

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

v.

14 MD 2543 (JMF)

7 GM IGNITION SWITCH MDL
8 DEFENDANTS,
9
10 Defendants.

-----x

New York, N.Y.
December 15, 2014
9:30 a.m.

11 Before:

12 HON. JESSE M. FURMAN,

District Judge

13 APPEARANCES

14 HAGGENS BERMAN SOBOL SHAPIRO LLP
15 Attorneys for Plaintiffs
16 BY: STEVE W. BERMAN

17 LIEFF CABRASER HEIMANN & BERNSTEIN LLP
18 Attorneys for Plaintiffs
19 BY: ELIZABETH JOAN CABRASER

20 HILLIARD MUNOZ GONZALES LLP
21 Attorneys for Plaintiffs
22 BY: ROBERT HILLIARD

23 SIDLEY AUSTIN LLP
24 Attorneys for Defendants
25 BY: EUGENE A. SCHOON

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APPEARANCES (Continued)

HARTLINE DACUS BARGER DREYER, LLP
Attorneys for Defendants
BY: KYLE HAROLD DREYER

KIRKLAND & ELLIS, LLP
Attorneys for Defendants
BY: ANDREW B. BLOOMER
RICHARD C. GODFREY
RENEE D. SMITH

DELPHI AUTOMOTIVE SYSTEMS
BY: JOSEPH PAPELIAN

1 (In open court)

2 THE COURT: Please be seated.

3 (Case called)

4 THE COURT: Good morning to all of you. Does anyone
5 else want to note their appearance? All right. Welcome back.
6 Good to see you all.

7 A couple preliminary matters which won't come as a
8 surprise just to make clear we are on or my understanding is
9 the Court call is up and running and folks are listening in.
10 As I mentioned last time, some judges and/or their staffs may
11 be listening in, so just be mindful of that. That should be
12 working well.

13 Because of that, I also just want to remind you as
14 well as the fact the acoustics in here are a little bit
15 challenged, just remind you to please do your best to speak
16 into the microphones and for the sake of the Court Reporter, to
17 speak clearly, loudly and relatively slowly.

18 All right. My plan, as you know, is largely to track
19 the proposed agenda that was set forth in the general letter of
20 December 11th. I am going to deviate in a couple instances
21 which will be made clear, and also then to address the
22 supplementary issues I flagged in my endorsement of Thursday as
23 well as the issue I raised in the order that was issued on
24 Friday.

25 Now, one first deviation is that I'm going to start by

1 briefly addressing the Valukas report issues that have been
2 fully briefed in part because I believe that Judge Tanksley
3 and/or her staff is on the line and I just want to accommodate
4 them, and if they have any reason to go and attend to other
5 matters, they can at least listen for this part. Let's start
6 with that.

7 To be clear, I don't intend to have full blown oral
8 argument. I think the issues are fully joined in the briefs,
9 and in that regard I have for the most part what I need, but I
10 do have a few discrete questions.

11 The first question is for plaintiffs' counsel. Mr.
12 Berman, are you taking the lead on this?

13 MR. BERMAN: Yes.

14 THE COURT: The first question is just a sort of
15 organizational one, which is I am not sure, obviously
16 Mr. Cooper did not file anything before me, but I understand
17 from the footnote in GM's response brief, he did file something
18 albeit belatedly before judges Tanksley. I just don't know
19 quite what to make of that or what, if anything, I should do
20 about it. He is obviously a member of the executive committee
21 in the MDL.

22 He also obviously has his own obligations to his
23 client in Melton, and maybe there isn't anything to be done
24 about it, but it did raise some concerns on my part about --
25 well, some concerns on my part. Let me leave it there.

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1 MR. BERMAN: I have to confess I don't have the
2 footnote in mind. It is my understanding that Mr. Cooper is
3 proceeding independently seeking the materials in the court in
4 Georgia, and we are seeking it independently under a different
5 law before your Honor.

6 THE COURT: The footnote is Footnote III of their
7 response brief in which they note that while the lead counsel
8 here has taken the position that the issues should be decided
9 at least in the first instance by me, that Mr. Cooper filed a
10 brief in Melton stating that Judge Tanksley should decide the
11 intervening material.

12 And again, maybe it is what it is and we'll deal with
13 what it is, but I want to raise it as a concern.

14 MR. BERMAN: I understand your concerns, but I think
15 that both courts should be ruling on this independently of each
16 other because the law is different. Mr. Cooper's motion is
17 brought under Georgia law and our motion is not.

18 THE COURT: How does that square with the position
19 you've taken in your briefs that the issues should be decided
20 by me at least in the first instance?

21 MR. BERMAN: We think you're the lead court in the
22 country to decide common issues and significant issues that
23 affect cases all over the country. To some extent we're in
24 conflict with Mr. Cooper.

25 THE COURT: All right. Defense counsel, anything you

1 want to say on that score?

2 MR. GODFREY: Two points, your Honor:

3 Number one, under Rule 502 (d), Congress has spoken as
4 to who has the sole authority to decide the issue;

5 Number two, the court's orders, which we understood
6 would be joint court orders, were that the briefing was to be
7 simultaneous, and here Mr. Cooper for the first time on
8 December the 10th filed his brief in Georgia asking the Georgia
9 court to decide.

10 Until that filing, to which General Motors has been
11 given no opportunity to respond, we were unaware that an
12 executive committee member of the MDL was taking the position
13 to the contrary of lead counsel of the MDL. We don't see the
14 need to respond in Georgia as long as this Court rules
15 consistent with Rule 502 (d) and what the Congress has already
16 decided that the rule of this Court binds every state court in
17 the land.

18 This is not a question of an independent action, but
19 it is another illustration of what we faced earlier in the
20 case, where we have a member of the executive committee that,
21 where Mr. Berman sees it acting somewhat independently of the
22 MDL in counsel, which we don't understand.

23 THE COURT: All right. Let me say a couple of things.

24 I don't think there is any need for me to do anything
25 and I don't hear any applications with respect to that

1 conflict, if you will, just yet. As I think I made clear, it
2 does raise some concerns. Now, if it gets to it and there is a
3 need to, then I will do what I need to do to ensure that the
4 proceedings proceed in an orderly fashion.

5 Now, having said that, I don't think there is again
6 any need to do anything just yet, and that is in part because
7 having read the parties' briefs here, I am mindful of the fact
8 the parties here at least agree I should take the lead in
9 deciding the issues that have been briefed in the MDL, and
10 having communicated with Judge Tanksley, I will take the lead
11 on deciding those issues.

12 Having said that, I haven't read Mr. Cooper's brief.
13 It wasn't filed in this Court and I don't know to what extent
14 it is duplicative of the arguments and issues briefs here, to
15 what extent the briefed issues specific to the Melton case and
16 ultimately whether and to what extent any ruling that I make is
17 binding on Judge Tanksley is something that obviously remains
18 to be seen based in part on whatever I rule and also based in
19 part on whatever issues are raised in the Melton matter, and I
20 presume would be for Judge Tanksley to decide in the first
21 instance, but in any event certainly not ripe for a decision at
22 this point. I am going to take the lead on issues that have
23 been briefed and try to get you a decision on those issues
24 sooner rather than later.

25 I have a couple of other questions on that score

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1 before we turn to the agenda items. The first question for GM
2 which is in the lead counsel's response brief, they note that
3 there are nearly 100 interviewees who were not named or cited
4 or disclosed in the Valukas report?

5 And number one, I wanted to chat to see if that was
6 accurate; and, number two, assuming it is, what impact that has
7 on the arguments you've made that essentially the plaintiffs
8 have what they need in order to pursue whatever discovery
9 they're entitled to take; that is to say, as I understand it,
10 you essentially argue they have an unprecedented amount of
11 materials as well as the names of all the witnesses and they
12 can go ahead and depose the witnesses.

13 If, in fact, they don't have the names of relevant
14 witnesses, is that, in fact, the case and should I require at a
15 minimum the names of the witnesses who were interviewed be
16 disclosed and so forth?

17 Mr. Godfrey, are you addressing this?

18 MR. GODFREY: Yes, your Honor. There were a number of
19 questions that I think you asked.

20 THE COURT: I did.

21 MR. GODFREY: I'll try to cover them all. If I
22 forget, I apologize.

23 Roughly a little over half -- and I can provide the
24 court with precise figures of that -- a little roughly over
25 half of the interviewees were disclosed in the Valukas report,

1 which means a little less than half were not disclosed. The
2 precise number doesn't really matter for the court's question.
3 I think you can say it is certain, it is a hundred or more is
4 my understanding, but it is a fair number at least for the
5 purposes of what I think the court's questions are.

6 THE COURT: Mr. Godfrey, keep your voice up and into
7 the microphone please.

8 MR. GODFREY: I will do my best.

9 Secondly, it confirms in our view the work product and
10 the privileged nature of it. It is the ultimate exercise of a
11 lawyer's duty and a lawyer's work to interview people in
12 preparation for the matter. As the court knows, Mr. Valukas
13 was broadly retained early on. He is actively representing the
14 company in certain matters involving the government. The court
15 is aware of that.

16 What the plaintiffs are looking for is to get access
17 to ongoing work product of the most broad fashion, which we
18 think is unprecedented. The fact that they're not all
19 disclosed only confirms the inherent nature of both the
20 attorney-client work product and the attorney-client privileged
21 communications that have taken place and are taking place.

22 Third, the plaintiffs are certainly able, and we are
23 certainly willing, to provide names of people that we believe,
24 based upon Mr. Valukas' investigation, are fact witnesses who
25 might have relevant information. Ordinarily in a case,

1 plaintiffs would serve interrogatories, we would file the
2 response to say here are the people with the names that may
3 have factual information responsive to the interrogatories.

4 If the court is interested, we'll short-circuit that
5 because you feel that would be a balance, maintain the
6 privilege and work product but at least they have us identify
7 the names. We can accommodate the court in that, although that
8 does cause me some concern in the event if someone were to say
9 by doing so, therefore, we are waiving both work product and
10 attorney-client protection privileges.

11 But if, in order to preserve what we think is the
12 inherent work product and attorney-client communications here
13 of the Valukas materials at large, as a way of working out
14 either meet and confer conference pursuant to court's order
15 pursuant, which if we disclose names of other individuals
16 outside the interrogatory context, that would not constitute in
17 this court or in any other court a waiver of work product or
18 attorney-client privilege, that we are willing to have that
19 discussion or go down that path.

20 I think I have answered all the court's questions, but
21 I am not a hundred percent sure.

22 THE COURT: I think you have as well. Mr. Berman, let
23 me turn to you on this. Number one, is there anything you want
24 to say, you can say it.

25 Specifically, if I were to rule that GM had to

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1 disclose the identities of the witnesses who were not disclosed
2 in the Valukas report, but otherwise the interview materials
3 remain protected and not subject to disclosure, and I were to
4 say that by disclosing those names, they're not waiving, that
5 should not be be deemed and will not be deemed to be a waiver
6 of any privilege or work-product protection, would that be --
7 obviously minding the meeting, I will adhere to it, or is there
8 any concern or could any argument be made that constitutes a
9 waiver and could any other court treat that as a waiver of
10 other protections?

11 MR. BERMAN: First, your Honor, we don't think that
12 that's the solution.

13 THE COURT: Understood.

14 MR. BERMAN: You understood that?

15 I am not going to repeat the brief. The Allied Bank
16 case in particular, this is not an attorney-client situation.
17 It was not rendering legal advice and it was not done in
18 anticipation of litigation so it is not work product. There is
19 no legal advice in the report, as we point out in our brief;
20 and, therefore, we don't think that this is the answer.

21 Now, with respect to your question on waiver, I think
22 that you under Rule 502 (d) as a federal court have the power
23 to decide what is a waiver and what is not a waiver. If at the
24 end of the day your answer is to order GM to give us these
25 names, obviously that is not what we are seeking.

