

FCHJGM1 Conference

1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
2 -----x
IN RE: GENERAL MOTORS LLC
3 IGNITION SWITCH LITIGATION
4 -----x

14 MD 2543 (JMF)

New York, N.Y.
December 17, 2015
1:30 p.m.

7 Before:

8 HON. JESSE M. FURMAN,

9 District Judge

11 APPEARANCES

12
13 HAGGENS BERMAN SOBOL SHAPIRO LLP
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24 KIMBERLY O. BRANSCOME

25

1 (Teleconference in Open Court)

2 THE COURT: You may be seated.

3 (Case called)

4 MR. HILLIARD: Your Honor, Ms. Cabraser has asked
5 permission to also speak. She is on the phone. I am not sure
6 of the coordination of it.

7 THE COURT: I am not sure of the coordination of that,
8 either.

9 MR. HILLIARD: We'll do the best to speak for her on
10 all matters.

11 THE COURT: All right. Good afternoon to all of you
12 you. Now, I should mention, I am not sure every disclosed this
13 way back when in the beginning of this case, but Ms. Geman and
14 I actually went to college together. We have known each other
15 for a while. We don't see each other every very often, once a
16 month, once every other month. I don't think there is any
17 issues there. I mention that.

18 We are on court call, and I guess Ms. Cabraser is on
19 court call as well. We'll see how that goes. Just a
20 remainder, of course, to speak into the microphones loudly
21 clearly and slowly, please, and we will proceed with the
22 agenda.

23 Mr. Hilliard, I understand tomorrow you have a
24 Christmas pageant to attend. Is that why we are here this
25 afternoon?

1 (Off-the-record discussion)

2 THE COURT: All right. Let's proceed. Good luck to
3 your family tomorrow.

4 I think I actually think this conference may go
5 quickly, although maybe that is famous last words. Items 1
6 through 6 on the agenda letter strike me as ones we don't
7 really need to dwell on. I appreciate your updates in the
8 agenda letter and in the letter of yesterday regarding related
9 actions.

10 Now, beyond those updates I am not sure there is
11 anything to discuss. Maybe there is other information or stuff
12 I am not aware of. Mr. Godfrey, you looked like you want to
13 say something.

14 MR. GODFREY: Only one issue, your Honor. Rick
15 Godfrey for the record.

16 Yesterday plaintiffs took an appeal to this Court from
17 Judge Gerber's punitive damages ruling. There is significant
18 overlap between the issues in that appeal and what is already
19 pending in the Second Circuit. We think this Court should stay
20 that appeal pending the Second Circuit's decision, which should
21 be sometime next year.

22 As you know, the oral argument is set in the Second
23 Circuit I think the second week of March of 2016. So that was
24 after the agenda letter was submitted and it took place
25 yesterday. I wanted to alert the court in the event of this

1 appeal to this Court, it would be GM's position with respect to
2 that appeal.

3 THE COURT: All right. I saw the reference in the
4 agenda letter -- not agenda letter -- related case letter
5 yesterday to the notice of appeal having been filed, but it has
6 not come to my attention otherwise, which is to say that it
7 hasn't been assigned to me as far as I know.

8 MR. GODFREY: We are assuming that it will be.

9 THE COURT: I think I would make the same assumption.

10 MR. GODFREY: So I didn't know whether your Honor saw
11 it or not. As a preemptive matter, I thought you should know
12 about it and new GM's position because of the overlap. If you
13 want a short letter brief, I would be happy to do that. I
14 don't know what the position of plaintiff's is. We think it
15 should be stayed pending the Second Circuit's decision to avoid
16 any inconsistent potentialities.

17 THE COURT: Who are the appellants or the folks at the
18 front table? Yes, Mr. Berman?

19 MR. BERMAN: We are the appellants and it is a very
20 narrow claim, if I recall, involving our right to have made a
21 claim, class claim in the bankruptcy. It is a subset of the
22 claims. I don't know whether we agree or not whether it should
23 be stayed. I will confer with my colleagues, and if we
24 disagree, we'll let you know.

25 THE COURT: All right. Again it has not yet been

1 assigned to me or even come to my attention other than what I
2 just mentioned. It seems like the first step is for you guys
3 to talk about it and obviously it is not stayed unless or until
4 I or whatever judge is assigned to it says it is stayed. In
5 that regard, the normal rules apply unless or until I or
6 whoever that judge is says otherwise. You should obviously
7 talk to one another and make whatever submissions or proposal
8 you want to make with respect to that.

9 Now, I raised this at the last conference and
10 everybody seemed to be of the same view that whatever appeal
11 there is from the now judgment in that has no bearing on the
12 bellwether trial. That is obviously my primary concern.
13 Everybody seems to agree that the two are unrelated.

14 MR. HILLIARD: That's correct, Judge.

15 THE COURT: Very good. Let me know. I do assume that
16 the appeal will be assigned to me and I will look into it after
17 the conference. Let me know how you want to proceed on that.

18 With respect to Item No. 6 on the agenda letter, and I
19 will treat it as a subset of Item No. 6, I assume you saw my
20 decision yesterday on the plaintiff's motion in limine No. 5
21 with respect to the DPA or statement of facts. I think that
22 leaves only one motion in limine ripe for decision at this
23 time, which is plaintiff's motion in limine No. 6 about live
24 trial witnesses, and I am prepared to rule on that motion now
25 and will proceed to do so.

1 The motion is granted, to the extent that plaintiff
2 seeks an order requiring new GM to make any witnesses that it
3 calls live during its case available to the plaintiff during
4 his case in chief assuming, of course, that plaintiff has
5 included that witness in his own pretrial witness list. I
6 reach that conclusion substantially for the reasons stated by
7 Judge Nathan in *Buchwald v. Renco Group, Incorporated*, 2014
8 WestLaw 4207113 (S.D.N.Y. August 25, 2014); Judge Cote, in
9 *Maran Coal Corp. versus Societe Generale De Surveillance S.A.*,
10 1996 WestLaw, 11230 (S.D.N.Y. January 10, 1996); and Judge
11 Mukasey in *Re Gulf Oil/Cities Service Tender Offer Litigation*,
12 776 F.Supp. 838, 839 (S.D.N.Y. 1991).

13 As Judge Nathan explains, and new GM more or less
14 concedes, I have discretion to grant plaintiff's request
15 pursuant to Federal Rule of Evidence 611 (a) and Federal Rule
16 of Civil Procedure 1. It is also consistent with the spirit if
17 not the letter of my own individual rules which make clear that
18 witnesses on both parties' lists may normally be called only
19 once.

20 The bottom line is that to prevent unfairness and the
21 waste of time, new GM must either permit plaintiff to examine
22 its witnesses live so that both parties may elicit the
23 witness's live testimony or rely itself on the witness's
24 deposition testimony so that neither party may elicit the
25 witness's live testimony. In other words, what is good for the

1 goose is good for the gander and both sides will either have
2 live testimony or not as the case may be with respect to
3 witnesses on both lists.

4 Now, I will leave to you to confer with one another
5 how that ruling is implemented in practice; that is, to confer
6 over who will be testifying live and to schedule witnesses
7 appropriately, again understanding that absent good cause at
8 least, I will not allow witnesses to testify more than once.

9 Also I will say while the choice of whether the
10 witnesses at issue testify live or through depositions may
11 ultimately be known GM's to make. I, like Judge Nathan, hope
12 and expect the new GM will choose to make the witnesses
13 available to testify live as I think that that is far
14 preferable for purposes of the jury and generally for
15 truth-seeking purposes than having testimony through
16 depositions, whether video or paper.

