32,000. Did you do the other things?

23 MR. BOMBARD: Yes, I did, Your Honor.

24 THE COURT: Do you have any evidence of that, the --
25 you know, the copies of what you --



1 MR. BOMBARD: Yes, I -- I have --

2 THE COURT: Let me -- Mr. Bombard, just stop for a
3 minute. Let me finish my question. Okay?

4 MR. BOMBARD: Uh-huh.

5 THE COURT: Was there a transmittal or something --
6 letter in which you submitted the other items that you were
7 required to submit?

8 MR. BOMBARD: They were faxed to General Motors, Your
9 Honor, and that probably would have been --

10 THE COURT: Okay. Do you have --

11 MR. BOMBARD: And they were faxed to them, and I have
12 the faxes --

13 THE COURT: Okay.

14 MR. BOMBARD: -- and the proof.

15 THE COURT: Include that with the materials that you
16 send to the Court. Okay? And copy Mr. Steinberg --

17 MR. BOMBARD: Okay.

18 THE COURT: -- as well with it.

19 MR. BOMBARD: Okay.

20 THE COURT: All right?

21 MR. BOMBARD: Yes.

22 THE COURT: Here's what I'm going to do. I'm going
23 to continue this hearing because I want to make sure I'm ruling
24 on a full record. Let me ask, are both sides available for
25 hearing -- and, Mr. Bombard, you can again participate on



1 telephone -- on Thursday, April 12th --

2 MR. STEINBERG: I am, Your Honor.

3 THE COURT: -- at 10 a.m.?

4 MR. STEINBERG: Your Honor, would it be all right --

5 THE COURT: No. Let me hear from Mr. Bombard first.

6 MR. STEINBERG: Sure.

7 MR. BOMBARD: Yes, Your Honor, I am available.

8 THE COURT: Okay. So I'm going to adjourn this
9 hearing to Thursday, April 12th at 10 a.m. Mr. Steinberg,
10 arrange a CourtCall call-in number so that Mr. Bombard can call
11 in rather than appear in person and advise Mr. Bombard of the
12 call-in instructions.

13 I would like the -- any additional documents that
14 either side is going to provide. Mr. Bombard, you're going to
15 provide me with whatever evidence you have of the 13 items that
16 you believe that you did to satisfy the participation
17 agreement. I'm going to set Thursday, April 5th as the
18 deadline. I know you said --

19 MR. STEINBERG: Thank you.

20 THE COURT: -- you thought you could get it done more
21 quickly than that, but I want to be sure that you have enough
22 time to get the materials together, Mr. Bombard. And what I
23 would ask you to do is FedEx it to the -- or, you know, some
24 fast delivery service to the Court so that we get it with a
25 copy to Mr. Steinberg. Okay? So I want all of -- both sides'



1 additional submissions by Thursday, April 5th at 5 p.m. Okay?

2 That's the deadline. Okay?

3 MR. BOMBARD: Yes.

4 THE COURT: And we'll do the telephone hearing --
5 telephone for you -- Mr. Steinberg, if you would be here, or
6 Mr. Davidson, whoever is going to cover it -- for Thursday,
7 April 12th at 10 a.m.

8 MR. STEINBERG: Your Honor, just to be clear here so
9 that the terminology is correct, there is a participation
10 agreement that is unsigned dated June -- that appears to have a
11 date of June 1, 2009, and then there's a letter of intent that
12 is the March 2010 document. I think that the questions that
13 you're asking was the -- whether the letter of intent was
14 performed or not performed and the conditions for the letter of
15 intent. I know we've used the term "participation
16 agreement" --

17 THE COURT: Right.

18 MR. STEINBERG: -- but I want to make sure that we do
19 that. And obviously the letter of intent had, as Mr. Bombard
20 has acknowledged, assigned from the return of the payment
21 another set of conditions as well, too. So what we will be
22 submitting is documents related to the performance or not
23 performance of that letter of intent. And we will include in
24 that the letters of termination of the letters of intent and
25 the termination of the wind-down agreement so that Your --



1 which is already in the record, but Your Honor will have it at
2 one point in time.

3 THE COURT: All right. By that deadline, I will
4 allow each side to submit an additional memorandum if they wish
5 to explain what it is that's being submitted and how it bears
6 on the issue before me. Okay? Do you understand, Mr. Bombard?

7 MR. BOMBARD: I do.

8 THE COURT: Okay. Mr. Steinberg?

9 MR. STEINBERG: Thank you.

10 THE COURT: Okay. I just want to be sure I have a
11 full record because there's --

12 MR. STEINBERG: I appreciate that. And --

13 THE COURT: -- there's obviously a disconnect to --

14 MR. STEINBERG: No. I apologize. Obviously, I wish
15 I had a client here to ask the questions that Your Honor has.
16 I just don't know the answer.

17 THE COURT: That's fine. I want to try and resolve
18 this quickly. I understand there's a hearing date on the motor
19 vehicle board and I'm definitely going to rule in advance of
20 that, but I want to make sure I have a full accurate record.
21 Okay?

22 MR. STEINBERG: Appreciate that.

23 THE COURT: All right. Mr. Bombard, you're excused.

24 MR. BOMBARD: Your Honor?

25 THE COURT: Yes? Go ahead, Mr. Bombard.



1 MR. BOMBARD: I have two questions. I would like to
2 make sure that they provide me New GM paperwork for Chevrolet
3 dealers moving forward. That is critical in what they ask me
4 to provide so that you understand that the Old GM is gone and
5 I'm dealing with the New GM. And I don't understand the
6 reasons that -- excuse me -- that, you know, I'm -- the time
7 essence is so critical because of my hearing with the
8 Department of Motor Vehicles. And I don't want to miss that.
9 And that's why I'm asking the Court, you know, for its help in
10 that matter.

11 THE COURT: Okay. I think I'm going to have to --
12 just bear with me. My courtroom deputy handed me a note that
13 on April 12th at 10 a.m. I do have a scheduling conflict. So
14 we're going to -- are you each able to do it on April 12th at
15 3:00 p.m. rather than at 10:00 a.m.?

16 MR. STEINBERG: I am, Your Honor.

17 THE COURT: Mr. Bombard?

18 MR. BOMBARD: I am, Your Honor.

19 THE COURT: All right. So Thursday, April 12th at
20 3:00 p.m. I have a meeting at the -- my courtroom deputy has
21 reminded me I have a meeting at the circuit in the morning.
22 Okay?

23 MR. STEINBERG: Your Honor, just --

24 THE COURT: Go ahead.

25 MR. STEINBERG: Just one other thing. And certainly



1 Your Honor gets what he wanted to get, clarity on this. There
2 are rights that Mr. Bombard may be asserting under this June 1,
3 2009 agreement, and we're not trying to supplement that. We
4 are focused on the letter of intent of March of 2010, and
5 whether there was performance and a proper termination of that
6 letter of intent. I don't know whether Mr. Bombard is talking
7 about activity after the termination of that letter of intent
8 based on what he believes were understandings that he had with
9 New General Motors pursuant to something. I mean, the reality
10 is that he has not been a dealer for GM since 2009. He hasn't
11 sold GM cars since 2010 when the wind-down agreement was over.

12 So I don't know what he's talking about. His papers
13 did refer to some kind of new agreement that was going to be
14 renewed, but there was no document that was attached to that
15 other than the June 1, 2009 participation agreement. We, in
16 our papers, have just addressed the letter of intent issue with
17 Your Honor. I don't know what Mr. Bombard is going to do, but
18 I do hear from his comments that there may be something more or
19 something different than just the focus on that letter of
20 intent.

21 THE COURT: Okay. The thing that threw me for the
22 loop today, Mr. Steinberg, is you said he got paid, and he said
23 he sent it -- first you told me 128,000. Then you changed it
24 to 32,000. And he says he has evidence that he paid it back.
25 You haven't had a chance to respond to that, but, you know, I'm



1 obviously somewhat perplexed about if Old GM or New GM got the
2 \$32,000 back and never -- so he doesn't -- he's got nothing.
3 He doesn't have the money he was -- he says, and you'll have a
4 chance to respond to it.

5 It raises a question about why. What did he think he
6 was doing when he sent the money back? If he sent the money
7 back, if it was in connection with the letter of intent, and he
8 says he complied with the other requirements of it, and did --
9 was he told, no, you didn't comply, and so here's your \$32,000
10 back, or was the 32,000 accepted, and what's the consequences
11 of that.

12 MR. STEINBERG: We'll address that another time.

13 THE COURT: Okay. And so, Mr. Bombard, I want to
14 give you a -- I want to be sure -- I want to see the documents
15 that you have. But I want to see -- if you have some further
16 explanation you want to provide, I want to be sure you have a
17 chance to do that. You'll have a chance to appear by telephone
18 again and tell me, but -- okay?

19 MR. BOMBARD: Yes, Your Honor.

20 THE COURT: All right. Thank you very much. All
21 right. So you're excused, Mr. Bombard. We're going to
22 continue on with our hearing on another New GM Matter. Okay.
23 So --

24 MR. BOMBARD: Thank you.

25 THE COURT: Thank you very much, Mr. Bombard. We're



1 going to move forward now with the motion by General Motors,
2 LLC to enforce the sale order with respect to the Moore case in
3 Michigan.

4 MR. STEINBERG: Again, good morning, Your Honor.

5 THE COURT: Let me get the appearances from both
6 sides of this.

7 MR. STEINBERG: Arthur Steinberg and Scott Davidson
8 on behalf of New General Motors.

9 MR. MEMMEN: Good morning, Your Honor. Alex Memmen,
10 M-E-M-M-E-N, here on behalf of the Moore plaintiffs.

11 THE COURT: Thank you. Just give me a second,
12 Mr. Steinberg. Go ahead, Mr. Steinberg.

13 MR. STEINBERG: All right. Your Honor, I'd like to
14 sort of focus in as to the areas of the dispute because there
15 are areas of agreement that we have. They're -- New GM, under
16 the sale agreement and pursuant to the sale order of 2009,
17 agreed to assume liabilities relating to environmental laws.
18 So contained in the Moore complaint, there are counts that we
19 believe are covered by the assumed liabilities, and therefore
20 that the litigation at some point will go forward in the
21 District Court of the Eastern District of Michigan on Counts 1,
22 2, 8, and 9 of the Moore amended complaint.

