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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 to request a telephonic status conference with the Court to discuss the bellwether trial procedure and remaining bellwether cases. As was flagged for the Court during a pre-trial conference in *Scheuer*, we question the utility of conducting all five of the remaining bellwether injury and wrongful death trials in light of GM's detailed admissions regarding the defect and its efforts to conceal it.[1] GM made these admissions ten months after the Court established the process for selecting and trying the bellwether cases. *See* MDL Order No. 25 (Doc. No. 422), entered Nov. 19, 2014.

As the MANUAL FOR COMPLEX LITIGATION (Fourth) (MANUAL) provides, bellwether test cases "should produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis[,] and what range of values the cases may have if resolution is attempted on a group basis." MANUAL, § 22.315. The device depends on selecting cases that are representative of the remaining group of cases. As the Court has recognized, "[f]or this bellwether trial plan to succeed, the cases selected as trial candidates must constitute a representative sampling of cases in this proceeding." Order No. 25, ¶ 34.

The process utilized to select the individual bellwether cases may, indeed, have yielded a representative sampling. But, as the *Scheuer* trial demonstrated, the individual circumstances of each crash may still result in specific trial findings of limited—or no—application to other cases. In light of GM's trial strategy in *Scheuer*, it is doubtful that a verdict in the future bellwether cases will be perceived as a truly representative test. GM has emphasized that each car accident is different—from the cause itself to other factors such as terrain, vehicle speed, other vehicles' involvement, other drivers' culpability, contributory negligence, and other facts specific to each plaintiff and his or her specific injuries. That was GM's playbook in *Scheuer*, as it will be in future trials. In the remaining bellwethers, liability will likely turn on these highly individualized, case-by-case accident details and inherent plaintiff factors, rendering jury

[1] The *Yingling* case, which is MDL Bellwether Trial #3, should be tried regardless of other changes that are made to the bellwether process.

verdicts difficult to extrapolate to other cases. In other words, individual issues of causation and injury may result in a jury verdict that does not reach the more general issues of GM's liability (or not) for purposes of benchmarking. Moreover, with the resolution of the vast majority of Mr. Hilliard's cases—which comprised roughly 80% of the personal injury and death cases in the MDL—the need for so many MDL bellwether cases is of less importance than when the concept was first adopted. The settlement framework that will be established in connection with Mr. Hilliard's settlement can be applied more globally without holding multiple bellwether trials.

We recognize that the Court has committed to the bellwether process. But perhaps the *Scheuer* trial, and other developments that post-date the Court's entry of MDL Order No. 25, suggest that the bellwether process should be modified. Alternatives to trying five more bellwethers should be explored. They include:

1. After *Yingling*, sending cases back to transferor courts for trial in the communities in which they were filed.[2] 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. All cases have substantially benefitted from this Court's pre-trial rulings in *Scheuer*, as well as the Court's efforts to coordinate discovery between the MDL and the Coordinated Actions. Individual cases can now be tried in their original courts. As the Court has recognized, "[a]t the conclusion of pretrial proceedings, the JPML must remand these personal injury cases (as well as economic loss cases) back to the originating/transferor courts across the country." Order No. 25 at 1 (citing *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34 (1988)). Furthermore, trials in state cases not in the MDL will be commencing soon, including *Felix* (May trial in Missouri), *Stidham* (July trial in Kentucky), and *Worthington* (July trial in Georgia). Notably, while not formally bellwethers, the majority of the trials in *Vioxx* that led to the ultimate global MDL/state resolution were state trials. Eldon E. Fallon, Jeremy T. Grabill, and Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2334-37 (June 2008). "The transferee court conducted six bellwether trials in the Vioxx MDL, only one of which resulted in a verdict for the plaintiffs. . . . During this time, approximately thirteen additional cases were tried before juries in New Jersey, California, Texas, Alabama, Illinois, and Florida." *Id*. at 2335.

2. Another alternative is to include in the next two bellwether trials summary jury trials on specific issues. The Court has recognized that there are other tools available to the Court to advance the litigation and promote resolution. More specifically, the Court noted that, "[n]otwithstanding the advantages and usefulness of bellwether trials in litigation of this sort, this Court is of the view that there may be other, less expensive means that the Court and parties

[2] One jurist has expressed concern about not trying cases where they are filed: "I sense something is lost when Mrs. Smith, who is injured by ingesting a drug in Columbus, Georgia, [] does not have the opportunity to tell her story here at home but must be relegated to 'Plaintiff number X' in some settlement grid in a faraway courthouse . . . ." Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. 667, 685-86 (2013) (quoting Letter from Judge Clay D. Land, United States District Court Judge for the Middle District of Georgia, to Professor Francis E. McGovern, Duke Law School (Oct. 29, 2010)).

could and should use—in addition to bellwether trials—to advance the litigation and promote resolution of cases individually or globally, including but not limited to early neutral evaluation and summary jury trials (either on select issues, such as gross negligence and punitive damages, or in select cases)." Order No. 25, ¶ 6. Although GM has previously objected to summary trials, we believe that a summary jury trial on recurring common law issues of negligence and gross negligence, as well as unfair and deceptive conduct and punitive damages, could be very useful in advancing the litigation and should be considered.

Bellwethers have become a recurring feature of MDLs because they can and do have value in informing or hastening the resolution process, even though, as demonstrated by Judge Fallon's account of the bellwether regime in *Vioxx*, the causal relationship is not always direct or obvious. Sometimes, resolution occurs on the eve of the first bellwether, as occurred in the *Bextra/Celebrex* and *Guidant* MDLs. There is an analogue here, given that most of the MDL cases have settled, and GM has committed to larger discussions. GM needs no assistance from a jury's verdict to determine settlement value given its years' long disbursement of hundreds-of-millions of dollars of settlement monies to thousands of victims. Thus, the question is whether, at this point or beyond *Barthelemy* and *Yingling*, MDL bellwethers retain a necessary function.

The Court has previously asked the parties to explore alternatives to bellwethers. Although GM has not shown any interest, we believe that an alternative approach should be seriously explored now that the MDL litigation has substantially progressed, GM has entered into the Deferred Prosecution Agreement with the Department of Justice, and the Court has seen the very case-specific manner in which GM tried the *Scheuer* matter—a strategy that it will undoubtedly pursue in other trials. Co-Lead Counsel believe that these ideas, in addition to using data from Mr. Feinberg's program and from the Hilliard group settlement allocation by Mr. Perry to inform a program to resolve remaining federal and state death and injury cases, are worthy of consideration and discussion and, accordingly, request a telephone conference.

Respectfully submitted,

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cc: All Counsel of Record (via ECF)