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1 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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3 IN RE: GENERAL MOTORS LLC  
IGNITION SWITCH LITIGATION,

4 14 MD 2543 (JMF)

5 Conference

6 -----x

New York, N.Y.  
October 4, 2017  
9:31 a.m.

8 Before:

9 HON. JESSE M. FURMAN,

10 District Judge

11 APPEARANCES

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ANDREW B. BLOOMER, ESQ.

25 WENDY L. BLOOM, ESQ.

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1 THE COURT: Good morning. Welcome back, ladies and  
2 gentlemen. Please state your appearances for the record.

3 MS. CABRASER: Good morning, your Honor. Elizabeth  
4 Cabraser for plaintiffs.

5 MR. BERMAN: Good morning, your Honor. Steve Berman.

6 MR. WEISFELNER: Judge, Edward Weisfelner, Brown  
7 Rudnick.

8 MR. HILLIARD: Good morning, Judge. Bob Hilliard.

9 MR. GODFREY: Good morning, your Honor. For New GM,  
10 Rick Godfrey, joined by Mr. Brock, Ms. Smith, Mr. Bloomer, and,  
11 at your Honor's request, Ms. Bloom.

12 THE COURT: Always happy to see Ms. Bloom. It  
13 suggests progress is being made.

14 All right. And is Mr. Shepard here as well?

15 MR. SHEPARD: Yes, I am, your Honor.

16 THE COURT: All right. Welcome, Mr. Shepard. And  
17 good morning to you.

18 All right. I think CourtCall is operational is my  
19 understanding. We've been having some technical difficulties  
20 in my courtroom the last couple days. I think they have been  
21 resolved. We'll find out, I'm sure.

22 COURTCALL REPRESENTATIVE: Yes, your Honor, CourtCall  
23 is connected and able to hear in the courtroom.

24 THE COURT: There you go. Excellent.

25 So just a reminder: Please speak into the microphone

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1 so that everyone here and on the call can hear you.

2 I did receive this morning an electronic device order  
3 from Mr. Shepard. I assume you did receive it back. I just  
4 want to tell everybody, don't assume that I'll be able to act  
5 on things if you send them at 8:00 the morning that you need  
6 them. So particularly as we approach trial, as you know, it is  
7 really up to you to ensure that your needs are met and to do  
8 that in advance of the trial to ensure that if there are any  
9 issues, they are resolved in a timely fashion. And I was able  
10 to sign that order and get it back this morning, but don't  
11 assume I'll be able to do that on such short notice at all  
12 times.

13 Before we proceed, I feel obliged to ask how everybody  
14 from Texas is doing. I was obviously thinking a lot of you in  
15 the days leading up to the hurricane and then the days after.  
16 I hope everybody down there is doing okay.

17 MR. HILLIARD: Thanks, Judge. So Houston is in  
18 trouble still. The counties surrounding Corpus Christi were  
19 devastated. I was telling some of my associates, they actually  
20 canceled their school district and sent the kids to Corpus, and  
21 they're still in a bad way. Corpus Christi was basically  
22 spared except for a loss of power after six or seven days.  
23 Friends in Houston are probably, as you can imagine, just  
24 having new lifestyle, and permanently so, unfortunately, but  
25 thank you very much for your thoughts.

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1           THE COURT: All right. Well, to the extent that there  
2 are any needs on that front or, for that matter, if there are  
3 lawyers from Puerto Rico or Las Vegas or anywhere affected --  
4 it seems like we're surrounded by a lot of awful things these  
5 days -- let me know, I'll be as accommodating as I can, but my  
6 thoughts are with the folks down there from the MDL and from  
7 other places as well. And I didn't mean to leave out Florida.  
8 The list goes on.

9           All right. You guys I think have all met at this  
10 point my new law clerk, Kristen Loveland, who will be the GM  
11 clerk, so to speak, for the next year or so. So I think her  
12 transition has largely been smooth, but give her a little bit  
13 of a break because as she learns the ropes, there's a lot to  
14 handle on our end, and you all know how things work better than  
15 she does at the moment. So to the extent that you can help her  
16 out and help ensure that the transition is smooth, that would  
17 be great.

