SUPERIOR COURT OF DECATUR COUNTY
STATE OF GEORGIA

JAMES BRYAN WALDEN and LINDSAY WALDEN, Individually and on Behalf of the Estate of Their Deceased Son, REMINGTON COLE WALDEN, Plaintiffs, v. CHRYSLER GROUP, L.L.C., and BRYAN L. HARRELL, Defendants.	* * * * * * * * * * * * * *	CIVIL ACTION FILE NO. 12-CV-472

PLAINTIFFS' RESPONSE TO DEFENDANT CHRYSLER GROUP LLC'S MOTION FOR SUMMARY JUDGEMENT

Chrysler's own engineer admitted under oath that the gas tank on the Jeep Grand Cherokee was "vulnerable to rear impact." Dec. 10, 2014 Estes dep. 67:02-11 (Ex. 1). The rear-mounted gas tank was vulnerable to rear impact because it is only 11" from the rear of the car and because it hangs 6" below the bottom of the car. Chrysler knew the gas tank was in the crush zone – that same engineer admitted Chrysler had a rule against putting any instruments in the back 24" of the car when Chrysler ran crash tests because that was the crush zone in rear impacts. *Id.* at 47: 16-21. *That means Chrysler deliberately put the gas tank in the crush zone.*

Because Chrysler knew its rear gas tanks were vulnerable to rear impacts and were in the crush zone but sold the Grand Cherokee anyway, Chrysler is liable for willful and wanton conduct. Because Chrysler refused to warn anybody about the Jeep's "vulnerab[ility] to rear

impact," Chrysler is liable for failure to warn. Because Chrysler acted willfully and wantonly, *and* because Chrysler failed to issue any warning, the statute of repose does not bar this claim. O.C.G.A. § 51-1-11(c).

Chrysler received a taxpayer bailout in 2009. During the course of that bailout, Chrysler expressly agreed—both in binding bankruptcy court documents and in promises to Congress and the public —that it would "accept product liability claims on vehicles manufactured by Chrysler LLC (now OldCarco LLC) before June 10, 2009, and involved in accidents on or after that date." 08/27/2009 Press Release (Ex. 2); *see* Order Approving Amendment No. 4 to Master Transaction Agreement, Annex A (Ex. 3). The Jeep in which Remington Walden was killed was manufactured *before* the bailout, but was involved in this wreck *after* the bailout. Therefore, 'new' Chrysler assumed liability for Plaintiffs' claims. Now, Chrysler is attempting to violate both the binding bankruptcy order and its public promises. That attempt fails.

Plaintiffs note that this response is due on December 24, 2014. That is important because Plaintiffs are scheduled to take videotaped depositions for use at trial of three more Chrysler executives and employees (including CEO Sergio Marchionne) on January 9, 22, and 23, 2015. It is very likely that those depositions will yield even more evidence refuting Chrysler's arguments. In order to present that evidence to the Court, Plaintiffs may respectfully request that the Court allow Plaintiffs to file a supplemental brief after the January depositions.

I. FACTS

On a motion for summary judgment, the Court "view[s] the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovants." *Assoc. Servs., Inc. v. Smith*, 249 Ga. App. 629, 630 (2001).

A. Chrysler

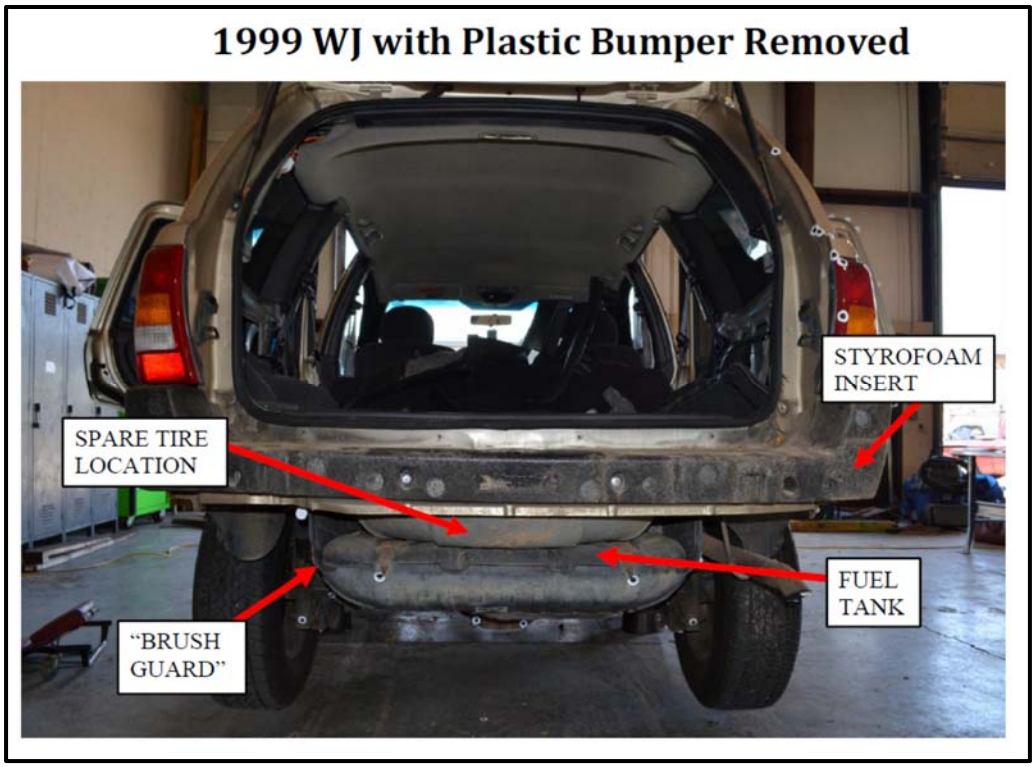
Chrysler and other automakers have known for decades that rear gas tanks are dangerous. As early as 1932, automotive engineers knew that gas tanks "in the extreme rear" of passenger vehicles were vulnerable in "rear-end collisions." Maxwell N. Halsey, "The Relationship between Automobile Construction and Accidents," SAE Journal, Vol. 30, No. 6, 1932 at 258 "Fire-Hazard Factors" (Ex. 4). Chrysler's internal documents from the 1970s prove that Chrysler knew that "any fuel tank regardless of shape, which has its lower and [sic] extend downward and behind the rear axle, will be punctured in any fixed barrier rear-end collisions at 20mph." J.A. Siedl, "Fuel Tank Location," February 15, 1971 at para. 3 (Ex. 5).[1] Other internal Chrysler documents analyzed "the Ford Pinto case" and acknowledged that "locating the fuel tank ahead of the rear wheels appears to provide good protection for the tank." L.L. Baker,

[1] The document is from "American Motors," an automaker who manufactured early Jeeps and was acquired by Chrysler.

