

Ea20gmic

Conference

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 GM IGNITION SWITCH MDL
4 PLAINTIFFS,

5 Plaintiffs,

6 v.

14 MD 2543 (JMF)

7 GM IGNITION SWITCH MDL
8 DEFENDANTS,

9 Defendants.

10 New York, N.Y.
11 October 2, 2014
12 9:30 a.m.

13 Before:

14 HON. JESSE M. FURMAN,

15 District Judge

16 APPEARANCES

17 HAGGENS BERMAN SOBOL SHAPIRO LLP
18 Attorneys for Plaintiffs
19 BY: STEVE W. BERMAN

20 LIEFF CABRASER HEIMANN & BERNSTEIN LLP
21 Attorneys for Plaintiffs
22 BY: ELIZABETH J. CABRASER

23 HILLIARD MUNOZ GONZALES LLP
24 Attorneys for Plaintiffs
25 BY: ROBERT HILLIARD

26 SIDLEY AUSTIN LLP
27 Attorneys for Defendants
28 BY: EUGENE A. SCHOON

29 HARTLINE DACUS BARGER DREYER LLP
30 Attorneys for Defendants
31 BY: KYLE HAROLD DREYER

Ea20gmic

Conference

1 APPEARANCES (Continued)

2 KIRKLAND & ELLIS LLP
Attorneys for Defendants
3 BY: ANDREW B. BLOOMER
RICHARD C. GODFREY
4 BARRY E. FIELDS

5 HUSCH BLACKWELL SANDERS LLP
Attorneys for Defendants
6 BY: MELISSA M. MERLIN
7

8 GM COUNSEL
BY: JOSEPH LINES
9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Ea20gmic

Conference

1 (Case called in open court)

2 THE COURT: Welcome back. I hope you guys appreciate
3 the party I arranged for you outside of the courthouse.

4 All right, let me get started right away with a couple
5 of housekeeping matters, and then we can jump in with the
6 agenda.

7 First, I want to thank counsel, again, for setting up
8 the call-in number, which I understand is operational and,
9 hopefully, folks are listening in.

10 I do want to tell you, I indicated that I would be
11 trying to make arrangements for the Court to handle that, and
12 the Court has in fact contracted with a service called *Court*
13 *Call* that I gather other courts around the country have been
14 using for a long time. And I'm going to be the guinea pig for
15 purposes of the Southern District with respect to the service.
16 My plan is to begin using it for the November 6 conference.
17 And in that regard, you should anticipate, in the next couple
18 weeks, either orders or guidance of some sort with respect to
19 how that system works. I need to figure that out myself first.
20 And needless to say, I look forward to your feedback on whether
21 and how it works but, hopefully, it will be helpful and work
22 well.

23 Now, also just an FYI. I made the call-in number that
24 we're using today available to judges presiding over related
25 cases, including Judge Gerber and his staff, and the other

Ea20gmic

Conference

1 judges around the country. Now, some of them, or members of
2 their staffs may well be listening in, and I want to make sure
3 everybody is aware of that, both because the acoustics in the
4 courtroom are not so good and, for that matter, because there
5 are demonstrators outside and, also, because folks are
6 listening in, it is especially important to speak into the
7 microphone. So just a reminder to please do that, even if it
8 means shuffling things about and/or moving about. Just make
9 sure that you speak loudly, clearly, and into the microphones.

10 All right. Other housekeeping matters.

11 I am speaking with our technology folks about setting
12 up a website devoted, or web page I should say, devoted to this
13 MDL. I agree that it would be an excellent idea. And there is
14 some provisions in the coordination order that I signed with
15 respect to that. Now, as advanced as this district is,
16 however, the Court's website, to put it bluntly in my opinion,
17 leaves some things to be desired. And, in fact, the Court is
18 in the process of reviewing it and may be overhauling it. But
19 at least right now, I'm told, that the only real option is to
20 set up something along the line of the web page that is
21 currently in use for the 9/11 litigation that Judge Hellerstein
22 has been presiding over. Some of you may be familiar with
23 that. If not, you can check it out. The link is through the
24 cases. There is a case link on the Court's website and there
25 is a link there to the 9/11 litigation.

Ea20gmic

Conference

1 Now, in my view, it is far from ideal. It doesn't
2 have text searchability, for example. And, you know, it is
3 sort of only has the basics, but it is better than nothing.
4 That being said -- and I'm prepared to move forward and have
5 the folks, our technology folks, set something up akin to that,
6 unless and until something better is available within the
7 court.

8 There is always the option of counsel setting up some
9 website that might be better than what the Court can make
10 available. And in that regard, I think you guys should confer
11 and discuss whether that is preferable. It just may be more
12 functional and user friendly that way. In principle, I would
13 prefer for the website to be managed by me and by the Court,
14 but it may be that the technical limitations and opportunity
15 outweigh the advantages of my managing it. So why don't you
16 discuss that and let me know.

17 One additional word on that. And I think in the
18 coordination order, the proposed language had included a
19 reference to the possibility of setting up a portion of a
20 website as password protected. That would be available only to
21 me and to judges presiding over related cases. I actually
22 changed the language to say that it "may" -- I "may" do that,
23 rather than committing myself to do that. Upon reflection, I
24 am inclined not to do that. I think there are both sort of
25 logistical management issues, as well as my concerns about

Ea20gmic

Conference

1 security and how well protected it would be. Bottom line is I
2 think that I can communicate and coordinate effectively with
3 the other judges through other means, and I don't think I need
4 that. And given that and the other concerns, I don't think
5 that is necessary.

6 So, as I said, why don't you guys talk and you can let
7 me know before the next conference whether you think it is
8 better for you to set up a website with perhaps more bells and
9 whistles, or if you think that I should proceed with something
10 along the lines of the 9/11 web page on the Court website.

11 One other thing. I think counsel know I have had my
12 law clerk e-mail a red-lined copy of the order that I entered,
13 the coordination order indicating the changes that I had made
14 from the proposed order that had been submitted to me. I did
15 that obviously so that you wouldn't have to go through line by
16 line in order to figure out what changes I made. I will
17 continue to do that going forward, just for convenience of
18 counsel. I don't think that that is something that needs to be
19 publicly docketed in the sense that my order is what matters.
20 It is just for your convenience to know what changes, if any, I
21 have made.

22 If I don't have my law clerk send you a red line of
23 that sort, it means that I haven't made any substantive
24 changes, which is to say that if I make a typographical change
25 or something of that sort, I don't see the need to send you the

Ea20gmic

Conference

1 red line. But I will continue that practice going forward for
2 the convenience of counsel.

3 All right, turning to more substantive matters per my
4 endorsement of the other day and as of the September
5 conference, my intention is to largely track the proposed
6 agenda set forth in counsel's letter, in this case, of
7 September 29th. And I thank you again for that letter, which
8 is very helpful, and I anticipate will continue to be helpful
9 going forward.

10 I did of course flag two supplemental issues that I
11 wanted you to be prepared to discuss. And we will get to those
12 as well, but I will basically go in order of that letter.

13 All right. The first item in the letter -- and sorry
14 about the background noise -- is the document depository.

15 Let me say a few things, and then I'm happy to hear
16 from you.

17 Number 1, I definitely think this is an issue that we
18 have to resolve sooner, rather than later. At the same time,
19 I'm inclined to think that the issue is not ripe for me to
20 weigh into just yet. That is to say that you can, and should,
21 confer further and try to work through the issues. And I think
22 this letter indicates that you are essentially doing just that.
23 But let me share some preliminary thoughts about the issue on
24 the theory that it might help, although it always has the
25 possibility of hurting more than helping.