18           Let's get to the agenda. First item on the agenda is  
19 the status of the bankruptcy proceedings. I would have put  
20 under this heading the representational issues that have been  
21 raised in the letters over the last few days, although you guys  
22 put that in the coordination and related actions item on the  
23 agenda, but I'll address it now. The long and short of it is,  
24 I'm not going to opine on that myself, for two reasons. One  
25 is, I am firmly of the view that it is not ripe at the moment.

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1 I would note in that regard that in New GM's own letter, Quinn  
2 Emanuel letter of September 25<sup>th</sup> that was submitted to Judge  
3 Glenn, one of the arguments that New GM made to Judge Glenn  
4 with respect to how to proceed with respect to the issues  
5 before him was that addressing the enforcement of the  
6 settlement in the first instance would potentially obviate the  
7 need to get into and resolve all sorts of complicated issues,  
8 and among the list of issues that were flagged in that letter  
9 was the very representational issues that have been raised  
10 before me. All of which is to say I think, on New GM's own  
11 view, those issues are only relevant or ripe in the event that  
12 Judge Glenn decides that the settlement is enforceable, and for  
13 that reason, I do think that it would be an advisory opinion  
14 and/or is not ripe at this juncture.

15 On top of that, my inclination is to think -- and I  
16 don't even need to get into this, really, but I will  
17 nevertheless. My inclination is to think that these are not  
18 issues for me to decide, that they're for Judge Glenn to  
19 decide. I don't think, as I read plaintiff's counsel's papers,  
20 I don't read them to be suggesting -- and there may be errant  
21 lines here or there in the settlement papers or what have you.  
22 I don't read them to be suggesting that they are purporting to  
23 represent absent parties but rather proposing some sort of  
24 procedural mechanism via Rule 9019 by which notice can be  
25 provided and essentially bind absent parties. To me that's an

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1 issue for Judge Glenn to decide whether that's kosher and a  
2 proper way of proceeding or if Rule 23 is the necessary way of  
3 proceeding, and I think wrapped up in that is whether  
4 plaintiff's counsel have the authority to sort of do that. I  
5 understand the arguments, I think they're interesting issues,  
6 but at least my initial reaction is: (a) they're not ripe; and  
7 (b) to the extent that they would be ripe, they're not for me  
8 to decide in the first instance. But again, I come back to  
9 their not being ripe. If they ripen and there is a good-faith  
10 belief to think that I am the relevant judge to opine on these  
11 issues, then you can certainly come back to me. Judge Glenn  
12 and I did talk about the matter so it's on both of our radars,  
13 and we'll have future opportunities to talk about it if or when  
14 it becomes a relevant issue. So I don't think anything further  
15 needs to be discussed on that front.

16 Taking a step back, I don't know if you all will agree  
17 on the issue, but I wouldn't mind your help in understanding  
18 what the relationship is between those issues that are being  
19 litigated before Judge Glenn and the MDL writ large -- that is  
20 to say, what bearing or what effect the settlement, if it turns  
21 out to be enforceable, would have on the claims in the MDL and  
22 the prospects for settlement in the MDL and the mediation in  
23 connection with that and so forth. And again, I don't know if  
24 you are all in agreement on this. I certainly have some notion  
25 or inkling of what I think the relationship is between these

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1 things, but I confess there are a lot of moving parts and  
2 complications here, and I just want to get a better handle on  
3 whether my inkling is correct. So again, I don't know if you  
4 all agree, but anyone want to share their thoughts on --

5 MR. BERMAN: Good morning, your Honor. Steve Berman.

6 First, to update the Court, yesterday Judge Glenn set  
7 a trial date of December 18<sup>th</sup> through the 20<sup>th</sup> for our  
8 motion to enforce the settlement agreement. So that's just an  
9 update on the status of that. With respect to providing you a  
10 submission --

11 THE COURT: And Ms. Loveland was listening in on that  
12 conference. My understanding is that he did decide to  
13 bifurcate and deal with the enforcement question first, was  
14 that correct?