23 THE COURT: Let me stop you there and ask you some
24 questions. Okay? When you say that New GM assumed liability
25 under environmental laws, I want to probe that further to make



1 sure I understand. So let's assume that Old GM poured benzene
2 into the ground, and it went down into the groundwater and
3 migrated to adjacent properties. And environmental regulators
4 don't impose a cleanup obligation until after -- post sale. Is
5 New GM obligated to remediate the environmental contamination
6 from benzene that migrated off the property?

7 MR. STEINBERG: I assume the property was transferred
8 to New GM pursuant to the sale.

9 THE COURT: Yes, it was.

10 MR. STEINBERG: The answer's yes.

11 THE COURT: Okay. And what's the reason for that?

12 MR. STEINBERG: Because New GM agreed to comply with
13 environmental laws as the owner of the property. It has the
14 responsibilities of an owner having had the property
15 transferred over to it. And I think the sale agreement does
16 provide for that. There was -- this issue did come up
17 specifically at the sale hearing. The Michigan Department of
18 Environmental Quality were one of the people who had
19 objections. The State's Attorney Generals had objections.
20 They wanted to clarify that New GM would be a good citizen and
21 comply with the environmental laws going forward.

22 THE COURT: But that's -- I just wanted to be clear
23 that it included -- the assumed liability includes remediation
24 for environmental contamination that occurred on Old GM's
25 watch.



1 MR. STEINBERG: Correct.

2 THE COURT: Okay.

3 MR. STEINBERG: And it would also, I think, cover the
4 cost incurred by, in this case, the plaintiff, if they had any
5 things to remediate the environmental situation.

6 THE COURT: So if they're -- if any of the plaintiffs
7 were obtaining their water from a well on their property, and
8 the well was contaminated in some fashion attributable to Old
9 GM, New GM assumes liability for remediation of the
10 environmental harm?

11 MR. STEINBERG: Yes. I think they -- I think that's
12 correct, Your Honor, but I'm not a practicing environmental
13 lawyer. The term that was used to me was "response cost,"
14 which is a defined term under environment law, and it's
15 supposed to cover cost incurred to remediate the contamination.
16 So that's what we agreed to.

17 If Your Honor was trying to sort of understand why
18 we're fighting over what's an assumed liability -- and what
19 they've admitted was a retained liability, but believe they
20 should be able to assert it because of an alleged due process
21 violation. Is that on the causes --

22 THE COURT: I'm not focusing on a due process
23 violation. I'm focusing on -- what I'm -- my questions now are
24 -- I want to be sure I understand what are assumed liabilities
25 under the sale agreement. That's -- for now, that's where my



1 focus is. I may have some questions later about due process,
2 but I'm not sure whether I do. Okay.

3 MR. STEINBERG: And, you know, the sale agreement was
4 written in a tight timeframe, and then there was negotiations
5 over it. But the relevant provision as to why we believe that
6 certain counts of the Moore amended complaint are retained
7 liabilities is found in section 2.3(b)(4)(C) of the sale
8 agreement. And I actually don't think that they disagree with
9 the -- that there are counts that are technically retained
10 liabilities.

11 And the section that I just referred to says that New
12 GM is not assuming liabilities, quote, "Arising out of, or
13 relating to, or in respect of, or in connection with
14 third-party claims relating to hazardous materials that were or
15 are located or that were released into the environment from
16 transferred real property prior to the closing, except as
17 required under applicable environmental laws." So --

18 THE COURT: Except as otherwise required under
19 applicable --

20 MR. STEINBERG: Under applicable --

21 THE COURT: -- environmental laws.

22 MR. STEINBERG: -- environment laws, right. So what
23 the parties were trying to do there was that -- to the extent
24 that there was claims for fraud that they said Old GM committed
25 by not disclosing a contamination --



1 THE COURT: That's not where my questions are right
2 now. Okay? I'm -- specifically, my focus is on claims for
3 personal injury or property damage resulting from contamination
4 when this property -- you know, that migrated off the proving
5 ground when it was owned by Old GM. And I've been struggling
6 to reconcile various provisions of the sale order.

7 So I have open in front of me all of Section 2.3, and
8 I see in 2.3(a)(viii), assumed liabilities are all liability --
9 quote, "All liabilities arising under any Environmental Law; A,
10 relating to conditions present on the transferred property,
11 other than those liabilities described in Section 2.3(b)(iv)."
12 Its goes on from there, but I'll stop there.

13 Okay. So then I looked at 2.3(b)(iv), and, let's
14 see, what does that carve out? What's the "retain liabilities"
15 that 2.3(b)(iv) carves out? It's all liabilities associated
16 with non-compliances with environmental laws including fines,
17 penalties, damages, remedies. And then (C), arising out of,
18 relating to, in respect of, or in connection with third-party
19 claims related to hazardous materials that were or are located
20 at, or that migrated or may migrate from, any transferred real
21 property, except as otherwise required under applicable
22 environmental laws.

23 So if one of Mr. Memmen's clients owned property --
24 owns property, and their well is contaminated by salt -- and
25 let's assume it was -- I know that, at least for a long time,



1 Old GM/New GM denied that it was from salt that was spread on
2 the roads or wherever, and said it was somehow in the ground.
3 Let's assume it was because a lot of salt was used and it got
4 into the groundwater and migrated. I'm trying to -- so you're
5 -- you've acknowledged that New GM assumed liability for
6 response costs to remediate the harm. Okay. But you're now
7 telling me it didn't assume liability for personal injury or
8 property damage, although I would think that the contaminated
9 well, isn't that property damage?

10 MR. STEINBERG: Property damage in the way that they
11 argued that their overall real property was reduced in value
12 because of the aura of --

13 THE COURT: So where do I -- how do I parse these
14 sections to say, yes, assume liability or remediation; no,
15 assume liability or personal injured? Let me stop at personal
16 injuries.

17 MR. STEINBERG: Yeah. There is -- Mr. Davidson
18 pointed out to me there was a generic provision in the retained
19 liabilities in Subdivision 11, which is not specifically tied
20 to environmental laws, but says all liabilities to third
21 parties for claims based upon contract, tort, or any other
22 basis, but --

23 THE COURT: Well, I would've thought that somebody
24 whose well had been contaminated would have a tort claim.

25 MR. STEINBERG: That's --



1 THE COURT: Look, let me drill down further, okay.
2 I've been poring over definitions and -- so on page 4 of your
3 memorandum of law, you quote section -- you quote the retained
4 liabilities, 2.3(b)(iv), which we've just been looking at. And
5 actually the carryover sentence from page 3 of the memorandum
6 of law, you have footnote 6 that's on the bottom of page 4.
7 And you say environmental law -- I won't read the whole thing.
8 You define -- you quote what environmental law is. And then
9 you quote the definition of law. So defined terms in the
10 agreement are capitalized, right?

11 MR. STEINBERG: Right.

12 THE COURT: And you define law, and this has me
13 really curious and confused. The term Law is defined in the
14 sale agreement as, quote, "Any and all applicable United States
15 or non-United States federal, national, provincial, state, or
16 local laws, rules, regulations, directive, decrees, treaties,
17 statutes, provisions of any constitution, and principles,
18 including principles of common law, of any Governmental
19 Authority, as well as any applicable Final Order," referring to
20 sale agreement page 11.

21 Okay. So I look at -- you've got the definition of
22 environmental law, and I look at page 7 of the sale agreement,
23 the definitions -- it's ECF 2968-2, page 12 of 132. And I see,
24 okay, there's the definition of environmental laws, and that in
25 turn has hazardous materials as a defined term. Okay. And,



1 you know, you have this, what I thought was a curious sentence,
2 going back to page 4. After defining law, you said, "The
3 common law claims asserted by the Moore plaintiffs are not
4 principals of a governmental authority. There are third-party
5 non-governmental authority claims." No citation. What is
6 that?

7 So I go look at the definition of governmental
8 authority on page 9 of the definition, 14 of 132 of the sale
9 agreement. Governmental authority means any United States or
10 non-United States federal, national, provincial, state or local
11 government, or other political subdivision thereof; any entity,
12 authority, agency, or body exercising executive, legislative,
13 judicial regulatory or administrative functions. It goes on.

14 So I guess my question is, is New GM liable for
15 violation of Michigan common law? Has it assumed liability for
16 Michigan common law with respect to environmental claims? So,
17 you know, it sent me off to read Michigan Supreme Court cases.
18 In Michigan, for -- a lot of the cases are common law nuisance.
19 The Michigan Supreme Court has dealt with liability for common
20 law nuisance because of environmental contamination. And
21 what's not clear to me, Mr. Steinberg, is your last sentence in
22 footnote 6.

23 MR. STEINBERG: I think the --

24 THE COURT: The last two sentences. You know,
25 governmental authority includes a court, and courts -- the



1 Michigan Supreme Court spells out Michigan common law. And
2 whether it's trespass or common law nuisance, those are two
3 common law claims typically, in many states, applied to
4 environmental -- to personal injury and property damage
5 resulting from environmental contamination.

6 MR. STEINBERG: I think, Your Honor, what was meant
7 to -- said, and hopefully we had said it, was that the common
8 law principles have to be asserted by the governmental
9 authority itself.

10 THE COURT: I don't see that. That's what you need
11 to be able to -- it doesn't say the common law principles have
12 to be asserted by a governmental authority.

13 MR. STEINBERG: Well, the common law principles in
14 the definition of law is the -- in the parenthetical is
15 describing principles. But then you go outside of the
16 parenthetical and it -- the overall covering is of any
17 governmental authority.