1 If that is what your order is, we won't claim that is
2 a waiver. We have already made our waiver argument. If we
3 lose it, we lose it. We think if you rule giving the names is
4 not a further waiver, you have the power to do that under 502
5 (d).

6 THE COURT: And that would be binding on other courts,
7 which is to say, to the extent that there are other lawyers out
8 there or other members of the executive committee or not who
9 might not necessarily agree with you, they would be bound by my
10 ruling on that issue.

11 MR. BERMAN: That is the way we interpret 502 (d).

12 THE COURT: I don't want any of my questions to --
13 anyone to read too far into my questions and I am reserving
14 decision ultimately on this issue and will give you that
15 decision later. I do want to ask, take the opportunity to ask
16 these questions.

17 Mr. Godfrey, there is a note in the plaintiffs'
18 response brief that raises the question of whether the oral
19 proffers that were made, hypothetical or oral proffers, if you
20 will, to DOJ and maybe other agencies, whether all of those
21 witnesses were disclosed in the report. Do you have an answer
22 to that question? Do you know the answer to that question?

23 MR. GODFREY: I don't think I can say with any
24 certainty that each of the oral proffers were disclosed in the
25 report. I think the vast majority, but I can't represent to

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1 the court that I know. I can certainly ask Mr. Valukas, and we
2 can determine that, but I do not know the answer to that
3 question with certainty.

4 THE COURT: Let me ask you another question.

5 Let's say I agree with you ultimately on the big
6 picture issues. Is it fair to say that the issues might need
7 to be revisited with respect to a particular witness or
8 witnesses in the event that a witness is shown to be
9 unavailable for deposition?

10 MR. GODFREY: I think that the court has correctly
11 foreshadowed an issue that possibly could arise at some point
12 in time five months, seven months from now, either a witness is
13 physically unavailable or a witness makes himself on advice of
14 counsel unavailable, that is always possible in a matter like
15 this.

16 I think at that point in time we can revisit it. I
17 don't believe our position would change, but I think that the
18 facts would certainly warrant a reconsideration both by the
19 court and by us as to a position with respect to a particular
20 witness. So I think that the court properly has noted that on
21 the unavailability argument, one would analyze it as through
22 the prism of pre-maturity, which we pointed out in one of our
23 responsive papers it is a hypothetical that may or may not
24 arise. Why deal with the big issue in the face of
25 hypotheticals that may not ever arise?

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1 THE COURT: I take it right now at least the issue has
2 largely been briefed on a level of generality that this is sort
3 of the general principle, and if there is reason to address
4 things in particular, we'll get there.

5 MR. GODFREY: Yes.

6 THE COURT: My ruling may make it unnecessary to deal
7 with anything in the particular.

8 MR. GODFREY: We hope the ruling on a general level is
9 supportive of our position for reasons articulated. I won't
10 correct that. Both under work product doctrine case law and
11 under Rule 26, this is an issue that if something were to arise
12 six months or four months from now, whatever, we would have a
13 conversation first on a meet and confer basis, and we may or
14 may not need to revisit it with the court. Your Honor has
15 thought some in the fundamental trust of your question.

16 THE COURT: The last question I have is for
17 plaintiffs. In your response brief, Page 7 and Notes 31 and
18 32, the thinking more or less suggests or implicitly concedes
19 that the question of waiver is governed by Rule 502, but I want
20 to put the question to you explicitly. Is that your position?

21 Is that your position?

22 MR. BERMAN: Yes, that is our position, your Honor.

23 THE COURT: What role, if any, then do the common law
24 principles of waiver apply? Both sides have briefed them, but
25 maybe that is just on a cover-your-bases and

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1 belt-and-suspenders.

2 MR. BERMAN: That's correct.

3 THE COURT: Everybody is in agreement waiver is
4 governed by Rule 502?

5 MR. BERMAN: That's correct.

6 THE COURT: Mr. Godfrey?

7 MR. GODFREY: It is governed by Rule 502, and I should
8 mention that (d) is the controlling principle. There is that
9 (ff) and (ii) which also says the same thing in terms of
10 binding rules and decisions on the states. It is repeated
11 throughout the rule in terms of 502 is the rule of decision
12 that will govern.

13 THE COURT: All right.

14 MR. BERMAN: On the issue of unavailability, Mr.
15 Godfrey says it may be premature, we don't know. We don't know
16 today whether any witnesses have made themselves unavailable
17 because of Fifth Amendment and so perhaps we should find out
18 from GM, are there any witnesses right now who are unavailable?

19 THE COURT: I don't think we need to find that out
20 right now. You guys can discuss that, and again I think the
21 first step is for me to answer the questions at the level
22 they've been briefed, which is basically, I don't know if it's
23 the 30,000 or 10,000 foot level, but to the extent we then need
24 to deal with particular instances, we can deal with those down
25 the road and we'll discuss this in more detail. We are not

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1 talking about starting depositions next week. We have some
2 time to sort that out. All right. As I mentioned, I will
3 reserve decision on that and hope to get it to you sooner
4 rather than later. I am mindful we are entering the holiday
5 season.

6 Turning to the agenda items, first the document
7 depository issue. Let me say say I am fine if you continue to
8 meet and confer and plan to update me at the January 9th
9 conference. In fact, as far as I am concerned, you only need
10 to include it on that agenda or raise it with me if there is
11 any issue, which is to say, I think there is a status quo. As
12 far as I am concerned, that is where things stand.

13 Unless and/or until there is a dispute or application
14 or something, which is to say, I encourage you to be conferring
15 on this as on any issue that has any import to the MDL, but as
16 far as I am concerned, you only need to include it on the
17 agenda if there is something for me to consider. In that
18 regard, I am happy to say that this is not a live issue unless
19 and until one of you tells me otherwise and there is something
20 for me to address.

21 Now, the second item is the effect or effects of the
22 consolidated complaints. I did receive your proposed orders
23 and the red line reflecting the differences between those, and
24 I just had a couple of questions or issues that I wanted to
25 raise on that score.

1 Now, first, on the question or the issue of the
2 deadline for an amended complaint, I agree you, GM, it should
3 be set for June 4th, 2015. I say that mindful of the fact
4 plaintiffs can always seek an extension of that deadline if an
5 extension is justified and it is consistent with my general
6 view and approach. It is better to set an aggressive deadline
7 at least in the first instance and try to keep you to those and
8 hope that you will be kept to those as, for example, GM was
9 kept with respect to its initial discovery deadlines.

10 Now, I also think that that more aggressive deadline
11 is more consistent with the plaintiffs' own view of how
12 aggressively and quickly we will be moving the cases forward on
13 the economic loss front which we will discuss shortly. That is
14 the first issue.

15 Second, I noted that I think it is defendants who
16 proposed, if I am not mistaken, defendants proposed that for
17 good cause shown language on Page 3 and Page 4 of the redline.
18 I guess the question I have, Mr. Godfrey, I don't know if
19 you're addressing this -- you're not? All right. Let me defer
20 to you then. Is just what the basis is for that language.

21 Obviously, by setting a deadline, it puts the
22 amendment into Rule 16 territory as opposed to the Rule 15
23 territory. And Rule 16 material is a good cause standard to
24 begin with, so why should I be inserting any language in the
25 order, on the theory that the standard is set by the relevant

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1 rules?

2 MR. GODFREY: Understood, your Honor.

3 I think it is in Rule 16 territory, which is a good
4 cause standard, and I think the intent was simply to make that
5 expressed so there is no confusion, and also underlying that is
6 that any amendment should be based on something that actually
7 did bubble up or occur in discovery and not just based on --
8 there ought to be some minimal showing that an amendment is
9 necessary given what has been learned in discovery to date as
10 opposed to a re-thinking of a position or something like that.

11 There ought to be some objective trigger to it, and
12 that was the intent of seeking a good cause standard which I
13 think is elsewhere in the order as well. It is consistent with
14 what the order says elsewhere in terms of requiring good cause.

15 THE COURT: Except that my concern is that -- maybe I
16 just misunderstood it, the proposed language seemed to inject a
17 good cause standard into any amendment given before the
18 relevant deadline, and I would think that any amendment at that
19 stage is governed by Rule 15 and it is a freely given standard
20 rather than the good cause standard that would apply to an
21 amendment after the deadline under Rule 16, which is to say,
22 intentionally or otherwise, it comports into Rule 15 territory
23 the standard that would apply when the deadline is passed.

24 MR. BLOOMER: We understand that point, and I can see
25 why your Honor would say that. I think it is slightly

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1 different here given the fact that there has been substantial
2 time that has passed. Ordinarily courts even in large cases
3 allow relatively shorter time for amendments to pleadings to
4 get them set.

5 Whether you're in Rule 15 or Rule 16 land, where we
6 come out on it, and to some extent we based our proposed
7 language on this, on what lead counsel had said, they wanted
8 the opportunity if something occurred in discovery to do that,
9 to make the amendment.

10 Our point was that is the standard. It should have
11 some objectivity to it. We understand the court's point if the
12 view of the structure now is we are still in Rule 15 land, it
13 is justice so requires.

14 THE COURT: I think I will not include that language
15 on the theory the rules themselves are adequate to the task and
16 I can take it as it comes, but I won't alter the standard what
17 the rules dictate.

18 There is a dispute on Page 3 of the redline that I
19 just wanted to get you to address; namely, the dispute over the
20 language that defendants propose. This is at the top of Page 3
21 of the redline, failure to seek leave for reinstatement within
22 such 14 days will convert any such dismissal without prejudice
23 into a dismissal with prejudice, and so forth. If I could just
24 have you guys address that and make your positions clear to me,
25 that might be helpful.

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1 MR. BERMAN: Your Honor, we think it should be without
2 prejudice and, in fact, we think what the defendants are
3 suggesting, particularly if Delphi joins in, this is actually
4 going to harm what they seek to achieve and here is why. As I
5 understand the way things work right now after you issue this
6 order, any claim that was brought in an existing complaint that
7 is not in the consolidated complaint is without prejudice.

8 We have told all the lawyers in the country that we're
9 going to examine the facts as discovery proceeds and ultimately
10 decide on what the final complaint may look like. We are not
11 closing our minds to the suggestions they had when we filed the
12 claims. For example, there are lawyers out there who sued
13 Delphi. There are lawyers out there who brought racketeering
14 claims. If the language that they propose is entered by your
15 Honor, then I think what will happen is those lawyers aren't
16 going to want those claims to be dismissed with prejudice right
17 now, so they're going to come before this Court and say I want
18 to name Delphi, I want to add RICO.

19 So we think that what I think they hope to achieve was
20 to put a time-out in those claims, maybe they never come back,
21 as they're more likely to come back by inserting this language.

22 THE COURT: That seems like a valid point to me. On
23 the flip side, I imagine they want to, there is some interest
24 in proposed or finality is the word to use, but I can
25 understand from their perspective they don't want this to be a

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1 moving target. If they're litigating against consolidated
2 complaints, and everybody seems content to treat those as the
3 operative complaints, and low be and behold at the 11th hour,
4 whenever that is, these other claims suddenly rear their ugly
5 heads, I can understand that that would cause them some
6 concern. What happens in that instance and how do you address
7 that concern if it is not with prejudice?

8 MR. BERMAN: The concern is addressed by the June 4th
9 date. That is not that far away. It is six months. There
10 might be some uncertainty with respect to a defendant, but it
11 seems to me that is better than forcing us, forcing our hand
12 right now. The June 4th date is not a date we are happy with
13 because Phase I discovery will be ending shortly before June
14 4th, and so we are going in a position where we will have no
15 discovery on many of the defects at issue.

16 Right now Phase I is all the ignition switch issues
17 and one other defect. So by picking their date of June 4 and
18 not our date of September, we will not have seen a whole range
19 of material that relates to the other defects. That kind of
20 hampers. That is why we were suggesting September because by
21 September we will have gone through I think a bigger universe
22 of documents.

