UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE:

GENERAL MOTORS LLC IGNITION SWITCH LITIGATION 14-MD-2543 (JMF)

This Document Relates to All Actions

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GENERAL MOTORS LLC'S SURREPLY IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM NEW GM AND KING & SPALDING BASED ON THE CRIME-FRAUD EXCEPTION

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INTRODUCTION

Plaintiffs' reply advances factually unsupported and legally untenable theories in support of their lawyer-misconduct claims. The Court should deny Plaintiffs' motion for each of three independent reasons.

First, Plaintiffs impugn attorneys' personal reputations for defending and settling claims to minimize or avoid the risks of adverse jury verdicts. But to the extent courts apply the crime-fraud exception at all where the "very act of litigating is alleged as being in furtherance of a fraud,"[1] they require a particularized and heightened showing—limited to extreme circumstances such as bribing judges, altering contractual documents, or suborning perjury. The case evaluations and settlement recommendations here do not come close to meeting this standard.

Second, the reply and new expert opinions are predicated on the supposition that New GM's inside and outside counsel had not only solved a technical engineering question that had baffled its engineers for years, but had also concluded that there was in fact a defect within the meaning of the Safety Act. This underlying assumption has no evidentiary support and mistakenly conflates the roles of lawyers with those of engineers; it cannot meet Plaintiffs' burden to show a "factual basis" for the crime-fraud charge.[2]

Third, Plaintiffs ask the Court to adopt (and find violations of) ethical duties that are non-existent, and have never been adopted by any state or national bar association, nor recognized by any court. (*See generally* Ex. 1, Supplemental Declaration of Bruce Green)[3]

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[1] *In re Richard Roe, Inc.*, 168 F.3d 69, 71 (2d Cir. 1999) ("*Roe II*").

[2] *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997).

[3] The following conventions are used in this brief. "GM Resp." refers to New GM's Opp. to Pls. Mot. to Compel Prod. of Documents from New GM and King & Spalding Based on the Crime-Fraud Exception (Dkt. No. 1159); "K&S Resp." refers to King & Spalding LLP's Response to Pls. Mot. to Compel Production of Documents from New GM and K&S Based on the Crime-Fraud Exception (Dkt. No. 1160); "Reply Br." refers to the Reply Mem. of Law in Supp. of Pls. Mot. to Compel Prod. of Documents From New GM and King & Spalding Based on the Crime-

ARGUMENT AND AUTHORITIES

I. Plaintiffs Have Not Made The Special Probable Cause Showing Required Here.

As amplified in their reply brief, the crux of Plaintiffs' motion is that by defending and/or confidentially settling product liability claims, New GM improperly used its lawyers to further a crime or commit a fraud. Plaintiffs' reply, however, does not meaningfully address binding Second Circuit precedent holding that where—as here—"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." *In re Richard Roe, Inc.*, 168 F.3d 69, 71 (2d Cir. 1999) ("*Roe II*"). Plaintiffs have failed to comport with binding Second Circuit authority and have done nothing more than offer baseless arguments in an effort to circumvent *Roe II* and its progeny.

First, Plaintiffs seek to dilute the "in furtherance" requirement by focusing on aspects of a handful of cases referencing the "reasonably related" standard in the crime-fraud context. (*See* Reply Br. 21) But Plaintiffs' reliance on *United States v. Ceglia*, 2015 WL 1499194 (S.D.N.Y. Mar. 3, 2015), only underscores that "***a special prima facie*** showing is required" where litigation acts are alleged as furthering a crime or fraud. *Id.* at *3 (emphasis added).[4] "Under those circumstances, … the party invoking the crime-fraud exception must make a prima facie showing of 'probable cause that the litigation or an aspect thereof had little or no legal or factual

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Fraud Exception (Dkt. No. 1256); "Hazard Decl." refers to the Aug. 12, 2015 Declaration of Geoffrey C. Hazard, Jr. (Dkt. No. 1257-1); "Zitrin Decl." refers to the August 13, 2015 Declaration of Richard Zitrin (Dkt. No. 1257-2).