"Fuel System Design – Chrysler Passenger Cars and Trucks," August 24, 1978 at 1, para.2 and at 2, para 3 (Ex. 6).

Still other internal Chrysler documents from the time when Chrysler sold the subject vehicle prove that Chrysler recognized the benefits of a "more secure 'midship' fuel tank design/location" and the need to "Redesign & Relocate Fuel tank[s] to . . . enhance vehicle safety." "1998 AB Fuel System Summary" at 1 "Overview" (Ex. 7); "1998 AB Chassis Engineering" at 3 "Program Objectives" (Ex. 8). As early as 1985, Chrysler was publicly boasting through its Dodge brand that "[o]n all models except the rear-wheel drive Diplomat, the fuel tank is located under the car beneath the rear seat—where it's *forward of the rear suspension* and between the bodyside rails—*giving it protection in the event the car is subjected to rear or side impacts*." Chrysler "Engineering" brochure at 22 "Fuel Tank Location" (emphasis added) (Ex. 9). In sum, the jury will have abundant evidence from which to conclude that automakers—especially Chrysler—have long known that rear tanks are dangerous, and midship tanks are safer. *See* Arndt dep. 269:09-270:15 (Ex. 10). Despite this clear knowledge, Chrysler sold the 1999 Jeep Grand Cherokee with a gas tank located in the extreme rear of the vehicle—and hanging down underneath the car. If you remove the thin strip of plastic fascia (what Chrysler's engineer calls a "trim piece") from a 1999 Jeep Grand Cherokee (referred to internally at Chrysler as the "WJ" platform), the vulnerability of the gas tank is obvious. *See*

Estes dep. 20:17-21:08 (referring to "trim piece") (Ex. 1). Chrysler has admitted that the below photograph is accurate and correctly labeled:



Estes dep. 21:23-22:19 (Ex. 1). Photograph of 1999 "WJ" with Plastic Bumper Removed (Ex. 11).

The evidence shows not only that Chrysler knew that rear tanks were dangerous—but Chrysler knew that *the Grand Cherokee's rear tanks* were dangerous. Chrysler's own engineer has admitted that the Grand Cherokee's tank was "vulnerable to rear impact." Estes dep. 67:02-11 (Ex. 1). Chrysler has admitted that the Grand Cherokee gas tanks leaked even in Chrysler's internal, 30 mph crash testing. *Id.* at 48:22-25. Chrysler's engineer has admitted that Chrysler knew that the rear *twenty-four inches* of the Grand Cherokees was crushing in rear impact—yet

Chrysler sold the Grand Cherokee with the gas tank located *eleven inches* from the rear of the vehicle. *Id.* at 45:02-16, 47:16-21. **That means Chrysler knowingly put the gas tank in the "crush zone."** *Id.* at 45:02-16.

Because Chrysler knew rear gas tanks were dangerous it eventually moved the gas tanks away from the rear and to a midships location (for the 2005 model year Grand Cherokees and 2008 model year Libertys). Before doing that, however, Chrysler performed one – and only one – rear impact crash test at 50 mph, replicating a real world wreck. That crash test was of a 1999 Grand Cherokee – *the subject vehicle.* Chrysler apparently did that test to see if, for the next generation Grand Cherokee (the 2005 model year, due to be sold in 2004), it could leave the gas tank at the rear. Before subjecting that 1999 Grand Cherokee to a 50 mph rear impact test, however, Chrysler put a steel "frame" around the gas tank and installed a steel bumper "beam." (The production model 1999 Grand Cherokee had no "bumper" – only a piece of plastic trim called a "fascia", and behind it, a strip of styrofoam.) Those modifications are shown in this photograph from Chrysler's own crash test document (Ex. 12):

Estes dep. Exh. 15a; *see* Estes dep. 53:25-60:25 (Ex. 12).

Chrysler never put a "frame" around the gas tank on any production model it sold; Chrysler never put a steel bumper "beam" on the rear of any production model it sold; when it designed the 2005 model year Grand Cherokee, instead of reinforcing the gas tank with a "frame" and installing a steel bumper "beam" to protect the tank, Chrysler *moved the gas tank away from the rear*. The Waldens' 1999 Grand Cherokee had neither a "frame" around the gas tank nor a steel bumper "beam." Chrysler never warned anyone that when it chose to do that single 50 mph rear impact crash test, it reinforced the gas tank and protected it with a steel bumper "beam."

Safety advocates wrote letters to NHTSA and Chrysler warning Chrysler and Marchionne that "[i]n the United States alone from 1993 to 2009, there have been 184 fatal fire crashes in Jeep Grand Cherokees that have resulted in 269 deaths and numerous burn injuries." 09/01/2011

letter from Clarence Ditlow of the Center for Auto Safety.[2] In 2010, the federal government began a defect investigation into the Jeeps with rear tanks—including the Grand Cherokees—that would lead to a formal request that Chrysler recall them. Kam dep. Ex. 2 at 11 "Procedural Background" (Ex. 13).

In addition, long before Remington Walden died in the subject Jeep on March 6, 2012, real-world victims had been warning Chrysler that the Jeeps were burning. Many families, such as the Maulano and Jarmon families, sued Chrysler over the deaths of loved ones—notifying Chrysler that the tank design was defective though legal complaints. *See, e.g.* Maulano Complaint (Ex. 14); Jarmon Complaint (Ex. 15). Other families had loved ones who barely escaped the flames, and then contacted Chrysler to warn the company.

