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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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3 GM IGNITION SWITCH MDL
PLAINTIFFS,
4
5 Plaintiffs,

6 v.

14 MD 2543 (JMF)

7 GM IGNITION SWITCH MDL
DEFENDANTS,
8
9 Defendants.

9 -----x

New York, N.Y.
November 6, 2014
9:30 a.m.

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Before:

HON. JESSE M. FURMAN,

District Judge

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1 (In open court, case called)

2 THE COURT: Good morning, welcome back. Thanks for
3 bringing the weather with you.

4 We have a bunch of stuff to cover. Let me just start
5 by saying that my understanding is that the Court called the
6 call-in service that we have contracted with to deal with the
7 telephone participation of counsel and others. As I
8 understand, it is now operational. I look forward to getting
9 anybody's feedback on whether and how well it works, but
10 hopefully it will be helpful and work well. I know other
11 courts have been using it for a while to good effect.

12 Also just again as a reminder or FYI, I have made the
13 call-in number available to other judges presiding over related
14 cases on requests of some of them or members of their staff, so
15 they will be on the line, and I will have more to say on that
16 in a moment. Because there are folks listening in on the
17 telephone, it is essential for that reason, and because the
18 acoustics in here are a little bit challenging, just reminder
19 to please speak loudly, clearly, and slowly into the
20 microphones.

21 As I have it done in the past conferences, my plan is
22 largely to track the proposed agenda set forth in the joint
23 letter of the other day, as well as the supplemental issues or
24 questions that I flagged in my endorsement of Monday, some of
25 which obviously relate to the issues that were listed in the

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1 joint letter, so I will address them in tandem with those.

2 One wrinkle in terms of the order, as I will explain
3 in more detail later, I have spoken to Judge Tanksley in
4 connection with the Melton motion to compel issue. She has a
5 criminal calendar this morning and is not available to listen
6 in right now, but she expects to about free in about 45 minutes
7 or so. I think a member of her staff is listening in right
8 now, but as an accommodation to her, I will rearrange the order
9 a little bit to deal with the issues that are of most concern
10 to the Melton case later in the conference rather than dealing
11 with them earlier in the hopes that Judge Tanksley will be on
12 the line at that point.

13 As I mentioned, we have a lot to cover, and if I still
14 have the energy for it, I would like to leave a little amount
15 of time for oral argument on the motion to remand, so let's get
16 right into things.

17 First on web site, I have naturally visited the
18 plaintiffs' proposed web site, and I must say that I found it
19 quite impressive and promising. In an ideal world, I agree
20 with GM or the defendants that it would be preferable for a web
21 site to be created by and run by the Court, but we aren't in an
22 ideal world, by which I mean that what we have to offer,
23 frankly, and I'm sad to say, pales in comparison to the web
24 site that I think the plaintiffs have proposed would provide.
25 So in that regard, I am going to go with the plaintiffs'

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1 proposed route here and basically adopt their plan and web site
2 that they have proposed.

3 The defendants indicated in the letter that they
4 objected to certain content, quote, unquote, on the proposed
5 site, but did not specify what those objections were. In any
6 event, I'm confident that you guys can work out any objections
7 as to specific content, and that you can work those out by
8 conferring, and to the extent that there are disagreements,
9 they can be presented to me.

10 So to that end, I want you to meet and confer with
11 respect to the content of the web site, both to discuss any
12 specific objections to the initial content that is already
13 there, to the extent that defendants have specific and
14 colorable objections, and then more broadly to discuss a
15 protocol going forward for maintaining and adding content to
16 the site. And I would think, and I would propose, that that be
17 memorialized in some sort of an order.

18 Now candidly, I don't care whether the site is run by
19 one side or the other or jointly by folks from both sides or by
20 a mutual third party of some sort, but the ultimate goal of the
21 web site is to be informational and promote coordination with
22 other courts. I think most of what it should do, is aside from
23 providing contact information and basic neutral information, is
24 provide links to court documents and other things that are
25 publicly available in a neutral and informative manner that is

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1 free of any editorializing. The web site is not intended to be
2 the forum in which either side tries its case, it is intended
3 to be a neutral means by which people and other judges can get
4 information in an efficient manner.

5 Now I am confident that you all can work out the
6 details and work through any objections as to the specific
7 content. If you can't, either I will, or, if necessary, I can
8 always create a court-run web site, but, as I said, I don't
9 think it would be as good as what plaintiffs have offered. So
10 to that end, why don't you guys discuss it and submit an order
11 to me within let's say two or three weeks, let's say three
12 weeks from today, earlier if you can, just discussing any of
13 the sort of protocols and rules going forward. And on the same
14 timetable, if there are any objections that you can't resolve
15 yourselves, you can present those to me, but candidly, I expect
16 that you will be able to work those out.

17 All right. Turning to the next item, document
18 depository, per the joint agenda letter, I will let you
19 continue your meeting and conferring on that, but I do expect
20 an update on the status of those discussions at the next
21 conference, if not earlier, and hope that you can resolve those
22 issues as well. As indicated, I am going to postpone
23 discussion on the motion to compel issue until later in the
24 conference and when Judge Tanksley is able to call in at that
25 point. So skipping that, we'll move to the consolidated

1 briefing schedule.

2 Per the parties' agreement, I will defer setting a
3 briefing schedule with respect to the so-called presale
4 consolidated complaint until after Judge Gerber has ruled, but
5 I do want accounts on that as soon as it becomes ripe. And to
6 that end, what I want you to do is within 14 days of any ruling
7 by Judge Gerber, I want a joint letter proposing how you think
8 I should proceed with respect to that complaint, that is,
9 whether motion practice is necessary or appropriate, and to the
10 extent that it is, a proposed briefing schedule.

11 I also want to warn you, I obviously don't know when
12 Judge Gerber will rule on these issues, but when he does, I am
13 going to try to push things forward as soon and quickly as
14 possible. So in that regard, in your proposed briefing
15 schedule, don't be too generous with yourselves. That's what
16 I'm trying to say.

17 I am also okay with the proposal to brief the question
18 of whether or to what extent to proceed with the motion
19 practice on the so-called post-sale consolidated complaint, and
20 I'm okay with your proposed briefing schedule on that, with
21 simultaneous initial briefs not to exceed 20 double-spaced
22 pages by November 25th, and simultaneous responses not to
23 exceed ten double-spaced pages by December 10.

24 I guess the one question I did want to raise with
25 respect to your proposal in the letter is whether it makes

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1 sense -- whether your proposal that you wait until I rule in
2 order to confer on a subsequent schedule in the event there's
3 motion practice makes sense, which is to say I'm inclined to
4 think that you could actually have that discussion now.
5 Obviously you don't know how I'm going to rule, but if you have
6 a discussion that presumes I will allow motion practice to go
7 forward in substantial or part or in whole, and basically have
8 a briefing schedule that is pegged to the date on which I make
9 that ruling, and to the extent that I rule in GM's favor and
10 postpone things, obviously that will be moot and the issue will
11 be postponed, but at least you will have a schedule in place,
12 and to the extent there were disagreements about that, you
13 could litigate it before I decide the issue.

14 Any questions or problems with that?

15 MR. BERMAN: That's okay with the plaintiffs, your
16 Honor.

17 MR. GODFREY: That works, your Honor, thank you.

18 THE COURT: So why don't do you that now rather than
19 later, and plan by that November 25th date either submit
20 something agreed upon to me, or to the extent there is
21 disagreement, you can present your respective positions on
22 that.

23 I should also say that if I do decide with GM --

24 Ms. Cabraser has arrived. Welcome, Ms. Cabraser.

25 MS. CABRASER: Good morning, your Honor, I apologize.

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1 THE COURT: That's okay. Mr. Hilliard told me you had
2 transportation issues. You have not missed a whole lot.

3 MS. CABRASER: Thank you.

4 THE COURT: If I decide with you, GM, on the briefing
5 or the question is when briefing should take place on the
6 motion to dismiss, the post-sale consolidated complaint, that
7 is, if I decided it should be deferred until after Judge
8 Gerber's ruling, you should basically submit your proposal on
9 that subject in that same joint letter within two weeks of any
10 ruling by Judge Gerber.

11 One note on the briefing of the threshold question
12 with respect to this post-sale consolidated complaint, and I
13 just throw this out there, I obviously don't know enough at
14 this point to have informed views on that, but I guess the
15 question arises in my mind whether this is an either/or
16 situation, that is, it may well be that briefing can and should
17 proceed now with respect to certain work, or assuming that it
18 should proceed at all, I could imagine a scenario in which
19 briefing went forward on certain issues with respect to the
20 post-sale complaint but was deferred on other issues, that is
21 to say, there may be choice of law issues or discrete legal
22 questions, the legal liability of the certain claims and so
23 forth, that it would make sense to move forward on now.
24 Obviously, these would primarily be things that would have to
25 be addressed or answered regardless of how Judge Gerber were to

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1 rule, but again, my point is that in your briefing you should
2 think about it and address the question of whether, if waiting
3 for Judge Gerber makes sense at all, it would be feasible and
4 desirable to brief some questions now on the theory, again,
5 that it would have to be addressed regardless and would help
6 expedite things and narrow the issues that needed to be
7 addressed and resolved after he rules. So again, I don't mean
8 to suggest a view on that, I don't have one yet, but I do want
9 you to at least think about it and address the question if you
10 think that it is either/or, either on or off, if you will, then
11 you can certainly make that point to me.

12 I am going to postpone discussion of Phase 1 discovery
13 or discovery generally until a little later, in part because I
14 think that Judge Tanksley may have some interest in that
15 subject as well. And in light of that, I am going to turn to
16 the bellwether trial order, which will take us a little while
17 in any event.

18 So first off, let me say that your briefs were super
19 helpful. I spent a fair amount of time considering the issue,
20 considering the arguments and points that you have each made,
21 considering talking with other judges. As some of you may
22 know, there was an MDL conference last week that was well
23 suited for my purposes, and I am prepared to rule on several of
24 issues in dispute, and want to give you an opportunity to be
25 heard and to address a few questions that I have on other

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1 issues in dispute.

2 First, let me make a preliminary comment. As we
3 discussed last time, I do agree that a bellwether trial order
4 makes sense and is appropriate. Obviously it has been used to
5 good effect in other MDLs. That said, as I noted in my
6 endorsement, there may well be other options out there that are
7 worth exploring, and may pay to be creative and even think a
8 little bit outside the box, that is, other options either in
9 lieu of or in addition to bellwether trials, which have, as I
10 understand it, received some criticism from lawyers and others
11 by the fact they are expensive and some way inefficient ways of
12 handling these situations.

13 I mentioned in my endorsement two alternatives or
14 additions, if you will, that I'm aware of, namely early neutral
15 evaluation either through some sort of administrative process
16 akin to the finder protocols or more involved mediation type
17 process, or what I gather has been called summary trials, some
18 sort of abbreviated potentially non-binding trials before a
19 jury but with limited number of witnesses and stipulations from
20 both sides.

21 My intention at the moment is to enter a bellwether
22 trial order and to proceed on that front, and my instinct is
23 that to the extent that there are viable alternatives that
24 maybe it's best to apply them in addition to bellwether trials.
25 But the bottom line is I wanted to raise this as an issue for

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1 you to think about and to discuss whether it makes sense to
2 employ any of these before we proceed to what might be an
3 expensive series of trials. So it's something that I will
4 revisit down the road but I wanted to have you start to think
5 about.

6 Turning to the bellwether trial order itself, the
7 process to be used on that score, I am, I would say, more in
8 agreement with the defendants' preferred approach than I am
9 with the plaintiffs' preferred approach. That is to say, I do
10 think both sides should participate in the selection of the
11 initial disposition pool, bellwether trial pool, both sides
12 should be given some sort of strikes, and the pool of potential
13 cases to be tried should be larger than the pool of cases that
14 are ultimately tried, that is to say, the cases to be tried
15 should be chosen from a larger pool. That is not to say, as
16 you will see in a moment, that I agree with the defendants on
17 every issue or in every respect, so let me run through the
18 different issues in dispute and then raise a few other issues
19 to boot.

20 First, there's disagreement as to the potentially
21 universe of cases that the pool should be selected from. As I
22 understand it, the plaintiffs argue that the pool should
23 essentially be all three recalls at issue, and the defendants
24 argue it should be limited to accidents and incidents involving
25 the cars involved in the first recall. I think I need a little

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1 bit more -- I need a little help here to understand what is at
2 stake from both sides in order to resolve this issue. And
3 among the things that I need some help on is I know the
4 plaintiffs at least seem to suggest that the Feinberg protocol
5 may be skewed things such that things shouldn't be limited to
6 the first recall, and I wanted to have you flesh that out a
7 little bit.

8 And then relatedly, my inclination with the Feinberg
9 protocol is that it provides some of the data that one would
10 get from bellwether trials already, that is to say, that, as I
11 understand it, the purpose of trying bellwether cases is, in
12 essence, for both sides to get data points of valuations of
13 representative cases from which they can extrapolate and in
14 theory hopefully arrive at a global-type settlement.

15 To the extent that GM on its own set up protocol to
16 evaluate cases and to value them with someone who is obviously
17 well respected and has experience and ability in doing that, it
18 seems we already have some of those data points, at least with
19 respect to the first recall. And I guess the question that I
20 would pose to the defendants is, given that, does that not
21 argue in favor of expanding the pool, argue in favor of the
22 plaintiffs' preferred approach here and take cases not just
23 from the first recall?

24 Bottom line is the ultimate goal is obviously to
25 choose a representative sample to enable both sides to get

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1 meaningful data to facilitate a global settlement. You know
2 the cases better than I do, but if you can talk to me about why
3 you think your proposal as to the pool is better, that would be
4 helpful.

5 So why don't I start with you, Mr. Hilliard. I assume
6 you're taking the lead on this.

7 MR. HILLIARD: I am, Judge, Bob Hilliard.

8 I spoke to Mr. Feinberg. The Court asked for an
9 update with regard to what is going on with the compensation
10 plan, and we also discussed what we're talking about now in
11 front of you, your Honor, and that is how do you deal with the
12 plaintiffs' inside the MDL. And with your permission, I would
13 like to kind of blend his comments into your request, and that
14 is how many of the recalled cars should be in the bellwether.

15 Just starting from the beginning, the Feinberg
16 protocol was developed by Ken Feinberg and Camille Biros, but
17 the eligibility was solely GM's. He has -- and he wanted me to
18 make clear to the Court, he has no flexibility in regards to
19 the vehicles that are eligible. The only vehicles that are
20 eligible are the first recalled vehicles of 2.5 million
21 vehicles. He commented that he thought that his outline of
22 eligibility could be used to perhaps accelerate the bellwether
23 process inside the MDL with some adjustments.

24 Most of the, I will call them easy cases, went into
25 the Feinberg protocol. He determined eligibility and then he

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1 determined the pay out. GM has the information. I and other
2 plaintiffs' lawyers who submitted claims have the information
3 as to why he determined eligibility and what the pay out is, so
4 we have a universe of value, basically.

5 But the MDL plaintiffs are a little different than the
6 Feinberg plaintiffs, and here's why. When Mr. Feinberg was
7 developing his protocol, we negotiated an issue that I lost.
8 And it was important, I thought, and it just simply didn't go
9 my way, and that was because most of these injuries are neck
10 and back injuries, when you don't have an air bag deploy and
11 you hit your dash, you're not going spend a night or two in the
12 hospital unless there's other injuries as well, you're going to
13 seek conservative treatment and ultimately perhaps get back
14 surgery relationship months and months down the road and have a
15 disability and that has value. And he said I'm not discounting
16 that, Bob, but I'm not going to do that, I'm only going to say
17 if you have two days in the hospital you get X amount.

18 So inside the MDL there are those types of cases, and
19 in the meet and confer with GM about the Court's idea about a
20 neutral arbitrator or summary trial, I believe there is a
21 quicker mechanism than pure bellwether trial. I think there's
22 a way to sit down, instead of having Ken Feinberg develop the
23 protocol, GM and plaintiffs develop the protocol and we have a
24 third party assess value. And we met and conferred about that,
25 and to their credit, they said they would think about it, it

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1 was just too quick this morning to get to a conclusion.

2 But the only issue that I brought up with them that
3 perhaps this Court could help with is many of these cases don't
4 have significant injuries, but the value of the case is the
5 potential punitive damage recovery as a result of GM's conduct.
6 And without arguing the plaintiffs' side to severely, there are
7 some pretty strong facts that should support a jury submission
8 on punitive damages. So I proposed to them maybe what we do is
9 a summary jury trial on the punitive damage issue to see how a
10 jury's view of GM's conduct affects the value of the case, and
11 then we factor that into the plaintiffs inside the MDL.

12 In the FEMA MDL, Judge Englehardt in New Orleans used
13 summary jury trials pretty effectively, and we tried a number
14 of those. And the Court is right, they're quick, they give us
15 all a sense of how juries feel about these cases. GM is a
16 little different because there is conduct that needs to be
17 evaluated in order to determine the value of otherwise medium
18 to low medium value injury cases, and these plaintiffs have a
19 sense that GM's conduct should be considered in their
20 settlement.

21 So I know I wanted to give you all that information in
22 regards to what you asked before, what Mr. Feinberg asked me to
23 share with you, and to address finally your question as to the
24 Feinberg eligible plaintiffs versus the universe of recalled
25 vehicles. If we follow GM's protocol we simply don't have that

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1 many cases, because if you have an '05 Cobalt with an airbag
2 that didn't deploy and a down low that showed that the car was
3 in that position, as of today's date, not one single claimant
4 has rejected Ken Feinberg's award. So if we stick with GM's
5 proposal, we simply don't have a pool of bellwethers that might
6 be indicative of the value of other types of vehicles.