[4] Moreover, Plaintiffs' cited cases employ the "reasonably related" analysis only after the Court had already made a finding that the crime-fraud showing had been met. *See Ceglia*, 2015 WL 1499194, at *3; *Amusement Indus., Inc. v. Stern*, 293 F.R.D. 420, 427 (S.D.N.Y. 2013). To the extent the cases reference the reasonably related standard in the context of the initial crime-fraud inquiry, they do so in reliance on *In re Bairnco Corp Sec. Litig.*, 148 F.R.D. 91, 101 (S.D.N.Y. 1993)—a case that predates *Roe*. *See In re Enron Corp.*, 349 B. R. 115, 127 (Bankr. S.D.N.Y. 2006); *Zimmerman v. Poly Prep Country Day School*, 2012 WL 2049493, at *7 (E.D.N.Y. June 6, 2012).

basis and was carried on substantially for the purpose of furthering the crime or fraud.'" *Id.* (quoting *Roe II*, 168 F.3d at 71). If that prima facie showing is satisfied, then "in the context of allegedly fraudulent litigation, a particular document or communication is in fact in furtherance of the alleged fraud if it: (1) is created in furtherance of the litigant's fraudulent purpose, even if the person who creates it did not know the purpose was fraudulent, and (2) reasonably relates to the fraudulent portion of the litigation." *See id.* at *4.

In *Ceglia*, in contrast to the allegations here, the ***litigation itself was the alleged fraud***. Defendant "Ceglia allegedly altered the StreetFax Contract" with Facebook's Mark Zuckerberg "to make it appear that Zuckerberg had agreed to provide Ceglia with at least a 50 percent ownership interest in Facebook" and "then filed a civil lawsuit against Facebook and Zuckerberg to assert this purported ownership interest." *Id.* at *1. Here, there is no evidence that New GM or its lawyers defended or settled claims for the purpose of committing a crime or fraud, much less that New GM fabricated evidence as in *Ceglia*. Plaintiffs have not come close to showing that the purpose of the defense and settlements was anything other than avoiding or minimizing potential adverse verdicts. (*See* GM Resp. 12-14; K&S Resp. 24-25) Attorney communications or work product created for the purposes of "soliciting advice about how (lawfully) to proceed in court" or "how to litigate" "are not part of any criminal or fraudulent course of conduct." *See DRFP, LLC v. Republica Bolivariana de Venezuela*, 2015 WL 5026223 at *2 (S.D. Ohio Aug. 26, 2015) (*See also* GM Resp. 13-14).

Second, Plaintiffs make arguments about the meaning of King & Spalding's July 22, 2013 *Melton* case evaluation letter, claiming that New GM settled cases "for the express purpose of preventing evidence of the defect" "from being exposed." (Reply Br. 5-6) But that letter says

no such thing.[5] It instead addresses an ongoing investigation into potential causes of airbag non-deployments that K&S attorneys opine "ties nicely into ***plaintiff's expected theme*** that the original Information Service Bulletin was an inadequate 'band-aid fix' for a significant safety issue that should have been addressed through a recall and design change."[6] The K&S attorneys were not stating their own views, but instead predicting plaintiff's strategy.

In short, the challenged materials simply are not close to the extreme type of litigation conduct—such as bribing officials, fabricating contracts or notes, or suborning perjury—that courts in this Circuit and elsewhere have found to fall within the narrow crime fraud exception. *See DRFP, LLC v. Republica Bolivariana de Venezuela*, 2015 WL 5026223 at *2 (S.D. Ohio Aug. 26, 2015); *Chevron Corp. v. Donziger*, 2013 WL 1087236 (S.D.N.Y. Mar. 15, 2013) (bribery of judge); *Ceglia*, 2015 WL 1499194 (filing lawsuit based on falsified contract).[7]

II. Plaintiffs' Reply Is Premised On Both Unsupported And Incorrect Assumptions.

The foundation for Plaintiffs' reply is the assertion that New GM's counsel could and did in fact determine that there was an ignition switch safety defect under NHTSA standards long before New GM engineers had done so. This assertion defies common sense and is unsupported and incompatible with unrebutted deposition testimony that Plaintiffs have themselves elicited.[8]

Engineers, Not Litigators, Make Safety-Defect Determinations. Plaintiffs attempt to transform litigators into engineers—incorrectly assuming that non-engineer lawyers were able to

[5] *Cf. Johnson v. Sea-Land Serv., Inc.*, 2001 WL 897185 at *4 (S.DN.Y. Aug. 9, 2001) ("Plaintiff's inarticulate and ambiguous characterization of what his doctor might be prepared to say or conclude, without any evidence that his doctor actually did make an intentional misrepresentation as to his physical condition in an attempt to mislead defendant, does not demonstrate probable cause to believe that a fraud occurred or was attempted.").

[6] Pls. Ex. 3, 7/22/13 P. Holladay Letter GM-MDL2543-000985320.003 (emphasis added).