Ea20gmic

Conference

1 Number one, I am concerned about the timing of
2 plaintiff's objections and concerns, that is, you know, lead
3 counsel explicitly agreed to the use of ShareVault, knowing
4 that the costs would be shared pursuant to some formula to be
5 worked out. And I think it's fair to say that the time to do
6 due diligence on ShareVault, its pricing structure, and its
7 capability, was before agreeing to the use of it. And from
8 that standpoint, plaintiffs' objections are not especially well
9 taken. And to the extent that the issue is presented to me to
10 resolve, I would want more specific information about the
11 chronology of events, that is when the agreement was made, the
12 nature and extent of that agreement, and the information
13 provided to counsel and so forth, in order to decide whether,
14 again, the objections or concerns are timely made.

15 Having said that, you know, I think sticking with
16 ShareVault solely because the parties have paid some money to
17 it already is a classic case of what is known as the sunk cost
18 fallacy, which is if you're not familiar with it, that costs
19 already incurred should not be factored into the utility of
20 decisions going forward. Now, that is to say that if there is
21 another option that is cheaper and better -- and I'm not
22 expressing a view on that -- then it may well pay to change,
23 despite whatever contractual obligations have already been
24 incurred. And if so, then it probably, as I said at the
25 outset, pays to do that sooner rather than later, before the

Ea20gmic

Conference

1 transaction costs of changing vendors are prohibitive, that is
2 to say, before it effectively becomes too late.

3 Finally, I am inclined to agree that, all things
4 being -- equal, and I want to emphasize that because I don't
5 know whether they are. I do think it is better to have a
6 vendor that allows you more advanced search capabilities and
7 the like. There may well be tools out there that can do that,
8 that is to say, you know, separate tools. And I would
9 certainly encourage counsel to look into that.

10 But to the extent that the depository is intended for
11 use, not just by counsel in the MDL who may well have the
12 resources and capabilities to use and obtain other tools to
13 sort through what is likely to be quite voluminous materials,
14 but also by plaintiffs' counsel or counsel in related cases.
15 It may be unrealistic, if not inefficient and more costly, to
16 expect each and every counsel to get their own separate
17 software and tools to go through materials.

18 Now, in addition, if ShareVault is indeed just a
19 secure platform for the delivery of documents, as defendants
20 themselves describe in the letter, that is in essence a
21 sophisticated version of the, you know, of Drop Box, if you
22 will. And I do find it a little hard to understand why that
23 would be more expensive than more functional alternatives.

24 So, those are my thoughts, for what they are worth.
25 Again, they may be helpful, they may complicate matters

Ea20gmic

Conference

1 further, I don't know. But I do think that you can, and
2 should, try and resolve these issues yourselves and, in that
3 regard, should confer further about it. But I'm obviously
4 happy to resolve the issue if you can't. And, in either case,
5 as I said, I think it's in everybody's interest that we resolve
6 this sooner rather than later. And I would think certainly at
7 the November conference, if not before.

8 Anyone wish to say anything? Why don't I start with
9 the folks at the front table.

10 MR. HILLIARD: Judge, unfortunately probably ends up
11 coming to you to resolve it because the Court's right. In your
12 last order, you said the costs of production in ShareVault
13 would be borne by the producing party. The costs of
14 ShareVault will be shared. And, in fact, I had forgotten, as
15 well. But I went back and read your transcript. And you
16 actually brought that up. You asked Ms. Cabraser what about
17 the costs of this. She said we're sensitive to it, and we're
18 going to test it against other vendors. And your reply was,
19 well, let me know if you need my help.

20 And though we have continued to confer -- because you
21 can imagine when we told the defendants if you're going to
22 charge us 250,000 post contract without us negotiating with
23 you, we have an issue with that, especially since it is just a
24 sophisticated Drop Box. And it's sticker shock to us. And
25 they were concerned that we're not going to help pay. But we

Ea20gmic

Conference

1 got passed it and we tried to find a way to reach an agreement.
2 We talked and talked and just could not do it.

3 We have now picked a vendor. Our vendor is a secure
4 vendor. And ShareVault charges \$250,000 just to get the
5 documents into storage. Our vendor -- and they were vetted,
6 they were interviewed, they showed us their product -- charges
7 zero. And we can also do proprietary searches and work product
8 searches.

9 If we pay for ShareVault, our vendor will then, once
10 they get the documents that ShareVault takes from GM, will then
11 charge us for the proprietary searches, for the work product
12 searches. Our suggestion to GM was why don't we make
13 plaintiffs' chosen vendor the MDL depository for all of the
14 related actions. They have to sign a protective order, the
15 state court plaintiffs if they want to look at it, they will be
16 bound by the protective order. And it will keep them from
17 having to pay a pass-through charge that we had to pay for
18 ShareVault. We thought we had a solution. And the only
19 impediment to that is they signed a contract for six months.
20 And they advised us of that, post contract, and asked us to
21 pay. And we said no. And we had told them over and over how
22 much, how much is it going to be. Because that's the issue.

23 My proposal is, and my proposal to GM was, you guys
24 bear the costs of ShareVault, because you have to drop the
25 documents in on October 2nd. Our vendor can take them, as

Ea20gmic

Conference

1 well, on October 2. So they can bypass ShareVault if they
2 want, put it in our vendor's depository, and we will give them
3 the protections that they deserve to have that, you know, to
4 make sure no documents were seen by anyone that doesn't comply
5 with or agree to be bound by your court's protective order.
6 And that's where it is.

7 So I can tell you that, based on my conversation with
8 Andrew, that we're still talking, we're trying to figure out a
9 way that GM doesn't carry the full ShareVault nut. And we
10 don't have to take the 250,000, which is just a pass-through.
11 You know, we just get the documents from ShareVault, put them
12 somewhere where we can do our searches, and share them with the
13 other plaintiffs. But there is no solution yet.

14 THE COURT: That is a long way of saying, I think,
15 that you are talking about it, and that my notion that you
16 should continue, is at least right for now.

17 I guess what question I have, is how time sensitive is
18 this issue. Is this something that we need to resolve
19 immediately, or is it something that we could, for example,
20 resolve at the November conference. I ask, only because I
21 don't know what it means to upload these things into ShareVault
22 if, having done that, it becomes impossible to provide them to
23 an alternative vendor, or if that simply can be done with the
24 click of a button, in which case perhaps it is not as urgent as
25 I might have thought.

Ea20gmic

Conference

1 MR. HILLIARD: Delphi has produced documents to
2 ShareVault. We have access to ShareVault. So it is not time
3 sensitive in regards to us looking at the documents, or GM
4 producing the documents. Right now, GM is simply carrying the
5 cost of ShareVault to us. And they have not even permitted us
6 access at all. So we can continue with the status quo in
7 regards to production, getting those documents into our vendor.
8 And if we can't meet and confer on the final percentage share,
9 then we'll come back to you.

10 THE COURT: Okay. So I think this is something that
11 we should, hopefully, or plan to discuss further if not resolve
12 at the November conference, and you should continue your
13 discussions between now and then.

14 Now, I will say, if you can't resolve them and the
15 issue is presented to me to resolve, again, I want to know more
16 about the timing of the discussions and substance of those
17 discussions. I also, to the extent that you indicated that you
18 have identified an alternative vendor, will want to know, I
19 mean basically want a detailed comparison of the pros and cons
20 of the two options, both in terms of price and in terms of
21 capabilities, in terms of security and the like. But I think
22 it is in everybody's interest to identify a single site and
23 depository to be used. And it's not clear to me that you
24 shouldn't all be on the same page. So I would hope that you
25 can work through these things. Anyone at the back table want

Ea20gmic

Conference

1 to say anything? You don't need to make your position known.
2 If you have any disagreement with my way of proceeding, let me
3 know.