7 THE COURT: So I don't know if I'm getting into
8 territory that isn't -- or information that shouldn't be
9 disclosed, but can somebody give me a sense of how many cases
10 are currently pending in the Feinberg protocol, maybe what the
11 universe -- I guess the big question I have is I take it the
12 deadline for the Feinberg protocol is next month sometime, is
13 that correct?

14 MR. HILLIARD: It is.

15 THE COURT: And the question I have is: Is there a
16 slew of the cases that are coming down the pike to me after
17 that run its course, plaintiffs who rejected offers through
18 that or plaintiffs having elected to sort of sit and wait and
19 watch how it develops and choose not to even file there. That
20 may have some material bearing on what I decide to do, and it
21 would be helpful to have a sense of that, if anybody has a
22 sense.

23 MR. HILLIARD: I will speak to both of those.
24 Mr. Feinberg gave me permission to share with the information
25 about the fund and sends a chart. There have been 196 wrongful

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1 death claims filed inside the fund, there have been 116
2 Category 1 cases filed inside the fund, there have been 1,460
3 claims under Category 2 filed inside the fund. So as of
4 October 31st, the fund has received 1,772 claims. The same
5 date he has determined eligible, as of October 31st, 30 death
6 cases, four Category 1 cases, and 27 Category 2 cases.

7 THE COURT: Do you have a sense of, come January,
8 there are going to be dozens or hundreds more cases filed in
9 court or --

10 MR. HILLIARD: There will be. There's no doubt in my
11 mind that he will reject a high number of cases that are
12 currently in or will be filed before December 31. And I would
13 suggest that this Court should expect soon into the first
14 quarter of 2015 that there will be filings into this MDL of the
15 cases that he deems not eligible for whatever reason.

16 As a caveat, if GM determines to expand the Feinberg
17 fund, which, as you know, they have been encouraged to do by
18 Congress and the Senate and others, then some the MDL
19 plaintiffs who are not eligible but who have very, very, very
20 strong liability and damage cases may disappear from the MDL,
21 to give you the universe of what may happen.

22 THE COURT: Okay. Anything else you want to say on
23 the universe question?

24 MR. HILLIARD: The only other thing, I believe myself
25 and other plaintiffs' lawyers around the country, if the client

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1 has an eligible claim, as a matter of course they are all
2 submitted into the Feinberg fund, whether or not there's
3 ultimately going to be an acceptance or rejection by Ken
4 Feinberg, as part of the duty to the client to give them all
5 options. And then if there's a rejection by Feinberg, at least
6 with my clients, which are going to number into the hundreds,
7 they will come into this Court's MDL.

8 THE COURT: Okay. Let me throw out a question which I
9 have not given a whole lot of thought too because it popped
10 into my head. We're obviously -- I don't know if there is a
11 precedent for this kind of situation with something like a
12 Feinberg protocol going on in parallel to litigation of this
13 sort, but the question that popped into my head is whether it
14 would be worthwhile and proper for me to speak with
15 Mr. Feinberg to talk through some of these issues and maybe get
16 a sense of what is going on in his head and so forth.

17 I could understand one or both sides thinking this is
18 a bad idea or me decide it's improper or problematic for some
19 reason, but I throw it out there and ask you to discuss that
20 and submit a joint letter maybe within a week telling me your
21 views. And I think what I will do is if either side objects,
22 just tell me that there's an objection and I won't necessarily
23 get into who objected, but if both sides agree that would be
24 okay, then maybe that would be worthwhile to do.

25 MR. HILLIARD: Generally as the courts have done with

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1 judges and cases, my view is transparency always helps the
2 process. And this is a hybrid-type situation because you have
3 a developed protocol which is simply an agreed bellwether
4 process basically administered by a very respected
5 administrator. He makes his decisions quick, he makes them
6 very, very inexpensively, and everybody saves a ton of money
7 and time and expenses.

8 I would, subject to talking to my co-leads, that would
9 make a lot of sense to me. In talking with Mr. Feinberg, he
10 wants his protocol to be expanded to include as many of the GM
11 cases as GM is comfortable with simply because he understands
12 how much time and money is saved.

13 THE COURT: All right. Well, that's obviously beyond
14 the scope of what I have to decide right now. Again, why don't
15 you talk about it within each side and with each other and just
16 let me know by joint letter within a week your respective -- or
17 if there's an objection or if everybody is agreeing that I
18 can't or shouldn't talk to him.

19 Mr. Godfrey, let me turn to you, and just get you to
20 address the universe question, if you will, on the bellwether
21 pool front.

22 MR. GODFREY: Let me defer to Mr. Fields. On your
23 prior question, we will discuss it, but there is some precedent
24 where a parallel program -- there is some precedent for a
25 parallel conversation program for some period of period of

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1 time, MDL 2179. I will take, with my client, the question
2 under advisement, and we'll discuss it the plaintiffs. I have
3 a view, but I think I need to discuss it with my client first.
4 But there is some precedent before this case, but I think we
5 need to consider the implications of that.

6 Mr. Fields is going to answer.

7 THE COURT: That's fine, as long as he uses the
8 microphone.

9 MR. FIELDS: Good morning, your Honor, Barry Fields on
10 behalf of GM.

11 I think with respect to the Court's question regarding
12 the universe of cases, the scope of cases that your Honor knows
13 identified several categories of vehicles or groups of vehicles
14 that we believe should be included in the bellwether trial
15 plan.

16 After consulting with the plaintiffs and also
17 receiving the filing yesterday, which was Document 387, which
18 the Court had requested to give us additional information on
19 the categories of vehicles, the types, the number of vehicles,
20 the number of plaintiffs, et cetera, one of the things that we
21 proposed this morning is expanding the scope of the vehicles
22 that would be covered under the bellwether trial plan.
23 Specifically, there were additional vehicles that were actually
24 included in recall -- I'll call it recall 47 that we believe
25 would be appropriate to include in that plan.

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1 For instance, your Honor, I don't know if you have
2 Document 387?

3 THE COURT: I do.

4 MR. FIELDS: If you look at the first page of the
5 spreadsheet, your Honor, you will see that there's a recall
6 number 14B47. And in our original bellwether trial proposal we
7 had selected some of these vehicles for inclusion in the trial
8 plan but not others. But as we look through the vehicle list,
9 we believe that it would be appropriate to expand the scope of
10 vehicles that were involved this. And I mentioned this to
11 Mr. Hilliard this morning. Specifically as some examples you
12 will see on the second page there are vehicles that are post
13 2007 vehicles, for instance, the 2008 to 2011 Chevy HHR, the
14 2008 to 2010 Chevy Cobalt, the G5 in 2008 to 2010 years, the
15 Pontiac Solstice 2008 to 2010, and also the Saturn Sky,
16 2008-2010, although right now, according to Mr. Hilliard's
17 data, there are no claims or plaintiffs in those particular --
18 for those particular vehicles. So we believe that it would be
19 appropriate to expand the pool of vehicles that would be
20 subject to the bellwether trial plan.

21 One additional piece of information that we discussed
22 with Mr. Hilliard this morning is that for some of these
23 vehicles they are also subject to additional recalls, and your
24 Honor can see that on this particular document, for instance,
25 some of them are subject to a recall for power steering. And

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1 the defendants believe that it would be appropriate if you have
2 allegations of power steering defects, et cetera, for these
3 particular categories of vehicles, that those also should be
4 included within the scope of the bellwether trial plan.

5 So our proposal was actually to is expand the number
6 of vehicles or groupings of vehicles that would be included in
7 the bellwether trial plan as well as take on an additional
8 defect to which some of these vehicles might be subject, or
9 allegations concerning that particular vehicle.

10 THE COURT: Okay. And can you just clarify for me, is
11 the eligibility for the Feinberg protocol, is that all the cars
12 that are listed within the 47 recall, if you will, or --

13 MR. FIELDS: I don't believe so --

14 It's all 47, yes.

15 THE COURT: Can you just answer my question, which is
16 does that not skew things and/or provide the data for that pool
17 of vehicles that we would -- obviously it's not necessarily the
18 same data, but provide some degree of the same data that we
19 would hope to get through the bellwether process, which is to
20 say doesn't that counsel in favor of broader pool beyond the
21 vehicles just in that recall?

22 MR. FIELDS: I think one of the things I would say,
23 your Honor, is I think we agree with what Mr. Hilliard says,
24 which is the universe of cases are somewhat different, and the
25 types of issues that might be dealt with in the bellwether

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1 trial plan might be different as well. For instance, the
2 question is whether or not you have a frontal collision and the
3 air bag deployed, that's something that we would be interested
4 in exploring as part of the bellwether trial plan that may not
5 be eligible under the Ken Feinberg protocol.

6 So there are the universe of the cases, and the issues
7 are somewhat different in the bellwether trial plan. There
8 would be data that might be useful from the Feinberg plan. I
9 don't know because I don't know what person has spoken with
10 Mr. Feinberg, to my knowledge, it may be relevant, but I think
11 there is additional data that we need to get from this process
12 in the bellwether trial plan for this MDL because the universe
13 of the cases and the universe of claims are different than the
14 types of claims that are being settled by Mr. Feinberg.

15 THE COURT: Do you agree that, among the most
16 important data, if you will, that could be obtained from this
17 process is essentially juries' views and the punitive damages
18 question?

19 MR. FIELDS: On the bellwether trial plan?

20 THE COURT: Yes.

21 MR. FIELDS: I think that is one of the issues that
22 you would obtain information about, whether talking about a
23 summary jury trial or talking about a bellwether trial plan,
24 we're trying to figure out a number of issues, including
25 potential punitive damages issues and how that might apply to

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1 different categories of cases that are within the pool.

2 THE COURT: Okay. Anything else? Anything anyone
3 else wants to say on the universe question of bellwether
4 claims?

5 MR. FIELDS: The only other issue, your Honor, when
6 you look at, if you look at -- there is a sum total that are at
7 the bottom of this particular chart, but when you add up the
8 numbers, you will see that with our modified proposal, which
9 expands beyond what's included in the initial draft of the
10 bellwether order, our scope of vehicles that would be covered
11 by the MDL bellwether plan would be the vast majority of claims
12 in this MDL, and I think that would also be true for the claims
13 that exist out in the state case as well.

14 THE COURT: Thank you. I am going to backtrack a
15 little bit. I have been advised that Judge Tanksley is
16 listening in on the call, so I think, with apologies, what I am
17 going to do is table further discussion of the bellwether trial
18 plan in order to cover the issues that are of greatest concern
19 to the Melton case, just to be sensitive to her calendar and
20 schedule and not make her suffer through the entirety of our
21 conference.

22 So let's go back to that issue now, and let me say a
23 couple of things. As I already made clear, I have obviously
24 had some conversations with Judge Tanksley, and I think we have
25 agreed upon a process whereby we would jointly consider some of

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1 the issues raised by the motions and at least jointly consider
2 who should decide them.

3 So let me just say that there is no question in my
4 mind that at least some of the motions or some aspects of the
5 motions are specific to potentially unique circumstances in
6 Melton, but certainly specific to Melton itself, and I want to
7 be clear that I have no intention of intruding on Judge
8 Tanksley's turf and prerogative to decide those issues. But I
9 do think that GM made it colorable, and I will leave it at that
10 for now, the case has some aspects of -- the motions have
11 potentially broader implications to the MDL as a whole and
12 other cases around the country, and that some of them may be
13 controlled by federal law, and in those regards, it is
14 certainly of interest to me, if you will.

15 In any event, I don't want to get too far ahead of
16 ourselves. I think for now, as far as I'm concerned, the only
17 issue is whether I should coordinate with Judge Tanksley in
18 considering the issues raised by the motions, and if so, how.
19 And as I indicated, I have spoken to her about that question,
20 and she and I agreed that at least some measure of coordination
21 was appropriate.

22 To that end, what I would propose is that I have you
23 brief the same issues in front of me, and by "same issues" I
24 mean the same substantive issues raised by the motions that
25 were filed in Melton as well as the sort of subsidiary or

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1 threshold question of who should decide those issues, that is
2 to say, if they're for me or Judge Tanksley or for both of us
3 to decide. If everybody is in agreement with that, why don't I
4 start with that. Is everybody in agreement that makes sense?

5 MR. GODFREY: Your Honor, I apologize for perhaps
6 preempting plaintiffs, but we may make your life and Judge
7 Tanksley's easier.

8 THE COURT: You could make it easier if you speak
9 loudly in the microphone.

10 MR. GODFREY: What was missing when the motion was
11 filed but did not take place here was a substantive meet and
12 confer to see whether we could simplify the issues for this
13 Court and for Judge Tanksley. And in discussing this, and
14 certainly with my colleagues at GM, we developed a proposal
15 that we have a meet and confer on with lead counsel earlier
16 this week, and Mr. Hilliard asked to put it in writing, which
17 we did, so he could share with Mr. Cooper, which I understand
18 was shared with Mr. Cooper two nights ago.

19 And what we thought, the proposal was on the following
20 lines: One, we agree with the Court that there should be
21 coordination, and we know that the Court will work that out
22 with Judge Tanksley. Two, we set meet and confers -- we set a
23 series of meet and confers between now and next Tuesday at
24 5:00 p.m. And following your Honor's suggestion at the
25 September 4th status, the parties should identify the

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1 categories and the differences among the categories of
2 privileged documents. Because as your Honor well knows, and I
3 suspect Judge Tanksley is equally very familiar with, the
4 privilege and work product considerations and considerations
5 differ by category, and therefore, the rulings could very well
6 vary by category of document.

7 I then said that on behalf of GM as to certain
8 categories, assuming we could work out some specified
9 conditions, we were prepared to seriously entertain withdrawing
10 the documents from the privilege log and producing them, and I
11 gave some examples of specified conditions, such as no subject
12 matter waiver by doing it, such as producing in the MDL Court
13 for the use in the MDL Court and any state court, including
14 that in the Melton 2 case, or any of the other state courts. I
15 said that I was prepared to engage now on the categories. I
16 had my own views on the categories that General Motors has
17 agreed with me on, and I thought we ought to be able to, as
18 counsel, by next Tuesday at 5:00 p.m., determine, A, can we
19 reach agreement to moot much or large portions of this
20 controversy, B, can we reach agreement as to what we disagree
21 about, and then we could let the Court know by 5:00 p.m. both
22 courts, both your Honor and Judge Tanksley by 5:00 p.m., so
23 then we would let the Court know by 5:00 p.m. Wednesday the
24 12th, Eastern time. And that would inform your Honor and the
25 parties to what needs to be briefed, when, and where.

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1 And I use as an example a simple, discrete set of the
2 documents. In the Valukas report, various documents are cited
3 that are otherwise privileged, but they're referenced
4 specifically, may be a quote from document or valuation letter
5 that I'm sure your Honor is familiar with. As I said, that's a
6 discrete set. I am prepared on behalf of General Motors now to
7 discuss the conditions under which we withdraw our claim of
8 privilege to those to simplify matters. And at the end, I
9 think many of the documents at issue we can moot, assuming we
10 can work out the specified conditions, and as to those that we
11 can't moot, then that will enable your Honor and Judge Tanksley
12 to jointly determine does it need to be decided now, is it
13 relevant to Melton and the MDL, is it relevant just to Melton,
14 or is it really the MDL and not Melton at all.

15 I said that what I would like to do to is postpone, and I
16 want to talk with Mr. Hilliard and Mr. Cooper, I said this is
17 an MDL meet and confer, I want to deal with the lead counsel,
18 and I expected Mr. Hilliard to share my conversation and letter
19 and my email with Mr. Cooper, which I understand he did. And
20 as I said, at the end of the day, I think we can moot a great
21 deal of this. I don't think we can moot all of it, but, for
22 example, the Valukas interview notes, that is something that I
23 don't think we're going to reach agreement on. I think that's
24 an MDL issue that does not relate to Melton because these
25 interviews took place, as I understand it, this year, long

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1 after the Melton case was settled, it couldn't possibly relate
2 to Melton, we think that is an MDL issue. That is an issue
3 that, if we ever brief that, we would brief that to the Court.

4 THE COURT: To be clear, taking that specific example,
5 when you say that's an MDL issue, you mean an issue that I
6 should take the lead on deciding, not that it's irrelevant to
7 Melton, because to the extent that Mr. DeGiorgio was
8 interviewed as part of the Valukas report, I would imagine it's
9 not my prerogative to decide, but it strikes me that that would
10 be relevant to Melton. But you're suggesting that it's for me
11 to decide, not --

12 MR. GODFREY: I think it's for you to decide, and I
13 have questions about the relevance to Melton given the purpose
14 of the interview, but that would, it seems to me, be something
15 that we could brief.

16 So most of the interviews, I think a couple of hundred
17 of them, as I understand it, there are very few witnesses that
18 would apply to Melton. But I understand the argument that
19 could be made these were done now, so the notion that these
20 were documents that existed as of the time of Melton to
21 settlement, they didn't exist, the interviews were taken
22 earlier this year. But you're correct, our view is that's an
23 MDL issue.

24 And when we're all said and done here, I think that we
25 have a reasonable opportunity here to simplify matters

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1 immensely. And therefore, that's what I propose. I told
2 Mr. Hilliard, I don't know what Mr. Cooper's reaction was, I
3 said I would like to, as part of this process, which I assume
4 was going to be a joint process -- it was not a surprise that
5 you and Judge Tanksley had a conversation, I assumed that, as
6 part of moving the briefing schedule back so we have three
7 additional weeks. Because I think if we do that, much of what
8 is at issue currently will not be at issue, and the things that
9 are at issue you will be in a better position and Judge
10 Tanksley will be in a better position to jointly evaluate, is
11 this a joint issue, is this an MDL lead, or is this -- as we
12 said in our letter, there are some issues that are, we think,
13 probably unique to Melton.