[7] To the extent Plaintiffs suggest that Ray DeGiorgio's signed deposition errata in *Melton* was part of an effort to "hid[e] evidence of the ignition switch part change," (Reply Br. 26-27), they have not alleged (let alone identified identified any evidence) that New GM participated in or even knew about any instructions to DeGiorgio regarding the errata sheet.

[8] Plaintiffs' reliance on the Valukas Report is improper. The Report is not admissible evidence.

and did in fact make the engineering decisions necessary to determine whether or not there was a defect. Their assumption misapprehends the attorneys' expertise, roles, and authority within New GM. Indeed, to the extent Plaintiffs chose to elicit testimony on this score from any of the dozens of deponents who have testified to date—including at least seven current or former New GM attorneys—such testimony has conclusively demonstrated that engineers, not lawyers, must undertake complex analyses to determine if a safety defect exists across a class of vehicles.[9] As the recently-retired former General Counsel of New GM testified, it is the engineering organization's "decision to make as to whether or not there is a defect," and "whether that defect is such that it would require a recall. That's an engineering decision."[10]

New GM Lawyers Did Not Conceal A "Known" Safety Defect. Plaintiffs' contention that New GM lawyers "knew years before the February 2014 recall that the ignition switch defect existed in model year 2005-07 Cobalts," (Reply Br. 2; Hazard Decl. ¶14(c)), is also based on speculation, mischaracterizes the record, and ignores sworn testimony to the contrary.[11]

First, former New GM lawyers have testified that there was not a known ignition switch safety defect years before 2014. Plaintiffs' reply continues to conflate references to a sensing

[9] If lawyers learned information they believed was relevant to a potential safety issue of which the engineers were not aware, they would take steps to ensure that such information was provided to the engineering group. *See* Ex. 2, Kemp. Dep. 45-46, 48.

[10] Ex. 3, Millikin Dep. at 35, 42; Ex. 2, Kemp. Dep. 197 (Lawyers within GM or GM's outside counsel did not have the responsibility to determine whether there was a safety defect in a vehicle or to recommend a recall.); Ex. 4, Palmer Dep. 69 ("defect determinations were not made by the litigation group"); Ex. 5, Buonomo Dep. 84 (The litigation group "did not make determinations or report defects" "within the meaning of recall responsibilities"); Ex. 6, Nowak-Vanderhoef Dep. 219 (While "the lawyers may provide advice to that group," "it is the EFADC members, not including the lawyer, who make the recall decisions, again, and they make the decision based on the information that is presented by the engineers about the defect.").

[11] Plaintiffs' continued reliance on Judge Gerber's findings in his decision on New GM's Motion to Enforce violates the Bankruptcy Court's express directive order that such findings "shall have no force or applicability in any other legal proceeding or matter, including without limitation, MDL 2543. *In re Motors Liquidation Co*., 09-50026 (REG), Dkt. No. 13177 (Bankr. S.D.N.Y. June 1, 2015) ("Bankr. Dkt.") (*See*, *e.g.,* Reply Br. 4 n.12; 6 n. 22; Hazard Decl. ¶ 14(c)) Moreover, New GM is appealing the findings on this issue because they are based on the erroneous understanding that New GM had "stipulated that at least 24 Old GM personnel … were informed or otherwise aware of the Ignition Switch Defect prior to the Sale Motion," and knew that the vehicles should be recalled. Bankr. Dkt. No. 13109 at 32-33 & n.60. New GM did not so stipulate.

anomaly that was one hypothesis for certain airbag non-deployment events with what is now known as the ignition-switch defect. (*See* Reply Br. 6-7; Hazard Decl. ¶¶ 14(c)-(n)) Jaclyn Palmer—the New GM in-house lawyer in charge of the *Chansuthus* and *Sullivan* matters—explained that this posited sensing anomaly was related to an electronic "contact bounce" theory, which was a totally different theory than the "ignition switch physically turning."[12] And after ignition torque was proposed as an alternative explanation in 2012, Ms. Palmer explained that the torque issue was merely considered one "possibility," not "a definitive reason," for the airbag non-deployments.[13] Ultimately, the New GM engineers—not New GM's counsel—had to figure out the answer to this engineering problem.