23 THE COURT: And you may be able to show good cause
24 for --

25 MR. BERMAN: We may be able to show good cause.

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1 THE COURT: Mr. Bloomer, do you want to address this?

2 MR. BLOOMER: We are all in agreement that the nature
3 of the consolidated complaints is that they are superseding
4 complaints. Then the question is what does that mean?

5 As I understand lead counsel's position, they agree
6 that if a claim -- their language is such a dismissal with
7 prejudice would pertain only to claims not included in the
8 consolidated complaints, it will not be dismissed if a given --
9 not be dismissed given plaintiffs' entire case unless that
10 plaintiffs' underlying complain failed to include any claims
11 set forth in the consolidated complained, if they have
12 underlying complain that didn't show up anything.

13 If they have an underlying complaint that did not
14 assert any claims that appear in the consolidated complaint, as
15 I understand their position, they agree with that being a
16 dismissal with prejudice; but that if the claim, if their
17 complaint had a claim that showed up in the consolidated
18 complaint in another claim that didn't, it would not be
19 dismissed with prejudice. I think the crux of it, your Honor,
20 what is the purpose of the consolidated complaint?

21 It seems if they're dismissed without prejudice, and
22 there is motion practice on the consolidated complaints, then
23 once that motion practice is done, are those claims still
24 preserved to be litigated somewhere else notwithstanding the
25 fact that the court ordered the filing of a consolidated

1 complaint that I think we all agreed are superseding
2 complaints. Trying to preserve those claims defeats the
3 purpose of what I think this Court's intent was originally,
4 which was to have a consolidated complaint that addressed all
5 economic loss claims so that this could be addressed in an
6 orderly and efficient practice.

7 Our concern is if it doesn't start getting narrowed,
8 then it will leave claims out there in individual complaints
9 that will remain to be litigated notwithstanding what happens
10 on the consolidated complaints, in which case I think we have
11 lost the efficiencies and the orderly process of the MDL.

12 THE COURT: And what do you say to Mr. Berman's point
13 which I do think has some validity, namely, that proceeding in
14 the manner you suggest might not work as you want it to work,
15 which is to say, if lawyers are out there and their claims are
16 not included in the consolidated complaints, they will seek
17 leave to reinstate them simply to preserve whatever claims they
18 have, say, against Delphi or RICO claims or what have you, and
19 then I guess the question is what do I do in that instance?

20 MR. BLOOMER: Two points:

21 One is I think they may do that anyway at the end of
22 the day. So I think it is just a question of when the fight
23 gets fought, as it were.

24 Secondly, your Honor originally set in place a process
25 that would allow people to make these objections. That process

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1 was supposed to bring those things to the fore in advance of
2 bringing a consolidated complaint. That didn't occur.

3 As we understood your Honor's directions at the last
4 conference, it was to build in a mechanism as we then confer to
5 allow other plaintiffs to raise those issues. I think our
6 preference is to get that resolved sooner a rather than later.

7 If the answer is well, what counsel is saying, we have
8 plaintiffs out there that object to what we've done and think
9 it is the wrong path, then perhaps those issues have to get
10 resolved and adjudicated now rather than later where they're
11 still going to be raised by individual plaintiffs, I think.

12 THE COURT: I agree with you that the structure was
13 intended to ferret out whatever objections there might have
14 been, and this is partially my fault, but to be candid, I think
15 all of us were either blind to or ignorant of the ambiguities
16 of the law, what the effects of the consolidated complaint
17 were, which is issue I raised at the last conference, but it is
18 proper for this discussion.

19 It may well be, or I don't want to foreclose the
20 possibility that lawyers refrain from making objections when
21 the complaints were filed in the first instance because of some
22 understanding that their claims would survive in some fashion
23 and be revived down the road, and the consolidated complaints
24 were in essence just a mechanism, convenient mechanism to
25 adjudicate the big pictures in the case; which is to say, I

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1 don't think it is fair they've been estopped from raising those
2 issues now, and that is precisely why I raised this issue,
3 although belated in the sense it wasn't raised before the first
4 time we dealt with this, better to deal with it now than down
5 the road.

6 Mr. Schoon, do you want to be heard?

7 MR. SCHOON: Yes, your Honor, just briefly.

8 Of course, we are not included in the consolidated
9 complaints and we have an agreement with the plaintiffs that we
10 will not be included in those based on the information that is
11 known to date. Because Mr. Berman brought us up, I want to
12 clarify our position. We don't think we are going to be
13 brought back in, either. We are interested in certainty and we
14 are interested in clearing up the ambiguity that currently
15 exists because we have all these other pleadings that are out
16 there that still name Delphi, and it is not clear to me what it
17 is they're supposed to do with these pleadings.

18 The kind of bottom-line position for Delphi is we're
19 fine with the dismissal being without prejudice at this point
20 until June 4. We do want a point where there is some certainty
21 as to Delphi's status in the case. I think after discovery is
22 conducted through Phase I, the conclusions about how Delphi
23 fits into this are going to hold and that there will be no
24 basis for bringing Delphi back in, and that is why I have no
25 objection to that being modified.

1 I joined in GM's position on this because, as you
2 might imagine, there is a lot of back-and-forth how these
3 orders get done. If the court believes that dismissal without
4 prejudice is a better, more efficient way to approach this, we
5 are fine with that.

6 THE COURT: Again my concern is what happens if I say
7 it is with prejudice, and lawyers come running in saying please
8 reinstate my claims at least on a place-holder basis. What do
9 I do with that?

10 Do we have Rule 12 motion practice with respect to
11 those claims even though they're technically not even live,
12 they're just being asserted to preserve their rights, or do we
13 defer that, in which case, you know, why isn't it better to
14 just say it is without prejudice and if they ever resurface, we
15 deal with it then and so forth. Mr. Berman.

16 MR. BERMAN: The solution that Mr. Bloomer is looking
17 for is the June 4th date. By June 4 we are going to be telling
18 folks what the final consolidated complaint will look like.
19 They're either going to have to say I object, I want this claim
20 or not. To trigger this all now I think would be a bad idea.

21 THE COURT: Is there anything else anyone wants to say
22 on this? Otherwise, we'll move on to the next issue.

23 MR. BLOOMER: One more item briefly.

24 That is just the fact that Judge Gerber is deciding on
25 the process of -- deciding the motions to enforce. Those were

1 briefed based on the consolidated complaints because that was
2 basically the agreement of all the parties in the beginning.

3 If a dismissal without prejudice does leave in place
4 some claims, that may impact what he is doing. I have to think
5 about that to know exactly what those claims are, but it is
6 something that ultimately he may have to address because
7 people, the parties have been shooting at one target. If it
8 turns out actually there is something else left out there
9 dismissed without prejudice, the question is how that gets
10 addressed before you?

11 THE COURT: How is that different than a complaint
12 some lawyer out there has in his word processor and hasn't yet
13 filed? In other words, it becomes a complaint that just --

14 MR. BLOOMER: You all need is a mechanism to deal with
15 the stuff that is yet to be filed, that is true.

16 I think the claims that have previously been filed
17 which are now pending for some time stand in a different
18 position. Later-filed claims, you can look back and see what
19 either this Court has ruled or Judge Gerber has ruled and
20 decide how best to deal with those claims.

21 I think in the interests of efficiency and trying to
22 move the ball along, we have to give some thought and the court
23 has to give thought how this impacts what Judge Gerber's
24 deciding order is as well.

25 THE COURT: Very good. Let's turn to the next I think

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1 substantive language in dispute, namely, this is at Pages 3 and
2 4 of the redline language:

3 "Such a dismissal will pertain only to claims not
4 included in the consolidated complaints and will not be a
5 dismissal of a given plaintiff's entire case unless that
6 plaintiff's underlying complaint failed to include any claims
7 set forth in the consolidated complaints."

8 That is the first sentence, and then the second is:

9 "Statutes of limitations that would otherwise run
10 prior to the amendment deadline set forth in this order are and
11 shall remain tolled until that date."

12 Those may be a misunderstanding.

13 Number one, those two sentences seem to address
14 slightly different issues;

15 Number two, if you could elaborate on your relative
16 positions on those issues, that would be helpful. Take them
17 one at a time. Assuming I am correct they're addressing
18 different issues, turn to the first sentence. Mr. Berman, do
19 you want to take the lead on that?

20 MR. BERMAN: Ms. Cabraser will.

21 MS. CABRASER: The first sentence, your Honor,
22 simply --

23 THE COURT: Just move the microphone a little closer.

24 MS. CABRASER: -- the first sentence, your Honor,
25 simply assures that the entirety of an underlying complaint

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1 would not be dismissed unless it didn't include any claims that
2 were included in the consolidated complaint. It won't be an
3 operative complaint, but there may be a remand situation later
4 in the day, your Honor, we don't know what is going to happen
5 on various motions.

6 To the extent the underlying complaint remained
7 operative for some reason -- for example, an opt-out of the
8 class or non-class certification -- it would not have been
9 dismissed.

10 THE COURT: Is that in Exhibit A that was sent later,
11 is that the distinction between the first section, if you will,
12 and second section?

13 The first is identified as economic loss cases to be
14 dismissed, and the second is cases with economic loss
15 allegations and/or claims to be dismissed. Is that a --

16 MS. CABRASER: Yes.

17 THE COURT: What is the Clerk's Office supposed to do
18 with the latter category? They're not supposed to dismiss
19 those cases?

20 MS. CABRASER: They would not dismiss the cases, but
21 the only operative claims within those complaints would be
22 those contained in the consolidated complaint. We'd have to
23 come up with cross-referencing at the appropriate time, but any
24 court on remand would have your Honor's orders and would also
25 have the consolidated complaint.

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1 We thought that was a less problematic way of dealing
2 with that rather than have a situation where we have a remand,
3 someone who isn't in a class who, who opted out of a class and
4 wasn't subject to a class certification order, they had a
5 complaint and they no longer do. They could refer to the
6 consolidated complaint with respect to the remaining claims
7 but, of course, the consolidated complaint doesn't have that
8 plaintiff's specific information in it.

9 It is something that may or may not be a problem in
10 the future. We thought this was the best, succinct way of
11 addressing it now.

12 THE COURT: I think that makes sense to me, but I do
13 also want to make sure that I provide clear directions to the
14 Clerk's Office what it is supposed to do, that is now, and can
15 you just elaborate. The proposed order says the Clerk is
16 requested to enter an order of dismissal without prejudice in
17 each of those cases.

18 First of all, is that true with respect to the cases
19 in Section 1 of Exhibit A and Section 2, or just Section 1?

20 And what should the order --

21 MS. CABRASER: I think, your Honor, what the order
22 should state to the Clerk is that the Clerk is directed to
23 enter an order of dismissal in those cases with respect to
24 claims not asserted in the consolidated complaints.

25 THE COURT: Mr. Bloomer is shaking his head. Now he

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1 is sort of equivocating.

2 MR. BLOOMER: Yes and no, your Honor, at the same
3 time.

4 MR. HILLIARD: Welcome to our world!

5 THE COURT: Mr. Bloomer, do you want to elaborate on
6 your head motions?

7 MR. BLOOMER: If a claim hasn't been asserted at all
8 in the consolidated -- if an underlying complaint has a claim
9 that is not asserted in the consolidated complaint, it should
10 be dismissed unless it is a personal injury claim.

11 I think what the two sections of Exhibit A were
12 intended to do is address the fact that most economic
13 complaints, economic loss complaints in the MDL are pure
14 economic loss complaints. You do have some where you have
15 economic loss claims mixed with personal injury and/or wrongful
16 death claims. I think most are personal injury claims.