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

16 THE COURT: Okay. Go ahead.

17 MR. BERMAN: With respect to the issue of providing  
18 you some kind of memo on where all this might be going, we'd be  
19 glad to do that.

20 THE COURT: To be clear, I didn't ask for a memo. I  
21 just asked for your thoughts. But if you think it's better to  
22 be done in writing, that's fine. I'm not interested in  
23 litigating the issue so much as just getting a sense of what  
24 the bigger picture is or at least what your respective views of  
25 the bigger picture are. If you think it's better to do that in

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1 writing, that's fine. Although you certainly all give me  
2 plenty of things to read already. So what are your thoughts?

3 MR. BERMAN: Well, I think because of the  
4 complications of the overlapping issues, I would prefer to have  
5 time to think it through, consult with Ms. Cabraser, and give  
6 you something very short in writing.

7 THE COURT: All right. That's fine with me. And for  
8 what it's worth, based on my conversations with Judge Glenn, I  
9 imagine that he might appreciate a little bit of a sense of the  
10 bigger picture as well. So I think copying him or sending it  
11 to both of us might be in order, although I'm taking some  
12 liberties in speaking on his behalf.

13 All right. Mr. Godfrey, do you have any problem with  
14 that?

15 MR. GODFREY: No, your Honor. I think that there are,  
16 depending on how this proceeds before Judge Glenn, a number of  
17 issues that are not only overlapping but are issues that, up  
18 until now, this Court has had the principal responsibility for.  
19 For example, there was a suggestion yesterday during the  
20 hearing, and I have the transcript of it, that perhaps they  
21 will seek class certification. That is going to be an issue  
22 that I think is ripe for your Honor and is certainly  
23 overlapping. There is an issue about the notice which I think  
24 is ripe for your Honor. Your Honor has issued orders in the  
25 past with respect to notifying potential class members and



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1 consumers. That's going to be an overlap issue. And then  
2 there's experts. Because the putative proof by which the  
3 aggregation of claims is made to justify the exercise of the  
4 shares under Section 3.2 of the sale agreement, 3.2(c) is based  
5 upon experts, that we think your Honor is going to have to  
6 determine whether those experts, A, are experts and, B, whether  
7 their so-called conjoint analysis meets the standards.

8 With respect to your Honor's initial observation, I  
9 understand the court's position. I don't think my silence  
10 should be seen as acquiescence, because let's make one thing  
11 perfectly clear. The draft agreement purports to represent the  
12 millions of --

13 THE COURT: I read your papers.

14 MR. GODFREY: I got it.

15 THE COURT: I got it. And I didn't take your silence  
16 as acquiescence. I took it as hearing that I have made my  
17 ruling.

18 All right. So I don't think there's any great rush in  
19 getting me something on the sort of big picture issues. And to  
20 be clear, I'm not looking to gin up issues for me to resolve or  
21 for you to litigate. I think this is really kind of a status  
22 report on what you think this all means and how you think it  
23 all fits together and depending on sort of what happens in that  
24 litigation, what you see happening here, just so I have a  
25 slightly better sense of the big picture.

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1           So do you want to say letters up to five pages, two  
2 weeks from today? Does that seem reasonable?

3           MR. BERMAN: Seems reasonable to us.

4           MR. GODFREY: I'm not sure, your Honor, because there  
5 was a -- we will file the transcript of yesterday's hearing  
6 with the Court. I think you will see a shifting explanation of  
7 what they're trying to achieve with the bankruptcy court, and  
8 until we know precisely what it is their plan in the bankruptcy  
9 court is -- are they going to seek class certification, and if  
10 so, when. I can identify issues based upon yesterday's  
11 transcript, but I think it's a little unfair for your Honor for  
12 us to identify issues if that's not going to be their plan or  
13 if they're going to change. I think we need to have a very  
14 clear understanding of what it is they propose in the  
15 bankruptcy court, and Judge Glenn asked those questions  
16 yesterday and he got answers, but I don't think that discussion  
17 is yet done.