14 But I think we can cut through a lot of this. We had
15 a conversation this morning, Mr. Berman and Mr. Hilliard can
16 speak to this, I think there is obvious interest in proceeding
17 to try to resolve as much of this as possible. So I agree with
18 your suggestion about briefing, but I had, I think, some
19 positive developments that may make it easier to the Court that
20 I think we would like to seriously pursue in a short time
21 frame. I'm not asking for three weeks to meet and confer, I'm
22 asking by Tuesday next week by 5:00 p.m. we have an agreement
23 on A, B, C and D not E, F and G, we have agreement on it all,
24 which I doubt, then we let your Honor and Judge Tanksley know
25 that which we are still in dispute on, and you can decide the

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1 briefing.

2 What we would like is to postpone -- and we'll ask
3 Judge Tanksley for this, but I want to put on the record in
4 this process we think a lot of this will be mooted, so we would
5 like to postpone the briefing until we can figure out exactly
6 what is at issue and how it should be briefed, which of course
7 we have defer to the Court on.

8 THE COURT: Let me react briefly before I hear from
9 plaintiffs' counsel. I certainly do think this is good and
10 welcome news as far as I'm concerned, and I will go out on a
11 limb and say Judge Tanksley would probably prefer you to work
12 out some or all of this if you can.

13 Having said that, I think tentatively, what I will say
14 is I'm open to this approach, however, I don't feel that I can
15 or should speak for Judge Tanksley without actually speaking to
16 her to make sure that she's comfortable with a slightly slower
17 schedule. Because when I spoke with her, I was sensitive to
18 the fact this issue was already teed up, at least initially
19 before her, and I basically indicated that I thought some of
20 these issue should be briefed before me at least to inform a
21 decision as to what she should decide versus what I should
22 decide versus what we should decide together, and agreed to
23 expedite briefing on that so that we were in a position, or I
24 was in a position to decide those issues essentially on the
25 schedule or roughly on the schedule that she was already on.

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1 All of that is to say what I would be inclined to do
2 is to give that you expedited briefing schedule now, subject to
3 my speaking with Judge Tanksley later today, to confirm that
4 she's okay with slowing things down a little bit, in which case
5 we could go to the back-up plan, which is essentially along the
6 lines of what you just proposed, and I would issue an order
7 later today just indicating where things stand on that.

8 So I guess that's my reaction, but let me hear from
9 you, Mr. Hilliard. I should also say obviously Mr. Cooper is
10 on the executive committee here, and in that regard, I think
11 his views can be represented that he has some interest in this
12 issue as well.

13 MR. HILLIARD: Co-lead thoughts on this. Judge
14 Tanksley was kind enough to allow me to sit in on her last
15 hearing by phone, and it was clear that she was very cognizant
16 of this Court's interest, as this Court is cognizant of hers,
17 and it seems that they're working well together.

18 The only issue in regards to this specific request,
19 and I appreciate Mr. Godfrey's proposal, and I encourage the
20 Court to allow us to do it, and it looks like you are, that
21 should happen. However, Melton is unique on its facts in
22 Georgia involving Georgia plaintiffs where there is more than
23 likely a fraud and crime issue that has to be developed.
24 Separate and apart from what this Court decides to do about
25 that issue, the Meltons have rights under Georgia law, and

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1 Mr. Cooper, one the finest lawyers in Georgia, has to represent
2 them in front of Judge Tanksley. And we want to the support
3 him and support our requirements under the MDL without being
4 put in the middle between GM and Mr. Cooper, which has happened
5 more than once, as you can probably appreciate.

6 So what I told Mr. Godfrey this morning is that's
7 fine, I like that idea. I'm skeptical that it will ultimately
8 not need to be addressed on the documents that we think are
9 important, but it's a process that, given what Judge Tanksley
10 decided in trial settings is going to be, probably won't delay
11 things substantively too much as long as you keep us on a short
12 leash.

13 THE COURT: Fair to say I will keep you on a short
14 leash.

15 Mr. Godfrey.

16 MR. GODFREY: One point, I apologize if I was not
17 clear, the crime fraud allegations, which obviously we disagree
18 with, but those documents, that set of documents we are willing
19 to entertain producing to moot this controversy. And it is
20 not -- this is one of those instances where why fight over
21 something when there's nothing there. There's no there there.
22 So if we can get the right conditions, this may be one of those
23 instances where we can work out an agreement that would
24 certainly address the specific issues and certainly address
25 Mr. Hilliard's comments. I don't know for certain whether we

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1 can reach that agreement, but I'm confident we can come pretty
2 close.

3 THE COURT: I think you're getting out a little bit
4 ahead, and this area is one that you can and will be talking
5 about, but let me just ask, there are obviously two motions
6 that were filed before Judge Tanksley, one pertaining to GM,
7 one pertaining to King & Spalding. As you know, King &
8 Spalding submitted a letter to me indicating its agreement with
9 GM that the issue should be coordinated with -- or
10 consideration of the issue should be coordinated with Judge
11 Tanksley and agreeing to the subject of jurisdiction before me
12 for those purposes. I take it this proposal is with respect to
13 King & Spalding matters as well, and I guess relatedly are
14 those issues that need to be briefed separately, or it struck
15 me there was a lot of overlap between the motions that were
16 filed by Mr. Cooper and before Judge Tanksley.

17 Mr. Godfrey.

18 MR. GODFREY: We have not discussed the proposal yet
19 with King & Spalding, but my goal would be to rope them into
20 these discussions and try to reach a resolution similar to what
21 I have outlined for GM. But in fairness to the Court, we have
22 not yet reached -- had a discussion with King & Spalding
23 because we thought we would start with lead counsel, and if
24 there was an interest, if there is, then move to the next step.
25 That's our plan.

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1 THE COURT: Okay. And if King & Spalding were not
2 amenable and/or if the meet and confer didn't resolve the
3 issues with respect to the King & Spalding documents, is there
4 need to brief those issues separately or would that be folded
5 into a single set of briefs on this?

6 MR. GODFREY: I think probably separately. They have
7 their own counsel, so I think it's a separate briefing, but I
8 don't know whether we have to worry about that, your Honor,
9 because I haven't had the discussions with them yet.

10 THE COURT: All right. And just generally --
11 obviously it sounds like you haven't had detailed discussions
12 about this, but assuming there remain any issues in dispute,
13 whether narrow or broad, after the meet and confer, what would
14 be your proposal for a briefing schedule regarding those?

15 MR. GODFREY: The one issue that I am confident will
16 remain in dispute --

17 THE COURT: The interview notes.

18 MR. GODFREY: Yes. So if the plaintiffs still want to
19 pursue that now, because you will recall in the September
20 status, they agreed to defer that for a later point in time, if
21 they want to pursue that now, we should set up a separate
22 briefing schedule on that. And it should be, I think, their
23 only brief, because it's their motion. I don't know how much
24 time they want, and they can file -- date it from next
25 Wednesday. In other words, we'll tell the Court on Wednesday,

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1 both courts, what issues are not resolved, if any, but I think
2 there's one we know will be resolved, and then three or four
3 weeks.

4 I don't know what they want. Depending on what they
5 want, that would guide us, but they have not -- lead counsel
6 here have not moved on this, it's only been moved on in front
7 of Judge Tanksley. We think that the interview notes are an
8 MDL lead issue. Like some things are clearly Melton lead
9 issues, we think interview notes are an MDL lead issue. If
10 they're going to move contrary to what they agreed to earlier
11 in our September get together, then we think they will have to
12 file a motion. I don't know how much time they think they
13 need, depending how much time they think they need, I could
14 tell you how much time we think they need.

15 THE COURT: Mr. Berman.

16 MR. BERMAN: Your Honor, in terms of timing, we think
17 what we ought to do is to see how many issues there are. It
18 may be that we disagree on more than the interview notes. We
19 may have three issues. We may have four issues. They may be
20 interrelated from a foundational standpoint. So once we have
21 this meet and confer that concludes on Tuesday, we would be in
22 a better position to know when we want to file a brief and how
23 many issues we cover.

24 THE COURT: All right. So let me do this, I am
25 generally open to this approach. I think it would obviously be

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1 preferable, certainly preferable for me, let me speak for
2 myself, to resolve as much of this as you can, and you have
3 narrowed the issues in dispute, as you have done very well thus
4 far in this litigation, and for my purposes the schedule that
5 you have outlined, namely that you would let us know by next
6 Wednesday what sort of issues remain in dispute, and I would
7 say the proposed a briefing schedule with respect to those
8 issues, whether they are separate or together with King &
9 Spalding, what have you, that would be okay with me, and I
10 don't think it would hold up things up for my purposes. My
11 instinct is that Judge Tanksley would agree, and that given her
12 trial schedule, which I have no desire to intrude upon or
13 delay, I wouldn't see why this would materially affect that.
14 And given that, I am inclined to think she would agree, but I
15 really don't want to and am not in a position to speak for her.

16 So what I would propose or what I am going to do is
17 the following, I will speak with her today and will order today
18 indicating this is the way we're going to proceed, but unless I
19 agree that that is the way we're going to proceed then I'm
20 going to direct lead counsel for the plaintiffs in this case to
21 file a motion on the issues raised by the Melton motions and
22 addressing the question of who should take the lead on deciding
23 these things or how it should be coordinated with Judge
24 Tanksley. But the catch is that's going to be on a pretty
25 expedited schedule, and I would want an opening brief or

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1 briefs, because, again, there may be multiple sets of briefs
2 here that are necessary on King & Spalding issue, by
3 November 18, opposition from New GM or King & Spalding by
4 November 25th, and given the intervening holiday, I will give
5 until December 4th to file any reply.

6 (Continued on next page)

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1 THE COURT: Now, I will let you know later today
2 whether I'm going to make you stick to that schedule or if I'm
3 okay with your alternative proposal which would obviously give
4 you a little bit more time to work things out and brief the
5 issues that are not worked out, which is to say later today
6 you'll have a sense of whether you're going to be on that
7 forced march or not.

8 Anyone care to comment on that?

9 All right. Very good. I do want to turn to another
10 issue that I expect Judge Tanksley has given before, that I
11 think Judge Tanksley has some equity or some interest in which
12 is the discovery schedule at large. And I guess I'm in need of
13 a little bit of a 30,000 foot picture here, that is, the big
14 picture.

15 As you know, I did sign and enter the agreed upon
16 order for a Phase 1 discovery plan the other day. But I am a
17 little bit in the dark right now as to essentially how many
18 phases you think there are going to be, what proportion of the
19 discovery that the Phase 1 discovery plan covers, how that
20 interfaces with the respective positions on the schedule for
21 development of trials. On the plaintiff's view, those should
22 begin next October. On defendant's view, they should begin in
23 July of 2016. But in either case I'm trying to get a sense of
24 how this all fits together.

25 So I don't know who wants to take the lead on speaking

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1 to that, but just trying to get a sense of the bigger picture
2 here.

3 MR. HILLIARD: Your Honor, Bob Hilliard. The trial
4 schedule that we have proposed would be helped if the discovery
5 in Melton proceeds. Given that Phase 1 discovery plan, it's my
6 view that we can begin some substantive depositions, some
7 substantive trial preparation even before the Phase 1 is over.

8 And the Court is exactly right. The Court's decision
9 on when the first bellwether should begin decides or determines
10 really the answer to your question. I spent some time thinking
11 about if there was a way to use your Phase 1 order, use our
12 October or November trial setting, and still prepare the
13 bellwether case for trial in regards to depositions and
14 documents and came up with just a rough calendar that would
15 allow this to happen.

16 If I could hand this to the Court and to GM just to
17 speak to it?

18 THE COURT: Sure.

19 MR. HILLIARD: Judge, so this will take a little bit
20 of adjustment and though I was hopeful that the selection
21 process would be a little more unilateral, I prepared for the
22 idea that the Court would want GM to participate in the initial
23 selection process. The calendar that I have proposed to the
24 Court would still be able to effect itself with the plaintiff's
25 fact sheets being filled out and the joint participation in the

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1 initial selection.

2 What you'll see pretty quickly, Judge, is that this is
3 not a rapid pace. We actually gave the full month of July to
4 anyone's personal life or other cases. We didn't schedule
5 anything in July and in the first two weeks of September or the
6 middle two weeks of March thinking about spring break, fall
7 break, and a lot of, you know, shared custodial issues when
8 children are shared during the summer time.

9 But this gives at least the Court a kind of working
10 ability to see how we believe based on my experience getting
11 cases ready how this could proceed in a now full preparation by
12 both sides in a fair manner and give the Court a chance to try
13 the first case in the country, which we think is important.
14 And we agreed with GM that this Court should take the lead in
15 the GM litigation and that this case should be tried as the
16 first case in the country which would, if this schedule is
17 generally followed, would be about three months before the
18 Melton case in Georgia is set or two months.

19 So I hand this to you to both answer your question in
20 that Phase 1 discovery not going to be done until May.
21 However, there are many, many documents now available to us,
22 the 4 million documents that were turned over to Congress and
23 the NHTSA that we're reviewing and that we could immediately
24 utilize to begin the liability depositions of key witnesses of
25 General Motors. I've suggested a number of times that we're

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1 going to meet and confer on dates now to preserve in the future
2 for Ms. Barra, Mr. Millikin, the pretty high-ups that need a
3 lot of lead time in order to preserve the data necessary to
4 take the depositions and we're talking about that.

5 So the trial itself would have, okay, who is part of
6 this, when did they know and why did it happen. And then the
7 bellwether case would be developed for who was hurt or killed
8 and what's the result and the consequence of those damages.
9 Both can be developed under your Phase 1 schedule to allow for
10 this trial in November to occur. And, again, I'll just remind
11 the Court that I was pretty cognizant that it was going to be
12 unlikely we were going to be able to select our plaintiffs by
13 ourselves.

14 THE COURT: You gave it the old college try.

15 MR. HILLIARD: I went for it. I did. We spent a lot
16 of time developing, okay, let's say Judge Furman says I don't
17 think so. You're going to pick. They're going to pick. And
18 we kind of went with their schedule on how to select, but we
19 kept it within this calendar.

20 And I would propose to you that I can submit a similar
21 calendar to GM and to the Court that would allow that to happen
22 with one caveat -- it's the plaintiffs' fact sheet because the
23 next issue the Court is going to need to decide is their
24 plaintiffs' fact sheet makes this schedule impossible. I'll
25 tell you now. It was unique in how difficult it would be to

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1 answer each one of these. And our plaintiffs' fact sheet,
2 which is similar to many plaintiffs' fact sheets that have been
3 used in the past, can be answered pretty quickly and then allow
4 for an educated selection process. And then the bellwether
5 selection can be developed completely, more similar to what
6 they want through their plaintiffs' fact sheet, which I will
7 respectfully propose the Court consider.

8 But if the plaintiffs' fact sheet issue can be worked
9 out, then the discovery and the preparation for the bellwether
10 in -- and frankly, October, won't work. It's going to have to
11 be November given how the world turns and how delays occurred.
12 But you could set us for trial and we could get ready by
13 November based on this schedule even with your Phase 1 order.

14 THE COURT: All right. And can you just enlighten me
15 how the Phase 1 order fits in with other discovery that you're
16 discussing, that you're anticipating and the like? On this
17 schedule I take it depositions, it looks like you would propose
18 would start in the neighborhood of --

19 MR. HILLIARD: January.

20 THE COURT: -- January of next year.

21 MR. HILLIARD: Right. So we have about six or seven
22 outstanding requests for production and we have sent them more
23 not with the idea -- I understand that your Phase 1 order says
24 they don't have to answer any requests for production. They
25 have to answer these agreed-to categories. We sent them

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1 requests for production to remind them that we have developed
2 through our review of their documents information that we want
3 more information about. The Phase 1 documents are not
4 necessary to begin the depositions given the 4 million
5 documents that exist already.

6 And, again, this MDL is somewhat of a hybrid because
7 the documents were turned over before the development -- before
8 the creation of this MDL to Congress and the NHTSA, and we have
9 access to things quicker and more completely than a traditional
10 MDL would give us access to.

11 And so if you determine that this is going to be the
12 schedule and you determine when we start depositions in
13 January, I could represent to you that before the Phase 1
14 discovery is complete, there are substantive depositions that
15 can go forward given the document production to date that would
16 allow the schedule to be adhered to and that wouldn't have to
17 be a repetitive deposition of someone once more documents were
18 turned over.

19 THE COURT: Okay. And are there other categories of
20 discovery that you don't yet have either within the scope of
21 the Phase 1 discovery plan or otherwise that are necessary
22 before we get to the next step of depositions and the like? I
23 would imagine, for example, that the issues that we were just
24 discussing, namely, some of the Valukas report materials, that
25 that would presumably be something that should or needs to be

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1 resolved certainly before some of the depositions go forward.

2 MR. HILLIARD: It does because this whole conversation
3 blends into the Court's idea of how to get the bellwethers
4 quickly, how to do a summary trial, how to do a neutral
5 arbitrator. This Phase 1 discovery doesn't give us the crime
6 fraud documents. There is a need in order to determine value
7 of the MDL plaintiffs, I believe, and we're going to suggest to
8 the Court later a summary trial as maybe not as an alternative
9 to the bellwether, but as an addition to the bellwether on the
10 punitive damage issue.

11 So in order to prepare that case and to have the
12 fundamental evidence necessary, the Valukas documents, the
13 argument about the notes, which I disagree with but I'll save
14 for another day, have to be determined. Since Melton is going
15 forward, there's a way through coordination to blend the two
16 together and allow them to make each stronger by Judge Tanksley
17 ordering documents be produced in order for Melton to be ready
18 and those documents could actually help us while we review the
19 Phase 1 documents.

20 So as long as there's a blend of both courts trying to
21 get their case ready in a coordinated way, it will help the MDL
22 when Melton gets their documents. It would help Melton when we
23 analyze and provide to Mr. Cooper our summary of the 4 million
24 documents.