17 See Buchwald at Page 1 and see also Maran Coal, at
18 Page 2, discussing the advantages of live testimony.

19 The motion in limine also seeks an adverse inference
20 instruction in the event that new GM does not produce a witness
21 to testify live. I am prepared to say that I would be inclined
22 to grant that request or at least to permit plaintiff to argue
23 the point to the jury as Judge Mukasey did in re Gulf Oil. See
24 Page 839 of his opinion, but I am going to defer actually
25 deciding the issue until trial when I will have a better sense

1 of who any particular witness is, the reasons for his or her
2 nonappearance a trial and so on; that is to say, that I think
3 as the cases cited and discussed by the parties in and their
4 briefs make clear, the decision whether to give that
5 instruction is a discretionary one and is one that should be
6 made based on the totality of the circumstances, and I think I
7 will be in a better position to assess and evaluate that
8 totality at trial than I am now.

9 That portion of the motion is denied, albeit without
10 prejudice to renewal at trial in the event any witnesses do not
11 appear, and new GM should certainly understand that if it does
12 not make a witness available to testify live, that it does so
13 and proceeds at its peril, as I may well decide an adverse
14 inference instruction is warranted. So again bottom line is
15 the motion is granted in part and denied without prejudice in
16 part.

17 MR. BROCK: Yes, your Honor.

18 On issue of adverse inferences, is that issue limited
19 to the witnesses that are on our list or does it go to all GM
20 witnesses that potentially could be brought to trial to
21 testify?

22 THE COURT: So for present purposes, I was talking
23 only about the ones that are on your list. In other words, if
24 they're on your list and they don't make an appearance, and the
25 plaintiff is forced to rely on deposition testimony, I think it

1 is a much stronger case for an adverse inference instruction
2 than if they are not on your list and they're beyond the
3 subpoena power.

4 Having said that, I'll reserve judgment on that, and
5 plaintiffs may have authority and arguments that make such an
6 instruction appropriate, but I will consider that at the
7 appropriate time.

8 MR. BROCK: A couple of our witnesses are on the may
9 call witness list for us. At the appropriate time we will be
10 able to, to the extent we do not bring a witness to trial who
11 was on the may call list, we would be able to offer you the
12 reasons why their witness was on a may call list, what that
13 witness was responsive to and if the witness is not called by
14 us.

15 THE COURT: You certainly can. Again I am not ruling
16 on the issue now. I am just giving you fair warning that
17 depending on the circumstances, an adverse inference
18 instruction may well be given and so you should be mindful of
19 that in whatever decisions you make about who you bring here
20 and don't bring here.

21 You proceed at your peril, which is not to say I will
22 give the instruction. It is to say that I reserve judgment and
23 you will have an opportunity to argue why it is not appropriate
24 given in any particular witness or any particular circumstance,
25 and the flip side is the plaintiffs can argue that it is

1 appropriate.

2 All right. I will continue to rule on other motions
3 in limine on a rolling basis as they become fully submitted
4 which to say after Monday you should obviously expect
5 additional rulings. I think that is the next round or stage of
6 briefing.

7 Now, one other comment that I do want to make that I
8 probably don't need to make in light of the various several,
9 the last few opinions that I have issued. I am sort of taking
10 them as they come and deciding each one on its own, and I think
11 this is clear from the opinions, but have not had an
12 opportunity or had occasion to sort of step back and take a
13 look at things in a more global way.

14 I am a little bit concerned, and I express this most
15 clearly in the opinion I filed yesterday about cumulateness.
16 I think that if the plaintiff were to offer the statement of
17 facts from the DPA, whatever excerpts are ultimately allowed
18 from the Volukus report, whatever portions of the NTSA report
19 come in, the Congressional testimony of Ms. Barra and Mr.
20 Miliken, the actual witness testimony and other exhibits that
21 it is a little bit of overkill and there is a lot of redundancy
22 there and that you ought to give a lot of thought to
23 streamlining it to what you really, really want to get in and
24 perhaps at the final pretrial conference, as I think I
25 mentioned in yesterday's opinion, I might want a better sense

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1 of what it is you intend to offer or proffer of what you intend
2 to offer so I can make an evaluation exania what can or can't
3 be excluded on cumulative grounds.

4 Also so that you're not taken by surprise in that
5 regard because you should be able to make an informed decision
6 and know at the front end so that if you reserve what you think
7 of as your best evidence for later in the trial, you are not
8 taken by surprise when I don't let it in because it is just too
9 much. I want you to give a lot of thought to that and we can
10 discuss it further at a later date.

11 Yes, Mr. Godfrey?

12 MR. GODFREY: On that point, your Honor, briefly we
13 filed on tomorrow on OSI there will be a section on that point
14 as an alternative argument. We see the issues as the court
15 sees it. We will frame it slightly differently, but it will be
16 framed in the context of OSI because it is a broader issue than
17 OSI.

18 So the court is not surprised, we have a section on
19 that already written. I will take account of what the court
20 said here and work some of that in. The basic point being if
21 OSI is admissible, you don't get to do it 44 times because of
22 Rule 402 and cumulative nature. We will tee that up for the
23 court's determination. It is a much broader issue as the court
24 has acknowledged.

25 THE COURT: Plaintiff will have an opportunity to

1 respond by Tuesday at noon.

2 MR. HILLIARD: I will, but briefly as the court
3 hopefully sees, it is oranges, those what the court sees as
4 apples with regards to OSI and number accidents. I appreciate
5 it. I have been talking to Mr. Brock about streamlining this
6 trial and will finalize this at the pretrial. We are hopeful
7 to put on our case in one full week and give you what you have
8 indicated you are going to assist on, not cumulative, specific
9 laser focused and that drives evidence in.

10 Once the horse dies, there is no need to beat it any
11 more and we won't. It is important to stand up. I do not see
12 that in the limited OSI as the court allowed us to prepare and
13 will be ready to respond more formally to that.

14 THE COURT: I think it is premature for me to opine on
15 that. I was expressing a concern with respect to the evidence
16 that I have seen and addressed in the motions in limine but
17 sort of dealt with and addressed in isolation.

18 I want to underscore the comment about the evidence
19 when viewed not in isolation. I agree that OSI may be in a
20 different category, but obviously the concern, 403 is 403 and
21 it applies to all evidence. So I will consider the arguments
22 and decide them in due course.

23 Yes, Mr. Hilliard?

24 MR. HILLIARD: I was just going to say your message is
25 received as to the other matter.

1 THE COURT: Very good.

2 Next on the agenda letter is trial demonstratives,
3 that is to say, the speedy disclosure of demonstratives to be
4 used during cross-examination. I don't want to assume what
5 your respective positions are, but Mr. Godfrey, Mr. Brock, do
6 you want to fill me in on that.

7 MR. BROCK: I think the parties are in agreement about
8 what should be done with regard to demonstratives to be used in
9 opening statement as well as those we would use in direct
10 examinations and closing arguments. We have got that worked
11 out.

12 THE COURT: Move the microphone over.

13 MR. BROCK: My apologies. The one open issue is how
14 to approach the issue of demonstratives to be used on
15 cross-examination. The plaintiff's position is that they
16 should not be disclosed before the cross commences. Our view
17 is that it would be better to have those disclosed. I will say
18 the approach of bringing out demonstratives during a
19 cross-examination can be effective for both sides. We know how
20 to do that, too.