18           THE COURT: I understand that, and to the extent there  
19 are open issues or questions, perhaps you'll just have to say  
20 these are the various possibilities and the way things could  
21 go, but I think giving me a sense of the big picture is a good  
22 idea and should be feasible even if you don't entirely know how  
23 things are going to proceed and can't tell the future. So --

24           MR. GODFREY: Understood, your Honor.

25           THE COURT: Letters not to exceed five pages. If that

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1 proves not to be sufficient, you can make an appropriate  
2 application, but within two weeks. And again, I'm not looking  
3 for you to raise issues for me to resolve. I have enough on my  
4 plate from you and others. But really, this is just sort of a  
5 status report, step back and tell me what's going on and, you  
6 know, both with respect to what impact it has on the claims and  
7 motion practice here and also on the prospect for settlement  
8 here.

9 All right. Anything else to discuss on items 1  
10 through 4, that is, bankruptcy coordination and related  
11 actions, document production, and deposition update?

12 MR. GODFREY: Just as an update, we start the Orange  
13 County trial on October the 23<sup>rd</sup>, your Honor. I thought the  
14 Court ought to be aware of that. I don't see any issues at the  
15 moment of the type of the emerging risk we've identified  
16 before, but because that court will be hearing some of the  
17 issues that would have been before this Court, there's always  
18 that possibility, and I thought the Court should be aware of  
19 that.

20 THE COURT: How long is that trial slated to go?

21 MR. GODFREY: Mr. Berman and I may disagree on that.  
22 I think with the evidence they want to put in, we'll be done  
23 around Thanksgiving. He seemed to think it would be done in  
24 two weeks. He sits four days a week. So I think it's at least  
25 16 to 20 trial days, but Mr. Berman may have a different view.

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1  
2 THE COURT: Well, I'll be seeing some of you quite a  
3 bit during that period anyway, so you'll know how to find me if  
4 anything comes up.

5 Anything else on those items?

6 All right. That brings us then to status of the  
7 Scruggs trial, which I'll now call Scruggs rather than Dodson.  
8 If you detected a degree of frustration in my text order of  
9 yesterday and then my subsequent opinion addressing the motions  
10 *in limine* and the OSI evidence, that is because I am a little  
11 bit frustrated. We've been at this for three plus years, and I  
12 have a tremendous amount of respect for all of you and the work  
13 that you've done and do, but, you know, the procedures that we  
14 have set up that heretofore have worked pretty well, in my  
15 opinion, are really designed to tee up disputes early and to  
16 get them resolved in a timely fashion, and the theory is, the  
17 closer we get to trial, the fewer new issues that will arise,  
18 and to some extent it feels a little bit like the opposite is  
19 happening here -- the closer we get to trial, the more new  
20 things are popping up.

21 On top of that, as I indicated yesterday, it is my  
22 view that you could have done, and going forward I hope will do  
23 a much better job of, number one, conferring in advance of  
24 filing any motions to ensure that issues are actually in  
25 dispute. There were at least two motions *in limine* that I

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1 think either there wasn't a real dispute or the real dispute  
2 was significantly narrower than the opening brief might have  
3 suggested, and I had admonished you at the August conference to  
4 confer in advance of those motions to ensure that that didn't  
5 happen, and I don't feel like that succeeded to the degree I  
6 would have liked. Number two, as my ruling on the OSI evidence  
7 I think made clear, I think that there are rulings that I have  
8 made in the past that I understand the advocates' desire to  
9 argue your case to kingdom come, but I'm just don't want to  
10 entertain reargument unless you think that there is a  
11 demonstrable and material legal error that I have made or  
12 something distinguishable about this case. And you can  
13 preserve your rights in whatever way you think is appropriate,  
14 as you have done in other instances, but I really do expect  
15 that you will heed my past rulings and apply them in good faith  
16 to the case going forward and therefore minimize the amount of  
17 briefing that you need to submit and the amount of issues that  
18 I need to decide. And be mindful of the fact that there's only  
19 one of me and there are a lot of you. And I know there are  
20 others of you who are not even sitting here.

