[redacted] *Plaintiffs* vs. FCA US LLC c/o CT Corporation Systems, Statutory Agent 4400 Easton Commons Way, Suite 125 Columbus, Ohio 43219 and TRI STATE CONCRETE INC. c/o Dean Dillingham, Statutory Agent 1 Millikin Street, Suite A Hamilton, Ohio 45013 and TRACY WAYNE MOORE 1226 North Frieda Drive Fairfield, Ohio 45014 *Defendants.*	CASE NO. 2018-07-1583 COURT OF COMMON PLEAS BUTLER COUNTY, OHIO JUDGE: J. GREGORY HOWARD **PLAINTIFF'S RESPONSE TO DEFENDANT FCA'S MOTION TO DISMISS**

FCA knew that its Jeeps with rear-mounted gas tanks, including the subject 2004 Jeep Liberty, were defective, unreasonably dangerous, and—as FCA's own engineer admitted under oath *three years* before this collision—"vulnerable to rear impact." Compl. ¶¶ 10, 25, 37. FCA concealed the dangers and sold the subject Jeep anyway. ¶¶ 11, 38.[1] After FCA marketed and sold the Jeep, evidence of its dangerousness continued to mount. *See, e.g.*, ¶¶ 27, 52 (other

[1] These and subsequent citations to paragraphs ("¶") refer to the Complaint unless otherwise specified.

similar incidents). FCA concealed that evidence and warned nobody. ¶¶ 34, 35, 58, 59. Instead, FCA's Chairman and CEO fraudulently reassured the public that the rear-tank Jeeps were "absolutely safe." ¶¶ 35, 121(m). Eventually, in the face of building public pressure, FCA conducted a "recall" of rear-tank Jeeps, including the subject 2004 Jeep Liberty, that involved installing a free trailer hitch. ¶ 67. FCA knew that this "recall" would not fix the problem—in fact, it made the problem worse—but FCA concealed that too. ¶¶ 65, 66, 71.

Then on October 20, 2017, the rear-tank Jeep that [redacted] was driving was struck in the rear. ¶ 82. The trailer hitch failed, the gas tank ruptured, the seat back collapsed, the Jeep exploded, and [redacted] burned to death inside her vehicle because of the exact dangers that FCA had concealed. ¶ 121(l).

A. FACTS

The allegations of the Complaint, *and the evidence that it cites*, show that FCA[2] knew about the dangers associated with its rear-tank Jeeps, including the 2004 Jeep Liberty, but knowingly concealed those dangers. *See* ¶¶ 10-36 (gas tank), 37-59 (seat backs).

As early as 1978, FCA's own engineers concluded, after studying the notorious Ford Pinto, that placing gas tanks "ahead of the rear wheels" provided better protection for the tanks than placing them behind the rear axle. ¶ 12. Then throughout the 1980s and 1990s, FCA manufactured many of its vehicles with tanks mounted *forward* of the rear axle (i.e., in the "midships" location) and repeatedly boasted in advertising materials that those midships tanks

[2] After being purchased by Fiat Chrysler Automobiles N.V., an international corporation, Chrysler Group LLC renamed itself "FCA US LLC." That change occurred on December 16, 2014. FCA US LLC is the named defendant in this case. Before the renaming, at various times before, during, and after the bankruptcy and bailout process, Chrysler had been known as Chrysler Corporation, DaimlerChrysler AG, Chrysler LLC, Old Carco LLC, Chrysler Group LLC, and other names. For the sake of simplicity, Plaintiff uses the name "FCA," which stands for "Fiat Chrysler Automobiles," to refer collectively to these entities. *See* ¶ 5.

were safer for occupants in the event of rear impact. ¶¶ 13-15. By 1999, FCA's engineers acknowledged that "the tank should be located in a manner that avoids known impact areas," and by 2001, that there "should be no crush in the tank area." ¶¶ 18, 21.

Despite these known dangers of rear-mounted gas tanks, FCA manufactured certain Jeep-branded vehicles—including the 1993-2004 Jeep Grand Cherokees, 1993-2001 Jeep Cherokees, and 2002-2007 Jeep Liberties—with *rear* tanks. FCA placed the tanks in all of these Jeeps "within the rear-most *eleven inches* of the vehicle." ¶ 27 (emphasis added). Even after it became appallingly apparent that gas tanks mounted in the extreme rear were in "a known impact area[]" that regularly got "crush[ed]" in rear impact, FCA kept selling these rear-tank Jeeps—such as the subject vehicle, a 2004 Jeep Liberty.