21 I do think the -- thinking about your Honor's
22 direction to us to get issues worked out before the jury is in
23 the box, that if we go forward with the trial where we're
24 putting demonstratives in front of experts or fact witnesses
25 that the opposing side has not seen, it is likely to lead to

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1 some objections, some disruption to the process. It is just
2 our thought that exchanging demonstratives to be used on cross
3 so that the other party can see them and bring objections to
4 the court's attention, if they have them, would be the better
5 way to proceed.

6 THE COURT: All right. Mr. Hilliard?

7 MR. HILLIARD: Probing a witness's veracity is best
8 done by, you know, not having them pre-alerted through being
9 woodshed-ed by a demonstrative exhibit which is appropriate.
10 So it doesn't waive the duty to make sure the demonstrative is
11 appropriate to the witness, but if I show it to Mr. Brock the
12 night before, I can assure the court that the witness will have
13 been woodshed-ed as to that demonstrative way before he sees it
14 in front of the jury.

15 There is a tension there, but if you assume my
16 responsibility is to be sure that the demonstrative is
17 appropriate, understanding the ruling so far and the court's
18 willingness to lay down the law, so to speak, as to what we
19 should or shouldn't do, I would suggest, having cross-examined
20 many experts, that I would like the opportunity unrelated to
21 demonstratives we have showed during opening and agreed to and
22 discussed with the witnesses, but I would like the opportunity
23 to have in my possession a demonstrative that might have fit my
24 cross of this witness based on his direct.

25 I understand their position. I have seen it both

1 ways. I disagree.

2 THE COURT: All right. I am not going to require
3 prior disclosure of demonstratives to be used on cross. As you
4 know, I am a fan of trying to work as much out in advance as
5 possible. To that end, I trust that if there is a significant
6 evidentiary issue that would arise in connection with any such
7 demonstrative, that you either already have raised it through
8 motion in limine or would appropriately raise it with counsel
9 and meet in advance.

10 Having said that, I think the famous saying is that
11 cross-examination is the greatest engine of truth, and I think
12 that probably wouldn't be the case if the person being
13 cross-examined knew every question that he or she was going to
14 be confronted with. In that regard, I don't want to remove all
15 the fun from this trial.

16 I think we should have a Perry Mason moment if there
17 is one to be had. Yes.

18 MR. BROCK: "Woodshedding" is a very strong word for
19 the way we interact.

20 THE COURT: He is a Texas trial lawyer.

21 MR. BROCK: I know. That is fine. We can do it that
22 way. We have done it that way in many trials and we know how
23 to use those tools also. That is fine. I just wanted to bring
24 it to the court's attention.

25 THE COURT: Understood. That is fine.

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1 Again take it with a grain of trial. He is a Texas
2 trial lawyer. In any event, request for pre-cross disclosure
3 requirement is denied.

4 The next item is the trial exhibits. Anyone want to
5 fill me in on that issue? This is the issues regarding
6 anyway, authenticity and business records.

7 MR. HILLIARD: That is coming along but I was hoping
8 to speak to them first, Judge, but I will speak to authenticity
9 of business records. As far as I know, another team was
10 handling that part. There is some agreement as to taking off
11 the objections to business records that General Motors
12 initially asserted.

13 I think Mr. Berman will speak more fully to it. I
14 stood up because I wanted to advise the court on a couple of
15 things. That is the demonstrative exhibits and the exhibits
16 that we intend to offer in evidence that are physical in
17 nature, we are in the process of sharing with both sides and
18 either agreeing to as an exhibit that gets marked and admitted
19 or as a demonstrative aid. We also have, and if this is the
20 time to talk about it, I brought the photograph of the vehicle
21 we told you is coming to New York from Texas, and we have been
22 to the courtroom and measured it and shared it, the photographs
23 with GM, invited them down to Corpus to look at it, invited
24 them to use it as theirs or show us theirs. We will use theirs
25 if they make theirs nicer than us. I have photographs to pass

1 up to the court so you get a sense of what we are talking about
2 if you would like to see them.

3 THE COURT: Sure. Where do things stand in terms of
4 your discussions about having, possibly having only one of
5 these that both sides can rely on?

6 MR. HILLIARD: We are going to agree to that. As far
7 as Mike Brock and I are the ones discussing and we agree to
8 ignition switches, we are going to have one for both sides.
9 The cooperation regards to shared exhibits is complete and full
10 and there is not really much I can report that we aren't going
11 to cooperate in that regard.

12 MR. BROCK: We started a discussion I think Tuesday
13 about the availability of the demonstrative that Mr. Hilliard
14 has developed. We have one also. We are going to look at each
15 other's and have a conversation about whether a single car will
16 be appropriate.

17 We were able to see briefly the photographs this
18 morning, but we need to do an inspection and he needs to see
19 ours also. I am hopeful we will be able to come to agreement
20 what we will be able to use at trial.

21 THE COURT: Very good.

22 MR. BROCK: Again into the courthouse and into the
23 courtroom, that is a different issue. We have very bright
24 engineers on both sides that will hopefully work with that.

25 MR. HILLIARD: We are well on our way to do that.

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1 THE COURT: I will leave that to you guys to figure
2 out. The business records authenticity objections issue, is
3 that --

4 MR. BERMAN: We are making progress. We gave them a
5 hundred exhibits that we thought they should not have been
6 objected to. They pointed out to us as to authenticity
7 sometimes we had a stray page or too many pages or metadata
8 attached. We can correct that as to authenticity and we will.

9 On business records, they have withdrawn many and now
10 they're going to look at a bigger realm and after our
11 discussion come back with a new list and we'll keep that and I
12 am confident we'll narrow it down to a narrow group of
13 documents.

14 THE COURT: These are documents that would be offered
15 at the first trial?

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

17 THE COURT: I commend you and encourage you to
18 continue trying to work through the list, but obviously the
19 days are dwindling and in that regard any disputes that need to
20 be resolved or anything that needs to happen as a result of
21 disputes needs to happen sooner rather than later. I don't
22 need to tell you that. I am sure you have that in mind.

23 MR. BERMAN: We are well aware of that.

24 THE COURT: I should also say, I can't remember if we
25 talked about this, but I think some thought needs to be given

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1 to how -- I take it a lot of exhibits will basically be
2 consented to on both sides. Having said that, I think you
3 should give some thought to how they are presented to or come
4 into evidence to the jury.

5 My general view is that exhibits should either come in
6 through a witness who is in a position to authenticate it them
7 even if there is no dispute as to authenticity or alternatively
8 through some sort of stipulation between the parties that
9 basically says the parties agree that the following exhibits
10 are business records and admissible and so forth, just so there
11 is a record at trial as to the foundation that is laid for
12 them, all right?

13 Very good. Trial confidentiality, I think we have
14 addressed and has been taken care of by Order No. 88. I have
15 one just comment and remark on that. First of all, there are
16 certain redactions and information that can, not only can but
17 has to be redacted pursuant to the federal rules and as to
18 which you don't need my permission. I want to be sure you're
19 sensitive and aware of that, social security numbers, birth
20 dates, that sort of information.

21 Second, in a document if there is a portion of a
22 document that is not relevant, I don't see any reason why it
23 can't be -- I am not saying you have to redact something
24 because it is not relevant. If there is anything that has
25 other considerations, sensitivities, privacy issues and also

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1 both sides agree is not relevant, I don't see any reason why it
2 can't just be redacted and not shown at to the jury. In other
3 words, there is a distinction between things you want the jury
4 to see but might have broader privacy-type applications and
5 things that aren't relevant and even the jury and I don't need
6 to see. I want to make sure that is clear to everybody. Again
7 I think that has been adequately addressed in Order 88.

