UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: GENERAL MOTORS LLC IGNITION SWITCH LITIGATION	No. 14-MD-2543 (JMF)
This Document Relates to: ALL ACTIONS	

CO-LEAD COUNSEL'S MEMORANDUM IN OPPOSITION TO LANCE COOPER'S MOTION TO REMOVE CO-LEAD COUNSEL AND FOR RECONSIDERATION OF THE ORDER APROVING THE QUALIFIED SETTLEMENT FUND

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I. INTRODUCTION

In just 16 months since being appointed by the Court to lead the prosecution of common benefit claims and to coordinate pretrial proceedings for the individual plaintiffs, Co-Lead Counsel, with the input and assistance of the Executive Committee (EC) and Liaison Counsel, readied this massive, multi-faceted action for its first bellwether trial. In doing so, Court-appointed leadership, comprising the three Co-Leads, the nine active EC members, and the Liaison and Federal/State Liaison Counsel, reviewed over 14.9 million pages of documents; took 98 fact depositions, including depositions of the most important witnesses with knowledge of the defective Delta ignition switch and the deadly consequences thereof; coordinated the preparation of expert reports and conducted or defended 25 expert depositions; filed and responded to 28 pretrial motions *in limine*; and opposed GM's summary judgment motion.

Co-Lead Counsel, again with the assistance of some members of the EC, then tried the *Scheuer* bellwether case. While the *Scheuer* trial did not end with a jury verdict, the pre-trial and trial work performed by the Co-Leads and the EC substantially advanced the MDL litigation and will favorably benefit all personal injury and wrongful death plaintiffs in both the MDL and the Coordinated Actions. In *Scheuer*, expert reports were prepared that can be used as guideposts for other cases; many *in limine* orders and a summary judgment order were issued that will have either precedential or persuasive impact on other trials; and procedures were established that will guide the conduct of other trials. In short, Plaintiffs in all other personal injury/wrongful death cases can borrow from, and build upon, all of the hard work that went into the *Scheuer* trial.

The strong leadership structure established by the Court has worked exceedingly well and led to the efficient and effective preparation of cases for trial, and not just the MDL bellwethers but all injury and wrongful death cases related to the Phase One ignition switch recalls. The

many advances provided by this discovery in the *Scheuer* trial were made possible through the hard work and funding provided by Co-Lead Counsel and the EC and benefitted ***all*** plaintiffs, including Mr. Cooper's clients.[1]

Against this backdrop of accomplishment comes the untimely motion filed by Mr. Cooper. Mr. Cooper did not previously register with Co-Lead Counsel any concerns about the bellwether process or the *Scheuer* case in particular. Nor did he previously bring to the Court's attention his dissatisfaction with Co-Lead Counsel generally. The only prior "notice" of Mr. Cooper's displeasure was his decision in April 2015 to withdraw as a working member of the EC and, thereby, abandon the important responsibilities that the Court directed him to fulfill for the benefit of all MDL Plaintiffs. And Mr. Cooper "resigned" without seeking the Court's permission to do so; he simply stopped working for the common benefit in the MDL.

Without providing any evidentiary support, Mr. Cooper makes sweeping and unsupported allegations of mismanagement by Co-Lead Counsel—that the Co-Leads have violated their fiduciary duties to all plaintiffs, have placed their interests above those of the plaintiffs, have frozen out the EC, and have refused to coordinate with state counsel. As a non-participant, Mr. Cooper is not in any position to make these allegations or otherwise opine on the work of Co-Lead Counsel and the EC. In any event, Mr. Cooper's allegations are false. Contrary to his contentions, the bellwether trial selections were not manipulated to disadvantage any case or counsel, and *Scheuer* was indeed a logical bellwether selection given the nature of the car crash, plaintiff's injuries, GM's inability to promptly fix the ignition switch defect, and the applicability

[1] While the Cooper motion pertains primarily to the personal injury/wrongful death cases, the efficient and extensive discovery efforts also apply to the economic loss side of the case. In addition to conducting discovery benefitting the economic loss class action, the leadership team has worked on the consolidated complaints and related briefing and conducted extensive work pertaining to bankruptcy issues.

of favorable Oklahoma law. Co-Lead Counsel have diligently managed this case and, in doing so, have faithfully discharged the responsibilities placed on them by the Court, have fought tooth and nail on behalf of ***all*** plaintiffs, have relied on the EC members to participate in the case and accomplish important work, and have coordinated with state counsel in the Coordinated Actions.

Mr. Cooper's belated attack on the Qualified Settlement Fund fares no better. His reconsideration motion is untimely, and he fails to explain why his tardiness should be excused. And, on the merits, Mr. Cooper cannot establish that reconsideration is warranted. He points to no intervening change in controlling law, no new evidence, or the need to correct a clear error. Moreover, his "manifest injustice" argument fails. Mr. Hilliard's publicly-disclosed settlement of his clients' claims does not prejudice any non-settling plaintiffs, who maintain their ability to discuss potential settlement with GM.

Mr. Cooper's unsupported recriminations—made by one who abdicated the important responsibilities given him by the Court to help further the MDL—fail to recognize and acknowledge the substantial work performed by the Co-Leads and the EC. Co-Lead Counsel and the EC remain dedicated to the zealous and diligent prosecution of all cases against GM in the MDL and to assist with discovery in the Coordinated Actions. That unwavering commitment, coupled with the common benefit efforts undertaken by Co-Lead Counsel to date, demonstrates that the Cooper motion should be denied.

II. THE CO-LEADS HAVE DILIGENTLY PERFORMED THEIR DUTIES IN TANDEM WITH THE EC AND HAVE EFFICIENTLY AND EFFECTIVELY LED DISCOVERY AND PREPARED FOR TRIAL

In Order No. 5, the Court adopted a plaintiff's counsel structure consisting of three Co-Leads and an Executive Committee (EC) of ten (10) counsel. The Court charged Co-Lead Counsel with the responsibility for "acting for all plaintiffs—either personally or by coordinating

the efforts of others—in presenting written and oral arguments and suggestions to the Court, limiting the number of plaintiffs' counsel who appear at hearings, working with opposing counsel in developing and implementing a litigation plan, initiating and organizing discovery requests and responses, conducting the principal examination of deponents, retaining experts, arranging for support services, and seeing that schedules are met." Order No. 5 (Doc. No. 70) at 3.[2] The Court charged the EC with the responsibility for "assisting Co-Lead Counsel with consolidated pleadings and motion practice; document management and review; electronic discovery issues; discovery issues generally; depositions; liaison with government actions and proceedings; expert witnesses; damages; bankruptcy coordination; non-GM defendants; communication with class members and coordination with personal injury/wrongful death actions; trial; and other issues as needs arise[.]" *Id.* at 3-4.[3]

Order No. 8 then appointed counsel to the foregoing positions. Steve Berman, Elizabeth Cabraser, and Bob Hilliard were appointed Co-Leads; Robin Greenwald was appointed Plaintiff Liaison Counsel; Dawn Barrios was appointed Federal/State Liaison Counsel; and the Court appointed an EC consisting of David Boies, Lance Cooper, Melanie Cyganowski, Adam Levitt, Dianne Nast, Peter Prieto, Frank Pitre, Joe Rice, Mark Robinson, and Marc Seltzer. Order No. 8 (Doc. No. 249) at 3. Order No. 13 directed Mr. Berman and Ms. Cabraser to "focus on economic

[2] Order No. 5 and all other Orders of the Court are posted on the official MDL No. 2543 website, www.gmignitionmdl.com.

