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April 17, 2018

**VIA E-MAIL TRANSMISSION
AND ECF FILING**

The Honorable Martin Glenn
United States Bankruptcy Judge
United States Bankruptcy Court
Southern District of New York
Alexander Hamilton Custom House
One Bowling Green
New York, New York 10004

**Re: In re Motors Liquidation Company, et al.
Case No. 09-50026 (MG)**

Letter Regarding Update on Related Proceedings

Dear Judge Glenn:

King & Spalding LLP is co-counsel with Kirkland & Ellis LLP for General Motors LLC (“**New GM**”) in the above-referenced matter. Pursuant to Judge Gerber’s Endorsed Order dated May 5, 2015 [ECF No. 13131], we write to update the Court regarding developments in proceedings in MDL 2543:

1. *A Memorandum Opinion and Order Regarding New GM’s Motion for Summary Judgment with Respect to Plaintiffs’ Claims for Benefit-of-the-Bargain Damages*, entered by Judge Furman on April 3, 2018 [MDL ECF No. 5310], a copy of which is attached hereto as **Exhibit “A.”** This Opinion was one of three anticipated developments identified in Plaintiffs’ March 26, 2018 update letter to the Court [ECF No. 14257].
2. A joint letter to Judge Furman dated April 15, 2018 from MDL Lead Counsel and New GM requesting an extension of certain deadlines relating to the economic loss schedule in MDL 2543 [MDL ECF No. 5385], which was granted pursuant to a text-only order entered by Judge Furman on April 16, 2018. A copy of this joint letter is attached hereto as **Exhibit “B.”** The schedule attached to the joint letter as Exhibit 1 modifies certain dates that were set forth in the *Schedule of Certain*

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MDL 2543 Events That May Impact the Late Claims Matter that was attached as Exhibit A to New GM's letter to the Court dated March 29, 2018 [ECF No. 14265].

3. Letters dated April 5, 2018, April 10, 2018 and April 16, 2018 to Judge Furman by New GM and the Plaintiffs in MDL 2543 regarding the status of bankruptcy court litigation regarding whether Non-Ignition Switch Plaintiffs can assert due process violations with respect to the Sale Order [MDL ECF Nos. 5340, 5341, 5368 and 5388]. Copies of these letters are attached hereto as **Exhibits "C"** through **"F."**
4. *MDL Order No. 148 [Amended] Regarding Next Steps for Pre-Sale Personal Injury Claims*, entered by Judge Furman on April 12, 2018 [MDL ECF No. 5373], a copy of which is attached hereto as **Exhibit "G."** Approximately 334 of the MDL Pre-Sale personal injury claims are also late claims filed against the MLC GUC Trust. MDL Order 148 will permit the parties to exchange basic factual information and test the legal sufficiency of such claims in the MDL.

If the Court has any questions or needs additional information, please let me know.

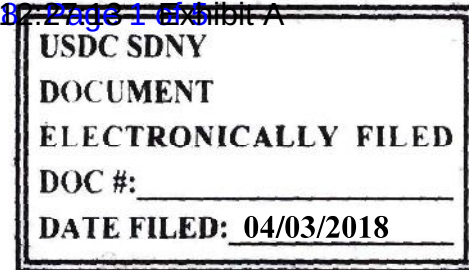
Respectfully submitted,

/s/ Scott Davidson

Scott Davidson

SD/hs
Encl.

Exhibit A



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
IN RE:

14-MD-2543 (JMF)
14-MC-2543 (JMF)

GENERAL MOTORS LLC IGNITION SWITCH LITIGATION

MEMORANDUM OPINION
AND ORDER

This Document Relates To All Actions
-----x

JESSE M. FURMAN, United States District Judge:

**[Regarding New GM’s Motion for Summary Judgment with Respect to
Plaintiffs’ Claims for Benefit-of-the-Bargain Damages]**

In this multidistrict litigation, familiarity with which is presumed, Plaintiffs seek recovery from General Motors LLC (“New GM”) on behalf of a broad putative class of General Motors car owners and lessors whose vehicles were subject to recalls for certain defects. They allege that they were harmed by, among other things, a drop in their vehicles’ value due to the defects. Thus far, the Court has entertained two partial motions to dismiss, addressing — in lengthy opinions — the legal validity of Plaintiffs’ claims under federal law and the laws of fifteen states and the District of Columbia. *See In re: Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 (JMF), 2017 WL 2839154 (S.D.N.Y. June 30, 2017), *as amended on reconsideration by* No. 14-MD-2543 (JMF), 2017 WL 3443623 (S.D.N.Y. Aug. 9, 2017); *In re: Gen. Motors LLC Ignition Switch Litig.* (“TACC MTD Op.”), No. 14-MD-2543 (JMF), 2016 WL 3920353 (S.D.N.Y. July 15, 2016). To the extent relevant here, the Court largely upheld Plaintiffs’ theory of damages known as the “benefit-of-the-bargain defect theory.” That theory provides that “Plaintiffs who purchased defective cars were injured when they purchased for x dollars a New GM car that contained a latent defect; had they known about the defect, they would have paid

fewer than x dollars for the car (or not bought the car at all), because a car with a safety defect is worth less than a car without a safety defect.” *TACC MTD Op.*, 2016 WL 3920353, at *7.

Notwithstanding the Court’s opinions, not to mention the fact that discovery is still ongoing, New GM requested leave a few months ago to file a motion seeking summary judgment with respect to Plaintiffs’ claims for benefit-of-the-bargain damages under the laws of the sixteen jurisdictions subject to the prior motions to dismiss. (Docket No. 4338, at 1). Lead Counsel did not oppose the request, but expressed some skepticism about the “basis” for a motion given the Court’s rulings on New GM’s motions to dismiss. (Aug. 11, 2017 Status Conf. Tr. (“Tr.”) 14, available at <http://gmignitionmdl.com/court-documents/transcripts>; see also Docket No. 4337, at 1 & n.1). At a status conference, the Court expressed some misgivings of its own about New GM’s proposal. (See Tr. 9-10). Specifically, the Court cited its aversion to “piecemeal motion practice” and raised the question of whether a summary judgment motion would be premature given the Court’s prior rulings on the benefit-of-the-bargain theory and the fact that discovery was not yet complete. (See *id.*). Ultimately, based on New GM’s view that a ruling on its proposed motion “would materially advance the litigation and inform the Court’s later decisions on motion practice regarding class certification and summary judgment,” (Docket No. 4338, at 1), the Court put aside those misgivings and granted New GM leave to proceed. (Tr. 14; see also Docket No. 4499, ¶ 3). New GM’s motion is now fully briefed.

