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December 23, 2015

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

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

Dear Judge Furman:

New GM submits this letter brief in support of its application to defer the appeals filed by the Ignition Switch Plaintiffs [Bankr. Docket No. 13567] and Post-Closing Ignition Switch Accident Plaintiffs [Bankr. Docket No. 13572] of the Bankruptcy Court's *Decision on Imputation, Punitive Damages, and Other No-Strike and No-Dismissal Pleadings Issues*, dated November 9, 2015 [Bankr. Docket No. 13533] ("November Decision"), and resulting Judgment, dated December 4, 2015 [Bankr. Docket No. 13563] ("December Judgment").¹ New GM requests that plaintiffs' appeals be deferred pending the Second Circuit's ruling on the direct appeal of the Four Threshold Issues decided by the Bankruptcy Court in its April 15, 2015 *Decision on Motion to Enforce Sale Order* [Bankr. Docket No. 13109] ("April Decision") and the corresponding Judgment, dated June 1, 2015 [Bankr. Docket No. 13177] ("June Judgment").

In the November Decision/December Judgment, the Bankruptcy Court held, among other things, that an Old GM vehicle plaintiff with an ignition switch defect ("IS Plaintiffs") may assert a claim for punitive damages against New GM (as a non-manufacturer of the vehicle) if the plaintiff has a viable claim under non-bankruptcy law that is based solely on New GM's own, independent, post-Closing conduct (*i.e.*, an "Independent Claim").² *Id.* ¶¶ 7, 10, 12. The

¹ The Ignition Switch Plaintiffs filed their appeal of the December Judgment on December 15, 2015 and the Post-Closing Ignition Switch Accident Plaintiffs filed their appeal on December 18, 2015. In the ordinary course, these appeals are not expected to reach the District Court for several weeks. This submission assumes that these appeals will be assigned to this Court as being related to MDL 2543.

² In the June Judgment, the Bankruptcy Court expressly limited the right to assert "Independent Claims" to "IS Plaintiffs" (*i.e.*, plaintiffs asserting claims based on vehicles included in New GM's February and March 2014 recalls, including the Chevrolet Cobalt and Saturn Ion). *See* June Judgment, ¶ 4. Judge Gerber reaffirmed in

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Bankruptcy Court did not opine whether such Independent Claims were viable, and left it for determination by the non-bankruptcy courts.

A key element of the Bankruptcy Court's November Decision/December Judgment is that IS Plaintiffs can assert Independent Claims and seek punitive damages relating to such claims. In the April Decision/June Judgment, as part of addressing a purported due process violation relating to notice of the Sale Motion, Judge Gerber amended the final and non-appealable Sale Order to permit IS Plaintiffs to assert Independent Claims against New GM. June Judgment, ¶ 4. If not for this amendment, IS Plaintiffs would be barred from asserting so-called Independent Claims (including punitive damages) against New GM with respect to Old GM vehicles. New GM has appealed the Bankruptcy Court's due process finding, and the remedy which permitted the assertion of any Independent Claims against it, directly to the Second Circuit.

Thus, the appeal of the April Decision/June Judgment to the Second Circuit and the appeal of the November Decision/December Judgment to this Court are inextricably intertwined. This is not surprising since, in many respects, the December Judgment is the second phase of the extent to which plaintiffs' recall-related litigation violates the Bankruptcy Court's Sale Order, with the first phase being the June Judgment. In particular, the concept of Independent Claims (which was created by the April Decision/June Judgment, and is being challenged on appeal in the Second Circuit), is at the heart of most of the issues resolved in the November Decision/December Judgment.³ The Second Circuit's decision on the parties' dispute with respect to the ability of plaintiffs to assert Independent Claims (and, as a result, punitive damages) against New GM, will bear directly on any resolution of the appeal of the November Decision/December Judgment by this Court. Put another way, either the Second Circuit will conclude that there was a due process violation against the IS Plaintiffs and that the Sale Order

the December Judgment that all other plaintiffs could not assert Independent Claims. *See* December Judgment, ¶ 14.

³ *See, e.g.*, December Judgment, ¶ 4 ("With respect to Independent Claims, knowledge of Old GM may be imputed to New GM, if permitted by nonbankruptcy law, to the extent such knowledge") (internal footnote omitted); *id.*, ¶ 7 ("A claim for punitive damages with respect to a post-Sale accident involving vehicles manufactured by Old GM with the Ignition Switch Defect may be asserted against New GM to the extent—but only to the extent—it relates to an otherwise viable Independent Claim and is based solely on New GM conduct or knowledge"); *id.*, ¶ 12 ("Claims for punitive damages asserted in economic loss actions involving vehicles manufactured by Old GM with the Ignition Switch Defect cannot be asserted except for any that might be recoverable in connection with Independent Claims, and then based only on New GM knowledge and conduct."). The ability to assert certain types of Independent Claims was also a subject of the December Judgment. *See e.g., id.*, ¶¶ 12, 19, 21, 23, 34.

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can be modified six years after its entry to permit the assertion of Independent Claims against New GM, or the Second Circuit will find that no due process violation occurred or, even if it did, that the remedy fashioned by the Bankruptcy Court was inappropriate, and no Independent Claims will exist or be allowed to proceed. Either way, the Second Circuit's resolution of the appeal will have a clear and direct impact on the rulings in the November Decision/December Judgment, and it makes sense for this Court to see what the Second Circuit does before considering and deciding the appeal of the November Decision/December Judgment.

To be sure, there are certain issues resolved by the November Decision/December Judgment relating to whether or not certain claims were assumed by New GM, that are not specifically raised by the appeal to the Second Circuit. However, the general issue of which liabilities were assumed by New GM and which were retained by Old GM is part of the appeal of the Four Threshold Issues in the Second Circuit, and it is likely that the Second Circuit opinion will have at least some impact on those rulings in the December Judgment as well.

The length of deferral requested by New GM is not substantial. As the Court knows, the April Decision and June Judgment already are on expedited appeal to the Second Circuit, with briefing set to be completed in February 2016, and oral argument expected to take place in March 2016 (with a decision thereafter). And, there will be significant activity in this Court relating to MDL 2543 and the Bellwether trials that will require the parties and this Court's attention during this time interval. Under these circumstances, given this short anticipated delay, a deferral of the current appeal, which could moot or impact the appeal of the November Decision/December Judgment, makes eminent sense.

For all the foregoing reasons, New GM requests that the appeal of the November Decision/December Judgment be deferred until the Second Circuit rules on the already pending appeal of the April Decision/June Judgment.

Respectfully submitted,

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

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

Counsel for Defendant General Motors LLC

cc: MDL Counsel of Record