8 Item 10 is trial witnesses.

9 MR. HILLIARD: On No. 9, trial confidentiality.

10 One issue that we have been discussing with GM is a
11 confidential streaming of the trial outside of the physical
12 courtroom to law offices that will be in charge of briefing.
13 In checking with Courtroom Connect, they advise that that has
14 been done by the Southern District in the past, and the idea is
15 we will have lawyers in Texas and Seattle and California who
16 will be responding to legal motions, and assuming that both
17 sides agree to the process that allows for the streaming of the
18 audio out of the courtroom to our offices, with appropriate
19 confidentiality, I wanted to bring it up and get your views on
20 if you would consider letting that occur.

21 THE COURT: I will need to think about that and look
22 into it. To the extent it has been done in this Court and you
23 can tell me what cases and what judges have done it, I would be
24 very interested in that so that I can speak with those judges
25 and see if there were any issues and what concerns, if any, I

1 should have.

2 MR. HILLIARD: I asked that exact question to
3 Courtroom Connect, if they can get me the case it was done on
4 and how it was done. They will get it to me. I will present
5 it to you and to GM.

6 THE COURT: Great. I will expect to hear from you on
7 that. All that is to say I am not categorically against it,
8 but I do want to make sure we think through whatever issues
9 there are that it raises. To the extent anyone has done it
10 before, I would benefit from hearing about their experiences.

11 MR. HILLIARD: Understood.

12 THE COURT: All right. No. 10 is trial witnesses. I
13 already gave you my ruling on the live witness issue.

14 Are there any other issues or things to discuss on
15 that score?

16 MR. HILLIARD: There are, Judge. You was hopeful we
17 could work this out, but we can't and we are going to need the
18 court's assistance.

19 Last Friday was the deadline for the will call and may
20 call list. Going to Tulsa on Saturday and spending the day, I
21 discovered that the first responders we had listed did not
22 include the first first responder, a gentleman by the name of
23 Scott Forester. We talked with him. He was the first one on
24 the scene and has just fact witness information specific to
25 things that weigh on this case, the engine and lights being on

1 or off, but he was there first.

2 In talking with him, General Motors had also talked
3 with him early on and had discussed setting his deposition. So
4 Tuesday I reached out to General Motors and asked I could agree
5 I could put him on the list and I would offer him for
6 deposition immediately. I just didn't do it. I told them
7 that, too, and today they told me that they would not agree to
8 let Mr. Forester be put on the will call list, and so that
9 issue now needs to be decided by the court.

10 THE COURT: Is there a reason that it came to your
11 attention only Saturday? Suffice it to say this case has
12 received quite a bit of attention from you, among others. I
13 would have thought --

14 MR. HILLIARD: I focused on it. I saw two first
15 responders on there. I physically got to Tulsa to spend the
16 day. I tracked down who I thought was the guy who got there
17 and realized the man who did get there first, a gentleman Scott
18 Forester was not on the list. The deadline is passed.

19 General Motors had the option of agreeing to it or
20 not. They decided, as is their right, to not agree to it. I
21 will also tell the court your order says extraordinary
22 circumstances, absent extraordinary circumstances. He is a
23 fact witness that we missed and there is reasons for it. I am
24 not going to represent to you that the reasons meet the court's
25 level. I believe that we operated and functioned in good

1 faith. Quite frankly, it was my first time to spend a full day
2 in Tulsa and start to really look and talk to witnesses. That
3 is what happened.

4 In talking to GM, I said look, I don't see the
5 prejudice. You interviewed him. He can be deposed. He is a
6 fact witness that will give some truthful facts about the
7 circumstance of finding this man's car against a tree. Let's
8 agree to it. They thought about it and today they said no.

9 I am just giving the court a heads-up that that will
10 quickly be in front of you and we'll quite frankly understand
11 whatever the court decides. I wanted to give you a sense of
12 it.

13 THE COURT: When you say it will be in front of me,
14 are you suggesting you plan to file something?

15 MR. HILLIARD: Right. They told me today when I was
16 in the courtroom they weren't going to be able -- not
17 courtroom, courthouse, agree to it. I will send a letter
18 asking the court, asking the court consider allowing us to put
19 him in late. The deadline was Friday. I learned Saturday, we
20 told GM Tuesday, and we met and conferred informally about it
21 and finally today they said look, we are sorry but we are not
22 going to agree to it.

23 THE COURT: All right. Mr. Godfrey, it sounds like
24 something will be filed and you will obviously have an
25 opportunity to respond.

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1 MR. GODFREY: Quickly. First, the name of Mr.
2 Forester was disclosed in three depositions taken last summer,
3 the other first responders and the investigating officer as
4 well as Mr. Forester last summer.

5 Second, I am not certain whether your Honor had set a
6 record, but you're close to it. There have now been 308
7 depositions in this case since May. We actually have a deal in
8 calendar between now and January 6. We are out of time for
9 something that could have been noticed up if they wanted to
10 notice it up June, July, August, September, October.

11 Third, there is no extraordinary circumstance here.
12 They have already got the testimony and know what two of the
13 first responders said as well as the investigating officer. We
14 are happy to brief it, but we are out of time to do another
15 deposition. We just finished a round of depositions.

16 THE COURT: Mr. Hilliard, when do you anticipate
17 filing something?

18 MR. HILLIARD: Given how this has gone, I just sent a
19 text saying file it today. It will be filed today.

20 THE COURT: All right. I will consider it when it is
21 filed. I will tell you I am exceedingly skeptical. At some
22 point -- in general, I view deadlines are deadlines.

23 In a case of this magnitude, given how much you have
24 done and have to do and given all of what I directed you to do
25 and when to do it, I just think it is important to adhere to

1 the deadlines, and the good cause standard which is lower than
2 the extraordinary circumstances standard includes due diligence
3 as a component.

4 I do not suggest that you proceeded in bad faith at
5 all, but the bottom line is I just don't understand how it
6 could possibly be that it wasn't until Saturday that the name
7 Forester would have been on your radar such that you would want
8 to include him on the list; that is to say, I am skeptical, but
9 I will consider it when you file it. To the extent you can
10 cite authority that under these kinds of circumstances in a
11 case of this nature that adding somebody after the deadline
12 would constitute good cause let alone extraordinary
13 circumstances, I will certainly keep an open mind.

14 You have a little bit of an uphill road to climb.

15 MR. HILLIARD: I am clear on that.

16 THE COURT: All right. Any other trial witness
17 related issues to discuss?

18 Next item, proposed jury submissions and related
19 filings are due tomorrow by noon. Anything to discuss on that
20 front?

21 MR. GODFREY: I do not think we will work out our
22 differences. I think you should expecting briefing on some
23 fundamental differences.

24 THE COURT: I am shocked!

25 MR. GODFREY: I didn't want you to be unpleasantly

1 surprised next Monday or Tuesday.

2 THE COURT: I am unpleasantly unsurprised. All right.

3 There is one issue that I do want to raise on this
4 score that you may well be addressing in what you submit
5 tomorrow, but if not, I want to put it on your radar so that
6 you give some thought to it, which is, I am sure to some extent
7 you are addressing this and have given thought to it. The
8 implications of Judge Gerber's ruling on imputation and
9 significance of the bankruptcy and the distinction between new
10 GM and old GM.