FCA knew about the dangers of the subject Jeep's rear-tank design. In 1998, internal computer-aided crash tests had revealed that the rear-most *twenty-five inches* of the Jeeps was getting crushed in rear impact—despite FCA's rule about "no crush in the tank area." ¶ 17. In 2000, FCA's "Rear Impact Tech Club" decided to stop placing test instruments in the rear-most *twenty-four inches* of the Jeeps because the instruments were getting destroyed in physical crash tests. ¶ 20. But FCA kept selling Jeeps with the gas tanks only *eleven inches* from the rear, with predictable results: people burned alive. Even before discovery in this case, Plaintiff has identified *sixty-one* other similar collisions between 1998 and 2017 in which FCA's rear-tank Jeeps leaked gasoline after rear impact. ¶ 27.

In 2009, the National Highway Traffic Safety Administration ("NHTSA") launched an investigation into the rear-tank Jeeps. The investigation ultimately encompassed the 1993-2004 Jeep Grand Cherokees, 1993-2001 Jeep Cherokees, and 2002-2007 Jeep Liberties. During that investigation, NHTSA's Office of Defects Investigation ("ODI") found "numerous fire-related deaths and injuries" and concluded that the 1993-2004 Grand Cherokees and 2002-2007 Jeep Liberties "contain[ed] defects related to motor vehicle safety." ¶ 60.

To deal with the investigation, FCA's Chairman and CEO, Sergio Marchionne, sought a private meeting with the top political heads of NHTSA. ¶¶ 62-63. FCA already knew—and the President of Chrysler International had already *admitted under oath*—that "the tow package [trailer hitch] does not protect the tank." ¶ 65. But in that secret meeting, Marchionne struck a deal under which FCA would escape the investigation by agreeing to conduct a "recall" in which it provided free trailer hitches for some of its rear-tank Jeeps, including the subject 2004 Liberty. ¶¶ 64-67. FCA knew that this "recall" would not fix the problem, but told no one. ¶¶ 65, 71.

In addition to its own engineers, real-world collisions, consumer complaints, and the federal government, *judges and juries* put FCA on notice about the dangers of its rear-tank Jeeps. In 2015, for the first time, a lawsuit involving fire in a rear-tank Jeep went to trial. (FCA had settled all others, usually for confidential amounts.) The jury found that FCA "acted with a reckless or wanton disregard for human life" and returned a verdict of $150,000,000. ¶ 26. The trial court denied FCA's motion for a new trial after a remittitur, then the Georgia Court of Appeals and the Georgia Supreme Court affirmed unanimously. *Id.*

FCA has also long known about the dangers of weak, collapsing seats. ¶ 37. Collapsing seats can cause injuries all on their own, but when paired with a gas tank located in the rear crush zone, collapsing seats are especially dangerous. *Id.* When a seat back collapses, the occupant is disoriented (which makes escape more difficult), is harder to reach (which makes rescue more difficult), and is thrown rearward (toward the tank and fire). *Id.* When a vehicle is burning because its rear-mounted gas tank has exploded, a collapsing seat can be catastrophic.

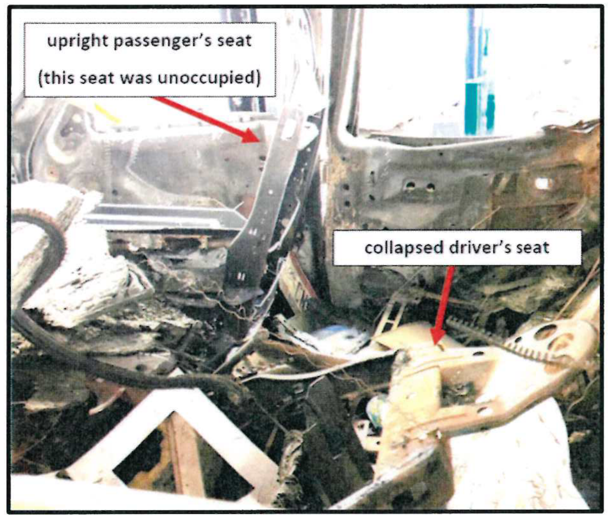
FCA knew how to build stronger seats. As early as 1980, FCA's engineers recognized that "seat back collapse" was occurring in internal tests and noted that "improvements could be made, but would require development costs." ¶ 40. By the mid-1990s, FCA was manufacturing its Chrysler-branded Sebring sedans with strong seats that resisted failure in rear impact. ¶ 45. In the 1990s through the 2000s, when Chrysler and Daimler-Benz were merged, the company's Mercedes-branded vehicles had stronger seats that were "designed to resist bending rearward, and twisting, in a wide variety of rear impacts." ¶ 41.