4 MR. GODFREY: Your Honor, Rick Godfrey.

5 I think that the meet and confer should take place. I
6 think there are two points that the Court needs to be aware of
7 now. And I don't know plaintiff's position. In the very first
8 conversation that we had about this, I said there are two ways
9 to select an MDL document depository vendor. One is to select
10 one with full search capabilities. The other is one, which you
11 might call it a Drop Box. But it is just a posting service. I
12 said I have seen it done, and I've done it both ways. That the
13 plaintiffs' bar, generally, did not like the full service
14 capabilities for the MDL depository, because of concerns about
15 opposing parties seeing what they were searching. And I said
16 so we're prepared to do it, we have our own search tools with
17 our own document vendor. You can have yours, we're prepared to
18 do it either way. And they agreed and said let's just have
19 ShareVault. So they may have a different position now. But
20 we're going to have to walk through that issue, because we have
21 some securities concerns that, traditionally, have been raised
22 by opponents across the bar. And they are legitimate concerns.

23 Secondly, the reason for the costs of ShareVault being
24 expensive, I am informed that, prior, people who negotiated a
25 contract with security, it's got very good security. So when

Ea20gmic

Conference

1 someone says we have a vendor that can do it for far cheaper,
2 given the sensitive nature of certain of the documents, and the
3 confidential designations, and that, I think it behooves us to
4 have a pretty clear understanding about is this the security
5 that we have seen from our security services. Like, what
6 O'Hare, one man can shut down central air transport in the
7 center of the country, or is it security that we would expect
8 to have from ShareVault. So I think a meet and confer is
9 necessary, I think it is helpful. I would hope -- and I mean
10 this sincerely -- I would hope that we don't have to bother
11 your Honor again with this.

12 And either present your Honor with here's what we're
13 going to do with ShareVault, split the cost and try to get a
14 new vendor, or here's what we are going to do, work with
15 ShareVault and tell them to get the costs going forward and I
16 think we have agreed to that by November 4. It will not, in the
17 meantime, since we have signed the contract, inhibit at all the
18 production of documents.

19 In fact, this morning, General Motors completed its
20 production, as you required. I am pleased to tell the Court we
21 posted 4,123,346 pages in the ShareVault, now, I'm told in the
22 production. There's Congress, NHTSA and Melton, in two
23 productions. Later today, the various privilege logs will be
24 produced also to counsel, so that we are -- I think your Honor
25 made it very clear you wanted it to be done by today. We are

Ea20gmic

Conference

1 going to be done by today with the first phase of the
2 documents. So we'll meet and confer. I'm confident that we
3 can work it out and we'll present the Court with discrete
4 issues and a basis and a timeline for the Court to resolve.

5 THE COURT: Right, okay. I'm pleased to hear about
6 the production, which was something I would have asked about
7 shortly, and urge you to continue your discussions. And I,
8 too, hope that you can work them through. But if you can't,
9 I'm obviously prepared to help you. And I do agree that
10 security is definitely something that is a high priority and
11 needs to be considered in the mix.

12 All right. Moving on, items two and three, that is
13 third-party discovery, and preservation issues, and additional
14 preservation protocols. You have indicated that you are
15 continuing to meet and confer. And I see no reason to discuss
16 them further, unless there is anything that you need to discuss
17 or want to update me on. But, you know, seeing nobody getting
18 up, I will move on.

19 Item number 4, is now moot, because I signed and
20 entered order number 17 the other day. So we are on to item
21 number 5, about which I don't have a whole lot to say, either.

22 Item number 5 is the use or the potential need for a
23 discovery or privilege master. And counsel indicated that a
24 magistrate judge would be suitable. As I previously indicated,
25 my hope and intention is to handle discovery issues myself.

Ea20gmic

Conference

1 For various reasons, I think that is more efficient and
2 sensible. And, hopefully, will deter you from having any
3 issues at all. But if that proves -- I mean that is something
4 that can always be revisited. And if it proves to be
5 unrealistic or unmanageable for me, and is causing undue delay,
6 then I may well take you up on your suggestion of involving the
7 assigned magistrate judge, Judge Dolinger and turning to him
8 for help. And if that proves to be unrealistic or
9 unmanageable, we can always revisit the issue of whether we
10 should consider a different option or route all together. But,
11 again, just to stress that, for now, I will handle things
12 myself and pursuant to the procedures that we have already
13 discussed.

14 All right. Item number 6, the proposed bellwether
15 order. Again, this is a little bit of a theme for today. It
16 doesn't seem to me that it is ripe yet for my intervention.
17 That is to say the letter indicates that you are continuing to
18 discuss the issue, and that if you have not resolved it that
19 you may be in a position to update me or present the issue for
20 me to decide at the November conference.

21 Let me say a couple of things right now.

22 Number one, I do agree that some order should be
23 entered, and that we ought to do that sooner rather than later
24 so that everybody is on the same page about discovery issues
25 relating to cases and, just generally, about how we are going

Ea20gmic

Conference

1 to proceed.

2 Now, number two, that I want to make the language from
3 order number 16 -- I think it was my mantra here, maybe it
4 wasn't. Order 16, I'm losing track of the numbers, but I think
5 reasonable but aggressive should apply here too. That is to
6 say that, you know, we should set a schedule that provides for
7 bellwether trials as quickly as reasonably possible, given the
8 nature and extent of the discovery and the claims in this
9 litigation. That is, in my view, consistent with my
10 obligations under Rule 1 of the Federal Rules. It is also in
11 the interests of justice and in the interests, as I have
12 mentioned several times, of promoting maximum coordination
13 between the MDL and related cases pending in other courts.
14 That is, as I have already remarked, I think those courts are
15 more likely to coordinate with this litigation and defer to the
16 what I am doing, if they believe that we are moving things
17 forward steadily and reasonably quickly. And so I think that
18 that should be the guiding mantra, again, reasonable but
19 aggressive.

20 So, I guess the question I have is, because I do think
21 it is in everybody's interest to do this sooner rather than
22 later, does it pay for me to give you a deadline by which you
23 should either submit an agreed-upon bellwether order, or if
24 there are disagreements, then you can submit dueling orders to
25 me with the red line, as you have done before showing the

Ea20gmic

Conference

1 differences, and letter briefs supporting your respective
2 versions.

3 Mr. Hilliard?

4 MR. HILLIARD: When we talk bellwether, those two
5 adjectives are used by both of the parties. You can guess
6 which side uses which. But, in all seriousness, we need your
7 help. Because we believe we can't reasonably and aggressively
8 be ready for trial in 12 months, and they just said we have a,
9 fair to say, a different view. We have agreed to discuss the
10 plaintiffs' fact sheet which is step 1. They have to know the
11 universe of the bellwether potential plaintiffs. And we're
12 about to hopefully close the loop on getting the Court an
13 agreed to plaintiffs' fact sheet. But then we have to pretty
14 quickly get into, after the discovery documents are produced
15 and reviewed, we have to start taking depositions of their
16 liability witnesses. And they have to be able to take
17 depositions of the chosen bellwether to prepare for trial. So
18 my view, and my experience, tells me that the sooner the Court
19 gives us some direction on what the bookends of us having to
20 decide are, the less time will be wasted.

21 THE COURT: So my question was whether I ought to set
22 a deadline for that. Let me through out maybe October 31 as
23 the deadline for either the submission of an agreed upon order
24 or if there is not an agreement, then competing orders and,
25 again, letter briefs supporting your respective proposals.

