IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re: GENERAL MOTORS LLC IGNITION SWITCH LITIGATION This Document Relates to: All Actions	MDL No. 2543 Master File No.: 14-MDL-2543 (JMF)

KING & SPALDING LLP'S RESPONSE TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM NEW GM AND K&S BASED ON THE CRIME-FRAUD EXCEPTION

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I. INTRODUCTION

There is absolutely no truth to the baseless and defamatory allegations that King & Spalding LLP ("K&S") and its lawyers – three of whom Plaintiffs call out by name – committed a crime or fraud, or that they violated their ethical obligations representing General Motors LLP ("GM") in the three product liability claims referenced in Plaintiffs' crime-fraud motion to compel and Second Amended Complaint. To establish the crime-fraud exception, Plaintiffs must demonstrate probable cause (1) that a crime or fraud occurred and (2) that the documents at issue furthered that crime or fraud. They do not come close to meeting either element.

Ordinarily, the movant in a crime-fraud motion must make a prima facie showing that a crime or fraud was committed *without* the benefit of the privileged documents being sought. Here, however, despite already having access to thousands of otherwise privileged communications between K&S and GM, Plaintiffs have not identified even one email or document which supports their reckless and outrageous allegations that K&S and GM were conspiring to hide evidence, lie to the court, and circumvent GM's obligations under the Safety Act. Instead, Plaintiffs' specious arguments, personal attacks, and false and irresponsible allegations, are untenable and are built upon knowing distortions and strained interpretations of the carefully curated portions of the record they cite, and willful strategic omissions of record evidence that proves beyond a shadow of any doubt that K&S and its lawyers did nothing wrong.

The full record before the Court shows that K&S and its lawyers ethically and effectively defended GM's interests in three product liability claims, provided GM detailed evaluations of the known facts, relevant state law, and the prospects for success in state court jury trials, and then appropriately recommended that GM explore settlement in all three matters. K&S's candid evaluations and recommendations were motivated by the probability of plaintiffs' verdicts and the possibility of large damage awards. And the settlements neither impacted GM's disclosure

obligations under the Safety Act nor hid any of the underlying facts from discovery in other cases. It is neither a crime nor a fraud nor an ethical violation for a law firm to recommend settlement to end or avoid litigation. Any finding to the contrary would stifle litigants from obtaining competent and effective legal advice.

Plaintiffs also have not shown – and cannot show – that the documents that are the subject of their motion furthered a crime or fraud. Plaintiffs' motion is directed at purely internal K&S work product that has never been shared with GM or anyone else outside K&S. Since GM has never even seen the documents that Plaintiffs are seeking to compel, those documents cannot possibly have furthered any alleged crime or fraud.

For these reasons, the Court should deny Plaintiffs' motion.

II. FACTUAL BACKGROUND

A. GM HIRED K&S TO DEFEND PRODUCT LIABILITY LITIGATION.

Most of the K&S documents at issue in this Motion are purely internal K&S work-product related to three product liability claims in which K&S represented GM.[1] Two of these ("Chansuthus" and "Sullivan") were initially pre-litigation claims (not-in-suit matters, or "NISMs"), and the third was a lawsuit pending in state court in Georgia (*Melton v. Gen. Motors LLC*, Civil Action No. 2011-A-2652 ("Melton")).

GM hired K&S to defend it and provide legal advice in these three product liability claims. As part of its representation, K&S sent evaluation letters to GM in each of the three matters. The letters discussed the facts then known specific to each claim, outlined the applicable state law, applied the then known facts to that law, evaluated the likely trial outcome,

[1] K&S's use of formerly privileged materials produced under Rule 502 is not offensive use and is not intended to waive privileges or protections. K&S's use is intended to rebut Plaintiffs' selective use of the same or similar documents.

and made recommendations based on that analysis. The letters did not provide advice regarding GM's obligations under the National Traffic and Motor Vehicle Safety Act of 1966 (the "Safety Act") or any other disclosure obligation. Nor did K&S's engagement letters for these three matters specifically refer to the Safety Act.[2] Given the scope of K&S's engagement in these three discrete matters, Plaintiffs grossly distort the scope and substance of K&S's evaluation letters.

1. *Plaintiffs' Claim that K&S Knew of an Alleged Defect "by 2010" Is False.*

Plaintiffs accuse K&S of knowing by 2010 that the ignition switch defect GM ultimately reported to NHTSA—that the ignition switch could inadvertently rotate from the run to accessory position—caused the Cobalt's air bags not to deploy.[3] That is a false and irresponsible assertion for numerous reasons. It assumes engineering acumen by lawyers that would have exceeded that of the GM engineers who were responsible for technical analysis of product issues. Furthermore, GM did not retain K&S in Sullivan or Melton until 2011.[4] As of 2010, the only Cobalt air bag non-deployment matter K&S had worked on was Chansuthus. No discovery took place in Chansuthus because it was initially a NISM. K&S did not see or produce any technical documents or information related to the design, development, and testing of the Cobalt's ignition switch or air bag systems. Further, the GM engineers who provided K&S attorneys with their preliminary technical assessments in Chansuthus did not inspect the car at issue or visit the accident scene. Consequently, they did not reach definite conclusions as to what caused the

[2] Exhibit ("Ex.") A, January 22, 2010 Chansuthus Engagement email; Ex. B, May 25, 2011 Sullivan Engagement Email; Ex. C, June 30, 2013 Melton Engagement Letter.
[3] Plaintiffs' Br. in Support of Motion to Compel Production of Documents from New GM and K&S LLC Based on the Crime-Fraud Exception ("Pls.' Br.") at 6.
[4] Ex. B, Sullivan Engagement Email; Ex. C, Melton Engagement Letter.

accident and air bag non-deployment.[5] Finally, although GM's engineers suspected that an electrical issue could cause certain Cobalts under specific operating conditions to sense that the ignition switch had been turned off while the car was still running,[6] those engineers did not advise K&S in Chansuthus that they believed the ignition switch may have physically rotated from the run to the accessory position.

Plaintiffs also assert that K&S represented GM in "three strikingly similar product liability matters."[7] That statement is also untrue and ignores the true nature of these cases.

2. *Chansuthus*

In 2010, GM engaged K&S to defend it in a dispute arising from an accident involving Hasaya Chansuthus. Chansuthus began as a NISM, but a lawsuit was filed shortly before the matter settled to prevent the expiration of the statute of limitations. As with other NISMs, no discovery occurred. Chansuthus alleged that the driver's air bag failed to deploy as it should have in a frontal collision, asserting strict liability under Tennessee law. Like most states, Tennessee product liability law requires a showing that the vehicle at issue is defective for a plaintiff to recover.[8] Relying on the technical analysis of GM's engineers, K&S evaluated Plaintiff's alleged defect claim under Tennessee law.[9]

K&S's evaluation letters discussed potential causes of Chansuthus' accident, including potential power steering issues as well as Chansuthus' intoxication.[10] The letters also evaluated

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[5] Pls.' Ex. 15, GM-MDL2543-000660577 at .009-.012; Pls.' Ex. 1, GM-MDL2543-000660601 at .012 (discussing but failing to conclude on cause of crash); Pls.' Ex. 15, GM-MDL2543-000660577 at .012.
[6] *See* Pls.' Ex. 1, GM-MDL2543-000660601 at .008 n.2; Pls.' Ex. 15, GM-MDL2543-000660577 at .012.
[7] Pls.' Br. at 6.
[8] *See* Pls.' Ex. 1, GM-MDL2543-000660601 at .009 and Pls.' Ex. 15, GM-MDL2543-000660577 at .009 (under Tennessee law, manufacturer not liable unless product is determined to be in defective condition).
[9] *Id.*
[10] Pls.' Ex. 15, GM-MDL2543-000660577 at .009-.012 and Pls.' Ex. 1, GM-MDL2543-000660601 at .012 (discussing possible power steering defects and intoxication as causes of accident); Pls.' Ex. 15, GM-MDL2543-000660577 at .012.

potential causes for the air bag non-deployment. Without reaching definitive conclusions, GM engineers advised K&S lawyers of a suspected electronic sensing "anomaly" affecting the car's body control module ("BCM")—a condition they had not been able to replicate. GM's engineers hypothesized that a "bounce" in the ignition switch could cause the BCM to sense that the vehicle was powered off while it was still running.[11] During these discussions, GM's engineers did not address the issue of whether there may have actually been physical rotation of the ignition switch from "run" to "accessory."

After analyzing the known facts, Tennessee law and considering the preliminary assessments of the assigned GM engineers, K&S advised GM that Chansuthus would be able to present credible evidence of an alleged product defect in her vehicle and that she would likely succeed on her state law defect theory.[12] K&S also observed that Chansuthus might be able to develop a punitive damages claim.[13] Thus, K&S recommended that GM explore settlement.[14]

The Chansuthus evaluation letters did not discuss, much less conclusively identify, the ignition switch defect GM ultimately reported to NHTSA. Accordingly, Plaintiffs' allegation that K&S "buried . . . 'clear evidence of a defect'" is willfully false.[15] K&S could not "bury" a defect that GM's engineers had not even identified in their preliminary assessments. K&S only evaluated "evidence of a defect" in a single car in the context of a jury trial governed by Tennessee law. K&S did not conduct an analysis of the Safety Act or other federal law. Nor was K&S in any position to analyze whether there was a defect in any other GM vehicle.

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[11] Pls.' Ex. 1, GM-MDL2543-000660601 at .008 n.2; Pls.' Ex. 15, GM-MDL2543-000660577 at .012.
[12] Pls.' Ex. 1, GM-MDL2543-000660601 at .002.
[13] *Id*. at .012.
[14] *Id.* at .002; *see also id.* at .012 ("[W]e would expect a Tennessee jury, based on our discussions with Tennessee counsel, would likely still return a plaintiff's verdict.").
[15] *See* Pls.' Br. at 1.

3. ***Sullivan***

In May 2011, GM retained K&S to advise it in a dispute arising from an automobile accident involving Bridgette Sullivan. Sullivan alleged that her injuries were aggravated because her air bag failed to deploy as it should have in a frontal collision. This matter was also a NISM, so no discovery occurred. K&S was not provided and did not produce technical documents related to the design, development, or testing of the Cobalt's ignition switch or air bag system as part of its representation in Sullivan. K&S's evaluation letter focused on the known facts of Sullivan's accident and applied them to applicable South Carolina law.[16] Given the known evidence, K&S concluded that a plaintiff's verdict was likely, with punitive damages at least possible.[17] K&S recommended that GM explore settlement.[18] As in Chansuthus, K&S's evaluation letter did not analyze the existence of a defect under the Safety Act. Nor did it analyze the existence of a potential defect in any car but Sullivan's.

GM's engineers offered their preliminary technical assessments to K&S without the benefit of vehicle or scene inspections. They offered three possible causes for the accident and the air bag non-deployment. While the possibility of the unrestricted driver physically moving the key to accessory during the crash was raised, GM's engineers again focused on a potential electronic "anomaly" causing the BCM to sense that the ignition switch had been turned off,

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[16] *See* Pls.' Ex. 13, GM-MDL2543-003455366.001 at .011-.016.