Upon review of the parties’ motion papers, the Court — regrettably — concludes that its initial misgivings were well founded and that New GM’s motion is premature. The crux of New GM’s argument is that Plaintiffs did, in fact, receive the benefit of their bargain because New GM “recalled their vehicles, fixed (or offered to fix) each vehicle free of charge to each plaintiff, and incurred . . . [costs] for the repairs.” (Docket No. 4681 (“New GM’s Br.”), at 1). Plaintiffs

counter that all of the states at issue “calculate bargain-of-the-benefit [*sic*] damages as of the time of the sale” and, therefore, that “damages calculations would *not* be affected by any repairs.” (Docket No. 4805 (“Pls’ Br.”), at 1). In the alternative, Plaintiffs contend that there are genuine disputes of material fact with respect to whether New GM’s recall repairs “actually fix the defects at issue.” (*Id.* at 53). On that front, each side offers the opinions of experts. (Compare, e.g., Docket No. 4682, ¶ 30, with Docket No. 4806, ¶ 38). Additionally, each side contends that the other’s experts’ testimony may be inadmissible and signals the likelihood of *Daubert* motions to come. (See Docket No. 4807, ¶ 30 (“No expert has been qualified or offered to testify about these opinions, and the foundation required under Rule 702 has not been established.”); Docket No. 4868, at 27 (arguing that Plaintiffs’ expert reports are “unsupported and inadmissible” and “will be subject to *Daubert* briefing at the appropriate time”).

The Court has not exhausted its research on the question of whether and to what extent evidence of post-sale mitigation would affect the availability or calculation of damages in the sixteen jurisdictions at issue. But it has done enough research to conclude that many, if not most (or even all), states would factor such evidence into the analysis. Judge Chen’s decision in *In re Myford Touch Consumer Litigation*, No. 13-CV-3072 (EMC), 2016 WL 7734558 (N.D. Cal. Sept. 14, 2016), is instructive. In that case, Ford contested the plaintiffs’ motion to certify a class of purchasers of Ford vehicles with a defective computer system. *See id.* Plaintiffs argued that, under California law, damages need not “account for benefits received after purchase” — in that case, repairs that Ford had made to the computer system. *Id.* at *18. Judge Chen disagreed, concluding that “Plaintiffs are incorrect in arguing their damages cannot be reduced by post-purchase mitigation.” *Id.* at *19 (citing *Clayworth v. Pfizer, Inc.*, 233 P.3d 1066, 1087 (Cal. 2010); Restatement (Second) of Contracts § 350). The Court then examined the plaintiffs’

“evidence that Ford did not meaningfully fix the [computer system],” ultimately concluding that whether the fix was successful was “a factual dispute, going to the merits of the case.” *Id.*; see also *Liles v. Pentecost*, 105 So. 198, 198-99 (Ala. 1925) (holding that, while the “general rule as to measure of damages in [fraudulent misrepresentation cases] is the difference between the actual value of the property at the time of the sale . . . and its represented value,” that rule does not apply where, “because of peculiar circumstances of the case involved, such difference fails to measure accurately the loss sustained”).

In light of the foregoing, the Court surmises (though, to be clear, does not yet hold) that the viability of Plaintiffs’ claims for benefit-of-the-bargain damages is likely to turn on the question of whether New GM actually fixed the recalls at issue in its many recalls. That, in turn, would require a determination of whether each side’s expert testimony is admissible — an issue that the parties address barely, if at all, and as to which they plan to file motions in the future. It is for those reasons that the Court concludes New GM’s motion is premature. That is, the Court concludes that it would be more efficient and sensible to defer resolution of the issues raised in New GM’s current motion until the Court has the opportunity, on a full record, to determine the admissibility of each sides’ experts. See, e.g., *Celebrity Cruises Inc. v. Essef Corp.*, No. 96-CV-3135 (JCF), 2005 WL 3527142, at *5 (S.D.N.Y. Dec. 23, 2005) (“It will be far more efficient to determine whether [the plaintiff] has sufficient evidence to support its damage claims after it has been established what evidence is admissible. Therefore, [the defendant]’s motion is denied with leave to renew following a decision on the *Daubert* motions.”); *Allstate Ins. Co. v. Heil*, No. 07-CV-0097 (JMS), 2007 WL 4270355, at *2 n.2 (D. Haw. Dec. 6, 2007) (“Because the parties have not briefed the Rule 702 issue in anything more than a cursory way as part of their summary judgment arguments, the court declines to resolve the expert admissibility issues on the

record before it.”). Accordingly, New GM’s motion for summary judgment as to Plaintiffs’ claims for benefit-of-the-bargain damages is DENIED without prejudice.¹ Counsel should confer on whether and how the motion should be renewed and be prepared to address that question at a future status conference.

The Clerk of Court is directed to terminate Docket No. 4679.

SO ORDERED.

Date: April 3, 2018
New York, New York



JESSE M. FURMAN
United States District Judge

¹ The Court recognizes, as New GM argues, that Plaintiffs do not dispute that New GM’s recall “cured” the “Power Steering Defect.” (*See* Pls’ Br. 53-54). In the interest of avoiding piecemeal resolution of New GM’s motion, the Court will also defer resolution of this argument until it addresses Plaintiffs’ arguments concerning all of the recalls.

Exhibit B



Lieff
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&
Bernstein
Attorneys at Law



April 15, 2018

VIA ELECTRONIC COURT FILING

The Honorable Jesse M. Furman
United States District Court
Southern District of New York

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

Dear Judge Furman:

Pursuant to Order No. 131 ¶ 11 (Docket No. 4499), Co-Lead Counsel for the Economic Loss Plaintiffs and counsel for New GM, having met and conferred, write jointly to request a further short extension on certain deadlines relating to the economic loss schedule. This request is necessary as the parties continue to work in good faith to complete expert discovery.

First, the parties propose to adjust the current expert discovery deadlines as follows: moving the deadline for Plaintiff expert rebuttal reports from April 20, 2018 to **Friday, May 18, 2018**, and the deadline to depose New GM's experts and Plaintiffs' rebuttal experts from May 4, 2018, to **Friday, June 22, 2018**.

Second, and flowing from the parties' proposed adjustment to the completion of expert discovery, the parties propose to adjust the current summary judgment, class certification, and *Daubert* motion practice deadlines by moving the deadline for opening briefs from May 4, 2018 to **Friday, June 29, 2018**; opposition briefs from June 22, 2018 to **Friday, August 24, 2018** (including any *Daubert* motions that Plaintiffs may file in connection with New GM's summary judgment motion and any remaining *Daubert* motions that New GM may file limited to plaintiffs' class certification motion); reply briefs from July 20, 2018 to **Friday, September 21, 2018**; and certain replies in support of *Daubert* briefing from August 10, 2018 to **Friday, October 12, 2018**.

Third, the parties propose to change the hearing on summary judgment and class certification contemplated in Order No. 131 from "September or October 2018 or as soon thereafter as is reasonably practicable" to "October or November 2018 or as soon thereafter as reasonably practicable."

This is the parties' third request for an extension of the deadlines in Order No. 131, and, if granted, would only modestly extend the timing of resolving summary judgment and bellwether class certification motions in the economic loss case. Consistent with Order No. 131, the parties have attached as Exhibit 1 hereto a revised economic loss deadline chart incorporating the parties' proposed extension request.