11 I guess without making any substantive rulings about
12 what is and isn't going to be admissible, what arguments can
13 and can be made, I am assume some amount of evidence with
14 respect to old GM will obviously be presented or is likely to
15 be presented to the jury and is not inconsistent with Judge
16 Gerber's rulings to the extent that he ruled, for example, that
17 a witness, an employee of old GM who became an employee of new
18 GM obviously brought with him or her whatever knowledge they
19 acquired of old GM and documents. Anyway, the principles he
20 laid out with respect to imputation allow for a certain amount
21 of evidence with respect to old GM.

22 Now, having said that, obviously, the sale order is a
23 significant moment in time and I think that some explanation
24 will have to be given to the jury about it and the implications
25 of the bankruptcy and the difference between old GM and new GM

1 for the purposes of the case.

2 My strong inclination, it would make sense to give the
3 jury some instructions about that at the front of the case and
4 not wait until the end of the case so that they are sensitive
5 to and aware of the distinction, and as they hear evidence they
6 can sort of in their minds organize whether it is old GM that
7 is being discussed or new GM and what the significance of that
8 is so that they consider any evidence only for the purposes
9 they should be considering it.

10 Again, it may well be you're already addressing that
11 in this submission to come. It may be you're on the same page
12 about that or it may be that is something you disagree about or
13 will disagree about, but I do want to just present it as
14 something that I have been thinking about and want you to think
15 about.

16 MR. GODFREY: There might be more agreement now so
17 this is heading in the right direction. We are going to try to
18 crystalize the issues. I don't think there will be a big
19 dispute about that issue, but we are still having discussions.

20 I would like, though, if we could, you limited the
21 briefs to five pages, given the amount of disagreement, we
22 would like a 10-page brief, if that is possible. We proposed
23 this to plaintiffs. I am not sure what their position is on
24 it. We would like to have a 10-page submission, if that is
25 possible. I know we are inundating the court with a lot of

1 papers and we apologize for that, but these are important
2 issues.

3 THE COURT: All right. Mr. Hilliard?

4 MR. HILLIARD: We'll give them the five pages for Mr.
5 Forester.

6 THE COURT: These --

7 MR. HILLIARD: I am kidding. We don't disagree.

8 THE COURT: I will give you up to 10 pages, but try to
9 be merciful. I guess more broadly, I think in most cases I do
10 not give preliminary substantive instructions to the jury and
11 follow the more conventional path of waiting until the end of
12 the case to do that. I don't know whether it warrants
13 deviating from that here or not.

14 I certainly am inclined to think it does with respect
15 to the issue that I just discussed and the distinction between
16 old GM and new GM. If you think there are other things like
17 that that it would pay to give preliminary instructions, I am
18 open to that and you should give some thought to it.
19 Obviously, that is not necessarily something you need to tell
20 me by tomorrow since I am telling you for the first time today.
21 I am open to your suggestions.

22 All right. Next is pretrial deadlines for Trials 2
23 through 6. I can barely think about Trial 2 given everything
24 we need to deal with in Trial 1, but there it is. I entered
25 Order No. 89, but did want to give you an opportunity to

1 comment or even object to the changes that I made to the
2 deadlines for the more substantive motions. Those are the
3 motions, dispositive motions, Daubert motions and OSI briefing
4 schedule, and the basic theory is that given that we are
5 setting these deadlines further in advance, that I can avoid a
6 little bit of what happened with respect to Trial No. 1, which
7 is back-ending a lot of very serious work to be done and which
8 puts a lot of burdens on you guys and, needless to say, on me
9 as well.

10 To the extent we can spread that out, I would imagine
11 whatever motions you plan to bring on those issues, you should
12 know if not now, then sooner than the deadlines you had
13 proposed. So that is the reason I wanted to front-load those a
14 little more.

15 Any comment? Discussion?

16 MR. GODFREY: Yes, your Honor.

17 It was clear what your Honor's intent was when we
18 looked at this. I was reminded, though, of your Honor's
19 formulation early on of reasonable yet aggressive. I think you
20 have hit the mark on the aggressive very well.

21 THE COURT: I would rather be aggressive than
22 reasonable.

23 MR. GODFREY: There are three buckets of date changes
24 which for the later trials I think are less problematic than
25 the earlier trials. The reason I say that, if we look at

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1 dispositive motions, for example, we have the Bartholomew,
2 Spain dispositive motion being now due on the 22nd of January
3 which is -- well, maybe not. We had assumed the heart of this
4 case, maybe now towards the end of this case and most of the
5 people working on that dispositive motion will be some role
6 directly or behind the scenes in this trial.

7 So I can see the court's point about the Norville
8 case, October is too far down. I can see that. The first two
9 trials, maybe the third, I wonder if we can get a little more
10 time there and split the baby, a little more time. What is
11 happening is the people -- B side is a lot of lawyers. The
12 senior people are involved in the trial for the most part and
13 our time was actually spent on motion practice or witness work
14 in this trial and filing another dispositive motion will be
15 limited.

16 I have the same concern with respect to the Daubert
17 motions. That is more important. If I get only one wish list
18 to change and one set of dates to get more time, the Daubert
19 motions will be highest of the list. The final bucket was OSI.
20 OSI may solve itself as a result of the rulings that your Honor
21 makes with respect to motion in limine No. 11 and some of the
22 other things.

23 Right now our OSI disclosures and OSI briefing starts
24 under the revised schedule the day we give openings in this
25 case. That just struck me as a bit of a bit of a lift. Those

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1 are the three that cause me some concern about the
2 aggressive-reasonable formulation.

3 THE COURT: All right. Have you talked about this
4 with --

5 MR. GODFREY: We have not done that. I was unclear
6 whether you wanted -- we can do it this way and see, if your
7 Honor is willing to consider an alternative not as unreasonable
8 as perhaps you perceived our original dates, but perhaps some
9 more time, I am sure we can come with some agreement with Mr.
10 Hilliard and Mr. Berman about that.

11 THE COURT: Talk to one another and make a proposal.

12 I think through the footnote that I added to the order
13 and the agenda letter I tried to make clear I was open to
14 briefing considering some of these. Your point is well taken
15 at least with respect to Trial No. 2, all of which is to say I
16 think the case for adjusting the dates gets weaker and weaker
17 as you go down the line, and Trial 3 frankly is a big step down
18 from Trial 2, and by the time you get to Trial 6, you are going
19 to have a very hard time to persuade me.

20 MR. GODFREY: At Trial 6 I won't try that, your Honor.
21 This works, so I appreciate it.

22 THE COURT: It is a sliding scale is what I am saying.

23 I am open to reasonable extensions of the dates I have
24 set at least for Trial No. 2. I am mindful that I want to give
25 myself adequate time to rule on any motions that are filed.

1 Why don't you talk to each other and make whatever proposals
2 you think are appropriate, focusing principally on Trial No. 2.
3 If you think some adjustments, smaller adjustments, are
4 appropriate with respect to 3 and thereafter, you can certainly
5 try. You may not get them.

6 All right. Anything else?

7 MR. GODFREY: No.

8 THE COURT: I am not going to set a deadline for that.
9 Deadlines are what I have set unless and until I have said
10 otherwise. In that regard, it is in your interest to get me
11 proposed modifications sooner rather than later.

12 All right. The next item is No. 13, the factual
13 correction to my December 7th opinion and order, and suffice to
14 say I am pleased that given everything I have issued in this
15 case, there is only one factual correction you have been able
16 to identify. That being said, I am not thrilled about that
17 one. I take it, I appreciate the correction and it is duly
18 noted.