18 THE COURT: No. Well, that -- and that -- and
19 governmental -- that's what sent me to look -- you didn't
20 define governmental -- you didn't give me the definition of
21 governmental authority, so I went and found it.

22 MR. STEINBERG: Right.

23 THE COURT: That's on page 9, 14 of 132.

24 MR. STEINBERG: Right.

25 THE COURT: And coming through that language means --



1 governmental authority means any state body that carries out
2 judicial functions. That's what courts do. They define common
3 law. The Michigan Supreme Court has, you know, cases that deal
4 with the application of Michigan common law for environmental
5 harm, personal injury, property damage, based on the cases I
6 read. I didn't go further -- nuisance. Okay.

7 MR. STEINBERG: Well, Your Honor --

8 THE COURT: And so I'm having problems,
9 Mr. Steinberg. I don't -- you know, and I'll tell you, look,
10 this is the first time I've had to delve quite so deeply into
11 Michigan law, but there's a reported decision of mine in In re
12 Oldco M Corp., 438 B.R. 775 (Bankr. S.D.N.Y. 2010). It's --
13 you know, it's different. It was -- the Michigan Department of
14 Natural Resources and Environment appeared in the Metaldyne --
15 Oldco M was Metaldyne. This is in the same time period that
16 the auto companies were going to go bust.

17 Metaldyne was a big tier-one auto parts supplier. It
18 had factories in Michigan. And the MDNRE had claims. The
19 purchase agreement -- the site that was involved in this claim
20 was acquired by the buyer, 363 buyer, and on page -- at 448
21 B.R. 779, note 5, I quote the definition of environmental
22 liabilities in that purchase agreement. A little different
23 than here, but in that same footnote, I quote from the purchase
24 agreement what environment law means. They used the same term,
25 "environmental law." And it included -- including common law.



1 It didn't have the language that the GM sale
2 agreement has at the end about governmental authority, but I'm
3 reading it in the context -- it looks to me that governmental
4 -- the reason it has governmental authority, because you
5 assumed liability, whether it's Canada or the U.S. or some
6 other country. If New GM acquired a plant on the border -- in
7 Michigan on the border with Canada, and it contaminated
8 property in Canada, and Canada law, either statute or common
9 law, provided remedies, it looked to me that that's what you
10 were -- that's why you didn't just -- that's why you used
11 governmental authority, because it means United States or
12 non-United States, and that includes judicial.

13 So I don't know. I'm -- I don't know whether this
14 issue has come up in GM before, so I'm struggling in that. But
15 I'm trying to reconcile that with what are the retained
16 liabilities. And so another question. You know, in
17 2.3(b) (iv) (C), which you quoted and which I've read, I started
18 asking about what's the "Except as otherwise required under
19 applicable environmental law." I don't know whether
20 environmental law is limited solely to statute or whether it
21 includes common law. Because environmental law means any law.
22 That said, okay, what's a law? Okay. So I went to the
23 definition of a law.

24 MR. STEINBERG: Your Honor, I think that -- I
25 appreciate the struggle that you're having. I think the clear



1 intent of the parties was that with respect to third-party
2 claims, that they would not be able to be asserted against New
3 GM for essentially Old GM conduct, unless it fell within the
4 general category of remediating the property or paying for
5 response costs.

6 THE COURT: Where do I find that?

7 MR. STEINBERG: Well, I --

8 THE COURT: You've acknowledged that it includes the
9 cost of remediating the property, and that's what -- one of the
10 things I struggle to see. How do you -- what is it that
11 separates out -- you assume liability for remediating property,
12 whether the contamination was post sale because salt continued
13 to migrate through the groundwater or not. I don't know.
14 That's what I -- I'm -- I've been -- I'm struggling with this.

15 MR. STEINBERG: The -- obviously, the -- if the
16 broader interpretation that environmental law would cover
17 anything judicial, which would pick up anything common law,
18 then that would totally swallow the exception that was created.

19 THE COURT: I didn't draft this agreement.

20 MR. STEINBERG: I understand.

21 THE COURT: You didn't either. I understand.

22 MR. STEINBERG: I actually didn't draft it, either,
23 but --

24 THE COURT: I know. I know that.

25 MR. STEINBERG: -- but the argument is that the --



1 that there was clearly an intention to carve out something.
2 And frankly, in the context of this case, they haven't
3 quarreled with the notion that these are retained liabilities.
4 They just don't think they have to comply with them, so they
5 haven't contested and struggled. Maybe they will now, but they
6 hadn't up to this point struggled with it the way Your Honor
7 has.

8 On this here, it is a little consistent with -- if
9 you had to think of an analogy area about how this agreement
10 worked, assume liabilities for accidents that take place after
11 the sale relating to Old GM vehicles. Judge Gerber wrote a
12 decision as to what was actually assumed and what wasn't
13 assumed. And one of the things that he determined in his
14 November 2015 decision/December 2015 judgment was that fraud
15 claims, Old GM fraud claims, those aren't covered by the
16 assumed liabilities because there was clearly an intent for New
17 GM to pay, in effect, compensatory damages for a post-sale
18 accident, but not to pick up some ancillary stuff.

19 THE COURT: I -- let's assume that I agree. I don't
20 know whether I do or not, but let's assume I agree that fraud
21 claims are not covered. My -- I'm focusing on persona injury
22 or property damage to adjacent property owners resulting from
23 migration of contaminants before -- migration before the sale
24 to New GM.

25 Let me ask you a different question. What's your



1 position with respect to whether New GM would have liability to
2 third parties, adjacent property owners, or injury -- personal
3 injury claims resulting from the post-sale migration of
4 contaminants that were dumped when Old GM owned the property?

5 Let's assume -- I mean, they allege that New GM
6 continued to use salt and continued to contaminate, but so for
7 this question I'm asking you to assume New GM stopped. There
8 was no further dumping of salt or it was reduced, or what have
9 you.

10 Groundwater -- once the problem -- groundwater
11 contamination is insidious. It tends to move from high
12 gradient to low gradient in -- I've actually litigated these
13 cases. You contract the plume -- and I know there's a dispute
14 about what direction the plume was going off the proving
15 ground. That's not for me to decide. The allegation is it did
16 migrate.

17 What's your view as to whether New GM assumed
18 liability -- well, not assumed, whether New GM, as the property
19 owner, is liable for personal injury or property damage
20 resulting from the continued migration of contaminants from the
21 proving ground property post-closing, post-sale?

22 MR. STEINBERG: Your Honor, I want to give you an
23 answer, but I want to make sure I understand the question,
24 because I thought two minutes before the final words you were
25 talking about that it stopped totally.



1 THE COURT: No. I want you to assume that they
2 stopped dumping.

3 MR. STEINBERG: Stopped dumping.

4 THE COURT: Okay? The problem is, and once it gets
5 into the groundwater, the groundwater keeps migrating. It goes
6 from high gradient to low gradient. Okay? Do you follow me so
7 far in my assumption?

8 In your papers, you agree if New GM continued dumping
9 -- it's not dumping. Continued using salts that got into the
10 groundwater that migrated, you're not asserting that New GM
11 wouldn't be liable for that, right?

12 MR. STEINBERG: Right.

13 THE COURT: Okay. That's why I said assume that New
14 GM wasn't dumping more, wasn't putting out more contaminants.

15 MR. STEINBERG: I mean, I think, Your Honor, if there
16 is personal injury that was caused by an Old GM conduct review,
17 GM hadn't done anything, and it's a third-party claim, our
18 position is that it is not GM's liability.

19 THE COURT: Okay. I think you're wrong, but that's,
20 you know --

21 MR. STEINBERG: But to say something further is that
22 if the migration took place after the sale, not caused by New
23 GM but just because of the rate and water flow, that under the
24 sale agreement you did have an obligation to rectify that
25 issue, rectify the problem, comply with the environmental law,



1 and to pay for any expense that the homeowner had in trying
2 itself to rectify the problem.

3 THE COURT: But let's assume that the guy next door
4 gets sick and can show that it resulted from post-sale
5 migration of contaminants into his well. He drank the water.
6 He got sick. The contaminants were dumped by Old GM, but New
7 GM owns the property. In your view --

8 MR. STEINBERG: It's a good question. I do have my
9 -- the environmental lawyer, Mike Caldwell, who is on this
10 phone call. I have never discussed it with him. It looks to
11 me like this is somewhat analogous to, in the product area
12 where I've had more discussions with more lawyers about, you
13 know, sort of a duty to warn post-sale. You didn't do
14 anything, but you became aware of an issue, and do you have a
15 responsibility or not? And --

16 THE COURT: Mr. Caldwell, are you on the phone?

17 MR. CALDWELL: I am, Your Honor.

18 THE COURT: All right. What is your -- and just
19 identify yourself a little further than your last name.

20 MR. CALDWELL: Again, Michael Caldwell from the law
21 firm of Zausmer August & Caldwell. I practice here in Michigan
22 primarily as an environmental attorney.

23 And I think one of the issues that the Court is
24 focused on and perhaps could use some clarification, under
25 Michigan and also federal and, to my knowledge, the



1 environmental statutes of other states, you can't recover
2 personal injury damages, emotional distress damages, or
3 property value diminution, or damage to property under the
4 environmental statutes, including the --

5 THE COURT: I have looked at your -- I have some
6 familiarity with it and looked again at the Michigan
7 Environmental Protection Act, which I think was one of the
8 first state --

9 MR. CALDWELL: Yeah.

10 THE COURT: -- acts that did that. And I understand
11 it creates remedies for injunctive or other equitable relief.
12 I don't know anything in the statute that provides for personal
13 injury or property damage. But as I understand it, most of
14 those claims for personal injury and property damage arise from
15 the common law claims, nuisance, for example. True?

16 MR. CALDWELL: Correct. That's where if you want to
17 recover property value diminution or personal injury, those
18 types of monetary damages are only recoverable under common law
19 claims.