FCA also knew about the *benefits* of stronger seats. Following public attention to the issue of seat backs as a result of a "60 Minutes" special in 1992, FCA's engineers recommended that the company build vehicles with stronger seats. ¶ 42; *see also* ¶ 43 (FCA executives also watched the 60 Minutes special). In January of 1996, engineers noted that the stronger Sebring seats "performed very well in impact tests." ¶ 45. In November of 1996, FCA engineers acknowledged "the ability of [a] car seat to add appreciable crash victim occupant protection." ¶ 46. And from 1988 through 2015, Plaintiff has identified—even without the benefit of discovery—*twenty-nine* other similar occasions of seat back collapse in FCA vehicles. ¶ 52.

In addition to engineers and real-world collisions, *judges and juries* put FCA on notice about the dangers of weak, collapsing seats. In 2004, a Tennessee jury found that the weak, collapsing seat in a Dodge minivan was defective and unreasonably dangerous, that FCA failed to warn at the time of first sale and afterward, and that FCA acted recklessly such that punitive damages should be imposed. ¶ 47. The jury returned a verdict of $105,500,000. *Id.*

Despite these known dangers, FCA manufactured the 2004 Jeep Liberty with a weak, collapsing seat and refused to issue any warning. ¶¶ 57-59.

Because a picture is worth a thousand words, two post-collision pictures follow—the subject Jeep on the left, and [redacted] seat back on the right. ¶ 83, 85.



What happened on October 20, 2017 was chillingly predictable. [redacted] 2004 Jeep Liberty—a rear-tank Jeep manufactured with weak, collapsing seats and equipped with a recall-approved trailer hitch—was rear-ended. ¶ 82. The crush damage did not reach the occupant area. ¶83. Nonetheless, the trailer hitch buckled and speared the gas tank. ¶ 94. The tank ruptured. ¶ 84. The Jeep exploded. ¶ 89. [redacted] seat collapsed. ¶ 86. [redacted] was thrown rearward toward the fire. ¶ 86. She could not escape. ¶ 90. Bystanders could not rescue her. ¶ 91. She burned to death inside the Jeep. ¶ 93.

B. STANDARD OF REVIEW ON MOTION TO DISMISS

On a motion to dismiss, courts accept all factual allegations in the Complaint as true and draw all reasonable inferences in the non-moving party's favor. *Transky v. Ohio Civil Rights Comm'n.*, 193 Ohio App.3d 354, 2011-Ohio-1865, 951 N.E.2d 1106, ¶ 11 (overruled on other grounds). "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *Doe v. Cleveland Metro. Sch. Dist.*, 2012-Ohio-2497, 972 N.E.2d 63, ¶ 21.

FCA ignores this standard. For instance, FCA suggests to the Court that Plaintiff's Complaint "acknowledge[s] that [the subject vehicle] passed federally mandated tests for fuel tank integrity." Opp. at 10. Plaintiff's Complaint acknowledges no such thing. *See* ¶¶ 104, 106 (paragraphs cited by FCA). For another example, Plaintiff has *already* identified *ninety* other similar incidents, all involving rear impact, by date, occupant(s), and vehicle. ¶ 27, 52. FCA's claim that Plaintiff's Complaint lacks "detail corroborating [Plaintiff's] claim that the other incidents were similar to the accident at issue" ignores the black-letter rule that when a party moves to dismiss, the Complaint's allegations, including those relating to similarity, are taken as true. *See* Opp. at 3.