19 The question I have for you is what the implications
20 of it are, rereading it -- first of all, nobody asked me to
21 reconsider the decision. I am not sure it would provide a
22 basis to do so. I want to make sure that I pose that question.

23 MR. GODFREY: We are uncertain whether it has any
24 practical implications with respect to Trial No. 1. It seemed
25 to us that it is undisputed we should get it fixed. Given the

1 footnote I think your Honor has in each of issued opinions
2 about the reserve to right to reconsider the right, reserve
3 right as evidence comes in to modify, will have curative
4 instructions, we thought the easiest thing to do since we
5 couldn't determine that it was likely to be the basis for
6 reconsideration, let's just get it fixed.

7 If it comes up, we'll bring it up outside the presence
8 of the jury, if we need to re-raise the issue or something, and
9 that is what we thought was the better course of action.

10 THE COURT: All right. The footnote is more directed
11 at -- there are a lot of motions that I've resolved where, for
12 example, punitive damages being in the case or not could be a
13 very significant difference. I was mindful of the fact there
14 were motions not yet fully submitted that might eliminate them
15 and wanted to make clear that the rulings I was making were
16 sort of based on the reality at the time, and things may
17 change.

18 Now so a little bit different. I want to make that
19 clear. It probably does warrant correction if only because I'm
20 not the only judge presiding over these cases and I don't know
21 whether this issue would present itself in any other cases, but
22 I wouldn't want a party or a judge in another case to rely on
23 my opinion to the extent that there's a factual error in it. I
24 guess at a minimum I would be inclined to correct it through
25 either an amended opinion or through subsequent order just to

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1 make it clear.

2 I guess what I want to make sure is that I do that
3 correctly, and in that regard would it suffice to simply remove
4 the references to the quote-unquote CAPA switch, which are I
5 think the two nested clauses, one on Page 2 of the slip opinion
6 and one on Page 3 of the slip opinion.

7 Would that eliminate the issue or does something more
8 significant need to be done?

9 MR. GODFREY: We would like to study that and get back
10 in a letter tomorrow if we think there is -- I had thought an
11 amended opinion where you have a sense, either changing or -- I
12 don't have an answer for you. I would like to study it and get
13 you a letter the end of the day tomorrow what we think. We
14 would like to discuss the plans as well what we jointly think
15 is perhaps the best way to approach this. I will revisit the
16 issue with Mr. Brock and Mr. Bloomer and Mr. Dreyer whether we
17 think the motion itself needs to be reconsidered. Our
18 inclination was not to and see how the evidence comes in.
19 We'll take your point and revisit the issue on our side.

20 THE COURT: I don't want to invite a reconsideration
21 motion because reviewing my opinion and the record, I do think
22 that the larger point is a valid one; namely, that new GM
23 itself treated it different, which is essentially similar or
24 the same, and in that regard I think the ruling is probably
25 unaffected by the error. For the reasons that I said, I think

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1 that it should probably be corrected. Why don't you confer
2 with one another. If there is a joint proposal and everybody
3 is in agreement how the corrections can be made, that would be
4 ideal from my standpoint.

5 If there is disagreement, you should let me know what
6 the situation is, and I'll deal with it appropriately. My
7 inclination would be to issue an amended and corrected opinion
8 and just avoid any potential problem that could arise from
9 leaving it out there. All right.

10 Mr. Hilliard, anything you want to say on that?

11 MR. HILLIARD: GM is right and the court is right with
12 regards to the substance of the ruling not being affected by
13 the name. There is another switch, C A T E R A, another Catera
14 switch in play in the fact situation, but I don't think that
15 speaks to what GM is concerned with in regards to the second
16 name for the same exact switch.

17 THE COURT: All right. Very good. Let me know by
18 letter tomorrow. The next item is settlement. As you saw, I
19 granted the motions for appointment of the special masters and
20 the QSF. I assume there is nothing else we need to discuss on
21 those fronts at this time. Very good.

22 Ms. Bloom is shaking her head. I am guessing that is
23 a "no." I do want to remind you, I am not sure I don't need
24 to, about the submissions you need to make about whether and to
25 what extent the submissions on those motions can be kept under

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1 seal or redacted. I gave you an extension on everything else
2 we need to do on the next month. That is due January 25th if I
3 am not mistaken.

4 The last item on your agenda, schedule for additional
5 status conferences. Status conference, the only one we have on
6 the calendar at the moment is February 26 aside from the final
7 pretrial conference, of course, and the fact that we'll be
8 seeing a lot of each other in January.

9 Now, I am happy to put additional conferences on the
10 calendar after February 26th if you think it makes sense to do
11 that now. I am happy to wait. What are your thoughts?

12 MR. GODFREY: I vote for waiting, your Honor.

13 MR. HILLIARD: We vote the same.

14 THE COURT: Excellent. I am not going to overrule
15 you. In terms of my extra items, first rebuttal experts. I am
16 assuming since I told you you needed to raise any disputes with
17 me promptly, that there are no disputes. I figured I would
18 check.

19 MR. DREYER: We have a response or reply on the other
20 similar incidents issue. It is coming due. We intend to offer
21 as part of that reply an issue with respect to rebuttal expert
22 reports on the OSI issue. We think that is the appropriate
23 thing to do in light of the scope of the OSI briefing by them.

24 In a nutshell, it concerns the fact that when the
25 plaintiff's experts did their original reports, none of them

1 spoke to one of the plaintiff's burden of proof items, which is
2 that the switch actually rotated. Instead what they said is
3 the bag should have deployed and didn't, and our explanation
4 for that non-deployment is switch rotation. Our experts then
5 delivered their reports, and two of our experts drew the
6 conclusion, specific conclusion, that this switch did not
7 rotate in this accident separate and apart from any discussion
8 about the air bag situation.

9 After that point in time, plaintiffs submitted
10 rebuttal reports on that principal issue that is part of their
11 case in chief. Mr. Caruso, for example, in his rebuttal report
12 says I looked at 21 other accidents, 10 of which General Motors
13 identified to the government as having been ones where the
14 ignition switch may have rotated and caused air bag
15 non-deployment and 11 of them that I looked at independently
16 and concluded the bag should have deployed but it didn't and
17 the only explanation I have is the ignition switch rotated.

18 He then goes on to say from that evidence I'm drawing
19 the conclusion that since it rotated in these accidents, I
20 believe Mr. Sawyer's rotated even though in his prior
21 deposition Mr. Caruso said I am not going to talk about
22 ignition switch rotation. We don't think that is proper
23 rebuttal and we also think the evidence is inadmissible on
24 other evidentiary grounds. Our intent, your Honor, is to try
25 to address that in our briefing that I think is due tomorrow or

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1 Monday.

2 THE COURT: It is tomorrow. All right.

3 MR. DREYER: We get lost in days, your Honor.

4 THE COURT: I am very mindful of the days, believe me.

5 Mr. Hilliard, you'll respond presumably in your reply due on
6 Tuesday at noon and I will consider it in that context.

7 MR. HILLIARD: We will, Judge. Thank you.

8 THE COURT: All right.

9 Moving to the second item is modifications to Order
10 No. 89 which we have already discussed. The third item is the
11 parties' dispute with respect to discovery from absent class
12 members or putative class members, I should say, at this point.