Ea20gmic

Conference

1 MR. HILLIARD: That's fair. We can be ready by then.
2 Judge.

3 THE COURT: Mr. Godfrey, or anyone at the back table.

4 MR. GODFREY: I think, your Honor, October 31 would be
5 fine. I think the phrase "reasonable yet aggressive" is a
6 phrase that I already see somewhat differently, as we'll
7 discuss a bit later. I do think that there is wisdom to, at
8 some point, getting a bellwether order. I think that the
9 proposal that is being advocated would be unprecedented, in the
10 sense of at this stage of the litigation, we don't have the
11 plaintiff access to basic discovery. But I think the parties
12 will get some things in agreement on, and then the Court is
13 going to have to take a look at it from a reasonable timing
14 perspective, and feasibility perspective, and consistent with
15 the Court's own view of a case like this how best to manage it.
16 I think we can tee it up by October 31 for the Court to decide.
17 Because I'm fairly confident that we're not going to end up
18 agreeing to certain issues with respect to timing. I think I
19 can say that.

20 THE COURT: Okay, great.

21 Then I will set a deadline for the submission of
22 either an agreed upon order or competing orders. And obviously
23 as you have in the past, to the extent that you can agree on as
24 much as possible, and narrow your disagreements, that is
25 obviously the best course and most helpful to me. And

Ea20gmic

Conference

1 consistent with prior practice, if you can give me your
2 competing orders in a red line showing the differences, that is
3 most helpful to me.

4 In addition, in any letter briefs that you submit, in
5 conjunction with the competing orders, if you are not able to
6 agree, it will would be helpful to me, and I imagine you would
7 have done this anyway, just to site, and even attach might be
8 helpful, examples of these kinds of orders from other MDL
9 litigations, just since that may be a helpful point of
10 reference.

11 Mr. Godfrey.

12 MR. GODFREY: I was going to say headline points for
13 the Court to be aware of. Timing. Who gets to select, whether
14 the plaintiffs gets to select all, or whether it is a equal
15 selection process, relationship to plaintiffs' fact sheets.
16 And then how it measures with the overall schedule of the MDL.
17 Because I think, statistically, as the Court knows, there are
18 the personal injury cases, some number of which are being
19 considered, we believe -- I don't have the details -- but we
20 believe by Mr. Feinberg and his process, which we need to give
21 the time and opportunity to resolve. And Mr. Hilliard probably
22 knows, more than I do, about that, since I think a number of
23 his clients are in the Feinberg process. But those are some
24 kind of headlines that, so the Court is not surprised when you
25 see the letters, those are points of departure I think that can

Ea20gmic

Conference

1 capture in a sense the boundary conditions that people see
2 differently.

3 THE COURT: I don't find any of that surprising. I
4 don't need to hear your respective positions now. I would
5 encourage you to agree on as much as you can and I'm happy to
6 resolve any other disagreements.

7 All right. Moving on to the next issue, item
8 number 7, your letter on consolidated complaints and motion
9 practice. I don't think there is much that needs to be said on
10 that, either, except that here, too, I think it would pay to
11 give you a deadline to either submit an agreed upon order or
12 competing orders of the same sort. And my inclination would be
13 to set the same deadline, just to simplify matters, of October
14 31. Does that make sense.

15 MR. BERMAN: That makes sense, your Honor.

16 THE COURT: Mr. Godfrey, any objection?

17 MR. GODFREY: No problem. Mr. Berman and I had
18 discussed a tentative schedule, but since we have not seen the
19 complaint, we decided to wait to see the master complaint. but
20 I have no question we'll be able to work this one out, your
21 Honor.

22 THE COURT: Okay.

23 MR. BERMAN: I think we have a question, just to give
24 you a framework for what we are discussing. We're going to
25 file two complaints. One will be post bankruptcy sale, one

Ea20gmic

Conference

1 will be pre.

2 The complaint involves the laws of all 50 states. And
3 they're presently in the draft form that we sent out to lawyers
4 throughout the country. Each complaint is over 800 pages. So
5 the concept is we don't want you to be hit with motions in all
6 50 states, right out of the box in entirety, for example. We
7 picked some states and we are talking about that. But given
8 the fact that there is gonna be a motion, and we're going to be
9 talking about page limits and timing, we're wondering what your
10 inclination is on pages. Judges can be very different in how
11 they accept lengthy briefs. And give us some guidance on that.
12 I'm thinking, given the length of the complaint, that they may
13 want 50 pages. If we're talking in that kind of range, is that
14 something that --

15 THE COURT: I mean, listen, I gonna punt on that one,
16 and let you guys discuss it. Because I think you're in a
17 better position to decide, in the first instance, what you
18 think you need. And I can then decide whether I think that is
19 reasonable. And that may also be influenced by seeing the
20 complaints when they are filed. Although the mere reference to
21 the number of pages, alone -- well, anyway that was the most
22 notable thing you have said to me.

23 You know, my interest is in ensuring that the briefing
24 is not duplicative. I don't object if you -- I want to give
25 you an adequate number of pages to make whatever arguments you

1 want to make. And I trust that you are good lawyers, and I
2 trust that you know that I will be annoyed if I read your
3 briefing and I think that there is a lot of fat that could have
4 been trimmed. And in that regard, it is in your interest, as
5 much as mine, for you to be economical in your briefing. And
6 for that reason, I am not inclined to give you artificial page
7 limits. But I want to make sure that you have an adequate
8 number of pages. What I am concerned about, and want to avoid,
9 and I think you are sensitive to this and this is what you will
10 be discussing, is to ensure I don't get multiple briefs
11 basically making the same arguments, when I think you know you
12 could coordinate, in advance, and ensure that that doesn't
13 happen.

14 Why don't you discuss, again, and make a proposal to
15 me about page limits, mindful that, obviously, the fewer pages
16 that I have to read, the better. But I want to make sure that
17 you can make whatever arguments you think should be made.

18 Sounds good?

19 MR. GODFREY: Yes, your Honor. Thank you.

20 MR. BERMAN: Sounds good.

21 THE COURT: All right.

22 Item number 8, document discovery and fact sheets and
23 the like. So number one, I was going to ask about a status
24 report on the discovery previously ordered. I don't know if
25 there is anything further to be said on that.

Ea20gmic

Conference

1 Maybe, Mr. Schoon, you can update me on your end of
2 that.

3 MR. SCHOON: We are up to date. We produced all of
4 our documents as required yesterday. Posted on ShareVault.
5 And accessible to the plaintiffs.

6 THE COURT: Great. Is there anything else I need to
7 be told, just to update.

8 MR. SCHOON: This is really very minor. I think your
9 order number 11 required, by yesterday, a report on data that
10 was not reasonably accessible. Quite honestly, I missed that
11 deadline. But I saw the GM letter last night. And this
12 morning we filed a letter concurring with their position on
13 that.

14 THE COURT: I think you dated it yesterday, though.

15 MR. HILLIARD: I apologize if that happened. It was
16 drafted last night.

17 THE COURT: Hard to trick ECF, though.

18 MR. HILLIARD: My apologies, your honor.

19 THE COURT: I will grant you an extension nunc pro
20 tunc to today.

21 MS. SOWERS: Continental is in the same position as
22 Delphi, with respect to letter regarding ESI and our letter
23 will be filed today, as well. And so if we could be granted
24 the brief extension, as well, I would appreciate it, your
25 Honor.

Ea20gmic

Conference

1 THE COURT: Sure. I'll grant everyone an extension
2 today to file the letter in compliance with, I think it was
3 Section 16 of order number 11.

4 I thank you, Mr. Godfrey, for complying with the
5 deadline and bringing it to everybody's attention.

6 MR. GODFREY: Thank you, your Honor.

7 THE COURT: All right. On the broader discovery
8 issues, I guess here, too, I'm inclined to give you a deadline
9 by which you should either submit an agreed upon order or
10 competing order. And you're probably detecting a Halloween
11 theme here, but I would propose an October 31 here, as well.
12 Does that sound sensible?