C. STATUTE OF REPOSE AND RULE 9(B)

Because the Complaint properly pleads a fraud claim, the statute of repose does not bar this case. R.C. 2305.10(C)(2); *Papasan v. Dometic Corp.*, No. 16-CV-02117, 2017 WL 4865602, at *10-11 (N.D. Cal. 2017) (applying Ohio law); ¶ 120.

Fraud has six elements under Ohio law.[3] "Ohio courts have consistently recognized 'fraud by concealment' or 'fraudulent concealment' when the fraud claim raises the issue of concealing a fact when a duty to disclose exists." *Schmitz*, 2016-Ohio-8041, 67 N.E.3d 852, ¶ 57. Plaintiff has pled each of those six elements with sufficient particularity to satisfy Rule 9(B),

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[3] The elements are (1) a representation, or when there is a duty to disclose, "concealment of a fact," (2) that is material, (3) "made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred," (4) intent to mislead, (5) justifiable reliance upon the representation or concealment, and (6) injury proximately caused by the reliance. *Schmitz v. Nat'l Collegiate Athletic Ass'n*, 2016-Ohio-8041, 67 N.E.3d 852, ¶ 56.

as shown below. *See* Complaint ¶ 121; *Papasan*, 2017 WL 4865602, at *10-11 (applying Ohio law).

1. Representation, or where there is a duty to disclose, concealment.

FCA had statutory and common-law duties to disclose defects in the subject Jeep. When a "manufacturer kn[ows] or, in the exercise of reasonable care, should . . . know[] about a risk that is associated with the product," then the manufacturer has a duty to warn. R.C. § 2307.76(A); ¶ 121(a). FCA had this statutory duty to warn of known risks at the time of initial marketing (i.e., at the time of initial sale). R.C. § 2301(A)(1). Because evidence of the dangers continued to mount after the sale of the subject Jeep, FCA also had a statutory duty to issue a "*post-marketing*" warning (i.e., a warning *after* the initial sale). R.C. § 2301(A)(2). FCA also had a duty to warn at common law. *See Davenport v. Correct Mfg. Corp.*, 24 Ohio St. 3d 131, 133 (1986).

Because FCA had a duty to disclose, "concealment" satisfies this first element of fraud. *Schmitz*, 2016-Ohio-8041, ¶ 56; *Papasan*, 2017 WL 4865602, at *10-11. FCA concealed the defects in the subject Jeep at the time of initial marketing *and* after the Jeep was sold. ¶¶121(b), (c). FCA also fraudulently concealed the fact that the trailer hitch would not protect the tank. ¶¶ 121(d), (e). FCA made false representations by fraudulently announcing to the public that its rear-tank Jeeps were "absolutely safe." ¶¶ 35, 121(m).

FCA was alerted to the dangers in the subject Jeep by failures in its other vehicles with substantially similar designs. As to gas tanks, those included the 1993-2004 Jeep Grand Cherokees, 1993-2001 Jeep Cherokees, and 2002-2007 Jeep Liberties, *all* of which had rear tanks mounted within "the rear-most eleven inches of the vehicle" and *all* of which were involved in the federal investigation. ¶¶ 27, 60. As to seat backs, those included other vehicles manufactured with substantially similar seats. FCA's suggestion that an allegation is irrelevant if it "do[es] not reference the model 2004 Jeep Liberty" is silly. Opp. at 3. As the Court likely knows, manufacturers build vehicles by "platforms" that span several years. There are no meaningful differences between a 2002, 2004, or 2007 Liberty; no substantial differences in the fuel tank designs of the above-mentioned Grand Cherokees, Cherokees, and Liberties; and no substantial differences between the seats of the subject Jeep and other FCA vehicles equipped with the same or similar seats. The known failure of a substantially similar design is relevant because it shows that FCA knew about the dangers at issue. *See Taylor v. Freedom Arms, Inc.*, 2009-Ohio-6091, ¶ 52-55 (admissibility of substantially similar incidents).