20 THE COURT: All right. So my question is, did GM --
21 in the hypothetical I give, if the contaminants were -- if the
22 groundwater was contaminated by Old GM, and the contamination
23 migrated off the property after New GM owned it, and adjacent
24 property owners suffered personal injury, is New GM liable for
25 those personal injury claims?



1 MR. CALDWELL: They would not be under any of the
2 environmental statutes.

3 THE COURT: Well, I understand environmental
4 statutes, but my question is broader. You have acknowledged
5 that claims for nuisance, personal injury, or property damage
6 is recoverable on claims for nuisance. And so would a -- would
7 someone who became ill from post-sale migration of contaminants
8 be able to recover from the property owner, New GM, for
9 personal injuries resulting from the migration of contaminants
10 post-sale?

11 MR. CALDWELL: Typically, migration of groundwater
12 contamination that the release has occurred before the current
13 owner who owns the property, under nuisance there is -- you
14 typically don't have liability. For instance, under nuisance
15 there's lack of control. You know, the release has already
16 occurred, and the continuing migration does not constitute a
17 new release.

18 And in the various other -- and then under trespass,
19 there is -- in Michigan there is no cause of action for
20 trespass with regard to groundwater contamination. And --

21 THE COURT: So let's just talk about nuisance then.
22 Are there any cases that support what you've just told me?

23 MR. CALDWELL: Yes. I can't -- I'm not sure I could
24 pull them off the top of my head, but dealing with the lack of
25 control, I believe there are.



1 THE COURT: Well, you control the property after you
2 buy it. And if the migration of contaminants occurs after you
3 buy it, don't you control it?

4 MR. CALDWELL: If there is an ability to stop
5 migration off your property, there could be, subject to
6 technical and practical limitations.

7 THE COURT: So when I litigated these cases before I
8 became a judge, the typical way that you dealt with it was you
9 -- first, you drilled monitoring wells to track the plume, and
10 you drilled pumping wells to remove the contaminated
11 groundwater, so that it wouldn't continue to migrate. Is that
12 generally correct?

13 MR. CALDWELL: Yeah. Pump and treat is one of the
14 tools in your toolbox, yes.

15 THE COURT: All right. And so has that -- either
16 Mr. Steinberg or your colleague, what has happened since New GM
17 bought the property? I mean, is the groundwater being treated?
18 Is pump and treat being done? Is there other steps being done
19 to prevent continued migration of contaminated groundwater? On
20 this site.

21 MR. STEINBERG: Mike, do you want to start with that?
22 I can answer part of the question, but you may have a more
23 complete response.

24 MR. CALDWELL: Your Honor, I have not been involved
25 in the remediation efforts and the investigation efforts that



1 took place prior to the lawsuit being filed. That was, you
2 know, the start date for my involvement. I know bottled water
3 has been offered. I mean, all -- sodium and chloride is -- you
4 know, these are naturally occurring substances, and it would
5 be, in my experience, somewhat unusual for this type of
6 situation to be solved by pump-and-treat type remediation.

7 Typically, point of service treatment system,
8 alternative water that has been supplied to the plaintiffs and
9 others in that neighborhood, is the more typical remedy. But
10 I'm not sure, beyond those types of alternative water supplies,
11 what affirmative remedial efforts. I think it's still in the
12 investigation stage.

13 THE COURT: I guess, Mr. Steinberg, the issue of
14 whether New GM would be liable for personal injury or property
15 damage for post-sale migration would be for the District Court
16 in Michigan where the case is pending. That wouldn't be --
17 would you agree that wouldn't be a Bankruptcy Court issue under
18 the sale order?

19 MR. STEINBERG: I think that that's correct.

20 THE COURT: Okay. So we can --

21 MR. STEINBERG: I will say, Your Honor, that this has
22 obviously been a challenging and interesting dialogue that you
23 have on this question. The one variable that I would just
24 overlay on your conversation with Mr. Caldwell was that the law
25 of a new property owner taking over the property and its



1 responsibility does have the overlap of this bankruptcy sale
2 order and the attempt to try to cabin some of these liabilities
3 as being retained liabilities.

4 I know you're struggling with exactly what was
5 cabined, and the example that you gave is an example that under
6 the construct of how we've thought about retain liabilities,
7 assume liabilities, and independent claims. You have raised
8 the issue as to whether where New GM was not responsible for
9 any further problems relating to --

10 THE COURT: Well, when you say not responsible, you
11 may be responsible for --

12 MR. STEINBERG: I'm just saying --

13 THE COURT: -- for contamination migrating off the
14 property, whether you dumped it. You obviously --

15 MR. STEINBERG: I'm was trying to say that part, that
16 New GM didn't dump anything, didn't have an obligation as the
17 property owner. That would be an independent obligation, an
18 independent claim. And I think Your Honor has been fairly
19 consistent that, if properly pled, the issue of whether
20 something is an independent claim or not is something for the
21 other Court to determine.

22 THE COURT: So here, look, there are things in their
23 amended complaint that I think kind of foul up the sale order.
24 Pleading the conduct of Old GM in conduct that resulted in --
25 if it did, in salt contamination -- I know it's not for me to



1 decide. It's disputed whether it was naturally occurring salt
2 or whether it's the result of the amount of salt that they put
3 on the roads in surrounding areas.

4 That all seems to me to be proper from the standpoint
5 of, well, is New GM -- if contamination continued to migrate
6 up, if the contamination resulted from Old GM's conduct, you've
7 got to say, what did Old GM do? It dumped a lot of salt. And
8 a Court -- not this Court I think -- is going to have to decide
9 whether if there was continued migration of salt and it caused
10 injury, personal injury or property damage, whether that
11 post-sale -- that gives rise to liability for New GM.

12 So I'm not troubled by allegations, detailed
13 allegations about, here's what Old GM did. New GM bought the
14 property. They do say there has been this continued migration
15 of contaminated groundwater.

16 So to understand, how did it become contaminated,
17 when did it become contaminated, is it still migrating, has the
18 continued migration caused personal injury, property damage,
19 and it may be essential to assert independent claims against
20 New GM. It may raise the issue, well, is New GM supposed to do
21 something about it? It owns the property. According to their
22 allegations, there is continued migration of contaminated
23 groundwater.

24 So I'm not bothered by those allegations. There are
25 punitive damage allegations, other things, you know, is a



1 non-starter as far as I'm concerned. But the fact that they've
2 pled a lot about Old GM and conduct, and the consequences of
3 Old GM conduct, you know, at some point I have to go through
4 and parse, okay, this paragraph is okay, this paragraph is not.

5 But generally speaking, if you're trying to excise
6 all allegations about Old GM, I don't think that's going to
7 work.

8 MR. STEINBERG: I don't think we were, Your Honor.
9 And, in fact, if this was just a pleading exercise of how to
10 properly plead an independent claim, I'm somewhat confident
11 that I could have probably talked through those issues with my
12 adversary.

13 The reason why I think we're in Court today is that
14 which we think are retained liabilities, which I think that
15 they acknowledge are retained liabilities, whether they have to
16 comply with that, whether we're allowed to, in effect, exercise
17 sort of a self-help remedy and decide that there was a
18 violation. And that's what really --

19 THE COURT: I agree with you on that. Okay?

20 MR. STEINBERG: And that's what brought us to Court.

21 THE COURT: Mr. Menli (phonetic) is going to have a
22 problem with me on that score. He can't use self-help, go to
23 another Court in another place, and simply do something
24 contrary to the sale order. Okay? I enforce the sale order.

25 MR. STEINBERG: And while Your Honor has identified



1 an interesting hypothetical about assume New GM totally stopped
2 doing anything, that's actually not what they have alleged.
3 They have alleged the --

4 THE COURT: You continue to do it.

5 MR. STEINBERG: -- that we continue to do it. We had
6 said that, you know, as a technical matter, when you repeat and
7 re-allege, for purposes of the independent claim, some of it is
8 background. You have to put in the background. But some of it
9 is the actual averment. And when you have a fraud count, and
10 the only thing that you're alleging is the fraud count, is a
11 2007 statement about the water flow, that seems to be relying
12 on Old GM conduct.

13 The issue really was is that once someone takes the
14 position that they don't have to comply with the sale order,
15 it's hard to have a discussion with them on the pleading
16 because they don't really care about whether they're pleading
17 in accordance with the sale order or not anymore.

18 THE COURT: I am going to want a supplemental brief
19 regarding common law liability under Michigan law. Okay.

20 Generally, the environmental -- my familiarity with
21 the environmental statutes is they don't create personal --
22 they don't create liability for personal injury/property
23 damage. Michigan allows -- provides broad standing for
24 equitable relief under the Michigan Environmental Protection
25 Act. But that's -- the real issue here are the personal



1 injury/property damage claims.

2 Go ahead and address the due process issues, if you
3 would.

4 MR. STEINBERG: I'm sorry?

5 THE COURT: The due process issues.

6 MR. STEINBERG: Due process. Your Honor, on the due
7 process issues, I take it I can skip over the seller tax and
8 compliance with the seller?

9 THE COURT: You can.

10 MR. STEINBERG: So on the due process issue, there
11 are three parties that are relevant to look at, besides Old GM,
12 when looking at the due process issue. What did the developer
13 of the property know about the issue relating to salt at the
14 property prior to the sale? What did the environmental agency
15 know about the issue about salt prior to the sale? And what
16 did the homeowners know about the issue of salt related to the
17 sale?

18 And then overlaying on top of that is the issue that
19 the Second Circuit didn't really deal with on the appeal by the
20 ignition switch defect plaintiffs about whether due process
21 requires prejudice as well, too. And there are two elements
22 about prejudice which I want to address as well.

23 So let me just sort of focus in that everybody knew
24 Old GM's position with regard to its responsibility for salt
25 migration prior to the sale. It was well-known and it was



1 subject to a litigation. Back 10 years, more than 10 years
2 before the sale, the developer had -- of the plaintiff's
3 property had filed a complaint with the Michigan Department of
4 Environmental Quality saying that there was migration coming
5 from the Milford Proving Ground.