13 MR. HILLIARD: It does, Judge.

14 THE COURT: Mr. Godfrey, or anyone at the back table?

15 MR. GODFREY: I think we can do that, your Honor. I
16 think the Court ought to be aware, my comment that was
17 somewhat cryptic about reasonable, yet aggressive. I'm not
18 sure the Court contemplated over 1300 separate document
19 requests under the limited discovery. I have found that we
20 have worked through what we considered a phase one discovery
21 plan. And if not, we will tee it up for the Court so that the
22 Court can decide it and discuss it at the November 6
23 conference.

24 THE COURT: Great. All right. And I guess the next
25 item is distinction between class and merits discovery. I

Ea20gmic

Conference

1 would think that that is really part of the same conversation,
2 and so should be part of whatever order is submitted to me by
3 October 31 or whatever submissions are made by that date. Or,
4 if you decide that it doesn't need to be decided on the same
5 schedule, you can let me know that. But I guess I would just
6 fold that into the same category.

7 Does that make sense?

8 MR. BERMAN: That works for us, your Honor.

9 THE COURT: Mr. Godfrey?

10 MR. GODFREY: Yes, your Honor, thank you.

11 THE COURT: All right.

12 And then the last item of your letter is the need for
13 a separate coordination order. There is, I think, no need to
14 discuss that. I trust that you will bring it up if or when you
15 decide that a separate coordination order is needed. Though,
16 obviously, you should confer first in the event that either of
17 you, or any of you, comes to think that it is.

18 Now, as for the coordination order that I did enter, I
19 know that Judge Tanksley adopted it in her case in the Melton
20 case. I don't on know if there is any other update. If
21 counsel wants to tell me where things stand in terms of either
22 bringing it to the attention of the other judges or whether
23 anyone has adopted it.

24 MS. CABRASER: Your Honor, Dawn Barrios is not here
25 this morning. She's appearing in a hearing before Judge Fallon

Ea20gmic

Conference

1 in another MDL. So wanted to make sure to report in that
2 letters have been sent to all the plaintiffs' counsel in the
3 related state actions, with your Honor's coordination order,
4 inviting them to consider and support coordination. And that
5 has been sent to 106 counsel. Some counsel have reported in
6 that their actions have been removed. They may be in the
7 process of being transferred as part of this MDL. But I think
8 the long story short is counsel are aware of the order, they
9 are considering it, and the judges will also be made aware of
10 the order. Ms. Barrios is on a mission to encourage maximum
11 coordination among the courts. And I wanted to make sure your
12 Honor was aware of that.

13 THE COURT: Thank you. And I am aware of that,
14 especially insofar as she has been conscientious and helpful in
15 making sure that I have an up-to-date list of the judges
16 presiding over those cases and contact information for them.

17 In that regard, I should note, I think it's no
18 mystery, that I have been communicating with the judges, or
19 many of the judges, presiding over related cases. I made that
20 clear in some of my orders.

21 Number one, I have communicated with all of them by
22 e-mail. I had a conference call a couple of weeks ago with a
23 critical mass of those judges. And I have spoken to some of
24 them individually, as the need has arisen.

25 Now, we have also agreed to stay in touch in a variety

Ea20gmic

Conference

1 of ways, including having regular conference calls I think at
2 least every other month, and perhaps more if the need arises.
3 And I have also taken steps, or actually have simply sent the
4 coordination order to all of them by e-mail. So in that
5 regard, judges may well already be aware, or should already be
6 aware, of that order. But I just want to make that known, and
7 put that on the record, as with my communications with Judge
8 Gerber and his staff, I also want to make clear that we're not
9 discussing substance, per se. I think each of us, to the
10 extent that we have to make decisions about substantive matters
11 should, you know, exercise our own judgment. But this is all
12 in aid of coordinating matters and sort of processing and
13 schedule, more than anything else, just to make sure that this
14 litigation and the related cases proceed in an orderly fashion.

15 Mr. Godfrey.

16 MR. GODFREY: I agree with Ms. Cabraser.

17 Three quick points. Either later today or tomorrow,
18 the coordination order will be submitted to the Texas MDL Judge
19 Schaffer, so that is in process. And we are hopeful that he
20 will consider it, enter it.

21 Secondly, I was not aware that Judge Tanksley had
22 adopted, yet, the coordination order. She did adopt or enter a
23 companion protective order that measures nicely with this
24 Court, so we have resolved that issue.

25 I'll look into, I know we are working on a

Ea20gmic

Conference

1 coordination order. I just was not aware of -- your Honor
2 maybe have advance notice of this than we do about the
3 coordination order. But I was not aware. We are working on
4 that, as well. Ms. Cabraser has been very helpful I think
5 dealing with Mr. Cooper.

6 And then, finally, I meant to mention one thing or ask
7 one issue of the Court. I don't think this is in dispute. On
8 the documents we were served last night with 900 some requests,
9 but as our letter reflected, on the 23rd of September, we were
10 served with the first 415. I am assuming that until we work
11 out, and the Court decides that what takes place with these
12 document requests is General Motors, New GM, does not have to
13 respond, that is file answers and objections to the first 415,
14 since that will precede the November 6 date and it will precede
15 that October 31 date. And a great deal of leg room and also
16 seems that it should be something we should have a meet and
17 confirm about. I wanted to raise that before, I apologize for
18 raising it out of order. I want to be sure we have the
19 guidance of the Court on that.

20 THE COURT: I sort of took the last discussion, namely
21 that you were meeting and conferring about discovery, as a sign
22 that everybody was in agreement, that rather than responding
23 you would discuss the schedule and a process for working out
24 any objections and responding to those requests. And folks at
25 the front table are nodding to that, so I think that's a fair

Ea20gmic

Conference

1 statement.

2 MR. GODFREY: Thank you, your Honor.

3 THE COURT: Mr. Hilliard, you were rising.

4 MR. HILLIARD: I'm not sure if the Court is aware, but
5 the MDL judge for Texas has set a hearing for Friday this week.
6 And presumably, since he does have the coordination order, he
7 will likely enter it on that date. I just didn't know if that
8 was on your radar or not. And that's true on the discovery, as
9 well, Judge. Mr. Godfrey and I have talked about which
10 adjective will rule the day on when we gonna reply. Until we
11 get guidance from the Court, we are simply trying to come up
12 with a matrix of what documents we get first.

13 THE COURT: Okay. And I'm happy to give you guidance,
14 but I think the best practice, as we have generally followed,
15 is to let you try and work out and/or narrow the disagreements
16 before I give you any definitive guidance.

17 All right, that exhausts the issues that you had
18 listed in your agenda letter. Let me turn to the two items
19 that I had, and then I have a couple of other issues at least
20 to flag.

21 First, I mention the California vs. General Motors.
22 Docket number here is 14 CV 7787. Has been transferred to MDL.
23 And I am aware that there is a fully-briefed remand motion in
24 that case. I don't know if -- well, counsel, I don't think, is
25 present from the plaintiffs' side on that. But perhaps lead

Ea20gmic

Conference

1 counsel has communicated with them.

2 The question I pose is to the extent that Second
3 Circuit law governs my decision about, at least the federal
4 legal issues in that whether either new briefing should be done
5 or at least supplemental briefing, insofar as the briefs
6 presumably focused on Ninth Circuit law, I not have actually
7 looked at them, just to be clear.