17 I think if a complaint has an economic loss claim,
18 then I think it gets resolved however the court decides to
19 resolve it based on our prior argument, meaning all economic
20 loss claims, whether they are the totality of a complaint or
21 portion of a complaint, get addressed however the court decides
22 to resolve it.

23 In a case where you have a hybrid, personal injury
24 claims combined with economic loss claims, the economic loss
25 claims get covered by what the court does in this order, but we

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1 agree you would not dismiss the personal injury claims in that
2 case.

3 THE COURT: Are those the cases listed in Section 2 of
4 the appendix?

5 MR. BLOOMER: I believe that's correct, yes.

6 Those are cases that have economic loss and they're
7 cases with economic loss allegations or claims that would be
8 subject to dismissal under whatever order the court enters but
9 also have non-economic loss claims. I think they're all
10 basically personal injury claims.

11 THE COURT: So is it your contemplation that the cases
12 in Section 1 of Exhibit A, they would be dismissed in their
13 entirety, correct?

14 MR. BLOOMER: Correct.

15 THE COURT: Should they be closed or should they
16 remain open?

17 MR. BLOOMER: This gets back to the dismissal without
18 prejudice versus dismissal with prejudice point. It implicates
19 the same issue we just argued.

20 THE COURT: Okay. Ms. Cabraser, you --

21 MR. BLOOMER: We prefer it be closed, for the record,
22 your Honor, but it does raise the issue we just argued
23 previously.

24 THE COURT: I am not sure it ultimately matters
25 whether they're technically kept open or closed. That is more

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Conference

1 an administrative function of the Clerk's Office. Ms.
2 Cabraser, do you have views on that?

3 MS. CABRASER: Your Honor, I think Mr. Bloomer is
4 correct. Our main concern is the type of other sections of
5 this order. It is our position none of these underlying claims
6 should be dismissed without prejudice until the deadline. I am
7 sorry. None of the claims should be dismissed with prejudice
8 until the June deadline. In the interim, they would be
9 dismissed without prejudice.

10 I think Mr. Bloomer's suggestion is correct, whatever
11 is -- frankly, I don't know what would be the easiest from the
12 standpoint of administration of the Clerk's Office, but that is
13 obviously an important point. So I think the simplest thing to
14 do would be to enter an order in both cases that dismissed
15 claims without prejudice to the extent that they are economic
16 loss claims not asserted in the consolidated complaints.

17 THE COURT: All right. I'll try to sort all of this
18 out and maybe speak to folks in the Clerk's Office. It may be
19 the easiest thing is to enter an order declaring what the
20 effect of the order is, but not giving any direction to the
21 Clerk's Office. Giving them direction may ultimately cause
22 them confusion and cause them to do something that isn't in the
23 contemplation of either you or me, but I will try to sort that
24 out.

25 Let's turn to the statute of limitations sentence, if

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Conference

1 you want to speak to that?

2 MS. CABRASER: Yes, your Honor.

3 The point of that sentence is simply that if the
4 claims, the economic loss claims not asserted in the
5 consolidated complaints are to be dismissed without prejudice
6 subject to reinstatement on June 4th, 2015, and the purpose of
7 that is to determine whether matters adduced in discovery would
8 call for the reinstatement of those claims, we think it would
9 be an unintended gotcha if anyone would be to argue well, you
10 took the discovery, that was the whole purpose of this but
11 meanwhile a statute ran.

12 We're not suggesting there should be any waiver of
13 arguments with respect to statutes of limitation, but simply
14 any statutes of limitation that would otherwise arguably run
15 during that period be tolled personally to this order.

16 THE COURT: Mr. Bloomer, that seems like:

17 A, fair; and B, again maybe even in your interests in
18 the sense that lawyers who might otherwise be concerned about
19 losing six months on their statute would somehow insist that
20 their claims be reinstated sooner rather than later.

21 In any event, do you want to address this?

22 MR. BLOOMER: I thought it about it in two parts.

23 One is if you have -- maybe it is a question of kind
24 of making sure that all of the potential statute of limitations
25 issues have been thought through here. If there is a statute

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Conference

1 of limitation on a claim that has not been asserted in either
2 an individual complaint or consolidated complaint, then I don't
3 see any basis to toll a statute of limitations on that claim.

4 If it hasn't been asserted anywhere, the statute is
5 what it is. Our position would be -- and I am not saying that
6 is necessarily what lead counsel is suggesting, but I wanted to
7 be clear that theoretically if there is some statute of
8 limitations on a claim that has not been asserted, there is no
9 reason to toll it.

10 If there is a claim that's in an individual complaint,
11 in the consolidated complaint that is currently tolled, and it
12 would seem to me the tolling of that claim would be addressed
13 according to the procedures that the court would enter as part
14 of this order, meaning it would be preserved as long as the
15 claim lasts through the amendment process or some ruling by the
16 court that says if it is not included in a consolidated
17 complaint or reinstatement that hasn't been sought by June 4th,
18 it is now with prejudice.

19 So I think it is just two points. If there is no
20 statute of limitation, a claim hasn't been asserted anywhere,
21 there is no reason for the statute of limitations to toll.

22 Secondly, if it is a claim in an individual complaint
23 or consolidated complaint, it gets covered by these procedures,
24 and that issue gets wrapped into these procedures and it is
25 tolled for as long as an amended consolidated complaint is

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Conference

1 filed or there is a final complaint that the court and the
2 parties agree is the last complaint.

3 THE COURT: Maybe I am losing the trail here, but I
4 think there are three categories of claims, if you will. There
5 are claims that appear in the consolidated complaint.
6 Obviously, there is no statute of limitations there where they
7 were in originally an underlying complaint or not, they're
8 asserted and pending.

9 MR. BLOOMER: Agreed.

10 THE COURT: There are claims that appear in underlying
11 complaints that are not asserted in the consolidated complaint,
12 and then there are claims that are nowhere. In either the
13 underlying complaints or consolidated complaints, I hear you to
14 be saying whatever language is included in this order, it
15 shouldn't toll the statute of limitations as to anything in
16 that last bucket --

17 MR. BLOOMER: Right.

18 THE COURT: -- because they're not asserted in this
19 case at all and there is no reason pertaining to this procedure
20 to toll it. I don't think that that counsels against tolling
21 it with respect to the second, but it may lead, to the extent,
22 say, let's use RICO as an example.

23 If the lead counsel has chosen not to include a RICO
24 claim in the consolidated complaint, but there are obviously
25 RICO claims in underlying complaints, to allow this procedure

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Conference

1 to work in an orderly fashion, those claims, claims asserted in
2 some underlying complaints, but don't appear in the
3 consolidated complaint, that -- if there is no gotcha game
4 here, the statute is tolled as to those claims.

5 Do you have any objection as to that?

6 MR. BLOOMER: I think that is appropriate because it
7 will get tolled through whatever deadlines your Honor sets if
8 it is June 4th or whatever, correct? It is hard to argue with
9 that.

10 THE COURT: Ms. Cabraser, are you asking for more than
11 that, which is to say: A, do I have it right; and B, are you
12 asking that claims in Bucket 3, if you will, namely, claims
13 that aren't in any of these complaints, the statute should be
14 tolled as to those as well?

15 MS. CABRASER: You have it, right. We are not arguing
16 that this order should operate to toll claims that have been
17 unasserted anywhere. If discovery reveals claims that were
18 unasserted anywhere, that in our view should be asserting, what
19 we would be arguing at that point would be tolling through
20 fraudulent concealment or through discovery.

21 Our concern with respect to this order was again to
22 avoid against the gotcha, and perhaps we should have clarified
23 to say the statutes of limitations that would otherwise run on
24 claims dismissed without prejudice under this order prior to
25 the amendment, so we make it clear that is how the tolling

1 would apply.

2 THE COURT: Very good. I think we have all arrived on
3 the same page even if we didn't start there.

4 Here is what I will do. I am not going to include the
5 with prejudice language, and I have already indicated that I
6 will not include the for good cause shown language, either. I
7 have also indicated that I am going to go with the June 4th
8 deadline, and I don't think I have any problem with the first
9 sentence of the last section that we were just discussing.

10 Now, with those remarks and to the extent we have
11 arrived on the same page as to the statute of limitations
12 issue, I want you guys to confer and submit a revised order
13 consistent with those remarks. Today is Monday, so let's say
14 no later than Thursday at noon. If you can get it to me
15 sooner, that would be even better. We are not talking about
16 substantial revisions here, so I would imagine that would be
17 doable.

18 I think the answer as to the dismissal and closing
19 business is the order should just say what the effect is and
20 shouldn't direct the Clerk's Office to do anything. We should
21 leave those cases open for now because that is really more an
22 administrative issue for the court than it is for you guys.

23 If I tell the Clerk's Office to do something, they're
24 going to want I should be clear precisely on what they're being
25 asked to do. If it is a function of the legal effect of the

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Conference

1 complaints, I don't think the Clerk's Office needs to do
2 anything per se. You can take a stab at clarifying that as
3 well in the revised order.

4 All right. That exhausts what I wanted to discuss on
5 that front. Unless you have anything else to add, we'll move
6 on to the next item.

7 MR. SCHOON: For clarity, do we want the Exhibit A
8 included in the order so we have clarity what cases are
9 affected?

10 THE COURT: I have Exhibit A already. If there are
11 any changes to it, I suppose you can resubmit it with the
12 revised order by Thursday, at noon. If there aren't, then
13 unless you tell me to do otherwise, I will plan to attach the
14 Exhibit A that you have already submitted to me, which is to
15 say, I have that and unless there are changes, I will stick
16 with that.

17 The next item is plaintiff fact sheets. I am fine
18 with your continuing to meet and confer, but I do want to check
19 what the status is with respect to the fact sheets, mindful
20 that per the belt and your trouser order, in personal injury
21 and wrongful death cases, they're due by January 16th, which is
22 to say, time is a little bit of the essence here and as long as
23 you're meeting and conferring on the issues that you've flagged
24 in the January letter isn't holding up plaintiffs filling these
25 up and submitting them, that is fine with me. I am concerned

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Conference

1 with sticking on the deadlines since we have set a reasonable
2 and aggressive schedule.

3 MR. HILLIARD: To directly answer your question, the
4 issue about how GM would get to review the information provided
5 by the plaintiffs in no way affect our ongoing and daily effort
6 to be sure all the information is collected timely.

7 I can report to the court that we are well on the way.
8 We are on the course to meet the court's deadline. We are
9 still talking with GM about the best way to technically assure
10 that they can review and evaluate the information. I am
11 hopeful we'll reach an agreement. I am sure we will, but we
12 are still talking about the best company that seems to work in
13 that regard.

14 (Continued on next page)

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Conference

1 THE COURT: All right. I am hopeful that you will
2 without the need to involve me. I guess I'm concerned only in
3 the sense that our next conference is January 9 and the
4 deadline is January 16. You know better than I when these
5 issues need to be resolved in order to make sure that deadline
6 is met and it doesn't affect our schedule. If that requires
7 bringing disputes to my attention before January 9, I'll trust
8 that you will do that.

9 MR. HILLIARD: If the dispute exists, it will require
10 that. And so perhaps what we could do is advise the Court,
11 either get on the telephone with you or just brief it and let
12 you know what the issues are and let you tell us what direction
13 you want us to go. I don't think that's going to be necessary.
14 But you're right -- we've got to have a decision before the
15 next status conference.

16 THE COURT: When do you think that decision has to be
17 had?

18 MR. HILLIARD: The collection, again, the collection
19 of the data is being inserted into a database that we have not
20 gotten GM to completely agree to yet. We're evaluating a
21 different database they suggested we should use with a
22 different company. I would say we would have to get to a
23 decision in order to meet the deadline -- subject to my legal
24 assistant in the back throwing her pencil at me -- by January 2
25 or 3rd at the latest.