[3] The Court also created a Plaintiff Liaison Counsel position in New York with responsibility for facilitating communications with the Court, counsel in the MDL, and Counsel in the Bankruptcy proceedings. *Id.* at 4. And the Court established a Federal/State Liaison Counsel position to communicate "between the Court and other counsel with similar actions pending in state courts . . . ." *Id.*

loss class claims" and Mr. Hilliard to "focus on individual Plaintiffs." Order No. 13 (Doc. No. 304) at 4.

Order No. 13 also refined the duties of Co-Lead Counsel and the EC. The refinement made Co-Lead Counsel "responsible for prosecuting any potential common benefit claims, as well as coordinating the pretrial proceedings conducted by counsel for the individual Plaintiffs." Order No. 13 (Doc. No. 304) at 1-2. The Court then listed tasks that Co-Lead Counsel "must" accomplish with regard to "the common benefit claims and coordinated pretrial proceedings," including determining and presenting "the position of the Plaintiffs on matters arising during the coordinated pretrial proceedings;" conducting discovery on behalf of the Plaintiffs; consulting with and retaining expert witnesses; delegating "specific tasks to other counsel in a manner to ensure that pretrial preparation for the Plaintiffs is conducted effectively, efficiently and economically;" and "perform[ing] all tasks necessary to carry out the functions of Lead Counsel and to properly coordinate Plaintiffs' pretrial activities." Order No. 13 at 2-3. The order also directed Co-Lead Counsel to consult with the EC as appropriate and monitor the work "performed by the Executive Committee, Liaison Counsel, and Federal/State Liaison Counsel and those whose work it has specifically authorized." *Id.*

The Court detailed the responsibilities of the EC, "subject to the prior approval of Lead Counsel." Those responsibilities include "consult[ing] with Lead Counsel in conducting the Plaintiffs' coordinated pretrial activities and in planning for trial;" "contribut[ing] to the Common Benefit Fund for 'shared costs;'" and otherwise assisting Lead Counsel in their discharge of their duties and responsibilities. *Id.* at 5-7.

Thus, the Court enacted a strong leadership structure that vested Co-Lead Counsel with broad authority and discretion to carry out their responsibilities, buttressed by Liaison Counsel

and a diverse and talented EC to support the Co-Leads. And contrary to the picture painted by Mr. Cooper, that structure has worked exceedingly well. It has enabled Plaintiffs' counsel, working together, to conduct a tremendous amount of discovery and prepare for trial in a very short period of time. The work accomplished included:

- Reviewing over ***14.9 million*** pages of documents from GM and parts supplier Delphi;
- Conducting 98 fact depositions (52 by Co-Lead Counsel and 46 by EC members), including depositions of the key personnel involved in designing and investigating the defective Delta ignition switch and concealing the defect from consumers and NTHSA;
- Coordinating scores of experts and conducting or defending 25 expert depositions; and
- Preparing for the first bellwether trial, including filing and responding to 28 pre-trial motions *in limine* and opposing an omnibus summary judgment motion.[4]

All of this work, including over 200 meet-and-confers with GM's counsel, many discovery motions, and innumerable issues flagged for consideration at the status conferences, was led and conducted by Co-Lead Counsel, involved substantial efforts by the other active designated counsel, and was accomplished in just ***16 months***. In furtherance of the Court's repeated "aggressive but reasonable" admonition, these collective efforts got the team trial-ready against a worthy and well-prepared adversary. The document review and depositions have developed important evidence that will allow plaintiffs in ***all*** actions—here in the MDL and in the Coordinated Actions—to prove the general liability case against GM relating to Delta ignition switch defects associated with the Phase One recalls.[5] The Co-Leads are proud to have accomplished so much in such a short period of time in a complex product liability and economic loss MDL involving so many players, and we appreciate the Court's observation that Co-Lead

[4] Berman Declaration (Berman Decl.)., ¶ 4; *see also* Cabraser Declaration (Cabraser Decl.), ¶ 8.

[5] Although much of this work benefits the economic class actions as well, there is still much to be accomplished in the class cases.

counsel have done "a remarkable job of leading this incredibly complicated litigation in general and especially given the demanding schedule."[6]

In discharging their duties, and as directed by the Court, Co-Lead Counsel have repeatedly called upon the EC to perform a wide variety of tasks. A brief review of the work that the EC has accomplished is a testament to how involved the EC has been and demonstrates, contrary to Mr. Cooper's narrative, that Co-Lead Counsel did not exclude the EC from important work. For instance, EC members have: extensively participated in reviewing and coding the 14.9 million pages documents produced; researched and drafted memoranda on legal topics, both in the MDL and in the related bankruptcy proceedings; helped prepare general liability outlines; attended a May 2015 meeting to discuss the evidence and deposition strategy; took depositions, some of which were played at trial; helped research and draft amended bellwether complaints; helped respond to many of GM motions *in limine* and participated in drafting several of Plaintiff's motions; assisted with OSIs; and created cross-examination outlines for use at the *Scheuer* trial.[7] Indeed, lodestar reporting reflects the EC's fulsome participation in the litigation; the EC members, collectively, have reported hours comprising just under half of all hours jointly reported by the Co-Leads, EC, Liaison Counsel, and Designated Bankruptcy Counsel.[8]

Even though most of the EC members represent solely or predominantly economic loss class claims, Co-Lead Counsel also invited and encouraged the entire EC to participate in bellwether trial preparations and on the trial team itself:

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[6] Jan. 22, 2016 Trial Trans. at 1304.

[7] Berman Decl., ¶¶ 4-5.

[8] Cabraser Decl., ¶ 7. On February 5, 2016, Co-Lead Counsel will file, *in camera*, their lodestar reporting with the Court as required by Order No. 86. *Id.*

From: Robert C. Hilliard <bobh@hmglawfirm.com> Sent: Fri 8/21/2015 7:1
To: GM Co-Lead Group; GM Executive Committee Group
Cc: Victor Pribanic
Subject: roll up our sleeves and out work GM every day.

Team,

The first BW trial begins in January, 2016.

Though the Judge has not endorsed the subsequent trial dates yet, we have jointly recommended the following dates:

1.11.16-2.5.16 **Scheuer vs. GM**

4.4.16-4.21.16 **Barthelemy vs. GM**

6.6.16-6.24.16 **Cockram vs. GM**

8.15.16-9.2.16 **Reid vs. GM**

10.27.16-11.4.16 **Yingling vs. GM**

11.28. 16-12.16.16 **Norville vs. Gm**

GM has made clear indications that it intends to try all of the BW cases.

This EC has a deep reserve of talent, experience, and spit and vinegar. Lets get work horses workin!

I would like to assign and staff 6 'trial team's to take primary responsibility for helping prepare each of the trials starting now and invite you and your firm to participate and nominate team members.

This is not an assignment regarding who will actually try the case. This is a project to help get each case ready for trial and to participate in the trial with whomever does try it.

Each team or team leader will meet separately and then with the other teams or team leaders as well as the co-leads to be sure there are no 'silos' and we are all moving forward together, separately.

We are all committed to one goal: nothing falls through the cracks, nothing gets left undone.