21 So please hear me. I have a lot on my plate at the  
22 moment. I have a lot on my plate just with respect to this  
23 trial, but I'm out two days this week, three days next week for  
24 Jewish holidays, I have the MDL conference coming up, I have a  
25 bench trial before this trial starts, I have all the motions

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1 for this trial, I have all the motions in the MDL generally,  
2 and I have 300 other cases with a lot of motions, so hear me  
3 when I say that I need your help to really try to limit the  
4 amount of things that you need from me, and the easier you make  
5 my job, the happier I will be and the happier you will be by  
6 extension. So I don't need you to respond. I'm certainly not  
7 interested in figuring out, you know, which side is more to  
8 blame, if that's even an appropriate way to think about it. I  
9 just am making a desperate plea.

10 All right. So in particular, with the things coming  
11 down the pike and the Scruggs deadline chart, I think there's  
12 the Valukas and statement of facts briefing that I gave you an  
13 extension on until Friday; there's the show cause briefing with  
14 respect to past evidentiary rulings; there's obviously the  
15 deposition designation disputes. You know, really thinking  
16 hard about, are these depositions that we actually are going to  
17 play at this trial, is this evidence that we are actually going  
18 to offer at trial, you know, and not briefing things that are  
19 really hypothetical rather than real, and again, faithfully  
20 applying my past rulings would make me very grateful.

21 All right. There are two issues that are fully  
22 briefed on this front that are flagged in the agenda letter.  
23 Well, there are more issues that are fully briefed that are on  
24 my plate at the moment, and I hope to rule on *Daubert* and  
25 summary judgment in particular in the next week or two.

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1           First, with respect to the trial subpoena dispute,  
2 I've read your briefs. I confess that I have not had a chance  
3 yet to read the cases or really think too much about the issue,  
4 and on that score, I'm going to reserve judgment. I did want  
5 to take the opportunity, since I have you here, just to ask New  
6 GM to address one issue or argument on the interaction between  
7 Rule 43 and Rule 45. Namely, there is a line in the advisory  
8 committee notes on Rule 45 that states -- and I think this is  
9 flagged in one of plaintiff's briefs -- that when an order  
10 under Rule 43(a) authorizes testimony from a remote location,  
11 the witness can be commanded to testify from any place  
12 described in Rule 45(c)(1), which strikes me as a pretty strong  
13 basis to conclude that there is an interaction between the  
14 rules, a synergy between the rules, and that Rule 43 should be  
15 read in such a way that the place for compliance, if you will,  
16 is more critical than the place of the actual physical trial.  
17 But do you care to respond?

18           MR. HILLIARD: Your Honor, since Mr. Shepard is going  
19 to be my co-counsel in this trial, with your permission -- I  
20 think the bankruptcy issues were prepared to be addressed --  
21 can we play musical chairs and bring Mr. Shepard to counsel  
22 table?

23           THE COURT: You can. Sorry, Mr. Weisfelner, if I  
24 didn't give you a chance to shine today, but --

25           MR. WEISFELNER: Thank you, Judge.

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1 THE COURT: All right. Mr. Shepard?

2 All right. Everybody's in place? Go ahead.

3 MS. SMITH: Good morning, your Honor. Renee Smith.

4 We have looked at that issue and kind of had the same reaction  
5 that the Court had and looked for cases to see if they  
6 addressed this precise advisory committee note, and we couldn't  
7 find any. So we're left looking at, when an order under  
8 Rule 43(a) authorizes testimony from a remote location, the  
9 witness can be commanded to testify from any place described in  
10 Rule 45(c)(1). Then you go to Rule 45(c)(1), it says place of  
11 compliance, for trial, hearing, or deposition, etc., within a  
12 hundred miles of where the person resides, is employed, or  
13 regularly transacts business in person. So when it says that  
14 they can be commanded from any place described in  
15 Rule 45(c)(1), I do agree there's obviously synergy  
16 contemplated there, but the synergy is perhaps the person is  
17 not live in the courthouse, but when you are commanding  
18 somebody to come, it still needs to be within 100 miles of the  
19 place of compliance, which in this case the place of compliance  
20 is the trial and the trial is in New York. And I know we have  
21 a lot of discussion in both our briefs on the *MTBE* decision,  
22 which was decided under the old Rule 45, but the crux of that  
23 opinion is, the trial is where the trial is. The place of  
24 compliance is here in New York City.

