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February 7, 2016

VIA ELECTRONIC COURT FILING

The Honorable Jesse M. Furman
United States District Court for the
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *In re: General Motors LLC Ignition Switch Litig.*, 14-MD-2543 (JMF)

Dear Judge Furman:

Co-Lead Counsel write in regard to the reply brief filed by Lance Cooper (Doc. No. 2243 ("Reply")). For the reasons stated below, Co-Lead Counsel respectfully request that the Court strike the new evidence and argument raised for the first time in Mr. Cooper's Reply or permit Co-Lead Counsel to file a sur-reply not to exceed 12 pages by February 12, 2016. Mr. Cooper chose to submit no evidentiary support for the inflammatory and untrue accusations contained in his opening motions. He should not be permitted to sandbag Co-Lead Counsel with over 150 pages of new evidence and argument on Reply. Moreover, Mr. Cooper has, without authorization, filed documents that are protected work product, a protection Mr. Cooper did not have permission to waive. This letter also requests that the Court immediately seal this work product that Mr. Cooper was not authorized to disclose. Finally, Mr. Hilliard also wishes to bring to the Court's attention Mr. Cooper's serious breach of the rules of professional conduct.

A. Mr. Cooper's Reply Improperly Raised New Argument and Evidence

This Court requires that all motions "shall include . . . [s]upporting affidavits and exhibits thereto containing any factual information and portions of the record necessary for the decision of the motion. Local Civil Rule 7.1(a)(3). In an attempt to cure this clear deficiency, Mr. Cooper included in his Reply brief evidence and arguments that were not included in his moving papers. For example, Mr. Cooper attached to the Reply his own declaration that provides, for the first time, the "basis for the contentions that this MDL litigation was not properly managed." Reply at 2, citing the Declaration of Lance A. Cooper. Similarly, Mr. Cooper's opening briefs attacked Mr. Hilliard for violating his fiduciary duties but provided little supporting authority. Now, for the first time on Reply, Mr. Cooper has attached the Declarations of Charles Silver and Larry Coben, who raise a host of new arguments as to why Mr. Hilliard's settlements and bellwether selections were purportedly improper. *See* Reply Exhibits 2-3.[1] And, for the first

[1] For example, Mr. Silver and Mr. Coben offer new opinions about the propriety of the selection of the particular bellwether cases without considering the fact that the initial bellwether selections were made in February

time on Reply, Mr. Cooper attempts (and fails) to meet the standard required for reconsideration of the Court's approval of the Qualified Settlement Fund. *See* Reply at 11-12.

Citing evidence and raising new arguments for the first time in a reply brief is manifestly improper this District. *See In re: General Motors Ignition Switch Litig.*, Op. & Order Regarding New GM's First Motion *In Limine* (Doc. No. 1770) at 2 (refusing to consider an argument GM raised for the first time on reply); *Tutor Time Learning Centers, LLC v. GKO Grp., Inc.*, 2013 WL 5637676, at *1 (S.D.N.Y. Oct. 15, 2013) ("But arguments raised for the first time in a reply memorandum are waived and need not be considered."); *see also Mullins v. City of New York*, 653 F.3d 104, 118 n.2 (2d Cir. 2011) (declining to consider argument raised for the first time in a reply brief); *Mayer v. Neurological Surgery*, *P.C*., 2016 U.S. Dist. LEXIS 10260, *11 (S.D.N.Y. Jan. 28, 2016) ("The law in this Circuit is clear that arguments raised for the first time in reply briefs need not be considered."). Indeed, in *Mayer*, the Court granted the aggrieved party's alternative request to file a sur-reply brief but still refused to consider the new argument raised in the movant's reply. 2016 U.S. Dist. LEXIS 10260, at *10.

