December 5, 2016

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

Re: ***In re: Gen. Motors LLC Ignition Switch Litig.***, 14-MD-2543; 14-MC-2543

Dear Judge Furman:

Plaintiffs seek the Court's assistance in compelling New GM to respond to a single request for production contained in Plaintiffs' Eighth Set of Consolidated Requests for Production of Documents [Regarding Successor Liability]. The parties have conferred and disagree as to whether New GM should be compelled to produce documents in response to RFP No. 10, which seeks documents sufficient to identify the Old GM and New GM stock holdings for 59 specifically named senior officers, managers, and engineers with knowledge of the Delta ignition switch defect.[1]

Under Rule 26(b)(1), Plaintiffs are entitled to discovery pertaining to "'any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case,' whether or not admissible in evidence. The requesting party 'bears the initial burden of demonstrating any possibility of relevance sufficient to warrant discovery,' but 'once that showing is made, the party resisting discovery bears the burden of demonstrating that . . . the requests are irrelevant, or are overly broad, burdensome, or oppressive.'" *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2016 U.S. Dist. LEXIS 158455, at *10 (S.D.N.Y. Nov. 16, 2016) (quoting *Royal Park Invs. SA/NV v. Deutsche Bank Nat'l Trust Co.*, 2016 U.S. Dist. LEXIS 120131, at *21-22 (S.D.N.Y. Aug. 31, 2016)).

RFP No. 10 seeks relevant evidence that is proportional to the needs of the case. New GM should be compelled to provide responsive documents.

A. The Information Sought Is Relevant

"Although not unlimited, relevance, for purposes of discovery, is an extremely broad concept." *Alaska Elec. Pension Fund*, 2016 U.S. Dist. LEXIS 158455, at *10-11. The relevancy "standard presents a 'relatively low threshold' for a party to show that the material sought is relevant to any claim or defense in the litigation." *Royal Park Invs.*, 2016 U.S. Dist. LEXIS 120131, at *22 (quoting *John Wiley & Sons, Inc. v. Book Dog Books, LLC*, 298 F.R.D. 184, 186 (S.D.N.Y. 2014)). "[W]here relevance is in doubt, the district court should be permissive." *Id.* (quoting *In re Fosamax Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 44323, 2008 WL 2345877, at *8 (S.D.N.Y. June 5, 2008)). Relevancy is easily demonstrated here, where Plaintiffs' claims and New GM's defenses have directly put into issue the stock ownership information that Plaintiffs seek.

[1] The full text of Request for Production No. 10 is reproduced at Exhibit A.

In addition to forcing New GM to account for its own actions, Plaintiffs seek to hold New GM liable for Old GM's misconduct by relying on continuity doctrines that ask whether "it was the intent of the successor to absorb and continue the operation of the predecessor." *Nettis v. Levitt*, 241 F.3d 186,194 (2d Cir. 2001) (New York law). With slight variation, most of the states flexibly consider a number of factors, including continuity of ownership. *Id.*[2] The Old GM and New GM stock holdings of key personnel are relevant because Plaintiffs intend to demonstrate continuity of ownership given that, among other things, many of the principals at New GM held stock in *both* Old and New GM. *See, e.g.*, *Roman v. Western Mfg.*, 2013 U.S. Dist. LEXIS 145158, at *30-37 (W.D. La. Oct. 4, 2013) (granting motion to compel discovery into, among other things, corporate ownership for purposes of establishing jurisdiction under successor liability theory in California). While New GM appears to read the continuity requirement narrowly (and only look at ownership on the day of the Sale), the case law is to the contrary. *See, e.g.*, *Fizzano Bros. Concrete Prods. v. XLN, Inc.*, 42 A.3d 951, 968 (Pa. 2012) (considering continuity and holding that "transactional realities sometimes require a scrutiny that extends the focus beyond the confines of the immediate consequences of the proximal asset purchase agreement.").

New GM's partial summary judgment on the issue of successor liability also highlights the relevancy of corporate shareholder information. *See* Dkt. No. 3520. New GM acknowledges that a "continuation" exception to a successor liability bar applies in the majority of jurisdictions, *id.* at 33, but expends six pages of briefing contending that successor liability fails because, among other things, it maintains that "there was no continuity of shareholders between Old GM and New GM." *Id.* at 53-59. Plaintiffs need discovery into that precise issue in order to rebut the motion. Indeed, if the discovery is not provided, Plaintiffs will be forced to invoke Rule 56(d) and request that the Court defer consideration of the motion. *See, e.g.*, *Laborers' Local #231 v. Rupe Contr., Inc.*, 2014 U.S. Dist. LEXIS 13935 (C.D. Ill. Feb. 5, 2014) (staying summary judgment motion pending completion of discovery into successor liability issues).