13 I have reviewed your letters, and my inclination is
14 notwithstanding my desire to move things forward aggressively,
15 albeit also reasonably, I am inclined to defer deciding the
16 question of whether and to what extent new GM can seek
17 discovery from non-party class members until after whatever
18 motion practice we have on the third amended consolidated
19 complaint or tack.

20 First of all, new GM asks that it be held in abeyance
21 until after then anyway. In that regard, I don't see any rush
22 in deciding that issue. At that point I will be in a better
23 position to evaluate new GM's assertions of need and set
24 appropriate limits on any discovery that I authorize.

25 To that extent, I will keep your current letters under

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1 advisement, but I'll also ask you to submit supplemental
2 letters or a joint letter ideally within let's say one week of
3 any decision on a motion to dismiss the tack. Obviously, this
4 may be many months from now, but nevertheless I don't see any
5 reason not to address it now.

6 In addition to any -- well, that letter or letters
7 should address any new developments or new arguments one way or
8 the other, but you should also address first what limits, if
9 any, I should set on any discovery that I authorize; that is to
10 say, should I set any limits and, if so, what they should be.

11 And, two, whether I should impose safeguards with
12 respect to any communications with absent class members such as
13 those, for example, imposed by Judge Selden in the Toyota
14 litigation and, if so, what. Again I will be deciding the
15 question of whether and to what extent discovery can be sought
16 from non-party class members until after motion practice, and
17 at that point we can revisit the issue with those additional
18 issues addressed in letters.

19 Now, the proposed orders, however, also concern
20 discovery from the named plaintiffs in the tack, and I am
21 inclined to think we can or should deal with that sooner. I
22 guess my question is do you agree with that or counter should
23 we put that off as well? If we should deal with it now, I
24 understand that there is some different, difference in views on
25 the scope of that discovery.

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1 Mr. Berman, any thoughts on that?

2 MR. BERMAN: Well, it is our objective --

3 THE COURT: Microphone.

4 MR. BERMAN: Steve Berman on behalf of the class.

5 It is our objective to have a reasonably aggressive
6 schedule to get to class certification. If new GM wants to
7 take 121 plaintiffs in tack, if new GM wants to take 121
8 depositions and then another 50 to a hundred depositions of
9 additional absent class members, that is going to take a long
10 time. We would prefer if they want to do all of that and you
11 haven't ruled on whether they're going to get the absent class
12 members, I understand. With 121 depositions, let's get
13 started.

14 THE COURT: All right. Mr. Godfrey or Mr. Bloomer?

15 MR. GODFREY: There are 216 depositions in this case
16 is not terribly challenging given how many we have taken
17 already. I am not persuaded by that.

18 I think that I'd like to see what survives the motion
19 to dismiss. I think there are fundamental issues before we
20 take a deposition where we're asking questions that go to
21 issues that we think either should be dismissed or should be
22 curtailed. It makes more sense to me in terms of an efficient
23 use of deposition time.

24 I don't know how, what the court's thinking in terms
25 of a schedule overall in terms of the deferral. My own view

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1 would be I think our view, get the motions briefed, have it
2 decided and start the depositions and you can decide whether we
3 can have absent class members as well. I am not a big fan of
4 asking people questions on an issue what I think shouldn't be
5 in the case.

6 THE COURT: Here is my thinking, and more to the point
7 what we're going to do, which is to say, I will defer that,
8 too. I may revisit it sooner than I intend to revisit the
9 absent class member discovery question. At a minimum I think
10 I'll wait. I think you have a proposal due to me on January
11 6th, if I am not mistaken, with respect to what motion practice
12 should proceed with respect to the tack.

13 I think I'll wait at least until I see that submission
14 and perhaps until I see whatever motion is filed at which point
15 I will be in a better position to evaluate the implications of
16 that motion practice on the consolidated complaint and then
17 perhaps there is a way of moving forward in some sort of staged
18 manner or something. To the extent we can move things forward
19 without inefficiencies, that is to say, taking discovery on
20 things that may end up not being in the case, I would like to
21 do that and that is what I will try to figure out.

22 The bottom line is I think the first step is getting
23 your proposals on the motion practice and we can revisit the
24 question and evaluate it in that context.

25 We are coming almost to the end here. There are two

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1 issues raised by Mr. Peller in his letter of December 3rd that
2 one is moot, namely -- or one doesn't require addressing,
3 namely, the amendment of his complaints.

4 The other two issues he seeks clarification with
5 respect to I think it was Order No. 69 that required other
6 counsel to seek additional discovery from lead counsel by a
7 certain date, but basically asks that he be given until after
8 the Second Circuit rules on his appeals to request any
9 additional discovery with respect to the additional defects.

10 I am inclined to think that does make sense, as he
11 concedes in his letter. If the Second Circuit affirms, his
12 request would be moot; and if the Second Circuit reverses, then
13 I think it would be only fair to give him an opportunity at
14 least to be heard. That is obviously reserving judgment
15 whether and to what extent I would grant any request. His
16 point is will taken. I would be inclined to give him that.

17 Anyone have a different view or want to be heard?

18 All right. I will assume that is good. Second, is he
19 advised me there is a sort of brewing issue or dispute with
20 respect to whether or what qualifies as common benefit work.
21 He says, he said that he believed or anticipated raising that
22 at some later date but wanted to bring it to my attention.

23 My inclination is to let him raise it at some later
24 date. I have plenty on my plate now and I don't think that is
25 something that we need to resolve now as long as the records

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1 being kept are sufficient to differentiate the two categories
2 so what that whatever ruling I later make can be applied.

3 Obviously, it is not really ripe now in any event. I
4 guess the bottom line is I appreciate his heads-up on that, but
5 I think we can deal with that down the road.

6 MR. BERMAN: Just to be clear, as we talked about our
7 fiduciary responsibility to look at time and from time to time
8 we have seen parties doing things, either they ask whether we
9 can do it and we say no, we don't believe that is appropriate,
10 common benefit time or we see it happening and reach out to
11 them and say if you think you're going to put in for fees at
12 the end of the time, we don't think this is appropriate. So
13 that is what is prompting all of this.

14 THE COURT: That is part of your duties under the
15 early orders, and so I appreciate your exercising those duties,
16 but obviously ultimately if there is a dispute with respect to
17 that, I will have to resolve it. I just don't want to resolve
18 it now.

19 MR. BERMAN: We have to have something to recover from
20 and have a dispute first.

21 THE COURT: That is why I said not yet, right?

22 MR. BLOOMER: Going back just to the discovery sought
23 by Mr. Peller's clients, understanding the court's preference
24 to defer that till the Second Circuit rules, I just wanted to
25 clarify that I assume that Order 69 is still in effect and

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1 whenever that ruling comes down, if it moots his discovery, it
2 moots his discovery. If it doesn't, then is the court
3 contemplating at that point you need to go through the
4 procedures to meet and confer with lead counsel on that
5 discovery, and that plays out however it played out? If there
6 are filings that need to be made, they get made. But otherwise
7 the procedures and timetables and Order 69 would govern that if
8 and when it becomes live again?

9 THE COURT: It has been a little while since I looked
10 at Order 69. Order 69 goes well beyond just the one issue that
11 Mr. Peller raised. In that regard, yes, Order 69 still remains
12 in effect, and I guess all I am saying is Mr. Peller after the
13 Second Circuit rules can certainly raise with lead counsel
14 first and ultimately with me if there is an issue to be
15 resolved, any additional discovery that he thinks is
16 appropriate or necessary, but Rule 69 otherwise remains in
17 effect for sure. Does that clear things up?