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Conference

1 THE COURT: I don't see any pens flying.

2 Mr. Godfrey.

3 MR. GODFREY: We have suggested a system that we
4 believe will work. Plaintiffs are proffering a system that we
5 have concerns about. If it can be demonstrated that their
6 system, which I think is called survey gizmo or something like
7 that, that it actually works, then I think we'll be able to
8 meet the deadline. But we have some operational concerns.
9 We've expressed those to them, and we will see where it turns
10 out. Assuming it all works, that would be terrific. If not, I
11 think we will articulate with some precision for the Court the
12 two comparative systems. But it may very well -- this may not
13 be a tempest in a teapot and it may all work out fine.

14 I would that say the parties are meeting and
15 conferring. We both have the same goal. We both understand,
16 from New GM's perspective, the January 15 date is particularly
17 important because any slippage prejudices us. But we are not
18 yet confident that it will work, but we don't know that it
19 won't work. So we're continuing to work on it this week. And
20 if we need to raise this with Mr. Hilliard and then the Court,
21 we'll do so promptly.

22 THE COURT: Okay. And, again, I don't want to
23 precipitate a conflict where I think it can be worked out. My
24 question to you is when do you think it needs to be resolved in
25 order to ensure that the deadlines that have previously been

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Conference

1 set are met?

2 MR. GODFREY: I think we need by the end of this week
3 or certainly Monday, a week from today, we need to know whether
4 the system they're proposing will work because if it doesn't,
5 then we need to have the Court intervene and decide what to do
6 because we're going to be running out of time. January 15 is
7 not that far away.

8 THE COURT: All right. I tell you what -- try to work
9 this out. I'm assuming you can with respect to the technical
10 issues that can be resolved, and maybe there are bigger issues
11 at stake that I'm not aware of. But I think this is the kind
12 of thing you can and should be able to resolve without my
13 needing to involve myself.

14 If there's any issue, I want to hear about it by
15 Christmas Eve, by December 24. So submit a letter to me, joint
16 or otherwise, doesn't matter, but just a letter of some sort
17 indicating that there's an issue and I will try to resolve it
18 as promptly as possible. And mindful of the fact that it's
19 Christmas Eve, do it by noon on December 24.

20 All right. Turning to the next issue, which is the
21 economic loss bellwether trial question. I agree with New GM
22 here that there's by little sense in entering a comprehensive
23 case schedule for an economic loss bellwether trial at this
24 point. The bottom line is I think there are so many variables,
25 beginning with bankruptcy court ruling and Rule 12 motion

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Conference

1 practice and so forth, so many steps between now and when a
2 trial would be held that any date would essentially be a
3 fantastical one. As far as I'm concerned, the key at this
4 point is just to aggressively move things forward as much as we
5 reasonably can and I'm confident enough in my abilities to do
6 that, as I think I have been doing, without setting arbitrary
7 dates for deadlines years down the road.

8 So for those reasons, I'm not going to set a
9 comprehensive schedule now. If or when one or preferably both
10 sides think that I should revisit that decision, you can and
11 indeed should raise it again, but not before conferring as you
12 have done already.

13 I also should say that I don't foresee revisiting that
14 decision, that is, entering a comprehensive schedule, until at
15 a minimum the bankruptcy court issues, the motions to enforce,
16 have been resolved and perhaps not even until after the choice
17 of law and/or Rule 12(b)(6) issues have been litigated before
18 me.

19 That said and consistent with what I said about being
20 capable of setting interim deadlines, I will set interim and
21 preliminary deadlines as appropriate. And one I'm inclined to
22 think we should set and which I raised in my endorsement of
23 last week is the question of whether there should be a deadline
24 set at this point for plaintiffs in the economic loss cases to
25 submit their plaintiff fact sheets. I'm not sure we need as

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Conference

1 aggressive a deadline as we have on the personal injury
2 wrongful death front since there's not as much need to proceed
3 expeditiously. But I do think it may pay, well, I guess the
4 question is should we set a deadline for that.

5 Mr. Berman.

6 MR. BERMAN: Yes, your Honor. The first question I
7 have is for which plaintiffs. So we have the plaintiffs, I'll
8 call them the pure New GM plaintiffs that we're going to go
9 ahead and brief the choice of law issues on. I would have no
10 problem with starting the fact sheet process right now on those
11 plaintiffs.

12 Then you have the plaintiffs who are what New GM calls
13 the mixed plaintiffs. They may have bought a car post sale,
14 but it's a car manufactured by old GM. And New GM takes the
15 position that those claims are barred and Judge Gerber needs to
16 decide that. And then you have the pure old GM people who
17 bought a presale.

18 And so my view is given that those latter two
19 categories seem to be in the bankruptcy court right now that we
20 ought to put a hold on those because those people may or may
21 not ever have to do a fact sheet.

22 THE COURT: All right. Mr. Godfrey, that strikes me
23 as making some sense. Do you disagree? I assume you don't
24 disagree as to the latter categories. Maybe it's the pure New
25 GM plaintiffs that you might disagree.

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Conference

1 MR. GODFREY: I think the New GM plaintiff fact sheets
2 should be filed in a period relatively quickly -- 60 or 90
3 days. As I hear Mr. Berman, I think he's not in disagreement
4 on that. We can work out a date that's reasonable but
5 aggressive -- I think is the phrase of the Court -- reasonable
6 but aggressive. I think that the mixed plaintiffs, given the
7 differences of view in the party, those should be included in
8 that.

9 As to the Old GM, my position from day one is that
10 this Old GM shouldn't be having to do any discovery, but I've
11 been unsuccessful with that position because of the personal
12 injury side.

13 So I think I leave this to the Court. I'm going to
14 point out the fact that at some point if we have to go forward
15 with the Old GM case, we'll have to have those. But our focus
16 right now is on the first two categories in terms of the
17 plaintiff fact sheets. I think those are fairly
18 straightforward.

19 I have no objection to the Court deferring the third
20 category because I think that our position is Old GM should not
21 have -- we shouldn't have to do anything vis-a-vis that. I
22 only note we're producing discovery because of the PI cases.
23 And it strikes me that at some point we're going to have to
24 have that information if anything survives. But I think we can
25 wait until another day.

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1 So I think I agree with Mr. Berman on point three,
2 disagree on point two, and agree on point one. I think it
3 should be 60 or 90 days, or if Mr. Berman says that 60 or 90
4 days does not work, maybe we can figure out what might work,
5 although that strikes me as not consistent with the Court's
6 philosophy of reasonable yet aggressive if it's beyond that
7 period of time.

8 THE COURT: This is a question that dovetails with the
9 issue I flagged in my order on Friday. Is there agreement
10 between the parties as to who's in category one versus category
11 two, or who's in category one, to be more precise.

12 MR. GODFREY: I think that we both agree we'd have a
13 further meet and confer on this. They provided information to
14 us. I think we're working through the issues. My proposal
15 would be maybe next Monday or -- we might not have all the
16 information by then. Maybe it should be by the 27th or 28th of
17 December. And I'd be interested in Mr. Berman's views on this,
18 whether we have enough of the information so we can identify
19 who's in category one and category two.

20 I think we agree that we would at least tee up our
21 respective positions but we would not -- we'd ask for a further
22 meet and confer opportunity to work out the details and
23 hopefully we can resolve this issue if we have guidance from
24 your Honor as to when you're thinking.

25 THE COURT: Mr. Berman.

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1 MR. BERMAN: Yes, your Honor, to elaborate on what
2 Mr. Godfrey was saying. So you identified the states from the
3 face of the complaint that has clearance of New GM. These are
4 2011 models. So we have some 2010 plaintiffs. We don't know
5 if they're a car manufactured by New GM or Old GM. So what
6 we've done is given the VIN numbers from those plaintiffs to
7 New GM, most of them, and we're going to finish that process
8 early this week. New GM is then going to undertake to find out
9 what day those cars were manufactured.

10 THE COURT: I think we've lost one of the front mikes.
11 Mr. Hilliard, you'll have to scoot over when you need to speak.

12 Go ahead, Mr. Berman.

13 MR. BERMAN: So we're in the process of trying to
14 identify which plaintiffs are really New GM plaintiffs. And
15 I'm told that it will take GM two weeks to get that
16 information. So what we thought we would do is see if we can
17 agree on, by the end of the year, who those plaintiffs are and
18 what states we want to tee up for the choice of law briefing
19 and let your Honor know that we're ready and here's the states.
20 And we already agreed on a schedule for choice of law. So
21 that's what we're proposing.

22 THE COURT: All right. Let's not mix the issues.
23 We'll get to that.

24 MR. BERMAN: As for the fact sheets on the pure New GM
25 plaintiffs, 60 to 90 days is fine. We can do 60. We want to

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1 be reasonable and aggressive here on all things.

2 THE COURT: It sounds like there remains some work to
3 be done to figure out who's in that category in the first
4 instance.

5 MR. BERMAN: That's correct.

6 THE COURT: So I'm clear, the second category is made
7 up of?

8 MR. BERMAN: The second category would be people who
9 bought an Old GM car, a car manufactured by Old GM, but they
10 bought it post sale.

11 THE COURT: So on the secondary market or otherwise.

12 MR. BERMAN: That's correct.

13 THE COURT: Okay. Very good. I think what I'm going
14 to do is just set a deadline now for the first category, just
15 for the first category. I'll leave it at that. I'll leave it
16 to you guys to confer. I think 60 days is preferable, but it
17 should be 60 days from the date on which it's clear who's in
18 that category. So why don't you continue to confer on that
19 issue and aim to get me by the end of this year a proposed
20 order setting a deadline and making clear who is in that
21 category and you can indicate if there's any sort of problem on
22 that.

23 Does that make sense?

24 MR. GODFREY: Yes, it does. We'll do our best. It
25 takes about two weeks, but I think we'll come close. And if we

1 need a little more time because of tracking down of the VINS,
2 we'll let the Court know and we'll indicate with precision how
3 much more time we need. It's simply a mechanical issue
4 tracking this information down.

5 THE COURT: I'll set a deadline of December 31 for
6 that. And if it turns out you need more time than that, you
7 can make an appropriate letter or motion application.

8 All right. Next item is the summary jury trial issue.
9 Bottom line is here, at least preliminarily, I'm not inclined
10 to do it unless both sides are interested because, at bottom,
11 the purpose is intended to be a means to obtain data and
12 facilitate settlement. And if both sides are not on board to
13 thinking that it would in fact facilitate it, then I'm not
14 inclined to do it. Plus, as New GM points out in the letter, I
15 think the aggressive schedule that I have set with the first
16 bellwether trial on January 2016 ensures some of that data will
17 be obtained shortly thereafter.

18 Having said that, I will continue to think about the
19 issue and may revisit it down the road. I would also encourage
20 you to do the same and to continue to talk about it. And these
21 things may also change over time. If it turns out that getting
22 some data with respect to say the punitive damages type issues
23 lurking here would be helpful and a summary trial might be a
24 helpful way of getting it, then I think it would be worth
25 revisiting it. I think, again, my understanding of the

1 process -- I've never done it -- is that it can be more
2 inexpensive way of obtaining data than having a full blow trial
3 and the two aren't necessarily mutually exclusive either.

4 So to make a long story short, I'm not going to
5 schedule anything now. I'm not going to assume we're doing
6 anything now. But I do think it pays to continue to think
7 about it in our arsenal of tools we have to get this case going
8 wherever it's going.

9 The next issue on the agenda is the Phase II discovery
10 schedule.

11 Before we turn to that, I wanted to just get any
12 updates, if you will, on the sort of coordination letters that
13 GM has submitted to me because it may have some bearing on the
14 issue. On that, I will say that I have reached out to the
15 three judges involved in the cases that were flagged in GM's
16 first letter, that is, the Felix case, the Goins case, and the
17 Szatkowski case. I don't know if it's the season or what, but
18 I have actually failed in my efforts thus far to reach those
19 judges, but I will continue in my efforts to do it. Obviously,
20 the hearing or the argument as to one of them already took
21 place. The other two I think are scheduled for tomorrow and
22 next Monday.

