

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE:  
GENERAL MOTORS LLC IGNITION SWITCH  
LITIGATION

14-MD-2543 (JMF)

*This Document Relates to All Actions*  
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**PLAINTIFFS' MOTION TO RECONSIDER THE  
ORDER APPROVING THE ESTABLISHMENT OF THE 2015  
NEW GM IGNITION SWITCH QUALIFIED SETTLEMENT FUND**

On December 4, 2015, GM and Plaintiffs' Co-Lead Counsel filed their Joint Motion to Approve the Establishment of the 2015 New GM Ignition Switch Qualified Settlement Fund ("Settlement Fund Motion"). (Docket No. 1798) On December 11, 2015, this Court granted that motion. (Docket No. 1854) Plaintiffs respectfully request that this Court reconsider its decision on this matter.

Mr. Hilliard, the Co-Lead tasked with focusing on personal injury cases, represents every MDL plaintiff, and every State Court Coordinated Action plaintiff. Yet, he and GM have established a Trust that mostly benefits Mr. Hilliard and his contracted clients, and cloaks the entire process in secrecy. Furthermore, it has come to Plaintiffs' attention that Mr. Hilliard may have cut a deal with GM when he settled his cases other than the bellwether cases. Specifically, Mr. Hilliard apparently agreed to a high-low arrangement in the bellwether cases so that GM

could limit its financial exposure in the event a jury were to return a substantial verdict against GM. He did all of this without notifying the Executive Committee for the MDL, or any other MDL plaintiffs or their attorneys. His conduct is a flagrant breach of his fiduciary duty to all MDL plaintiffs as a Co-Lead in this MDL. For this reason, we respectfully request that this Court reconsider the motion, the effect that it will have on the remaining victims, and prevent the process from moving forward any further than it already has.

**A. Preliminary Matter**

The following Plaintiffs join in this Motion:

- 1) Lisa Allen Fobbs, as Personal Representative of the Estate of Charleston Darae Fobbs, Case No. 1:15-cv-04182.
- 2) Karina K. Keeler n/k/a Karina Crawford, as Personal Representative of the Estate of Edward William Keeler, and James Robert Bowie, as Personal Representative of the Estate of Josie Marie Keeler, Deceased, Case No. 1:15-cv-06233.
- 3) Robert Joseph Lelonek, as Personal Representative of the Estate of Richard L. Lelonek, Deceased, Case No. 1:15-cv-03641.
- 4) Kimberly Rowe and Michael Rowe, Case No. 1:15-cv-04768.
- 5) Douglas Brown, as Personal Representative of the Estate of Paige Brown, Deceased, Case No. 1:15-cv-06452.

6) Nelson Modeste, as Personal Representative of the Estate of Marcel O. Modeste, Deceased, Case No. 1:15-cv-05995.

7) Jamie Lee Dowling, individually and as surviving mother of Raylee Kay Dowling and Landyn Scott Dowling, Case No. 15-CV-02033.

8) James Gregory, as Personal Representative of the Estate of Jennifer Louise Gregory, Deceased, Case No. 1:15-cv-06591.

9) Dena M. Smith, Individually, and as Parent of Lillyana Blackwell, a Minor and as Personal Representative of the Estate of Agnes C. Smith, Deceased, Case No. 1:15-cv-02493.

#### **B. General Principles**

As Plaintiffs outlined in their Motion to Remove Co-Leads and Reconsider the Bellwether Trial Schedule, the MDL goals of efficiency and economy are laudable, but should never come at the expense of the victims or the value of their individual claims. The attorneys who the Court selects to oversee the litigation on behalf of the plaintiffs, the Co-Lead Counsel,<sup>1</sup> supplant the lawyers in each case, and in each coordinated action bound to the MDL, and become the MDL lawyers for those many plaintiffs. Those Co-Leads owe each individual plaintiff a fiduciary

<sup>1</sup> Robert Hilliard is the Co-Lead counsel tasked with focusing on the cases where plaintiffs suffered personal injury as a result of GM's ignition switch defect and its cover-up of that defect.

duty,<sup>2</sup> the highest standard of duty implied by law.<sup>3</sup> That duty requires those attorneys to “act fairly, efficiently, and economically in the interests of all parties and parties’ counsel.”<sup>4</sup> Thus, Co-Lead counsel is prohibited from engaging in self-dealing and self-enriching conduct at the expense of any individual claimant.