One advantage will be that each team gets to learn from the preceding trial. No doubt there will be 'real-time' adjustments to assignments within the teams as the first trials unfold. Each team will be able to see weeks of general liability testimony and how GM is going to defend itself. Each team will be able to understand the defenses as GM puts on its case and adjust accordingly.

Some general thoughts:

Judge Furman has indicated trial will be from 9:30 -2:30 each day. This gives us plenty of time to prepare for the next day.

We are discussing with GM the practical agreements we can reach (how much notice to the other side re who is going to be called to the stand each day, agreed to exhibits and demonstratives, questionnaires, etc).

The day-shift war room team will be on alert during trial, receiving real time instructions and requests and sending suggestions.

The night shift war-room team is as vital and important as any other part of the process, getting witnesses ready, summaries of the day before—adding to responses to directed verdict, etc.

As with any intellectual, psychological and emotional endeavor with this level of commitment playing well with others is a **must**. Tackling massive amounts of pre-trial and war-room trial work day in and day out (while humming a tune) is vital.

When you send your recommendations please include the level of experience/suggested roles of those nominated and any other information you think would help us assign roles. ('she is great at witness prep' 'he is strong on quick briefs re real time legal issues', 'she was lead war-room paralegal for 5 trials', etc).

I also invite you to generally weigh in on this and offer any tweaks you think may help.

Thanks,

Bob

A week later, Co-Lead Counsel sent a memo to the EC and Liaison Counsel asking for assistance in preparing trial exhibits, deposition designations, and briefing for the *Scheuer* trial.[9] Most of the EC members answered the call and played important roles on the *Scheuer* trial team; Lance Cooper was not one of them. In addition, EC member Boies Schiller is taking a major role in trying the second bellwether trial, *Barthelemy*.

In carrying out their responsibilities, Co-Lead Counsel regularly communicated with EC members about the progress of the litigation and the work the EC was conducting, as the Court expected the Co-Leads to do. To be sure, the EC was not involved in all day-to-day tactical decision making; this is the logical province of Co-Lead Counsel, and it would be unworkable to involve the EC in all of those decisions. Nonetheless, the Co-Leads have regularly communicated and coordinated with the EC, whose important work could not have been accomplished without that communication and shared cooperation.[10]

III. THE *SCHEUER* TRIAL HAS SUBSTANTIALLY ADVANCED THE LITIGATION IN THE MDL AND THE COORDINATED ACTIONS

Mr. Cooper suggests that the *Scheuer* trial did not accomplish anything because it did not result in a jury verdict, even decrying it a "disaster." Br. at 15. Mr. Cooper is wrong. Even without a verdict, the *Scheuer* trial has ***substantially*** advanced the MDL litigation and helped all injury and wrongful death plaintiffs in the MDL and Coordinated Actions ready their claims for trial, and assisted the economic loss class claims. The benefits include:

- Expert reports were prepared that can be used as paradigms in both injury and economic loss cases.

[9] Hilliard Declaration (Hilliard Decl.), ¶ 11.

[10] Berman Decl., ¶ 6; Cabraser Decl., ¶ 9; Hilliard Decl., ¶ 3.

- Orders with application to other cases were issued on scores of motions *in limine*. *See* Order No. 94, Exhibit 1 (applying certain rulings to the next bellwether trial). These include rulings admitting portions of the Deferred Prosecution Agreement and the Valukas Report (Doc. Nos. 1894, 2018, 1837, 2019); requiring GM to make its witnesses equally available to both parties (Dec. 17, 2015 Hearing Trans. at 5-7); denying GM's attempt to exclude evidence that GM intentionally misled or concealed information from NHTSA (Doc. No. 1791); governing the use of "other similar incidents" at trial (Doc. No. 1790); denying GM's bid to keep out evidence relating to other ignition switches (Doc. No. 1971); and refusing to strike the opinions of plaintiff's general liability experts (Doc. No. 1970).

- The Court issued an order on summary judgment that, among other things, found that "New GM had a post-sale duty to warn Plaintiff of the known ignition switch defect." Doc. No. 1980 at 16. That order made other findings that will also benefit all plaintiffs, including:

> "[T]he Sale Agreement provides that New GM assumed all liabilities under express warranties, even for Old GM cars sold before the bankruptcy; that creates obligations with respect to Old GM vehicles still under warranty, and presumably also means that New GM continued to provide spare parts and services for Old GM vehicles even after warranties expired. . . . The notification and recall obligations under the Safety Act that New GM inherited provide another kind of service and repair duty." *Id.* at 15.

> "[A] reasonable jury could find for Plaintiff on these questions [of reliance], as he purchased and drove his car based on a belief in its safety—a belief that, to put it mildly, would have been hard to maintain had New GM not concealed the ignition switch defect." *Id.* at 18.

> "Plaintiff was foreseeably endangered by New GM's alleged misconduct—that is, New GM's delay in recalling admittedly defective vehicles—because New GM knew that Plaintiff was driving a defective car by at least 2012." *Id.* at 21.

> "[D]elay of the recall was arguably unreasonably dangerous conduct, as it involved a hidden defect that caused a risk of serious injury or death 'beyond that which would be contemplated by the ordinary consumer who purchases it.'" *Id.* (citation omitted).

> "New GM also assumed a duty when it instituted the recall. . . . Here, New GM had (and still has) a relationship with drivers like Plaintiff 'that inherently implicates safety and protection.' Thus, when the company undertook the ignition switch recall—which was 'necessary for the protection of [an]other's person or thing'—it exposed itself to liability if the recall was carried out negligently and caused injury." *Id.* at 22 (citation omitted).

- Procedures were established for the designation of trial testimony and disclosure of exhibits and demonstratives.
- Other plaintiffs can build upon or otherwise modify the jury instructions and verdict form submitted in *Scheuer*.
- The Court was able to see the evidence against GM and how it was presented, as well as how GM reacted.

The many advances provided by the *Scheuer* trial were made possible through the hard work and funding provided by Co-Lead Counsel and the EC (excepting Mr. Cooper) and benefitted ***all*** plaintiffs, including Mr. Cooper's clients. Despite these advances, the bellwether procedure is imperfect. Co-Lead Counsel have been discussing—both internally and with GM—alternatives to the present bellwether process. These discussions began long before Mr. Cooper launched his attack, and another meet-and-confer with GM is scheduled for this week. The Co-Leads expect to present to the Court a proposal to improve the bellwether process.

IV. THE BELLWETHER SELECTION PROCESS WAS REASONABLE AND FAIR

Order No. 25 (Doc. No. 422) provided a "bellwether trial plan for cases in MDL 2543," established "the procedures for identifying and selecting claims to be tried under the plan," and set the "discovery and trial schedule for those [MDL] cases." MDL Order No. 25 at ¶ 5. To be

eligible for selection as a bellwether trial case, the case must have been filed in the MDL. *See id.* at ¶ 5 (ordering that the bellwether plan applies to "cases in MDL 2543"); *id.* at ¶ 8(e) (requiring the submission of a Plaintiff Fact Sheet to be eligible as a potential bellwether case); *id.* at ¶¶ 12-15 (requiring MDL-filed cases to complete and submit Plaintiff Fact Sheets). The Court ordered the parties to select cases as bellwether trial candidates that "constitute a representative sampling of cases in this [MDL] proceeding," but observed that the "Court cannot police this request and will not entertain applications regarding whether one side or another has abided by it." *Id.* at ¶ 34. In February 2015, the Court established the MDL bellwether plan's "Type of Alleged Defects and Categorization of Claims." *See* Order No. 34 (Doc. No. 573).