The Honorable Jesse M. Furman

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Respectfully,

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cc: MDL Counsel of Record

Exhibit 1

[PROPOSED] ECONOMIC LOSS DEADLINES

Deadline	Submission	Party or Parties
May 18, 2018	Plaintiff Expert Rebuttal Reports	Lead Counsel
June 22, 2018	Deadline to Depose New GM's Experts and Plaintiffs' Rebuttal Experts	Both Parties
June 29, 2018	Summary Judgment Motion	New GM
June 29, 2018	New GM's <i>Daubert</i> Motions (if any) in connection with its Summary Judgment Motion	New GM
June 29, 2018	Class Certification Motion	Lead Counsel
August 24, 2018	Summary Judgment Opposition Brief	Lead Counsel
August 24, 2018	Plaintiffs' <i>Daubert</i> Motions (if any) in connection with GM's Motion for Summary Judgment	Lead Counsel
August 24, 2018	Plaintiffs' response to GM's June 29 <i>Daubert</i> Motions	Lead Counsel
August 24, 2018	Class Certification Opposition Brief	Lead Counsel
August 24, 2018	New GM's remaining <i>Daubert</i> Motions (if any) limited to Plaintiffs' Motion for Class Certification (motions must not duplicate arguments as to any experts already the subject of GM's June 29 <i>Daubert</i> Motions)	New GM
September 21, 2018	Summary Judgment Reply Brief	New GM
September 21, 2018	New GM's reply in support of June 29 <i>Daubert</i> Motions and Opposition to Plaintiff's <i>Daubert</i> Motions	New GM
September 21, 2018	Class Certification Reply Brief	Lead Counsel
September 21, 2018	Plaintiffs' opposition to New GM's August 24 <i>Daubert</i> Motions	Lead Counsel
October 12, 2018	New GM's reply in support of its August 24 <i>Daubert</i> Motions	New GM

Deadline	Submission	Party or Parties
October 12, 2018	Plaintiffs' reply in support of their August 24 <i>Daubert</i> Motions	Lead Counsel
October or November 2018 (or as soon thereafter as is reasonably practicable)	Class Certification/ Summary Judgment Hearing	Both Parties

Exhibit C



**Lieff
Cabraser
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&
Bernstein**
Attorneys at Law



April 5, 2018

BY ECF

The Honorable Jesse M. Furman
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

RE: ***In re: General Motors LLC Ignition Switch Litigation,***
14-MD-2543 (JMF); 14-MC-2543

Dear Judge Furman:

At the March 22, 2018 Status Conference, the Court requested clarification on the status of the determination, if any, of whether “Non-Ignition Switch Plaintiffs” could demonstrate a due process violation. This issue relates to whether Non-Ignition Switch Plaintiffs: (i) can pursue successor liability claims despite the “free and clear” provision in the Sale Order; and (ii) should be granted leave to file late proofs of claims against the GUC Trust. The due process issue is not yet teed up for a determination on the merits by the Bankruptcy Court. The potential settlement between certain plaintiffs, including certain Non-Ignition Switch Plaintiffs, and the GUC Trust would resolve the issue of whether leave to file late proofs against the GUC Trust should be granted to Non-Ignition Switch Plaintiffs as a remedy for a due process violation.¹ However, the question of the due process violation would remain relevant for potential successor liability claims (which, of course, this Court would decide on the merits if the “free and clear” provision of the Sale Order does not apply to Non-Ignition Switch Plaintiffs).

The relevant history is as follows: in 2014, New GM filed a motion to enforce the Sale Order seeking to enjoin claims brought by “Non-Ignition Switch Plaintiffs” (a term that was limited at the time to plaintiffs asserting economic losses and did not include plaintiffs asserting

¹ Certain Non-Ignition Switch Plaintiffs reserved the right to raise this issue in the *Motion for an Order Granting Authority to File Late Class Proofs of Claim*, dated Dec. 22, 2017 [Bankr. ECF No. 13806] (the “Late Claims Motion”). The Plaintiffs and GUC Trust began settlement negotiations to resolve issues related to the late claims before briefing on the Late Claims Motion was complete.

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personal injury or wrongful death claims), including successor liability claims.² This motion was deferred pending the determination of New GM's motion to enforce against the Ignition Switch Plaintiffs. *See In re Motors Liquidation Co.*, 529 B.R. 510, 523 (Bankr. S.D.N.Y. 2015). Following the Bankruptcy Court's ruling on the motion to enforce against the Ignition Switch Plaintiffs, the Bankruptcy Court determined that "[t]he Non-Ignition Switch Plaintiffs' claims remain stayed" because they had not yet shown a due process violation. *See In re Motors Liquidation Co.*, 531 B.R. 354, 360 (Bankr. S.D.N.Y. 2015). However, the Second Circuit "vacate[d] the bankruptcy court's decision to enjoin those claims [based in non-ignition switch defects] and remand[ed] for further proceedings consistent with this opinion." *Elliott v. Gen. Motors LLC (In re Motors Liquidation Co.)*, 829 F.3d 135, 166 (2d Cir. 2016) (internal citation omitted). On remand, the definition of the term "Non-Ignition Switch Plaintiffs" was expanded to include plaintiffs asserting personal injury or wrongful death claims, in addition to plaintiffs asserting economic losses.

The Bankruptcy Court then directed counsel for New GM and plaintiffs to identify issues on remand and what discovery, if any, would be necessary, and the parties responded with their positions.³ As advocated by Designated Counsel, Goodwin Proctor, and New GM, the Bankruptcy Court declined to address the fact-specific issue of the demonstration of a due process violation.⁴ Instead, the Bankruptcy Court scheduled briefing on five threshold issues (which did not include whether the Non-Ignition Switch Plaintiffs could establish a due process violation).⁵

Notably, although New GM contended in the briefing on these threshold issues that the Non-Ignition Switch Plaintiffs had waived the right to establish a due process violation (which plaintiffs disputed), Judge Glenn specified that he was *not* addressing this dispute in his rulings. *See In re Motors Liquidation Co.*, 568 B.R. 217, 226 n.5 (Bankr. S.D.N.Y. 2017); *In re Motors Liquidation Co.*, 571 B.R. 565, 574 (Bankr. S.D.N.Y. 2017).

Finally, Plaintiffs note that the question of whether Non-Ignition Switch Plaintiffs can bring independent claims is pending before Your Honor as one of the appeals of the second set

² *See Motion of General Motors LLC Pursuant to 11 U.S.C. §§ 105 and 363 to Enforce the Court's July 5, 2009 Sale Order and Injunction (Monetary Relief Actions, Other Than Ignition Switch Actions)*, dated Aug. 1, 2014 [Bankr. ECF No. 12808]. This motion to enforce was filed against certain Non-Ignition Switch Plaintiffs asserting economic losses (but not personal injury or wrongful death claims).

³ *See* July 18, 2016 Hr'g Tr. 11:7-14:8; *Order Setting Case Management Conference for 11:30 A.M., November 16, 2016*, dated Oct. 18, 2016 [Bankr. ECF No. 13775]; *Status Report Pursuant to Order Setting Case Management Conference*, dated Nov. 11, 2016 [Bankr. ECF No. 13786].

⁴ *See* Nov. 16, 2016 Hr'g Tr. 59:1-3.

⁵ *See Order to Show Cause Regarding Certain Issues Arising from Lawsuits with Claims Asserted Against General Motors LLC ("New GM") that Involve Vehicles Manufactured by General Motors Corporation ("Old GM")*, dated Dec. 13, 2016 [Bankr. ECF No. 13802] (the "Order to Show Cause").

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of threshold issues.⁶ However, given Your Honor's ruling as to the pre-sale purchasers' claims, which is preserved for appeal, *see In re Gen. Motors LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 401-03 (S.D.N.Y. 2017), Plaintiffs respectfully observe in the interests of 'triage' that resolution of this threshold issue arguably has little if any immediate significance in the litigation.