25 THE COURT: All right. Mr. Godfrey or Mr. Fields.

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1 MR. GODFREY: Your Honor, this is the first we've seen
2 this document.

3 THE COURT: I understand. And let me say outright I'm
4 not inclined to get into the weeds of these particular dates
5 right now. I think it would be much better for you -- I think
6 as you will learn, I guess what I'm inclined to do is give you
7 a date on which I think the first bellwether should or actually
8 will start and allow you to meet and confer and work out the
9 intervening dates between now and then whether using this as a
10 template or otherwise.

11 So I don't really want you to get into the weeds of
12 responding to these particular dates, but your help in giving
13 me a 30,000 foot picture of discovery here and whether there
14 are other phases coming down the pike and the like.

15 I should say, this probably goes without saying, but
16 for Judge Tanksley, for any other judges that have trial
17 calendars out there, I would like very much not to interfere
18 with them and to enable them to go to trial on the calendars
19 that they have set. And in that regard, I imagine that for
20 Judge Tanksley or for any other judge, for that matter, who is
21 looking at whether to coordinate with the MDL, it might ring
22 some alarm bells to see Phase 1 discovery not over until summer
23 and not knowing how many other phases or other discovery can
24 proceed in the meantime. As Mr. Hilliard just described, it
25 sounds like while those are ongoing we can push forward. And I

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1 wouldn't intrude upon Judge Tanksley's calendar or on the kind
2 of schedule that you have each proposed for bellwethers before
3 me.

4 So that's sort of what I want you to focus on for now.

5 MR. GODFREY: I'm so pleased you weren't going to get
6 into details. I can't make out which boxes are which boxes.
7 I'll set that aside.

8 We had envisioned, I believe, consistent with Toyota
9 and some other cases, three phases. The second phase would be
10 depositions and additional document issues, and the third phase
11 would be experts.

12 The Melton case is important. And we respect Judge
13 Tanksley's calendar and are going to work within that. But we
14 need to understand that Melton is one case with one set of
15 issues, and this MDL is much broader than Melton with many sets
16 of issues. There are 64 recalls in the consolidated
17 complaints. You have the chart about the personal injuries and
18 you see the scope of the recalls. And so the notion that the
19 speed of this MDL and discovery of this MDL is going to match
20 Melton misses the fundamental factual difference between the
21 two cases in terms of Melton is a subset of the issues in this
22 case but this case is much broader, as is typical with an MDL.

23 I'm happy to sit down with Mr. Hilliard or lead
24 counsel to discuss Phase 2. But Phase 1 is a substantial
25 undertaking, very substantial undertaking. And we worked very

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1 hard with the plaintiffs to work that out and the days were
2 negotiated about what the parties thought were reasonable.

3 I do think that there are some inflection points of a
4 critical nature. One, the plaintiff fact sheets. It is
5 amusing at best to me to hear that a fact sheet of 15 or so
6 pages is overwhelmingly burdensome to the plaintiffs when
7 they've served 1400 document requests upon us and when they say
8 they need to go to trial. Two, when they want to pick
9 bellwether cases without us having the plaintiff fact sheets to
10 have an educated assessment of how to do it.

11 So these are issues where there are inflection points
12 that we're going to need the Court's guidance on because if we
13 don't have a plaintiff fact sheet that allows us to make any
14 rational determination as to whether or not the bellwether
15 trial is going to work or not, then we're not really advancing
16 the ball.

17 I'm happy to have the discussion about Phase 2 now and
18 give dates. I have no preordained views on what the
19 appropriate dates are or are not, other than that these
20 inflection points will have a serious impact upon the rational
21 selection of those dates. And that's about as far as I can go
22 I think in answer to the Court's question.

23 THE COURT: Okay. Let me then turn to some of those
24 inflection points and we can discuss going forward. I do,
25 however, think you should be talking about the Phase 2 schedule

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1 now. And to the extent that you need the inflection points
2 answered, I'll answer them in a moment. I think it's in
3 everybody's interest, both for the MDL and related cases,
4 including but not limited to Judge Tanksley, to have a schedule
5 in place and to move things forward as much as we can. So let
6 me comment on what you have described as some of the inflection
7 points and say a couple things.

8 One is I agree with the defendants that both sides
9 should participate in the selection process of bellwethers.
10 Relatedly, I think that the plaintiffs have the order backwards
11 in the sense of postponing plaintiffs' fact sheets until after
12 the selection. I think obviously that's necessary in order for
13 both sides to make a meaningful choice from the universe of
14 cases that are in whatever the pool is going to be. So in that
15 regard, the answer to the first inflection question or point is
16 that I do think that the first step is having the plaintiffs
17 complete a plaintiff fact sheet.

18 Now, the question arises what that looks like, and
19 there I guess I am inclined to agree with the plaintiffs that
20 it's not so much that it -- well, there is a burden imposed in
21 answering all or many of the questions in what I'll call the
22 long form fact sheet, fact sheet A, whether it is the
23 defendants' preferred version or the plaintiffs' preferred
24 version. And my gut is that it is not necessary for every
25 single plaintiff to answer every single one of those questions

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1 in order for both sides to make a meaningful choice of which
2 cases should be in the bellwether pool.

3 So, and I'm jumping around a little bit here. What
4 I'm inclined to do and I'm happy to hear your thoughts on it is
5 basically come up with a schedule whereby every wrongful death
6 or personal injury plaintiff is directed to complete some
7 version of essentially the short form plaintiffs' fact sheet,
8 that is, plaintiffs' fact sheet B. And if GM or any defendant
9 for that matter believes that there are questions that are on
10 the long form that are not on that short form that are
11 essential to the decision of what cases should be in the
12 bellwether pool, then I'm open. I think the first step would
13 be that you would confer with one another about whether to add
14 those questions to the short form, and, if you can't agree,
15 then I'll resolve it.

16 But, again, the goal here is to basically have enough
17 information for both sides to meaningfully assess what cases
18 are going to be representative and would most help to try
19 sooner rather than later. In that regard, I understand you're
20 advocates and you're advocating for your respective sides.
21 But, in theory, we have a common goal here and this process
22 works best and only really works if we're able to pick
23 representative cases.

24 So my proposal is that all the plaintiffs are required
25 to submit essentially plaintiffs' fact sheet B, if you will,

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1 plus whatever questions the defendants are able to articulate
2 and make a case for including as essential to making the
3 selection. Thoughts? Then we can get into schedule or I can
4 leave you to try to work out a schedule.

5 Mr. Fields.

6 MR. FIELDS: There are some questions that we will
7 work with the plaintiffs and hopefully reach agreement on to
8 add to the shorter form of plaintiff's fact statement.

9 One additional thing your Honor should be aware of is
10 that the parties agreed that one of the things that is valuable
11 in the selection process would be to have a database, an
12 electronic database, searchable database so the materials could
13 be easily reviewed by the parties. And so one of the things
14 that needs to be created and I think plaintiffs' counsel are
15 working on that is to create a database that the parties can
16 use to efficiently review the plaintiff fact statements as they
17 come in. So that's another project that needs to be built into
18 the schedule as your Honor is looking at the information.

19 THE COURT: Okay.

20 MR. FIELDS: I assume, your Honor, with respect, one
21 of the issues out there is obviously there will be a need for
22 additional discovery post plaintiff fact statement, and that's
23 one of the things that we'll obviously be dealing with.

24 THE COURT: Sorry. I should have elaborated. My
25 vision here is that all the plaintiffs or at least all the

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1 plaintiffs who will be eligible for consideration for
2 bellwether selection would fill out a short form and to be
3 determined what that means. And then those that are selected
4 to go forward would proceed to more expedited and thorough case
5 specific discovery plan. And, obviously, if there were
6 questions on the long form that were left out of the short
7 form, those could be posed and explored in that context. So
8 that was my idea. I didn't mean to suggest that you wouldn't
9 get that information at all.

10 MR. FIELDS: And one additional thing, your Honor.
11 One of the issues that you probably saw on the various fact
12 sheets or the various bellwether trial orders is to deal with
13 the situation where you really try to ensure that the vast
14 majority or all the plaintiffs, in fact, do fill out a
15 plaintiff fact statement. So in many bellwether orders, you
16 will see an indication that the plaintiff must submit a
17 plaintiff fact statement by X date and, if not, the Court will
18 have to deal with whether or not the claim is dismissed.
19 Otherwise, you have individuals who obviously don't want to
20 participate in the bellwether process who don't fill out a
21 plaintiff fact statement.

22 THE COURT: That's on my agenda of things to raise so
23 I'll get there shortly.

24 I think I may have said this already, but if I didn't,
25 let me make it clear. I agree with the defendants that the

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1 goal here should be to pick a pool of potential bellwether
2 cases and then, at the end of case specific discovery, to have
3 some process, and my inclination is to think we don't actually
4 need to answer the question today what that process will be, to
5 pick a subset of that pool for actual trial. And that's
6 another reason why I think that some of the case specific
7 discovery can be obtained after the initial pool is determined.
8 That is to say that in agreeing with the defendants that we can
9 basically choose cases from a more limited pool, if that case
10 specific discovery reveals that one or more of those cases is
11 not representative in some fashion, then we can adjust for that
12 in not picking that case ultimately for trial, which is part of
13 the reason at the first stage I don't think we need quite as
14 many questions in the long form questionnaire filled out by
15 everyone.

16 Mr. Hilliard, do you want to comment on a lot of
17 things in the mix here?

18 MR. HILLIARD: One thing that's going through my mind,
19 Judge, is an outstanding issue is the absence of vehicle and
20 download given the time difference between when we learned
21 about the issue and when the accident occurred. So do you
22 contemplate the initial pool selection to have any defined
23 specificity as to have to have the vehicle, have to have the
24 download, or do you want to make that decision initially or
25 carry it for later because it does affect the selection

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1 process. As the Court can see through the document we
2 produced, a majority of these vehicles don't exist and there's
3 going to be a point in time where we're going to have to
4 address that with the Court based on GM's conduct in relation
5 to covering up the evidence for so long.

6 However, there is evidence that we believe will allow
7 us to meet the burden of proof in regards to police reports,
8 photographs. For example, there's a frontal impact and expert
9 testimony that it was higher than the federal standard where
10 air bags should deploy and there is the box checked in the
11 police report that the air bag did not deploy and the injuries
12 are consistent with no air bag protection.

13 But you don't have a vehicle and you don't have a
14 download, there's going to be two things. There's going to be
15 a need for the Court to determine whether you want those
16 vehicles or those incidents to be your bellwether. And then
17 there's going to be a need to determine the absence of vehicle
18 and downloads, should that be able to used affirmatively by GM
19 if the conduct of their own client prevented the preservation.
20 That issue has to be carried to another day.

21 But the threshold issue is going to be what's your
22 vision of the initial pool.

23 THE COURT: All right. I think that's certainly a
24 question and I understand the question. Obviously, there's a
25 little bit of disagreement, and I'll get into that in a moment.

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1 But I think it's the next level question.

2 The first level question is just in connection with
3 the inflection issues that I have just addressed, in essence,
4 having all plaintiffs submit some short form version of the
5 plaintiff fact sheet, followed by the selection process,
6 followed by more thorough case specific discovery as to those
7 that are selected, followed by some sort of process to choose a
8 set of those cases for trial.

9 Are you in agreement with that or okay with that?

10 MR. HILLIARD: Accept and agree to all those things,
11 yes.

12 THE COURT: Very good. And let me be clear. So what
13 I envision happening is for me in the next few days or week to
14 enter a bellwether order. But there are a lot of things at
15 play here and I think we should all understand that I would be
16 doing that so that we have kind of a clear path forward but
17 that the plan may be modified as needed, or if we come up with
18 better or different ideas of how to handle these issues,
19 whether it be on a punitives front or with a summary trial or
20 with mutual evaluation of some sort, basically that this is at
21 least a placeholder so we have a path forward, but it's
22 something that you should continue to think about and discuss.

23 Relatedly, I guess my instinct is to kind of set
24 certain benchmark dates, including a date for a first
25 bellwether trial, and give you the first crack at essentially

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1 reasoning backwards from that on appropriate intervening
2 deadlines, and also discussed in that context, the Phase 2
3 discovery issues and the like, which is to say I think there's
4 an interest in getting a bellwether order in place. And I
5 don't want to wait for all those intermediate deadlines to be
6 worked out; I think that that can be done after. So that's
7 sort of my vision for how we're going to move forward here.

8 And, relatedly, I think that I would enter a
9 bellwether order while you meet and confer and work out the
10 particulars of the plaintiff fact sheets, but I think that
11 should be done on a pretty expedited basis so the plaintiffs
12 actually have time to fill those out because that's obviously
13 one of the necessary steps here. So just to give you a sense
14 of essentially where I'm thinking this is headed.

15 With that, let's get into the other areas of
16 disagreement on a bellwether order. We've already discussed
17 the universe of what cars and plaintiffs should be in that
18 pool. I will consider your arguments, look at the spreadsheet.
19 And if you indicate that I can or should speak to Mr. Feinberg,
20 maybe factor that in as well. The bottom line is I'll reserve
21 decision on that and make clear where I come out in whatever
22 order I enter.

23 The next question is one I think, Mr. Hilliard, you
24 were getting into which is essentially different categories,
25 subsets or subcategories that should be included in the pool.

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1 Let me say a couple things on that. Again, the ultimate goal
2 here is to make sure that the case in the pool of bellwether
3 trials is representative and informs both sides for purposes of
4 settling other cases or even a global settlement. In that
5 regard, you know better than I do what the salient categories
6 or characteristics are. That is what Judge Fallon in his
7 article refers to as the major variables. And it seems like
8 there are subtle differences between your proposed categories,
9 not the least being one side says pick five categories and the
10 other six. But it seems like the ones that you have settled
11 upon is whether the vehicle and downloads are available or not
12 is a pretty significant distinction.

13 Let me say I guess my instinct is on that that the
14 pool should include cases from each of those categories because
15 I assume that the valuation -- No. 1, the legal issues, and
16 No. 2, the valuations may differ between those categories. And
17 I think ultimately, again, I think we don't need to settle this
18 today. But ultimately to the extent that I have view on this
19 today, my inclination would be that in picking a case for
20 trial, it would make sense to pick one from each of those
21 categories to try seriatim so we have one where there was a
22 vehicle download, one where there wasn't and so forth, as a way
23 of kind of getting markers in each of those categories.

24 I guess the questions I have are, No. 1, I think I
25 need a little bit of elaboration from each side as to why your

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1 preferred categories are the better ones. No. 2, whether there
2 are differences here that you can work out. Again, at the end
3 of the day, you know better than I what categories will be
4 helpful to you in determining values of cases. And then,
5 No. 3, are there other quote/unquote major variables that we
6 should be considering, including, for example, choice of law
7 issues or any other issues pertaining to either categories of
8 plaintiffs or categories of cars or the like. I take it the
9 answer to that is no in your judgment, but I did want to at
10 least pose the question.

11 So let me turn to this question now and, Mr. Hilliard,
12 if you can, just I guess tell me why you think your five
13 categories are the appropriate ones and why you think the
14 defendants' proposed categories are somehow less ideal.

15 MR. HILLIARD: Mine are real world and theirs are not.
16 But in their defense, they did not see my list until you saw my
17 list. And I'll just reflect that our meet and confers have
18 been both substantive and effective to date. My suggestion is
19 now that they have my list and they understand the universe of
20 the cases inside the MDL, at least to today's date, it might be
21 worthwhile to sit down with them and see if there's some
22 adjustment that GM is willing to do with regards to whether
23 they insist on all vehicles and all downloads.

24 I'm aware that the Court now believes you should have
25 both and there are both, I will tell you. So if you believe

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1 the bellwether in order to determine value on all types of
2 cases should have both, there can be both. I don't know if
3 there's going to be strikes, whether the vehicle and the
4 download cases will survive the strikes, just be cognizant of
5 that given the numbers. And it does make some sense because
6 there are some that do exist.

7 The other issue that often comes up is seat belt and
8 contrib.

9 THE COURT: And what?

10 MR. HILLIARD: Contributory negligence. Was there
11 alcohol involved? Was there a third party that started the
12 accident scenario in sequence and then the ignition switch
13 contributed to it? If there needs to be some sort of value and
14 understanding from a jury's perspective as to how much they
15 will forgive GM if there's Jack Daniels involved or how much
16 they will forgive GM if there's a third party that crosses the
17 center lane, then we need to determine should there be a
18 bellwether where there's no seat belt and there's serious
19 contrib where the defect still exists because those cases are
20 out there as well.

21 Otherwise, choice of law, I don't really think that's
22 going to be an issue.

23 THE COURT: All right. Mr. Fields.

24 MR. FIELDS: Thank you, your Honor. One of the things
25 that we tried to do is to deal with -- I think Judge Fallon's

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1 article was very informative in the way he sort of looked at
2 selecting bellwether cases. One of the things that we tried to
3 do in developing our categories was to try to look at the major
4 variables. I agree with your Honor there could be other
5 variables that exist out there, but in our view these are the
6 major variables that are at play in this particular MDL
7 proceeding.

8 And the way we developed our six categories was we
9 looked at certain issues and what we considered to be major
10 variables, whether it was wrongful death claim versus personal
11 injury claim, whether there was a claim involving frontal
12 impact and allegations of air bag nondeployment or whether or
13 not those allegations did not exist, whether the claim involves
14 some type of loss of vehicular control, and also whether or not
15 the vehicle in the EDR is still available. So what you will
16 see is we have categories for each of those.

17 So in our particular plan there is a category for a
18 situation where the vehicle and the EDR are not available. So
19 what we tried to do is take those variables; and the reason we
20 have six of them is we tried to deal with situations where
21 vehicles are available, where vehicles are not available, where
22 we have allegations of air bag nondeployment or where
23 allegations were lacking in that respect. So I think our six
24 categories really try to capture the key variables that exist
25 in this MDL pool.