[17] *Id.* at .015 (noting that a "significant plaintiff's verdict would be likely"). The advice was based on a number of factors, including GM's potential exposure to a substantial adverse verdict. *Id.*

[18] *Id.* at .016. Plaintiffs misrepresent an April 5, 2013, email from K&S to GM, alleging that K&S recommended additional funds for settlement to conceal a defect. (*See* Pls.' Br. at 12.) The email does not mention keeping anything a secret. (*See* Pls.' Ex. 27, GM-MDL2543-000662287). Rather, it states that *new information*, including evidence regarding the severity of the plaintiff's injuries and more than $60,000 in special damages, would increase GM's exposure. K&S and GM learned this new information about the plaintiff's damages in a letter from plaintiff's counsel sent *after* the case initially settled. (*See id.* at .002.) Plaintiffs ignore K&S's clearly stated rationale and fabricate their own false rationale.

although the car was still running.[19] However, GM's engineers did not offer any definitive opinion and did not advise K&S that they believed the Sullivan ignition switch had inadvertently rotated from run to accessory—the defect Plaintiffs falsely accuse K&S of covering up.[20]

4. *Melton*

In June 2011, GM retained K&S to defend it in a dispute arising from an automobile accident involving Brooke Melton. Melton's allegations differed dramatically from those in Chansuthus and Sullivan. In Chansuthus and Sullivan, which were frontal impacts, the primary defect allegation was that the driver's air bag did not deploy. Melton was a side collision. The Melton plaintiffs never alleged that the driver's air bag should have deployed, and Melton's expert testified that he had no complaints about the car's air bags. Thus, K&S never considered Melton an air bag non-deployment case. Instead, the plaintiffs alleged different defect theories. Initially, the plaintiffs alleged that a power steering defect or electrical system defect caused the accident. Only later did they allege that a sudden loss of power resulting from a defect in the ignition switch caused the accident.[21] Moreover, Melton presented the unique circumstance that an aftermarket security system had been installed in Melton's car by the dealership. Thus, as the engineers evaluated the possible causes of the accident, the aftermarket installation and its possible disruption of the car's electrical system was initially identified as one of three potential causes.

K&S prepared two case evaluation letters in Melton, one early in the case and the second

[19] *See* Pls.' Ex. 13, GM-MDL2543-003455366.001 at .009-.010.

[20] Because Sullivan was a minor and settled her claim before filing suit, GM and K&S wanted to ensure that the settlement would be enforceable. As required by South Carolina law, GM sought court approval for the settlement so that the matter would not "come back somewhere down the line." Pls.' Ex. 30, GM-MDL2543-400258799. Plaintiffs blatantly misrepresent this language. GM was concerned the matter might "come back" because Sullivan was a minor, not because GM sought to conceal the cause of her accident. *Id.*

[21] *See* Pls.' Ex. 3, GM-MDL2543-000985320 at .006-.007.

after significant discovery had been completed. Each described the facts specific to Melton's accident, set forth the applicable Georgia product liability law, and applied the then known facts to that law.[22] The first letter identified three potential causes for the car's loss of power before the crash: (1) interference from the aftermarket security system, (2) a sensing "anomaly", or (3) intentionally or inadvertently turning the key from run to accessory.[23] Unlike in Chansuthus and Sullivan, where GM's engineers focused primarily on the electronic sensing issue, GM's engineers hypothesized that Melton might have rotated the key from run to accessory. As indicated in the letter, the GM engineers at that time had not identified the most likely cause of the loss of power and wreck. Although the cause of the accident was still unclear, K&S recommended exploring settlement because, regardless of the cause, a jury would likely find for the plaintiffs under Georgia product liability law and assess some fault to GM.[24]

In the second letter seventeen months later, K&S evaluated Melton's more recently-asserted defect claim—that a loss of power resulting from a defect in the ignition switch had caused the wreck—under Georgia law and, based on the additional facts that had been discovered and developed, concluded that a Georgia jury would likely find for the plaintiffs on their state law defect claim and assign most of the fault to GM.[25] K&S addressed the new defect claim under Georgia law because it was an element of the plaintiffs' strict liability theory.[26] As it had previously, K&S advised GM that the case was a "poor trial candidate."[27]

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[22] *See generally* Pls.' Ex. 3, GM-MDL2543-000985320; Pls.' Ex. 17, GM-MDL2543-300002915.
[23] Pls.' Ex. 17, GM-MDL2543-300002915 at .003-.004.
[24] *Id.* at .021. K&S did not analyze the Safety Act or other federal reporting obligations.
[25] Pls.' Ex. 3, GM-MDL2543-000985320 at .002.
[26] *See* Pls.' Ex. 3, GM-MDL2543-000985320 at .023 and Pls.' Ex. 17, GM-MDL2543-300002915 at .019 (discussing Georgia's risk-utility rule for determining whether product was defective).
[27] Pls.' Ex. 3, GM-MDL2543-000985320 at .002; *see also* Pls.' Ex. 17, GM-MDL2543-300002915 at .021 (recommending GM pursue settlement because "a jury here likely will hold [GM] primarily responsible"); Pls.' Ex. 3, GM-MDL2543-000985320 at .026 (same).

None of the evaluation letters in Chansuthus, Sullivan, or Melton contemplate that GM's settlement of the cases would conceal anything, least of all a Safety Act violation. The letters clearly set forth the reasons K&S recommended exploring settlement in each case: based on the known facts, GM was unlikely to win at trial and risked large jury verdicts.[28]

Plaintiffs erroneously contend that GM entered into "confidential settlements" to prevent disclosure of evidence of a defect.[29] While it is GM's usual practice (and that of many other defendants) to negotiate confidential settlements in product liability matters, contrary to Plaintiffs' assertion, confidential settlements *do not* conceal the underlying facts or insulate documents and information in GM's possession from discovery in future cases. Those facts and any relevant and responsive documents in GM's possession remain available and discoverable regardless of any settlement. Similarly, GM's disclosure obligations to NHTSA and other government agencies remain unchanged. Thus, Plaintiffs' claims of an attempt to conceal, through settlement, evidence of alleged defects are untenable and patently false.

5. *GM's Discovery Responses in Melton Were Proper.*

Plaintiffs contend that Melton settled before the facts could be exposed.[30] But the Melton

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[28] *See* Pls.' Ex. 1, GM-MDL2543-000660601 at .002; Pls.' Ex. 3, GM-MDL2543-000985320; Pls.' Ex. 17, GM-MDL2543-300002915; Pls.' Ex. 27, GM-MDL2543-000662287 (GM should settle because of the risk of a large verdict.). Plaintiffs repeatedly misrepresent K&S's rationale for recommending settlement. Specifically, Plaintiffs claim that K&S "was concerned that the 'thorough' plaintiffs' attorney would develop all the facts of the case." Pls.' Br. at 12. Contrary to Plaintiffs' mischaracterization, K&S did not recommend settlement because it was "concerned" that plaintiffs' counsel would uncover facts. Rather, K&S predicted in the first Melton letter that settlement was unlikely because neither GM nor plaintiffs' counsel could determine the cause of the accident. *See* Pls.' Ex. 17, GM-MDL2543-300002915. Plaintiffs contend that GM and K&S were motivated by a desire to "prevent the Meltons from obtaining evidence of 'GM's conscious indifference and willful misconduct.'" Pls.' Br. at 2. The document Plaintiffs cite was predicting (correctly) Melton's counsel's expected trial strategy *using documents that had already been produced to Melton*. *See* Pls.' Ex. 3, GM-MDL2543-000985320. The letter does not indicate an attempt to hide any evidence as the evidence had already been produced.

[29] *See, e.g.*, Pls.' Br. at 1, 13, & 32.

[30] *Id.* at 12. To support this claim, Plaintiffs cite K&S's February 2012 evaluation letter in Melton, which speculates that GM would be held liable if the facts developed in a certain way. Plaintiffs ignore that *{footnote continued}*

plaintiffs' counsel engaged in probing discovery before agreeing to a substantial settlement amount. For example, GM produced more than 134,000 pages of documents in response to the plaintiffs' five sets of document requests and three sets of interrogatories, produced 12 current or former employees for deposition, helped arrange other depositions, and made all of its retained experts available for deposition before the case settled. Also, while Plaintiffs contend that GM's discovery responses were insufficient, they ignore that most of the information GM allegedly withheld was in fact produced, including the Product Investigation file[31] related to air bag non-deployment. There is absolutely no evidence that any of the alleged discovery deficiencies Plaintiffs cite were the result of fraudulent conduct.

Melton's second set of discovery sought claims data related to Information Service Bulletin 05-02-35-007 (the "ISB").[32] In response, GM stated that it would run specified searches for responsive claims data.[33] GM's written responses clearly identified the searches GM ran.[34] GM ran those searches and uncovered no responsive documents.[35] Communications between

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discovery continued for more than a year and a half. K&S wrote another evaluation letter in July 2013, after significant discovery had been completed, expressing its view that GM would likely lose the case in front of a Cobb County, Georgia jury.

[31] In response to discovery requests in products cases, GM regularly searches for responsive documents and information that have been generated by the Company's Product Investigation group as part of their evaluation of potential product issues that have been identified. The Melton case was no exception. GM produced two sets of file materials from the Product Investigation group in Melton: (1) materials generated by the Product Investigations group related to the power steering recall involving certain model year Cobalts; and (2) materials generated and collected by Product Investigations as part of Brian Stouffer's work.

[32] *See* Pls.' Exs. 39, GM-MDL2543-000728812 and 40, GM-MDL2543-000936810. While Plaintiffs' counsel referred to 05-02-35-007 as a Technical Service Bulletin, it is actually an ISB. The ISB warned that some drivers might inadvertently turn off the ignitions due to low ignition key cylinder torque.

[33] Because the ISB does not reference air bag non-deployment and focuses on a loss of power caused by inadvertent key movement, GM's response made clear it was searching for claims relating to loss of power caused by key movement that caused a crash, not claims involving air bag non-deployment.

[34] Pls.' Ex. 47, GM-MDL2543-000958800 at .003.

[35] *See* Pls.' Exs. 46, GM-MDL2543-001282913 and 47, GM-MDL2543-000958800. However, without support or citation, Plaintiffs allege that "New GM and K&S . . . had crafted the searches to omit

{footnote continued}

GM and K&S demonstrate that they sought to produce responsive documents in a timely fashion.[36] There is no evidence that GM or K&S conspired to conceal anything.

The collision in Melton was a side impact. The air bags were not designed to deploy in a side impact, and the Melton plaintiffs did not allege that the Cobalt's front air bag should have deployed. Thus, GM asserted throughout the Melton case that air bag non-deployment claims were irrelevant to the issues in dispute. Consistent with that position—which was based on the allegations in the complaint—GM and K&S determined that the Product Investigation file investigating incidents in which frontal air bags failed to deploy was not relevant and responsive.[37] There is no indication, however, that K&S or GM made that initial decision because the file evidenced a defect as defined by the Safety Act.[38] The Melton court did not overrule GM's relevance objection, much less find that the objection was fraudulent.[39]

In any event, without waiving its relevance objection, GM voluntarily agreed to produce the Product Investigation file, excluding certain privileged documents, *before* the February 7, 2013, hearing in which Melton sought additional air bag non-deployment documents.[40] GM later supplemented its production to include additional documents subsequently added to the Product Investigation file. Additionally, GM had already produced—as much as a year earlier in February 2012—data regarding more than 500 NISMs and lawsuits relating to the plaintiffs'

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responsive documents." Pls.' Br. at 17. Plaintiffs do not allege how K&S and GM did so. Although Plaintiffs have reviewed attorney-client communications between GM and K&S, Plaintiffs do not cite any communication where GM and K&S discussed an alleged attempt to craft deficient searches.