23 I don't know if we have any updates or anything you
24 want to tell me on those cases first, Mr. Godfrey, Mr. Bloomer.

25 MR. GODFREY: We are very concerned about the Felix

1 case, the Goins case, and the Szatkowski case. The plaintiffs'
2 lawyers in those cases have not been willing to coordinate. I
3 know that class counsel, lead counsel, and the state
4 coordination counsel Dawn Berrios has tried; but we have been
5 collectively, as a group, unsuccessful.

6 Our problem is that in each of those cases, the
7 plaintiff's counsel are taking very aggressive positions that
8 will frustrate at a very fundamental level all that this Court
9 has done thus far. In fact, in the Yazoo County, Mississippi
10 case, the Goins case, before we even had an opportunity to
11 respond, the trial setting was issued. And the plaintiff's
12 counsel in that case has taken some rather strong positions in
13 discussions with Mr. Dreyer about the federal court's inability
14 to intervene or take a role.

15 We have suggested rather strongly that we want to
16 process cooperatively through the coordination order as
17 compared to the other alternatives available to this Court.
18 But make no mistake, each of these cases is on a fast track to
19 derail, potentially, all of the work that this Court has done
20 over the past several months and, therefore, we're very
21 concerned.

22 The category three cases are somewhat different. They
23 are the unrelated but seeming related discovery -- the Smith
24 case, the Prospere case. Smith is in Butler County, Alabama.
25 We mentioned that before in one of our first hearings.

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1 Prosperere is in Brevard County, Florida. Then there's the
2 Mathes case in Augusta County, Virginia. And the Goodman case
3 in Lee County, Florida. What's taking place in those cases is
4 that while they're not, as the Court knows from category three,
5 they're not directly on point for this case. The plaintiffs in
6 those cases want Valukas information and materials and
7 corporate representatives.

8 So, again, we have the oddity of state courts in four
9 jurisdictions that will potentially have a greater conflict
10 with what this Court is doing. We do have the protection under
11 Rule 502(d) in terms of the order, but we don't have the
12 protections with respect to depositions. They want people on
13 the Valukas report. They want CEO, etc.

14 But if you ask me to rank order, the first three cases
15 that your Honor identified -- Felix, Goins, and the case in
16 Luzerne County, Pennsylvania -- those are serious issues for
17 all of us here collectively, that is, lead counsel and for New
18 GM and the other defendants, I think.

19 THE COURT: Okay. And Felix, again, I gather, was
20 argued if you will last week. I take it that Judge Dowd has
21 not yet resolved that issue.

22 MR. GODFREY: That's my understanding. It's not been
23 resolved. It's under advisement.

24 THE COURT: Okay. And in terms of the category three
25 cases, as you called them -- Smith, Prosperere, and Mathes -- and

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1 you said Goodman, which is not listed in your letter.

2 MR. GODFREY: That's a new development, new
3 development. But, yes, that's a new one.

4 THE COURT: And it might be helpful for me to know
5 with more particularity what the issues that have been raised
6 in those cases are. If they are the interview materials, then
7 I would think that Rule 502 provides even more protection, if
8 you will, than any coordination order would in the sense that
9 my ruling -- again, I'll try and get it to you sooner rather
10 than later -- would presumably be binding on those courts.

11 But to the extent we're talking depositions, I don't
12 know when we're talking -- if they've noticed them, if they
13 just threatened to notice them and what the timing of it would
14 be, whether and to what extent it would overlap with the
15 depositions that would happen here. I'm not interested in
16 providing any GM witnesses with immunity from depositions for
17 all cases, but at the same time recognize there's some value in
18 ensuring that each witness is only deposed with respect to the
19 issues that are relevant to the MDL once.

20 MR. GODFREY: I think perhaps what we could do, I
21 could spend five or ten minutes now, but I think it would be
22 better if we submitted a short letter to the Court with precise
23 dates and the precise issues that are being teed up in each of
24 those four cases. I think that's what your Honor really is
25 looking for.

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1 For example, the Smith case, New GM has a motion for a
2 protective order regarding the plaintiff's notice of deposition
3 for a corporate representative on the topics of the Valukas
4 report, which goes straight into the issues that are before the
5 Court in large measure. But we will put together a detailed
6 letter so that the Court, when your Honor makes the calls, if
7 you choose to do so -- we would request that you do, of
8 course -- knows precisely what it is that the issues are at
9 stake so that the Court can decide how best to proceed. We'll
10 do that by Friday if that's agreeable to the Court.

11 THE COURT: It's not so agreeable only because I'm
12 imagining that my ability to get in touch with any of these
13 judges next week is going to be limited to nonexistent.

14 MR. GODFREY: Wednesday?

15 THE COURT: How about Wednesday morning.

16 MR. GODFREY: Wednesday morning.

17 THE COURT: So no later than noon on Wednesday. I
18 mean the sooner you can get it to me, the better it is for you
19 because to the extent that I agree with you that it makes sense
20 for me to reach out to these judges, the longer you take, the
21 less likely it is I'll be able to reach anyone.

22 MR. GODFREY: We'll try to do that on category three.
23 Does the Court need anything else for Goins, Szatkowski, and
24 Felix? I think it's pretty covered in our letter with
25 attachments, but do you need anything more from us on that?

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1 THE COURT: I don't think so, but if you think there's
2 anything more beyond what you've put in the letters, you can
3 let me know. Again, I already have calls in to those judges,
4 so hopefully I will speak to them sooner rather than later.

5 MR. GODFREY: Thank you.

6 THE COURT: Anything folks at the front table want to
7 add on this score?

8 MS. CABRASER: Your Honor, our federal state liaison
9 counsel, Dawn Berrios, could not here this morning. She has
10 made considerable efforts to communicate with plaintiffs'
11 counsel so that they will have and understand the Court's
12 orders and transcripts. They're keyed in to the website. Her
13 mission is simply to make sure that plaintiffs' counsel in
14 those cases are operating on as full an understanding of what
15 it is going on in these proceedings as possible. I will be
16 meeting with her later this week to get an update on that. We
17 can't interfere with plaintiffs in other cases proceeding on
18 their obligation to their counsel and their courts, but we
19 don't want those decisions to be made based on a
20 misunderstanding or misapprehension of what this MDL is doing.
21 So, it's an educational effort and it's ongoing.

22 THE COURT: All right. And, again, I recognize
23 Ms. Berrios isn't here. But as you understand it, what is the
24 nature of the counsel's objections, if you will, in those cases
25 to the coordination order? Is it just a perception that they

1 are likely to move more quickly if they don't bind themselves,
2 if you will, to the MDL, or is there something else going on
3 there?

4 MS. CABRASER: Without attempting to read anyone's
5 mind on this, I think it's basically a perception concern as to
6 whether or not this MDL is moving quickly enough so that it
7 would be useful and worthwhile for them to participate and
8 coordinate. And, obviously, we're aware of your Honor's
9 efforts in that regard. The transcripts of the hearings come
10 out. And so what we can do is to simply reiterate that this
11 MDL is moving with great speed relative to some in the past.

12 I think frankly, your Honor, partly it's a perception
13 based on lack of experience with MDLs or perhaps experience
14 with very early MDLs. And so our goal is to simply make sure
15 that plaintiffs' counsel are making their decisions for their
16 clients based on a real and accurate understanding of what's
17 happening in this MDL.

18 THE COURT: All right. Very good.

19 Mr. Godfrey.

20 MR. GODFREY: I think Mr. Dreyer on behalf of New GM
21 has had conversations with each of those plaintiff's counsel.
22 If the Court wants to know their reasoning as a heads up, he
23 can spend two minutes now and provide the Court. I think the
24 Court may find it informative, but I leave that to your Honor.

25 THE COURT: I would say it can't hurt, but maybe it

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1 can. But go ahead.

2 MR. DREYER: I would hope not, your Honor.

3 I have attended the hearing and I was at the hearing
4 in the Felix case and the same objections were raised in the
5 Felix case are also raised in Goins and in Szatkowski. And
6 they are, No. 1, there was a concern about whether or not the
7 state related lawyers would be a participant in the depositions
8 that would be taking place of the GM witnesses. In fact, from
9 experience in a prior MDL, the Ford Firestone, these lawyers
10 felt like they had been excluded from asking questions of
11 witnesses.

12 We pointed out to the Court and to counsel that the
13 joint coordination order here doesn't provide that. It says,
14 in fact, one person, one lawyer from each coordinated case gets
15 to participate and permitted a reasonable amount of time to
16 question witnesses. The Court was satisfied, in my view, with
17 that explanation.

18 The second objection that they raised was with respect
19 to all that happens in an MDL is they want to give us money.
20 All they want is our money and we get nothing from that. And
21 we pointed out to them, Ms. Berrios and I both pointed out to
22 them that under this Court's joint coordination order, yes,
23 there is a payment access to documents, but also there is a
24 recoupment portion of the coordination order where they can put
25 in for the time, effort, and energy that they're giving for the

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1 benefit of the whole. That seemed to satisfy Judge Dowd as
2 well.

3 The third objection that they raised is just generally
4 I don't want to be a participant in a federal proceeding when
5 all I'm doing is trying my case in Missouri, all I'm doing is
6 trying my case in Mississippi, and I don't want to get bogged
7 down with anything that a federal judge tells me that I need to
8 be doing.

9 Those are the three objections. We tried to emphasize
10 to them that this Court has set a reasonable and aggressive
11 discovery schedule. One of the issues that they raised was am
12 I going to get the documents that I need for my recalls other
13 than the Cobalt Ion. We pointed out to them that this Court's
14 discovery schedule and Phase I discovery that we talked about
15 has a whole host of the other recalls that are subject to the
16 discovery and that the Court has already set a May 5 deadline.
17 I think that also helped the Court in having some
18 understanding.

19 I don't know why they have not responded, but I think
20 it would benefit all of us if the Court was able to reach these
21 judges. I know two of the three. I have appeared before two
22 of the three, and I think they would appreciate that.

23 THE COURT: All right. I will certainly continue my
24 efforts and I would hope and assume I'll succeed at some point.

25 In terms of the Phase II discovery issues, I do agree

1 with both sides that Phase II should quote/unquote build on
2 what is learned in Phase I. I also, well, I agree with New GM
3 that that and my prior orders call for beginning Phase II after
4 Phase I has ended with a couple caveats.

5 No. 1, I don't see any reason to delay beginning
6 Phase II by a month. So as far as I'm concerned, it should
7 begin on May 5, the day that Phase I discovery is to be
8 substantially complete. As for substance, I think it's clear
9 to me that there's more for you to confer about here. So I
10 would agree with New GM's proposal that you should either
11 submit an agreed upon proposed order or competing proposals and
12 letter briefs not to exceed five pages no later than -- I'll
13 give you until January 5. You propose January 4, but that's a
14 Sunday. So to throw you a bone I'll give you until Monday.

15 One other thing. I am inclined to think that
16 depositions should continue to be deferred until Phase II, but
17 I'm open to allowing some depositions to proceed during
18 Phase I. And maybe the issue is just on some sort of showing
19 of good cause and also if -- and part of this would be, I
20 suppose, in the good cause standard on a showing that it
21 wouldn't interfere unduly with the compliance with the
22 deadlines of Phase I, which is to say I think there is an
23 interest in keeping this orderly and I don't want to start
24 doing things in a way that would make it harder than it already
25 is to meet the deadlines that have been set.