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Although Chrysler was *receiving* warnings about these Jeeps from its crash tests, its internal documents, safety advocates, and even its own customers, Chrysler refused to *issue* a warning. Chrysler warned nobody. Chrysler Resp. to RFA 71 (Set 1) October 1, 2012 (Ex. 18); Laux dep. 21:01-15 (Ex. 19). Instead, Chrysler publicly claimed there was nothing wrong with the Jeeps; it deliberately sought to *un-warn* the public about the known danger.

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[2] There have been 19 known fatalities in Chrysler's Jeeps with rear gas tanks *since Remington Walden died on March 6, 2012.*

C. Bailout

In 2009, Chrysler declared bankruptcy and received a taxpayer bailout. Initially, 'new' Chrysler—which kept over 70% of its pre-bailout corporate management team[3]—attempted to escape all liability for defective vehicles it had manufactured before the bailout. Chrysler nearly succeeded. In the summer of 2009, however, the national press picked up on the story. BusinessWeek reported that under the then-current bankruptcy order, "the newly constituted Chrysler is shielded from suits filed by anyone injured in a future accident involving the 31 million Chrysler vehicles currently on the roads." Michael Orey, "'New' Chrysler Shielded from 'Old' Product Liability," Bloomberg Businessweek, 06/10/2009 (Ex. 30). Chrysler's attempt to evade its liability *to the taxpayers* for defective vehicles while simultaneously receiving a bailout *from the taxpayers* prompted public outcry. As the husband of one deceased Jeep burn victim said publicly, "I'm a little aggravated that they're using taxpayer money to bail out companies that are essentially shirking any and all responsibilities to those people who lost the most." Jeff Gelles, "Two-Time Victims in Chrysler's Bankruptcy," philly.com, 06/07/2009 (Ex. 31).

In the face of mounting public pressure, Chrysler retreated. In the late summer of 2009, although product liability cases that were *then pending* against Chrysler were extinguished,

[3] Chrysler's corporate management team can be found at http://www.chryslergroupllc.com/company/leadership/Pages/Management.aspx (viewed 12/13/2014), with their personal CVs included. The CVs reveal that over 70% of the management team (even today, after the Fiat purchase) has been carried over from before the bailout. This stands in stark contrast to Chrysler's representation to this Court that "[t]he sale of assets of Old Carco in the Bankruptcy Court was achieved through an arms-length bargaining and negotiation process between two unrelated entities." Def.'s Br. at 22.

Chrysler assumed responsibility for *pre-bailout* vehicles involved *post-bailout* wrecks. In the Bankruptcy Court for the Southern District of New York, Chrysler formally consented to a modification of the bankruptcy order. The amended order directed 'new' Chrysler to accept compensatory liability for "Product Liability Claims" arising from *pre-bailout* vehicles involved in *post-bailout* wrecks. Order Approving Amendment No. 4 to Master Transaction Agreement (hereinafter "Amendment 4"), Annex A (Ex. 3). The bankruptcy court described the claims that 'new' Chrysler would assume in precise detail:

> 1. Section 2.08(h) of the MTA shall be amended in its entirety to read as follows:
>
> "(h) (i) all Product Liability Claims arising from the sale after the Closing of Products or Inventory manufactured by Sellers or their Subsidiaries in whole or in part prior to the Closing and (ii) all Product Liability Claims arising from the sale on or prior to the Closing of motor vehicles or component parts, in each case manufactured by Sellers or their Subsidiaries and distributed and sold as a Chrysler, Jeep, or Dodge brand vehicle or MOPAR brand part, solely to the extent such Product Liability Claims (A) arise directly from motor vehicle accidents occurring on or after Closing, (B) are not barred by any statute of limitations, (C) are not claims including or related to any alleged exposure to any asbestos-containing material or any other Hazardous Material and (D) do not include any claim for exemplary or punitive damages."

Id. (highlights added). The "Product Liability Claims" that Amendment 4 directed Chrysler to assume included any action "arising out of, or otherwise relating to in any way in respect of claims for personal injury, wrongful death or property damage . . ." Master Transaction Agreement (hereinafter "MTA") at 104 (Ex. 32).[4]

[4] Plaintiffs note that the MTA's original definition of "Product Liability Claim" was amended slightly, in a way that does not affect this case, by paragraph 36 to Amendment No. 1 to the MTA. *Id.* at 122. The portion of the definition quoted here was not affected by the Amendment.

Chrysler immediately reassured the taxpayers that it would stand behind its existing vehicles. On August 27, 2009, Chrysler sent a press release announcing that it would "accept product liability claims on vehicles manufactured by Chrysler LLC (now OldCarco LLC) before June 10, 2009, and involved in accidents on or after that date." 08/27/2009 Press Release (Ex. 2). The reason, Chrysler said, was that a better understanding of its own finances had convinced Chrysler that "the future viability of the company will not be threatened if we accept these claims." *Id.* Chrysler wrote letters to U.S. Senators assuring them that "the company will accept product liability claims on vehicles manufactured by Old Carco before June 10 that are involved in accidents on or after that date." 08/27/2009 Chrysler letter to Hon. Richard Durbin (Ex. 33). Following Chrysler's press release, the national press reported that Chrysler had assumed liability for compensatory damages for its pre-bailout vehicles. Mike Spector, "Chrysler Got Legal Shield in Chapter 11," Wall Street Journal, 04/04/2012 (Ex. 34). In sum, Chrysler reassured the world that it would accept compensatory liability for any defective Chrysler vehicles already on the road.

After the public attention died away, Chrysler quietly changed course. In court filings, Chrysler renewed its efforts to evade liability for defective pre-bailout vehicles. In May 2012, for instance, contrary to its very public promises—Chrysler asserted in a Florida Jeep fire case that "[t]he Bankruptcy Court . . . permanently enjoined plaintiffs from asserting *any claims* against Chrysler Group." Chrysler Motion to Dismiss at 9, *Mejia v. Chrysler Group LLC*, Fla.