**C. Mr. Hilliard Breached His Fiduciary to All MDL Plaintiffs**

**1. Mr. Hilliard Excluded Plaintiffs (Who He Represents as a Co-Lead) From Settlement Negotiations and Agreements**

In September 2015, Mr. Hilliard apparently entered into a settlement agreement with GM on behalf of well over 1,000 of his clients. Despite the fact that Mr. Hilliard represents all MDL and State Court Coordinated Action plaintiffs—and has a fiduciary duty to these plaintiffs—he made no effort to include plaintiffs other than plaintiffs who had a contract with him in settlement negotiations. Mr. Hilliard never bothered to tell any attorneys, including any Executive Committee (“EC”) members, that he and GM were discussing settling his contracted clients’ personal injury cases.

<sup>2</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.04 (2010) (“[c]lass counsel is a [ ] fiduciary to a client[, the named plaintiff,] who is also a fiduciary [to other class members],” and that “[a] similar relationship obtains between lead attorneys and other lawyers in a multidistrict litigation”) (emphasis added). See also *id.* at § 1.05 illus. 4 (emphasis added).

<sup>3</sup> BLACK’S LAW DICTIONARY 625 (6th ed. 1990).

<sup>4</sup> MANUAL FOR COMPLEX LITIGATION (FOURTH) §10.22.

Obviously, one advantage MDL plaintiffs have in settlement negotiations is the sheer number of cases the defendant must contend with. In other words, there is strength in numbers. By settling over a thousand cases without including any other plaintiffs in the negotiation process, Mr. Hilliard likely has made it more difficult for the remaining plaintiffs to receive full compensation for any harm GM caused. Mr. Hilliard's fiduciary duty to all plaintiffs should have led him to apprise all plaintiffs and their counsel of the settlement discussions regarding personal injury cases. Certainly this does not mean all cases would have settled, but it does mean the remaining plaintiffs would have been involved in the process and have a better understanding of the prospects of settling their cases. Simply stated, by choosing not to include any other attorneys representing MDL and State Court Coordinated plaintiffs in the negotiation process, Mr. Hilliard was clearly acting in his own interests in violation of his fiduciary duty to all plaintiffs.

Furthermore, despite negotiating settlements for more than one thousand of his personal cases, Mr. Hilliard chose to carve out *Scheuer v. GM*, *Barthelemy and Spain v. GM*, *Cockram v. GM*, *Reid v. GM*, and *Norville v. GM* from that settlement, all of which were filed by Mr. Hilliard and his firm. Of that group, Plaintiffs' Co-Leads chose *Scheuer* and *Cockram* as two of their bellwether selections. GM chose *Barthelemy and Spain*, *Reid*, and *Norville* as its three bellwether selections. Thus, Mr. Hilliard ensured that he would be trying two out

of three of the plaintiffs' bellwether selections, and GM ensured that he would be trying five out of six of all bellwether selections.

Other better cases are out there for plaintiffs. There is likely only one reason why Mr. Hilliard carved out the bellwether selections from his corporate settlement with GM: he wanted to ensure that he would be the lead counsel in five out of the six bellwether trials. The benefit of doing so is obvious: it allows Mr. Hilliard to be compensated from settling many of his personal injury cases while maximizing the billable hours that he and his team would need in order to prepare for two (and due to GM's selections, now five) bellwether trials. As a result of all of this, Mr. Hilliard appears to have—once again—placed his own interests above the interests of the remaining plaintiffs by settling most of his cases, while ensuring that he and his firm would remain the lead lawyers for five of the six bellwether trials.