8 Mr. Berman?

9 MR. BERMAN: I happen to be one of the counsel in that
10 case.

11 THE COURT: Well. Then counsel is present. Go ahead.

12 MR. HILLIARD: I have spoken with Mr. Godfrey --

13 THE COURT: Move the microphone a little bit.

14 MR. HILLIARD: The briefs were based on Ninth Circuit
15 law. We think that Second Circuit law is a little bit
16 different, although not outcome different. So we do want to
17 rebrief it. So we're proposing that we file our opening brief
18 one week from today. Mr. Godfrey would respond one week
19 thereafter. And the People of the State of California would
20 respond one week thereafter.

21 THE COURT: All right. Is that a joint proposal?

22 MR. GODFREY: Yes, your Honor. We agree with that.

23 THE COURT: That is fine by me. So that is how we
24 will proceed. And I take it those briefs will replace the
25 existing briefs, so I don't need to look at those.

Ea20gmic

Conference

1 MR. BERMAN: That's correct.

2 THE COURT: All right. The second issue, the safety
3 related discovery issue which is now fully briefed, let me give
4 you my current thoughts, and then give you an opportunity to
5 respond.

6 My inclination -- and again this is a little bit of a
7 theme, as well -- is to defer deciding the issue. I'm inclined
8 to think that it is better to await, at a minimum, the filing
9 of the consolidated complaints and, perhaps, even to await the
10 filing of a motion for preliminary injunctive relief, if that
11 is sought.

12 Now, I think that because, in my review of the case
13 law on conflict preemption, at least, it seems to me that the
14 analysis is not one that can, or should, be done in the
15 abstract but, really, depends on a nuanced analysis of the
16 claims that are being made and the law upon which plaintiffs
17 are relying, and whether and to what extent that law conflicts
18 with federal law.

19 Now, I'm inclined to think that, in light of that,
20 that it is hard to make those assessments in the absence of, at
21 a minimum, again, the consolidated complaints which we'll
22 presumably make clear the law upon which plaintiffs are relying
23 and clarify the claims that are being made, as well as the
24 relief being sought -- and again, that maybe it pays to even
25 await the filing of an actual motion, which would obviously

Ea20gmic

Conference

1 make the basis for the claim, then the relief sought, even
2 clearer.

3 Now, I recognize that one of the reasons that
4 plaintiffs argued, or asked, for the discovery, or argued that
5 they should get it now, is precisely to make a decision about
6 whether to seek preliminary relief. Number one, given the
7 motions that were previously filed, I think in Benton and
8 Kelly, if I remember correctly, it is not clear to me that the
9 discovery is necessary in order to make such a motion. And, in
10 any event, I certainly don't see any reason to decide the issue
11 before the filing of the consolidated complaint.

12 Now, I grant you that there may be less need for a
13 more developed record to decide the issue of field preemption
14 and maybe even the issue of primary jurisdiction. And those
15 are points that new GM has argued. But number one, I'm
16 somewhat skeptical of those arguments, though I'm not deciding
17 them today. And number two, I think that the more responsible
18 approach would be to consider the narrower issue of conflict
19 preemption before turning, and maybe never turning, to those
20 issues and arguments.

21 So given that, my inclination and my current thought
22 is to defer the question, again at least until the consolidated
23 complaints are filed.

24 Thoughts. Let me start with the front table, since
25 this is your application.

Ea20gmic

Conference

1 MR. BERMAN: Thank you, your Honor.

2 Seems to me there is two different issues here. One
3 is you're allowing document discovery to go forward, even
4 though the consolidated complaints have not been filed with
5 respect to the new GM vehicles. And so document discovery is
6 going forward, and we don't think that this category should be
7 any different. The documents are plainly relevant to the
8 current complaints.

9 The current complaints allege violation of state
10 consumer protection laws, warranty laws, and the law of
11 fraudulent concealment. The current complaints allege that the
12 repairs are not adequate. And so the discovery sought is to
13 test and to see whether or not we are correct that the repairs
14 are not adequate, which will allow us to frame the motion for
15 injunctive relief.

16 Let me give you an example. First of all, we filed a
17 rifle shot. These are four simple requests. Four document
18 requests. I'm a little surprised that GM's resisting, because
19 one of the statements that GM's CEO has made is she wants
20 everyone out there, driving a car, to have peace of mind.
21 That's a direct quote. Well, what better way to assure the
22 American public peace of mind is to let us have discovery to
23 see if there are safety issues, even after the recalls.

24 If we find that there are safety issues, then we will
25 present the motion to you. And it's at that time that you will

1 see a framework to see whether or not there is preemption. But
2 the mere fact of asking for the documents, I don't think that
3 that implicates, as of yet, a preemption concern. They are
4 just turning over documents that are relevant to the case. And
5 it's when we actually make a motion that the issue of
6 preemption will be framed. Right now, I think that objection
7 is premature. On the Benton motion, sure we rushed in and
8 filed a motion for preliminary injunction. But we have now
9 decided that we have to show irreparable injury and that the
10 equities are in our favor. If we take discovery now, and we
11 find that there are continual reports of people having stalls
12 and safety issues, that certainly helps us on the irreparable
13 injury and balance of the hardship tests.

14 So we think, for those reasons, we don't want to wait,
15 and we should not wait, for later in the case. We want to get
16 the discovery going now, along with the discovery that they are
17 now producing. Again, it is a rifle shot. It is four simple
18 document requests. And we don't think that that mere
19 production of documents invokes preemption at this stage.

20 THE COURT: Okay. Well, let me say a few things in
21 reaction, and then turn to the folks at the back table.

22 I certainly agree that discovery, itself, doesn't
23 implicate preemption in the sense that, I mean ordering and
24 granting the request for discovery itself. I don't think there
25 is a colorable argument that allowing discovery is somehow

Ea20gmic

Conference

1 conflicting with federal law in a way that implicates
2 preemption.

3 I think the argument is that to the extent that the
4 claims for relief sought is preempted, it is not relevant to
5 any viable legal claim. And I think there is an argument to be
6 made especially if responding to the requests would be
7 burdensome, then that is an issue that can be decided or should
8 be decided before responding to discovery. I think that's the
9 issue.

10 Having said that, now, I guess the question that I
11 will pose is, number one, maybe -- well, I think I do want a
12 little bit more information about how burdensome it would be to
13 comply with the requests, because maybe the better course is to
14 allow the discovery, allow plaintiffs to make a preliminary
15 injunction motion, and then to the decide the preemption issues
16 in the context of such a motion, which I have already indicated
17 I think is probably the better course, ultimately, anyway.

18 Now, number two, my general approach to preliminary
19 injunction motions would be -- I mean defendants are certainly
20 correct that they are often, if not usually, filed in
21 conjunction with the filing of a complaint. Or at least early
22 on in a case before discovery has been taken. And in that
23 regard, you know, it is not necessary, or not often necessary,
24 for discovery to be taken before such a motion has been made.

25 But my usual practice in those cases is to schedule an

1 immediate conference, bring the parties together, craft a
2 schedule for adjudication of the preliminary injunction motion,
3 and have a discussion with counsel about what discovery is
4 needed in connection with litigation of that issue.

5 So, you know, to the extent that I would follow a
6 similar practice here, I am not sure it makes a whole lot of
7 sense to force the plaintiff to file a motion without the
8 discovery on the theory that it would be a bit of a formality
9 if they are telling me that that motion will ultimately be
10 made. Now, to have them do that, and then order discovery, as
11 opposed to doing it in the other way.

12 So having said that, let me turn to the folks at the
13 back table and hear from you on your reactions to those
14 thoughts, and my initial inclinations to defer this. And,
15 also, just on what the burden would be of responding to
16 particular requests.