Respectfully Submitted,

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⁶ See GM appeal on whether NISD can assert Independent Claims – *In re Motors Liquidation Co.*, Case No. 17-6120.

Exhibit D

KIRKLAND & ELLIS LLP

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April 5, 2018

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 Litigation*, 14-MD-2543

Dear Judge Furman:

Pursuant to Order No. 147 Section VI (Docket No. 5302) arising out of the March 22, 2018 Status Conference, New GM responds to the Court's questions regarding (i) the status of the Bankruptcy Court's ruling on the definitions of who qualifies as an Ignition Switch Plaintiff and a Non-Ignition Switch Plaintiff, and (ii) proceedings in the Bankruptcy Court as to whether Non-Ignition Switch Plaintiffs can establish a due process violation relating to the Sale Order. As shown below, Ignition Switch Plaintiffs are plaintiffs asserting claims based on the Ignition Switch Defect in vehicles subject to NHTSA Recall No. 14-V-047; all other plaintiffs asserting claims relating to Old GM vehicles are Non-Ignition Switch Plaintiffs. New GM and Lead Counsel agree with these definitions. The Second Circuit ruled in *In Matter of Motors Liquidation Co.*, 829 F.3d 135 (2d Cir. 2016) cert denied sub. nom. *Gen. Motors LLC v. Elliott*, 137 S. Ct. 1813 (2017) that because of a due process violation, the free and clear provisions of the Sale Order do not apply to Ignition Switch Plaintiffs. No such ruling was made by the Second Circuit (or any other court) with respect to Non-Ignition Switch Plaintiffs. Thus, the Sale Order continues to apply to such plaintiffs and it is too late for them to challenge the Sale Order.

Definition of Ignition Switch/Non-Ignition Switch Plaintiffs

The Court asked whether Judge Glenn's ruling on who qualifies as an Ignition Switch Plaintiff versus a Non-Ignition Switch Plaintiff is final and whether it has been appealed. (3/22/2018 Status Conf. Tr. at 53:11-14.) On July 12, 2017, the Bankruptcy Court issued an opinion and order holding that "Ignition Switch Plaintiffs" include only those plaintiffs asserting claims against New GM that are based on the "Ignition Switch Defect" in vehicles subject to NHTSA Recall No. 14-V-047. (*See* 7/12/2017 Lead Counsel Ltr., Mem. Opinion and Order Deciding Certain 2016 Threshold Issues at 9-14, 19-21, Docket No. 4258.) All other plaintiffs asserting claims relating to Old GM vehicles are Non-Ignition Switch Plaintiffs. The Bankruptcy Court's decision is consistent with the position taken by Lead Counsel and their Designated

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Counsel in the Bankruptcy Court, this Court, and the Second Circuit. (*See, e.g.*, 2/27/2017 Pls.’ Br. on 2016 Threshold Issues at 1 n.1, Bankr. Docket No. 13866; 2/27/2017 New GM Br. on 2016 Threshold Issues at 24-33, Bankr. Docket No. 13865 (collecting examples of definitions in plaintiffs’ filings and/or court judgments and opinions).) The Bankruptcy Court’s July 12, 2017 opinion, however, was appealed by the *Pillars* plaintiff to this Court (*see* 17-CV-6196 Docket No. 7) and the matter is *sub judice*. (*See* 9/29/2017 A. Bloomer Ltr. ¶ 1, Docket No. 4653.)¹

Non-Ignition Switch Plaintiffs (Whether Economic Loss or Pre-Sale Accident) May Not Challenge the Sale Order on Due Process Grounds

With regard to the Court’s question about whether Non-Ignition Switch Plaintiffs can establish a due process violation relating to the Sale Order (3/22/2018 Status Conf. Tr. at 54:12-19), the short answer is that there has never been a ruling by any court that such plaintiffs were deprived of due process relating to the Sale Order. Accordingly, Non-Ignition Switch Plaintiffs are bound by the free and clear provisions of the Sale Order, and may not assert successor liability claims against New GM. *See, e.g., Celotex Corp. v. Edwards*, 514 U.S. 300 (1995) (the rule is well established that “persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed . . .”) (internal citations omitted). The burden to seek and prove a due process violation relating to the Sale Order has always been on Non-Ignition Plaintiffs. Their failure to pursue, much less establish, a due process violation for approximately four years since the 2014 recalls were announced is outcome determinative. The Sale Order indisputably applies to Non-Ignition Switch Plaintiffs.

The 2015 Bankruptcy Proceedings

The question of whether Non-Ignition Switch Plaintiffs would seek to prove a due process violation was addressed and resolved during the 2015 bankruptcy proceedings. After Judge Gerber entered his April 2015 Decision on the 2014 Threshold Issues,² he entered another decision in May 2015 concerning remaining disputes on the form of judgment for that decision,³ in which he recognized that “it is time to come to closure on whether there is any basis to excuse the Non-Ignition Switch Plaintiffs from the provisions of the Sale Order and the [Bankruptcy] Court’s

¹ The issue of how the Second Circuit used the term Ignition Switch Plaintiff was first raised in an earlier appeal involving the *Pillars* plaintiff (*see* 15-CV-8432 Docket No. 10), which is also *sub judice* before this Court. (*See* Docket No. 4316.) In that earlier appeal, the Court asked Judge Glenn to opine on the definitional issue of Ignition Switch Plaintiff (*see* 9/7/2016 Order, Docket No. 3339), and it became known as 2016 Threshold Issue 1 in the Bankruptcy Court, which, as noted, was determined by Judge Glenn in the July 12, 2017 decision, and appealed to this Court, where the matter is *sub judice*.

² The April 2015 Decision is published at *In re Motors Liquidation Co.*, 529 B.R. 510 (Bankr. S.D.N.Y. 2015).

³ The May 2015 Decision is published at *In re Motors Liquidation Co.*, 531 B.R. 354 (Bankr. S.D.N.Y. 2015).

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The Honorable Jesse M. Furman
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mootness conclusions.” *In re Motors Liquidation Co.*, 531 B.R. 354 (Bankr. S.D.N.Y. 2015). Thereafter, at an August 31, 2015 status conference, Judge Gerber discussed the due process issue as it related to Non-Ignition Switch Plaintiffs, noting that “the non-ignition switch plaintiffs’ inability or inaction to have yet established a due process violation . . . is, in my view, a big issue.” (8/31/2015 Bankr. Hr’g Tr. at 80:21-25.) Designated Counsel representing Lead Counsel at that conference told Judge Gerber that, to the extent due process remained an issue for Non-Ignition Switch Plaintiffs, “we need to get that issue teed up quickly because to the extent that people, either New GM or us, depending on who loses, needs to appeal that decision, they ought to get started.” (*Id.* at 81:24-82:2.)

Notwithstanding these representations, the Non-Ignition Switch Plaintiffs and their counsel did not pursue a due process claim before the Bankruptcy Court.⁴ Judge Gerber addressed their failure to pursue or establish a due process violation relating to the Sale Order in his November 2015 Decision:

Ignition Switch Plaintiffs asserting Economic Loss Claims may assert them, to the extent they are Independent Claims, under the April 15 Decision and Judgment. Non-Ignition Switch Plaintiffs cannot. The latter could have tried to show the Court that they had “known claims” and were denied due process back in 2009, but they have not done so. The Court ruled on this expressly in the Form of Judgment Decision. It then held:

The Non-Ignition Switch Plaintiffs’ claims remain stayed, and properly so; those Plaintiffs have not shown yet, if they ever will, that they were known claimants at the time of the 363 Sale, and that there was any kind of a due process violation with respect to them. And unless and until they do so, the provisions of the Sale Order, including its injunctive provisions, remain in effect.

