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*Via email delivery: RulesCommitteeSecretary@ao.uscourts.gov*

Carolyn A. Dubay  
Secretary, Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
One Columbus Circle, NE  
Room 7-300  
Washington, D.C. 20544

Re: Proposal to Clarify Rule 23(b)(3)'s Superiority Requirement

Dear Ms. Dubay:

General Motors LLC (“GM”) adds its voice to those requesting that the Committee on Rules of Practice and Procedure (the “Committee”) clarify Federal Rule of Civil Procedure 23(b)(3) to allow courts to consider out-of-court remedies—such as voluntary recalls, special-coverage, or customer-satisfaction programs—when evaluating whether class treatment is superior under Rule 23.

As other commenters have noted, courts applying Rule 23(b)(3) have disagreed on whether the rule allows consideration of out-of-court resolutions during the superiority analysis. Some courts, following *Van v. LLR, Inc.*, 61 F.4th 1053, 1062 n.4 (9th Cir. 2023), refuse to consider consumer remedies like refund programs, even if they make the consumer whole, on technical grounds because they do not consider such programs to be a procedural mechanism of “adjudicating the controversy.” Other courts permit consideration of out-of-court consumer remedies under Rule 23(b)(3) because they recognize that solutions like voluntary recall and refund programs are efficient and can be “better suited to provide relief” than a lengthy, costly class action. *See, e.g., Pagan v. Abbott Labs, Inc.*, 287 F.R.D. 139, 141 (E.D.N.Y. 2012); *see also Waller v. Hewlett-Packard Co.*, 295 F.R.D. 472, 488–89 (S.D. Cal. 2013) (finding “recall or refund programs kill superiority[ ]”).

Automotive manufacturers like GM are uniquely harmed by interpretations barring consideration of out-of-court remedies because auto companies, perhaps more than any other class of litigants, issue out-of-court remedies frequently – hundreds of times per year – to make their customers whole for vehicle defects or even perceived annoyances. Indeed, they are legally required to do so by federal law under a comprehensive regulatory scheme administered through the National Highway Traffic Safety Administration (“NHTSA”). By law, when an automaker identifies a safety defect, it must notify NHTSA and affected owners and provide a free recall that includes repair, replacement, or refund. The current ambiguity surrounding Rule 23(b)(3) creates a perverse incentive structure: even when an automaker fully complies with the law or makes its customers whole through recalls or voluntary special-coverage or customer-satisfaction programs, it nevertheless faces follow-on class action litigation often seeking the very same relief already provided.

GM has a long track record of providing extensive out-of-court remedies, such as safety recalls, voluntary special-coverage adjustment programs, and customer-satisfaction programs. It is these remedies themselves that often serve as an impetus for class action lawsuits. The following examples illustrate the point:

**Chevrolet Bolt EV Battery Recall.** GM implemented a safety recall of 142,000 Chevrolet Bolt EV and Bolt EUV vehicles due to battery fire risk, offering every affected owner a full battery module replacement at no cost. GM also provided complimentary loaner vehicles, extended battery warranties for some customers to eight years or 100,000 miles, and reimbursed owners who had incurred related expenses. Nevertheless, within one month after GM first announced its recall, a class action lawsuit was filed seeking similar relief.

**Joyson Roof Rail Airbag Recall.** GM recalled more than 400,000 MY15-16 Chevrolet Silverados and GMC Sierras because of a rare manufacturing defect caused by a supplier that could cause the roof rail airbags in those vehicles to unexpectedly inflate. Despite this recall campaign that completely resolved the alleged defect at no cost to consumers in a timely and reasonable fashion, GM soon found itself defending a class action alleging that these vehicles were defective and seeking classwide relief.

**Special Coverage Adjustment Programs.** GM may extend warranty coverage through voluntary special coverage adjustments for components with higher-than-expected failure rates—even absent a safety defect that would require a recall under the law. At various times, GM has extended warranty protection on certain transmissions, fuel systems, and emissions components in trucks and SUVs, covering repair or replacement costs beyond the standard warranty period. These programs provide direct, no-cost remediation, often without a formal claim. As an example, GM launched a special coverage for MY16-18 Chevrolet Volt vehicles that extended warranty coverage for the battery energy control module for 15 years or 150,000 miles. Notwithstanding this special coverage, which effectively provides warranty coverage for this component for the useful life of these vehicles, GM is defending a class action alleging that these vehicles are defective due to the battery energy control module.

In each of the above examples, GM provided a complete remedy. Yet upon the news of GM offering these remedies, class action plaintiffs were quick to file lawsuits seeking similar relief—plus an award of attorneys' fees. Clarification of Rule 23(b)(3) would ensure that courts have the flexibility to consider GM's voluntary relief to the putative class at the certification stage. Even if putative class members assert that they have incurred costs or suffered damages that are not compensated by the recall or refund program, the court in any given case should be able to consider GM's remedies in assessing whether a lengthy, cumbersome, expensive Rule 23 class action is in fact superior to other methods of adjudicating any theoretical remaining allegations.

In most situations, GM believes that courts will conclude that a class action simply is not superior to other methods of adjudicating claims when the defendant has already provided all or most of the relief plaintiffs seek. GM, therefore, respectfully urges the Committee to clarify Rule 23(b)(3) to confirm that trial courts may consider out-of-court remedies—including safety recalls and manufacturer-initiated special coverage adjustment or customer satisfaction programs—when determining whether class treatment is superior. This clarification would align the rule with practical realities faced by automobile manufacturers and consumers, and it would ensure the class action device is used where truly needed—not where it merely duplicates relief already provided.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jeff", with a long horizontal stroke extending to the right.

Jeffrey Koppy  
Assistant General Counsel – Litigation