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1 I raise the coordination issues because I also think
2 that what I just mentioned, namely, whether depositions move
3 forward sooner or not, may have some bearing on whether some of
4 these other courts choose to sign on to the coordination orders
5 or not or whether other lawyers essentially choose to latch on
6 and defer to the MDL or not. And I think it's in everybody's
7 interests if everybody wants the MDL to continue to be the sort
8 of quote/unquote lead case to be mindful of that and to move
9 things forward as fast as we reasonably can.

10 So with those comments, I'll leave it to you to
11 continue to confer on these issues in an effort to both set a
12 schedule and also discuss the substance of what should be
13 included in that phase and, again, set a deadline of January 5
14 for the submission of either an agreed upon order or competing
15 proposals.

16 The deposition protocol order, this issue overlaps
17 somewhat about with the issue I just mentioned, so I won't
18 repeat what I just said. I guess I'm inclined to think any
19 disagreements here should also be raised in the same manner,
20 that either you should submit an agreed upon order by that
21 January 5 date or competing proposals by that date. I think
22 the issues that I've flagged as disagreements are essentially
23 within the scope of the area that I just commented upon and
24 left for you to continue to consider about.

25 Anyone disagree with that, anything I'm missing here?

1 All right, Mr. Hilliard. You have to use that
2 microphone though.

3 MR. HILLIARD: I'll try not to sit in Steve's lap.

4 Your Honor, this issue I think is perhaps more ripe
5 and more critical than the Court has indicated. For example,
6 the depositions of the Delphi employees are ready to go in
7 regards to the document production of Delphi employees and the
8 willingness of Delphi counsel to produce those employees. And
9 we did intend -- I'll give the Court a heads up -- to request
10 that we be allowed to begin a limited deposition schedule in
11 January. We have through the documents already produced by GM
12 learned of many, many witnesses that will need to be deposed
13 that are not document dependent. There's no doubt that if we
14 choose to depose those witnesses, it's a one-time shot and we
15 understand that.

16 My big fear, Judge, is that there's no way, given the
17 amount of witnesses that we believe we want to depose and need
18 to depose, to get those depositions done in a coordinated way,
19 in a way that allows the other actions to participate, if we
20 continue to wait. GM fundamentally, simply, and professionally
21 just disagrees with us on that. And we're going to submit it
22 on the 5th. But, again, just to give you a heads up, I hope
23 that we can within reason and aggressively start depositions in
24 January of folks who are not document dependent but who have
25 factual information that we would like to get out of the way.

1 And we need some time to begin to coordinate with the various
2 states actions to be sure that they can participate.

3 And, quite frankly, this dovetails back to the issue
4 that we have with the state actions and you hit it on the head.
5 Having been on the business end of an All Writs Act order
6 before, the problem that I think that the plaintiffs' lawyers
7 have is MDLs simply do not move as fast as yours do. And
8 you're right that if we can show them that they can participate
9 and we can begin depositions, which substantively we should, I
10 believe, and we'll share that with you in our January 5 letter,
11 it would perhaps give them some comfort.

12 THE COURT: All right. I should note that my law
13 clerk advised me that Judge Dowd returned my call during this
14 conference. So I'm even more optimistic that I'll reach him.

15 Mr. Godfrey, let me turn to you. I guess, you know,
16 Mr. Hilliard's comments make me think that maybe there is some
17 reason to move forward as least as to witnesses that are not
18 document dependent or Delphi witnesses and so forth and that
19 you're provided some protection by virtue of the understanding
20 that witnesses will be deposed only once, unless there's a
21 pretty darn good showing of good cause to re-depose them. You
22 know, No. 1, why doesn't that protection suffice; and, No. 2,
23 why is it in your interest to the extent that you're trying to
24 persuade these other actions to defer to what we're doing here
25 to be proceeding in that manner. I recognize that you have a

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1 lot of work to do between now and say May 5, but you also have
2 a lot of lawyers. Tell me why that doesn't suffice.

3 MR. GODFREY: In reverse order, No. 1, the deponents
4 that are at issue in the other actions are not some nondocument
5 dependent, irrelevant, low-level witnesses. They go to the
6 heart of the issue. So it's a strong argument in terms of the
7 argument Mr. Hilliard has made.

8 No. 2, this is the first I heard of January
9 depositions for nondocument dependent witnesses, much less
10 Delphi witness. We have a schedule that we negotiated.
11 There's an order of 25. Good cause hasn't been shown. But
12 what's really taking place here -- and I'm going to put it on
13 the table in very blunt and candid terms -- is the following.
14 The plaintiffs pushed for early bellwether trials, which are 16
15 months or 17 months before they took place or scheduled to take
16 place in Toyota. There are tradeoffs and consequences to that.
17 And Toyota, there was 34 months of discovery before the trials,
18 is our understanding. We don't have that here.

19 And we're going to meet the Court's deadlines here,
20 but it strikes me as a bit unfair to the defendants,
21 particularly the principal defendant, New GM, to argue for we
22 can get it all done, we can get it all done and order 25 with
23 Phase I, Phase II discovery. We can get it all done by
24 January 2016. And then two statuses later come before the
25 Court to say now we need to change all the internal deadlines,

1 including the Phase I discovery plan which anticipated no
2 depositions because we have the trial date in January of '16.
3 There's a tradeoff that they made. They made choices.

4 We have a lot of lawyers, a lot of lawyers working on
5 this. I need more. They have already noticed up and given us
6 the dates for 70 or 80 depositions starting in May. Now I'm
7 hearing about Delphi depositions that I had no conversations
8 about, and I suspect rather strongly those are not nondocument
9 dependent depositions.

10 So we'll put this in the Court's letter brief on
11 January 5. But essentially they want deposition discovery now
12 and wide open discovery with no limitations. It's not fair,
13 it's not right, and it's not consistent with the Court's prior
14 orders, much less the agreements of the parties.

15 THE COURT: Mr. Hilliard.

16 MR. HILLIARD: Judge, with respect to Mr. Godfrey, he
17 participated in the BP litigation. And in doing some
18 preparation for this issue, because it is critical, and that is
19 once we have our trial setting, we have within reason a right
20 and a duty to come to you and say here's how we feel we can go
21 forward at the same time as this discovery is progressing.

22 And Mr. Godfrey's firm and BP, and I'm simply reading
23 from 910 F.Supp. 891, which is In re Oil Spill, it says:
24 Following the JPML centralization order, the parties engaged in
25 an extraordinary amount of discovery within a compressed time

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1 period to prepare for the Phase I trial. This included taking
2 311 depositions, producing approximately 90 million pages of
3 documents, and exchanging more than 80 expert reports on an
4 intense and demanding schedule. Depositions were conducted on
5 multiple tracks and on two continents. Discovery was kept on
6 course by weekly discovery conferences between Magistrate Judge
7 Shushan. The court also held monthly status conferences with
8 the parties.

9 You'll see in GM's response to the deposition
10 protocol, once Phase I discovery is finished, they want to
11 propose ten depositions a month. They want those ten
12 depositions to end in November, which effectively it's not
13 difficult to do the math, that's 50 total depositions not to
14 begin until June.

15 Our proposal I think would allow for depositions that
16 are not document dependent, witnesses that are fact
17 witnesses -- and their memories continue to fade -- to be done.
18 For Mr. Godfrey to say they don't have enough lawyers is a
19 little, respectfully, disingenuous simply because they did it
20 last year in BP and the year before and they've proven
21 themselves very, very able. If the Court says it makes sense,
22 we should consider doing it, my guess is they will do it and
23 they'll be very effective at doing it.

24 THE COURT: All right. Well, I think it's premature
25 to resolve this now except to say that I am open to the idea of

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1 some proceeding sooner than the end of Phase I, mindful, again,
2 of the protection provided the defendants given the fact that
3 with rare exception, witnesses will not be deposed more than
4 once; and also that I do think even if the depositions that
5 have been noticed are likely to be resolved in the related
6 actions or the unrelated actions, as the case may be, are not
7 necessarily the same witnesses, I do think it will provide some
8 assurance to those courts if I am able to say that we are
9 proceeding as fast as reasonably possible. And it will also
10 ensure that the bigger ticket witnesses, if you will, can be
11 deposed sooner in Phase II or what have you.

12 So with those comments as guidance, continue your
13 discussions and we will nail this down if not at the January 9
14 conference, then certainly shortly thereafter. I don't know
15 what bearing that has on whether the January deposition dates
16 are feasible or not, but you'll have to bear with whatever we
17 do. But bottom line is I'm open to the idea of having some
18 proceed and we'll go from there.

19 All right. Anything else on that that we need to
20 cover?

21 All right. Item No. 9, maybe it's eight on the agenda
22 letter, is the permissible modifications and alterations of
23 data issue. I guess I'm a little confused about where this
24 issue stands or whether I'm being asked to do anything at this
25 stage. Mr. Godfrey is shaking his head no.

1 MR. GODFREY: No. I think the parties are endeavoring
2 with their ESI experts to have perhaps an additional ESI order
3 that will either clarify or address certain things. I think
4 from where we stand -- Mr. Berman can agree or disagree -- I
5 think we're continuing to meet and confer on this and I don't
6 think the Court's intervention is being sought or necessary at
7 this time.

8 THE COURT: All right. Mr. Berman.

9 MR. BERMAN: We are meeting and conferring. We may
10 have a little different viewpoint on the urgency of this. When
11 New GM sent its letter to the Court of October 1 about how it
12 was treating not reasonably accessible material and material
13 dealt with in the ordinary course of business, we gave it to a
14 forensic firm and said are you okay with this and they said
15 we're not sure. We're a little bit worried there may be, for
16 instance, text message material that's not being preserved.
17 And so we want to put this -- either get it resolved or bring
18 it to you sooner rather than later. And I know GM has a lot on
19 its plate, but we on this side of the table have a little more
20 urgency about this than perhaps the other side does.

21 THE COURT: All right. But you don't disagree that
22 you're continuing to discuss it.

23 MR. BERMAN: That's correct.

24 THE COURT: It's just a question of its urgency. All
25 right. Very good. So try to resolve it. If you don't, then I

1 expect you can and will bring it to my attention and presumably
2 put it on the January agenda and we'll deal with it as it
3 comes.

4 The review of common benefit time records, I'm going
5 to essentially defer on that and just give it some thought
6 about what if anything I want to do. Obviously, we have some
7 orders in place already concerning those issues and those will
8 continue to apply. And I will get back to you either in the
9 form of an order or revisit this at the next conference if I
10 think that more is appropriate.

11 On a common benefit assessment order, that is also
12 fine for you to continue your discussions on that and why don't
13 you submit something to me. I'll give you that same January 5
14 date to submit something to me, either an agreed upon order,
15 hopefully, or competing orders if necessary.

16 All right. Turning to the additional items that I
17 have flagged, I've already addressed the first item, namely,
18 the deadline for plaintiff fact sheets in the economic loss
19 cases. Second item is whether expert discovery should be
20 divided, essentially, into categories. And maybe we don't need
21 to address this at this point, but I did want to raise the
22 issue. I know in other cases it has been done in that manner.
23 And, again, I would imagine that some expert discovery is
24 applicable to most, if not all cases, and some will be specific
25 to individual cases and just whether we have adequately thought

1 through that issue I guess is the question.

2 So, Mr. Hilliard, have you taken that on?

3 MR. HILLIARD: Again, the Court is right and that is
4 that general expert liability depositions will be across the
5 board, be sooner rather than later, and can be subject to a
6 separate schedule if once the bellwether plaintiffs are chosen
7 there will be case specific experts based on accident
8 reconstruction, healthcare plans, that would be on a different
9 track, if I understand your concern and your question.

10 THE COURT: Yeah. I guess the question really is in
11 reference to the bellwether order, at the moment it sets a
12 single deadline for disclosure of expert witnesses and reports
13 and depositions and doesn't distinguish between these
14 categories. And maybe the answer is to just flag this as
15 something that is worth your thinking about and talking to one
16 another about and we don't need to nail it down now. But it
17 may be worth refining, if you will, the deadlines that we have
18 set and front loading the experts that are more generally
19 applicable and doing them on a different time frame. I don't
20 know, but just want to flag that.