17 MR. BLOOMER: Your Honor, I think we agree with your
18 inclination to defer this matter. There is no, I think as the
19 Court right knows, these are better off decided in the context
20 of specific claims. And there is no evidence before the Court
21 of an actual issue. And I think our concern is that the
22 discovery that's served, when you actually look at it -- and I
23 would probably beg to differ with my friend across the bar, on
24 the issue of whether it is a rifle shot, is directed at the
25 recall process itself. Every request asked for information

Ea20gmic

Conference

1 regarding the recall remedies. And I'll jus tread you a couple
2 of them. This is Request for Production 2: With respect to
3 each of the recalls, all documents relating to, A, the proposed
4 time frame for completely implementing the recall remedies as
5 set forth in the recall notices sent to owners of the subject
6 vehicles; B, the reasons why that time frame was proposed; C,
7 any and all delays in meeting the proposed time frame,
8 including the reasons for any such delays; and, D, any interim
9 steps you have considered to take to address any safety issues
10 in advance of the completion of the provision of the recall
11 remedies. That's one document request relating to scores of
12 recalls. Request for production number 4: With respect to
13 each of the recalls, all documents relating to the sufficiency
14 of the recall remedies, including all documents related to the
15 initial choice of each recall remedy, all documents relating to
16 any proposed remedies that were considered and rejected; and,
17 C, all documents concerning the sufficiency of each recall
18 remedy in subject vehicles that have received a recall remedy.

19 Now, there's a theme here. Each of these requests is
20 directed specifically at what NHTSA I doing in overseeing right
21 now. And while the plaintiffs chide us for organizing over
22 preemption, what I don't think is in dispute is that the issue
23 of any claim relating to a recall or recall remedy, is
24 preempted. And if the Court is going to reach that issue, it
25 shouldn't be in the abstract. It should be done in the context

Ea20gmic

Conference

1 of a specific claim, with some evidence, so that the issue can
2 get tee'd up.

3 While the plaintiffs have talked generally about
4 filing some request for injunctive relief, neither we, nor the
5 Court, has any idea what that would entail. But if you look at
6 their document requests, it relates specifically, and would
7 relate specifically to the recall process which NHTSA has and
8 it's in the exclusive province of NHTSA. Do they want a park
9 it now injunction. That's been considered and decided both by
10 federal courts, Judge Ramos in the Silvas case, as well as by
11 NHTSA itself. NHTSA is actively engaged overseeing this
12 process, has already exercised jurisdiction to enter into a
13 consent order. Do they want documents related to the timing of
14 the recall, notice of the recall, timing of the recall remedy
15 and repairs. These are the issues, your Honor, that are all
16 under the purview of NHTSA right now. And trying to decide
17 these issues -- and we would respectfully submit trying to
18 decide these issues before they get tested, even on dispositive
19 motion, I think is problematic. But trying to deal with them
20 in the abstract, I think, underscores the Court's good judgment
21 to say it's best to defer this. And I don't think the Court --
22 I think the Court is right, right now, it doesn't need to
23 decide the issue of preemption or primary jurisdiction. I
24 think the way this has been tee'd up, the plaintiffs have
25 simply not made a prima facia showing of why this discovery is

Ea20gmic

Conference

1 necessary. I mean the bottom line is they have not identified
2 any actual issue, much less one requiring immediate discovery
3 or action.

4 They have an existing administrative remedy that they
5 can petition NHTSA to do something different about the recalls.
6 They have not done that. Their discovery requests for the
7 purpose of potential claim relating to recall process conflicts
8 with NHTSA's oversight. And I think it is going to, in the
9 abstract, just entangle the Court, without much of a record,
10 with issues implicating NHTSA's jurisdiction.

11 So the bottom line is, your Honor, I think the Court's
12 right to defer this, because the plaintiffs have not explained
13 what they need. To the extent they have served requests, those
14 are extremely wide-ranging requests applying to scores of
15 recalls. They have not explained why they need it. And they
16 have not explained why it would not interfere with NHTSA's
17 exclusive jurisdiction in the area.

18 THE COURT: Okay. Well, I think there is more
19 agreement or overlap between your positions than you are both
20 perhaps suggesting, or at least than Mr. Bloomer is suggesting
21 in the sense that I don't hear plaintiffs arguing that the
22 issue of preemption should be decided in the abstract. I think
23 you both are agreeing with me that that issue is best decided
24 in the context of, again, at a minimum, the consolidated
25 complaint, and I think even better, in the context of an actual

Ea20gmic

Conference

1 motion for injunctive relief.

2 In that regard, the question, I think everybody's in
3 agreement, that that is an issue better deferred until there is
4 a concrete context and record for it.

5 So the question, now, which is whether discovery
6 should proceed in advance of any such motion, or if a motion
7 should be made and then we discuss discovery in connection with
8 it. And I guess the question that I had posed is is there
9 really a big difference between those. And it turns to me a
10 little bit on the burden of responding to their request. And
11 maybe the better course here is for you guys to discuss the
12 requests in the context of discussing what relief the
13 plaintiffs are contemplating seeking, to see that if the
14 request could be narrowed to a point where the burden is not
15 insurmountable. And mindful that if the plaintiffs were forced
16 to file a motion before discovery proceeded that, again, I
17 would have you back in here promptly to figure out what
18 discovery I would allow in aid of litigating that issue. And
19 so to the extent that you can work that out in advance, and to
20 the facilitate the filing of any such motion, then that may be
21 the way to go.

22 So, what are your thoughts on that?

23 MR. BERMAN: Your Honor, I disagree with it slightly
24 in this respect.

25 I think we all probably read the newspaper article

Ea20gmic

Conference

1 last week about Ms. Gass, I believe her name was, a law student
2 who died in a vehicle that had been repaired by GM.

3 So there is a current need to find out what the safety
4 issues are when people go in, their car is repaired, and they
5 come out and they die.

6 Request number 1 asks for all documents relating to
7 communications to or from owners of the recalled vehicles that
8 have had a remedy and have reported safety issues.

9 The burden is minimal. These safety issues go to a
10 dealer from the customer. The dealer reports of safety issues
11 are rolled up onto a data base at GM. GM contextually searches
12 that data base and produces though documents to us now. In a
13 week. It is not a big deal. It is done all of the time in
14 automobile cases. We know about those customer data bases.

15 Once we find out the frequency of safety issues, what
16 vehicles they involve, how often they are occurring, once we
17 get that information, then we'll be in a position to frame what
18 relief we want.

19 The relief could be for the repair. For example, the
20 NHTSA administrator suspects, according to his testimony that
21 we cite in our brief, that it's an algorithm issue. It's in
22 the province of this Court, if we identified a defect like an
23 algorithm defect in air bags to order a repair. Not NITS.
24 That's something that judges do in auto defect cases all of the
25 time.

Ea20gmic

Conference

1 So again, we think the way we should do this, we are
2 glad to sit down and perhaps work out a schedule for this.
3 But, again, I think the burden is minimal. Let us look at the
4 safety issues, from their documents. And let us then frame the
5 motion that we want to bring. And that motion will then tee it
6 up for you. That's the process that we think makes more sense.

7 THE COURT: Okay. And, here's my suggestion.

8 I think you guys should talk about this today, or this
9 week, and see if you can work out a schedule. And see if
10 perhaps, in discussing both the relief that plaintiffs believe
11 that they might seek, and the burdening, if any, on defendants
12 of complying with the requests, that maybe you can agree on
13 either a staged production or narrowing the requests in a way
14 that everybody is okay with.

15 And then let me know, I'll say by next Tuesday, if
16 there is agreement on that. And, if not, let me know that.
17 And if there is not agreement, then I want a specific
18 explanation of what the burdens are of complying with the
19 existing requests. And then I will decide whatever is left to
20 be decided.

