U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**

1200 New Jersey Avenue SE.
Washington, DC 20590

MAR 03 2015

VIA US Mail and Email
James E. Butler, Jr.
Butler Wooten Cheeley & Peake, LLP
105 13th Street
Columbus, GA 31901

Re: Decision Regarding Request to Take the Deposition of David L. Strickland in *James Bryan Walden and Lindsay Walden, Individually and on Behalf of the Estate of Their Deceased Son, Remington Cole Walden v. Chrysler, L.L.C., and Bryan L. Harrell,* Superior Court of Decatur County, Civil Action File No. 12-CV-472.

Dear Mr. Butler:

This letter is a formal response to your request to the National Highway Traffic Safety Administration ("NHTSA" or "Agency") dated January 27, 2015. You request to take the deposition of David L. Strickland, the former Administrator of the Agency, between Thursday, February 26, 2015 and Monday, March 16, 2015. The Agency is denying your request.

Summary of Your Request Under 49 CFR Part 9

You state that the requested testimony is needed in the case *James Bryan Walden and Lindsay Walden, Individually and on Behalf of the Estate of Their Deceased Son, Remington Cole Walden v. Chrysler, L.L.C., and Bryan L. Harrell,* pending in the Superior Court of Decatur County, Civil Action File No. 12-CV-472. You describe this litigation as arising out of a fatal collision that occurred on March 6, 2012 involving a 1999 Grand Cherokee. The accident caused the death of one of the Jeep's occupants, Remington Cole Walden. This is state court litigation between private parties. Neither NHTSA, DOT, nor any other agency of the federal government is a party to this state-court litigation.

Specifically, your request states that Mr. Strickland's testimony would be limited to the following topics: (1) the June 10, 2013 meeting between Chairman Sergio Marchionne, Mr. David Strickland and former Secretary Ray LaHood, including all plans and arrangements therefor—*e.g.*, discussions, emails, etc. with anyone at Chrysler, Ms. Trapasso, Chairman Marchionne, and Secretary LaHood; what Chairman Marchionne, Mr. Strickland, and Secretary LaHood discussed during the June 10, 2013 meeting; and what happened as a result of the June 10, 2013 [sic]—including, but not limited to, the agreement Chairman Marchionne reached with NHTSA regarding the recall of the 1993-2004 Grand Cherokee and 2002-2007 Liberty vehicles;

and (2) Mr. Strickland's employment with the Venable LLP law firm, including the circumstances giving rise to Mr. Strickland's employment with Venable LLP, whether Mr. Strickland discussed his plans regarding his employment with Venable LLP with anyone at Chrysler Group or Fiat, and whether anyone at Venable LLP discussed its plans to hire Mr. Strickland with anyone at Chrysler Group. Additionally, via an e-mail dated March 2, 2015, you requested an additional topic to include in your request to depose Mr. Strickland: whether Mr. Strickland has been in contact with anyone employed by or representing Chrysler Group about your request for a deposition.

You state that this testimony is relevant to Plaintiffs' claims, *e.g.*, Chrysler failed to warn the public adequately of and failed to remedy the known defect in the 1999 Grand Cherokee, Chrysler's defenses in the lawsuit, and the credibility of Chairman Marchionne's testimony. You state that this information is not reasonably available from other sources, including Departmental documents.

Applicable Regulations

The Department has regulations governing the testimony of its employees "in legal proceedings between private litigants to requests or demands for testimony or records concerning information acquired in the course of an employee performing official duties or because of the employee's official status." 49 C.F.R. § 9.2. The legal foundation for Part 9 consists of federal records law and the Supreme Court's decision in *United States ex rel. Touhy v. Ragen,* 340 U.S. 462 (1951). In *Touhy*, the Supreme Court recognized the authority of agencies to restrict testimony of federal employees and the production of documents by regulation.