25 THE COURT: Although it didn't -- and I already said I



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1 haven't read the cases so I haven't read Judge Scheindlin's  
2 opinion, but my impression is that the old rule was framed in  
3 terms of where a subpoena could be served, that it couldn't be  
4 served beyond a hundred miles from the courthouse where the  
5 trial was taking place. So, I mean, that strikes me as a more  
6 fundamental and threshold problem. That problem is no longer  
7 in the rule because service can be nationwide. So now we're  
8 talking about the place of compliance. I mean, I guess, again,  
9 having not read the cases, I'm hesitant to opine, but it  
10 strikes me that it may or may not have shed a lot of light on  
11 what the current rules and their interaction and interplay  
12 should be.

13 MS. SMITH: Yes. And Rule 45, as we all know, was  
14 overhauled extensively, so there's a lot of apples and oranges  
15 here. But the place of compliance, from the *MTBE* court, the  
16 basic -- my reading of her opinion is that you just don't  
17 artificially -- you cannot use Rule 43 to artificially change  
18 the place of compliance, the place of trial, and under  
19 Rule 45(c)(1), even if there's synergy between Rule 43(a) and  
20 Rule 45(c)(1), which I agree there is, that still has to be  
21 within a hundred miles of where the trial is, and the trial is  
22 in New York.

23 THE COURT: And there's an argument in your briefs, if  
24 I remember correctly, that the subpoenas served here are  
25 facially improper. Is that because they command appearance at

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1 trial but then there's a rider, if you will, that says you  
2 don't actually have to appear at trial? What's the facial --

3 MS. SMITH: That's correct. On their face, the  
4 subpoenas actually direct, command the witnesses to come to  
5 trial at this courthouse in New York, and then there's a rider  
6 that says, we don't really mean that, we really mean at a place  
7 convenient to the witness.

8 THE COURT: Okay. I mean, how is that different than  
9 a subpoena that -- certainly in the grand jury context, you  
10 often see that says, you're commanded to appear, but if you  
11 provide these records in advance of your appearance date, then  
12 you don't have to appear.

13 MS. SMITH: Right. I think the point is just that as  
14 they are written now, it's invalid, and maybe they could be  
15 revised if the Court found that was appropriate. But as it's  
16 written now, it says you need to come to the courthouse in New  
17 York.

18 THE COURT: Okay. And if I remember correctly, there  
19 was one of the six subpoenas that had not yet been served. Is  
20 that still the case?

21 MS. SMITH: I actually am not sure. Mr. Shepard, do  
22 you know if it's actually been served yet?

23 THE COURT: Mr. Shepard, you're not accustomed to  
24 appearing here yet, but make sure you speak into the microphone  
25 and make sure to remember that for all time. Go ahead.

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1 MR. SHEPARD: Yes. Thank you, your Honor.

2 The subpoena to Mr. Mercer has not yet been served.

3 We expect to do so in October. Deposition has been scheduled  
4 in Detroit for October 13<sup>th</sup>. If it hasn't been served by  
5 then, it will be on that day.

6 THE COURT: I was about to say that seems like a good  
7 moment to serve it. All right. Very good.

8 Anything else you want to say, Ms. Smith?

9 MS. SMITH: I know you're just reading the papers, but  
10 regardless of the 45/43 interaction, there is just no  
11 compelling circumstance under Rule 43 here.

12 THE COURT: All right. Mr. Shepard, I don't want to  
13 deprive you of an opportunity to be heard on this. I am not  
14 going to decide it today. I think there's some interesting  
15 issues here and I want to think more about them and read the  
16 cases, but anything you want to say just in response to what  
17 Ms. Smith has said?

18 MR. SHEPARD: Very briefly, your Honor. The place of  
19 compliance would be the bankruptcy court in the Eastern  
20 District of Michigan. We confirmed with them that the IT  
21 systems will work with this courtroom here.

22 THE COURT: All right. And don't read anything into  
23 this, and I mean that. Are things in place such that if I  
24 granted the application in whole or in part, you'd be prepared  
25 to proceed, technologically, that is?