[36] *See* Ex. D, GM-MDL2543-300011940 at .001-.005 (discussing need to produce documents in timely fashion); Ex. E, GM-MDL2543-400248346-47 (discussing need to produce all documents "responsive to plaintiffs' second discovery requests no later than January 18" (emphasis in original)).

[37] Pls.' Ex. 53, GM-MDL2543-400253332.

[38] *Id.*; Pls.' Ex. 54, GM-MDL2543-000885044 (stating position "that the Product Investigation file is not responsive to plaintiffs' requests . . ."); Pls.' Exs. 53, GM-MDL2543-400253332.

[39] *See* Pls.' Ex. 48, GM-MDL2543-300044406 at 44501.

[40] *See* Pls.' Ex. 48, GM-MDL2543-300044406 at 44461-62. GM also offered to postpone Ebram Handy's deposition until the Product Investigation file could be produced. Melton declined. *Id.*

initial claim that a power steering defect caused the crash. Some of these matters, including Chansuthus and Sullivan, involved air bag non-deployments.[41] Similarly, in March 2012, GM produced two reports related to another air bag non-deployment claim, the Lambert matter.[42] These multiple productions directly contradict the allegation that GM and K&S concealed air bag non-deployment incidents.

a) ***Motion to Compel Hearing***

On February 7, 2013, the Melton court held a hearing. At the hearing, K&S reiterated the truth: that the searches GM ran for claims data related to incidents in which it was alleged that inadvertent key movement as described in the ISB had caused a crash had not returned any responsive documents.[43] K&S truthfully represented that GM was not withholding any responsive documents that had been found.[44] Attorney-client privileged documents that GM produced to Plaintiffs show that, rather than concealing responsive documents, K&S and GM worked to produce responsive "documents in GM's custody immediately."[45] After hearing the parties' arguments, the court ordered GM to rerun its searches and interpret the plaintiffs' requests more broadly.[46] The Melton court did not find that GM withheld documents it had already located.

b) ***GM's Second Supplemental Responses***

Consistent with the court's direction, GM served its second supplemental responses to

[41] *See* Ex. F, MELTON000001708-27.
[42] *See* Ex. G, MELTON0000013467-79.
[43] Pls.' Ex. 48, GM-MDL2543-300044406 at 44446.
[44] *Id.* at 444441, 44445-46; *see also id.* at 44472 (stating that although GM was not withholding any documents it had discovered, K&S was not "all-knowing" and could not confirm or deny that responsive documents existed notwithstanding the searches performed).
[45] Ex. D, GM-MDL2543-300011940 (discussing need to produce all responsive documents).
[46] *See* Ex. 48, GM-MDL2543-300044406 at 44504-506.

Melton's second discovery requests on February 28, 2013.[47] Along with those responses, GM produced more than 20,000 pages of documents related to the ignition switch ISB, including documents relating to incidents involving an alleged loss of power (no matter the claimed cause), as well as allegations of loss of control and air bag non-deployment.[48] The same day, GM also produced the "Sprague Spreadsheet," which included a list of then known air bag non-deployment incidents potentially related to the ISB.[49] Plaintiffs ignore these productions.

6. *GM Did Not Conceal Part Change Documents.*

Plaintiffs contend that GM and K&S "hid the existence of part change documents" related to the Cobalt's ignition switch.[50] Plaintiffs again blatantly distort the record. Melton requested that GM produce documents evidencing any changes to the design of the Cobalt's ignition switch that would affect its torque value. GM searched several times for such documents and reported that it had found none. So in response to document requests, GM stated that no such documents were found.[51] Although GM later located a part change document signed by Ray DeGiorgio, the design engineer for the switch, that would have been responsive, K&S never had this document at any time during the pendency of Melton I. Plaintiffs' contention that K&S intentionally concealed this evidence is false and baseless.

On April 29, 2013, the Melton plaintiffs deposed Ray DeGiorgio. The plaintiffs showed DeGiorgio photographs suggesting that certain components used in the ignition switch for the

[47] *See* Pls.' Ex. 49, GM-MDL2543-000763807.
[48] GM maintained, in good faith, that air bag non-deployment incidents that did not also allege a loss of power were irrelevant because the plaintiffs did not allege that Melton's air bags should have deployed.
[49] *See* Ex. H, MELTON000037915-21.
[50] Pls.' Br. at 22.
[51] GM did produce a "PRTS" document that included an attachment referencing the change in the ignition switch spring and plunger. *See* Ex. I. K&S did not realize this attachment was in the production or understand its potential significance until after Melton settled. Apparently, the Melton plaintiffs did not understand this document's significance either because they never referenced it or used it as an exhibit in any depositions.

2005 Cobalt differed from the components used in the ignition switch for the 2008 Cobalt.[52] DeGiorgio acknowledged the observable physical differences in the photographs, but testified that he did not authorize a change to the ignition switch or its components that would impact the torque required to move the switch from run to accessory.[53] K&S was surprised by Melton's photographic evidence, categorizing it in an email to a GM in-house attorney as a "bombshell."[54]

Despite these unauthenticated photographs, GM and K&S understood—based on DeGiorgio's testimony and GM's own searches for documents—that the company had not requested or authorized a change.[55] In response to plaintiffs' discovery requests in Melton and as part of the ongoing Product Investigation, GM had searched several times before DeGiorgio's deposition for documents that would show if it had authorized a part change. No change documents had been found. And DeGiorgio testified under oath that he had not authorized a change.[56] Thus, in response to Melton's Fifth Request for Production of Documents, GM cited DeGiorgio's deposition testimony in stating that it had not authorized or requested a change.[57]

Neither K&S nor those responsible for defending the Melton case at GM knew whether, when, or how the ignition switch was changed, although they believed that, if changes had been made, they were done without GM's authorization.[58] Thus, shortly after DeGiorgio's deposition,

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[52] Ex. J, April 29, 2013 Deposition of Ray DeGiorgio ("April 29, 2013, DeGiorgio Dep.") at 149-152.
[53] Ex. J, April 29, 2013 DeGiorgio Dep. at 57:23-58:3; 151:13-152:7; 187:5-7.
[54] Pls.' Ex. 59, GM-MDL2543-001049338.
[55] Ex. J, April 29, 2013 DeGiorgio Dep. at 187:5-7 (after seeing photographs that suggested the ignition switch had been changed, DeGiorgio maintained that if it had been changed, it was done without his authorization).
[56] Ex. J, April 29, 2013 DeGiorgio Dep. at 186:11-187:7.
[57] Pls.' Ex. 60, GM-MDL2543-400151182 at 83. Notably, GM did not state that there had not been a change, or that the 2005 switch was identical to the 2008 switch. *Id.* The photographs shown to DeGiorgio by Melton's counsel at least suggested that changes may have been made. Plaintiffs confuse this evidence with proof that GM requested or authorized a part change.
[58] When deposed on June 19, 2015, DeGiorgio again testified that he did not realize GM had authorized a change to the ignition switch until he saw the change order in early 2014. *See* Ex. K, June 19, 2015 Deposition of Ray DeGiorgio ("June 19, 2015 DeGiorgio Dep."), at 361:20-25; 270:20-271:1. Even after *{footnote continued}*

GM engaged a consultant, Subbaiah Malladi, to investigate whether the Plaintiffs were correct and there had been a change.[59] GM retained Malladi to consult on Melton and assist K&S in GM's litigation defense. As a consulting litigation expert, GM properly sought to preserve the work-product protection as to his work.

In June 2013, still accepting DeGiorgio's sworn testimony that GM had not requested or authorized a change, K&S came to believe that, if there had been a change, GM's supplier, Delphi, most likely had changed the switch unilaterally.[60] GM and K&S discussed the need to ask Delphi for part change information related to the ignition switch.[61] They asked Malladi to identify exactly what he would need for his investigation. GM then specifically requested that information from Delphi in June 2013.[62]

Melton settled in September 2013. Even though GM's legal staff had asked Delphi for the part change information in June 2013, at no time before the settlement was K&S provided with or made aware of the document signed by DeGiorgio showing that he had authorized a design change in the ignition switch. GM apparently did not receive the part change documents from Delphi until October 2013. DeGiorgio testified on June 19, 2015, that he still did not remember authorizing a change to the ignition switch even after he saw the change documents.[63]

7. ***Jim Federico Deposition***

Plaintiffs contend that GM and K&S lied about Jim Federico's role in the ignition switch

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seeing that change order, apparently signed by him, DeGiorgio did not remember authorizing the change. *Id.* at 431:24-432:12; 432:14-23.

[59] Because GM hired Malladi to assist in Melton, it sought to preserve the work-product protection.

[60] *See* Pls.' Ex. 61, GM-MDL2543-000698545 at .001-.002.

[61] *Id.* at .001.

[62] *See* Ex. L, GM-MDL2543-400251566-67 (June 26, 2013 request from GM to Delphi seeking part change documents); Pls.' Ex. 61, GM-MDL2543-000698545 at .001-.002. Plaintiffs misrepresent the record by implying that GM did not request such information until October 2013. *See* Pls.' Br. at 23.

[63] *See* Ex. K, June 19, 2015 DeGiorgio Dep., at 431:24-432:12; 432:14-23.

investigation to prevent his deposition. That is false. In mid-2013, the Melton plaintiffs sought to depose Jim Federico, a GM employee. In response, K&S told the plaintiffs what GM told K&S: Federico was not directly responsible for the 2005 Cobalt's ignition switch and had limited engineering knowledge about the switch design.[64] That remains K&S's understanding. Although Federico had been asked to assist GM with its Product Investigation, he had not been responsible for engineering issues related to the 2005 Cobalt's ignition switch. Plaintiffs offer no evidence to the contrary. Regardless of Federico's knowledge, K&S arranged to make Federico available for a deposition.[65] Federico was scheduled to be deposed on August 23, 2013,[66] and a K&S attorney was traveling to defend Federico's deposition when Melton's lawyer settled the case. K&S did not obstruct plaintiffs' effort to take Federico's deposition. To the contrary, K&S facilitated it.

8. *Melton Procedural History*

In mid-2014, in the wake of a comprehensive report of an internal investigation[67] by Anton Valukas and his firm Jenner & Block ("Valukas Report"), Melton was reopened ("Melton II"). The Melton II plaintiffs served a subpoena on K&S seeking many of the same documents Plaintiffs seek. K&S agreed to and did transfer to GM documents and communications (1) between K&S and GM, and (2) between K&S and third parties related to K&S's work and legal advice in Chansuthus, Sullivan, and Melton. In turn, GM agreed to produce to the MDL Plaintiffs many of those documents, subject to the protections afforded by Federal Rule of

[64] *See* Ex. M, GM-MDL2543-400253359 (communication from GM to K&S describing Federico's knowledge and availability).
[65] *See* Pls.' Ex. 63, GM-MDL2543-400262624.
[66] Melton settled before Federico could be deposed. While Plaintiffs imply that GM settled to avoid Federico's deposition, this is wild speculation, devoid of any supporting evidence, and wholly inconsistent with Federico's scheduled deposition.
[67] K&S participated in some aspects of GM's internal investigation into the switch after Melton settled.

Evidence 502(d).[68] Those documents were also produced to Melton's counsel. K&S objected to production of its internal communications regarding Chansuthus, Sullivan, and Melton. A motion to compel based on the crime-fraud exception was filed and fully briefed, but mooted when counsel for Melton settled the case for a second time.