Second, Plaintiffs continue to argue—improperly—that outside counsels' references to jury findings of "defect" under state tort law or warnings of potential punitive damages awards are synonymous with a conclusion that a vehicle is defective for purposes of the Safety Act. (*E.g.*, Reply Br. 9, 14-18) The unrebutted testimony of multiple deponents establishes that neither King & Spalding's nor other outside counsel's discussion of "defect" was understood as a finding that the vehicles "were defective in the sense that they should have been recalled."[14] Such references instead reflected outside counsel's "advice on what he thinks the jury will

[12] Ex. 4, Palmer Dep. 165-66; Ex. 2, Kemp. Dep. 196-97 (By the time engineer Terry Woychowski got involved in 2012, neither Kemp nor anyone at GM had made the determination airbag non-deployments were caused by the ignition switch rotating out of the "run" position); Ex. 5, Buonomo Dep. 57 ("We never had a case that we identified as an 'ignition switch case' until after the recall").

[13] Ex. 4, Palmer Dep. 82-83; *see also id*. ("[T]he engineers that were looking at this issue couldn't understand why, if this technical service bulletin was the reason, and it was a low torque issue, they couldn't understand why they were not seeing the same thing in 2008 model year and later Cobalts because their understanding at this time was that the ignition switches would have been identical in terms of torque."); Ex. 5, Buonomo Dep. at 110 (In 2012, he did not reach the conclusion that the vehicles were defective); Ex. 2, Kemp Dep. 124 ("In August of 2013, General Motors had not made a determination that there existed a defect relating to motor vehicle safety").

[14] Ex. 5, Buonomo Dep. 85 ("I never received a report from outside counsel stating the vehicles were defective in the sense that they should be recalled. I received reports about likely outcomes in litigation under whatever state law may have been applied to a given case, but those are different things").

find"[15] under state law claims in certain states. In the same manner, these deponents soundly reject the contention that a "warning" of punitive damages constituted notice of a safety defect.[16] Outside counsel's opinions that a jury may conclude that evidence supports punitive damages does not mean that intentional misconduct had in fact taken place. *Cf. Doe v. United States*, 2015 WL 4077440 at *9 (S.D. Fla. July 6, 2015) (that government had "collected information about possible improper behavior" with respect to civil rights violations did not make *prima facie* showing of crime-fraud, observing that "[a]n investigation into wrongdoing does not presuppose that wrongdoing took place").

III. The Challenged Litigation Activities Did Not Violate Professional Ethics Rules.

Confidential Settlements Are Not Ethical Breaches. Plaintiffs' expert Zitrin opines (based entirely on speculation) that "[t]he only purpose" for agreeing to confidential settlements was "to further New GM's concealment of the defect from both NHTSA and New GM's own consumers and dealers." (Zitrin Decl. ¶ 23) But this *ipse dixit* "reasoning" and opinion are belied by prior statements of both Zitrin and Plaintiffs' other expert, Geoffrey Hazard. Even Zitrin—an outspoken critic of confidential settlements generally[17]—has recognized that "[t]here are many lawyers, plaintiffs' and defense counsel alike, who simply believe that secrecy is

[15] Ex. 2, Kemp Dep. 118. *See also* Ex. 4, Palmer Dep. 68 ("A letter from an outside counsel, an evaluation from an outside counsel does not constitute a determination of defect").

[16] *See, e.g.,* Ex. 2, Kemp Dep. 177-78 (disagreeing that "if something is labeled with evidence that would support punitive damages," that that was a "warning to the GM Legal Staff and to the engineers that they should look very deeply into doing a recall"); *id.* at 199 (It "almost seemed like malpractice for a plaintiffs' lawyer not to include a claim for punitive damages in states where they were allowed").

[17] Zitrin had previously proposed that the ABA adopt a rule prohibiting lawyers from participating in confidential settlements when the public safety is involved. The commission (which included Hazard as a member) rejected his proposal, "unanimously agree[ing] that the ethics rules were not the vehicle for solving this problem." See Minutes, Com'n on Eval. of the Rules of Prof. Conduct (Feb. 16-17, 2001), available at http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_02_16mtg.html.

necessary to the way civil litigation is practiced in this country."[18] And Hazard has likewise cited "the universal principle that confidentiality should be observed" with regard to settlement communications.[19]

Nor does the fact that certain settlements were entered into prior to discovery evidence a knowing assistance in a crime or fraud. (*See* Zitrin Decl. ¶ 18) Under this bizarre theory, defense lawyers would ethically be required to force plaintiffs to expend time and money in discovery before paying those same plaintiffs to resolve their claims. Likewise no case could ethically be settled until comprehensive discovery had been concluded. There is of course no such ethical duty.