531 B.R. at 360. That ruling stands. In the April 2015 Decision and resulting Judgment, the Court modified a Sale Order under which the buyer had a justifiable right to rely because a higher priority—a denial of due process, which was of Constitutional dimension—necessitated that. But without a showing of a denial of due process—and the Non-Ignition Switch Plaintiffs have not shown that they were victims of a denial of due process—the critically important interests of finality (in each of the 2009 Sale Order and the 2015 Form of Judgment Decision and

⁴ The November 2015 Decision is published at *In re Motors Liquidation Co.*, 541 B.R. 104 (Bankr. S.D.N.Y. 2015).

KIRKLAND & ELLIS LLP

The Honorable Jesse M. Furman
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Judgment) and predictability must be respected, especially now, more than 6 years after entry of the Sale Order.

Motors Liquidation Co., 541 B.R. at 130 n.70 (additional citation omitted). Judge Gerber's ruling on the due process issue was a final order that was never appealed by Designated Counsel, Lead Counsel or any Non-Ignition Switch Plaintiff. And now nearly nine years have passed since entry of the Sale Order.

Post-Second Circuit Opinion Events

Since the Second Circuit's decision, Non-Ignition Switch Plaintiffs and their counsel have not taken any action in the Bankruptcy Court to challenge the Sale Order on due process grounds. For example, in November 2016 Lead Counsel and their Designated Counsel recommended threshold issues to be decided by the Bankruptcy Court in light of the Second Circuit's opinion; the due process issue relating to the Sale Order on behalf of Non-Ignition Switch Plaintiffs was not included in their list.

Finally, one of the 2016 Threshold Issues decided by Judge Glenn related to whether Non-Ignition Switch Plaintiffs could assert *Independent Claims*. In his June 2017 decision, Judge Glenn held that, to the extent footnote 70 of Judge Gerber's November 2015 Decision cited above addressed that particular issue, he considered it to be "dicta only." *In re Motors Liquidation Co.*, 568 B.R. 217, 226 (Bankr. S.D.N.Y. 2017). Judge Glenn made clear, however, that his ruling did not address the separate issue of whether Non-Ignition Switch Plaintiffs are precluded from seeking to litigate a due process violation relating to the Sale Order: "The issue whether Non-Ignition Switch Plaintiffs may still seek to establish a due process violation is not addressed in this Opinion." *Id.* at 226 n.5. New GM's appeal of the June 2017 decision relating to Independent Claims is *sub judice* before this Court.

Respectfully submitted,

/s/ Richard C. Godfrey, P.C.
/s/ Andrew B. Bloomer, P.C.

Counsel for Defendant General Motors LLC

cc: MDL Counsel of Record

Exhibit E



**Lieff
Cabraser
Heimann &
Bernstein**
Attorneys at Law



April 10, 2018

BY ECF

The Honorable Jesse M. Furman
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

RE: ***In re: General Motors LLC Ignition Switch Litigation,***
14-MD-2543 (JMF); 14-MC-2543

Dear Judge Furman:

Plaintiffs write in response to GM's April 5, 2018 letter, Dkt. No. 5341, to correct the most pronounced of its misrepresentations.

First, contrary to GM's letter, the Bankruptcy Court has expressly deferred consideration of, rather than decided, the question of whether Non-Ignition Switch Plaintiffs can prove a due process violation such that, under Second Circuit law, the "free and clear" provision of the Sale Order would not apply to them (as relevant for their ability to assert successor liability claims). In arguing otherwise, GM completely ignores the relevant procedural history, as set forth in Plaintiffs' letter. Dkt. No. 5340.

Specifically, upon the Second Circuit's remand and the Bankruptcy Court's directive to identify issues on discovery, Plaintiffs exchanged an initial issues list with GM, with one such issue being whether Non-Ignition Switch Plaintiffs could demonstrate a due process violation in connection with the Sale Order. Through the parties' discussions and as made apparent at the November 16, 2016 case management conference, the parties and the Bankruptcy Court agreed that discovery on the Non-Ignition Switch Plaintiffs' due process issue would be stayed. This resulted in, and is reflected by, the Bankruptcy Court's December 16, 2016 Order to Show Cause omitting the issue from its list of Threshold Issues. *See In re Motors Liquidation Co.*, Case No. 09-50026 (Bankr. S.D.N.Y.), *Order To Show Cause Regarding Certain Issues Arising From Lawsuits With Claims Asserted Against General Motors LLC ("New Gm") That Involve Vehicles Manufactured By General Motors Corporation ("Old Gm")* [Docket No. 13802]; *see also In re Motors Liquidation Co.*, Case No. 09-50026 (Bankr. S.D.N.Y.), Nov. 16, 2016 Hr'g Tr. 59:1-3 ("THE COURT: Believe it or not, Mr. Steinberg convinced me that—not to, at this stage, to have discovery on the due process issue.").

The Honorable Jesse M. Furman
April 10, 2018
Page 2

Second, GM’s reliance on statements contained in Judge Gerber’s May 2015 decision regarding Non-Ignition Switch Plaintiffs is misleading.¹ The proceedings leading up to that decision were confined to *only* those claims brought by Ignition Switch Plaintiffs and—as detailed in Plaintiffs’ letter—that decision only refers to economic loss parties, because, at that time, the defined term “Non-Ignition Switch Plaintiffs” was limited to economic loss plaintiffs. Regardless, GM neglects to mention that the portion of the May 2015 decision it cites was vacated by the Second Circuit as to all defects. *See Elliott v. Gen. Motors LLC (In re Motors Liquidation Co.)*, 829 F.3d 135, 166 (2d Cir. 2016).

Third, GM fails to mention that to the extent the quoted language of the November 2015 Order by Judge Gerber is anything other than dicta, it is *not good law on the subject of Non-Ignition Switch Plaintiffs’ claims*.² This is because Judge Gerber erred in stating that independent claims required the showing of a due process violation, among other reasons. The Second Circuit held that all independent claims could go forward without the need to show a due process violation: “[independent] claims are outside the scope of the Sale Order’s ‘free and clear’ provision” and, thus, “could not be enjoined by enforcing the Sale Order.” *Elliott*, 829 F.3d at 157 (internal citation omitted). The Second Circuit defined the term “Independent Claims” as “claims based on New GM’s own post-closing wrongful conduct.” This definition does not depend on the nature of the defect, vehicle, or claimant. *Id.* at 154-157.³ Judge Glenn held similarly. *See In re Motors Liquidation Co.*, 568 B.R. 217, 224 (Bankr. S.D.N.Y. 2017).

Moreover, GM’s selected quote from footnote 70 of Judge Gerber’s November 2015 Order did nothing to bar Plaintiffs from bringing due process issues at a later date. *See In re Motors Liquidation Co.*, 541 B.R. 104, 130 (Bankr. S.D.N.Y. 2015) (“Plaintiffs have not shown yet, *if they ever will* ... that there was any kind of a due process violation”) (emphasis added). Judge Glenn has reached a consistent conclusion. *See In re Motors Liquidation Co.*, Case No.