6 And Old GM -- so, in 1998, the MDEQ wrote the
7 developer regarding a potential salt issue and reaction to the
8 complaint that the development had made. So the developer knew
9 about the problem, and the deeds that went to the homeowners
10 had their identification of the sodium chloride issue that --

11 THE COURT: Say that again?

12 MR. STEINBERG: The deeds, the homeowner deeds --

13 THE COURT: Yes.

14 MR. STEINBERG: -- had a disclosure of sodium
15 chloride issues that relate --

16 THE COURT: So are you saying that -- does that cover
17 all putative class members, the deeds of their homes, include a
18 disclosure of the salt levels? Do I have that -- do I have one
19 of those --

20 MR. STEINBERG: Let me ask Mr. Caldwell to confirm
21 that. My --

22 THE COURT: Do I have one of those documents?

23 MR. STEINBERG: Yes, we do. It's in our reply.

24 MR. CALDWELL: Yes, Your Honor. That declaration of
25 restrictions applied to the entire subdivision that the



1 developer was putting together.

2 THE COURT: This is in the reply?

3 MR. CALDWELL: Yes.

4 MR. STEINBERG: Yes. It's an exhibit to the reply.

5 Scott, do you know the exhibit?

6 THE COURT: I don't have these. Are the exhibits

7 still --

8 MR. STEINBERG: It's just one exhibit to the reply.

9 So it's the only exhibit to the reply.

10 THE COURT: Okay.

11 MR. STEINBERG: So --

12 THE COURT: Just point to me -- okay. I see the --

13 all right. Go ahead.

14 MR. STEINBERG: All right. So that's the developer.

15 The MDEQ has known about this continuing issue, and Old GM and

16 New GM have both been working with the DEQ about this issue.

17 mean, they know about it, they're on top of it.

18 THE COURT: Yes. This seemed just to -- this memo

19 can deal with -- this seems so fundamentally different than the

20 ignition switch defect, which had not been disclosed. That was

21 the whole -- and I'm not getting into whether -- I live with

22 the Second Circuit decision.

23 MR. STEINBERG: Okay.

24 THE COURT: And --

25 MR. STEINBERG: So do I.



1 THE COURT: Yes. Okay? And, you know, I mean, it
2 all started with stipulated facts before Judge Gerber. But
3 this does seem fundamentally different. And I have to confess,
4 I read a lot of this stuff, but I didn't look at this deed, the
5 disclosure in the deed.

6 I don't know where the due process violation is in
7 your -- if people have been told it's fine for GM to deny that
8 they're responsible for it. But the issue was flagged, was
9 known. They do seem to fit into the category of unknown
10 claimants as to which direct mail notice is not required.

11 Go ahead.

12 MR. STEINBERG: The DEQ obviously was aware of this
13 entire situation. There was actually a litigation brought by
14 Old GM against the DEQ.

15 THE COURT: I know. I'm familiar with that.

16 MR. STEINBERG: And so you have --

17 THE COURT: And they reached a settlement, they
18 withdraw their --

19 MR. STEINBERG: That's correct. So the DEQ is aware
20 of it, and the DEQ gets notice of a sale hearing, files a
21 limited objection to the sale hearing, appears for all three
22 days of the sale hearing. And in junction with --

23 THE COURT: They appeared in my Metaldyne case. You
24 know, that was -- they were very aggressive in enforcing their
25 environmental -- making sure that any sale had appropriate



1 protection.

2 MR. STEINBERG: So I think Your Honor understands the
3 DEQ aspect. Let me deal with the homeowners, besides the deed
4 issue. The homeowners, according to the complaint, on Exhibit
5 H, they got a letter from the MDEQ relating to the sodium
6 chloride of their property in June of 2007. So they also got
7 notice from the DEQ.

8 This is not in their complaint. I'll just say it
9 because Mr. Caldwell told me that -- it sounds to me like it's
10 right -- that if you have salt in your water, you probably
11 could taste it. That's an easy way of understanding there's a
12 problem. But it's more than that, and it's not in the record
13 that is before you. It is something that I did see on the
14 internet.

15 There is an article that when this lawsuit was
16 started the local newspaper got quotes from Mr. Moore. And
17 Mr. Moore said in those quotes in the newspaper article, and we
18 could --

19 THE COURT: I think we ought to stick to the record.

20 MR. STEINBERG: No, no, but I -- but it is a fact
21 that I don't think counsel will deny. So I --

22 THE COURT: I'm only deciding it on the record I have
23 before me, Mr. Steinberg.

24 MR. STEINBERG: I understand that. If we do
25 supplement --



1 THE COURT: I don't want to know what he has said in
2 -- what a newspaper quoted him as having said.

3 MR. STEINBERG: Okay. But the point that I'm trying
4 to make -- and I know you -- the point I'm just trying to make
5 is that the bottled water situation that you asked about what
6 has New GM done after the notice of migration that all the
7 homeowners are getting or being offered at least bottled water,
8 the bottled water issue about what the homeowners were getting
9 actually preceded the sale, and that the DEQ was offering these
10 homeowners more bottled water.

11 And the thing that I was trying to say is that Mr.
12 Moore has acknowledged that they were -- he was getting bottled
13 water since 2005. I know it's not part of the record, but --

14 THE COURT: I only want -- Mr. Steinberg, I don't
15 know how many times I have to say this. I only want to hear
16 what's in the record.

17 MR. STEINBERG: The other thing, which is part of the
18 record, which is, you know, did -- unlike the people who may be
19 driving a car in Iowa or Idaho, Milford, Michigan, the largest
20 employer in Milford, Michigan -- I'll take that back. It's not
21 in the record, but it's the largest employer.

22 But paragraph 9 of the amended complaint says the
23 General Motors Milford Proving Ground was industry's first
24 dedicated automobile testing facility when it opened in 1924.
25 It is located in Milford, Michigan, and covers approximately



1 4,000 acres. It is over 115 buildings. It covers 100 miles of
2 road.

3 And the thing that I'm asking you to connect is that
4 when Old GM files for bankruptcy, the people in Milford,
5 Michigan, know that there was a bankruptcy.

6 THE COURT: Maybe I'm wrong. If they are known
7 claimants, they are entitled to actual notice by mail. If they
8 are unknown, notice by publication is sufficient. I think you
9 quote -- I can't remember which Circuit. There is -- this
10 issue of notice in environmental cases has come up before,
11 right? What's the case you -- I think -- I can't remember
12 which case you cited and put in your reply. I'm sorry.

13 MR. STEINBERG: Envirodyne, wasn't it? Third
14 Circuit? Mr. Davidson will look that up.

15 THE COURT: Maybe I'm misremembering. I know I read
16 a Circuit Court case involving notice of environmental cases
17 recently.

18 MR. STEINBERG: Yeah. But the reason why I go
19 through this provision, Your Honor, because it dovetails to the
20 prejudice argument, which, you know, is highlighted. You know,
21 it's the same issue that came up on an analogous basis in Queen
22 Elizabeth Realty, which is cited in our paper, which a Judge
23 Bernstein decision.

24 THE COURT: It's the Chemetron case. Chemetron.

25 MR. STEINBERG: Chemetron.



1 THE COURT: From the Third Circuit.

2 MR. STEINBERG: That's right.

3 THE COURT: That was the case I'm thinking of.

4 MR. STEINBERG: But the argument about that the
5 people of Milford knew about the bankruptcy and the sale is
6 that even if you should have given them notice by mail, and you
7 gave it to them by publication, if they otherwise were aware of
8 the sale hearing and that there was a bankruptcy because they
9 got it through other means, and here I'm suggesting that the
10 Milford Census has a certain level of population, the people
11 who work at the Milford Proving Grounds have a certain level of
12 population, people in Milford knew about this, and they knew
13 about that -- and even if there was improper notice, if you
14 became aware of the hearing date, then you don't have a due
15 process violation. That's the essence of the prejudice --

16 THE COURT: All right. Any other points you want to
17 cover?

18 MR. STEINBERG: The only -- I think we've talked
19 about the allegations and the independent claim issue or the
20 exemplary damages issue. Not for --

21 THE COURT: Do you agree that New GM, on independent
22 claims -- and I dealt with -- you brief it, I dealt with what's
23 an independent claim -- I don't think this makes it here. I
24 think it needs to be revised. But New GM, on independent
25 claims, if state law provided the remedy, punitive damages



1 might be available.

2 MR. STEINBERG: Correct.

3 THE COURT: Okay.

4 MR. STEINBERG: All right. Your Honor, I think
5 you've probably heard enough from me for now.

6 THE COURT: Okay. Mr. Memmen?

7 MR. MEMMEN: Thank you, Judge. Good morning, Your
8 Honor. Alex Memmen here on behalf of the Moore plaintiffs,
9 M-E-M-M-E-N. I came to Court today ready to talk about due
10 process, but I think Your Honor is maybe more interested in
11 some other topics. I am going to start --

12 THE COURT: You can talk about due process if you
13 want. I'm skeptical of your due process claim because this is
14 very different than the ignition switch defect. There has been
15 no -- you went to state court, then were moved to district
16 court, didn't come here, and you're -- you know, you have to
17 abide by the sale order. You didn't.

18 MR. MEMMEN: Your Honor, we don't disagree that we
19 have to abide by the sale order. We were coming up to a
20 statute of limitations on this case and we wanted to get a case
21 filed in a timely manner on behalf of our plaintiffs.

22 THE COURT: Okay.

23 MR. MEMMEN: We served General Motors. We intended
24 to come before the Court. Counsel are better bankruptcy
25 counsel than I am and they got something filed before I was



1 able to file something requesting leave from the sale order.

2 THE COURT: You filed this case when in Michigan?

3 MR. MEMMEN: We filed it in November. It was served
4 on General Motors, I want to say, in early to mid-December of
5 '17.