B. PLAINTIFFS' SUBPOENA AND MOTION TO COMPEL

Less than a month after Melton II settled, Plaintiffs served K&S with a third-party Subpoena to Produce Documents (the "Subpoena").[69] On June 10, 2015, Plaintiffs filed this Motion to Compel.[70] Plaintiffs seek all of K&S's work-product[71] related to (1) the Chansuthus, Sullivan, and Melton matters, (2) GM's pre-recall investigation of the ignition switch not associated with any particular matter, (3) communications with NHTSA, and (4) "whether any rules of professional responsibility applicable to lawyers permitted or required [K&S] to reveal information relating to its representation of [GM] (and/or to withdraw from representation of GM) in connection with the ignition switch defect."[72]

III. ARGUMENT

Plaintiffs admit that they seek documents protected by the work-product doctrine.[73] "[O]ne of the purposes of the work product doctrine is to protect the work of the attorney from disclosure for the benefit of the attorney."[74] "This work product immunity is the embodiment of

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[68] *See* MDL Order No. 23, Dkt. No. 404.
[69] Pls.' Ex. 6. Plaintiffs also served K&S partners Philip Holladay and Harold Franklin with subpoenas for deposition testimony.
[70] 14-MD-02543, Dkt. 1031.
[71] Plaintiffs seek only work-product from K&S. *See* Pls.' Mot. to Compel at 2; Pls.' Br. at 4 n.10. Thus, K&S understands that Plaintiffs do not seek from K&S any *communications* between K&S and GM described in subsections (a)-(d) of the Motion to Compel. Plaintiffs seek those communications from GM.
[72] Pls.' Mot. to Compel at 1-2; *see also* Pls.' Br. at 32-33.
[73] *See* Pls.' Br. at 4 n.10.
[74] *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 63 (7th Cir. 1980); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947) ("Were [attorney work-product] open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore *{footnote continued}*

a policy that a lawyer doing a lawyer's work in preparation of a case for trial should not be hampered by the knowledge that he might be called upon at any time to hand over the result of his work to an opponent."[75] GM previously produced to Plaintiffs, subject to this Court's Rule 502 order, communications between K&S and GM and K&S and third parties related to Melton, Chansuthus, and Sullivan. The documents Plaintiffs now seek from K&S related to those matters are *internal law firm documents that have never been shared with GM or anyone else outside K&S.*[76] There are more than 90,800 pages of documents.[77] "It has been a very rare case, indeed, in which inquiry has been permitted into the internal operation of the lawyer's office."[78] Plaintiffs seek to discover K&S's internal work-product without legal or factual support.

A. THE CRIME-FRAUD EXCEPTION

Although Plaintiffs contend that the crime-fraud exception applies, they have not established either of the requisite elements.[79] First, Plaintiffs must show probable cause "that a crime or fraud has been attempted or committed."[80] This showing "requires more than mere

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inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.").

[75] *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 483 (4th Cir. 1973). "[T]he immunity extended to attorneys' mental impressions, conclusions, opinions, or legal theories by the last sentence of F.R.C.P. 26(b)(3) does not expire once the litigation for which they are prepared has been concluded[.]" *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 736 (4th Cir. 1974); *see also The Shinnecock Indian Nation v. Kempthorne*, 652 F. Supp. 2d 345, 362 (E.D.N.Y. 2009) (same).

[76] *See* Pls.' Mot. to Compel at 2; Pls.' Br. at 4 n.10.

[77] *See* Ex. N, Declaration of John Tucker filed in *Melton et al. v. General Motors LLC, et al.*, Civil Action No. 14-A-1197.

[78] *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d at 63 (quotation omitted); *In re Grand Jury Proceedings*, 604 F.2d 798, 801 n.4 (3d Cir. 1979) (noting that "intrafirm" communications may be specifically protected by the attorney in particular, as such communications are crucial to an attorney's proper preparation but potentially damaging to the attorney-client relationship).

[79] *In re Richard Roe, Inc.*, 168 F.3d 69, 71 (2d Cir. 1999) ("Given that the attorney-client privilege and work product immunity play a critical role in our judicial system, . . . the limited exceptions to them . . . should not be framed so broadly as to vitiate much of the protection they afford.").

[80] *Id.*; *see also In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1039 (2d Cir. 1984).

allegations or suspicions that the communications were made in furtherance of fraudulent activity."[81] To establish probable cause that a crime or fraud occurred, Plaintiffs must show *intentionally* wrongful conduct. "*With strong emphasis on intent*, the crime-fraud exception applies 'only when there is probable cause to believe that the [documents in question] were intended in some way to facilitate or to conceal the criminal [or fraudulent] activity.'"[82] Negligent, careless, or inadvertent conduct, even in violation of a legal obligation, is insufficient to trigger the exception.[83] Although intentional torts may suffice, the exception is not triggered without a showing of knowledge or intent.[84]

Plaintiffs seek to read out the intent requirement. Each of the cases Plaintiffs cite, however, requires intentional conduct. In *Diamond v. Stratton*, the court expanded the application of the crime-fraud exception under New York law to *intentional* torts.[85] The court stated that the crime-fraud exception applied only to "deliberate plan[s] to defy the law."[86] Similarly, in *Chevron Corp. v. Donziger*,[87] the court cited "abundant" direct evidence that

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[81] *Tindall v. H & S Homes, LLC,* 757 F. Supp. 2d 1339, 1353 (M.D. Ga. 2011); *see also Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman,* 342 B.R. 416, 427 (S.D.N.Y. 2006) ("[M]ere allegations of criminality are insufficient to warrant application of the exception." (quotation omitted).

[82] *United States v. Jacobs*, 117 F.3d 82, 88 (2d Cir. 1997) (emphasis added) (quoting *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32, 34 (2d Cir. 1986)), *abrogated on other grounds by Loughrin v. United States*, 134 S. Ct. 2384 (2014).

[83] *Doe v. United States*, 82 F. App'x 250, 252 (2d Cir. 2003) (finding intent to deceive was necessary to support crime-fraud exception); *In re Grand Jury Subpoenas Duces Tecum*, 773 F.2d 204, 205-06 (8th Cir. 1985) (finding failure to produce responsive and incriminating documents did not trigger crime-fraud exception without evidence of intent to conceal); *Jinks-Umstead v. England*, 233 F.R.D. 49, 51 (D.D.C. 2006) (noting that negligent, careless, and insufficient discovery responses, without showing intent to conceal, do not trigger crime-fraud exception); *In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 643 (8th Cir. 2001) ("[T]he crime-fraud exception does not apply when a publicly held company seeks legal advice concerning its disclosure obligations and then commits an *unintentional* disclosure violation.").

[84] *See* Pls.' Br. at 28-29.

[85] 95 F.R.D. 503, 505 (S.D.N.Y. 1982). Unlike the attorney-client privilege discussed in *Diamond*, federal law governs the work-product doctrine in federal court. *Pyramid Controls, Inc. v. Siemens Indus. Automations, Inc.*, 176 F.R.D. 269, 276 (N.D. Ill. 1997).

[86] *Diamond*, 95 F.R.D. at 505.

[87] No. 11 Civ. 0691 (LAK), 2013 WL 1087236, at *3 (S.D.N.Y. Mar. 15, 2013).

Donziger and others bribed a foreign judge and intentionally submitted fraudulent evidence to cover-up that fraud.[88] None of the cases Plaintiffs cite involve negligent or unintentional conduct.[89] Plaintiffs distort Second Circuit precedent by implying that the crime-fraud exception applies without a showing of knowing and intentional misconduct.

Second, Plaintiffs must establish probable cause that K&S's work-product furthered the crime or fraud.[90] This element requires "a determination that 'the client communication or attorney work product in question was *itself* in furtherance of the crime or fraud.'"[91] "Communications that merely relate to the fraudulent scheme will not trigger the crime-fraud exception to the attorney-client privilege."[92]

B. PLAINTIFFS HAVE NOT SHOWN PROBABLE CAUSE THAT A FRAUD OCCURRED.

Despite having thousands of pages of attorney-client communications, Plaintiffs do not come close to establishing the first prong of the crime-fraud exception.

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[88] *Id.* at *28-29. Notably, the *Chevron* court found insufficient evidence to support the crime-fraud exception as to subsequent reports created with the assistance of counsel that perpetuated and furthered the fraudulent scheme, but were not themselves fraudulent. *Id.* at *29.

[89] *See Irving Trust Co. v. Gomez*, 100 F.R.D. 273, 277 (S.D.N.Y. 1983) (applying crime-fraud exception where court found evidence party seeking to assert the privilege had participated in a knowing and intentional scheme to withhold the defendant's funds and relying on evidence that co-conspirators had discussed that scheme); *Madanes v. Madanes*, 199 F.R.D. 135, 149 (S.D.N.Y. 2001) (only "*intentional* tort[s]" that undermine the adversary system trigger exception (emphasis added)); *Cooksey v. Hilton Int'l Co.*, 863 F. Supp. 150, 151 (S.D.N.Y. 1994) (holding that exception applied based on an *intent* to mislead); *In re Impounded*, 241 F.3d 308, 316-17 (3d Cir. 2001) (noting that the key question was whether the movant had submitted sufficient evidence of an *intent* to obstruct justice). One case Plaintiffs cite does not even apply or analyze the exception. *See In re Grand Jury Subpoenas*, 454 F.3d 511, 520 (6th Cir. 2006) (dealing with procedure for reviewing privileged documents and noting that case did not implicate crime-fraud exception); *Chevron Corp. v. Salazar*, 275 F.R.D. 437, 454 (S.D.N.Y. 2011) (applying crime-fraud exception to intentional conduct designed to undermine the adversary system and noting that exception can apply where there is evidence of *intentional* tort).

[90] *In re Richard Roe, Inc.*, 168 F.3d at 71.

[91] *Id*. (citation omitted); *see also In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d at 34 (holding that the crime-fraud exception "cannot be successfully invoked merely upon a showing that the client communicated with counsel while the client was engaged in [fraudulent] activity. The exception applies only when there is probable cause to believe that the communications with counsel were intended in some way to facilitate or to conceal the [fraudulent] activity.").

[92] *United States v. Chervin*, No. 10 CR 918, 2011 WL 4424297, at *3 (S.D.N.Y. Sept. 21, 2011); *Shakima O. v. Westchester Cnty.*, No. 12 CV 9468, 2014 WL 521608, at *7 (S.D.N.Y. Feb. 10, 2014).

1. ***K&S's Litigation Advice Cannot Establish a Crime or Fraud.***

Plaintiffs contend that K&S participated in a fraud by providing thorough, honest, and ethical litigation advice. In fact, Plaintiffs do not disagree with K&S's analysis. Instead, Plaintiffs contend that it was fraudulent to provide such sound advice.[93] Plaintiffs offer no legal precedent for this dangerous theory. If adopted, Plaintiffs' interpretation of the crime-fraud exception would discourage attorneys from providing unbiased and candid advice to their clients.

Plaintiffs' theory would destroy the attorney-client privilege and work-product protection in any case alleging a plausible or potentially meritorious defect claim under state law. Plaintiffs contend that K&S engaged in a fraud by concluding that Chansuthus, Sullivan, and Melton were likely to succeed on their state law defect claims and, for that reason, recommending that GM explore settlement.[94] K&S's analysis, however, represents the very heart of the work-product doctrine, which creates "an environment in which counsel are free to think dispassionately, reliably, and creatively both about the law and the evidence in the case and about which strategic approaches to the litigation are likely to be in their client's best interests."[95] Plaintiffs' theory would turn the work-product doctrine on its head, using K&S's strategic litigation advice to destroy the protection that encourages just such advice.