18 MR. BLOOMER: It does.

19 One other unrelated issue that I just received a
20 message on from our team, and that is, and realizing he asked
21 and is making it, we have a summary judgment reply brief that
22 is due, and our team has asked, e need to ask your Honor if it
23 would be acceptable to submit, get additional five pages to
24 submit a 15-page reply?

25 THE COURT: Any objection?

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Conference

1 MR. HILLIARD: I try to be fair with him. If they
2 think they need it and the court is not opposed to reading five
3 extra pages, I won't object or bring up Mr. Forester again.

4 THE COURT: I will give it to you. Try not to use all
5 five pages. I thought you would ask for more time, which I
6 would be less inclined to give you.

7 I have one very minor housekeeping matter which is
8 with respect to exhibits that are under seal or at least
9 requested to be filed under seal, if they're not large, you
10 can -- and I think have been e-mailing them to us, but if they
11 are large, I gather -- I think on one or more occasions folks
12 have tried to send us those exhibits by drop box or FTP,
13 whatever that is. That is not something that we can do for
14 security and technology-related reasons.

15 I think you may have been told this, but I want to
16 underscore with respect to things that can't be e-mailed
17 directly, you should submit them to us on CD-ROM or DVD, and in
18 particular I think we have not yet received the plaintiff's
19 exhibits that were requested to be filed under seal with
20 respect to the summary judgment motion or the Daubert motions,
21 but suffice it to say we are working on those motions even
22 though they're not yet fully submitted, so we do need those.

23 If you can get them by tomorrow, I would appreciate
24 it. Does that work, Mr. Hilliard?

25 MR. HILLIARD: Yes, sir.

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1 THE COURT: Hang on one second.

2 (Pause)

3 (Continued on next page)

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1 THE COURT: That's all that I have.

2 Actually, one last thing. Normally I think you have
3 three business days to submit a proposed order memorializing
4 what we have done today, but I would ask that you submit that
5 by Tuesday at noon. I will not be here on Wednesday and want
6 to get that filed before I leave. I am mindful that you have
7 many other things on your plate, but would appreciate if you
8 could file or submit it by noon.

9 Do you have anything else?

10 MR. HILLIARD: So we spent a good hour beforehand
11 going through the courtroom we are going to try this case on
12 together and talking about the logistics of both how the jury
13 sees exhibits and the jury hears the lawyers. We have come up
14 with a plan. I started to think during the middle of it that
15 you need to be aware of it to sign off on it.

16 For example, it seems the best big screen to put up,
17 in order for the jury to see exhibits, is going to be to your
18 left in an area that will not be accessed by anybody. It will
19 be up to a 70-inch plasma screen that will always stay there,
20 won't block anyone's view of anything, but it is significant.

21 We are considering, by agreement, having counsel who
22 will be in the well talking about exhibits wearing wireless
23 microphones as well as the witness, things that will be agreed
24 to. But I am just cautious that I want to offer the court the
25 opportunity in realtime to say no, yes, or you guys work it

Fch2gm2

1 out, that's fine with me.

2 THE COURT: Okay. I appreciate that. Certainly
3 ultimately it's my call. I know my staff was with you. I
4 think Ms. Barnes attended.

5 MR. HILLIARD: We shared it with them as well. We
6 have our tech guys talking to the court's tech folks. That was
7 part of the reason to get you in the loop sooner rather than
8 later, because the implementation of the decision is high on
9 the effort scale and if you think and -- I'm sorry. I call her
10 Alex.

11 THE COURT: Ms. Barnes.

12 MR. HILLIARD: Ms. Barnes, I apologize. Ms. Barnes
13 was there, and we shared with her what we intend to do, in
14 regards to bringing counsel's tables back a little bit so that
15 the car can fit into the well. There is an area to your far
16 right where exhibits can sit out of the way if they are not
17 being used and be rolled pretty easily in front of the jury,
18 literally just the logistics of being sure that we get this
19 done smoothly. I just wanted to let you know that it seems to
20 be getting to that point, but perhaps you would like to hear
21 about it some.

22 THE COURT: Ms. Barnes seems to be of the view that it
23 will be okay and has indicated that she will go over it with
24 me. We can communicate telepathically.

25 Having said that, I think it does make sense for me to

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1 know what your intentions are and make sure that I am
2 comfortable with them so that when I show up in the courtroom
3 and say, "What?" you are not taken by surprise. I am open to
4 suggestion for what the best way to do that is. If you think
5 that I ought to go to the courtroom with one or all of you or
6 if you want to submit --

7 MR. HILLIARD: I do. I wanted you there today just so
8 we can say we have agreed to do this. I told Ms. Barnes about
9 it, and she will tell you about it, but it's just a practical
10 way of looking at the courtroom and understanding that this
11 ultimately is your decision, but it is important that you at
12 least see the walk-through. We did it all today. Basically,
13 we have got it done and laid out.

14 THE COURT: So I am open to doing it right now if you
15 guys want to just walk down there and go through it.

16 MR. HILLIARD: I agree.

17 THE COURT: Mr. Brock?

18 MR. BROCK: I think that will take care of it. I
19 think the main thing you want to see is where is the position
20 of the screen that we are talking about in relation to the jury
21 and in relation to where you are seated in relation to where
22 the witness is.

23 The other things, like the location of Elmos, the
24 microphones, I think you will be okay with whatever we come up
25 with, but you should obviously know about that.

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1 We have tried to make a judgment on where would it
2 make sense to put the screen so that it doesn't block your
3 view, doesn't block the witness's view, doesn't block the view
4 of folks who are in the audience, and we have the best solution
5 that we can think of, but you should definitely see that.

6 MR. HILLIARD: And by way of example, just before we
7 started this hearing, Mr. Brock and I talked about perhaps
8 having iPads which could not be messed with, simply portable
9 screens, one for each of the jurors as well, that only show the
10 exhibits once they come up that the court could control
11 wirelessly. Another option. The goal is to be sure that the
12 jury sees what we are talking about easily and the witness
13 does, too, and the court doesn't feel like there is a
14 clunkiness in the smoothness of the day.

15 THE COURT: I share that goal, and I am all in favor
16 of using technology to its maximum advantage. I think you
17 probably see I don't go anywhere without my iPad. It's not a
18 product placement for Apple, but simply to suggest that there
19 are ways to use those sorts of things.

20 As long as adequate thought has been given to how that
21 is done and how it works in practice, that there are adequate
22 plans in the event that it fails, because technology sometimes
23 does fail, and that I can control, for example, who sees what
24 and when and that everybody can see what's in evidence, I think
25 figuring out the most effective manner in which the jury can

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1 consider the evidence and the parties can make their arguments
2 makes the most sense. So I am certainly open to it; and, to
3 the extent that you have creative suggestions, I would be happy
4 to hear them.

5 For present purposes, I think the most efficient thing
6 is going to be to just go down there. You can walk me through
7 what you are thinking. Let's take care of it now.

8 Anything else aside from that to cover? Okay.

9 It is 2:50. Why don't we reconvene -- I don't know if
10 the courtroom down there is even open, but we will find that
11 out. Why don't we reconvene in ten minutes outside or inside
12 courtroom 506, and then we can take it from there.

13 I think that completes our business. I would say
14 happy holidays, but I suspect that I have ruined your holidays,
15 for which I apologize -- or at least apologize to your
16 families -- and you have ruined mine, too. Not really, but
17 happy holidays to everyone, and I will see some of you in a few
18 minutes.

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