6 THE COURT: Okay.

7 MR. MEMMEN: So it was not an attempt to evade the
8 sale order. We absolutely respect the sale order. We're not
9 saying the sale order doesn't apply to this case.

10 There are certain counts I think in this case, Your
11 Honor, that it doesn't apply to, but we'd certainly agree that
12 the sale order applies regarding claims that are relating to
13 old General Motors. Specifically, Judge -- and I apologize --
14 I think everybody agrees, and after hearing counsel's
15 discussion with Your Honor, Counts 1 and 2 and 8 and 9 are both
16 counts for violations of Michigan environmental law, those four
17 counts. What we attempted to do when we amended our complaint
18 was we attempted to split up the counts between counts that
19 impute or refer to or are talking about the conduct of Old
20 General Motors from the counts that are against New General
21 Motors.

22 Part of what has made this tricky, Judge, is that
23 what we allege is a continuing course of conduct. Your Honor
24 talked a little bit about plumes and migrating plumes and salt
25 contamination and environmental contamination in general. It's



1 not something that we alleged happened once and then stopped or
2 happened a couple times and then stopped. It's something that
3 continued onwards since, at least as early we say is 1985, and
4 we think long before that. So that's one of the reasons I
5 think that this is a little different.

6 Judge, the only thing I would say, you were talking a
7 little bit earlier about the construction of the sale
8 agreement, and the only thing I would add to that -- I don't
9 have very much to add about that -- I think Your Honor went
10 over that pretty well -- is that in the case of a sale
11 agreement like that, it's I think, to the extent that GM
12 drafted the sale agreement, to the extent that the plaintiffs
13 had no hand in drafting the sale agreement, and to the extent
14 that there are vague or inconsistent clauses, those should be
15 interpreted in favor of the non-drafting party.

16 THE COURT: What's the meaning of -- you tell me your
17 interpretation of 2.3(b)(iv), the retained liabilities?

18 MR. MEMMEN: I've looked at it at Judge, and Your
19 Honor talked about the end of (4)(c), except as otherwise
20 required under applicable environmental laws. I have a hard
21 time parsing this out as well.

22 THE COURT: Well if environmental laws means
23 statutes, the Michigan statutes, CERCLA the federal statute,
24 RECLA, they don't create liability for personal injury or
25 property damage; is that correct?



1 MR. MEMMEN: Well I actually do think that the
2 portion of our complaint, specifically, count 1 and I believe
3 it's count 8, Judge, that references the NREPA part 201, does
4 contain portions of that statute that do allow for, you know,
5 damages for the value of injury to destruction of or loss of
6 natural resources.

7 THE COURT: Which section? Give it to me again.

8 MR. MEMMEN: It's specifically section, it's
9 M.C.L. 324.20126(a), sub -- and I just found it, Judge, while
10 we were -- (a) (1) (c).

11 THE COURT: And I'll look at that. But hang on
12 because I did print some of those Michigan statutes. Just bear
13 with me, okay.

14 I didn't print that subsection. I looked at more
15 than this, but I had printed M.C.L. 324.1701 and its
16 subsections. And tell me what .20126a(1)(c), what does that
17 do?

18 MR. MEMMEN: That calls for damages for the value of
19 injury to destruction of or loss of natural resources,
20 including the reasonable cost of assessing those injuries and
21 destruction and losses.

22 THE COURT: Yeah, I did see. That has to do with
23 remediation doesn't it?

24 MR. MEMMEN: That's not my reading of the statute,
25 Judge.



1 THE COURT: Okay.

2 MR. MEMMEN: And I don't have any case law to cite to
3 you right now as it relates to that reading, but my reading of
4 it I thought was that it was pretty clear that it included
5 damages for destruction to the property.

6 THE COURT: And which count do you have that pled in?

7 MR. MEMMEN: That's in counts 1 and 8. Again,
8 count 1 is as it pertains to the actions of Old General Motors
9 and count 8 as it pertains to the actions of new.

10 THE COURT: Mr. Steinberg, you're agreeing that
11 counts 1 and 8 can properly be asserted against New GM?

12 MR. STEINBERG: Yes.

13 THE COURT: Okay. So that'll be for a judge in
14 Michigan to decide.

15 MR. MEMMEN: Sure.

16 THE COURT: Okay. Let me just make sure.
17 Mr. Steinberg, do you have a position on whether under Michigan
18 law, New GM can be liable for damages for injury or destruction
19 of property under the Michigan environmental law? Mr. Memmen
20 has cited to Section 324.20126a(1)(c). I think maybe it's
21 unfair for me to ask that question unless you've looked at
22 that.

23 MR. STEINBERG: I would be asking Mr. Caldwell. But
24 the counts that we think are the retain liabilities are
25 counts 3 through 7. Those are the ones that we say --



1 THE COURT: Mr. Caldwell, do you want to be heard
2 about this section that Mr. Memmen has referred to?

3 MR. CALDWELL: Well, and I do think we can parse that
4 out in the Eastern District, but those are natural resource
5 damages, Your Honor, which are more akin to remediation as
6 you've suggested. They're not property value diminution type
7 claims at all.

8 THE COURT: But you both agree --

9 MR. CALDWELL: You know if you had a fish kill, the
10 Department of Environmental Quality could assert damages for
11 the damage to that natural resource.

12 THE COURT: Well, but if the water in a well was
13 contaminated and was no longer potable, could a homeowner
14 recover damages for not being able to use their well anymore?
15 Isn't that natural resources? Let me withdraw the question.

16 Both sides agree that counts 1 and 8 can properly be
17 asserted and the issues resolved by the district court in
18 Michigan. Am I correct in that Mr. Memmen?

19 MR. MEMMEN: I agree with that Judge.

20 THE COURT: Mr. Steinberg?

21 MR. STEINBERG: That's correct.

22 THE COURT: Then you don't need to know anymore about
23 that.

24 MR. CALDWELL: And I would only add, Your Honor,
25 there are statutory defenses that would be applicable, but as



1 far as whether they can bring those claims, that's my
2 understanding.

3 THE COURT: Okay. The district court in Michigan
4 will deal with that. Go ahead Mr. Memmen.

5 MR. CALDWELL: Yeah.

6 MR. MEMMEN: So Your Honor, I did just want to deal
7 then with the due process arguments under the Elliott case.
8 And I understand the distinctions that Your Honor discussed
9 earlier, but I think that these cases are more analogous than
10 maybe it appears on the surface.

11 In the Elliott case, there was no question that there
12 were people other than General Motors who knew that the
13 ignition switch defects were a problem. The National Highway
14 Safety Board was aware of it. Various police agencies were
15 aware of it. There was questions about whether or not General
16 Motors was going to inform their dealers of the issue. I don't
17 remember if that's particularly clear, if it actually happened
18 in that case.

19 There were people who knew about this issue other
20 than General Motors. It wasn't as though General Motors was
21 just sitting on it and no one else had figured out that this
22 was an issue. It had been an issue for a long time before the
23 July 2009 bankruptcy, and it continued to be an issue
24 afterwards.

25 THE COURT: Did the putative plaintiff property



1 owners had the disclosure that Mr. Steinberg has pointed to in
2 their deeds with respect to salt content of the wells?

3 MR. MEMMEN: I believe they had disclosure that there
4 was salt content in the wells. I do not believe they had any
5 disclosure that the salt content came from General Motors. And
6 this is an important point because General Motors, up until
7 2014, continued to state adamantly that they did not cause this
8 problem. This was not an issue that they had created. This
9 was either a natural issue or was due to road salt or was due
10 to something else.

11 THE COURT: But it may be due to road salt. There's
12 a lot of road salt.

13 MR. MEMMEN: And that may be the case, Judge. That,
14 I think, would be an issue for a judge or jury in Michigan to
15 decide. The question is, how did the plaintiffs in this case
16 have an opportunity to make an objection to the sale at the
17 time of the sale order. And the point is that everybody knew
18 there was a bankruptcy -- that General Motors was in
19 bankruptcy. Anybody in the United States, and certainly
20 anybody in Michigan, knew that there was a bankruptcy
21 proceeding and that General Motors was in bankruptcy. That's
22 not a question.

23 The question is, did the plaintiffs in this case,
24 like the plaintiffs in Elliott, know that they were supposed to
25 show up for that proceeding and make an objection based on



1 general notice. I think the answer from the Elliott court is,
2 no, they didn't know, they didn't have adequate notice and that
3 due process requires that they be given adequate notice.

4 The real question, I think, in addition to that is
5 not just what did the plaintiffs know, but what did General
6 Motors know, and did General Motors have adequate knowledge or
7 that they knew or should have known that they had potential
8 claimants nearby the Milford facility. It's in the record that
9 for a very long time General Motors knew that the MDEQ believed
10 that they were the source of this contamination to the
11 southwest of the Milford proving grounds. There's an email, I
12 think it's Exhibit G in our response, it's an internal MDEQ
13 memo saying that they're going to tell or that they told
14 General Motors that the developer's upset and that the
15 developer has salt in the ground.

16 General Motors knew there was a development being
17 built there. They knew that there were problems with salt in
18 the ground there. And they knew that there was reason to
19 believe that they might be responsible for the salt in the
20 ground, even if they weren't taking responsibility for it at
21 that time. And so, again, very similar, I think, to the
22 Elliott case where General Motors, you know, knew or should
23 have known that there was a linkage between the ignition switch
24 defects --

25 THE COURT: But where did the Second Circuit in



1 Elliott establish a knew or should have known standard?

2 MR. MEMMEN: Elliott at 160, Judge. Even if the
3 precise linkage between the ignition switch defect and moving
4 stalls and air bag non-deployments was unclear, Old General
5 Motors had enough knowledge.

6 At a minimum, Old GM knew about the moving stalls and
7 air bag non-deployments in certain models and should have
8 revealed those facts in bankruptcy. Those defects would still
9 be the basis of claims even if the root cause, the ignition
10 switch, was not clear.