Further, if Plaintiffs are right, product liability lawyers must now choose between destroying the work-product protection and fulfilling their ethical obligations to provide

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[93] Summarizing their theory, Plaintiffs' counsel stated that K&S provided "good advice, but it's not legal. That is why this is a crime-fraud exception." Sue Reisinger, *GM Plaintiffs Try Crime-Fraud Exception to Get Documents*, Corporate Counsel (June 15, 2015), http://www.corpcounsel.com/id=1202729304577/GM-Plaintiffs-Try-CrimeFraud-Exception-to-Get-Documents#ixzz3dFHSHn8X.

[94] Pls.' Br. at 30-31.

[95] *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 392 (N.D. Cal. 1991).

complete advice.[96] If a defense lawyer concludes that a jury will likely find for the plaintiff on an alleged defect claim and recommends that her client explore settlement, she commits fraud by continuing to represent the client. Rather than take that risk, many attorneys might choose to defend product liability lawsuits by intentionally avoiding any analysis of the plaintiff's defect claims. This, of course, is antithetical to the purposes of the attorney-client privilege and work-product doctrine.[97] It would prevent product liability defendants from obtaining competent legal advice and disrupt the adversary system. Plaintiffs have cited no authority for creating such a broad crime-fraud exception in the product liability context. The Court should decline to do so.

a) ***Plaintiffs Have Not Shown an Intent to Conceal or Defraud.***

To establish the first prong of the crime-fraud exception, Plaintiffs must show that K&S's legal advice was "intended in some way to facilitate or to conceal the criminal [or fraudulent] activity."[98] Plaintiffs contend that K&S committed a fraud by advising GM that: (1) the plaintiffs would likely succeed on their defect claims; (2) GM might be liable for punitive damages; and (3) GM should pursue settlement. K&S did all those things. In fact, K&S had an ethical obligation to do so under the Georgia Rules of Professional Conduct.[99]

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[96] *See, e.g.*, Ga. Rules of Prof'l. Conduct 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. A lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.").

[97] *Hickman v. Taylor,* 329 U.S. at 511 ("Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing [and] the interests of the clients and the cause of justice would be poorly served.").

[98] *Jacobs*, 117 F.3d at 88; *see also In re Richard Roe, Inc.*, 168 F.3d 69 at 72 (declining to apply crime-fraud exception where "[n]o document suggests a belief that the defense of the litigation had no legal or factual support or that the act of litigating was for an *improper purpose*" (emphasis added)).

[99] *See* Ga. Rules of Prof'l Conduct 1.1 ("A lawyer shall provide competent representation to a client. . . . Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); *id.* at 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. A lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."); *id.*, cmt. 1 ("A client is entitled to

{footnote continued}

Importantly, however, none of the evaluation letters Plaintiffs cite show any improper purpose or fraudulent intent.[100] They do not discuss concealing anything.[101] Nor do they mention or evidence a cover-up.[102] To the contrary, the Chansuthus and Sullivan evaluation letters focus on an *electrical* sensing anomaly causing the BCM to incorrectly conclude that the car had lost power[103]—not on the defect Plaintiffs accuse K&S of concealing. K&S *could not* have engaged in a scheme to cover-up an alleged defect that it did not know existed. Thus, as in *In re Richard Roe*, K&S's evaluation letters do not indicate or suggest that K&S's litigation strategy was "carried on substantially for the purpose of furthering the crime or fraud."[104]

This case significantly contrasts with *A.H. Robins Co.*, cited by Plaintiffs.[105] In that case, applying Kansas law,[106] the court relied on a myriad of *direct* evidence establishing that the defendant and its lawyers engaged in an intentional fraud to conceal evidence and mislead the public. Specifically, the court relied on an extensive report by a special master describing

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straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.").

[100] *See In re Richard Roe, Inc.*, 168 F.3d at 72.

[101] Plaintiffs misrepresent a January 6, 2011, email from K&S to GM related to the Chansuthus matter. Pls.' Ex. 29, GM-MDL2543-003455136. In the email, K&S discusses the pros and cons of requesting an additional inspection of the subject vehicle. Pls.' Ex. 29, GM-MDL2543-003455136 at .001. K&S states that an inspection *could* result in both helpful and damaging evidence regarding Chansuthus' product liability claim. *Id.* K&S does not recommend or discuss hiding or concealing anything. K&S did not know the results of the potential inspection and therefore could not have recommended concealing them. Viewed in context, this email was simply an analysis of whether an inspection would be helpful to GM's defense. It is not evidence that GM or K&S covered up hypothetical inspection results that did not exist. Nor was it an attempt to prevent Chansuthus from taking any discovery.

[102] *See Doe*, 82 F. App'x at 252 (reversing finding that crime-fraud exception applied where there was no evidence of intent to conceal documents); *In re Richard Roe, Inc.*, 168 F.3d at 72; *Jacobs*, 117 F.3d at 88.

[103] *See* Pls.' Ex. 1, GM-MDL2543-000660601 at .008 n.2; Pls.' Ex. 15, GM-MDL2543-000660577 at .012; Pls.' Ex. 13, GM-MDL2543-003455366.001 at .009-.010.

[104] *In re Richard Roe, Inc.*, 168 F.3d at 71.

[105] 107 F.R.D. 2 (D. Kan. 1985).

[106] Federal law governs Plaintiffs' attempt to discover K&S's work-product. *Pyramid Controls, Inc.,* 176 F.R.D. at 276.

"*knowing* misrepresentation to the public concerning the effectiveness of the [product]" and an explicit attempt to cover-up those misrepresentations.[107] Notably, unlike here, defense counsel had knowingly "devise[d] strategies to cover up" the defendants' conduct, even destroying responsive documents.[108] As discussed above, Plaintiffs have not shown that K&S and GM devised any such strategy. For that reason, *Robins* is inapplicable.

b) *K&S's Rationale for Recommending Settlement Was Clear.*

The motive behind K&S's litigation strategy was clear. K&S recommended settlement because the claims against GM would likely have resulted in plaintiffs' verdicts and possibly large damage awards.[109] Plaintiffs' assertion that K&S and GM were motivated by a desire to conceal evidence of a defect simply has no basis in fact.[110] In Chansuthus, K&S advised that "a significant plaintiff's verdict remains more likely than not."[111] In Sullivan, GM cautioned that the claimant's theory "could provide fertile ground for laying a foundation for a punitive damages award."[112] Finally, in Melton, K&S recommended that GM explore settlement because the case "[was] not an attractive trial candidate," reasoning that "a jury here likely [would] hold [GM] primarily responsible for the crash and resulting injuries."[113] None of the documents Plaintiffs cite suggest that GM settled these cases to hide anything, least of all a defect under the

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[107] *Robins,* 107 F.R.D. at 10 (emphasis added).
[108] *Id.* at 15.
[109] *See, e.g.*, Pls.' Ex. 1, GM-MDL2543-000660601 ("[B]ecause there appears to be clear evidence of a defect, every effort should be made to settle this claim at this stage.").
[110] In several instances, K&S recommended settlement after concluding that GM would likely lose, even if K&S and GM's engineers had not yet conclusively determined the cause of the accident. *See* Pls.' Ex. 13, GM-MDL-003455366 at .010 and Pls.' Ex. 17, GM-MDL2543-300002915 at .021. K&S could not have been motivated by a desire to conceal a defect if it did not know what caused the accident.
[111] Pls.' Ex. 1, GM-MDL2543-000660601 at .012.
[112] Pls.' Ex. 27, GM-MDL2543-000662287 at .001.
[113] Pls.' Ex. 17, GM-MDL2543-300002915 at .021 (discussing jury's likely thought process and potential verdict generally); Pls.' Br. at 13 (quoting Pls.' Ex. 3, GM-MDL2543-000985320 at .026 (K&S recommending settling Melton "because: 'there is little doubt that a jury here will find that the ignition switch used on Ms. Melton's 2005 Cobalt was defective and unreasonably dangerous'")).

Safety Act. As discussed above, K&S recommended that GM explore settlement for a number of reasons, including avoiding large jury verdicts. That is not an improper purpose.[114]

Finally, if Plaintiffs could ever show that K&S's litigation strategy "was carried on substantially for the purpose of furthering the crime or fraud," they should be able to do so here. Plaintiffs have access to thousands of otherwise privileged attorney-client communications between GM and K&S related to Chansuthus, Sullivan, and Melton.[115] K&S and GM had every reason to speak freely in those documents. K&S identified its reasons for recommending settlement: plaintiffs' verdicts were likely and large damage awards were possible.[116] Given that Plaintiffs have not identified any communications between K&S and GM showing that they were conspiring to commit a crime or fraud, Plaintiffs have not carried their heavy burden to gain access to K&S's purely internal communications.

c) *GM's Violation of the Safety Act Does Not Support A Crime or Fraud.*

The engagement letters on these three matters make no reference to regulatory or reporting obligations under the Safety Act or any other statute.[117] Unsurprisingly, therefore, none of the communications Plaintiffs cite mention the Safety Act or GM's obligations to disclose a defect or institute a recall. However, even if K&S's legal advice related to GM's

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[114] *See In re Richard Roe, Inc.*, 168 F.3d at 72 (declining to apply crime-fraud exception where "[n]o document suggests a belief that the defense of the litigation had no legal or factual support or that the act of litigating was for an *improper purpose*") (emphasis added); *id.* at 71 ("Where the very act of litigating is alleged as being in furtherance of a fraud, the party seeking disclosure under the crime-fraud exception must show probable cause that the litigation or an aspect thereof had little or no legal or factual basis and *was carried on substantially for the purpose of furthering the crime or fraud*." (emphasis added)).

[115] *Id.* Pursuant to this Court's Rule 502 Order, GM produced to Plaintiffs communications between GM and K&S and between K&S and third parties related to Chansuthus, Sullivan, or Melton.

[116] *See, e.g.*, Pls.' Ex. 1, GM-MDL2543-000660601 (recommending GM pursue settlement "*because* there appears to be clear evidence of a defect, every effort should be made to settle this claim at this stage." (emphasis added)); Pls.' Ex. 27, GM-MDL2543-000662287 at .001 (plaintiff's theory "could provide fertile ground for laying a foundation for punitive damages award"); Pls.' Ex. 17, GM-MDL2543-300002915 at .021 ("[A] jury here likely will hold [GM] primarily responsible for the crash and resulting injuries.").

[117] *See* Ex. A, Ex. B, Ex. C.

disclosure obligations, which it did not, GM's violation of the Safety Act does not support Plaintiffs' theory. As discussed in GM's Response to the Motion to Compel, the May 16, 2014 Consent Order (the "Consent Order") does not contemplate an intentional violation of the Safety Act.[118] Thus, even if K&S's advice related to the Safety Act, which it did not, "the crime-fraud exception does not apply when a . . . company seeks legal advice concerning its disclosure obligations and then commits an *unintentional* disclosure violation."[119]

2. *K&S and GM Did Not Commit a Fraud During Discovery in Melton.*

Plaintiffs have not produced a single document showing an intent to conceal relevant and responsive information. Rather, Plaintiffs rely on hindsight to show that GM inadvertently failed to locate or produce certain documents. Without showing an intent to deceive, Plaintiffs cannot establish the first prong of the crime-fraud exception.[120]

In *In re Grand Jury Subpoenas Duces Tecum*,[121] the court ordered the defendant's attorneys to disclose documents. After a jury verdict against the defendant, the government discovered two incriminating documents that the attorneys had not produced. The government argued that the crime-fraud exception applied to all communications and work-product related to the production. The court disagreed, holding that the government had not shown that the

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[118] *See* Ex. 2 at 8-9 (setting forth requirements for reporting safety related defects more quickly and effectively that would be unnecessary, insufficient, and inappropriate remedy for intentional concealment).