Ohio recognizes fraudulent concealment in product liability cases. *Papasan*, 2017 WL 4865602, at *10-11; *In re Whirlpool Corp.*, 45 F. Supp. 3d 706, 721-23 (N.D. Ohio 2001); *Jones v. Am. Tobacco Co.*, 17 F. Supp. 2d 706, 720 (N.D. Ohio 1998). FCA's representation to this Court that "Ohio law does not recognize a claim for fraudulent concealment in product liability actions" is false, and the case that FCA cites[4] does not support its representation. Opp. at 7. [5]

2. *Materiality.*

FCA concealed the likelihood that the subject Jeep would explode in rear impact and the seat back would collapse. ¶ 10, 37. Those dangers are material. ¶ 121(f).

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[4] FCA cites "*Crisp. Stryker Corp.*, No. 5:09-cv-02212, 2010 U.S. Dist. LEXIS 51390 (N.D. Ohio May 21, 2010)" for this proposition. The case is available at https://law.justia.com/cases/federal/district-courts/ohio/ohndce/5:2009cv02212/161232/212/ or by Googling "crisp v stryker corp ohio."

[5] In a footnote, FCA refers with a "*Cf.*" citation to *Brosier v. Ford*, the trial court Order from this Court that FCA attached to its brief. Opp. at 12. In *Brosier*, the trial court dismissed a count of the complaint because the plaintiff failed to properly allege fraud. *Brosier* at 8-9. Here, Plaintiff has properly pled fraud, and specifically, fraudulent concealment. Further, the plaintiff in *Brosier* alleged that a single component part used in a recall was defective, whereas here, Plaintiff challenges the gas tank design, seat back design, and FCA's decision to install trailer hitches as a "recall" despite knowing that trailer hitches could not protect the gas tanks. *See id.* at 5 ("the Court finds that the replacement parts are the product in question.").

3. Knowledge of falsity.

FCA's own engineer admitted that FCA knew that the subject Jeep was "vulnerable to rear impact."[6] FCA knew that (1) the rear gas tank could rupture in foreseeable rear impacts, (2) the seat back could collapse, and (3) the trailer hitch would not help. ¶¶ 10-33 (gas tank), 37-57 (seat back), 65-67 (trailer hitch), 121(g) (all). Yet FCA concealed that information and falsely reassured the public that the Jeeps were "absolutely safe." ¶¶ 34-36, 57-59, 67-71, 76, ¶ 121(m).

4. Intent to mislead.

As FCA's Chairman and CEO admitted under oath, FCA "wanted the American people to believe" that the Jeeps were safe. ¶ 121(i). In truth, the Jeeps were deadly-dangerous, and FCA knew it. FCA intended to mislead consumers by concealing the dangers, and by offering false reassurances, for an obvious reason—it wanted to sell more Jeeps. ¶ 121(h).

5. Justifiable reliance.

FCA was a global automaker with experience in building, testing, selling, and recalling Jeeps. [redacted] ordinary consumers. [redacted] justifiably relied on FCA to disclose known dangers, as Ohio law required. ¶¶ 73-74, 121(j). [redacted] family also relied on FCA to conduct a meaningful recall, if necessary, that would actually fix the safety problem that it purported to address. ¶ 77-78. FCA had the ability to conduct crash tests, consult its engineers, evaluate crash data, and conduct recalls—the [redacted] did not.

6. Proximate cause.

The dangers that FCA knew about, but fraudulently concealed, caused [redacted] death. ¶¶ 132, 133. (When we reach the evidence phase, FCA will be unable to deny that.) If

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[6] ¶ 25. FCA faults Plaintiff for not providing more "context" for the deposition quotations in the Complaint. FCA had lawyers at those depositions; FCA has copies of the transcripts; FCA can file them if it so chooses.

FCA had told the [redacted] family about those risks, the [redacted] would not have purchased or kept the subject Jeep. ¶ 121(k). When the hitch failed, the gas tank ruptured, and the seat back collapsed, those exact risks caused [redacted] death. ¶¶ 82-93, 121(l).