21 MR. HILLIARD: You're absolutely right and that is
22 that the general expert depositions should be flagged
23 separately and done sooner simply because once done, they don't
24 need to be redeposed for the next bellwether case. And so they
25 could be done likely much earlier than the fact specific

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1 experts. So it makes a lot of sense and will help be sure that
2 we're ready for the bellwether trial. I support it.

3 THE COURT: All right. Again, my proposal at the
4 moment is just that you guys think about this and talk to one
5 another about it, not that we nail it down today.

6 But, Mr. Godfrey, anything you want to say or add?

7 MR. GODFREY: We will speak and we will listen. I
8 don't think we'll support it. I don't think this is a case
9 that lends itself to that given the rather expedited schedule,
10 but we'll certainly hear them out. If we have a disagreement
11 we'll let the Court know at the appropriate time.

12 THE COURT: Very good. All right.

13 The last item is the item that I raised in the order
14 of Friday again with respect to the briefing on the post sale
15 order complaint, if you will. As I indicated, in general, I
16 agree with New GM that that should be deferred until after the
17 issues have resolved themselves in the bankruptcy court. The
18 limited issue that I flagged is whether we should proceed now
19 on choice of law issues regarding the claims of the -- I can't
20 remember how Mr. Berman put them or one of you put them. Well,
21 in any event, the claims that are in bucket No. 1 that we were
22 discussing earlier of plaintiffs who are sort of unambiguously
23 alleging claims against New GM. I recognize even there there
24 may be some bankruptcy court issues to the extent the claim is
25 dependent upon conduct of Old GM, or to the extent at a minimum

1 that they're in the context of a complaint that includes claims
2 that relate to Old GM. But, regardless, it seems like that
3 bucket, if you will, sort of contains the claims that are the
4 most likely to survive any bankruptcy court ruling.

5 And I guess the question I had is to the extent that
6 that is right, why not proceed on choice of law briefing now or
7 sooner rather than later on the theory that, A, we'll have to
8 do it at some point; and, B, to the extent that any other
9 claims survive, that will shed light on the issues when we have
10 to deal with them.

11 So, Mr. Berman.

12 MR. BERMAN: I believe we have agreement to proceed
13 and so we're going to identify which plaintiffs are in that
14 first bucket through the VIN number process. We will identify
15 who the plaintiffs are and which states they are, hopefully, by
16 the end of this year and then we will let you know what we've
17 agreed to and then we have a briefing schedule we've already
18 agreed to. And so I think we're all in agreement to brief
19 choice of law.

20 THE COURT: Allright. And the briefing schedule that
21 you agreed to is the one included in your December 2 letter; is
22 that correct?

23 MR. BERMAN: That's correct, your Honor.

24 THE COURT: Mr. Godfrey?

25 MR. GODFREY: It is correct with one asterisk. We

1 don't know yet how many state laws will be implicated by the
2 VINs. We may want a modification. If we're briefing three
3 states, that's one thing. If we're briefing ten or 12 states,
4 that's something else. We may want an additional two weeks on
5 that schedule. We don't know that yet. We'll know it after we
6 get all the VIN information. We'll raise it with the
7 plaintiffs. I'm sure we'll work it out. I just wanted to put
8 an asterisk that directionally the briefing schedule is the one
9 we submitted, but it may get modified slightly depending upon
10 the magnitude of work we're undertaking on both sides.

11 THE COURT: It's only modified if I modify it. You
12 can make whatever application you want.

13 MR. GODFREY: Of course. Understood, your Honor.

14 THE COURT: Two questions. One, am I right that at a
15 minimum it's seven states? That's the number in GM's brief.

16 MR. BERMAN: That's our understanding, minimum of
17 seven.

18 THE COURT: Okay. No. 2, the proposal had been
19 initial briefs, 45 days from my ruling described in order
20 No. 22. I suppose there's an argument that that date was last
21 Friday. Is that the agreement, or is it 45 days from when you
22 resolve which states are at issue, or to the extent that we
23 have agreement on at least seven of those, is it 45 days from
24 today? I want to make sure we're all on the same page.

25 MR. BERMAN: I think we were contemplating, pursuant

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1 to your approval, it was 45 days from the date we settle which
2 states are at issue. Seven plus is the universe.

3 THE COURT: Mr. Godfrey.

4 MR. GODFREY: That's what we were contemplating as
5 well.

6 THE COURT: So here's what I'm going to do. I'm going
7 to assume that you are going to nail that down by January 5.
8 And in that regard, I don't see any reason to delay setting a
9 deadline for these briefs. So I'll set a deadline of let's say
10 February 20 for submission of the initial briefs. And then the
11 responsive briefs would be 30 days thereafter, so March 23, I
12 guess, would be the Monday that those would be due.

13 If it turns out that there's a delay either in
14 resolving which states are at issue or it turns out there are
15 more states at issue and we think that necessitates modifying
16 the schedule, you can make any application you think
17 appropriate by letter motion. But at least we will have those
18 deadlines in place unless and until they are modified.

19 All right. Anything else we need to deal with today?

20 MR. GODFREY: Your Honor, I discussed this with lead
21 counsel before the hearing. When we were looking at the
22 schedule in light of what we anticipated taking place today, we
23 wondered whether it would make sense, depending of course on
24 your Honor's schedule, to move the status from the 9th to the
25 following week. There's a lot of things that are taking place,

1 and it would give the parties perhaps a little more time and
2 the Court a little more time to digest it all.

3 I'm free. I think Mr. Berman prefers not on Mondays,
4 but I think Ms. Cabraser is also free the following week. So I
5 had suggested when we had our conversation this morning, if the
6 Court were amenable to that, it might give the Court and
7 everyone else -- but if the Court wants the 9th, we're going to
8 be here on the 9th. Just looking at the schedule, it's not
9 that far away from January 9 and the following week may be a
10 little better.

11 THE COURT: The point is well taken. It's not that
12 far away and a lot of the time between now and then are
13 holidays. My problem is I'm scheduled to be on trial the
14 following week. But I suppose I could do it Friday the 16th if
15 that is a date that everybody could do.

16 MR. GODFREY: It works for us, your Honor.

17 MR. BERMAN: It doesn't work for me. I would rather
18 stay with the 9th then.

19 THE COURT: What about the week after. Maybe Tuesday
20 the 20th. Court is closed the 19th.

21 MR. GODFREY: Works for me, your Honor.

22 MR. HILLIARD: Judge, I'm in trial in federal court in
23 Minneapolis on a Toyota case. The court has indicated that I
24 could break away to come on the initial date. She may reach
25 out to you on that. But subject to her allowing me that date,

1 I would actually prefer Tuesday than the first Friday. Judge
2 Montgomery, just in case she reaches out to you.

3 THE COURT: So how do you propose we leave it, should
4 I say it's the 20th and we'll assume and hope you can -- it
5 sounds like you have a conflict in either case. Maybe it's
6 best we move it to the 20th now for simplicity and you can
7 raise whatever issues there are to raise.

8 MR. HILLIARD: Yes, I agree with that.

9 THE COURT: All right. So we will change it to the
10 20th. And if you think that counsel is in favor of modifying
11 any of the January 5 deadlines that I've already set, you can
12 submit a letter to me to that effect. I'm open to that. And I
13 recognize there are obviously holidays between now and then, as
14 I've mentioned a couple times. But, obviously, some of those
15 issues should be flagged sooner rather than later.

16 And also in some of the issues we've discussed,
17 including the deposition question and the plaintiff fact sheets
18 question, I had assumed we'd be meeting on the 9th. So to the
19 extent that assumption is no longer a valid one and issues need
20 to be resolved sooner than the January 20 conference, then you
21 should let me know that. All right.

22 Mr. Schoon, did you have an issue?

23 MR. SCHOON: Not an issue, your Honor, at least I hope
24 not. I wanted to say that on behalf of Delphi and Mr. Papelian
25 and myself, we're going to ask -- we discussed this with lead

1 counsel and GM as well -- we're going to ask that we be excused
2 from further attendance at these status conferences in light of
3 Delphi's situation currently. And, of course, we would be
4 available should the need arises or should the Court request
5 our being here.

6 If you recall, at our very first hearing, we discussed
7 Delphi with you. And in response to a question you had raised,
8 I suggested that perhaps Delphi would not be in this litigation
9 for long. And it was of particular importance because of the
10 bankruptcy issues that are similar to but somewhat different
11 than GM had. Through a series of meetings and discussions with
12 plaintiffs' counsel, we've now been dismissed from all or
13 substantially all of the personal injury cases. We're not
14 included in the economic loss cases. And although we recognize
15 there's always a potential for additional litigation or there
16 may be amendments later on, we don't believe we'll be brought
17 back in. And for that reason, we'd ask that our continued
18 attendance be excused. We will participate by telephone.

19 And assuming that request will be granted, I wanted to
20 express my appreciation to counsel on GM's part, for
21 plaintiffs, who've been terrific professional colleagues. I
22 think we have some mutual respect here among ourselves. And
23 while it's been contentious, it's also been very professionally
24 rewarding. And, of course, Mr. Papelian and I thank the Court
25 and its staff for the courtesies extended to us. I don't take

1 pro hac vice admission for granted. It's a privilege to be
2 here, and I appreciate the opportunity to have participated in
3 the proceedings thus far.

4 THE COURT: All right. I'll try not to take the
5 application personally.

6 Lead counsel, comments?

7 MR. BERMAN: No. That's fine with us, your Honor.

8 THE COURT: The question I have which is sort of
9 implicitly answered in Mr. Schoon's remarks is Delphi is named
10 in some of the personal injury wrongful death cases, I take it.
11 I don't know if Mr. Hilliard --

12 MR. HILLIARD: So they are named in some of the
13 one-off cases around the country. On behalf of Delphi's
14 request, if an attorney contacts us, we tell them what we've
15 decided to do in regards to Delphi and why. It's my
16 understanding, and maybe Mr. Papelian has the exact numbers,
17 but those cases are quickly dwindling. And so when they
18 approached us with the idea of not attending anymore, it made
19 sense and we agreed.

20 THE COURT: Allright. Mr. Papelian.

21 MR. PAPELIAN: Good morning, your Honor. Joe Papelian
22 on behalf of Delphi.

23 Delphi was named in 21 product cases. We have
24 dismissals or agreements to dismiss in 17. We've had
25 conversation with the four remaining. Mr. Schoon and I are

1 hopeful and optimistic by early January we'll be dismissed on
2 the remaining four.

3 THE COURT: All right. But nobody sees the need to
4 keep them here even as those numbers still exist? All right.
5 Seeing everybody shaking their heads, Mr. Godfrey, do you want
6 to be heard on this?

7 (Continued on next page)

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1 MR. GODFREY: Your Honor, I have no objection if they
2 choose not to attend.

3 THE COURT: You would have more room at the back
4 table. The application will be granted, with the understanding
5 as long as Delphi remains in any cases, and frankly I think as
6 long as the economic loss complaints are not dismissed with
7 prejudice, then somebody should continue to listen into the
8 calls at a minimum, and if we need you, we will summon you.

9 So with that understanding, I think I have no
10 objection myself to the application, all right, Mr. Schoon?

11 MR. SCHOON: Yes, your Honor. Thank you, we will
12 participate by telephone.

13 THE COURT: Is there anything else we need to discuss?

14 MR. HILLIARD: No, your Honor.

15 THE COURT: All right. Consistent with the Order No.
16 8, I guess it is, I'll look for the order memorializing what we
17 have done today, including the revision to the January
18 conference date later this week, and I wish you all very Happy
19 Holidays and I will see you next month.

20 Thank you very much.

21 (Court adjourned)

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