[119] *In re BankAmerica Corp. Sec. Litig.*, 270 F.3d at 643 (declining to apply crime-fraud exception where plaintiffs presented evidence that company consulted with attorney regarding disclosure obligations, that defendant's employees were aware of undisclosed losses and urged defendant to report them, but company nevertheless violated disclosure requirements); *see also In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997) (showing that client consulted with attorney and then violated campaign finance law insufficient showing to trigger crime-fraud exception).

[120] *See Jacobs*, 117 F.3d at 88 ("*With strong emphasis on intent*, the crime-fraud exception applies 'only when there is probable cause to believe that the [documents in question] were intended in some way to facilitate or to conceal the criminal [or fraudulent] activity.'" (emphasis added) (quoting *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d at 34)).

[121] 773 F.2d 204 (8th Cir. 1985).

attorneys *intended* to conceal the undisclosed documents.[122] The court rejected the government's position that it need not prove the attorneys' intent. Although the undisclosed documents were incriminating, and thus the attorneys had a motive to withhold them, the court reasoned that "[m]ere coincidences in the physical evidence cannot form the basis for application of the crime or fraud exception to those privileges."[123]

Similarly, in *Jinks-Umstead v. England*,[124] the plaintiff argued that the defendant made misrepresentations during the discovery process in an attempt to cover-up its previous discriminatory and retaliatory conduct. The defendant had incorrectly represented that documents did not exist, incorrectly stated that it was not withholding documents, and made incomplete discovery responses. The court, however, refused to apply the crime-fraud exception, reasoning that the plaintiff did "not know 'whether the [defendant's] misstatements [relating to discovery] were made intentionally in furtherance of a cover-up . . . or whether the failure to produce the responsive documents requested by plaintiff *was merely negligent*.'"[125] Although the court found that the defendant's discovery responses were deficient, the court "found no precedent requiring [it] to expand the crime-fraud exception to inaccuracies and omissions in discovery absent prima facie evidence of a cover-up."[126]

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[122] *Id.* at 207.
[123] *Id*.
[124] 233 F.R.D. 49 (D.D.C. 2006).
[125] *Id.* at 51.
[126] *Id*.; *see also Doe*, 82 F. App'x at 252 (where client made misrepresentation to attorney regarding existence of records, and attorney provided that representation to the government, crime-fraud exception did not apply where government failed to show that the client intended the misrepresentation to be repeated to the government, thereby obstructing justice); *Jinks-Umstead,* 233 F.R.D. at 51 ("[P]laintiff asks that the court infer from the government's alleged discovery omissions and inaccuracies that the government consulted with its attorneys as part of a bad faith effort to cover-up discriminatory conduct towards plaintiff. However, . . . the case law simply does not support the expansion of the exception to the facts of this case. Plaintiff cited no precedent and I found no precedent requiring me to expand the crime-fraud exception to inaccuracies and omissions in discovery absent prima facie evidence of a cover-up."); *Johnson Elec. N. Am., Inc. v. Mabuchi N. Am. Corp.*, No. 88 CIV. 7377 (JES), 1996 WL 191590, at

{footnote continued}

Here, as in *In re Grand Jury, Jinks-Umstead*, and *Doe*, Plaintiffs have not shown that GM's discovery conduct was fraudulent. The documents Plaintiffs cite show just the opposite.

a) *GM Did Not Intentionally Conceal Documents Related to the ISB.*

First, Plaintiffs assert that GM withheld claims documents and lawsuit information related to the ISB.[127] In response to the Melton plaintiffs' second set of discovery, GM stated that it would search for responsive documents, defining the searches it would conduct.[128] GM conducted those searches. It uncovered no documents.[129] Despite access to thousands of attorney-client communications between GM and K&S, Plaintiffs present no evidence suggesting that GM uncovered responsive documents and intentionally withheld them. To the contrary, the documents GM produced to Plaintiffs contradict such a theory. In privileged communications, K&S repeatedly emphasized the need to *produce* documents responsive to Plaintiffs' second discovery requests, not conceal them.[130] Plaintiffs ignore these communications, no doubt because they devastate Plaintiffs' theory.

Further, in an apparent admission that GM did not withhold documents located by its searches, Plaintiffs baldly allege that "New GM and K&S . . . had crafted the searches to omit

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*6 (S.D.N.Y. Apr. 19, 1996) (where plaintiff argued that defendant had fraudulently obstructed discovery by making improper and unfounded discovery objections, court found that crime-fraud exception did not apply, reasoning that "no court decision of which we are aware has read this rule so broadly as to encompass any action by counsel or party that may be viewed as undesirable or improper"); *Peterson v. Fairfax Hosp.*, 1994 WL 1031134, at *1 (Va. Cir. Ct. Apr. 11, 1994) (holding that "no amount of discovery abuse or nondisclosure alone would suffice to leverage the Plaintiffs' desire to unlock the attorney's confidences in this case"); *United States v. Stevens*, No. 10-694, slip op. (D. Md. May 10, 2011) (honest attempt at complying with discovery requests not fraud).

[127] *See generally* Pls.' Br. at 13-14.

[128] *See* Pls.' Ex. 46, GM-MDL2543-001282913 and 47, GM-MDL2543-000958800 at .003-.004.

[129] *Id.*; *see also supra.* p. 10.

[130] *See* Ex. D, GM-MDL2543-300011940 at .001-.005 (discussing need to produce documents in timely fashion); Ex. E, GM-MDL2543-400248346-47 (discussing need to produce all documents "responsive to plaintiffs' second discovery requests no later than January 18" (emphasis in original)).

responsive documents."[131] Tellingly, Plaintiffs cite no support for that allegation, despite access to the very attorney-client communications GM and K&S would have used to "craft" such allegedly fraudulent searches.

Finally, neither GM nor K&S lied to the Melton court about the existence of responsive documents related to the ISB. At a February 7, 2013 hearing before the Melton court, K&S told the truth. Specifically, K&S stated that GM was not withholding any documents that had been located by the searches GM agreed to run.[132] That representation was, and is, true. Plaintiffs have produced no evidence to the contrary.[133] Instead, Plaintiffs allege that K&S "did have personal knowledge of other similar incidents or lawsuits—no database queries needed."[134] *That allegation is false.* As outlined above, the defect allegations in Chansuthus and Sullivan involved claims of air bag non-deployment. Melton did not allege that the air bag failed to deploy. Thus, the claims in Chansuthus and Sullivan were not the same or similar. Plaintiffs have not cited a single document that supports their assertion that K&S *knew* GM's discovery responses were inaccurate. To the contrary, documents in Plaintiffs' possession disprove this

[131] Pls.' Br. at 17.
[132] *See* Pls.' Ex. 48, GM-MDL2543-300044406 at 300044441 (K&S stated that GM was "not withholding documents that are responsive" to Plaintiffs' requests and that "G.M. has, in fact, produced the documents that it—that resulted from its searches and has produced them"); *id.* at 44445 ("[T]he results of those searches, nothing came back with regard to the lawsuit searches in interrogatory number one."); *id.* at 300044445-46 (K&S stated that "it's not as if we got documents and decided not to produce them."). At the hearing, K&S stated that it was not withholding documents GM had discovered. It did not represent that no responsive documents existed. *See id.* at 300044472 (stating that K&S "is not all knowing" as to whether lawsuits existed notwithstanding GM's searches). However, if K&S had incorrectly stated that no responsive documents existed, that misstatement would still not trigger the crime-fraud exception. *See Doe*, 82 F. App'x at 252; *Jinks-Umstead,* 233 F.R.D. at 51.
[133] Moreover, after the February 7, 2013, hearing, GM expanded its search in an attempt to comply with the Melton court's directives. Pls.' Ex. 51, GM-MDL2543-400159389 at 59399-401. It produced the responsive documents located from these searches. Pls.' Ex. 50, GM-MDL2543-400000941 at 0946.
[134] Pls.' Br. at 17.

allegation.[135] Thus, as in *In re Grand Jury* and *Jinks-Umstead*, Plaintiffs' allegations cannot pierce the work-product protection.[136]

b) *GM Did Not Fraudulently Conceal Air Bag Non-Deployment Documents.*

Plaintiffs assert that GM fraudulently concealed air bag non-deployment incidents in Melton.[137] Again, Plaintiffs present no evidence that GM or K&S intentionally concealed any relevant and responsive documents.[138]

First, GM properly objected to the relevance of certain air bag non-deployment incidents in Melton. The Melton plaintiffs did not allege that the air bags should have deployed in that side impact crash. Thus, incidents alleging strictly air bag non-deployment claims were irrelevant.[139] The Melton court did not overrule GM's objection, much less find that it was fraudulently asserted. The documents Plaintiffs cite prove that K&S genuinely held that position. In attorney-client communications, K&S specifically stated that it would not produce air bag non-deployment documents "because our position is that [they are] not responsive to plaintiffs' requests," not because they were evidence of a defect under the Safety Act.[140]

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[135] *See* Ex. D, GM-MDL2543-300011940 at .001-.005; Ex. E, GM-MDL2543-400248346-47 (discussing need to produce all responsive documents).
[136] *See supra* notes 126.
[137] *See generally* Pls.' Br. at 14-21.
[138] As discussed above, Plaintiffs also ignore privileged communications between K&S and GM that indicate an intent to produce, not conceal, relevant and responsive documents. If K&S and GM were concealing anything, they would have discussed it in these otherwise attorney-client privileged communications. At a minimum, they would not have been so concerned with producing "all documents responsive to [the Melton] plaintiffs' second discovery requests." Ex. E, GM-MDL2543-400248347.
[139] Along with its second supplemental responses to Meltons' discovery requests, GM produced almost 20,000 pages of claims data, including air bag non-deployment incidents that also alleged a loss of power or an unexplained loss of control. *See* Pls.' Exs. 49, GM-MDL2543-000763807 and 50, GM-MDL2543-400000941.
[140] Pls.' Ex. 54, GM-MDL2543-000885044; *see also* Pls.' Ex. 53, GM-MDL2543-400253332 (discussing and ultimately determining that the Product Investigation file was not responsive and declining to produce it on that basis). As discussed, if K&S intended not to produce these documents for another reason, it had no reason not to state that motive in its privileged communications with GM.

K&S did not "[tell] one thing to the court and the opposite to New GM on the same day."[141] In response to Melton's motion for sanctions, GM reiterated its relevance objection.[142] By contrast, in its July 22, 2013 evaluation letter, K&S described the plaintiffs' discovery theory and expected evidentiary arguments at trial.[143] Specifically, K&S predicted (correctly) that the Melton plaintiffs would argue that the air bag investigation "tied nicely into plaintiffs' expected theme that the original [ISB] was an inadequate 'band-aid fix.'"[144] K&S, however, did not adopt the Melton plaintiffs' position. Rather, K&S reiterated the basis for GM's relevance objection: "there is no allegation here that Ms. Melton's frontal air bags should have deployed."[145] Plaintiffs ignore this context. Thus, the July 2013 letter does not evince any knowing intent to conceal documents. It also does not acknowledge that GM's relevance objection was fraudulent or even improper.[146]

Second, GM produced air bag non-deployment documents. GM produced the Product Investigation file, and updated that production after additional documents were added to that file.[147] On February 28, 2013, GM supplemented its responses, producing almost 20,000 pages

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[141] Pls.' Br. at 19.