D. POST-MARKETING FAILURE TO WARN

If a manufacturer fails to warn consumers of a known danger *after* the sale of a product, that manufacturer is liable for its "inadequate post-marketing warning." R.C. § 2307.76(A)(2). The elements of a post-marketing warning claim are: (1) the manufacturer knew or should have known about the risk that caused harm, and (2) the manufacturer failed to give the warning that "reasonable care" required, given the likelihood and severity of the risk. *Id.*

The Complaint properly pleads those elements. As to the first element, Plaintiff has shown that FCA knew about the risks of gas tank explosion and seat back collapse following rear impact. ¶¶ 10-36 (gas tanks), 37-59 (seat backs). As to the second element, Plaintiff has shown that FCA gave *no post-marketing warning at all*—and instead, falsely announced that the Jeeps were "absolutely safe." ¶¶ 35, 36, 59, 71, 76, 121(a). As to the "likelihood" of the risk, Plaintiff has identified *ninety* other product failures, even before discovery, in which gas tanks ruptured or seat backs collapsed. ¶¶ 27, 52. As to the "severity" of the risk, Plaintiff has shown that rupturing gas tanks can lead to "fire and death" and "explosion[s];" and that collapsing seat backs can lead to "head or cervical spine injuries," occupants who cannot escape from their burning vehicles, and occupants who cannot be rescued from their burning vehicles. ¶¶ 10 (gas tanks), 37 (seat backs). Plaintiff has properly pled a post-marketing failure to warn. ¶ 117.

The Complaint shows that after FCA sold the subject Jeep, the evidence of its dangers continued to mount. For example, it was *after* the sale of the subject vehicle that: FCA's own engineer testified that the rear-tank Jeeps were "vulnerable to rear impact" (¶ 25), the Office of Defects Investigation determined that the rear-tank Jeeps had "defects relating to motor vehicle safety" (¶ 60), a jury found that FCA "acted with a reckless or wanton disregard for human life" with regard to the rear-tank Jeeps (¶ 26), the gas tanks in forty-three rear-tank Jeeps now known to Plaintiff leaked after rear impact (¶ 27), the Executive Director for the Center for Auto Safety testified before Congress about FCA's collapsing seat backs (¶ 48), two U.S. Senators sent FCA a letter warning FCA about its collapsing seat backs (¶ 49), a jury imposed punitive damages against FCA for its reckless use of collapsing seats (¶ 47), and the seat backs in eighteen FCA vehicles now known to Plaintiff collapsed after rear impact (¶ 52). It was also *after* the sale of the subject Jeep that FCA undertook a "recall" of the rear-tank Jeeps that it *knew* would not actually fix the problem. ¶¶ 65-67, 71.

This evidence shows that *after* FCA sold the subject Jeep, but *before* [redacted] was killed, FCA was 'on notice' that the subject Jeep was unreasonably dangerous. This proof of 'notice' establishes Plaintiff's post-marketing failure to warn claim. **If FCA admits that it knew, at the time that it first sold the subject Jeep, that the gas tank and seat back were dangerous and defective, then this post-marketing evidence of the dangers could be irrelevant.** But FCA has not admitted that, and has instead taken the opposite approach by claiming that the Jeeps were "absolutely safe." ¶ 76. Unless FCA admits that it knew, at the time of initial sale, that the gas tank and seat back were dangerous and defective, Plaintiff's allegations of post-sale notice validly establish a post-marketing failure-to-warn claim.

FCA's reliance on *Linert v. Foutz* is misplaced. *See* 149 Ohio St.3d 469, 2016-Ohio-8445, 75 N.E.3d 1218. In *Linert*, the plaintiffs appealed from a defense verdict after having claimed that, but for alleged defects in the decedent's vehicle, the decedent would have sustained only "minor injuries" after being struck by a Cadillac "traveling at speeds estimated at 90 to 110 miles per hour." *Id.* at ¶ 4, 6. The jury disagreed and determined that the subject vehicle was not defective and that the manufacturer was not liable for failing to warn. *Id.* at ¶ 18. The Ohio Supreme Court held that the trial court properly refused to instruct the jury on a post-marketing failure-to-warn theory. *Id.* at ¶ 3.