Cir. Ct., Case No. 12CA2181-10-G, 05/21/2012 (Ex. 35) (emphasis added). The Florida court *denied* Chrysler's motion. Order Denying Defendant Chrysler Group LLC's Motion to Dismiss, *Mejia v. Chrysler Group LLC*, Fla. Cir. Ct., Case No. 12CA2181-10-G, 10/11/2012 (Ex. 36). Chrysler has represented to Plaintiffs that some courts have granted its bailout motions, but have declined to provide to Plaintiffs any court orders so holding. However, the *Mejia* and *Walden* cases make clear that Chrysler's attempts to evade the bankruptcy court order and its very public promises to Congress and the American taxpayers continue today.

D. Chrysler's "Statement of Facts"

Chrysler's "statement of facts" repetitively ignores the well-known rule that on summary judgment motions, courts "view the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovants." *Smith*, 249 Ga. App. at 630 (2001).

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Chrysler's "facts" paint a misleading—and legally irrelevant—picture of the evidence.

II. SUMMARY JUDGMENT STANDARD

Under O.C.G.A. § 9-11-56, the Court may grant summary judgment only "when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Rutherford v. Revco Disc. Drug Ctrs., Inc.*, 301 Ga. App. 702, 702 (2009). "The granting of summary judgment . . . 'is a very, very grave matter'" because "'the case is taken away from

the jury, and the court substitutes its own judgment for the combined judgment of the [jury].'" *Serv. Merchandise, Inc. v. Jackson*, 221 Ga. App. 897, 901(1996) (quoting *Johnson v. Curenton*, 127 Ga. App. 687, 688 (1972)). On a motion for summary judgment, the *Court must view the facts in the light most favorable to the non-moving party, drawing all reasonable conclusions and inferences in the non-movant's favor*. *See Assoc. Servs., Inc. v. Smith*, 249 Ga. App. 629, 630 (2001) (emphasis added). Defendants, as the moving parties, "have the *burden* of establishing the non-existence of any genuine issue of fact, and *all doubts* must be resolved in favor of the non-moving party." *Northside Bldg. Supply Co. v. Foures*, 201 Ga. App. 259, 259 (1991) (emphasis added). Where the evidence is conflicting, "the trial court . . . is [not] permitted to weigh that evidence or determine its credibility, as those tasks are within the exclusive province of the jury." *Serv. Merchandise, Inc*., 221 Ga. App. at 899. If the evidence is not "plain, palpable, and undisputed," then the Court cannot grant summary judgment. *Plyant v. Samuels, Inc.*, 262 Ga. App. 358, 361 (2003).

III. CHRYSLER WILLFULLY AND WANTONLY RISKED CONSUMERS' LIVES.

There is abundant evidence that Chrysler knew that (1) rear tanks were dangerous, and (2) the Grand Cherokee's rear tank was dangerous. Chrysler sold the Jeeps anyway. Because Chrysler willfully and wantonly disregarded this known danger, the statute of repose does not bar this action. O.C.G.A. § 51-1-11(c).

Where a manufacturer knows about the dangers of its products, but the company fails to fix the problem or warn consumers, the willful and wanton standard is met. *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 544-45 (1993).[5] Here, Chrysler's own engineer, Judson Estes, has *admitted* that the Grand Cherokee tanks were "vulnerable in rear impact." Estes dep. 67:02-11 (Ex. 1). Further, as discussed above in Plaintiffs' statement of facts, Chrysler knew about the danger from engineering articles, internal documents and memoranda, internal crash tests, previous litigation, safety advocates, the federal government, and even Chrysler's own customers. Despite all this notice, Chrysler sold the Grand Cherokee with a rear tank and refused to warn anyone. Therefore, the "willful . . . or wanton" standard is met. *See* O.C.G.A. § 51-1-11(c); *Conkle*, 263 Ga. at 544-45.

Low-hanging rear tanks are particularly dangerous in SUVs. That is because SUVs—especially those marketed for off-road use, like the Grand Cherokee—sit higher off the ground than other vehicles. When SUVs get struck in the rear, there is an increased likelihood that the front of the striking vehicle will be driven underneath the rear of the SUV, where it can strike the tank directly. Engineers use the term "underride" to refer to part of one vehicle being shoved underneath the vehicle it strikes. Underride is particularly common in rear-end collisions

[5] Because *Conkle* was a punitive damages case, not a statute of repose case, the *Conkle* Court referred to a "conscious indifference to consequences" standard instead of a "willful or wanton" standard. The difference in phraseology does not matter—under Georgia law, "conscious indifference" is the same as "willful . . . or wanton." *Bethany Grp., LLC v. Grobman*, 315 Ga. App. 298, 300 (2012) ("The standard of 'wilful or wanton' imports deliberate acts or omissions, or such conduct that discloses an inference of conscious indifference to consequences").

because both vehicles are often braking—and this braking causes the rear of the 'target' vehicle to go up and the nose of the 'bullet' vehicle to go down. *See* Estes dep. 64:20-65:11 (Ex. 1). Chrysler's own reconstruction expert admits that underride occurred in this collision. Fenton dep. 116:20-25 (Ex. 38).

Evidence shows that by the time the subject Jeep was manufactured, most automobile manufacturers had moved away from rear tanks. That was specifically true for SUVs. Even *Chrysler's* contemporary SUVs—like the Dodge Durango—had midships tanks. In model year 1999, there were *thirty-one* SUVs sold with midships tanks.[6] By contrast, Chrysler's lawyers found only eight[7] SUVs sold in model year 1999 with rear tanks—and Chrysler has made no showing to the Court that those vehicles sat as high, had tanks that hung as low, or had tanks that were so poorly protected as those on the Jeeps. Def.'s Br. at 9, referencing the document titled "Tank Roadmap". Even the Isuzu Amigo and Toyota Rav4—both of which had wheelbases far shorter than the Grand Cherokee and sold for far less—had midships tanks in model year 1999.