A. The Scheuer Case Was a Logical First Bellwether Trial Selection

Consistent with his duty to "focus on individual Plaintiffs," Mr. Hilliard—after careful culling and deliberation—selected the proposed bellwethers for the plaintiffs and ultimately recommended that *Scheuer* be tried first.[11] Mr. Berman and Ms. Cabraser believed that it was appropriate that Mr. Hilliard choose the bellwethers given the Court's charge and Mr. Hilliard's status as "Co-Lead Counsel with Primary Focus on Personal Injury Cases," and Mr. Berman and Ms. Cabraser logically deferred to Mr. Hilliard's selections. Later, Mr. Berman and Ms. Cabraser discussed the general order of the bellwether selections with Mr. Hilliard and supported his recommendations based on Mr. Hilliard's detailed knowledge of his own cases. And, at Mr. Hilliard's invitation, Mr. Berman gladly participated on the courtroom trial team, and Ms. Cabraser's team provided ongoing trial support.[12]

[11] Hilliard Decl., ¶ 12.

[12] Berman Decl., ¶¶ 7, 10; Cabraser Decl., ¶ 10.

The *Scheuer* case was chosen to be the first bellwether based on the following factors. *First*, the Delta-V that Plaintiff's experts estimated unequivocally demonstrated that the airbags in Mr. Scheuer's Ion should have deployed. *Second*, the accident occurred when replacement parts to fix the defect were not available; Mr. Scheuer followed the directive in the recall notice and contacted the dealership to get his defective switch replaced, but he was sent away without the new switch. *Third*, Mr. Scheuer suffered an annular tear at the C4-C5 level of his cervical spine, which his surgeon directly attributed to the crash. *Fourth*, punitive damages were available under applicable Oklahoma law. *Fifth*, having led the litigation since being appointed and done the bulk of the work in the MDL litigation, Co-Lead Counsel understandably wanted to lead the trial for the first bellwether and believed that the Court would expect Co-Lead Counsel to do so.[13]

Given the many variables involved, the *Scheuer* case was thus a rational choice as the first bellwether. That the trial did not go as planned is unfortunate but, as has already been explained in prior filings, no one on the Co-Lead Counsel and EC teams were previously aware of the issues raised by GM at trial regarding the Scheuer's aborted home purchase. Trial surprises are not uncommon, no matter how hard one prepares. Nor are victories guaranteed; setbacks naturally occur in litigation of this nature. For instance, in the *Vioxx* MDL, the transferee court conducted six bellwether trials, only one of which resulted in a verdict for the plaintiffs. *See* Eldon E. Fallon, Jeremy T. Grabill, and Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2335 (June 2008). Despite the string of plaintiff losses that preceded the first victory in the *Vioxx* MDL bellwethers, the *Vioxx* MDL

[13] Hilliard Decl., ¶ 23. Also, Mr. Scheuer's crash came after he followed GM's instruction to remove other keys from his key ring—instructions that GM asserted would make him safe and avert a defect that would prevent airbags from deploying (instructions that turned out to be false).

Court found the process valuable and instructive in advancing the litigation toward a global federal/state resolution, as Judge Fallon's article details. And no one on the *Vioxx* PSC resigned or moved to replace the lead counsel because plaintiffs lost the first several bellwether trials.

B. Mr. Pribanic's *Yingling* Case Was Included in the Bellwethers

Contrary to Mr. Cooper's contention, *Scheuer* was not chosen to penalize Mr. Pribanic or his clients, and attorneys' fee considerations did not dictate the bellwether recommendations.[14] Indeed, Mr. Hilliard repeatedly included the *Yingling* case among Plaintiffs' bellwether picks in the absence of any agreement with Mr. Pribanic. On February 17, 2015, pursuant to MDL Order No. 25, Co-Lead Counsel and GM each filed a list of nine MDL cases for inclusion in the Initial Discovery Pool as potential bellwether trial cases. *See* Doc. Nos. 589, 590. Co-Lead Counsel included seven clients represented by Mr. Hilliard and two clients represented by other MDL counsel. *See* Doc. No. 590. On June 24, 2015, Co-Lead Counsel and GM each filed their narrowed list of five claimants from the Initial Discovery Pool. *See* Doc. Nos. 1074, 1075. Plaintiffs' selections included three cases represented by Mr. Hilliard and two cases represented by other MDL counsel. *See* Doc. No. 1074. Thus, although Mr. Hilliard personally represented 75% of the injury/wrongful death cases in the MDL, only three of five of his cases (60%) made the selection—demonstrating that Mr. Hilliard did not disproportionately favor his cases over other bellwether candidates (contrary to Mr. Cooper's charge). Moreover, Mr. Hilliard did not deliberately avoid settling these cases so that he could try them as bellwethers, as Mr. Cooper contends; GM refused to settle the cases, forcing trials.[15]

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[14] Hilliard Decl., ¶¶ 12-30; Berman Decl., ¶ 8; Cabraser Decl., ¶¶ 11-12.

[15] Hilliard Decl., ¶ 32.

On July 1, 2015, GM exercised its two strikes against Plaintiffs' five proposed bellwethers (*see* Doc. No. 1110), leaving two Plaintiff-picked bellwether cases with clients represented by Mr. Hilliard (*Scheuer* and *Cockram*) and Mr. Pribanic's *Yingling* case. Mr. Hilliard sought to associate with Mr. Pribanic to ensure Co-Lead participation.[16] As Mr. Hilliard wrote, he was "not interested in sharing fees, just helping with getting this [*Yingling*] case ready."[17] On April 21, 2015, Mr. Pribanic agreed to associate on pretrial matters.[18]

On July 27, 2015, Co-Lead Counsel and GM jointly proposed that *Yingling* be the first bellwether trial. *See* Doc. No. 1214. Mr. Hilliard believed he would, at a minimum, be participating with Mr. Pribanic in trying the case.[19] The following day, Mr. Hilliard and Mr. Pribanic met in Pittsburgh.[20] Mr. Hilliard remained concerned with ensuring Co-Lead Counsel's involvement in the trial—not because of any fee to be earned, but because the Co-Leads (with the EC) were in the best position to try the first bellwether case in January 2016.[21]

On August 3, 2015, Mr. Pribanic informed Mr. Hilliard that Mr. Pribanic would not permit Co-Lead Counsel to participate in the *Yingling* trial. Mr. Pribanic thanked Mr. Hilliard for his "kind offer to try this case with me" but said he had "no solution short of going it

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[16] Hilliard Decl., ¶ 14.

[17] *Id*. at ¶ 15.

[18] *Id*. at ¶ 16.

[19] Hilliard Decl., ¶ 17.

[20] *Id*. at ¶ 18.

[21] *Id*. at ¶¶ 17, 21. For example, at that time, Co-Lead Counsel and active EC members had reviewed almost one million GM documents and had taken the bulk of the GM witness depositions, while Mr. Pribanic and his firm had not conducted such a deep level of review and had not yet taken depositions. Co-Lead Counsel and their firms also worked with all of the common liability experts, and with 11 of the case-specific experts for the bellwether trials. Mr. Pribanic and his colleagues had not yet worked with any of the common liability experts; their work was limited to *Yingling*-specific experts. *Id*. at ¶ 22.

alone."[22] Only then did Co-Lead Counsel ask that the cases be reordered so that Co-Lead Counsel could try the first bellwether case. *See* Doc. No. 1229.