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1 THE COURT: One very particular question: Why are
2 there six as opposed to eight, which is to say category three,
3 wrongful death claims involving loss of vehicular control, and
4 category six, personal injury claims involving the same, you
5 have where the vehicle and EDR are still available, but you
6 don't have the alternative where they're not.

7 MR. FIELDS: One of the things you can do, you can
8 expand that. You can bring these down even further. And one
9 of the issues you sort of get to is sometimes there's a need to
10 sort of collapse the category. But one thing you hope happens
11 is that when you select the pool, you will be able to find,
12 depending on what the plaintiff fact sheets show, you will be
13 able to select cases that will fall in the category that can
14 even be further subdivided. But just from a practical
15 standpoint, sometimes you do collapse the categories.

16 THE COURT: All right. And I guess the bigger picture
17 question for me is how much daylight is there between your
18 respective positions? It doesn't sound like you have really
19 sat down to talk them through.

20 MR. FIELDS: I think we have had several meet and
21 confers on this. But Mr. Hilliard is correct -- we did not
22 have this spreadsheet. And I do think it would make sense to
23 have further meet and confers to see whether or not we can
24 bridge the gap with respect to these different categories. I'm
25 not sure whether that can happen. But I think it's worthwhile,

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1 given the additional data that we have, to see if we can reach
2 agreement on categories.

3 THE COURT: Does the agreement on the categories
4 depend on either agreement or a ruling from me as to the
5 universe in the first instance?

6 MR. FIELDS: I don't think so, your Honor.

7 THE COURT: And what are your thoughts on
8 Mr. Hilliard's comments about other potentially major variables
9 being seat belts or essentially contributory negligence type
10 issues? It does strike me that it would be a shame if a
11 bellwether was a case where somebody had a .3 blood alcohol
12 level and that somehow complicated the jury's considerations of
13 the issue. That would not strike me as a representative case.

14 MR. FIELDS: The way we would deal with that, I think,
15 your Honor, is during the selection in the first instance. For
16 instance, by looking at the plaintiff fact sheet, if you had a
17 situation where you had, for example, the blood alcohol content
18 that was significantly above the legal limit and you were
19 concerned that that would skew the result one way or the other,
20 and you don't see the remainder of the pool, you don't see that
21 as being representative of the remainder of the pool, then I
22 think one of the things you do is decide whether or not that is
23 really a case that you want to select as a bellwether.

24 THE COURT: Agreed. But I guess the question I have
25 is, is it sufficient to leave that to the respective sides to

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1 decide in making their selections or is it better to either set
2 some parameters and say we should have or shouldn't have cases
3 with those features in them or that it's an eligibility
4 criteria that alcohol wasn't involved at some level or
5 something?

6 MR. FIELDS: I think at this point, your Honor, I
7 think it would depend on the information that we get in the
8 plaintiff fact sheets.

9 THE COURT: I think that may be right in the sense
10 that if it turns out 90 percent of the plaintiffs were under
11 the influence, which I'm not assuming is the case, then
12 obviously it might be important to value those cases. That is
13 to say, if there's a sizable portion that there's a
14 contributory negligence type issue, it may be that is a salient
15 characteristic or salient major variable we need to consider.

16 MR. FIELDS: I think the other thing that can happen,
17 your Honor, is if we get into situation where one side picks
18 the case like this and it's truly not representative, I think
19 it's one of those things where we have to simply get the Court
20 involved in that process and simply say for that particular
21 case, for one reason or another, it's going to skew the result
22 and does not result in the benefits that we hope to achieve
23 from the bellwether.

24 THE COURT: Let me throw out a question: Should we
25 defer the decision about the universe and categories until

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1 after the plaintiff fact sheets are in and you make a very
2 quick and initial determination of what the salient
3 characteristics and what the pool looks like?

4 MR. FIELDS: I think that's fine, your Honor. I think
5 what we can do is I think we have a general idea of what those
6 categories are. So the hope is once the plaintiff fact sheets
7 come in and are digitized that we can quickly then see whether
8 or not there needs to be some adjustment to the categories, and
9 that shouldn't be a very extended process.

10 THE COURT: All right. Mr. Hilliard, what do you
11 think about that?

12 MR. HILLIARD: It's a good idea. It won't delay the
13 trial. It will give them more information. If the Court gives
14 us parameters, I'm confident we can reach an agreement as to
15 the bellwethers. Unless there's a lot of contrib, I don't
16 think we need them and I want them weighted one way or the
17 other on download available or not available. Mr. Fields and I
18 generally get along and we can sit down and work them out.
19 Once we get the plaintiff fact sheets, if we have your
20 parameters generally, we can inform the Court that there is X
21 amount of contrib, X amount of nonseat belt or X amount of
22 nonvehicle download and just have more information to go on.
23 And, again, my strongest feeling is I don't see how it affects
24 the ultimate downstream trial setting, so it makes sense.

25 THE COURT: Okay. I guess what I'm saying is I think

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1 the parameters may depend a little bit on the reality of the
2 data that we will learn from the plaintiffs' fact sheets. If
3 it turns out that there are significant proportion of the cases
4 that involve a specific kind of contributory negligence type
5 issue, then that might speak to whether that type of whether a
6 case or cases involving that should be included in the pool.
7 So maybe we should just wait until we get all that data in and
8 then have a very quick process whereby you either agree upon
9 the categories that we're trying to get or I resolve any
10 disagreement.

11 MR. HILLIARD: Exactly right.

12 THE COURT: Is that true for the universe question as
13 well? I would think so.

14 MR. HILLIARD: Yes.

15 THE COURT: All right. Good. Very good. Let's move
16 on to the next issue which is the question of who selects. I
17 think I've already indicated my views on the big picture
18 question there, namely, that both sides should play a role in
19 the selection process for the reasons discussed by Judge Fallon
20 in his article. Basically, I don't want a situation where
21 cases are cherry picked by either side.

22 That said, let me just throw this out as an idea. I
23 am somewhat attracted to the idea of introducing an element of
24 randomness into the process. That is not completely for the
25 reasons that Judge Fallon describes in his article, but I

EB6LGM2

1 wonder whether some sort of hybrid approach makes sense. That
2 is, allowing both sides to pick some number for an initial
3 pool, say 15 or something, and then either allowing both sides
4 a limited number of strikes or just having some sort of random
5 selection process from that pool to arrive at the final number.

6 And it seems like both sides think 18 is a good
7 number. I'm okay with that in principle. It doesn't run the
8 problem of a completely random process, the problem Judge
9 Fallon describes, but it does introduce an element of chance
10 into the process that maybe is worthwhile. On the other hand,
11 maybe that's unnecessary because to the extent that random
12 selection should be part of the process, that can be done at
13 the second order stage, that is, when cases are selected for
14 trial from within the pool, and maybe that's the better moment
15 to sort of introduce an element of chance into this process.

16 The other thing is maybe chance isn't the thing we
17 want here. To the extent we're trying to get meaningful data
18 about representative cases, maybe chance is not actually a good
19 principle.

20 So, thoughts on that?

21 MR. HILLIARD: Well, we're trial lawyers, so chance
22 defines the job description. Are you saying that perhaps once
23 we get the pool, that once the pool is here, how does chance
24 pick the trial bellwether?

25 THE COURT: Well, again, I think I made pretty clear I

EB6LGM2

1 don't want to answer that question -- I don't think we need to
2 and I'm not inclined to answer that question today. I think we
3 can defer that.

4 MR. HILLIARD: Well, conceptually, chance is a good
5 idea because what happens is they're going to strike my best
6 cases, I'm going to strike the worst cases. And if the Court
7 picks one or chance allows some case to be tried, it keeps
8 everybody focused on the ultimate goal which is can we resolve
9 these, can this get done. It takes away the power, not in a
10 bad way, but it does take away the power of manipulating the
11 process in order to prevent the goal. Reasonably, that is
12 always the pushing and tension in that regard.

13 If the Court has some sort of built-in selection right
14 or if you review and say, look, you guys get three strikes but
15 there's going to be one case that goes to trial, I'm going to
16 select them randomly, there's no downside.

17 THE COURT: All right. But it sounds like your view
18 is that randomness should come in, if at all, at the point when
19 we're picking cases for trial, not in the decisions as to
20 what's in the initial pool.

21 MR. HILLIARD: Right, absolutely, because then it's
22 too diluted.

23 THE COURT: Mr. Fields.

24 MR. FIELDS: Your Honor, I agree with that concept. I
25 think when you look at what Judge Fallon talks about -- and

EB6LGM2

1 there are some law review articles that try to discuss
2 randomness and random selection and the benefits of random
3 selection. But I think the big danger, especially when you're
4 trying to select what we call the initial discovery pool, is
5 that if you include randomness in there, you can end up with
6 cases that are not truly representative. I think you reduce
7 the likelihood of that occurring substantially by having the
8 parties involved in that process as opposed to randomly drawing
9 them out of a hat.

10 THE COURT: To be clear --

11 MR. FIELDS: A hybrid.

12 THE COURT: A hybrid approach where you would narrow
13 it down to a relatively small pool so those are already somehow
14 representative and then there's a random selection from that
15 pool. Presumably, it would limit the problem that Judge Fallon
16 describes I think is correct. If you start with the overall
17 universe and randomly select from that, that strikes me as a
18 terrible approach, even if the manual of complex litigation
19 advocated for it. But if you narrow it down through a more
20 rational process and select randomly from that, that strikes me
21 as a good hybrid.

22 MR. FIELDS: I haven't talked with the client about
23 this. But one of the ways to think about it might be, and
24 maybe this is what you're suggesting -- and I'm not sure if
25 I've seen exactly the situation -- but you could have a

EB6LGM2

1 situation where both parties select a larger number than 18,
2 you could say 50 each, and then out of that pool you would then
3 select randomly 18. That might be a way to deal with the issue
4 on representativeness, if you were going to do random
5 selection. I think our preference would still be to stick with
6 the parties selecting the initial discovery pool.

7 THE COURT: All right. I think that was along the
8 lines of what I was throwing out. But in discussing it I think
9 I'm persuaded that randomness, if it enters the process at all,
10 should come at the stage when we're picking cases for trial,
11 not at the initial stage.

12 All right. Turning to the next issue which is
13 plaintiff fact sheets. We've already addressed a lot of the
14 issues there. I guess a couple questions that we haven't yet
15 addressed which is I've already indicated that I think some
16 version of the short form questionnaire is appropriate and then
17 more thorough discovery can be taken as to those who are
18 selected.

19 Just so that we're all on the same page, obviously,
20 the long form questionnaire includes the documents requests as
21 well and the short form does not. My assumption would be that
22 that would be deferred until after the selection is made, at
23 which point those document requests could be served on the
24 plaintiffs who are in the bellwether pool. But is everybody on
25 the same page, or I guess it raises the same question. Maybe

EB6LGM2

1 give GM an opportunity or defendants generally an opportunity
2 to just review the long form questionnaire and see if there are
3 things that you think are absolutely essential or important in
4 deciding what cases are representative, to discuss that and
5 then make the case for it if there's disagreement.

6 Mr. Fields.

7 MR. FIELDS: Your Honor, only one point of
8 clarification. As I look at the short form, the short form
9 does include document requests. It includes fewer document
10 requests than the long form, but there are document requests
11 that are also contained in the short form. Document requests,
12 medical authorization releases.

13 THE COURT: Is that in Exhibit B to your letter? I'm
14 sorry, pages 8 and 9. All right. So, again, I think it sounds
15 like we're all on the same page and that will be the sort of
16 the starting point. And you should discuss in the first
17 instance whether there are additional requests or questions
18 that you think are essential, again, the ultimate goal being to
19 have enough data to pick representative cases.

20 All right. I think we should come up with a timetable
21 for you to have that discussion, which is to say either agree
22 upon a plaintiff fact sheet along the lines and parameters I've
23 described, or submit to me any disagreements to be resolved
24 swiftly. And I think it should be a pretty short process
25 because the goal will be to get these out and give plaintiffs

EB6LGM2

1 an opportunity and enough time to submit them without
2 complicating the larger schedule.

3 So any thoughts on when you could get back to me on
4 this front?

5 MR. HILLIARD: A week from tomorrow.

6 THE COURT: Is that realistic?

7 MR. FIELDS: A week from tomorrow, yes.

8 THE COURT: Again, my hope is you guys can work this
9 through and that there won't be any disagreements. But by a
10 week from tomorrow, either present an agreed upon short form
11 questionnaire for everybody to fill out or submit your
12 disagreements. And some of them we'll address in the next few
13 minutes anyway.

14 I think you should also discuss -- and I don't think
15 you need to do it on that time frame, but we should figure this
16 out. This is something Mr. Fields mentioned before. I think
17 we do need, No. 1, I think we should have some understanding of
18 what materially deficient or substantially complete, whatever
19 phrase is used, what that means here so that maybe we can't
20 define it until we have concrete cases in front of us, but I
21 think you ought to give some thought to whether that should be
22 defined sooner rather than later or at least a process to
23 resolve whether fact sheets that are submitted are
24 substantially complete or not materially deficient.

25 Relatedly, I think there does need so to be some sort

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1 of process to resolve what happens with plaintiffs who don't
2 submit a fact sheet at all or fail to submit a substantially
3 complete one. And I know, for example, that Judge Seibel in
4 the Mirena MDL that she's presiding over has a process in place
5 whereby there are sort of different stages of warnings and the
6 like, culminating essentially, if a plaintiff doesn't
7 ultimately submit one, in dismissal, I think, without
8 prejudice. But, regardless, I assume she has an order on this.
9 I've discussed it with her.

10 I'm not suggesting that I'm going into that particular
11 approach, but I think that we should have some plan in place so
12 that it's clear what happens if or when some plaintiffs don't
13 submit these things. So I think you should discuss that and be
14 prepared to address it at the next conference, if not before.
15 And if you agree on something, great. But wanted to just put
16 that on your radar. I guess that's another way of saying I
17 don't think that needs to be in the initial bellwether trial
18 order, which, again, my hope and intention is to enter in the
19 next week or so. But I do think we should resolve it and have
20 in place before the deadline for submitting the fact sheets.

21 In terms of the selection size of the pool and the
22 selection process, I think I've already indicated that I agree
23 with the defendants that ultimately we should pick for trial a
24 subset of the cases that are in the pool because we'll know
25 more about the cases at the end of case specific discovery. I

EB6LGM2

1 also say that I'm not eager to try 18 cases myself. I'm
2 inclined to think that won't be necessary, or that I can enlist
3 the service of transfer order judges or just figure out what to
4 do in the event that that does prove to be necessary. But I
5 don't think we need to resolve all those issues today. But as
6 I said, I think the ultimate process would involve a selection
7 from the initial pool.

8 Let me turn to the question of timing, which is
9 probably the thing you're most interested in. I take it, well,
10 let me ask a couple questions before giving you my view on when
11 the first trial should be scheduled.

12 No. 1, what is the relationship between the first
13 bellwether, if you will, and the Melton case? Mr. Hilliard
14 indicated his view before, the MDL first bellwether should
15 proceed before Melton, but I don't know if that really matters
16 ultimately. I guess that's the question.

17 No. 2, I think you've both indicated that the goal
18 would be not to have trials going on simultaneously. But just
19 to press the point, is there a reason they can't? There are
20 obviously a lot of lawyers here and to the extent that,
21 obviously, if two cases involve the very same lawyers, I think
22 it's fair to say they couldn't go forward simultaneously. But
23 that may not be the case, and if that isn't the case, is there
24 a reason that trials couldn't be scheduled to run
25 simultaneously?

EB6LGM2

1 And, lastly, how long are we expecting these trials to
2 last? Mr. Hilliard on his colorful time line here seems to
3 indicate that allocating 15 days or so, trial days or so, would
4 be an estimate but, obviously, that has some bearing on the
5 schedule as well.

6 So, can you address those questions. Turn to you
7 first, Mr. Hilliard.

8 MR. HILLIARD: There are cases around the country and
9 there are state MDLs around the country. This MDL, the federal
10 MDL, has a powerful executive committee. Given how much work
11 we can do quickly, we can basically assist and help the
12 nation's cases and the other states' MDLs not only get ready
13 quicker and more thoroughly given the firepower we have, but
14 also get ready for settlement quicker, which lends itself to
15 the hope that we lead the way in regards to the trial.

16 Yes, they can go on simultaneously. Absolutely no
17 reason why you can't have two trials going on around the
18 country at the same time if the Court wants that. It does
19 happen. I don't see, unless they have one trial lawyer for all
20 of their GM cases, then I'd let them speak to that.

21 There's been a lot of success in time limit trials.
22 Let's say you say both sides have 30 hours, period.

23 THE COURT: Let me be clear: They will be time limit
24 trials. The question is just what the limits will be.

25 MR. HILLIARD: Thirty hours. We've thought about how

EB6LGM2

1 long it will take for -- Mr. Berman and I have an interest in
2 the Nexium trial that's going on in Boston right now which is
3 time limit. It keeps everyone on point. And Judge Wood in
4 Nexium only goes from nine to one every day, and that's a
5 five-week trial with an hourly time limit.

6 I don't know how hard this Court works his jury or
7 not. But I was hopeful, though I don't have another colorful
8 exhibit to give you, a 30-hour example of how it can be done.
9 But there's been a thoughtful process of coming to that number
10 not just at counsel table right now. So that would be our
11 general proposal subject to talking to GM about it.