11 So I think that's analogous to this case, Judge.
12 Where General Motors knew or should have known that there were
13 problems. And I would allege, Judge, by the way that they did
14 know. I think we allege that they did know and I think there
15 are facts in the record that show that they had reasons to know
16 these things. So much so that in 2000, they did file a lawsuit
17 against MDEQ seeking relief from the court to stop MDEQ from
18 proceeding with their claims against General Motors.

19 They knew that this was a problem to the southwest of
20 the Milford proving grounds. They knew that there were homes
21 being built there. They knew all these things. So I think
22 these are reasonably ascertainable claims that General Motors
23 should have provided specific notice about and when they didn't
24 provide specific notice, violated due process.

25 As it relates then to the prejudice argument which is



1 the second part of this, and I think the Second Circuit said,
2 you know, basically passed on whether or not prejudice was
3 required. But even if prejudice is required in this case,
4 Judge, the Second Circuit made, I think, quite clear that the
5 question as it relates to prejudice is whether or not you had a
6 seat at the table. And can the court say with any certainty
7 that by not having a seat at the table, things would have been
8 the same? And the court pointed to, I think, the lemon law
9 litigants who --

10 THE COURT: They assumed liability for lemon law
11 claims.

12 MR. MEMMEN: Correct. And that's the point that the
13 court makes in the Second Circuit in the Elliott case is that
14 even though --

15 THE COURT: Can they assume liability here for --

16 MR. MEMMEN: Yes. But the point being, Judge, that
17 even though those claimants didn't necessarily have a legal
18 reason to have those claims be assumed, it wasn't necessarily
19 based on a law. It wasn't necessarily saying well there's this
20 part of the Bankruptcy Code that allows us to keep those
21 claims.

22 THE COURT: But here, the Michigan Environmental
23 Agency appeared before Judge Gerber, actively participated,
24 satisfied itself that the provisions of the sale order with
25 respect to assumed liabilities protected the environmental



1 interests of Michigan. There wasn't a comparable provision in
2 GM. The sale agreement is part of the rub that while New GM
3 assumed liability for post-sale accidents, even for vehicles
4 manufactured before the sale, it did not assume liability for
5 presale accidents. That's one of the issues that Judge Furman
6 is wrestling with and has wrestled with. Okay. Here, GM did
7 assume liabilities for environmental law violations.

8 MR. MEMMEN: And I agree with that, Your Honor. I
9 think the difference is I don't think the MDEQ --

10 THE COURT: And it's because the Michigan
11 environmental regulators essentially insisted on it. They
12 appeared, you know, from my own experience in Metaldyne. They
13 appeared before me. They were active and they wanted to assure
14 that the environmental interests of Michigan and its citizens
15 were protected.

16 MR. MEMMEN: And I agree with that and I understand
17 that, Your Honor. But I don't think MDEQ could stand in the
18 shoes of the Moore plaintiffs in this case. The MDEQ is
19 looking out for the entire State of Michigan. They had
20 priorities. I don't know what those priorities were at the
21 time of the sale. Those priorities were not necessarily the
22 Moore plaintiffs. In fact, MDEQ eventually agreed to
23 essentially back off.

24 THE COURT: The unknown Moore plaintiffs, as opposed
25 to the Michigan environmental regulator that's looking out for



1 the public interest trying to assure that the interests of its
2 citizens, known or unknown, has been protected. That's where
3 I'm having a lot of trouble, Mr. Memmen, with respect to the
4 due process argument. This is fundamentally different.

5 NHTSA didn't appear before Judge Gerber and say, you
6 know, we're not sure exactly why but there have been ignition
7 switch problems that have led to stalls, non-inflation of air
8 bags during accidents, the sale agreement needs to be written
9 in such a way as to protect those interests. That didn't
10 happen in GM. Here, it did happen.

11 MR. MEMMEN: And I appreciate that, Your Honor. But
12 I think that the constitutional concept of due process requires
13 specific notice to known --

14 THE COURT: To known creditors.

15 MR. MEMMEN: Correct.

16 THE COURT: Agreed?

17 MR. MEMMEN: Correct. Yes. Known or reasonably
18 ascertainable creditors.

19 THE COURT: GM couldn't have looked in its books and
20 records to ascertain who owned the adjacent properties, could
21 it? You agree with that?

22 MR. MEMMEN: It wouldn't have been -- that specific
23 information would not have been in their books and records.
24 What information would have been in their books and records
25 were claims by --



1 THE COURT: The claimant has to be known or
2 reasonably ascertainable from -- well, let me ask you a
3 question.

4 MR. MEMMEN: Yes.

5 THE COURT: Do you agree that the claimant has to be
6 known or reasonably ascertainable from the books and records of
7 the debtor?

8 MR. MEMMEN: Yes.

9 THE COURT: Okay. I wrote on that issue in Borders
10 Books. Okay. I could be wrong, but that was what I
11 determined. That the standard for known creditors is known or
12 reasonably ascertainable, not from research of public records,
13 go to the land records to see who might be adjacent, who not,
14 known or reasonably ascertainable from the books and records of
15 the debtor. So with respect to a purchaser of a GM vehicle
16 with a defective ignition switch, they have books and records
17 that show who bought the cars.

18 If it's a vehicle of a particular year and model,
19 they have that in their books and records. That's part of what
20 the Second Circuit focused on. They were known or reasonably
21 ascertainable from the books and records of GM. You would
22 agree that your named plaintiffs and putative class members are
23 not known or reasonably ascertainable from the books and
24 records of GM, correct?

25 MR. MEMMEN: I don't agree to that, Judge, because I



1 haven't had an opportunity to see those books and records. In
2 other words, I think it's very likely that Old General Motors
3 did know about these potential claimants and I obviously
4 can't --

5 THE COURT: You think nine years after a bankruptcy,
6 you can come into this Court and say, we think that GM knew
7 about it? We don't have any evidence of that.

8 MR. MEMMEN: Well, no. I do have evidence.

9 THE COURT: Not knew of the problem, knew about the
10 claimants that they were known or reasonably ascertainable from
11 the books and records. How many years after a bankruptcy do
12 you think you can come back and try and reopen it, a very
13 different set of allegations than occurred with respect to the
14 ignition switch defect?

15 MR. MEMMEN: Right, Your Honor. Although the
16 ignition switch defect was made known to those plaintiffs at
17 about the same time that this was made to our plaintiffs.

18 THE COURT: Buy who bought the cars was known to Old
19 GM. They could go to their books and records, they could
20 identify -- if the car had been sold in a used car sale, they
21 may not have known. But they knew who bought cars. They may
22 have had records of who had the car serviced if the car had
23 been sold.

24 But that was part of the point of the Elliott case.
25 The known creditors were reasonably ascertainable from the



1 books and records of GM. These are the vehicles in which it
2 had been identified a problem that wasn't disclosed, okay.
3 That's not your case, right?

4 MR. MEMMEN: I agree that that's not our case.

5 THE COURT: All right. Go ahead.

6 MR. MEMMEN: Okay. The only thing I would say about
7 it, Judge, is that there's a five-year delay from the time of
8 the bankruptcy until the time that General Motors files their
9 notice with MDEQ saying the salt contamination is potentially
10 our responsibility. It's our fault. So during that time
11 period, I understand we're along way away from the 2009 sale
12 order. But five of those years are during a time when the
13 Moore plaintiffs have no reason to know that General Motors is
14 responsible for the contamination. And General Motors is
15 actively denying responsibility for the contamination during
16 that time.

17 THE COURT: They probably still don't think they're
18 responsible, but that's you know.

19 MR. MEMMEN: Yeah. And I understand that. Although
20 now they are providing water, they're doing certain things.
21 They have not taken any remediatary action, by the way.

22 But the point that I'm making, Your Honor, is that,
23 and I don't know that there's a statutory or a legal time limit
24 on how long we're allowed to come in, but I do think it would
25 be appropriate to --



1 THE COURT: There's a statute of limitation in
2 Michigan. I read a lot of statute of limitations cases in
3 Michigan --

4 MR. MEMMEN: Right.

5 THE COURT: -- dealing with environmental
6 liabilities.

7 MR. MEMMEN: Yeah. And that's why we filed when we
8 filed was to get this case. We had a tolling agreement with
9 General Motors. We wanted to file before the tolling agreement
10 expired. So that's why we filed when we filed.

11 THE COURT: Okay. Any other points you want to
12 cover?

13 MR. MEMMEN: Just, Judge, that we think that the
14 Court can reasonably read from the record that Old General
15 Motors knew of the (indiscernible) claims, or should have been
16 able to reasonably ascertain who the claimants were.

17 THE COURT: How? How are they supposed to -- but
18 it's not. I asked you and you agreed with me. The standard is
19 known or reasonably ascertainable from the books and records of
20 the debtor, not to go off and do property search records in a
21 public record to see who may own the house that year as opposed
22 to the year before or the year after. It's -- my -- because
23 I've written on this, there's no duty to go beyond the debtor's
24 books and records to identify the known or reasonably
25 ascertainable creditors. You believe that -- is that a correct



1 statement of the standard?

2 MR. MEMMEN: I agree with Your Honor on that point.

3 THE COURT: Okay.

4 MR. MEMMEN: The only thing I would say is that, if
5 that's the case, we'd like the opportunity to see what General
6 Motors has in their possession as it relates to their books and
7 records on these claims. I think that that's where we're at on
8 this.

9 As far as what we are then asking the Court for is
10 for us to move forward with our independent claims, whether or
11 not to --

12 THE COURT: I have problem with it -- I don't mean to
13 interrupt you there -- because one of the jobs I least like is
14 have to fly spec these complaints, say, well, this clause has
15 got to come out, this one come -- you know, is okay. But
16 that's what this -- in some ways it comes down to. You've
17 included things in your so-called independent claims that don't
18 meet the standard -- whether you agree with me or disagree with
19 me, I've ruled on this previously -- what satisfies. I have
20 the gate-keeping function. I allow independent claims to go
21 forward. And it seemed to me that your amended complaint runs
22 afoul of the standard for independent claims. I wish you could
23 work that out with Mr. Steinberg.