Mr. Pribanic then drafted (but never filed) a motion to reestablish *Yingling* as the first bellwether and discussed that motion with Mr. Hilliard. In the conversations with Mr. Pribanic that followed, including on August 11, 2015, Co-Lead Counsel explained that, regardless of which case was tried first, Co-Lead Counsel were best positioned to run the first trial in light of their deep knowledge of the facts and experts.[23] The August 11 call was followed by an e-mail from Mr. Berman to Mr. Pribanic, in which Mr. Berman reemphasized the desire for the Co-Leads to participate in the early trials and reiterated that the decision on the order of the proposed bellwethers was not related to fees:[24]

From: Steve Berman <Steve@hbsslaw.com>
Date: Tuesday, August 11, 2015 at 12:20 PM
To: Victor Pribanic <vpribanic@pribanic.com>
Cc: Bob Hilliard <bobh@hmglawfirm.com>, "Steve Shadowen (steve@hilliardshadowenlaw.com)" <steve@hilliardshadowenlaw.com>, Elizabeth Cabraser <ecabraser@lchb.com>
Subject: bellwether trials

Victor:

Thanks for the discussion yesterday. After reflection we have come to the conclusion that the order of bellwether trials should remain as approved by the court. We strongly feel that the first trials should be conducted by co lead counsel for the reasons stated on our call.

We also made clear on the call that the fee agreement between you and your client is unaffected by bellwether status. Our fee for work on your case would be common benefit work and recovery would be subject to the common benefit assessment.

As we get closer to the trial of your case we can again take up the issue of how we work together to bring our knowledge to bear on the trial.

If you need to discuss this further please let us know.

Steve Berman | Managing Partner
Hagens Berman Sobol Shapiro LLP
1918 Eighth Ave Suite 3300 - Seattle, WA 98101
Direct: (206) 268-9320
Steve@hbsslaw.com | www.hbsslaw.com | HBSS Blog

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[22] *Id*. at ¶ 19.

[23] Hilliard Decl., ¶¶ 24-25; Berman Decl., ¶ 9; Cabraser Decl., ¶ 12.

[24] Berman Decl., ¶ 9.

Co-Lead Counsel have continued to fully cooperate with Mr. Pribanic. Co-Lead Counsel asked the Court to address during the November 20, 2015 status conference Mr. Pribanic's request to accelerate *Yingling* to MDL Bellwether Trial No. 3. *See* Doc. No. 1663. Mr. Hilliard introduced Mr. Pribanic and advocated for him during that conference. *See* Nov. 20, 2015 Hearing Trans. at 61:18-24. Mr. Pribanic was provided access to all discovery conducted in the MDL, including the leadership's work product relating to that discovery. Mr. Pribanic attended the trial, was provided unfettered and friendly access to all of the lawyers and staff on the trial team and counsel's work product. He also met with some of Mr. Scheuer's trial experts and has spent time with Mr. Hilliard preparing for trial. There simply has been no effort to freeze out Mr. Pribanic and his clients.[25] Tellingly, Mr. Pribanic does not join in Mr. Cooper's motion; nor has any other counsel.

C. While They May Complement the MDL Bellwether Process, State Cases Are Not Eligible to Be Bellwether Trials in the MDL

Mr. Cooper complains that the Co-Leads did not consider state court cases when selecting trials for the bellwether cases. Br. at 9. This is true, but not for any improper reason. Because the many cases pending against GM in state courts are not pending in federal court, they are simply not part of the MDL and, therefore, cannot be tried as bellwethers in the MDL. *See* MDL Order No. 25 at ¶¶ 5, 8, 12-15. In other words, neither Co-Lead Counsel nor the Court has the power to select a state court case for trial in the Southern District of New York.[26]

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[25] Hilliard Decl., ¶¶ 26-30.

[26] Mr. Cooper contends that the state court victory in *Bookout v. Toyota* began the settlement of personal injury cases in the Toyota Unintended Acceleration MDL, Br. at 10, yet that is not accurate. Mr. Berman and Ms. Cabraser were among the co-leads in the Toyota MDL. While *Bookout* likely influenced Toyota's settlement decisions, it was tried ***after*** the class settlement and the first group of personal injury settlements and was not part of the MDL. The first cases to settle included the case designated for the first bellwether trial. The second bellwether MDL trial

Moreover, the state court cases have their own trial schedules, and, as a matter of comity and judicial courtesy, this Court has deliberately avoided trying to interfere with those schedules.[27] While the Court has helped coordinate discovery with certain cases pending in state courts and, as a result, facilitated the orderly progression of all cases pending in all courts, this Court does not have any control over the pre-trial and trial schedules of the state cases. The Court controls its own docket and set a "reasonable but aggressive" schedule in order to have an early bellwether trial in the MDL—a decision fully supported by Co-Lead Counsel and the EC.

V. MR. COOPER ABANDONED HIS RESPONSIBILITIES AS AN ACTIVE MEMBER OF THE EC AND HAS BROUGHT UNTIMELY, UNSUPPORTED, AND UNTRUE ALLEGATIONS AGAINST CO-LEAD COUNSEL

The Cooper motion reveals a fundamental misunderstanding of the work that Co-Lead Counsel and the EC have accomplished in this MDL and the manner in which Co-Lead Counsel have interfaced with the EC and counsel in the Coordinated Actions. This is perhaps not surprising given that Mr. Cooper long ago chose not to participate as a fully functioning member of the EC and, therefore, is not intimately familiar with the inner-workings of the EC and its relationship with the Co-Leads.

(a Toyota bellwether pick) was about to commence when the *Bookout* verdict was released. Following the first bellwether MDL settlement, the second bellwether's survival of Toyota's summary judgment, many *Daubert* and *in limine* motions, and the *Bookout* verdict, Toyota began settling individual injury/death cases as part of a court-supervised individual "Intensive Settlement Process" that we have discussed with the Court. Cabraser Decl., ¶¶ 3-6.

[27] The Court reached out to state courts interested in coordinating discovery activities but cautioned that the Court "is mindful of the jurisdiction of each of the other Courts in which other Coordinated Actions are pending and does not wish to interfere with the jurisdiction or discretion of those Courts." Order No. 15 (Doc. No. 49) at 2. Indeed, the Court's Joint Coordination Order provided state courts with the power "to modify, rescind, and/or enforce the terms of this Order." *Id.* at ¶ 33.

On April 20, 2015, Mr. Cooper informed Co-Lead Counsel that he would not complete the assignments he had been given as a member of the EC (including deposing two GM employees, one of whom—Mr. Fedullo—was GM's only live fact witness during the *Scheuer* trial) and would focus on state actions.[28] Despite being appointed to the EC by the Court and charged with the same responsibilities placed on all other EC members, Mr. Cooper has failed to discharge those responsibilities and did not seek the Court's permission to formally withdraw from the EC.[29] He has been "missing in action" and, indeed, did not submit any time records in 2015 showing any MDL work.[30] Nor has Mr. Cooper paid all of his EC assessments, which is no small matter, given that EC members have collectively advanced $1.6 million in assessments (not including individually held costs) to help fund the important work being done in the MDL that benefits ***all*** plaintiffs, including Mr. Cooper's clients.[31]

Mr. Cooper implies that the *Scheuer* trial has somehow offended the rights of his clients, but does not explain precisely how. That is because the trial did not resolve or adversely impact his clients' legal claims in any way; to the contrary, the trial assisted Mr. Cooper and his clients as a result of all of the pretrial work that Co-Lead Counsel and the EC accomplished and orchestrated—work that is available to Mr. Cooper (should he ask). Mr. Cooper's clients' claims are intact, and his clients will have their proverbial day in court soon.