12 THE COURT: Okay. Mr. Godfrey.

13 MR. GODFREY: Can there be simultaneous trials, yes.
14 Should this Court try to set a trial before Melton, I think
15 given what we don't know and given what I suspect the facts
16 will prove to be, that's overly aggressive given that Melton,
17 again, is a subset of a much broader MDL. So if you think
18 about all the recalls and all the plaintiffs and all the issues
19 in this case as compared to Melton, Melton is a smaller subset;
20 and, therefore, the notion that it would be second behind a
21 trial in this case I think is probably not realistic.

22 Can the Court maturely advance the litigation to
23 create opportunities for other resolutions in the next year or
24 so, the answer is obviously yes. That's going to take place in
25 the natural course of things. And do I think we know enough

EB6LGM2

1 from the plaintiffs in the pool -- setting aside economic loss
2 amounts; we're just talking about personal injury and death
3 cases -- to say whether 15 days is sufficient, 30 hours, I
4 don't think we know enough.

5 If you look at over the years doing this people's
6 estimates, good lawyers' estimates of the time to try a case
7 from the start when they first tell the judge I think it can be
8 done in X days to the time they actually get to a trial
9 setting, there's always a disconnect, a radical disconnect
10 going both ways. And I'm not in a position to tell you that 15
11 days is right or wrong. My suspicion is it's somewhat longer
12 than that. I don't think it's 40 days. But 15 days I'm a
13 little skeptical.

14 But I don't know the case well enough yet. I think
15 it's case specific. That's about all I can add. There's more
16 that we don't know by category than there is that we do. So
17 the notion of figuring out how many trial days we need to try a
18 case we haven't identified yet, for a plaintiff we haven't
19 selected yet strikes me as a bit aggressive.

20 THE COURT: I think that's probably a fair statement,
21 that is to say, it's hard to know how long a trial will be
22 until you know what the trial is going to be.

23 Let me ask you another big picture question which is
24 how does the timing of a bellwether trial relate to the timing
25 of the economic loss cases that are obviously a big part of the

EB6LGM2

1 MDL, anyone have thoughts on that?

2 MR. BERMAN: We do, your Honor. At some point we
3 would want to be the second trial or the third trial. Maybe do
4 two PI cases. But what we proposed to the court in Toyota was
5 that we pick a state, we try that case as a bellwether for
6 economic loss cases, and that's the same proposal that we would
7 be doing here. And I think that that would be ready for trial
8 in about a year from now.

9 THE COURT: Is that realistic given the need to wait
10 for Judge Gerber in some respects, at least combined with
11 whatever motion practice we would then have with whatever
12 remains after Judge Gerber has his whack at this, combined with
13 discovery, although discovery is obviously proceeding even
14 before that takes place.

15 MR. BERMAN: I do think it's realistic because Phase 2
16 for the economic loss case is going to be depositions and
17 damage discovery. So to give you the big picture on Phase 1,
18 what we did was we're taking discovery on all the ignition
19 switch recalls, plus we added a non-ignition switch recall, a
20 power steering defect that affected over a million cars, to get
21 a flavor for what the discovery would look like on the other
22 defects. And it could be that through those six cars and the
23 steering defect, we get enough evidence of GM's culture of
24 safety issues so we don't need a lot of discovery on the other
25 defects out there. But we would need discovery on the

EB6LGM2

1 valuation issues.

2 So when we move for class certification, we're going
3 to be seeking to certify the liability question and the damage
4 model. And the documents underlying the damage model are not
5 yet in play. That would be Phase 2. That shouldn't take long.
6 It's a very discrete group of documents. We know what they are
7 from prior work. And we think we could get to the class
8 motion, you know, by next summer.

9 THE COURT: And when do you think that takes place in
10 relation to whatever motion to dismiss practice would happen?

11 MR. BERMAN: After. So the sequence I see it, and
12 we're going ahead now on new GM and I'm confident that we will
13 go ahead on new GM and then we'll set a briefing schedule on
14 that. Probably that would be ripe for your ruling in February
15 or so. And then we will be doing the discovery work on the
16 class side, it's going to be going on. So we'll be ready, you
17 know, three, four months after that ruling to bring a class
18 motion.

19 THE COURT: All right. I think this may be a little
20 optimistic in the sense that we're talking about substantial
21 motions before Judge Gerber. We're talking about me deciding
22 the threshold question whether to move forward with substantial
23 motion practice here. Whether or when I do, there will be
24 substantial motions, and then class cert motions thereafter.
25 And I hasten to remind you this isn't my only case. But I will

EB6LGM2

1 do my best.

2 Mr. Godfrey, do you have anything you want to say on
3 the timing question?

4 MR. GODFREY: I think your Honor captured the essence.
5 If you wanted me to list the categories of motions that you're
6 going to have to decide before you even select the trial date,
7 we could go for the next 30 minutes.

8 But I think you've already figured out that there's a
9 lot of things that need to be decided, particularly with
10 respect to the class or subclass because, remember, here we're
11 seeking both B2, B3, C4 -- there's a lot of law on that. And
12 there's notice issues. There will be appeals. So that issue
13 alone usually takes on an MDL 12 to 18 months, just that one
14 issue alone. So I don't have anything else to say other than
15 the notion of a year trial from now on class or nonclass basis
16 is a bit optimistic.

17 THE COURT: Do you agree with Mr. Berman that
18 ultimately, whatever the timing will be, that ultimately having
19 a bellwether trial on the economic loss cases is warranted?

20 MR. GODFREY: I think we need more definition on what
21 that means. And the reason I say that is if class
22 certification is denied, then what is the bellwether trial, an
23 individual plaintiff over the economic loss and the used car
24 sales market? I doubt this Court will be trying that case. If
25 class certification is denied in part and granted in part, then

EB6LGM2

1 the question is what is the grant.

2 So, for example, in a washing machine bellwether trial
3 last week or two weeks ago in Ohio, they got through all the
4 discovery, went to the Supreme Court twice, went to the Sixth
5 Circuit a couple times, and they tried their first bellwether
6 trial and it was a defense verdict. It was a class
7 certification. It does give an indication of the value of the
8 case, but that took several years to get to that stage.

9 I don't think we know enough, I certainly don't know
10 enough to tell the Court with any reasonable degree of
11 certainty what I think the precise time frame is in terms of
12 bellwether. I know it's not five years from now. I don't know
13 whether it's a bellwether or a class. I think it depends on
14 the various motions and rulings the Court will have to decide.

15 (Continued on next page)

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EB6TGM3

1 THE COURT: All right. So number one, I want you to
2 guys to talk about whether a bellwether trial on the economic
3 loss front is the way to go, and if so, when is the time to be
4 talking about it, and be prepared to discuss those issues with
5 me at the next conference in December. And it sounds like
6 there may not be agreement on that, but why don't you start the
7 conversation and we can take it from there. I do think that
8 there's no reason to hold off, as I indicated, on entering a
9 bellwether trial order on the personal interest and wrongful
10 death cases, and I want to move forward on my quote, unquote,
11 reasonable but aggressive schedule.

12 So to that end, I will set the first bellwether trial
13 of that category for January 11, 2016, which is more than a
14 month before Melton 2, and I think will assist in making sure
15 the MDL remains sort of in the lead and other judges are
16 inclined to either, if not sign the coordination order,
17 coordinate and defer to the MDL knowing that we're going to
18 push forward pretty quickly given what is at stake here.

19 What I am going to do is leave it to you guys to meet
20 and confer with respect to all the dates between now and then,
21 it looks like Mr. Hilliard's colorful art project here or
22 otherwise, I think you're in a better position to basically
23 work backwards from that date and come up with either an
24 agreed-upon plan for all the relevant dates between now and
25 then, including the submission of plaintiffs' fact sheet

EB6TGM3

1 selection of bellwether cases discovery and deposition dates
2 and the like, and obviously if there's agreement, that's great,
3 and to the extent that there is disagreement, I will resolve
4 that promptly.

5 My inclination is other than maybe the deadline for
6 the submission of plaintiff fact sheets, that we don't need to
7 have the deadline set before the next conference, in which case
8 we can discuss them the next conference. Do you agree with
9 that?

10 MR. HILLIARD: We do, Judge.

11 MR. FIELDS: Yes, your Honor.

12 THE COURT: Why don't you basically leave it that we
13 will discuss the intermediate or intervening deadlines between
14 now and the next conference, unless you believe -- either side
15 believes or both sides agree that they need to be set or
16 discussed before then, that is to say, discussed whether we
17 should set a deadline for the submission of plaintiff's fact
18 sheets before then so that process can get rolling. But if you
19 think that it could be left to the December conference, then so
20 be it, understanding that obviously the time between now and
21 that December conference will be taken into consideration and
22 relevant and whatever the deadline should be.

23 Let me turn to a few other issues on this front, sort
24 of turning to really the defendant's proposed order, since I
25 think ultimately I will probably rely on that as a template for

EB6TGM3

1 whatever order I ultimately enter.

2 Number one, again, just paragraph 7F of that proposed
3 order just to reiterate, I think, that you should give some
4 thought to whether the term here is "materially deficient," but
5 whether it's that term or parallel term, whether that should be
6 fleshed out now or left to be litigated if or when plaintiff
7 fact sheets are submitted that might not comply, but I wanted
8 to raise that.

9 Second issue is paragraphs 8 and 18 and 19, I will
10 address the lexicon venue type issues. I want to say a few
11 things. First, I am not committing to try all of these cases
12 myself. If it is a feasible and doable and more efficient way
13 to handle it, then I will, which is to say in an ideal world I
14 will, but again we're not necessarily in an ideal world, but
15 depending how many trials we're talking about, depending on
16 what happens on the economic loss front, so on and so forth, I
17 may well need to consider alternatives, including the
18 possibility of remand to transfer courts enlisting their
19 services and trying cases. And I do agree that lexicon
20 waiver-type provision or process should be included, but I
21 don't want you to understand that including that I am
22 committing myself to trying every single GM defect case from
23 here to eternity.

24 Number two, I think and want to hear your thoughts
25 that the lexicon waiver has to be made at the front end, that

EB6TGM3

1 is to say in conjunction of the submission of plaintiffs' fact
2 sheet and before the selection is made. My concern being, and
3 it should be obvious, but if plaintiffs pick their set of cases
4 and defendants pick their set of cases and there's no lexicon
5 waiver in place, then in theory the other side could exercise
6 veto power by way of not doing a lexicon waiver, and if one of
7 the eligibility criteria that we're using is the lexicon waiver
8 is in place, then obviously it does give that veto power to the
9 other side. All which have is to say that I think that has to
10 be done at the front end, and the pool will be whatever the
11 pool is and the selections made from that.

12 Thoughts?

13 MR. HILLIARD: Absolutely fair. Otherwise, you're
14 exactly right, you can use it as kind of hold back of the wrong
15 cases, so yes.

16 My only other thought, I know Ms. Cabraser was kind of
17 the lexicon expert. I don't know procedurally if it's a
18 requirement, but given what you're attempting to do in regards
19 to the selection process, it seems like subject to a statute or
20 loss, it seems that is what I would agree to, is every one that
21 answered the plaintiffs' fact sheet acknowledges they're
22 selected as part of the initial pool and they will submit a
23 lexicon waiver.

24 THE COURT: Obviously no one is required to submit a
25 lexicon waiver, but I think the plan would be that the cases

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1 that would be in the bellwether pool would be chosen from those
2 that do. So that's the issue on the table.

3 Mr. Fields.

4 MR. FIELDS: I agree. I think what we need to do is
5 build it in somehow with the plaintiffs' fact statements, but
6 also have a process in place so if there is a challenge of an
7 objection that could be resolved by your Honor. For example,
8 if you feel that lexicon doesn't come into play or something,
9 we need to develop a process so that we can resolve any
10 disputes that might develop.

11 THE COURT: And do you think that needs to be -- well,
12 I guess I don't think that needs to be in place by next Friday,
13 but something that you should discuss and address at the next
14 conference as well.

15 The next point is the form of how a lexicon waiver
16 would be made. And I don't either have a view on that or
17 knowledge how that is typically done, if that is something done
18 with a filing with the Court or if it's sufficient to do it in
19 a fact sheet to the other side. There's also lexicon issue on
20 the defense side, both sides have to waive their lexicon
21 rights.

22 So why don't you discuss that, and to the extent that
23 it should be incorporated into the plaintiffs' fact sheet, then
24 it obviously is something that you should discuss and try to
25 resolve in the next week, but in either case, be prepared to

EB6TGM3

1 address it at the December conference as well.

2 Does that make sense?

3 MR. FIELDS: Yes, your Honor.

4 THE COURT: Mr. Hilliard?

5 MR. HILLIARD: Yes, sir.

6 THE COURT: Very good. Moving along, paragraphs 15
7 and 24 of the defendants' proposed order, I was just trying to
8 figure out why the dates would be different for the two sides.
9 In other words, in this proposed order lead counsel would make
10 their submissions first, followed two days later by defense
11 submissions. Is there a reason that should be the process, as
12 opposed to simultaneous papers?

13 MR. FIELDS: There was a reason for that, your Honor.
14 One of the things we were trying to deal with was a situation
15 on duplication. If both of the lists come at the same time,
16 you could have duplicates.

17 There is a process, and you have probably seen it, in
18 some of the orders that we attach for dealing with duplicates,
19 but this is a way of avoiding a process where you have
20 duplicates and have to put a process in place of dealing with
21 duplicates and how to replace the duplicates. Does the
22 plaintiff get the opportunity to replace the first duplicate?
23 What is the process to be used for that?

24 So that was the one reason that we went with a
25 non-simultaneous exchange, because it then would ensure that

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1 you don't have duplicates on the list.

2 THE COURT: But if there are duplicates, isn't that
3 ideal in the sense that both sides agree the case is
4 representative, presumably that case should be on the list.

5 MR. FIELDS: And it would remain on the list. The
6 question is how do you deal with who gets to replace it, which
7 party gets to replace that particular case.

8 THE COURT: The process that you have outlined
9 essentially gives you the right to replace it because you see
10 which ones on there, you get your picks. If it's not clear,
11 I'm not inclined to think that's the way to go.

12 MR. FIELDS: As I said, there is an order and orders
13 that appear, there is a process that is in place that I have
14 seen in several orders that deal with this situation of
15 simultaneous is exchange and a process to replace the
16 duplicate. So I think that would be easy enough to work.

17 THE COURT: And I guess the other question raised by
18 the paragraphs is why should these submissions be made in
19 camera as opposed to public filings?

20 MR. FIELDS: I'm sure there was a reason for that, but
21 it escapes me at the present time.

22 THE COURT: Mr. Hilliard?

23 MR. HILLIARD: I think my argument on the other side
24 would be a little more persuasive. It has to be public, Judge.
25 There is no argument to keep it private. The Court already

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1 indicated that it always balances opening it to the public
2 versus in camera. This is the selection of the bellwethers.
3 So I would request and hope that we could keep the selection
4 process part of the public filings.

5 MR. FIELDS: We don't feel strongly about that. We're
6 fine with that.

7 THE COURT: That is definitely consistent with my
8 pretty strong views on those issues.

9 The next issue that I wanted to raise is the selection
10 of replacement cases. I don't mean replacement if there are
11 duplicates, but I know sometimes what happens is that
12 plaintiffs voluntarily dismiss cases, and obviously other cases
13 may be settled. And I know that in other MDLs the process is
14 usually put in place for how cases should be selected to
15 replace those cases.

16 My sense is the sort of majority approach is to allow
17 defendants to replace any cases that are voluntarily dismissed
18 by the plaintiff and to allow the plaintiffs to replace any
19 cases that are settled presumably on the theory that
20 disincentivizes strategic settling to get rid of weak or strong
21 cases, as the case may be. I guess my inclination would be to
22 go that way, but I don't know if you have thoughts on that.

23 MR. HILLIARD: I agree.

24 THE COURT: All right.

25 Mr. Fields?

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1 MR. FIELDS: Same here, your Honor.

2 THE COURT: Okay. Then one last question is in the
3 plaintiffs' proposed order, there was a provision giving
4 plaintiffs sole discretion over the confidentiality of any
5 settlements. I didn't know, A, why that would be, and B, why
6 that should be in this order in any event.

7 Mr. Hilliard, any comments on that?

8 MR. HILLIARD: Judge, it's under the old college try
9 argument, and that is a lot of times settlements happen on the
10 courthouse steps strategically by defendants in MDLs to delay
11 the trial, and the settlements are confidential, which prevents
12 the separate thing from happening, that is, us announcing the
13 case is settled for X amount.

14 But quite frankly, we talked about it, we have had the
15 issue in the real world as a practical matter in past MDLs,
16 we're trying to figure out a way to prevent a confidential
17 settlement at the courthouse steps. So if our client wants it
18 confidential, that's fine, we'll keep it confidential, but if
19 GM insists on it, we wanted assistance from the Court to
20 support the position there would not be one. Quite frankly, I
21 don't know if it's the Court's place to do it, I'm simply
22 telling you that it's a real world issue, and we don't have the
23 best answer for it, and that is what we tried to do.

24 THE COURT: I'm not going to include it in this order.
25 Whether it's something that would be appropriate to include in

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1 an order down the road is something you can discuss and raise
2 at an appropriate time, but I don't think it needs to be in
3 this order. Whether it should be in any order is something
4 that we can consider later.

5 All right. I think, having said that, my plan would
6 be to enter a bellwether order in the next few days, but I
7 think what might be a more sensible thing to do is basically,
8 having a pretty much resolved a lot of disagreements that you
9 identified, put it on you to kind of revise I think really the
10 defendant's order, which I think is the better template here,
11 revise it consistent with my remarks and my rulings. To the
12 extent that additional revisions are necessary, I will take it
13 for review.

14 Can you do that by next Friday as well?

15 MR. HILLIARD: Yes, sir.

16 MR. FIELDS: Yes, your Honor.

17 THE COURT: I think to the extent -- just to
18 reiterate, I think that identifying the universe of cases from
19 which selections would be made and then salient categories
20 within that universe, my inclination is that is something that
21 should be done after the plaintiffs' fact sheets are in and you
22 have a better sense of what the overall universe is, but you
23 should discuss the process for doing that on a pretty quick
24 schedule so that that doesn't cause delay and we can stick with
25 the trial date that I have indicated.