¹ Judge Gerber made clear that his April 2015 Decision and June 2015 Judgment would not be *res judicata* to the Non-Ignition Switch Plaintiffs and that any reversal on appeal would inure to the benefit of Non-Ignition Switch Plaintiffs. *See* June 2015 Judgment ¶ 13(e).

² Moreover, the briefing in Fall 2015 was established by the September 2015 Scheduling Order, which contained a number of infirmities, including: (i) it was only served on approximately “150-200” Non-Ignition Switch Plaintiffs; (ii) it was not accompanied by a motion to enforce, adversary proceeding, summons, or any other recognized form of process that compelled the attendance or participation in the briefing contemplated under that order; and (iii) it did not contain the words “Independent Claims” or otherwise indicate that Independent Claims or the claims of Non-Ignition Switch Post-Closing Accident Plaintiffs were at issue in the proceedings. Therefore, the September 2015 Scheduling Order was ineffective to either compel the appearance of the few plaintiffs who were served or bind those that were not served.

³ Even to the extent there could be a good faith dispute as to whether the Second Circuit’s discussion was limited to Ignition Switch Plaintiffs, this ruling as to the categorical permissibility of independent claims must be adhered to under the mandate rule. Where an appellate court issues a mandate to the lower court, “the lower court must carry out its duty to give the mandate ‘full effect’ including foreclosing issues that are necessarily implied by a decision ‘from being considered by the lower court.’” *In re Coudert Bros. LLP*, 809 F.3d 94, 98-99) (2d Cir. 2015) (internal citations omitted).

The Honorable Jesse M. Furman
April 10, 2018
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09-50026 (Bankr. S.D.N.Y.). Apr. 20, 2017 Hr'g Tr. 40:2-6 ("I don't see language in the footnote [70] that says that the non-ignition switch plaintiffs had a deadline for waging their challenge based on due process to the sale order. It's a statement that they haven't done it.").

Thus, GM can point to no ruling regarding the ability of Non-Ignition Switch Plaintiffs' to establish a due process violation relating to the Sale Order, and any discovery to resolve that question has been deferred.

Respectfully Submitted,

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-and-

-and-

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250 Hudson Street
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New York, NY 10013-1413

Exhibit F

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AND AFFILIATED PARTNERSHIPS

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April 16, 2018

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 Litigation*, 14-MD-2543

Dear Judge Furman:

This is New GM's reply to Lead Counsel's April 10, 2018 letter that purports to describe the status of due process litigation in the bankruptcy court and accuses New GM of misstating that record. (Docket No. 5368.) Contrary to plaintiffs' assertion, New GM's April 5, 2018 letter accurately states the status and history of due process litigation as it relates to Non-Ignition Switch Plaintiffs (that are making economic loss or personal injury claims) against New GM. (Docket No. 5341.) New GM has consistently taken the position that Footnote 70 of Judge Gerber's November 2015 Decision¹ precludes Non-Ignition Switch Plaintiffs represented by Lead Counsel and others from seeking to establish a due process violation relating to the 2009 Sale Order because they failed to do so on a timely basis. Since that November 2015 Decision, the Bankruptcy Court has not ruled on the contention that Old GM committed a due process violation relating to the Sale Order.

Contrary to plaintiffs' straw man argument, New GM does not contend that Non-Ignition Switch Plaintiffs are barred from raising a due process violation due to Judge Gerber's May 2015 Decision.² Consistent with Judge Gerber's Footnote 70 of his November 2015 Decision, it is clear that the Bankruptcy Court did not decide Sale Order enforcement issues relating to Non-Ignition Switch Plaintiffs in that May 2015 Decision. Six months later, however, that changed. During that six-month time period, Judge Gerber expected Non-Ignition Switch Plaintiffs to raise the due process issue relating to the 2009 Sale Order if they wanted to pursue it.³ When they did not

¹ The November 2015 Decision is published at *In re Motors Liquidation Co.*, 541 B.R. 104 (Bankr. S.D.N.Y. 2015).

² The May 2015 Decision is published at *In re Motors Liquidation Co.*, 531 B.R. 354 (Bankr. S.D.N.Y. 2015).

³ See *Motors Liquidation Co.*, 531 B.R. at 360 ("it is time to come to closure on whether there is any basis to excuse the Non-Ignition Switch Plaintiffs from the provisions of the Sale Order and the [Bankruptcy] Court's mootness conclusions"); see also 8/31/2015 Bankr. Hr'g Tr. at 80:21-25 (statement at an August 31, 2015 status conference, wherein Judge Gerber discussed the due process issue as it related to Non-Ignition Switch Plaintiffs, noting that

KIRKLAND & ELLIS LLP

The Honorable Jesse M. Furman
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allege—much less seek to prove—a due process violation by November 2015, the Bankruptcy Court ruled that it was too late for them to make that claim in the future. That is why Judge Gerber modified the language from his May 2015 Decision — “has not shown *yet*, if they *ever will*” — and replaced it in his November 2015 Decision with “Non-Ignition Switch Plaintiffs **have not shown** they were victims of a denial of due process.” *Motors Liquidation Co.*, 541 B.R. at 131 n. 70 (emphasis added).⁴ Judge Gerber emphasized he was ruling on the lack of timeliness in pressing the due process issue when he highlighted in Footnote 70 (i) the importance of “finality” and “predictability,” (ii) that prior rulings “must be respected,” and (iii) the fact that it was then “more than 6 years after entry of the Sale Order.”⁵

Plaintiffs’ reference to the Second Circuit’s ruling regarding Independent Claims is beside the point. That holding did not obviate or change Judge Gerber’s separate ruling in the November 2015—which was not appealed or considered by the Second Circuit—that Non-Ignition Switch Plaintiffs are barred, on timeliness grounds, from raising due process issues relating to the Sale Order.

Finally, plaintiffs’ complaint regarding “ambiguities” in the September 2015 Scheduling Order is unavailing. Lead Counsel consented to the form of the Scheduling Order before it was submitted to Judge Gerber, fully participated in the proceedings leading to the November 2015 Decision, and failed to appeal the due process issue they are now claiming to have somehow preserved.

“the non-ignition switch plaintiffs’ inability or inaction to have yet established a due process violation . . . is, in my view, a big issue.”); *Id.* at 81:24-82:2 (Designated Counsel representing Lead Counsel at the August 31, 2015 conference telling Judge Gerber that, to the extent due process remained an issue for Non-Ignition Switch Plaintiffs, “we need to get that issue teed up quickly because to the extent that people, either New GM or us, depending on who loses, needs to appeal that decision, they ought to get started”).

⁴ The reference to the May 2015 Decision in Footnote 70 of the November 2015 Decision was background showing the evolution of the Court’s ruling on the timeliness/due process issue for Non-Ignition Switch Plaintiffs. Plaintiffs’ suggestion that the language of the May 2015 Decision (“have not shown yet, if they ever will”) was the actual ruling of the November 2015 Decision is incorrect.

⁵ *Motors Liquidation Co.*, 541 B.R. at 131 n.70.