[28] Hilliard Decl, ¶ 5.

[29] Hilliard Decl., ¶¶ 5-11; Berman Decl., ¶ 12.

[30] Cabraser Decl., ¶ 7.

[31] Berman Decl., ¶ 12. Mr. Cooper paid an initial assessment of $50,000, but has not paid additional assessments and is $100,000 in arrears. In addition to the cost assessments paid by the EC, Co-Lead Counsel have collectively paid assessments totaling $1.75 million. *Id.*

The Cooper motion is both disappointing and disingenuous. Mr. Cooper did not engage in any meet-and-confer prior to filing his motion, as required by the Court's rules. He failed to support his serious allegations with a sworn declaration or submit any evidence, and should, therefore, be precluded from presenting any evidence in his forthcoming reply.[32] Further, Mr. Cooper's arguments are untimely in the extreme. As evidenced by his April 2015 *de facto* withdrawal from the EC, Mr. Cooper has been disgruntled for quite some time yet never chose to raise concerns with the Court. Nor did he object to the bellwether trial selections, or nominate one of his nine federal cases to be a bellwether case. Mr. Cooper's retrospective criticism of the *Scheuer* selection is classic "Monday morning quarterbacking" of an agenda that Mr. Cooper previously failed to pursue. His failure to present to the Court any concerns with Co-Lead Counsel's solid leadership and good work in this case demonstrates that the instant motion is nothing more than a mean-spirited attack for improper ends. Mr. Cooper's failure to carry out the important EC responsibilities given him by the Court, coupled with his decision to withdraw without seeking Court permission, demonstrates that it is Mr. Cooper who has violated duties owed to all plaintiffs in the MDL.

Together, the Co-Leads and the EC have conducted a stunning amount of discovery in a short period of time and prepared for, and tried, the first bellwether trial. They have vigorously represented all of the plaintiffs, and breached no duties owed to any of them. The picture painted by Mr. Cooper—a self-exiled, disgruntled, non-functioning member of the EC raising unsupported objections in an untimely manner—is false.

[32] Mr. Cooper offers to "to submit, *in camera*, documents which support the chronology set forth in [his] Motion." Br. at 12. Because Mr. Cooper failed to provide that evidence with his motion, it is improper to do so after Co-Lead Counsel file their opposition.

VI. CO-LEAD COUNSEL, THE EC, AND FEDERAL/STATE LIAISON COUNSEL COOPERATE WITH STATE COORDINATING COUNSEL ON AN ONGOING BASIS

Mr. Cooper maintains that Co-Lead Counsel put the state court lawyers in a "silo" and refused to coordinate with them. Br. at 7-8. This is untrue.

Order No. 13 appointed Dawn Barrios as Federal/State Liaison Counsel and charged her with being "the point of contact between the Court and other counsel with similar actions pending in state courts" and directed her to "advise such parties of developments, and otherwise assist in the coordination of federal/state activities, as recommended in Section 20.313 of the Manual for Complex Litigation, Fourth . . . ." Order No. 13 at 4-5. The Court also issued a Joint Coordination Order which, among many other things, offered an opportunity to state courts to participate in coordinated discovery as a "Coordinated Action," using the MDL proceeding as "the lead case for discovery and pretrial scheduling in the Coordinated Actions;" directed Co-Lead Counsel to create a single electronic document depository for use by all counsel in the MDL and in the Coordinated Actions; and provided plaintiffs in the Coordinated Actions and their counsel an opportunity to participate in all discovery in the MDL, including depositions. Order No. 15 at 1-2, 8-11.

Ms. Barrios and Co-Lead Counsel have faithfully executed their duties under the Court's orders. A "Dropbox" has been established containing all information that the Court directed be provided to counsel in the Coordinated Actions, including deposition calendars and detailed logs of this Court's Orders and memo endorsements. The folder also contains a listing of all Liaison Counsel in Coordinated Actions and their contact information. At least monthly, each Liaison

Counsel in a Coordinated Action receives notice of new material placed in the Dropbox folder.[33] Mr. Cooper has had access to all of this information.[34]

In addition, Liaison Counsel in the Coordinated Actions have received notice and an opportunity to participate in all of the MDL depositions. State counsel attended and asked questions at some, but not most, depositions. Mr. Cooper noticed his intent to participate in the Nowak-Vanderhoef, Trush, Buonomo, Stouffer, Porter, Oakley, Sevigny, Manzor, Kent, DeGiorgio, Federico, and Palmer depositions, yet he only appeared on behalf of State Coordinated Action counsel in three.[35]

Neither Co-Lead Counsel nor a member of the EC ever objected to Mr. Cooper, or any other state counsel, examining a witness.[36] Co-Lead Counsel never interfered with Ms. Barrios' coordination efforts "or discouraged any state court counsel from advocating the interests of their client in a forum of the counsel's choice. . . . Rather, it was the opposite; the Co-Leads gave me guidance when asked, assisted when requested, and supported additional procedures I wished to

[33] Declaration of Dawn M. Barrios in Support of Co-Lead Counsel's Memorandum of Law in Opposition to Lance Cooper's Motion to Remove the Co-Leads and Reconsider the Bellwether Trial Schedule ("Barrios Decl."), ¶ 5.

[34] *Id.* at ¶¶ 5, 7.

[35] *Id.* at ¶¶ 6, 9. State Coordinated Action attorneys helpfully participated in important depositions, and Coordinated Action lawyer Scott West prepared jointly with Co-Lead counsel for the DiGiorgio and Manzor depositions, and important parts of his examination were used in the *Scheuer* trial.

[36] *Id.* at ¶ 6.

implement to further the goal of coordination."[37] Moreover, Mr. Cooper never expressed to Ms. Barrios "that he felt efforts to coordinate were lacking or oppressive in any respect."[38]

Lawyers in the Coordinated Actions have full access to the discovery being conducted in the MDL. Co-Lead Counsel has helped facilitate access to that information. The Court's Joint Coordination Order provides a mechanism to bring discovery disputes to the Court's attention for resolution (*see* Order 15 at ¶¶ 29-31). Tellingly, no counsel in a Coordinated Action has ever asked the Court to resolve any purported grievances with Co-Lead Counsel's level of cooperation in discovery, not even Mr. Cooper.

VII. THE COURT SHOULD NOT RECONSIDER ITS APPROVAL OF THE QUALIFIED SETTLEMENT FUND

"Reconsideration of a previous order by the court is an 'extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources.'" *Deangelis v. Corzine*, 2015 WL 9647531, at *2 (S.D.N.Y. Dec. 23, 2015) (quoting *In re Health Mgmt. Sys. Inc. Sec. Litig.*, 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000)). "The standard for granting a motion for reconsideration pursuant to Local Rule 6.3 is strict." *Radiancy, Inc. v. Viatek Consumer Prods. Grp., Inc.*, 2015 WL 9462117, at *1 (S.D.N.Y. Dec. 22, 2015); *see also Deangelis*, 2015 WL 9647531, at *2 ("A court must narrowly construe and strictly apply Rule 6.3 so as to . . . prevent Rule 6.3 from being used to advance different theories not previously argued or as a substitute for appealing a final judgment."). A court may grant reconsideration only "where the party moving for reconsideration demonstrates an 'intervening change in

[37] *Id.* at ¶ 8; *see also id.* at ¶ 11 ("I regularly reported to and interacted with all Co-Leads on every state court coordination matter, and I can recall no instance in which any Co-Lead discouraged me or ordered me to deviate from the mandates of the Court on coordination.").