New GM may challenge relevancy based on the assertion that "continuation" cannot be demonstrated under the laws of any state because Plaintiffs must *also* show that the Sale actually harmed or was intended to harm creditors of Old GM or that the Sale was not an arm's-length transaction involving fair consideration. *See* Dkt. No. 3520 at 1, 44. But this is untrue in all or nearly all of the relevant jurisdictions.[3] In any event, that is *not* for the Court to decide on *this* motion. At this point, it is enough for Plaintiffs to demonstrate, as they have, that the information

[2] Commonality of shareholders is a factor in almost all of the relevant jurisdictions (albeit usually non-dispositive). *See also, e.g.*, *Sodexo Operations, LLC v. Not-for-Profit Hosp. Corp.*, 930 F. Supp. 2d 234, 238 (D.D.C. 2013) (District of Columbia); *Amjad Munim, M.D., P.A. Corp. v. Azar*, 648 So. 2d 145, 153-54 (Fla. Ct. App. 1994) (Florida); *Nilsson v. Cont'l Mach. Mfg. Co.*, 621 N.E.2d 1032, 1034 (Ill. Ct. App. 1993) (Illinois); *JD Fields & Co., Inc. v. Nottingham Constr. Co.*, 184 So. 3d 99, 103 (La. Ct. App. 2015) (Louisiana); *Martin v. TWP Enters. Inc.*, 132 A.3d 361, 377 (Md. Ct. Sp. App. 2016) (Maryland); *Milliken v. Duro Textiles, LLC*, 451 Mass. 547, 559 (2008) (Massachusetts); *First Presbyterian Church of Ypsilanti v. H.A. Howell Pipe Organs, Inc.*, 2010 WL 419972, at *7 (E.D. Mich. Feb. 1, 2010) (Michigan); *Roper Elec. Co. v. Quality Casings, Inc.*, 60 S.W.3d 708, 712-13 (Mo. Ct. App. 2001) (Missouri); *Thomas v. New England Firearms Co., Inc.*, 1994 WL 562010, *1 (10th Cir. 1994) (Oklahoma); *Cont'l Ins. Co. v. Schneider, Inc.*, 810 A.2d 127, 134-35 (Pa. 2002) (Pennsylvania), *aff'd*, 873 A.2d 1286 (Pa. 2005); *Harris v. T.I., Inc.*, 413 S.E.2d 605, 610 (Va. 1992) (Virginia); *Western States Envel. Co. v. Midwest Envels. I, Inc.*, 2013 WL 5539416, at *5 (E.D. Wisc. Oct. 8, 2013) (Wisconsin).

[3] The additional inquiry that New GM demands is relevant only under a fraud doctrine in which a successor may have liability for predecessor actions when the sale transaction was entered into fraudulently to escape tort obligations, *see, e.g.*, *Schumacher v. Richards Shear Co.*, 451 N.E.2d 195, 1988 (1983), which Plaintiffs do not allege here.

sought meets the "low threshold" for relevancy. The burden now shifts to New GM, which cannot demonstrate irrelevancy given the defenses that it has raised in its partial summary judgment motion.

B. Proportionality: The Documents Are Not Unduly Burdensome to Identify and Produce

The burden is also on New GM to demonstrate, by submitting affidavits or evidence, that the discovery should be precluded on the basis of undue burden. *John Wiley & Sons, Inc. v. Book Dog Books, LLC*, 298 F.R.D. 184, 186 (S.D.N.Y. 2014). New GM is unable to show that producing the requested information is burdensome or oppressive. *Alaska Elec. Pension Fund*, 2016 U.S. Dist. LEXIS 158455, at *10.

Notably, RFP No. 10 does not request documents sufficient to identify *each and every* shareholder of Old GM and New GM. Instead, it is targeted to just 59 key executives, managers, and engineers at three discrete points in time: (i) June 1, 2009 (just prior to the Sale); (ii) July 10, 2009 (just after the Sale); and (c) August 10, 2010 (a date chosen by Plaintiffs to test whether the 59 Old GM personnel still owned New GM stock a little more than a year after the Sale). This information should be easy for New GM to locate and produce, as it likely has multiple yet centralized sources of shareholder information. For instance, Securities Exchange Commission rules require public companies such as Old GM and New GM to track purchases and sales of Company stock by certain insiders.[4] In addition, both Old GM and New GM ran a Savings-Stock Purchase Plan that would have tracked participant's purchases (and Company matches) of Old GM and New GM stock, respectively.[5]

New GM should be required to conduct a reasonable search for documents reflecting the requested stock holdings of the 59 designated employees.