KIRKLAND & ELLIS LLP

The Honorable Jesse M. Furman
April 16, 2018
Page 3

Respectfully submitted,

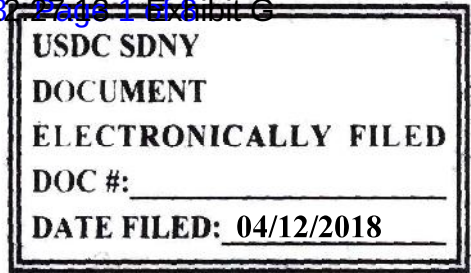
/s/ Richard C. Godfrey, P.C.

/s/ Andrew B. Bloomer, P.C.

Counsel for Defendant General Motors LLC

cc: MDL Counsel of Record

Exhibit G



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
IN RE:

GENERAL MOTORS LLC IGNITION SWITCH
LITIGATION

14-MD-2543 (JMF)
14-MC-2543 (JMF)

ORDER NO. 148
[AMENDED]

This Document Relates to All Actions

-----x
JESSE M. FURMAN, United States District Judge:

[Regarding Next Steps For Pre-Sale Personal Injury Claims]¹

The Court, having held a Status Conference on March 22, 2018, and pursuant to Order No. 147 (Docket No. 5302), issues this Order to address the claims of personal injury plaintiffs in MDL 2543 alleging a Subject Incident² that occurred on or before July 10, 2009 (“pre-Sale” plaintiffs or claims).

I. NEXT STEPS FOR ORDER NO 140-PROCESSES FOR PRE-SALE PERSONAL INJURY CASES

Upon consideration of the discussion on the record on March 22, 2018, and for good cause shown, it is hereby ORDERED that:

A. Air Bag Deployment Cases

By **Friday, April 13, 2018**, General Motors LLC (“New GM”) will file on the main MDL docket a list of pre-Sale plaintiffs that it has currently identified as ones it believes should be

¹ Order No. 148 (Docket No. 5366), entered on April 10, 2018, included an inadvertent error: “Tuesday, June 10, 2018” should have been “Tuesday, June 12, 2018.” In the interest of clarity, the Court issues this Amended Order with the correct date throughout. The Amended Order is otherwise identical to the original Order.

² Consistent with the definitions set forth in Order No. 108 (Docket No. 3115), “Subject Incident” is defined herein as the ignition-switch related event involving the “Subject Vehicle” that is the basis for the MDL No. 2543 plaintiff’s claims in this matter. “Subject Vehicle” is defined herein as the motor vehicle that serves as the basis for the plaintiff’s claims in this matter. “Claimant” as used in this Order is the person who has filed or on whose behalf has been filed a personal injury or wrongful death lawsuit in MDL No. 2543, including lawsuits transferred to MDL No. 2543, and who is alleged to have been injured in a Subject Vehicle during the Subject Incident.

dismissed in light of the Court's December 28, 2017 Opinion and Order. *See In Re General Motors LLC Ignition Switch Litig.*, 2017 WL 6729295, at *1 (S.D.N.Y., Dec. 28, 2017). By **Friday, May 11, 2018**, counsel for plaintiffs included on that list will file on the main MDL docket: (1) a list of the plaintiffs who agree to voluntarily dismiss their claims; (2) a list of plaintiffs as to whom counsel plans to move to withdraw; and (3) a list of the plaintiffs who intend to press their claims, along with the factual bases as to why those plaintiffs believe dismissal is not appropriate. By **Monday, May 21, 2018**, those plaintiffs who agree to dismiss will file voluntary dismissals, and counsel for plaintiffs who intend to withdraw will file motions to withdraw. By **Tuesday, June 12, 2018**, Lead Counsel and New GM will file a joint letter identifying the number of and proposing next steps to address any remaining disputed claims in this category.

B. “No Plausibly Pled Defect / Causation” Cases

By **Friday, April 13, 2018**, New GM will file its motion to dismiss claims that New GM believes should be dismissed for failure to state a claim. By **Friday May 11, 2018**, counsel for plaintiffs included on that list will file on the main MDL docket: (1) a list of the plaintiffs who agree to voluntarily dismiss their claims; (2) a list of plaintiffs as to whom counsel plans to move to withdraw; and (3) a list of the plaintiffs who intend to press their claims (specifically identifying which plaintiffs intend to amend their complaints). By **Monday, May 21, 2018**, those plaintiffs who agree to dismiss will file voluntary dismissals, and counsel for plaintiffs who intend to withdraw will file motions to withdraw. By **Tuesday, June 12, 2018**, Lead Counsel and New GM will file a joint letter identifying the number of and proposing next steps to address any remaining disputed claims in this category, including the proposed timing for any amended complaints.

C. Statute of Limitations/Repose Cases

By **Friday, April 13, 2018**, New GM will file a list of claims that New GM believes are barred by applicable statutes of limitation or applicable statutes of repose. By **Friday, May 11,**

2018, counsel for plaintiffs included on that list will file *on the main MDL docket*: (1) a list of the plaintiffs who agree to voluntarily dismiss their claims; (2) a list of plaintiffs as to whom counsel plans to move to withdraw; and (3) a list of the plaintiffs who intend to press their claims, along with the basis as to why those plaintiffs believe their claims are not barred. By **Monday, May 21, 2018**, those plaintiffs who agree to dismiss will file voluntary dismissals, and counsel for plaintiffs who intend to withdraw will file motions to withdraw. By **Tuesday, June 12, 2018**, Lead Counsel and New GM will file a joint letter identifying the number of and proposing next steps to address any remaining disputed claims in this category.

D. Amended or Supplemental Notices or Motion

New GM may file amended or supplemental notices identifying additional plaintiffs subject to the categories described in Paragraphs I.A., I.B., or I.C. based on additional information, including but not limited to information and materials received through the procedures described in Section II below. Any such notices shall state that they are being made subject to this Order and New GM shall include in any such notices (1) the deadline for responding to the notice, which shall not be less than three weeks from the date of the amended or supplemental notice; and (2) the deadline to file voluntary dismissals or withdrawals (if any), which shall not be less than two weeks from the date the plaintiff's response to the amended or supplemental notice is due.

II. NEXT STEPS FOR FURTHER ANALYSIS OF PRE-SALE CLAIMS

In addition to the initial notices and motions described above, the Court finds that the disposition of pre-Sale personal injury claims will be facilitated by the implementation of the following procedures. It hereby ORDERED that:

1. The following obligations shall not apply (a) to any plaintiff who, in response to inclusion on New GM's Notices or Motion described in Sections I.A., I.B., or I.C., responds that

the plaintiff intends to dismiss their claims or that counsel intends to withdraw;³ or (b) to any plaintiff not included on New GM's Notice or Motions described in Section I, who, before 90 days from the date of this Order otherwise voluntarily dismisses their claims or from whose case counsel files a motion to withdraw. This exception is without prejudice to any future request, in the case of plaintiffs from whose cases counsel moves to withdraw, by New GM or such plaintiffs to seek production of such documentation at an appropriate time after the Court rules upon motions to withdraw and after any procedures relating to any withdrawal orders have concluded.