[38] *Id.* at ¶ 13.

controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *In re Bear Stearns Cos. Sec., Derivative, & ERISA Litig.*, 2014 WL 4443458, at *2 (S.D.N.Y. Sept. 9, 2014) (quoting *Schoolcraft v. City of New York*, 298 F.R.D. 134, 136 (S.D.N.Y. 2014)); *see also Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992). Mr. Cooper did not even attempt to meet this strict standard, and even if he had, he could not.

A. The Cooper Motion Is Untimely

Local Rule 6.3 required Mr. Cooper to move for reconsideration "within fourteen (14) days after the entry of the Court's determination of the original motion." The 14 days began to run on December 11, 2015, when the Court granted the Joint Motion to Approve the Establishment of the 2015 New GM Ignition Switch Qualified Settlement Fund (*see* Doc. No. 1854),[39] and expired on December 28, 2015. Mr. Cooper did not move for reconsideration; nor did he move for an extension of the Local Rule 6.3 deadline.

Mr. Cooper does not argue that his motion is timely, and he fails to explain why his tardiness should be excused. Accordingly, it is well within the Court's discretion to deny the motion for reconsideration on this basis alone. *See Otto v. Town of Washington*, 71 F. App'x 91, 92 (2d Cir. 2003) (affirming denial of a motion for reconsideration filed more than ten days after judgment docketed); *Luv N' Care, Ltd. v. Regent Baby Prods. Corp.*, 986 F. Supp. 2d 400, 411 (S.D.N.Y. 2013) (denying motion for reconsideration filed 15 days after order); *Gurvey v. Cowan, Liebowitz & Latman, P.C.*, 2014 WL 5690414, at *2 (S.D.N.Y. Nov. 5, 2014) (motion filed two weeks late can be denied on untimeliness grounds alone."); *Intellectual Prop. Watch v.*

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[39] This Order was posted on a same-day basis to the official MDL 2543 website, gmignitionmdl.com, under "General & Case Management Orders" for easy reference by all interested in the MDL 2543 proceedings.

U.S. Trade Representative, 2014 WL 852168, at *1 (S.D.N.Y. Jan. 31, 2014) (denying as untimely motion for reconsideration filed twenty-three days after entry of the order).

Mr. Cooper has known about the settlement he challenges since September 17, 2015 when Mr. Hilliard emailed the EC, including Mr. Cooper, to inform them of the settlement and issued a press release.[40] At that point, Mr. Cooper knew or should have known that Mr. Hilliard had settled his own clients' cases, with the exception of the five bellwether cases, and that Mr. Hilliard had not settled the remaining MDL personal injury and death cases. Thus, Mr. Cooper could have brought his arguments in late September 2015, yet Mr. Cooper never previously raised any purported concerns with the Qualified Settlement Fund. There is no good reason to entertain them now.

B. Reconsideration Is Unwarranted Under the Governing Standard Mr. Cooper Does Not Attempt to Meet

Even if the Court is inclined to consider the untimely motion on its merits, Mr. Cooper has not come close to establishing that reconsideration is warranted. He fails to point to an intervening change in law, the availability of new evidence,[41] or "controlling decisions or data that the court overlooked—matters, in other words that might reasonably be expected to alter the conclusion reached by the court." *SOHC*, *Inc. v. Zentis Food Solutions N. Am.*, *LLC*, 2014 WL 6603961, at *1 (S.D.N.Y. Nov. 20, 2014) (internal quotation omitted). Having failed to raise any issue with the Qualified Settlement Fund until now, Mr. Cooper is not entitled to a "second

[40] *See* Hilliard Decl., ¶¶ 33-34.

[41] "For evidence to be considered 'newly available' it must be 'evidence that was truly newly discovered or could not have been found by due diligence.'" *Deangelis*, 2015 WL 9647531, at *3 (quoting *Space Hunters*, *Inc. v. United States*, 500 F. App'x 76, 81 (2d Cir. 2012)). There is nothing new about the Qualified Settlement Fund that Mr. Cooper could not have raised months earlier.

bite at the apple." *Magnuson v. Newman*, 2013 WL 5942338, at *1 (S.D.N.Y. Nov. 6, 2013); *see also Goldstein v. State of New York*, 2001 WL 893867, at *1 (S.D.N.Y. Aug. 7, 2001) (holding that a motion for reconsideration "should not be used to put forward additional arguments which the movant could have made, but neglected to make before judgment") (internal quotation omitted), *aff'd*, 34 F. App'x 17 (2d Cir. 2002).

Even if Mr. Cooper had argued that the existence of the High/Low Agreements between GM and Mr. Hilliard's bellwether clients is "new evidence" justifying reconsideration, that argument would fail. Mr. Hilliard disclosed the High/Low Agreements to the Court on November 20, 2015—three weeks prior to the Court's approval of the Qualified Settlement Fund.[42] Since the Court was aware of the High/Low Agreements before it approved the Qualified Settlement Fund, Mr. Cooper's reliance on them cannot "reasonably be expected to alter the conclusion reached by the court." *SOHC, Inc.*, 2014 WL 6603961, at *1.[43]

Contrary to Mr. Cooper's contentions, Mr. Hilliard has not breached his fiduciary duties.[44] Mr. Cooper's sensational characterization of the settlement as a nefarious, secret pact is simply untrue. As the parties have described in open court and in public filings,[45] the parties'

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[42] Hilliard Decl., ¶ 37.

[43] And since Mr. Hilliard disclosed the High/Low Agreements to the Court, there is, of course, no reason to "investigate" agreements that were not "secret." *See* Cooper Recon. Br. at 9.

[44] Mr. Cooper repeatedly asserts that Mr. Hilliard was appointed to represent state case Coordinated Actions plaintiffs. *See, e.g.*, Cooper Recon. Br. at 1 (stating that Mr. Hilliard represents "every State Court Coordinated Action plaintiff"); *id.* at 4 ("Mr. Hilliard represents all . . . State Court Coordinated Action plaintiffs . . . ."). Not so. The Court appointed Mr. Hilliard as Co-Lead Counsel for MDL plaintiffs. *See* MDL Order No. 8 (Doc. No. 249).