[6] Using the same counting methods that Chrysler used on page 9 of its brief. The information comes from a document entitled "Tank Roadmap" that Chrysler produced in this case. The spreadsheet does not print well and is too voluminous to constitute a handy exhibit, but Plaintiffs can provide the document at the Court's request.

[7] The number is actually lower because Chrysler's list, in places, counts the same vehicle twice. For instance, Chrysler provides separate bullet points for the "Chevrolet Geo Tracker" and "Chevrolet Tracker." Those were the same vehicle. The same is true for the GMC Jimmy and Chevrolet Blazer—that was the same vehicle sold under different nameplates. Chrysler also fails to note that the four-door versions of the Jimmy and Blazer had midship tanks, not rear tanks.

1999 Toyota Rav4 with midship tank. (Ex. 39) [8]

Because Chrysler acted willfully and wantonly, the statute of repose does not bar this claim. O.C.G.A. § 51-1-11(c).

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IV. CHRYSLER'S BAILOUT ARGUMENT IS DISINGENUOUS AND WITHOUT MERIT.

Following public outcry over Chrysler's attempt to evade responsibility for the vehicles it sold before the bailout, Chrysler promised the public that it would "accept product liability claims on vehicles manufactured . . . before June 10, 2009, and involved in accidents on or after that date." 08/27/2009 Press Release (Ex. 2). To effectuate its public promise, Chrysler agreed to a binding amendment to the bankruptcy Master Transaction Agreement ("MTA"). *See* Amendment 4 (Ex. 3). Now, Chrysler tells this Court that neither Amendment 4 nor its public

[8] http://autos.aol.com/cars-Toyota-RAV4-1999/

promises matter because a different, unamended section of the MTA controls. This argument is just a new twist on the old switcheroo. It lacks merit. *See Mejia* Order (Ex. 36).

A. Amendment 4 controls.

Amendment 4 unambiguously requires that Chrysler assume liability for Plaintiffs' claims. It requires that 'new' Chrysler assume liability for "Product Liability Claims" that arise from vehicles sold "prior to the Closing [of the bankruptcy]" and that "arise directly from motor vehicle accidents occurring on or after the Closing." This case presents such a claim because the subject 1999 Grand Cherokee was sold "prior to the Closing" and was involved in an "accident[] occurring . . . after the closing." Therefore, Amendment 4—which expands upon the liabilities that 'new' Chrysler assumed pursuant to § 2.08 of the MTA— requires that Chrysler assume liability. The whole definition is below:

> 1. Section 2.08(h) of the MTA shall be amended in its entirety to read as follows:
>
> "(h) (i) all Product Liability Claims arising from the sale after the Closing of Products or Inventory manufactured by Sellers or their Subsidiaries in whole or in part prior to the Closing and (ii) all Product Liability Claims arising from the sale on or prior to the Closing of motor vehicles or component parts, in each case manufactured by Sellers or their Subsidiaries and distributed and sold as a Chrysler, Jeep, or Dodge brand vehicle or MOPAR brand part, solely to the extent such Product Liability Claims (A) arise directly from motor vehicle accidents occurring on or after Closing, (B) are not barred by any statute of limitations, (C) are not claims including or related to any alleged exposure to any asbestos-containing material or any other Hazardous Material and (D) do not include any claim for exemplary or punitive damages."

Amendment 4 (highlights added).[9] Chrysler concedes that the MTA as amended—including Amendment 4—"controls what liabilities Chrysler Group agreed to assume," and that such an assumption of liabilities is binding. Def.'s Br. at 21-23; *accord R.D. Stallion Carpets, Inc. v. Dorsett Indus.*, 244 Ga. App. 719, 724-25 (2000).

It is also beyond dispute that this case constitutes a "Product Liability Claim" as the MTA defines that term and as the term is used in Amendment 4. "Product Liability Claim[s]" include "wrongful death" claims—such as this case—even if the claim was "unknown" or "unasserted" at the time of the 2009 bailout. MTA at 104 (Ex 32). The entirety of the relevant definitional language is below:

> "Product Liability Claim" means any Action or action taken or otherwise sponsored by a customer arising out of, or otherwise relating to in any way in respect of claims for personal injury, wrongful death or property damage resulting from exposure to, or any other warranty claims, refunds, rebates, property damage, product recalls, defective material claims, merchandise returns and/or any similar claims, or any other claim or cause of action, whether such claim is known or unknown or asserted or unasserted with respect to, Products or items purchased, sold, consigned, marketed, stored, delivered, distributed or transported by the Company Business, any Selling Group Member or any of its Subsidiaries, whether such claims or causes of action are known or unknown or asserted or unasserted.

Id. (highlights and italics added). (The grayed-out language above was removed from the MTA's definition of "Product Liability Claim" by Amendment 1, and therefore does not affect this case. MTA at 122, ¶ 36.)

[9] Should the Court want to review it, the entirety of § 2.08 is attached as Exhibit 32. MTA at 18-19.

Amendment 4 to the MTA directs Chrysler to assume responsibility for this case. Chrysler's suggestion that case is somehow excluded from the MTA's definition of "Product Liability Claim" if the claim involves "negligence" is incorrect. *See* Def.'s Br. at 26. "Product Liability Claim" expressly includes "any Action arising out of, or otherwise *relating in any way* in respect of claims for . . . wrongful death." MTA at 104. Neither Amendment 4 nor the definition of "Product Liability Claim" contains any exclusion for cases that involve "negligence." *Id.* (emphasis added).

B. Section 2.09(j) does not control.

Although Chrysler consented to Amendment 4 and promised the public that it would abide by Amendment 4, Chrysler asks this Court to ignore Amendment 4 and apply a different provision instead. Chrysler bases this switcheroo argument on § 2.09(j). The argument fails for three reasons.

First, at the time of the 2009 bailout, *then-pending* claims and *future* claims were treated differently. *Then-pending* claims were extinguished by the bankruptcy. (Butler, Wooten, Cheeley & Peak LLP had multiple 'then-pending' cases against Chrysler in 2009, and is painfully aware that such claims were extinguished.) But *future* claims—such as this case—were assumed by 'new' Chrysler pursuant to Amendment 4, as explained above.