[142] *See* Pls.' Ex. 51, GM-MDL2543-400159389 at 59398. K&S's relevance objection had not been ruled on by the Melton court when the case settled.

[143] Pls.' Ex. 3, GM-MDL2543-000985320 at .003.

[144] *Id.* at .002-.003.

[145] *Id.* at .003.

[146] Finally, Plaintiffs' contention that GM and K&S committed a fraud by seeking to maintain the work-product protection and attorney-client privilege is unfounded. *See* Pls.' Br. at 21-22. K&S was defending a lawsuit. As discussed above, K&S and GM were surprised by Melton's photographic evidence that the ignition switch in the 2005 Cobalt differed from the switch on the 2008 Cobalt. The explanation for the change was important to GM's defense. K&S and GM hired Subbaiah Malladi to investigate whether there had been a change. Without citing any authority, Plaintiffs ask the Court to pierce the work-product protection *because* GM and K&S attempted to preserve it. That Catch-22 would destroy the protection.

[147] Pls.' Ex. 51, GM-MDL2543-400159389 at 9406; Pls.' Ex. 48, GM-MDL2543-300044406 at 44461-62. Although Plaintiffs admit that GM produced "some air bag investigation documents," they fail to mention that GM produced the Product Investigation file they accuse GM of intentionally concealing. Plaintiffs argue that evidence showing that K&S analyzed the Product Investigation file's responsiveness shows that K&S fraudulently concealed the file. *See* Pls.' Br. at 20. The documents Plaintiffs cite do not

{footnote continued}

of potentially related claims data alleging a power loss or unexplained loss of control.[148] That data included air bag non-deployment incidents that also alleged a loss of power or unexplained loss of control, and GM produced the Sprague Spreadsheet, listing then known air bag non-deployment matters.[149] Further, GM had previously produced data on more than 500 matters, including Chansuthus and Sullivan.[150] GM had also previously produced two internal reports related to Lambert.[151] These productions totally negate any allegation that GM "hid" air bag non-deployment incidents. Plaintiffs ignore these productions because they undermine Plaintiffs' baseless contention that GM and K&S intentionally withheld relevant and responsive documents.

Finally, even if GM's relevance objection had been meritless, which it was not, the crime-fraud exception is not an appropriate discovery sanction, "particularly in the absence of prior settled case law making clear to the attorney and the client that such conduct is impermissible."[152] GM *did not* conceal the reason it refused to produce certain air bag non-deployment data.[153] To the contrary, GM clearly stated its objection repeatedly in publicly filed documents signed by counsel.[154] To the extent the Melton plaintiffs disagreed, they could, and

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indicate any intention to withhold the Product Investigation file for any reason but responsiveness. *See* Pls.'s Exs. 53, GM-MDL2543-400253332 and 54, GM-MDL2543-000885044. In any event, the claimed hypothetical attempt to conceal the Product Investigation file was mooted when GM produced it.

[148] GM maintained its position that air bag non-deployment incidents that did not also allege a power loss were not relevant because the Melton plaintiffs did not allege that the air bag should have deployed.

[149] *See* Ex. H, MELTON0000037915-21.

[150] *See* Ex. F, MELTON000001708-27; *see supra* pp. 11-12.

[151] *See* Ex. G, MELTON0000013467-79.

[152] *See supra* note 126.

[153] *See* Pls.' Ex. 51, GM-MDL2543-400159389-415. GM's clear defense of its relevance objection in Melton negates any intent to conceal responsive documents. Further, as discussed above, GM produced data on air bag non-deployment incidents.

[154] *See* Pls.' Ex. 51, GM-MDL2543-400159389-415 (defending relevance objection).

did, move the Melton court to overrule GM's objection.[155] Plaintiffs, however, attempt to relitigate the merits of GM's relevance objection here, despite the fact that Plaintiffs' counsel, who also represented the Melton plaintiffs, voluntarily settled Melton in September 2013 with their motion pending. That attempt is improper.[156]

c) *GM Did Not Fraudulently Conceal Part Change Documents*.

As K&S accurately stated in response to the Melton plaintiffs' Fifth Request for Production, GM had not located any documents indicating that GM *authorized* or *requested* a change to the Cobalt's ignition switch. Plaintiffs here contend that GM knew that it had changed the ignition switch after Ray DeGiorgio's April 29, 2013 deposition.[157] That is untrue. At DeGiorgio's deposition, the Melton plaintiffs' counsel presented unauthenticated photographs suggesting that the 2005 Cobalt's ignition switch differed from the 2008 switch. Although GM and K&S were surprised by these photographs, DeGiorgio and GM continued to believe that GM had not authorized a change affecting the ignition switch's torque values.[158]

Thus, in response to the Fifth Request for Production of Documents, GM cited the testimony DeGiorgio provided *after* he had seen the photographs, stating that GM did not request, authorize, or approve a change to the switch.[159] K&S's conduct confirms that it genuinely believed the response was true.[160] First, K&S characterized the photographs presented

[155] *See* Pls.' Ex. 55, GM-MDL2543-400159278-388.
[156] *Jinks-Umstead v. England*, 232 F.R.D. 142 (D.D.C. 2005) (crime-fraud exception is not proper discovery sanction); *Peterson*, 1994 WL 1031134, at *1 ("[N]o amount of discovery abuse or nondisclosure alone would suffice to leverage the Plaintiffs' desire to unlock the attorney's confidences in this case.").
[157] *See* Pls.' Br. at 22.
[158] Ex. J, April 29, 2013 DeGiorgio Dep. at 187:5-7 (testifying that if a change was made, it was made without his authorization).
[159] Pls.' Ex. 60, GM-MDL2543-400151182; Ex. J, April 29, 2013 DeGiorgio Dep. at 187:5-7 (testifying that if a change was made, it was made without his authorization).
[160] Further, the lack of any communications between GM and K&S acknowledging that GM had indeed authorized a change to the switch undercuts Plaintiffs' allegation.

at DeGiorgio's deposition as a "bombshell."[161] If K&S and GM had been concealing the change, Melton's evidence would not have been surprising, much less a bombshell. Second, as Plaintiffs note, GM and K&S quickly hired Subbaiah Malladi to investigate the new photographic evidence.[162] If GM and K&S had already known about the change, they would not have hired Malladi to investigate it. Third, as Plaintiffs also note, GM asked for documents related to a part change from GM's supplier, Delphi.[163] Contrary to Plaintiffs' allegations, however, GM made that request in June 2013.[164] If K&S and GM had wanted to conceal the change order, asking Delphi for the order would have sabotaged their plan. Finally, K&S made clear in its July 22, 2013, evaluation letter that at that time neither GM nor K&S knew the origin of the change.[165] Thus, Plaintiffs' own evidence undercuts their argument by showing that GM's responses to the Melton plaintiffs' Fifth Request for Production were not intentionally inaccurate or fraudulent.[166]

d) ***Neither GM Nor K&S Lied About Jim Federico's Knowledge or Role.***

Finally, Plaintiffs contend that GM and K&S lied about Jim Federico's role in the ignition switch investigation to prevent his deposition.[167] Plaintiffs are wrong. In the document Plaintiffs cite,[168] K&S discusses *scheduling* Federico's deposition, not preventing it. And, in fact, the parties scheduled Federico's deposition for August 23, 2013, but the Melton plaintiffs

[161] Pls.' Ex. 59, GM-MDL2543-001049338.
[162] Pls.' Br. at 22.
[163] Pls.' Br. at 23 n.113; *see also* Pls.' Ex. 61, GM-MDL2543-000698545 at .001-.002 (K&S and GM discussing need to request part change documents from Delphi in June 2013).
[164] *See* Ex. L, GM-MDL2543-400251566-67 (June 26, 2013 request from GM to Delphi seeking part change documents).
[165] Pls.' Ex. 3, GM-MDL2543-000985320.
[166] *Jinks-Umstead*, 232 F.R.D. 142 (incorrectly asserting that documents did not exist does not trigger exception); *In re Grand Jury Subpoenas Duces Tecum*, 773 F.2d at 205-06 (failure to produce incriminating documents, without showing of intent to withhold them, does not trigger exception).
[167] Pls.' Br. at 24.
[168] Plaintiffs offer no evidence that K&S knew that its April 9, 2013, email *to GM* was inaccurate. Although Plaintiffs allege that Federico was asked to investigate the ignition switch issue, they offer no evidence that K&S's statement was untrue. Federico *did not* have responsibility for the ignition switch on the 2005 Cobalt.

settled their case shortly before that date and as a result did not take the deposition. K&S did not move to quash or otherwise prevent the deposition. To the contrary, K&S facilitated it. Plaintiffs misrepresent the facts by contending otherwise.

C. PLAINTIFFS HAVE NOT SHOWN PROBABLE CAUSE THAT K&S'S WORK-PRODUCT FURTHERED A CRIME OR FRAUD.

There is no evidence that a fraud has been committed. There is also no evidence that the documents at issue were created to further a crime or fraud.[169] Accordingly, Plaintiffs' Motion can be denied based on the second element even without deciding the first element of the test.[170]

"It does not suffice that the communications may be related to a crime. To subject the attorney-client communications to disclosure, they must actually *have been made with an intent to further an unlawful act*."[171] K&S's work-product did not further an alleged crime or fraud. Plaintiffs have no evidence that K&S's work-product even addressed the Safety Act, much less furthered a scheme to violate it.

1. *Plaintiffs Have Not Shown That Documents Related to Chansuthus, Sullivan, or Melton Furthered a Fraud.*

Here, K&S was hired to defend GM in three matters involving pending or threatened litigation. K&S's evaluation letters addressed GM's potential liability in those three matters

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[169] *Jacobs*, 117 F.3d at 88; *In re Richard Roe, Inc.*, 168 F.3d at 71 (the crime-fraud exception requires "a determination that the client communication or attorney work product in question was *itself* in furtherance of the crime or fraud and (ii) probable cause to believe that the particular communication with counsel or attorney work product was *intended* in some way to facilitate or to conceal the criminal activity."); *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d at 34 (crime/fraud exception cannot be successfully invoked merely upon showing that client communicated with counsel while the client was engaged in fraudulent activity; exception applies only when there is probable cause to believe that the communications with counsel were intended in some way to facilitate or conceal the fraudulent activity).

[170] *King Drug Co. of Florence v. Cephalon, Inc.*, No. 2:06-cv-1797, 2014 WL 80563, at *4 (E.D. Pa. Jan. 9, 2014) (declining to decide the first prong of the crime-fraud exception "[b]ecause we conclude that the second 'in furtherance' element has not been met"); *In re Chevron Corp.*, 633 F.3d 153, 166 (3d Cir. 2011) ("[E]vidence of a crime or fraud, no matter how compelling, does not by itself satisfy both elements of the crime-fraud exception . . . .").