[45] *See* Oct. 9, 2015 Status Conference Tr. at 43:18-44:19; Joint Motion for Appointment of Daniel J. Balhoff and John W. Perry, Jr. as Joint Special Masters (Doc. No. 1499); Joint Motion to Approve the Establishment of the 2015 New GM Ignition Switch Qualified Settlement Fund (Doc. No. 1798).

settlement provides for: (i) the appointment of two highly regarded special masters to establish a settlement framework and assign dollar values to the claims that are to be settled; and (ii) the creation of a Court-approved Qualified Settlement Fund with a trust agreement to be managed by a highly experienced administrator.[46] Contrary to Mr. Cooper's speculation,[47] the only reason that Mr. Hilliard's five bellwether cases were not included in this settlement was that GM refused to settle them.[48] And any High/Low Agreements would also benefit other plaintiffs in that they reduce the likelihood that Mr. Hilliard and GM will settle the strongest bellwether cases, leaving the parties to try only GM's picks.[49]

Mr. Hilliard was not duty bound to enter a global settlement with GM, and Mr. Cooper cites no authority to suggest otherwise. Neither Mr. Hilliard nor other Co-Lead Counsel can force GM to settle all cases. Nonetheless, Counsel have encouraged GM to do so, both directly with GM, and in open Court. For example, When Mr. Hilliard's settlements were announced to the Court, Co-Lead Counsel asked GM to consider a Court-supervised intensive settlement process program like that used in the *Toyota Unintended Acceleration* litigation to settle all MDL

[46] As counsel for GM explained to the Court during the October 9, 2015 status conference, there are "benefits to a QSF-type format. It allows the deposit of funds into the trust and allows claimants before they take receipt of them to make decisions around how they might want to receive those funds. It allows for lien payments to be made in an expeditious manner . . . . " Oct. 9, 2015 Tr. at 44:9-13.

[47] Cooper Recon. Br. at 6.

[48] Hilliard Decl. ¶ 32.

[49] In the *Toyota Unintended Acceleration* MDL, for example, one co-lead settled the first bellwether pick (on the eve of trial) and his other cases with disclosure to the MDL Court and, as here, with an ongoing commitment to assist in the trial and settlement of the remaining cases. As a result, the first MDL bellwether case that was to be tried was Toyota's pick. Cabraser Decl., ¶¶ 3-4.

and state injury and death cases.[50] Moreover, GM has publicly stated—in a transcript available to anyone on the MDL website maintained by Co-Lead Counsel[51]—that it "is interested and willing to engage in further discussions with other groups."[52] It has been and continues to be Co-Lead Counsel's understanding that GM is discussing settlement with other plaintiffs in both the MDL and in Coordinated Cases. Mr. Cooper argues that, at a minimum, Mr. Hilliard "should have communicated with the Executive Committee about this settlement given its importance" (Cooper Recon. Br. at 6)—but, of course, Mr. Hilliard did so.[53]

Moreover, Mr. Cooper does not explain, except in the most vague terms, how the Qualified Settlement Fund has harmed anyone—let alone how it created the type of "manifest injustice" that merits reconsideration. Courts have routinely rejected fairness and justice-related arguments premised on allegations that the settlement of some claims might prejudice other non-settling claims. *See*, *e.g.*, *Deangelis*, 2015 WL 9647531, at *3. Although Mr. Cooper contends that "Mr. Hilliard likely has made it more difficult for the remaining plaintiffs to receive full compensation for any harm GM caused" (Cooper Recon. Br. at 5), the Court was well aware of the fact that the Qualified Settlement Fund did not resolve all claims asserted against GM when it approved the settlement. And both Mr. Hilliard and GM assured the Court during the October 9, 2015 status conference that non-settling plaintiffs would not be prejudiced because GM has not

[50] *Id.*, ¶ 6.

[51] *See* http://gmignitionmdl.com/wp-content/uploads/20151009-status-conference.pdf. The October 9, 2015 transcript, like all others, was posted on the MDL 2543 website the day it became available. *Id.*, ¶ 1.

[52] Oct. 9, 2015 Tr. at 45:13-14. On February 1, 2016, Dawn Barrios, the Federal/State Liaison, sent a letter via email to all MDL and Coordinated Action Counsel who have executed the Participation Agreement reminding them that GM is interested in settlement discussions with counsel in personal injury/wrongful death cases.

[53] Hilliard Decl., ¶ 34.

set aside a limited pool of money from which to settle ignition switch cases.[54] Reconsideration "is not an opportunity to renew arguments that the court considered and rejected." *In re Bear Stearns Cos. Sec., Derivative, & ERISA Litig.*, 2014 WL 4443458, at *3 (quotation marks omitted).

The Court was similarly aware that the parties intended to keep the settlement confidential when it approved the Qualified Settlement Fund, though it has required the parties to show cause in writing by February 8, 2015 as to why the continued sealing of the settlement materials filed with the Court is consistent with the presumption in favor of public access. *See* Doc. Nos. 1853, 2176. Even if the Court ultimately determines that these settlement documents, or some portion thereof, should be public, Mr. Cooper would not have access to the amounts that will be paid to individual claimants, because those amounts will be determined by the Court-appointed special masters. GM steadfastly insisted that the terms and amounts of settlement be kept confidential, as is routine in mass tort MDLs.[55] Indeed, this norm is reflected in the Common Benefit Order, which enforces settlement confidentiality if the settling parties so agree. *See* MDL Order No. 42 (Doc. No. 743) at ¶ 48 ("Details of any individual settlement agreement, individual settlement amount, and individual amounts deposited into the Common Benefit Order Fund that the parties to the individual settlement agreement agree must be kept confidential shall be kept confidential . . . . "). Mr. Cooper has failed to demonstrate that these typical

[54] *See, e.g.*, Oct. 9, 2015 Tr. at 45: 3-10 (THE COURT: "I'm assuming, based on my general sense of things, that this is not a limited pool such that settlement with these plaintiffs could prejudice or jeopardize the recovery of nonsettling plaintiffs. Is that correct? MS. BLOOM [counsel for GM]: That's correct, your Honor.").

[55] In the *Toyota Unintended Acceleration* litigation, for example, all settlement amounts were kept confidential with respect to bellwether cases and those federal and state cases settled pursuant to the ISP. *See* Cabraser Decl., ¶ 5.

confidentiality provisions, which are reinforced by Court Order, create the type of "manifest injustice" that would warrant reconsideration of the Court's approval of the settlement. What would be manifestly unjust is if Mr. Cooper is permitted to belatedly upend the settlement of 1,397 plaintiffs' claims four months after the settlement was announced.

VIII. CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the Court deny the Cooper motions.

DATED: February 1, 2016

HILLIARD MUÑOZ GONZALES L.L.P.

By: *\/s/ Robert Hilliard*
Robert Hilliard
bobh@hmglawfirm.com
719 S Shoreline Blvd, Suite #500
Corpus Christi, TX 78401
Telephone: (361) 882-1612
Facsimile: (361) 882-3015

Co-Lead Counsel with Primary Focus on Personal Injury Cases

DATED: February 1, 2016

HAGENS BERMAN SOBOL SHAPIRO LLP

By: */s/ Steve W. Berman*
Steve W. Berman
steve@hbsslaw.com
Sean R. Matt
sean@hbsslaw.com
Andrew M. Volk
andrew@hbsslaw.com
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594

DATED: February 1, 2016

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

By: *<u>/s/ Elizabeth J. Cabraser</u>*

Elizabeth J. Cabraser
ecabraser@lchb.com
Steven E. Fineman
sfineman@lchb.com
Rachel Geman
rgeman@lchb.com
Annika K. Martin
akmartin@lchb.com
275 Battery St., 29th Floor
San Francisco, CA 94111
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Co-Lead Counsel with Primary Focus on Economic Loss Cases

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party through the Court's electronic filing service on February 1, 2016, which will send notification of such filing to the e-mail addresses registered.

s/ Steve W. Berman
Steve W. Berman