The new evidence and argument included in Mr. Cooper's Reply is thus waived and should not be considered by the Court. *See Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Ed.*, 444 F.3d 158, 169 (2d Cir. 2006) (granting motion to strike that part of reply brief that raised new argument). Accordingly, Co-Lead Counsel move to strike evidence and argument that Mr. Cooper raised for the first time in his Reply, including:

- Declaration of Lance A. Cooper, the accompanying exhibits (Reply Exhibit 1), and argument based on the same;
- Declaration of Charles Silver (Reply Exhibit 2) and argument based on the same;
- Declaration of Larry Coben (Reply Exhibit 3) and argument based on the same;
- Declaration of Victor Pribanic (Reply Exhibit 6), the accompanying exhibits, and argument based on the same;
- Emails among Co-Lead Counsel (Reply Exhibits 9-10) and argument based on the same;[2]
- Sections IV(5) and V, which raise new arguments relying on documents created before Mr. Cooper filed his opening briefs; and
- Mr. Cooper's Section VI arguments with respect to "manifest injustice" and Fed. R. Civ. P. 1.

For these reasons, Co-Lead Counsel respectfully request that the Court strike the new evidence and argument raised for the first time in Mr. Cooper's Reply or permit Co-Lead Counsel to file a sur-reply not to exceed 12 pages by February 12, 2016.

2015 and the final selections were made in July 2015 – months before the September 2015 Qualified Settlement Fund.

[2] The Court should also decline to consider Exhibits 5, 9-10 for the reasons stated in Section B below.

B. The Court Should Seal Work Product that Mr. Cooper Was Not Authorized to Disclose

Mr. Cooper attached to his Reply and filed publicly documents that are protected from disclosure by the work product doctrine. *See* Reply Exhibits 3, 5, 9-10.[3] Mr. Cooper had no authority whatsoever to disclose this opinion work product containing analyses of bellwether cases.[4] Accordingly, Co-Lead Counsel respectfully request that the Court seal these exhibits for-Court's-eyes-only and remove them from the public docket.[5] The Court should also order Mr. Cooper and GM to return all copies of these documents, which were not voluntarily disclosed by the holder of the privilege.

C. Mr. Cooper Is Violating Rule 4.2 of the Code of Professional Conduct by Contacting Mr. Hilliard's Clients

Apparently conceding that he cannot meet the standard for reconsideration of the Court's approval of the Qualified Settlement Fund, Mr. Cooper argues on Reply that, contrary to what he says in his opening brief,[6] he is "not asking that the settlements be set aside"; he is "simply asking that the Court conduct further investigation" into the settlements. Reply at 11-12.

Since Co-Lead Counsel filed their opposition to Mr. Cooper's motions, Mr. Hilliard has learned that Mr. Cooper has been conducting his own "inquiry into the settlements between Mr. Hilliard's signed clients and GM" (Reply at 13) – including by causing others to improperly contact Mr. Hilliard's clients in an effort to manufacture, *ex post*, support for Mr. Cooper's unfounded motions. Such contacts are blatant violations of New York's Code of Professional Responsibility Rule 4.2. *See* Rules of Prof. Con., Rule 4.2(a) ("In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law."). Mr. Hilliard will provide evidentiary support documenting Mr. Cooper's improper contacts in a forthcoming motion for a protective order. Because of the seriousness of the apparent ethical violations by a lawyer that this Court appointed to a leadership position, we believe that it is appropriate to immediately inform the Court of Mr. Cooper's transgressions and of Mr. Hilliard's impending motion.

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[3] Reply Exhibit 3, ¶ 11 and Reply Exhibit 5 disclose opinion work product evaluating the bellwether cases that appears to have been prepared by Mr. Hilliard's co-counsel, the Thomas J. Henry Law Firm. Reply Exhibits 9 and 10 disclose Co-Lead Counsel opinion work product with respect to one or more of the bellwether cases.

[4] Unauthorized disclosure of work product does not result in a waiver. *See Bowne v. New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 479 (S.D.N.Y. 1993) (waiver only occurs if the a "party has *voluntarily* disclosed the work product in such a manner that it is likely to be revealed to his adversary") (emphasis added).

[5] A replacement version of Exhibit 3 with opinion work product redacted is attached hereto as Exhibit A.

[6] *Compare* Mr. Cooper's Motion to Reconsider the Order Approving the Establishment of the 2015 New GM Ignition Switch Qualified Settlement Fund (Doc. No. 2182) at 9 ("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 . . . . ").

Respectfully submitted,

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cc: All Counsel of Record (via ECF)