[171] *Jacobs*, 117 F.3d at 88 (quoting *United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989)).

under applicable state product liability law, not the Safety Act.[172] K&S thus analyzed defect claims only in the context of state law.[173] K&S's advice *was not* motivated, informed, or influenced by a desire to conceal *anything*, least of all a violation of the Safety Act.[174]

Thus, K&S's work-product did not further a fraud related to the Safety Act.[175] Plaintiffs already know this. They have reviewed attorney-client communications between K&S and GM showing that K&S's advice did not relate to or further any alleged fraud related to the Safety Act or other disclosure requirement. K&S's advice furthered GM's product liability defense in three individual claims—nothing more, nothing less.[176] Plaintiffs ask the Court to conclude, contrary to the evidence they submit, that GM settled product liability cases not because it risked large

[172] *See* Pls.' Exs. 1, GM-MDL2543-000660601 (analyzing Tennessee law), 3, GM-MDL2543-000985320 (analyzing Georgia law), 13, GM-MDL2543-003455366.001 (analyzing South Carolina law), 15, GM-MDL2543-000660577 (Tennessee law), 17, GM-MDL2543-300002915 (Georgia law).

[173] K&S only analyzed defect claims because Chansuthus, Sullivan, and Melton would have to prove a defect in the particular cars they were driving as an element of their state law product liability claims. *See* Pls.' Ex. 1, GM-MDL2543-000660601 at .009 and Pls.' Ex. 15, GM-MDL2543-000660577 at .009 (under Tennessee law, manufacturer is not liable unless the product is determined to be in defective condition); Pls.' Ex. 3, GM-MDL2543-000985320 at .023 and Pls.' Ex. 17, GM-MDL2543-300002915 at .019 (discussing Georgia's risk-utility rule for determining whether product that injured plaintiff was defective), Pls.' Ex. 13, GM-MDL2543-003455366.001 at .011-.012 (under South Carolina law, establishing defect is element of product liability claim).

[174] *See Chervin*, 2011 WL 4424297, at *3 ("[C]ommunications that merely *relate* to the fraudulent scheme will not trigger the crime-fraud exception to the attorney-client privilege." (citation omitted)).

[175] *See United States v. Davis*, 131 F.R.D. 391, 407 (S.D.N.Y. 1990) ("Government has submitted no proof, save the surmise in one footnote of its reply memorandum, that General Dynamics undertook the investigations with the intent to conceal from the Government its prior alleged fraud, or that such concealment occurred."); *In re Grand Jury Proceedings in Matter of Fine*, 641 F.2d 199, 204 (5th Cir. 1981) (where client consulted with attorney to create business and then used business to purchase boat to smuggle marijuana, crime-fraud exception did not apply to legal advice without more than "strong suspicion" that advice related to forming business furthered marijuana smuggling); *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d at 33-34 .

[176] *See In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d at 34 (crime-fraud exception inapplicable where client communicated with counsel while committing illegal activity because there was no "purposeful nexus" between documents at issue and client's fraud).

jury verdicts, as K&S warned,[177] but because it hoped to conceal the existence of a defect under the Safety Act. Again, Plaintiffs' speculation is baseless.[178]

2. ***Plaintiffs Cannot Show That Documents Related to Chansuthus, Sullivan, or Melton Furthered a Fraud.***

GM *could not* have used K&S's internal documents and communications to commit or further a crime or fraud because GM never saw those documents. The only documents Plaintiffs seek from K&S related to Chansuthus, Sullivan, or Melton are purely internal work-product that were never shared with GM or any third party. Thus, even if Plaintiffs had made a *prima facie* showing that GM was engaged in a crime or fraud, which they have not, GM could not possibly have used the documents Plaintiffs seek here in furtherance of such a crime or fraud.[179]

3. ***Plaintiffs Have Not Shown That Documents Related to GM's Internal Investigation Furthered a Fraud.***

Plaintiffs offer no evidence that K&S's work-product related to GM's internal investigation, but "not associated with any particular matter,"[180] furthered a fraud. Rather, Plaintiffs simply assert that K&S "assist[ed] in New GM's responses to requests from governmental agencies, and conducted some of the witness interviews in connection with the

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[177] *See* Pls.' Ex. 1, GM-MDL2543-000660601 at .002. Pls.' Ex. 27, GM-MDL2543-000662287 at .001; Pls.' Ex. 17, GM-MDL2543-300002915 at .021; Pls.' Ex. 3, GM-MDL2543-000985320 at .026.

[178] *Parkway Gallery Furniture, Inc. v. Kittinger/Penn. House Grp., Inc.*, 116 F.R.D. 46, 53 (M.D.N.C. 1987) (citing *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32) ("A mere speculative nexus or even coincidences between different pieces of evidence does not establish a *prima facie* basis for the exception."); *Jacobs*, 117 F.3d at 88 (citation omitted) ("It does not suffice that the communications may be related to a crime. To subject the attorney-client communications to disclosure, they must actually *have been made with an intent to further an unlawful act*.").

[179] *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995) ("[T]he [crime-fraud] exception applies only when the court determines that the client communication or attorney work product in question was *itself* in furtherance of the crime or fraud."); *In re BankAmerica Corp. Sec. Litig.*, 270 F.3d at 642 ("There must be a specific showing that a particular document or communication was made in furtherance of the client's alleged crime or fraud."); *Magnetar Techs. Corp. v. Six Flags Theme Park Inc.*, 886 F. Supp. 2d 466, 488 (D. Del. 2012) (refusing to apply crime-fraud exception where movant did not show any specific documents that the client used to further a crime or fraud).

[180] Pls.' Br. at 33.

Valukas Report."[181] This work did not even begin until months after Melton settled in September 2013. The fact that K&S participated in some aspects of the investigation, however, obviously does not establish that K&S's work-product furthered a fraud.[182]

Here, GM initiated an internal investigation into the Cobalt's ignition switch. Plaintiffs, however, have "submitted no proof, save the surmise in one footnote of [their Brief], that [GM] undertook the investigations with the intent to conceal . . . its prior alleged fraud, or that such concealment occurred."[183] Without showing, or even arguing, that K&S's work-product furthered a fraud, Plaintiffs seek these documents hoping that they will reveal, for the first time, evidence of fraud during GM's internal investigation. That attempt is improper.[184]

Finally, the Court has already rejected Plaintiffs' attempt to compel production of documents related to GM's internal investigation, including documents underlying the Valukas Report.[185] Plaintiffs' attempted second bite at the apple is improper.

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[181] Pls.' Br. at 33 n.144.

[182] Also, as discussed above, Plaintiffs have not met their burden to show that GM committed a crime or fraud by concealing a defect or delaying a recall during its internal investigation. The Consent Order is not evidence of a cover-up. *See supra* at p. 25.

[183] *Davis*, 131 F.R.D. at 407 (where attorney participated in two internal investigations of client's fraud, crime-fraud exception did not apply to investigation documents because they did not further fraud); *see also In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d at 34 (crime/fraud exception cannot be successfully invoked merely upon showing that client communicated with counsel while the client was engaged in fraudulent activity; exception applies only when there is probable cause to believe that the communications with counsel were intended in some way to facilitate or conceal the fraudulent activity); *Parkway Gallery Furniture*, 116 F.R.D. at 53 (citing *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32) ("A mere speculative nexus or even coincidences between different pieces of evidence does not establish a *prima facie* basis for the exception.").

[184] *In re Richard Roe, Inc.*, 68 F.3d at 40 ("[T]he crime-fraud exception does not apply simply because privileged communications would provide an adversary with evidence of a crime or fraud."); *Sound Video Unlimited, Inc. v. Video Shack Inc.*, 661 F. Supp. 1482, 1486 (N.D. Ill. 1987); *In re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986); *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 282–83 (8th Cir. 1984).

[185] *See* Dkt. No. 86; Pls.' Br. at 25 and 33 n.144 (specifically mentioning K&S's involvement in creating documents underlying Valukas Report).

4. ***Plaintiffs Have Not Shown That Any Analysis by K&S of its Professional and Ethical Obligations Furthered a Crime or Fraud.***

Plaintiffs do not explain how any documents analyzing K&S's obligations under the rules of professional conduct—if any such documents exist—could have furthered a crime or fraud. Even if Plaintiffs could show that a crime or fraud had occurred, they are not entitled to any self-critical analysis of K&S's *past* conduct.[186] Further, K&S did not violate any rules of professional conduct.[187] Georgia Rules of Professional Conduct 1.2(d)[188] states that "[a] lawyer shall not counsel a client to engage in conduct that the lawyer *knows* is criminal or fraudulent, nor *knowingly* assist a client in such conduct, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

Here, the evidence Plaintiffs cite establishes that K&S itself did not commit a crime or fraud and did not knowingly assist GM in committing any alleged crime or fraud. K&S had no reason to think or even suspect that GM was committing any alleged crime or fraud. To the contrary, K&S met its ethical obligations by providing candid and forthright legal advice regarding GM's likely exposure in three individual product liability cases.[189] Further, to the extent any discovery responses were inaccurate or incorrect, K&S's conduct shows that K&S

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[186] *Jacobs*, 117 F.3d at 88 (stating that consulting an attorney on the legality of action is the heart of the work-product doctrine); *Sound Video Unlimited, Inc.*, 661 F. Supp. at 1486) ("[T]he attorney-client privilege remains intact when a person consults an attorney in an effort to defend against past misconduct or to get legal advice or assistance."); *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 155 (D. Del. 1977).

[187] As submitted by GM with its brief in opposition to this crime-fraud motion to compel, the declarations of renowned legal ethics experts Charles W. Wolfram and Bruce A. Green both opine that K&S attorneys did not violate the Model Rules of Professional Conduct.

[188] Although Plaintiffs reference the Model Rules, the K&S attorneys Plaintiffs mention are governed by the Georgia Rules of Professional Conduct. Thus, K&S will discuss Georgia's Rules.

[189] *See* Ga. Rule of Prof'l Conduct 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. A lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.").

was unaware of the inaccuracy. The record shows that K&S characterized the Melton plaintiffs' ignition switch component photographs as a "bombshell," immediately hired a consultant to investigate the apparent difference between the 2005 and 2008 ignition switches,[190] discussed the need to seek part change documents from Delphi hoping to discover whether and how the ignition switch was altered,[191] and still did not know the origin of any change when it submitted its final evaluation letter on July 22, 2013.[192] This conduct controverts any inference that K&S was aware of an ongoing fraud or attempted to conceal documents related to a change in the ignition switch. For those reasons, K&S did not violate Georgia's Rules of Professional Conduct.[193]

IV. CONCLUSION

For the reasons set forth above, the Court should deny Plaintiffs' Motion to Compel.

[190] Again, although K&S and GM learned from the unauthenticated photographs presented by the Melton plaintiffs during DeGiorgio's deposition that the ignition switch might have been changed, neither GM nor K&S believed that GM had authorized or requested the change.
[191] Ex. L, GM-MDL2543-400251566-67 (June 26, 2013 request seeking part change documents).
[192] Pls.' Ex. 3, GM-MDL2543-000985320.
[193] Plaintiffs also cite Model Rule 1.16(a). The corresponding Georgia Rule provides that "[e]xcept as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the Georgia Rules of Professional Conduct or other law." K&S did not violate the Georgia Rules of Professional Conduct, and Rule 1.16(a) is inapplicable.

This 10th day of July, 2015.

By: /s/
s/Tai H. Park
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2015, I electronically filed the foregoing ***King & Spalding LLP'S Response to Plaintiffs' Motion to Compel Production of Documents from New GM and King & Spalding LLP Based on the Crime-Fraud Exception*** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the registered e-mail addresses for each attorney of record.

/s/
s/Tai H. Park