In sum, regardless of Zitrin's *sui generis* and personal objections to confidential settlements,[20] those policy views cannot be used to create a previously non-existent ethical duty and then become the basis for Plaintiffs' claims of ethics violation here.

There Was No Duty To Inform Consumers About Litigation Materials. Plaintiffs argue that lawyers had a duty to report litigation information to NHTSA and to consumers. This argument is wrong both as a matter of fact and law. As discussed above, the expert opinions proffered in support of the claimed ethics violations are premised on incorrect and speculative assumptions that New GM attorneys could and did determine that there was an ignition switch defect within the meaning of the Safety Act. New GM attorneys have testified that they did not know there was such a defect, let alone that New GM was violating any law by failing to report

[18] *See* Richard A. Zitrin, "The Case Against Secret Settlements (or, What You Don't Know Can Hurt You)," 2 J. Inst. for Study Legal Ethics 115, 117 (1999). *See also id.* at 117-18 ("Others . . . consider the courts to be places which serve 'private parties bringing a private dispute.' 'Litigants do not give up their privacy rights simply because they have walked, voluntarily or involuntarily, through the courthouse door'").

[19] G. Hazard et al, "Rules of Transnational Civil Procedure," 33 N.Y.U.J. Int'l L. & Pol. 793, 839 (Spring 2001).

[20] Indeed, Zitrin not only finds that confidential settlements violated ethical duties, but also that entering into court-approved protective orders maintaining the confidentiality of documents produced in discovery furthered crimes or frauds. (Zitrin Decl. ¶¶ 22, 24) Zitrin provides no citation for this conclusion, which taken its logical conclusion, would indict the parties, the Court itself, and the similar agreements in this MDL. *See*, e.g., Order No. 10.

such a defect to NHTSA.[21] As Professor Bruce Green explains in his supplemental declaration, absent actual knowledge on the part of the attorney, the ethics claims fail. *See* Ex. 1, Green Supp. Decl. ¶¶ 3-5, *also* Rule 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer ***knows*** is criminal or fraudulent."). The Court should thus reject those opinions at the outset because they are not based on "good grounds" and cannot satisfy Plaintiffs' burden here.[22]

Second, Plaintiffs' contention that attorneys had a duty to disclose confidential information gleaned in discovery or inform consumers about product liability settlements is pure fantasy. There is no suggestion that the attorneys advised New GM about any statements to consumers—let alone that they advised New GM to make statements that were fraudulent. (*See* Ex. 1, Green Supp. Decl. ¶¶ 6-9)

[21] *See, e.g.,* Ex. 4, Palmer Dep. 110 ("Q. … when you were with General Motors, you never believed that there was any violation of any regulation or law? A. I did not.").

[22] *Cf. Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 269 (2d Cir. 2002) (excluding opinion that "rested on a faulty assumption"). Plaintiffs' decision to provide the experts only hand-picked documents, as opposed to deposition testimony that would place such documents in context, further undermines the relevance or persuasiveness of those opinions. *See Berk v. St. Vincent's Hosp. & Med. Ctr.*, 380 F. Supp. 2d 334, 353 (S.D.N.Y. 2005) (excluding plaintiff's expert who admitted "he had never seen or reviewed [plaintiff's] deposition testimony, or the testimony of other parties and witnesses in this case before developing his expert opinion," but instead premised his report "on the hybrid view of the facts put forward by [plaintiff] for purposes of summary judgment").

CONCLUSION

If necessary to put an end to Plaintiffs' baseless claim, New GM remains willing—as it said in its Opening Brief—to provide materials for *in camera* review by the Court,[23] but not on the basis of Plaintiffs' motion. Plaintiffs have failed to show that New GM used its lawyers to further a crime or fraud—or even that New GM inside or outside counsel violated ethics rules. Accordingly, New GM requests the Court deny Plaintiffs' motion in its entirety.

Dated: September 4, 2015

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

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[23] Plaintiffs' seeming attempt to scale back their sweeping requests for *in camera* review (*see* Reply Br. 32) would not reduce the unduly time-consuming and extraordinary efforts necessary to search for and make judgments as to which documents fall within Plaintiffs' various categories, which are themselves premised on incorrect notions regarding, among other things, when defect determinations were made and the roles and responsibilities of New GM outside and in-house attorneys.

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2015, I electronically filed the foregoing Brief using the CM/ECF system which will serve notification of such filing to the email of all counsel of record in this action.

By: /s/ *Andrew Bloomer*
Andrew B. Bloomer, P.C.