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1 All right. Turning to the next issue is the plaintiff
2 fact sheets, some of which I have already addressed. Let me
3 start with the easy things. Obviously there's no disagreement
4 with respect to the plaintiffs' fact sheet for economic loss,
5 non-consumer plaintiffs, so that is approved or fine by me.

6 Number two, the only disagreement, as I understand it,
7 for the economic loss consumer plaintiffs is whether the Social
8 Security number should be included. Mr. Berman, I don't know
9 if you're the one to speak to this, but I guess the question I
10 have is why shouldn't it be included, and why do you object to
11 its increase here but don't appear to have an objection on the
12 personal injury, wrongful death plaintiff fact sheet, or is
13 that just a function of different people?

14 MR. BERMAN: Different people looking at it
15 differently. But in the personal injury case where your
16 medical issues and doctor treatments and so forth and billing
17 and your medical expenses are out there, maybe there's a need
18 for Social Security number.

19 In an economic loss case where it's a very narrow
20 issue, I bought my car and paid too much for it or it
21 diminished in value, I can't see how the Social Security number
22 is relevant, A, and B, whatever marginal relevance it has,
23 we're all busy trying to worry about private information, and
24 it seems to me unless your Social Security number, which is
25 very private, unless it's needed in the case, we should err on

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1 not having our clients turn it over.

2 THE COURT: All right. And what is your answer to the
3 defendants' argument that it's necessary or appropriate to
4 deter or identify fraud, to ensure that, or to help distinguish
5 between plaintiffs with similar names and the like?

6 MR. BERMAN: I offered to compromise, the last four
7 digits, which would allow them to do that. But more
8 importantly, they said they needed to make sure there were no
9 fraudulent claims being submitted. We're not at the claim form
10 stage, and we have given them plenty of information. We're
11 giving them driver's license, vehicle information, VIN
12 information, purchase information. It's hard to imagine that
13 they can't tell from that information that the plaintiff is who
14 they say they are.

15 THE COURT: All right. Mr. Fields, is this you?

16 MR. FIELDS: Yes, your Honor. Very briefly. With
17 respect to the confidentiality, we recognize that in fact this
18 is confidential information. As a matter of fact, that was
19 specifically, unless that was referred to one of your orders,
20 dealing with protecting confidential information. So our view
21 is obviously these types of documents, the fact statements,
22 would not be public documents, the information could be
23 protected by the Court's confidentiality orders and treated
24 accordingly.

25 And as your Honor has indicated, one of the things

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1 that we're trying to do is obviously to try to determine
2 background information of these individuals, and a Social
3 Security number is a standard piece of information that is used
4 for that purpose. With respect to the last four digits, I
5 think it is very difficult to use that particular piece of
6 information because you're not going to be able -- without the
7 first digits of the Social Security number I'm not sure how you
8 can use the last four. You see that if you purchase a phone at
9 a phone company or something like that, but that's because they
10 already have the remaining information in the database. So I
11 don't think the agreeing to give us the last four digits of the
12 Social Security number would be adequate. I think we need the
13 full Social Security number along with the driver's license
14 information for background purposes to deal with the fraudulent
15 issues and make sure we have the right person as the plaintiff.

16 THE COURT: Be very particular. What use would you
17 make of the full Social Security number? What would you be
18 checking? Where would you be checking? Why is that necessary
19 as opposed to the last four digits?

20 MR. FIELDS: Off the top of my head, I don't know the
21 specific databases that it would be used for. I know in
22 previous cases that information has been used for things such
23 as determining whether the person has a criminal background, et
24 cetera. So there are a wide variety of different types of uses
25 for that particular information. Again, I'm not sure I'm aware

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1 of being able to use just the last four digits to get that kind
2 of information.

3 THE COURT: Mr. Berman.

4 MR. BERMAN: We're answering whether they have
5 criminal background. That's one of the questions. And this is
6 precisely what we're trying to prevent. A background check for
7 what? They bought a car and they claim they paid too much.
8 There should be no need for digging into these people's lives
9 beyond the purchase documents related to their car what
10 advertisements they saw. It's precisely for this reason that
11 we don't want to give the Social Security number, a
12 wide-ranging intrusion into their personal life that is not
13 relevant.

14 THE COURT: I guess this begs the question of what the
15 plaintiffs' fact sheet is for on the economic loss side.
16 Obviously I know and understand what it's for on the personal
17 injury wrongful death, but is everybody in agreement that it's
18 basically to inform the same sort of process on the economic
19 loss side, namely to pick representative cases to ultimately be
20 tried? It is not a claim form, as Mr. Berman points out.

21 MR. FIELDS: One of the other issues is obviously
22 trying to collect information to determine adequacy of
23 representation of the named plaintiff. That's one of the
24 reasons you have the plaintiffs' fact sheets for the economic
25 loss side and one reason why we need this information.

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1 THE COURT: Anything else?

2 I think I am going to allow it to be included since it
3 is subject to the confidentiality provisions in place. I think
4 that is adequate protection. I understand the concerns here,
5 but we also are living in a world where sadly people's Social
6 Security numbers are out there in many different respects. I
7 don't think it's a big issue or onerous to include it here.

8 Turning to the personal injury, wrongful death
9 plaintiffs fact sheets, actually some of these I think apply to
10 all of them. Obviously, I'm going to look to you guys in the
11 first instance to modify the fact sheet in light of our
12 discussions today, but just to address a few of the
13 disagreements:

14 First, with respect to the Footnote Number 1, I guess
15 the question I would put to the defendants, to Mr. Fields, if
16 you're the appropriate party, is why that should be included?
17 That is to say, if these fact sheets are being treated as
18 interrogatories pursuant to the federal rules, why shouldn't it
19 be treated as an interrogatory subject to the federal rules and
20 therefore count, if you will, towards whatever discovery you
21 will take? It may be, as we already discussed, that you may be
22 able to take additional discovery as to the cases selected for
23 bellwethers or as to plaintiffs who are moving for class cert
24 or what have you, but I'm just not sure what this reservation,
25 if you will -- or why it's appropriate.

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1 MR. FIELDS: Your Honor, with respect to the fact
2 statements or fact sheets, it seems to me the kinds of
3 information that are being collected are in fact we say
4 interrogatories, they would be subject to the rules under
5 interrogatories. I think the purpose of this is to just advise
6 the plaintiff that there could be additional discovery that
7 would be coming down the pike. Obviously, that would be
8 subject to your Honor's orders as well as the Federal Rules of
9 Civil Procedure.

10 THE COURT: All right. I will direct you to strike
11 the footnote. I think all of us understand that you may well
12 come back and seek more, may be entitled to seek more. I think
13 counsel can explain to the plaintiffs if that happens that that
14 is the ordinary course and this may just cause confusion, and I
15 don't want this to be mistaken as my having ruled ex ante on
16 whether and to what extent you can proceed beyond this, so I
17 don't think that it's necessary or appropriate.

18 I do agree with the defendants with respect to the
19 references at the front end of the long form of the plaintiffs'
20 fact sheet to essentially discovery from the defendants, that
21 is to say, I think that that potentially could cause confusion.
22 This is focused on questions and discovery, if you will, from
23 the plaintiffs, so it doesn't really have a place here. So I
24 agree that that should be stricken.

25 Turning to the previous legal matters, forgive me, I

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1 should have looked myself, but is that in the short form or
2 not?

3 MR. FIELDS: I think it is, your Honor. With respect
4 to the prior convictions, et cetera, I don't believe that is in
5 the short form. That is something that we would probably want
6 to move over to the short form as well.

7 THE COURT: If that is the case, maybe it is ripe for
8 me to give you my views, which is I do think those should be
9 included. I think they are potentially relevant and/or
10 relevant within the meaning of discovery rules and potentially
11 admissible. And I also think, frankly, the plaintiffs have a
12 potential interest in learning that information insofar as it
13 may well be quite salient in selecting what cases might be
14 representative. The plaintiffs might not want to have a case
15 in the bellwether pool where the plaintiff was convicted of
16 perjury a couple of years before the claim arose, since that
17 would presumably be a little bit of a outlier, and I believe
18 it's relevant to what we're using these for.

19 In terms of the applicable time period, I did not go
20 through each and every disagreement, which is to say I'm not
21 sure they are all created equal in that regard, and that
22 it's -- they should all be ten or three, or maybe there's some
23 subset of one or the other. On the whole, I'm inclined to
24 agree with the defendants that the period should be ten years,
25 except, perhaps, with respect to the medical history, both

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1 because that was potentially burdensome. I would imagine for
2 some plaintiffs obtaining the kind of information that is being
3 asked for is not going to be terribly easy, and also that that
4 does raise sort of serious privacy issues.

5 Mr. Fields, is there some reason that you think that
6 that category of information should be a ten-year period as
7 opposed to a three-year period?

8 MR. FIELDS: Your Honor, with respect to a lot of that
9 information, you can have a situation where you have certain
10 types of pre-existing injuries or things like that, so I think
11 the period of time is appropriate. One of the things with
12 respect to the burden that might be produced by the fact that
13 you have these medical authorizations they will have to
14 provide, some of that information will come through documents.
15 So if we have the ten-year period, we can actually go back to
16 the medical providers and identify those medical providers and
17 obtain that information.

18 THE COURT: All right. I think on that category I am
19 going to go with the three-year period. Understanding, of
20 course, with the plaintiffs who are selected as part of
21 bellwether pool that you could perhaps go beyond that, and that
22 would inform the decisions to what cases are selected for
23 trial. That is to say, again, I have not reviewed each and
24 every one of these, but my inclination is to say ten years
25 where there is a dispute except to the medical information,

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1 which it should be three years. But why don't you, with that
2 guidance, discuss this in the next week, and to the extent
3 there remain discrete questions on which there is disagreement,
4 you can indicate that in your submission next Friday, and I
5 will pick one or the other or maybe somewhere in between.

6 Lastly -- actually not lastly, but the electronic data
7 issue, you indicated that you were conferring further on that
8 issue, and I guess Mr. Fields indicated earlier that those
9 conversations are continuing. I take it in light of that that
10 we don't need to discuss that at this point, is that correct?

11 MR. HILLIARD: That's right, and we don't anticipate
12 it being an issue. We contacted -- company defendants
13 suggested it was a process that was much easier of getting the
14 data to them, and my expectation is that it will continue to be
15 a non-issue and we'll have complete agreement on that.

16 THE COURT: Great. Let me make a few other comments
17 on the fact sheets. Number one, comments, I'll just throw out
18 some issues for you to discuss. In the prefatory statement
19 there appears to be contemplating the filing of an amended
20 plaintiff fact sheet if there is an inaccuracy or supplementary
21 or the like. I will leave it to you, and this may also relate
22 to what electronic system is used, but I would think you would
23 want some process to figure out or identify quickly what
24 information has changed or is new, and in that regard, you
25 should figure out whether that should be done by way of just

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1 refiling it or flagging that information or again, if it's all
2 electronically searchable, that's not necessary, but I wanted
3 to flag that as something that you should be thinking about.

4 Number two, I am inclined to think there are several
5 questions in here where there is an objection made, or
6 plaintiff says objection and then states the objection, and
7 then without waiving said objection, plaintiff responds as
8 follows. I think that's potentially confusing given who is
9 going to be filling these out. And what I would propose is
10 either adding to the prefatory statement itself or in a
11 footnote connected to the prefatory statement basically having
12 some sort of general disclaimer that counsel or plaintiffs
13 object to certain questions or reserve their rights to object
14 to certain questions, and that answering the questions does not
15 necessarily waive those objections, and somehow make it clear
16 that plaintiffs are to answer those questions notwithstanding
17 any objections. And that footnote or that addition can either
18 identify questions with particularity, or as far as I'm
19 concerned, if it suffices for your purposes, it could be a
20 general reservation or objection, but I am inclined that
21 including a objection with a specific question could cause
22 confusion and make some plaintiffs believe that they shouldn't
23 fill it out because there's an objection before they have to
24 fill it out or some such thing. So why don't you discuss that
25 and figure out how to handle it, but again, I think that my

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1 proposed approach is better than the current approach.

2 Another thing for you to discuss, I would be inclined
3 to think that whether you either agree upon the plaintiffs'
4 fact sheet or I resolve whatever disagreements remain that that
5 should be memorialized in some fashion in a Court order.
6 Presumably that could be done in the quote, unquote, bellwether
7 order that you will be submitting, or revised version, or maybe
8 it should be done it separately as far as the personal injury
9 and wrongful death cases. So give some thought to that, and by
10 next Friday submit a proposed order or give me some indication
11 of your views on that. And then when you do submit these
12 things, you should do so consistent with how you have done it,
13 both in PDF and Word format, so if there are any additional
14 changes that I want or need to make, I could do so easily.

15 Anything else that we need to discuss on that front?
16 If not, I think we can move forward, and don't have too much
17 more ground to cover.

18 Next issue is the deposition protocol order. Sounds
19 like you are and should continue to meet and confer on that and
20 be prepared to update me at the December conference if not
21 before.

22 A couple of comments. I think we have some time, but
23 I want to make sure that protocols are in place before any
24 disputes are resolved about those protocols before we get the
25 depositions, and it sound like -- and obviously this will be

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1 subject to your discussions about the sort of I'll say Phase 2
2 discovery, but sounds like we're not too far off, so I think
3 it's in everyone's interest to try to nail that down.

4 Second, I would encourage you to take advantage of and
5 explore whatever sort of modern technical options are out
6 there. At the MDL conference last week there were some
7 discussions about systems where depositions could be done and
8 lawyers who were not in the room could participate and watch on
9 some sort of the internet feed and pose questions through that.
10 I don't know the specifics. I assume you may or may easily
11 find out, but I would encourage to you explore those and
12 consider that as a viable option to kind of bring some order to
13 this and ensure that there aren't depositions with a cast of
14 thousands in attendance.

15 Next issue is additional preservation protocols. I
16 trust that you will and are continuing to negotiate and submit
17 orders as needed on that front. And obviously until that time,
18 your general preservation obligations and those that are
19 previously imposed, including by order number one, will
20 continue to apply.

21 Next item on your agenda was the modification and
22 alterations of -- sorry, permissible modifications and
23 alterations of data in the ordinary course of business. I take
24 it that this is something that -- well, it states that
25 plaintiffs will consult their experts and respond by the time

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1 of the next status conference. I assume by that you mean the
2 December status conference, is that correct?

3 MR. BERMAN: Yes, your Honor. Our letter that we sent
4 drafted by our forensic experts addresses Items 10 and 11. GM
5 has that letter and we're waiting to have a meet and confer.

6 THE COURT: By the letter, you don't mean a letter
7 that I should have seen?

8 MR. BERMAN: No, from the plaintiffs to GM on these
9 issues.

10 THE COURT: Very good. So I guess that covers items
11 10 and 11. You guys are discussing and you should be prepared
12 to fill me in in the December conference, if not before, about,
13 if it's appropriate.

14 MR. GODFREY: There are two different issues
15 Mr. Berman lumped together. Item 11 is the not reasonably
16 accessible data filing that was done by New GM, but also I
17 think by Delphi and other defendants.

18 THE COURT: I'm reminded by you.

19 MR. GODFREY: On that we received a memo from
20 Mr. Berman with some questions. We'll work through those. I
21 don't anticipate any issue, but if there are issues there.

22 Item number 10 was simply to let the Court know in the
23 regular ordinary course not to shut the business down. This is
24 a regular ordinary course issue, and we notified the Court and
25 the other parties, and we we're aware of our preservation, but

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1 in the ordinary course things will continue on as we are. I
2 think we have given the notification they have, but this is
3 ordinary course of operation, not just New GM, but the course
4 of all businesses.

5 THE COURT: I did not mean to suggest the issues were
6 the same, I recognize they're separate issues, but they're the
7 same in the sense that you're continuing your discussions about
8 them, and I will allow you to do that. And to the extent that,
9 while you should at a minimum update me in December, to the
10 extent there are any issues, we can address them in the
11 December conference if not before, if it proves to be
12 necessary.

13 All right. I think that exhausts the items that were
14 on your list. Let me turn to my additional issues, some of
15 which we have actually already addressed as well. So again,
16 we're nearing the end of our marathon conference here.

17 MR. GODFREY: Your Honor, if I might, one point, I
18 should say in the ordinary course we did consult with an
19 outside forensic expert to make sure that we were reasonably
20 compliant complying with the Court's preservation order, so
21 when we became aware of the issue, in the ordinary course of
22 things we consulted with an outside expert and got advice and
23 proceeded apace.

24 THE COURT: I understand and hear you. Talk to each
25 other about it and let me know if there are any issues for me

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1 to be involved in.

2 Turning to my additional issues, the first is the fact
3 of the consolidated class action complaints on the underlying
4 individual complaints. I recognize that that question or the
5 issue may well overlap or even be co-extensive with the issue
6 flagged in your agenda letter regarding the so-called
7 reservation of claims in the two complaints. But it did come
8 to my attention after the two consolidated complaints were
9 filed there is some ambiguity in the MDL world or MDL context
10 with respect to what role the quote, unquote, consolidated
11 complaint plays. And I think that is fleshed out in Judge
12 Sutton's decision that I cited in my endorsement, which I think
13 is the only decision that is really discussed, but maybe there
14 are others out there.

15 So I thought I would raise it sooner rather than later
16 just to make sure going forward we're on the same page, that is
17 to say, whether these essentially supersede the individual
18 complaints, at least until the time that remand comes into
19 play, as would be the case in ordinary litigation with an
20 amended complaint, or if essence it's some sort of
21 administrative role more specific to the MDL context.