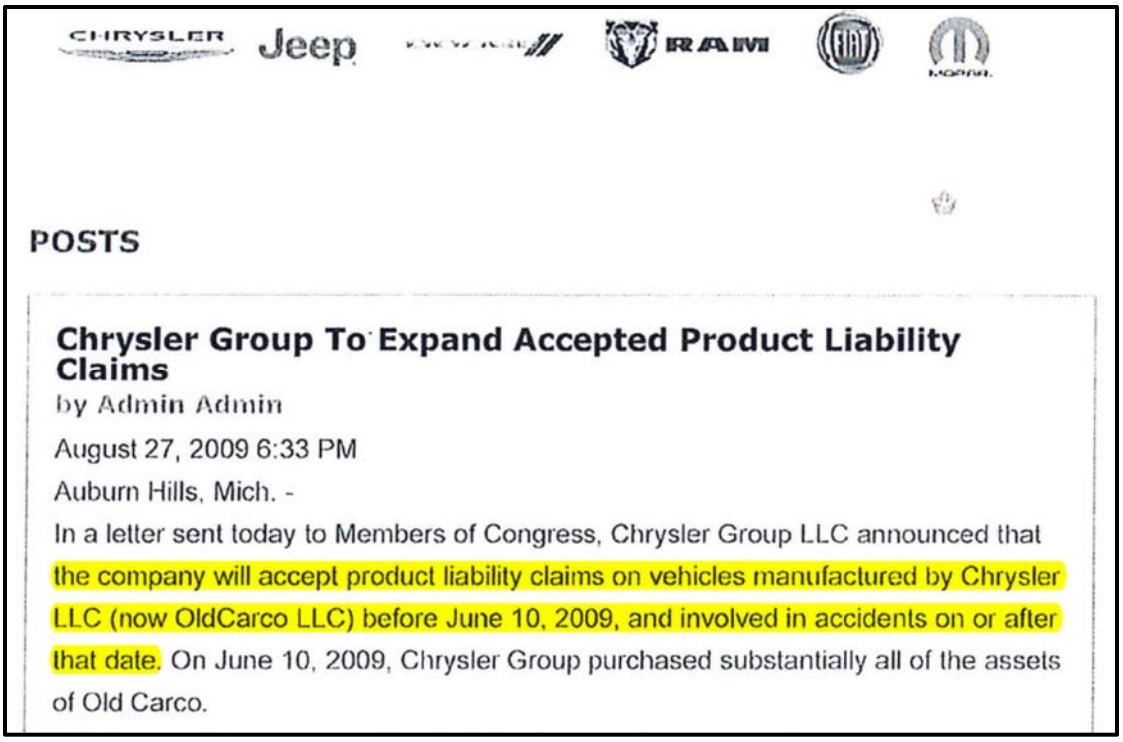
Section 2.09(j), on which Chrysler now seeks to rely to evade responsibility for Plaintiffs claims, applies only to *then-pending* claims—i.e., claims that were pending in 2009. By its explicit terms, subsection (j) addresses "Liabilities . . . *arising prior to or ongoing at the Closing*." MTA at 20 (Ex. 32) (emphasis added). The full subsection is below:

> (j) all Liabilities in strict liability, negligence, gross negligence or recklessness for acts or omissions arising prior to or ongoing at the Closing;

Id. (highlights added). This case was not one "arising prior to or ongoing at the closing" *in 2009* because the wreck upon which this case is based did not happen until *March 6, 2012*. Therefore, § 2.09(j) is inapplicable.

Second, even if Amendment 4 (upon which Plaintiffs rely) and § 2.09(j) (upon which Chrysler relies) are in conflict, Amendment 4 controls. That is a commonsense rule—because Amendment 4 occurred later, it better reflects the parties' intent. It is also the black-letter rule of New York law, which Chrysler contends governs: "*where there is a conflict between the old language and the new, the new terms control*." *Jacob Gold Realty v. Sckoczylas*, 186 Misc. 2d 612, 613, 720 N.Y.S. 2d 324 (2000) (emphasis added). Because Amendment 4 is "the new" and § 2.09(j) is "the old," *Amendment 4 controls*.

Third, even if the relationship between Amendment 4 and § 2.09(j) was unclear, the conduct of the parties reveals their intent. *See Coudert Brothers v. Peabody Energy Corp.*, 487 B.R. 375, 393 (S.D.N.Y. 2013) (under New York law, "a court may consider the factual circumstances surrounding the execution of a contract, because the court's primary purpose in interpreting the agreement is to determine the parties' intentions, and interpreting the contract's terms in a factual vacuum would undermine that goal."). Here, the "factual circumstances" are powerful. In the summer of 2009, Chrysler announced in a press release that:



POSTS

Chrysler Group To Expand Accepted Product Liability Claims

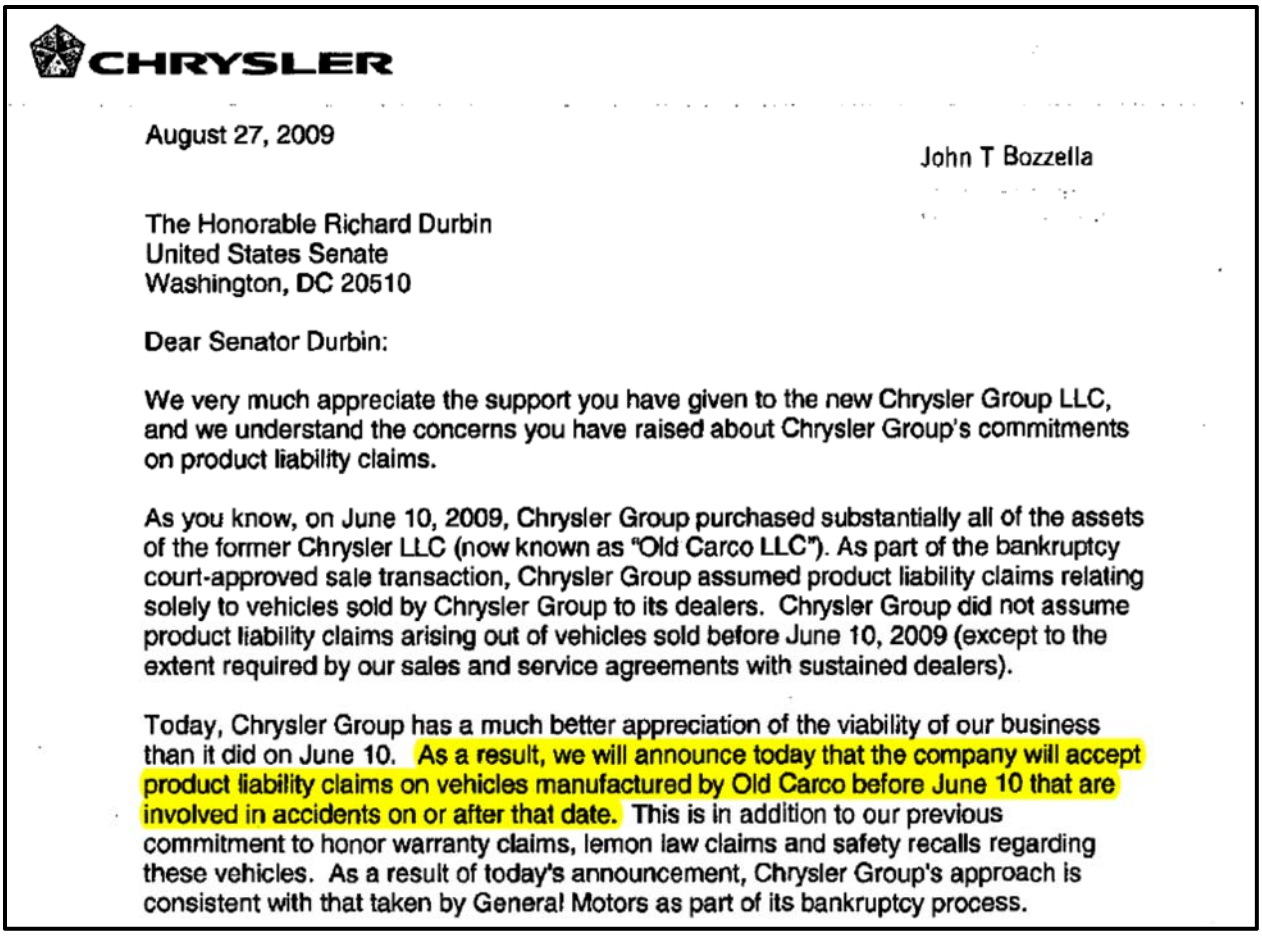
by Admin Admin

August 27, 2009 6:33 PM

Auburn Hills, Mich. -

In a letter sent today to Members of Congress, Chrysler Group LLC announced that the company will accept product liability claims on vehicles manufactured by Chrysler LLC (now OldCarco LLC) before June 10, 2009, and involved in accidents on or after that date. On June 10, 2009, Chrysler Group purchased substantially all of the assets of Old Carco.

08/27/2009 Press Release (Ex. 2) (highlights added). Chrysler contemporaneously wrote to members of Congress that:



CHRYSLER

August 27, 2009

John T Bozzella

The Honorable Richard Durbin
United States Senate
Washington, DC 20510

Dear Senator Durbin:

We very much appreciate the support you have given to the new Chrysler Group LLC, and we understand the concerns you have raised about Chrysler Group's commitments on product liability claims.

As you know, on June 10, 2009, Chrysler Group purchased substantially all of the assets of the former Chrysler LLC (now known as "Old Carco LLC"). As part of the bankruptcy court-approved sale transaction, Chrysler Group assumed product liability claims relating solely to vehicles sold by Chrysler Group to its dealers. Chrysler Group did not assume product liability claims arising out of vehicles sold before June 10, 2009 (except to the extent required by our sales and service agreements with sustained dealers).

Today, Chrysler Group has a much better appreciation of the viability of our business than it did on June 10. As a result, we will announce today that the company will accept product liability claims on vehicles manufactured by Old Carco before June 10 that are involved in accidents on or after that date. This is in addition to our previous commitment to honor warranty claims, lemon law claims and safety recalls regarding these vehicles. As a result of today's announcement, Chrysler Group's approach is consistent with that taken by General Motors as part of its bankruptcy process.

08/27/2009 Chrysler letter to Hon. Richard Durbin (Ex. 33) (highlights added). Therefore, even if the MTA was ambiguous, Chrysler's conduct makes it clear what the parties intended: *Chrysler assumed responsibility for pre-bailout vehicles involved in post-bailout wrecks*. This is such a case, and Chrysler has assumed responsibility.

IV. CHRYSLER'S REMAINING ARGUMENTS LACK MERIT.

A. Substantial Similarity

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B. Federal Minimum Standards

Contrary to Chrysler's suggestion, summary judgment is not proper on the grounds that Chrysler certified the 1999 Grand Cherokee as meeting Federal Motor Vehicle Safety Standard ("FMVSS") 301 or that NHTSA closed its investigation of the 1999 Grand Cherokee. This is a matter of black-letter law. In an automotive product liability case, summary judgment as to willfulness or wantonness is *not* proper "where, *notwithstanding the compliance with applicable safety regulations*, there is other evidence showing culpable behavior." *Gen. Motors Corp. v. Moseley*, 213 Ga. App. 875, 885 (1994) (holding that evidence "was sufficient to support an award of punitive damages" despite General Motors's compliance with FMVSS) (emphasis added), *abrogated on other grounds by Webster v. Boyett*, 269 Ga. 191 (1998); *accord Uniroyal Goodrich Tire Co. v. Ford*, 218 Ga. App. 248, 255 (1995), *vacated on other grounds by* 224 Ga. App. 187 (1997); *Watkins v. Ford Motor Co.*, 190 F.3d 1213, 1217 (11th Cir. 1999) (quoting *Moseley*); *Mascarenas v. Cooper Tire & Rubber Co.*, 643 F. Supp. 2d 1363, 1374 (S.D. Ga. 2009); *Woodard v. Ford Motor Co.*, No. 1:06-CV-2191-TWT, 2007 WL 4125519, at *4-5 (N.D. Ga. Nov. 2, 2007); *Reid v. BMW of N. Am.*, 430 F. Supp. 2d 1365, 1374 (N.D. Ga. 2006).[10] In sum, Chrysler's claimed "compliance with applicable safety regulations" *means nothing* for