Linert is distinguishable for several reasons. <u>First</u>, the issue on appeal was whether the plaintiff was entitled to a jury instruction on post-market failure to warn after the presentation of evidence. *See id.* at ¶ 2. Here, the issue is whether the Complaint contains sufficient allegations to withstand a motion to dismiss. <u>Second</u>, in *Linert*, it was established that "the risk of fire . . . was well-known to [the manufacturer] *prior* to the sale." *Id.* at ¶ 32 (emphasis in original). Here, FCA has *not* conceded that the risk of fire was well-known to it when it sold the subject Jeep, and has instead taken the opposite position. *See* Complaint ¶ 76 ("absolutely safe"). <u>Third</u>, in *Linert*, the jury determined that the subject vehicle was *not defective*, which made it impossible for the appellate court to find that the plaintiffs could meet the first element of a post-marketing failure-to-warn claim—i.e., that the manufacturer knew about an unreasonable risk that caused the harm. *Linert*, 149 Ohio St.3d at ¶ 18. Here, there has been no such finding of non-defectiveness. <u>Fourth</u>, in *Linert*, the plaintiffs failed to show post-marketing notice of any defect because "[t]here was a paucity of such evidence." *Id.* at ¶ 35. Here, as noted above, the Complaint shows repeated post-marketing 'notice' of the defects to FCA.

E. NEGLIGENT UNDERTAKING

The Complaint validly states a claim for a negligent undertaking. ¶¶ 118, 119. Having undertaken to recall the subject Jeep, FCA had a <u>duty</u> to conduct the recall with ordinary care.

Brink v. Giant Eagle, 2017-Ohio-7960, ¶ 39-44 (2017) ("When one undertakes a duty voluntarily, and another reasonably relies on that undertaking, the volunteer is required to exercise ordinary care in completing the duty.") FCA breached that duty by carrying out a "recall" that was futile, that FCA *knew* would be futile, and that actually contributed to the danger. ¶¶ 65-67, 71, 121(d).

FCA's decision to institute this "recall" originated with Marchionne's secret meeting with the political heads of NHTSA. ¶¶ 60-67. Marchionne's goal at the meeting was to end the federal investigation into the rear-tank Jeeps, which became contentious when NHTSA found that the Jeeps "contain[ed] defects related to motor vehicle safety." *See* ¶¶ 60-61. The deal that Marchionne struck with those political officials allowed FCA to end the investigation merely by offering free trailer hitches—even though FCA knew that hitches would not fix the problem. ¶¶ 65-67. As the President of Chrysler International had *admitted under oath* just two years earlier, "the tow package [trailer hitch] does not protect the tank." ¶ 65.

FCA's decision to conduct such a reckless recall struck home when [redacted] Jeep—which *had* the trailer hitch—exploded in a foreseeable rear impact. ¶¶ 69-70. The [redacted] family had reasonably relied on FCA to make honest, accurate decisions about recalls. ¶¶ 74, 77-78. They had reasonably relied on FCA's determination and announcement that if the subject Liberty had a trailer hitch on it—as it did—then it was reasonably safe. ¶¶ 77-78. But FCA's determination and announcement were false. ¶ 65-67, 121(d).

Plaintiff's negligent undertaking claim addresses the *process* of this "recall"—i.e., FCA's CEO-level decision to institute a recall that it knew would not fix the danger. Despite FCA's protestations, the OPLA does not make FCA immune from liability arising from that decision. FCA's suggestion that product manufacturers cannot be liable for negligent undertakings—or, put differently, that the OPLA allows product manufacturers to conduct negligent or reckless recalls with impunity—misses the mark. Plaintiff's negligent undertaking claim challenges the recall *process*, not merely a product. Therefore, the claim is not subsumed by the OPLA.

FCA's argument about its negligent undertaking was recently rejected by another court. *See White v. FCA US, LLC*, 579 B.R. 804, 815 (E.D. Mich. 2017). In *White*, a pregnant mother was burned to death "when the 2003 Jeep Liberty she was driving burst into flames after it was struck from the rear by another car." *Id.* at 806. FCA moved to dismiss Plaintiff's negligent undertaking claim, but the federal court denied FCA's motion. *Id.* (concluding that the *White* complaint "adequately alleges that, having voluntarily undertaken to act in issuing the recall, [FCA] failed to do so with reasonable care, based on the knowledge of the danger of the Jeep's design that was within [FCA's] purview at the time.") The court's holding was based on the fact that Michigan law, like Ohio law, provides that "once a duty is voluntarily assumed, it must be performed with some degree of skill and care." *Id.*

FCA's attempt to blame the car dealership that carried out the recall is misplaced. It was not the car dealership that decided to undertake a recall that it knew would not fix anything—that was FCA and, specifically, its Chairman and CEO.

F. CONCLUSION

Plaintiff respectfully requests that the Court deny FCA's motion.

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