22 Why don't I start with you, Mr. Berman.

23 MR. BERMAN: Yes, your Honor. We had a meet and
24 confer on it this morning and think we're close on the
25 agreement on the effect of a complaint, but not totally there.

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1 We agree that this complaint is more of a superseding
2 complaint, not an administrative complaint. And I think the
3 agreement we have reached is that the complaints that are not
4 in the consolidated complaint would be deemed dismissed without
5 prejudice, and that we would be giving a period time to file an
6 amend -- deadline for filing any amendments we want to make.

7 THE COURT: Amendments to the consolidated complaint?

8 MR. BERMAN: Amendments to consolidated complaints.

9 For example, I don't know that there will be any, but one of
10 the things we had to face when we filed the complaints is there
11 were plaintiffs' lawyers that had theories that were advanced
12 in their complaints that we did not advance.

13 An example was RICO. There were RICO complaints
14 filed. We looked at the research memorandums, and what we told
15 those lawyers was, at this stage of the case, given the
16 discovery we have seen and what evidence we have seen, we don't
17 believe that a RICO count is warranted, but we're going to have
18 a chance to amend our pleadings if the facts prove so. And so
19 what we think is, like in any other case, there will be a
20 deadline for amending our pleadings if we deem that we want to
21 bring in some of the counts that were out there, or new counts
22 that we haven't thought of, that we're allowed to do that.

23 THE COURT: And in your view, would the deadline be
24 before or after or in addition to the deadline process with the
25 motion practice?

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1 MR. BERMAN: After the motion practice. We want to
2 see where you think we might be deficient, and it should be
3 after there is some discovery. So I think the cut off might be
4 around the time of Phase 1.

5 THE COURT: Then another question is, is this an issue
6 on which I need to give an opportunity to be heard to the other
7 plaintiffs' lawyers in the pool, which is to say, to the extent
8 that you, as lead counsel, either in conjunction with them or
9 not, made a decision to leave out claims that other lawyers had
10 been pressing, their interests may not be aligned with yours in
11 terms of whether their complaints are a legal nullity. So
12 should some process be employed to get their views on that?

13 MR. BERMAN: We did give them notice and an
14 opportunity to object to what our plan was. We did send them
15 drafts that didn't have those counts, so everyone knew and no
16 one objected. We didn't give notice that their complaints
17 would be deemed dismiss without prejudice.

18 THE COURT: Okay. So obviously I signed on to the
19 process and there was an opportunity for them to object both
20 initially to you and then to me. My concern is that, to the
21 extent that I wasn't aware of this ambiguity in the MDL world
22 before, and we didn't make it clear ex ante what effect the
23 filing of these complaints would have on the individual
24 complaints, that maybe the need to object wasn't perceived
25 quite as much as it might have been if they had understood

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1 their complaints would be rendered a nullity.

2 I guess what I'm inclined to do is -- it sounds, as
3 you described it, you have conferred and they are largely in
4 agreement, and I don't think that we need to resolve this
5 today, but why don't you talk about it and discuss the
6 substance but also the process. I do think it would be prudent
7 to allow other lawyers to opine and be heard on this or make
8 their objections known before I come out one way or another on
9 this. Why don't you do this and we'll discuss it again at the
10 December conference. Does that make sense?

11 MR. BERMAN: That makes sense.

12 THE COURT: Mr. Godfrey, does that make sense?

13 MR. GODFREY: Yes, I think for a meet and confer, so
14 I'm clear on New GM's position: One is a superseding
15 complaint; two, the law is clear, there's abundant authority on
16 this in addition to the Sixth Circuit case that your Honor
17 referenced to; three, lead counsel, both in the position of
18 temporary lead counsel and in writings to the Court and on the
19 record in transcript made clear that, as contemplated by your
20 pretrial order, Number 8, Paragraph 3, Roman 3, it was a make
21 it or lose it proposition.

22 So we read it that way, I think the transcript
23 reflected it that way, but in light of the concerns that your
24 Honor raised to whether other people understood it that way,
25 then I think a meet and confer process to nail that down is

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1 important. And I don't have any problem in doing that. I
2 think that we'll be able to reach agreement on that. And I do
3 think the federal rules obviously has some role here, but what
4 we need to avoid is what I will call the moving target, we go
5 through motion practice making progress, and suddenly the RICO
6 claims, which were asserted but not reasserted in the
7 consolidated complaint, notwithstanding the 850-page length,
8 the RICO claims were not asserted. A lot of lawyers asserted
9 that. And I think claims like that, that they make them now or
10 lose them forever. It doesn't make sense to have series of
11 complaints where it's a moving target all the time. As to
12 complaints that haven't been made, it's a different
13 proposition. They say we've taken discovery, we didn't know
14 about it before. But they made conscious tactical choices
15 right now that makes it a tails we win, heads you lose
16 proposition from the defendants' standpoint, and that's what we
17 object to.

18 THE COURT: I don't want to get too far out ahead if
19 you are discussing this, but I will say this: Number one, to
20 the extent that we can minimize the moving target, or at least
21 make it move slowly, that would be ideal. The whole point is,
22 whether it's an administrative pleading or superseding
23 pleading, is to make things more efficient and orderly.

24 Having said that, in an ordinary case, plaintiffs have
25 an opportunity to amend when facts come to light that would

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1 justify it. And in that regard, they may well have made a
2 decision that, based on the current state of the facts, they
3 don't have a legal claim under RICO or some other theory but
4 subsequently learn in that regard. I will tell you now that
5 maybe we would do that by way of a motion to amend and I would
6 decide, but I don't think that it would be fair or appropriate
7 or consistent with the rules to say they made their choices and
8 are forever barred from coming back to me to amend.

9 But then the last thing I will say is I do think, to
10 the extent there wasn't any ambiguity in the prior orders that
11 were processed, and this is where my raising the issue came
12 from, I do think it is absolutely essential that everybody is
13 on the same page, and that is the objective at this point is to
14 make sure everybody is in agreement to what these things
15 actually are.

16 MR. SCHOON: The only thing I would add, your Honor,
17 is I think we're in substantial agreement with GM on this, I
18 have talked to lead counsel about our position for Delphi.
19 This effects us in particular because of course we're not a
20 defendant in the consolidated complaints, so again this
21 ambiguity affects in a particular way. We would like to get it
22 resolved as soon as possible.

23 We have agreements with lead counsel, and I am looking
24 at Ms. Sowers here who represents Continental. Her client is
25 not a defendant in that pleading. So we would like to get it

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1 resolved. We have had, I think, productive discussions, and I
2 am hopeful that I won't have to see you about this in December.

3 THE COURT: Very good. So we will discuss that in
4 December.

5 The next issue is the review of essentially counsel
6 fee type things. I know that in some MDLs there is a process
7 in place for regular submission and review of those submissions
8 by someone other than a judge, sometimes even including a CPA
9 or the like. I think it's big topic. I don't want to discuss
10 it now in part because of the hour, but I wanted to raise it
11 and make sure that it was on the agenda in the near future. So
12 why don't I leave it at that and give you some further
13 opportunity to think about it and maybe submit something to me
14 in writing on the issue. Maybe you think it's unnecessary or
15 invalid for some reason, but I wanted to throw it out there.

16 Briefly, if you could update me on the status of
17 discussions regarding cost sharing by non-MDL counsel,
18 including the appropriateness or size of any assessments for
19 cases that are settled by counsel to utilize the resources of
20 the MDL, again, I don't think that we need to nail that down
21 today, or my sense is that we don't need to nail that down
22 today, but I think it would be in everyone's interest to have
23 some clarity on that before that starts to happen.

24 MS. CABRASER: Your Honor, we have had initial
25 discussions with a number of counsel, and we are working with

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1 the federal state liaison counsel. Our plan is to develop a
2 proposed common benefit assessment order and to submit that in
3 advance of the December 15th status conference. And we are
4 resurveying the field in terms of the range of assessments that
5 would obviously be adapted to fit what we know of the
6 circumstances of this case. And as you know, your Honor, there
7 are many, many, many assessment orders out there, they have
8 become quite complex. We are looking to resimplify the
9 process, and we have the coordination orders in place with a
10 number of the state courts which give us a platform that some
11 cases don't have.

12 With respect to amount, that's obviously still under
13 discussion. We know from our current survey that the outreach
14 of that is somewhere between six and seven percent. We have
15 seen them go much higher. We don't think that's appropriate
16 here. We obviously want to make this as efficient and
17 economical for everyone as we can.

18 THE COURT: All right. There was a presentation on
19 this subject at the MDL conference last week, and my
20 understanding is the average is in the neighborhood of six
21 percent as well. Professor Issacharoff at NYU presented it,
22 and maybe you want to speak to him about, and it sounds like
23 there are various models out there in terms of sliding scales
24 based on either the timing of settlements or the size of
25 settlements, so give some thought to that.

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1 The next issue strikes me as premature to get into
2 today, it's the distinction, if any, between class cert related
3 discovery and merits discovery. My sense is that we're
4 proceeding kind of whole hog, if you will, and given that,
5 don't necessarily need to get into that. To the extent we do,
6 it's something that you can discuss in the context of your
7 discussions in the next few weeks over the next phases of
8 discovery.

9 Mr. Berman.

10 MR. BERMAN: You raised this, your Honor, a few times,
11 and we discussed this this morning and I we don't think we want
12 bifurcation. We are going whole hog, as you said.

13 THE COURT: Mr. Godfrey, you agree with that?

14 MR. BLOOMER: Andrew Bloomer on behalf of New GM. I
15 think we're in substantial agreement. In the way that
16 discovery unfolded and is proceeding I think doesn't lend
17 itself to that kind of distinction. Obviously if and when
18 there's class certification there will be discovery in
19 connection with that, but I think that can be adapted to the
20 ongoing discovery that will be occurring at that point anyway.

21 THE COURT: Okay. Great.

22 The next item I think I will leave it more to put it
23 on your radar something to be discussed, and the issue
24 discussed in the first instance is essentially the timing of
25 motion practice, and in particular, class cert motion practice

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1 and/or motion practice on choice of law issues, and there may
2 be obviously substantial interrelationship there. I'm not
3 going to get into the particulars today, obviously that's
4 something that you should be considering in the mix here.

5 And the last issue is the Feinberg protocols which we
6 also addressed.

7 A couple of other housekeeping type issues. First, we
8 have a schedule of conferences through January 9 but we don't
9 have anything thereafter. And I think as initially
10 contemplated we were going to move to conferences every other
11 month at the schedule at that point, but candidly I think we're
12 making pretty good progress with these monthly conferences. My
13 proposal would be to continue that for the foreseeable future,
14 and if at any point you think that they're not necessary, you
15 can articulate that and we can go to every other month type
16 schedule, or if there is a month that comes and you don't think
17 there is enough to discuss, we could cancel it. But given the
18 number of lawyers and the like involved, I think it's easier to
19 put things on the calendar with the right to take them off than
20 it is to add them later.

21 So to that end, I would propose that we put
22 conferences on the calendar now for February, March and April.
23 Unless anyone has an objection I will give you dates and times
24 for those now. Doesn't look like anyone is objecting, so
25 February conference will be Friday, February 13 at 9:30 a.m.,

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1 March will be Friday, March 13 at 9:30 a.m., and April, in
2 order to avoid conflict with the Passover holiday, will be
3 Wednesday, April 8 the 9:30 a.m.

4 All right. That exhausts the issues, the MDL-related
5 issues, pursuant to Order Number 8, submit a proposed order
6 memorializing everything that we have done today within three
7 business days, and obviously I have given you some other work
8 to do to be submitted by next Friday and some thereafter, and
9 you should follow the standard procedure for proposing an
10 agenda for the December conference as you have done and very
11 helpfully done with other conferences thus far.

12 It is now 12:30. I have exhausted everything
13 MDL-wise. Obviously we haven't addressed the motion to remand.
14 Unless there is anything else to be discussed, what I propose
15 is that we adjourn for some period of time to be discussed, and
16 then reconvene. I'm not sure that everybody has an interest in
17 the motion to remand, but everyone who has an interest in that,
18 reconvene, and we'll have a brief oral argument.

19 Is everybody good with that?

20 MR. BERMAN: Your Honor, it's also been a long morning
21 for you, and I will submit on papers. It's not a tricky
22 motion.

23 THE COURT: I don't want to deprive you of argument.
24 I'm fine doing it on papers. I will tell you that I typically
25 don't have oral argument on most motions and don't necessarily

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1 see the need for it here. Looks like folks at the back table
2 were nodding to that as well.

3 MR. GODFREY: We're fine submitting on papers.

4 THE COURT: We'll take it on submission and do away
5 with that.

6 Any other business that we need to deal with?

7 MR. GODFREY: Three quick items, your Honor. One,
8 Lisa Rubin of the Gibson Dunn firm on behalf of unit holders
9 and the bankruptcy has asked for access to the MDL depository
10 documents. We have no objection to that. We have a letter on
11 this. They are one of the parties that are briefing the
12 motions to enforce, so I think that is contemplated by the
13 coordination order, but I wanted to alert the Court and put
14 that on the record to see if we had any objections from any
15 party and figure out what to do with it.

16 MS. CABRASER: No objection.

17 MR. BERMAN: No objection.

18 THE COURT: No objection, fine with me.

19 MR. BLOOMER: Andrew Bloomer. Two housekeeping
20 issues, your Honor, one was somewhat related to earlier. When
21 the Court entered Order Number 20, the Phase 1 discovery order,
22 it held in abeyance pending the completion of Phase 1 GM's
23 obligation to respond in writing or to object to the
24 outstanding discovery requests. The parties, I think as the
25 Court indicated, will continue to discuss phase discovery.

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1 We did enumerate the discovery requests in that order
2 that we had when it was submitted. The day was entered we were
3 served with the defendants' fourth request, and we just wanted
4 to make sure that wasn't any confusion that our obligation or
5 lack of obligation to respond or to object would cover the
6 fourth request as well, even though we got -- we were served
7 with it after I think the proposed order had been submitted
8 and therefore didn't list it in Paragraph 8 of that order.

9 THE COURT: I would think it makes sense. It is
10 consistent with your agreement, but Mr. Hilliard?

11 MR. HILLIARD: And directly consistent with the
12 wording of the order, that's correct.

13 THE COURT: Very good.

14 MR. BLOOMER: Then the next issue I think the parties
15 have discussed an issue that we wanted to get the Court's
16 clarification on, and it relates to whether -- and I will
17 preface this by saying the parties, including with the federal
18 state liaison counsel, have been working well together with
19 coordinating with state courts.

20 As the Court knows, there were letters sent to state
21 court and also in other federal court judges by the federal
22 state liaison counsel. So the question is whether those types
23 of letters should be sent to the Category 2 and Category 3
24 cases that we report on in our bi-weekly related case letter.
25 Category 2 are the securities and derivative actions, Category

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1 3 are unrelated.

2 When the letters went out, counsel in those cases
3 weren't copied on them, so I think there was some confusion.
4 Both the federal state liaison counsel got calls from parties
5 in those cases and we got some calls. I think we're in
6 agreement, I'll obviously let lead counsel speak to this as
7 well, what we would propose is in the ordinary case not send
8 the correspondence out directly to the courts in the Category 2
9 and Category 3 cases to try to avoid any confusion. Some of
10 the Courts set scheduling conference to discuss it. And as
11 your Honor knows, you already held I think in your coordination
12 order and the order that followed it, that Category 2 and
13 Category 3 are not related actions.

14 So we propose handling it on a coordinated basis, if
15 we see a need to send something, we coordinate with federal
16 state liaison counsel and vice versa. We're happy to update
17 you with what is going on in the cases so you're aware of them,
18 but to avoid the potential for any concern or adverse reaction
19 in those cases not to send correspondence directly to the
20 courts in those cases.

21 THE COURT: All right. I think obviously I'm happy to
22 hear what you have to say in the front table, but that many
23 makes sense to me. As I think my prior order makes clear,
24 those cases are on sort of a different track, and to the extent
25 that coordination is warranted, it should be done on an ad hoc

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1 basis. And given that, I don't see the need to flood them with
2 correspondence or orders from me on things that could cause
3 confusion or make them think they should be doing something.
4 So that's a long way of saying I think we're in agreement.

5 MS. CABRASER: It makes perfect sense to us. I'm glad
6 this was clarified.

7 THE COURT: And for reasons that aren't really even
8 clear to me, and certainly won't be clear to you, that reminded
9 me of something that I meant to say earlier on the consolidated
10 complaint front, which is obviously the answer to the question
11 once we have sorted out what those things are, what kind of
12 creature they are obviously has some bearing on GM and for
13 defendants' obligations to answer. GM I think I have stated
14 needs to answer the individual complaints, so I wanted to throw
15 that out there as obviously something that is relevant in the
16 mix as well.

17 All right. Anything else?

18 All right. Excellent. Mr. Hilliard's daughter was
19 admitted to the Texas bar I think on her way up here, and he
20 made the request that I swear her in, which I understand from
21 him that I'm empowered to do. I indicated I was okay with that
22 if there was no objection from defense counsel, and I actually
23 have that authority. I am told that nobody objects, but I want
24 to make sure.

25 MR. GODFREY: We don't object, your Honor, although

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1 when I was younger I did this in the court and the judge swore
2 me in and said guess what, you're in our pro bono program.

3 THE COURT: That's a risk she will have to bear. My
4 clerk or I will discuss with Mr. Hilliard how I will do that,
5 but I congratulate Ms. Hilliard and I look forward to doing
6 that in a minute.

7 And thank you all for your patience. I do have to say
8 you said this wouldn't take more than three hours and it did
9 take three hours and ten minutes, so I want to charge you for
10 that. But I appreciate your assistance and help in everything
11 thus far.

12 Thank you very much, and we're adjourned.

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