[10] Most of the cases cited in this paragraph address claims for punitive damages. Those cases control here because the punitive damages standard (i.e., "willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences") is practically equivalent to the statute of repose standard (i.e., "conduct which manifests a willful, reckless, or wanton disregard for life or property"). O.C.G.A. § 51-12-5.1(b) (punitive damages); O.C.G.A. § 51-1-11(c) (statute of repose); *see Bethany*, 315 Ga. App. at 300 ("The standard of 'wilful or wanton' imports deliberate acts or omissions, or such conduct that discloses an inference of conscious indifference to consequences").

purposes of summary judgment if there is "other evidence showing culpable behavior." *Moseley*, 213 Ga. App. at 885.

Here, "other evidence of culpable behavior" abounds. As discussed above, the "other evidence" includes (1) Chrysler's admission that the gas tank was "vulnerable in rear impact" and was located in a known crush zone; (2) Chrysler's own crash tests, (3) Chrysler's internal documents, (4) warnings from safety advocates, and (5) warnings from Chrysler's own customers. Chrysler consciously ignored all of those things. Summary judgment is improper.

Federal law agrees with Georgia law that neither alleged compliance with FMVSS nor the fact that NHTSA closed an investigation has any effect on tort liability. The Federal Motor Vehicle Safety Act establishes that the FMVSS are merely "minimum" standards and expressly states that "compliance with" a Federal Motor Vehicle Safety Standard "*does not exempt a person from liability at common law*." 49 U.S.C.A. § 30102(a)(9); 49 U.S.C.A. § 30103(e) (emphasis added). Plaintiffs' expert witness Alan Kam, a 25-year veteran of NHTSA, has stated *in this case* that compliance with FMVSS does not mean that a vehicle is non-defective and that "[c]losure of a NHTSA investigation does not constitute a finding of no defect." Kam dep. Ex. 2 at 6, 8 (Ex. 13). In other words, neither Chrysler's alleged compliance with the FMVSS nor NHTSA's closure of the investigation affects this case. As NHTSA's former Administrator Joan Claybrook put it:

> Our [FMVSS] are and were intended by Congress to be minimum standards. The tragedy is that many manufacturers have treated the [FMVSS] more like ceilings on safety performance rather than floors from which to improve safety.

11/28/1980 Claybrook letter, (Ex. 45).

C. NHTSA's 2003 Statement

Chrysler argues that because NHTSA did not "require manufacturers . . . to place the tank in any particular location" in 2003, Chrysler should escape liability. Def. Br. at 12. That argument lacks merit. The reason NHTSA did not expressly forbid rear-mounted tanks is that, pursuant to its statutory authority, NHTSA can generally issue *performance-based*, but not *design-based*, regulations. Kam dep. at 116:07-21 (Ex. 46). That means NHTSA is generally authorized to require that vehicles *perform* in a certain way (e.g., withstand a certain type of impact in a crash test), but cannot require that vehicles be *designed* in a certain way (e.g., have the gas tank in a specific location). *Id.* at 116:03-117:18. Therefore, the fact that NHTSA did not expressly forbid rear tanks only reflects the limits of NHTSA's statutory authority—not an endorsement of the Grand Cherokee's dangerous design.

D. *Reese* is inapposite.

Ford Motor Co. v. Reese was a 'failure to recall' case—the Court of Appeals opinion establishes only that "absent special circumstances, no common law duty exists under Georgia law requiring a manufacturer to recall a product after the product has left the manufacturer's control." 300 Ga. App. 82, 85 (2009) (footnote omitted). Pretermitting the question of whether

"special circumstances" exist here, this is not a 'failure to recall' case— Plaintiffs are aware of *Reese* and have deliberately not advanced a 'failure to recall' claim. Instead, Plaintiffs' claims are that (1) Chrysler willfully and wantonly sold an unreasonably dangerous vehicle, and (2) Chrysler failed to warn anyone. The NHTSA investigation into the rear-tank Jeeps is relevant insofar as it provided notice of the defect to Chrysler and reflects Chrysler's willfulness, wantonness, and conscious indifference to the consequences; but not on the grounds of any 'failure to recall' claim—Plaintiffs have made no such claim. Therefore, *Reese* is inapposite.

E. *Ivy* is inapposite.

Citing *Ivy v. Ford Motor Co.*, Chrysler suggests that "where there is a bona fide dispute as to the propriety of the defendant's actions," the Court should *grant* summary judgment. Def.'s Br. at 31; *see* 646 F.3d 769 (11th Cir. 2011). Chrysler's suggestion ignores the summary judgment standard. In Georgia, summary judgment is *inappropriate* where there is a genuine factual dispute. *Rutherford*, 301 Ga. App. at 702. To the extent that *Ivy* actually stands for the proposition that Chrysler advances, the case does not control because it is federal.

V. CONCLUSION

Summary judgment is inappropriate. Abundant evidence shows that Chrysler knew that the Grand Cherokee was "vulnerable to rear impact," but sold the vehicle anyway without warning anybody. *See, e.g.*, Estes dep. 67:02-11 (Ex. 1). Therefore, the statute of repose does not bar these claims. *See* O.C.G.A. § 51-1-11(c).

Chrysler's bailout argument is, frankly, disappointing. That such a powerful, global corporation would attempt to evade both the bankruptcy court order to which it agreed and the promises it made to the taxpayers who funded its bailout is dispiriting even to seasoned automotive product liability lawyers. This new twist on the old switcheroo is not a basis for summary judgment.

Plaintiffs respectfully request that the Court deny Chrysler's motion.

This _____ day of _____, 2014.

Respectfully submitted,

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