Regulations covering the testimony of Departmental employees in legal proceedings are found at 49 C.F.R. Part 9 ("Part 9"). These regulations apply to both "current or former officer[s] or employee[s] of the Department." 49 C.F.R. § 9.3. There is a general prohibition against employee testimony disclosing any information acquired as part of the performance of that employee's official duties or because of that employee's official status unless authorized by agency counsel. 49 C.F.R. § 9.5. The reasons for this policy include conserving the time of employees for conducting official business; minimizing the possibility of involving the agency in controversial issues not related to its mission; maintaining the impartiality of the Department among private litigants; avoiding spending the time and money of the United States for private purposes; and protecting confidential, sensitive information and the deliberative processes of the Department. *See* 49 C.F.R. § 9.1(b).

We deviate from this policy only under limited circumstances. Testimony is permitted only when the deviation will not interfere with matters of operational necessity and when agency counsel determines that: (1) it is necessary to prevent a miscarriage of justice; (2) the Department has an interest in the decision that may be rendered in the proceeding; or (3) the exception is in the best interests of the Department or United States. *See* 49 C.F.R. § 9.1(c).

Decision

In conformance with the Department's policy prohibiting employee testimony concerning information acquired in the course of an employee performing official duties or because of the employee's official status, especially in the context of private litigation where the United States is not a party, I am denying your request to take Mr. Strickland's deposition with respect to the matters relating to Mr. Strickland's performance of his official duties or official status as former NHTSA Administrator. NHTSA takes no position on your request for testimony from Mr. Strickland regarding his employment at Venable LLP and matters related thereto. These matters are outside the scope of Part 9 and thus not governed by its provisions.

First, I note that the United States is not a party to this action. Thus, the Department's decision denying your request conforms with the purposes of Part 9 to minimize the possibility of involving the Department in controversial issues not related to its mission, to maintain the impartiality of the Department among private litigants, and to avoid spending the time and money of the United States for private purposes. *See* 49 C.F.R. § 9.1(b).

Furthermore, your request does not fall within any of the narrow exceptions to our general policy prohibiting employee testimony. Mr. Strickland's testimony is not necessary to prevent a miscarriage of justice. A "miscarriage of justice" has been defined as "a grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime." *Black's Law Dictionary* (9th ed., 2009). *See also Wright v. Hanna Steel Corp.,* 270 F.3d 1336, 1342 (11th Cir. 2001) ("A 'miscarriage of justice' is a '[d]ecision or outcome of [a] legal proceeding that is prejudicial or inconsistent with [the] substantial rights of [a] party.'")(quoting *Black's Law Dictionary,* 999 (6th ed.1990)). There is no discussion in your request about how the requested testimony is necessary to prevent a miscarriage of justice. Rather, it appears that Mr. Strickland's testimony is sought to confirm whether Chairman Marchionne's account of the June 10, 2013 meeting and events giving rise thereto is accurate. However, much of the information in your request should already be available from Chrysler. For example, Chrysler may have documents referring to plans and arrangements for the meeting. Furthermore, it appears that you have already received testimony from Mr. Marchionne regarding the meeting. If Mr. Marchionne's testimony was under oath, you should have had the opportunity to cross-examine him and test the truthfulness of his statement.

Furthermore, the Department does not have an interest in the decision that may be rendered in the legal proceeding, nor do I find that granting the exception is in the best interest of the Department or the United States. NHTSA achieves its safety mission through its own investigations and the issuance and enforcement of its regulations, not through involvement in private civil litigation. Further, NHTSA must consider the cumulative effect of such requests for testimony on the Agency and its employees. NHTSA receives numerous requests for the testimony of its employees and the cumulative effect of granting such requests would be a drain on the Agency's resources. These concerns remain even for former employees, as NHTSA counsel would need to be present for any testimony that is related to a former employee's official

duties or official status. Therefore, the testimony is not in the best interests of the Department or the United States.

After balancing your stated need for the testimony of Mr. Strickland against the purposes of Part 9, we have determined that the interests of the Department and the United States justify denying your request for Mr. Strickland's deposition testimony. This is our final decision. Should you have any questions, please contact me at (202) 366-4252 or Sarah.Sorg@dot.gov.

Sincerely,

Sarah Sorg
Agency Counsel