24 MR. MEMMEN: I think counsel was right, Your Honor,
25 that we could -- if that were the issue here, and I think that



1 we can work out those issues. I do think that counsel and I
2 can work those issues out.

3 THE COURT: Because I don't want to have to sit down
4 and redline a complaint, this paragraph's in, that paragraph's
5 out. I expect what I'll do -- I don't know what my ruling's
6 going to be yet. But with respect to those independent claims,
7 it is pretty clear to me that you've run afoul of the standards
8 I've set forth and that Judge Gerber did for what's an
9 independent claim. And you ought to sit down with
10 Mr. Steinberg sooner rather than later and see whether you can
11 iron that out. I don't think it's going to make a big
12 difference to how you're going to proceed. But the language
13 you have in there now runs afoul of what I've ruled before.

14 There are some other bigger issues that I do have to
15 decide. They're important to you and I appreciate that. I'm
16 sensitive to these environmental claims.

17 MR. MEMMEN: Sure. And I agree with Your Honor. I
18 think counsel and I can work those issues out. But we are
19 asking you to move forward with independent claims perhaps with
20 an amended complaint, move forward with assumed liabilities
21 that the parties agree to, and we are asking to move forward
22 with claims relating to Old GM based on our due process
23 arguments, or --

24 THE COURT: That's the successor liability?

25 MR. MEMMEN: Correct, Judge. We think the Michigan



1 judge would make the determination as to successful liability
2 under the laws of Michigan. Worst case scenario, we're asking
3 for the Court to allow us some limited discovery to be able to
4 understand what it is that General Motors had in their books
5 and records at the time of the 2009 Chapter 11 proceedings.
6 And that's about all I have to say for Your Honor, unless you
7 have any questions for me.

8 THE COURT: Okay. No, I don't. Thank you, very
9 much, Mr. Memmen. I take the issues here very seriously. I
10 hope you understand that.

11 MR. MEMMEN: And I take that from Your Honor. I
12 appreciate that. Thank you.

13 MR. STEINBERG: Your Honor, I'll be very brief and I
14 appreciate the time that you've given to this matter already.

15 Mr. Memmen is a nice person.

16 THE COURT: That's not the issue.

17 MR. STEINBERG: I know. But just so you understand
18 the timeline. He said that he filed a complaint because he was
19 running out of time in November of 2017. We wrote, as we
20 reflect in our papers, a demand letter saying that you're
21 running afoul of the sale order in January of 2018.

22 We actually had a phone call which we reflect in our
23 papers as well in February of 2018 in response to it. Well we
24 didn't get a real response to the demand letter, citing to him
25 the Celotex case, and saying that your job is to come to the



1 Court and not to exercise remedies.

2 The response to that was to file an amended complaint
3 in the Eastern District of Michigan. So the notion that he was
4 waiting and about to file a complaint here, I don't think
5 carries water.

6 THE COURT: Can I ask both of you this? Do you agree
7 about the assumed liabilities?

8 MR. STEINBERG: Correct.

9 THE COURT: Do you agree that properly pleaded
10 independent claims can be asserted?

11 MR. STEINBERG: Correct.

12 THE COURT: And the real area, the strongest area of
13 disagreement is over the claims that assert successor
14 liability. Is that a fair statement?

15 MR. STEINBERG: We agree on retained liabilities. He
16 thinks he doesn't have to comply because of the due process
17 issue.

18 THE COURT: Okay. What I would ask the two of you to
19 do -- I'm not going to rule instantly, okay. I want the two of
20 you to see if you could come to agreement on the independent
21 claims. I'm telling you, Mr. Memmen, you've got allegations in
22 there that don't satisfy my prior decisions and Judge Gerber's
23 decisions about what would truly be an independent claim.

24 Mr. Steinberg said he thinks you could work this out
25 with you. You know, I'd like you to try and work that out now



1 because I think where I need to focus my attention is on the
2 successor liability claims. Do you both agree with that?

3 MR. STEINBERG: Correct.

4 MR. MEMMEN: Yes, Your Honor.

5 THE COURT: Okay.

6 MR. STEINBERG: We will try.

7 If you want to give a time frame of when we should be
8 trying --

9 THE COURT: Yeah.

10 MR. STEINBERG: -- I'm happy to listen to whatever
11 your time frame is and say yes after you tell me.

12 THE COURT: Give me a time frame. Talk to each
13 other.

14 MR. STEINBERG: Two weeks?

15 MR. MEMMEN: Yeah, that's fine.

16 THE COURT: Fine.

17 MR. STEINBERG: Two weeks?

18 MR. MEMMEN: I was going to say 21 days, but that's
19 fine.

20 THE COURT: Two weeks.

21 MR. STEINBERG: Two weeks from today.

22 THE COURT: Okay. It will simplify my life if I
23 don't have to go through with a red pen and mark -- you can
24 agree or disagree, but I think the law is pretty settled
25 between Judge Gerber and myself as to what you have to do.



1 Okay. You want to be able to iron that out. Okay.

2 MR. STEINBERG: Your Honor, I just have a few more
3 quick points that I'd --

4 THE COURT: Go ahead.

5 MR. STEINBERG: -- just like to be able to give you.

6 One is that the due process issue that is being
7 raised in this case, at least on the papers that they filed, is
8 that they should have gotten direct mail notice of the sale
9 notice. The sale notice was approved by Judge Gerber prior to
10 the sale hearing in a separate order. The sale notice itself
11 doesn't say anything about claims or -- it just says, there's
12 going to be a hearing on a certain day to sell these assets.
13 This is the time to make a bid. It's your official form sale
14 notice.

15 Once counsel admits that his clients were aware of
16 the sale and knew about the sale agreement, they knew the
17 timing of the sale agreement, they've essentially conceded the
18 prejudice issue because they knew they could have come to court
19 and they could have said whatever they wanted to say at a time
20 when they had notice of sodium chloride issues relating to
21 their water. And it's not -- I'll just leave it there -- at a
22 time that they knew that there was issues, and there was a
23 public record of a lawsuit that Old GM had denied liability and
24 where the DEQ had withdrawn their lawsuit that was there.

25 Mr. Memmen referred to water flow issues. That was



1 in 1997 prior to the lawsuit where the lawsuit was addressing
2 those issues. And finally, I did have in my outline, it is in
3 our papers, I'll just tick off the other things.

4 Mr. Memmen referred to the reason why they didn't
5 take action. The notice of migration was October of 2014. I
6 think the tolling agreement that he referred to was a 2016
7 event. So there was at least like a year and a half before
8 they did anything at all. And then they brought their lawsuit
9 in November of 2017.

10 And we do have in our papers, and it's an argument
11 we've made to Your Honor before in other context, Your Honor
12 has never ruled on it. We have said that for parties who want
13 to enforce the sale agreement, and here the assumption of
14 liability is in the sale agreement, they're required to take to
15 the burdens as well as the benefits. And the burdens here
16 would be that retained liabilities stay behind. And we cited
17 some cases on that as well.

18 So I think, Your Honor, I think you've asked for some
19 additional papers. I'm not sure if you've set the time of how
20 you want to do it.

21 THE COURT: I didn't. And I do understand you didn't
22 draft the sale agreement, Judge Gerber didn't draft the sale
23 agreement. I have this question whether Michigan common law
24 claims for damages for personal injury or property damage from
25 environmental contamination are among the assumed liabilities.



1 MR. STEINBERG: If there's anything in the sale
2 hearing record or the sale objections record, we will include
3 it in whatever papers --

4 THE COURT: Okay. How much time do you want
5 Mr. Steinberg? I want simultaneous briefs from both of you, so
6 not seriatim.

7 MR. STEINBERG: I think two weeks from tomorrow is
8 fine with us.

9 THE COURT: That's fine.

10 MR. STEINBERG: Is that all right with you?

11 MR. MEMMEN: Can we get 21 days on that issue, Judge?

12 MR. STEINBERG: I'm happy to do whatever you --

13 MR. MEMMEN: Is that okay?

14 THE COURT: Yeah. Let's just do it with one. So
15 three weeks from tomorrow, you'll both brief on assumed
16 liabilities and the two of you trying to hammer out an
17 acceptable pleading on independent claims. So rather than do
18 it seriatim, three weeks.

19 MR. STEINBERG: That's fine. And Your Honor, just
20 for your convenience, and assuming counsel will be agreeing, to
21 whatever extent we haven't agreed, we will give you in effect
22 the paragraphs that we didn't agree so you don't have to
23 read --

24 THE COURT: Narrow it.

25 MR. STEINBERG: -- everything. But we will have



1 narrowed it down.

2 THE COURT: Okay.

3 MR. MEMMEN: Fair enough, Judge.

4 THE COURT: That would be very helpful to me, and I
5 would appreciate it. Thank you very much. Go ahead
6 Mr. Steinberg.

7 MR. STEINBERG: I think that that's all I have for
8 today. We will submit to you whatever we think will be helpful
9 to you.

10 THE COURT: Okay. Mr. Memmen, anything else that you
11 want to raise?

12 MR. MEMMEN: No, nothing further, Judge.

13 THE COURT: Okay. Thank you both, very much.

14 MR. STEINBERG: Thank you, Judge.

15 MR. MEMMEN: Thanks Your Honor.

16 (Proceedings concluded at 12:10 p.m.)

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

I, Ilene Watson, 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, and to the best of my ability.



ILENE WATSON, AAERT NO. 447 DATE: March 30, 2018
ACCESS TRANSCRIPTS, LLC

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

I, Lisa Luciano, 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, and to the best of my ability.



LISA LUCIANO, AAERT NO. 327 DATE: March 30, 2018
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