## **2. A Further Breach: The Settlement Fund Motion – Benefitting Claimants Who Filed Their Cases Through Mr. Hilliard**

On December 4, 2015, late on a Friday afternoon, Mr. Hilliard and GM filed the Settlement Fund Motion. The purpose of the Settlement Fund Motion is to set up a Trust so that many of Mr. Hilliard's clients will be compensated by a trustee chosen by Mr. Hilliard and GM. Although Mr. Hilliard represents all MDL and State Court Coordinated Action plaintiffs, he chose to exclude many plaintiffs from the Settlement Fund. At a bare minimum, he should have communicated with the Executive Committee about this settlement given its importance. As a Co-Lead,

he should have communicated with MDL and State Court Coordinated Action plaintiffs and their counsel about the process. Mr. Hilliard chose not to inform MDL plaintiffs and their attorneys about anything related to the process.

To make matters worse, he agreed with GM that the Memorandum of Understanding, which sets forth the terms of the settlement agreement, will remain strictly confidential. Clearly, it would be in the best interests of all plaintiffs to know the terms of any settlement, including amounts paid by GM globally and ultimately paid by GM to the individual plaintiffs. The remaining plaintiffs could use the information in evaluating their claims when making a decision whether to settle and, if they choose to settle, what they can reasonably expect GM to pay in order to maximize their recovery. There is simply no reason to keep this information from the remaining plaintiffs.

Of course, the Memorandum of Understanding and amounts paid to individual plaintiffs may remain confidential from public disclosure, but should not remain confidential from the remaining plaintiffs. Mr. Hilliard, however, is working with GM to conceal this important information from the remaining plaintiffs (again, plaintiffs he represents as a Co-Lead) in order to benefit himself and the plaintiffs who have contracts with him and his firm.

Mr. Hilliard asked this Court to appoint him as a Co-Lead. Once approved, he became one of three lawyers representing every plaintiff in the MDL and State

Court Coordinated Actions. He asked to be Plaintiff's Co-Lead Counsel with Primary Focus on Personal Injury Cases. The MDL and State Court Coordinated Action plaintiffs and their counsel with wrongful death and personal injury cases are looking to Mr. Hilliard to adequately represent their interests in this litigation. To date, he has not adequately represented their interests. He has, in fact, harmed their interests a great deal.

**3. A Further Breach, Mr. Hilliard Cuts a Secret Deal to Limit GM's Financial Exposure**

There has been a stunning revelation since the Court entered its order granting the motion to approve the Qualified Settlement Fund. Mr. Hilliard has confirmed that he entered into a high-low agreement in all of his bellwether cases. He entered into this agreement with GM without disclosing it to the Executive Committee, any other attorneys representing MDL plaintiffs, or any of the MDL plaintiffs he represents in his capacity as a Co-Lead. Mr. Hilliard's breach of fiduciary duty here is obvious. Mr. Hilliard chose the bellwether cases and then cut a secret deal with GM which limited GM's financial exposure for its fraudulent concealment which caused the deaths and injuries of hundreds of American citizens. Of course, it is not surprising that GM agreed to settle Mr. Hilliard's remaining cases which are included in the Qualified Settlement Fund. Plaintiffs respectfully submit it is imperative that this Court investigate whether there was a quid pro quo. Did GM pay off Mr. Hilliard and, in return, get him to agree to the

high-low in every bellwether case where he represented the plaintiffs? Of course, such a secret deal would only embolden GM to go to trial since it had limited financial exposure in the event of a large verdict.

**D. Conclusion**

The private and secretive settlement process set up by GM and Mr. Hilliard benefits Mr. Hilliard, his contracted clients, and GM. It does not benefit the remaining plaintiffs. In truth, it harms them. It excludes them from that settlement process (without any input from them). It prevents them from knowing what those other matters settled for, even if they are similar or virtually identical to their claim. And it steals away one of the few strengths that the MDL process affords to claimants: strength in numbers.

Furthermore, the secret deal between Mr. Hilliard and GM must be investigated before the parties move forward with the Qualified Settlement Fund. For this reason, Plaintiffs request that the Court enter an order setting aside the Order Approving the Motion to Establish the 2015 New GM Ignition Switch Qualified Settlement Fund and schedule a hearing so the Court can investigate all of the circumstances surrounding the decision for Mr. Hilliard and GM to enter into this secret deal.

Respectfully submitted this 27<sup>th</sup> day of January, 2016.

**THE COOPER FIRM**

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**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that the foregoing was filed electronically with the Clerk of the Court using the CM/ECF system on January 27, 2016 and served electronically on all counsel of record.

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