21 Does that make sense?

22 MR. BERMAN: That's fine with the plaintiffs, your
23 Honor.

24 MR. BLOOMER: What I think your Honor, would be
25 helpful -- and I don't disagree at all with the notion of

1 talking -- it obviously is helpful to try to understand what
2 the specific claim is. Because the way this is tee'd up right
3 now, it is just wide-ranging discovery, that the plaintiffs
4 would like to get, and then figure out what might fall out of
5 that.

6 I think if there are specific claims that would put
7 some meat on the bones and provide a basis for meaningful
8 discussion about what discovery would actually be necessary to
9 decide those claims, that would be a proper way for this to
10 proceed. It is hard to handle, in the abstract, when a party
11 says just give us the documents and then we'll tell you what we
12 can do.

13 THE COURT: I think that's exactly what I'm saying, is
14 you can get some elaboration, I would think, on that front.
15 And that can frame the discussion. And you can provide further
16 information to counsel on what the burdens would be of
17 complying with their requests. And my hope is that in that
18 discussion you can forge an agreement on some sort of
19 compromise or reasonable compromise that minimizes the burden
20 on defendants, but gives something to plaintiffs to make the
21 arguments that they want to make.

22 So, again --

23 MR. BLOOMER: One point of clarification, your Honor.

24 I don't think -- I read the same argument Mr. Berman
25 did. As I understand it, that tragic accident, the individual

Ea20gmic

Conference

1 unfortunately was killed. But not before the car was repaired.
2 It was at the very beginning of the recall process when the
3 accident occurred on an icy freeway in Virginia.

4 THE COURT: All right.

5 MR. BLOOMER: I wanted to make that clear, based on
6 what I read in the public records.

7 THE COURT: We don't need to litigate that case which
8 is not before me.

9 So let me know, by close of business on Tuesday, where
10 things stand on that front, and if there is agreement or
11 disagreement. I will try and give you my reactions to whatever
12 you submit promptly. Next Thursday and Friday are Jewish
13 holidays, so that's why I'm setting a deadline of Tuesday so
14 that I can hopefully give you my views by the next day. My
15 views may end up being that I am going to wait and see what is
16 in the consolidated complaint. But, regardless, my hope is
17 that you can resolve and/or narrow the issues by Tuesday.

18 All right. Moving on to other business. There are a
19 couple of issues that I just want to flag as issues that I
20 think should be or, you know hopefully are, on your radar.

21 Number one, we're not yet in position to begin with
22 depositions. But I hope and assume that you're continuing to
23 talk about the need for, and if there is a need for, the
24 particulars of protocols to govern depositions and, obviously,
25 think that that should be discussed and resolved before we get

Ea20gmic

Conference

1 to depositions, rather than after.

2 Now, number two, I had previously raised and flagged
3 the need to have procedures with respect to cost sharing
4 vis-a-vis counsel in related cases as they are not part of the
5 MDL. I don't think that I have actually addressed that in any
6 of the prior orders, but just want to flag that as something
7 that may be an open issue as well.

8 Number three, the two letters that have been filed in
9 compliance with the ESI order that is order number 11, I think,
10 that is GM's letter of yesterday, and Mr. Schoon's letter of
11 either yesterday or today, depending on which date you follow,
12 and whatever letters are subsequently filed, there may be
13 nothing to discuss. But obviously counsel should discuss
14 those. And if there are any issues, be prepared to raise them
15 with me at or before the November 6th conference.

16 Finally, we had deferred discussion about the
17 discovery of documents provided by new GM to government
18 agencies other than NHTSA until after the filing of a
19 consolidated complaint. My guess is that that issue can now be
20 folded into the larger discussion about discovery, generally.
21 And maybe we don't need to focus in particular on it, but
22 obviously insofar as the consolidated complaints are to be
23 filed in the next couple of weeks, that is an issue that you
24 should be discussing and that should be on our agenda for
25 November, if there are any issues that need to be discussed.

Ea20gmic

Conference

1 In that regard, for the November conference, you
2 should obviously follow the procedures that have been set up,
3 and that you have been following to submit a proposed agenda in
4 advance. I have mentioned any number of things today that I
5 think should be on that agenda, and many things you have the
6 October 31 deadline, so I presume that all of those would be on
7 the agenda. But, needless to say, just go through what we have
8 discussed today and any other issues that arise.

9 Before I conclude, are there any other items or issues
10 that counsel wants to raise?

11 THE COURT: Mr. Godfrey?

12 MR. GODFREY: Just one housekeeping question, your
13 Honor.

14 Mr. Bloom, or I, obviously, will be at every status
15 conference. But there will be times when one of us, and I have
16 two trials now set for next year. I don't know if you have a
17 protocol, when one of the lead counsel is unavailable because
18 of a trial conflict, whether you want a letter before or
19 something else, but I don't want to be impolite to the Court.
20 But there will be times when one or more of us, I'm sure same
21 is true for the plaintiff side, have a conflict, what protocol
22 you want us to follow in that regard.

23 THE COURT: I think that you should notify me and
24 opposing counsel. What I don't want to happen is have a
25 conference where an issue arises and the counsel who can't be

Ea20gmic

Conference

1 here is the relevant party on the other side to discuss it,
2 and. In that regard, I don't think I need any more notice than
3 the joint agenda letter that you submit in advance of each
4 conference. And in that regard, I think what you can do is
5 just make sure that the other side is advised of the issue.
6 And if anyone is going to be absent, advise me in the context
7 of that letter, assuming that you know. Again, you will
8 generally have a better idea of what issues are going to be
9 discussed, and what needs to be discussed. And to the extent
10 there is an issue, I think it can be raised in that context.
11 And if there is not an issue, you can just alert me in that
12 letter. And I think that's probably an natural way to proceed.

13 MR. GODFREY: Thank you, your Honor.

14 THE COURT: Anything further, from the front seat?

15 MR. GODFREY: Thank you, your Honor.

16 MR. BERMAN: One housekeeping issue, with respect to
17 the consolidated complaints, and how we can assist the court in
18 receiving those. So there are going to be two 850 page
19 documents, just on the notebooks, because the complaint was of
20 similar length. What would you like us to do to help you with
21 those documents. Do you want more than one set, so your clerk
22 has a set, whatever you want.

23 THE COURT: I want you to e-mail a copy to the
24 chambers e-mail address, so I have an electronic version,
25 because that is my general way of reading things these days and

Ea20gmic

Conference

1 saves paper.

2 I want one courtesy hard copy for us to have in
3 chambers for use of my staff, if not for me. And, obviously,
4 you should just work with the clerks's office to figure out
5 something. I'll give you heads up. It may be complicated to
6 file on ECF. Just work with the ECF Help Desk to figure out
7 the best way to do that. I'm not sure you can even file it
8 electronically. We're changing that procedure. But I think
9 amended complaints need to be submitted in a different manner.

10 What I want you to do, though, is to ensure that it is
11 text searchable. That is most important with respect to the
12 electronic copy that you provide me. And that should be easily
13 done. But if there is some way that working with the Help Desk
14 you can ensure that the one that is publicly filed is text
15 searchable, as well, given the length, I think that is helpful
16 for everybody involved. That would be very helpful.

17 MR. BERMAN: We'll do all that. And just, you know,
18 we are charged with representing the laws of 50 states. And
19 just setting forth the counts for each state takes pages. And
20 just so you understand we're not trying to make these things
21 big.

22 THE COURT: I do understand. And, you know, I trust
23 that you all are doing what you need to do on behalf of your
24 clients, and I have no problem with that.

25 All right. Anything else to be discussed?

Ea20gmic

Conference

1 All right, in that case, I thank everybody for helping
2 make this an efficient and productive conference.

3 I will see you November 6, if not before, and I look
4 forward to all of your filings. Thank you very much.

5 THE DEPUTY CLERK: All rise.

6 (Adjourned)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25