2. With respect to each plaintiff in MDL 2543 asserting pre-Sale claims, New GM is hereby ordered to produce within **90 days** of the date of this Order, to the extent available and in New GM's possession as of the date of this Order, the following non-privileged and non-work-product materials:

- CDR/SDM data from Subject Vehicle
- Tech2/MDI from Subject Vehicle
- Customer Complaints relating to the Subject Vehicle (*i.e.*, 1241 or Service Request)
- Vehicle Invoice and Warranty /Repair Records
- Police Reports for Subject Incident (including photos)
- ESIS Photos relating to Subject Vehicle or Subject Incident
- Subject Vehicle or Subject Vehicle Parts

3. Each plaintiff in MDL 2543 asserting pre-Sale claims is hereby ordered to produce the following documentation:

- Driver's License of the Claimant

³ If the motion to withdraw is denied and/or if the claimant files an amended complaint following the withdrawal, these obligations will be reinstated starting from the date of the denial or the filing of an amended complaint.

- If plaintiff is not the Claimant, the documentation plaintiff contends establishes his or her legal authority to assert claims on plaintiff's behalf, such as court order appointing plaintiff legal guardian, if such documentation exists.
- Police Report for the Subject Incident.
- All photographs of Subject Vehicle taken at the time of the Subject Incident or thereafter that are known to plaintiff, e.g., photographs taken by family members, insurance adjusters, mechanics. If photographs are known to plaintiff but not obtainable for some reason, plaintiff should identify the photographs and provide a written explanation.
- CDR/SDM and Tech II data from the Subject Vehicle if in the custody, control or possession of plaintiff.
- If Claimant or plaintiff filed an automobile insurance claim in connection with the Subject Incident, the insurance company file for the Subject Incident, including photographs of Subject Vehicle.
- If Claimant or plaintiff know of, or assert that, any repairs or modifications were made to the Subject Vehicle prior to Subject Incident, such as replacement of the ignition switch or airbag, the documentation Claimant or plaintiff contend establish that such a repair or modification occurred.
- The Carfax or Epic VIN report for the Subject Vehicle, if already in the possession, custody or control of plaintiff.
- All medical records from each health care provider who treated the Claimant in connection with injuries that plaintiff alleges were sustained as a result of the Subject Incident, including diagnostic testing results, if any.
- A copy of any results known to plaintiff of drug and/or alcohol testing of Claimant that occurred, if any, relating to the Subject Incident.
- Death Certificate and Autopsy Report for Claimant, if applicable.
- If plaintiff is asserting a claim pertaining to unpaid medical bills, the source documents that plaintiff contends supports his or claim, e.g., medical bills. Plaintiff is not ordered to produce any expert reports at this time.
- If plaintiff is asserting a claim for future medical expenses, the source documents that plaintiff contends supports his or her claim, e.g., tax returns, employer letter, health care provider letter. Plaintiff is not ordered to produce any expert reports at this time.
- If plaintiff is asserting a claim for lost earnings, the source documents that plaintiff contends supports his or her claim for lost earnings, e.g., income tax returns,

employer documentation. Plaintiff is not ordered to produce any expert reports at this time.

If not previously produced to New GM, plaintiffs shall provide New GM with the requested documentation within **ninety (90) days** of the date of this Order. For any category of documents that do not exist, plaintiff shall provide New GM with written confirmation that no such documents exist.

4. MDL No. 2543 plaintiffs shall produce all documentation to New GM via a secure FTP site that is named, "KPMG MoveIT." To set up a KPMG MoveIT account, the MDL No. 2543 plaintiff or plaintiff's Counsel shall email deirdre.oreilly@kirkland.com with the contact person for whom the account should be set up. Instructions will then be sent to that user on how to activate and upload to his/her account. The user will then upload the documents for a particular Claimant in (1) folders by Claimant name, and then (2) subfolders for each document type.

5. New GM may in its sole discretion choose to waive or modify some or all requirements of this Order as to any MDL No. 2543 plaintiff. Any such waiver or modification must be set forth in writing to plaintiff. This Order is entered with the understanding that New GM will act in good faith so as to consent to waivers and modifications of this Order for lawsuits in which settlement discussions are well under way and the documentation has been provided already. If, following agreement to such a waiver or modification, New GM seeks to reinstitute the requirements of this Order as to a particular MDL No. 2543 plaintiff, New GM may do so and must make the request to plaintiff in writing. The MDL No. 2543 plaintiff shall have **ninety (90) days** from receipt of New GM's request in which to comply. Nothing in this Order shall require New GM or any MDL No. 2543 plaintiff to disclose confidential settlement communications.

6. The requirements of Order No. 25, Docket No. 422, remain in full force and effect, including the requirement to submit a completed Short-Form PFS.

7. Any plaintiff who fails to comply with his or her obligations under this Order may be subject to having his or her claims dismissed. For plaintiffs whose claims were pending in MDL 2543 as of **April 5, 2018**, plaintiffs must comply with the terms of Paragraphs 1-3 of this Order within **ninety (90) days**. For plaintiffs whose claims are subsequently transferred and/or consolidated to MDL 2543, plaintiffs must comply with Paragraphs 1-3 of this Order within **ninety (90) days** of his or her claims being transferred to and/or consolidated in MDL 2543.

8. If a plaintiff has not submitted the information required under Paragraphs 1-3 of this Order within **fourteen (14) days** following the due date set forth in this Order, New GM may serve on plaintiff (if *pro se*) or plaintiff's counsel a Notice of Overdue Discovery identifying the discovery overdue and stating that, unless plaintiff complies with the Court's discovery orders, the case may be subject to dismissal. If plaintiff fails to submit the information required under this Order within **fourteen (14) days** after service of the Notice of Overdue Discovery, New GM may move the Court for an Order dismissing the relevant Complaint without prejudice. Plaintiff shall have **fourteen (14) days** from the date of New GM's motion to file a response either (a) certifying that the plaintiff has submitted the information required under Order No. 108 or (b) opposing New GM's motion for other reasons. If a plaintiff certifies that he or she has submitted the information required under this Order, the plaintiff's claims shall not be dismissed (unless the Court finds that the certification is false or incorrect). If any plaintiff files a response to a motion to dismiss his or her claims without prejudice pursuant to the terms of this Order, New GM shall file a reply, no later than **seven (7) days** following the deadline for objections to New GM's motion, indicating which plaintiffs' claims (if any) it still moves to dismiss.

9. If the Court dismisses a Complaint without prejudice under the previous paragraph, the Order will be converted to a Dismissal With Prejudice upon New GM's motion — to be filed

no earlier than **thirty (30) days** after the Court’s entry of the Order of Dismissal without Prejudice — unless a plaintiff submits the information required under this Order or moves to vacate the dismissal without prejudice within that same time period.

10. If any plaintiff files a motion to vacate the dismissal of his or her claims, New GM shall file a consolidated opposition to any motions arising out of the same dismissal without prejudice **two weeks** after those plaintiffs’ deadline for submitting such motions (thirty days after the Court granted the motion to dismiss). Each plaintiff’s reply, if any, shall be due **one week** thereafter. If the Court denies any plaintiff’s motion, New GM may move for dismissal with prejudice at any point thereafter.

11. If New GM files a motion to dismiss with prejudice, any opposition shall be filed **two weeks** after the motion’s filing. New GM’s reply, if any, shall be filed **one week** thereafter.

12. Counsel is advised to file all documents related to motions to dismiss pursuant to Order Nos. 25 and 45 in 14-MD-2543 and to “spread” the filings to any relevant individual member case or cases.

SO ORDERED.

Dated: April 10, 2018 (nunc pro tunc)
New York, New York



JESSE M. FURMAN
United States District Judge