[4] Companies are required to file Forms 13D and 13G for disclosure of outside beneficial ownership, and Forms 3, 4 and 5 for disclosure of insider beneficial ownership. Therefore, the Companies are required to collect stock transaction information from their employees. We should note that Plaintiffs are unable to obtain the information that they need from just these forms, because the forms do not show ownership at the three relevant points in time. Further, only insiders with more than 10% of the voting power file Forms 3, 4 or 5, and only outsiders owning more than 5% file schedule 13D or its amendment form 13F. *E.g.*, http://www.investopedia.com/articles/stocks/05/042605.asp.

[5] General Motors Company Form 10-K (Dec. 31, 2009), page 193, found at https://www.sec.gov/Archives/edgar/data/1467858/000119312510078119/d10k.htm, states: "The Savings-Stock Purchase Plan (S-SPP) is a defined contribution retirement savings plan for eligible U.S. salaried employees. The S-SPP provides discretionary matching contributions up to certain predefined limits based upon eligible base salary. The matching contribution for the S-SPP was suspended by Old GM in November 2008 and reinstated by us in October 2009. A benefit contribution equal to 1.0% of eligible base salary for U.S. salaried employees with a service commencement date in or after January 1993 was discontinued effective in January 2010. A retirement contribution to the S-SPP equal to 4.0% of eligible base salary is provided for eligible U.S. salaried employees with a service commencement date in or after January 2001. Contributions are also made to certain non-U.S. defined contribution plans. There is also an unfunded nonqualified defined contribution savings plan covering certain U.S. executives that is based on contributions in excess of qualified plan limits."

Respectfully,

/s/ Steve W. Berman
Steve W. Berman
Hagens Berman Sobol Shapiro LLP
1918 Eighth Ave.
Suite 3300
Seattle, WA 98101

-and-

555 Fifth Avenue
Suite 1700
New York, NY 10017

/s/ Elizabeth J. Cabraser
Elizabeth J. Cabraser
Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street
29th Floor
San Francisco, CA 94111-3339

-and-

250 Hudson Street
8th Floor
New York, NY 10013-1413

/s/ Bob Hilliard
Bob Hilliard
Hilliard Muñoz Gonzales L.L.P.
719 S Shoreline Blvd
Suite #500
Corpus Christi, TX 78401

cc: The Honorable Martin Glenn
MDL Counsel of Record

EXHIBIT A

REQUEST FOR PRODUCTION NO. 10:

Produce all documents sufficient to identify the precise number of shares owned by each of the following individuals of (1) Old GM stock; and (2) New GM stock as of (a) June 1, 2009; (b) July 10, 2009; and (c) August 10, 2010:

a. Errol B. David, Jr.

b. Stephen J. Girsky

c. Frederick A. Henderson

d. E. Neville Isdell

e. Kent Kresa

f. Philip A. Lasawy

g. Robert Lutz

h. Thomas G. Stephens

i. Ray G. Young

j. David N. Reilly

k. Walter G. Borst

l. Nicholas S. Cyprus

m. Mark R. LaNeve

n. Timothy E. Lee

o. Michael P. Millikin

p. John F. Smith

q. Robert E. Socia

r. Marry Barra

s. Ray DeGiorgio

t. Carmen Benavides

u. Alan Adler

v. Gary Altman

w. Eric Buddrius

x. Jim Federico

y. John Calabrese

z. Alicia Boler-Davis

aa. William K. Chase

bb. James Churchwell

cc. Dwayne Davidson

dd. John Dolan

ee. Brian Everest

ff. William Hohnstadt

gg. Michael Robinson

hh. Gary Kent

ii. Elizabeth Kiihr

jj. Alberto Manzor

kk. Kathy Anderson

ll. Doug Parks

mm. Steven Oakley

nn. Manuel Peace

oo. Keith Schultz

pp. John Sprague

qq. Lisa Stacey

rr. David Trush

ss. Douglas Wachtel

tt. Douglas Brown

uu. Michael Gruskin

vv. Jaclyn C. Palmer

ww. William Kemp

xx. Laura Andres

yy. Victor Hakim

zz. Lori Queen

aaa. Matthew Schroeder

bbb. James Sewell

ccc. Lawrence Buonomo

ddd. Ron Porter

eee. Jennifer Sevigny

fff. Maureen Foley-Gardner

ggg. Brian Stouffer