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1 MR. SHEPARD: Yes, your Honor.

2 THE COURT: Okay. Very good.

3 All right. So I'll give you my ruling on that as soon  
4 as I can. Obviously you should proceed with respect to the two  
5 depositions in the coming weeks, and you should be prepared for  
6 the possibility that I won't allow live transmission and  
7 therefore that those depositions will have to function as the  
8 trial testimony of those two witnesses, but all of which is to  
9 say that everybody should hedge their bets, I guess, and I'll  
10 give you my ruling as quickly as I can.

11 All right. The other issue is the Rule 37.2 motion,  
12 if you will. I do want to note that letters on 37.2 issues are  
13 not to exceed three pages, but I let it slide this time. The  
14 first issue regarding OSI seems to be moot or withdrawn based  
15 on the exchange of letters, so I have nothing further to say on  
16 that. On the other issue with respect to Keepers and Lo, I  
17 think what I'm going to do is address that and resolve it in  
18 the context of my *Daubert* ruling since there's sort of an  
19 interplay and interaction with the arguments under *Daubert*.

20 I guess I did want to just pose a question to New GM  
21 based on the letter that it submitted last night. And I  
22 granted leave to file. There's an argument in there -- let me  
23 see if I can find it.

24 So the argument is made that plaintiff should be  
25 precluded from offering the general causation opinion. I think

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1 those are arguments that are fully joined in the *Daubert*  
2 briefing that, again, I'll get to when I resolve that motion,  
3 hopefully in the next week or so. But then the second issue is  
4 with respect to the suggestion in plaintiff's letter, which is  
5 now I think ripe in light of my motion *in limine* ruling, that  
6 she should be permitted to offer the specific causation  
7 opinions by way of rebuttal but rebuttal should be permitted to  
8 go first, you know, in anticipation of New GM's evidence. New  
9 GM argues that I should find that the plaintiff has waived the  
10 specific causation opinions.

11 And to me, there are two different issues. One is  
12 this argument that she has waived them, and I guess I wanted to  
13 find out what the basis of that would be. If the basis is the  
14 stipulation that Ms. Scruggs filed back in August, on its face,  
15 at least, the stipulation is limited to the evidence to be  
16 presented at trial in her case in chief. So I don't know how I  
17 could find a waiver if on its face the disclaimer of an intent  
18 to proceed with that evidence or make those arguments is  
19 limited to the case in chief, although maybe there is an  
20 argument to be made.

21 The second question is just the procedural/merits  
22 question as to, putting aside waiver, whether it's proper to  
23 proceed in the way that Ms. Scruggs is proposing. It strikes  
24 me as creative, I will say, but maybe it passes muster. I  
25 don't know.

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1           So Ms. Smith, do you want to take this on as well?

2           MS. SMITH: Yes. Thank you, your Honor.

3           So in this issue we raised a *Daubert* challenge to  
4 Dr. Keepers and Dr. Lo because they did not consider the  
5 October -- or even know about the October 2015 accident. We  
6 raised it in our *Daubert* brief. We said it's unreliable,  
7 doesn't meet *Daubert*. Plaintiff in reply said -- not only do  
8 they say they're withdrawing those opinions, but plaintiff  
9 offered no response to our *Daubert* challenge. So they didn't  
10 respond to our *Daubert* challenge, and it's too late to do so  
11 now. They never did. And so that's the basis of our waiver  
12 point is they didn't address the -- regardless of how the Court  
13 ruled on the motions *in limine*, regardless of the case in chief  
14 argument, they've never responded to our argument that these  
15 experts' opinions are inadmissible under *Daubert*.

16           THE COURT: I see. Okay. I did not appreciate or  
17 understand that from the letter.

18           All right. Anything else you want to say on that?

19           MS. SMITH: And then I don't know if you wanted to  
20 address the second point, which was the case in chief issue.

21           THE COURT: Yes. So assume for the sake of argument  
22 that I don't buy that argument and I think that they haven't  
23 waived their right to rely on it or what have you or give them  
24 an opportunity to be heard about the *Daubert* arguments that you  
25 made, what have you. Assume we get past that. And I'm not

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1 suggesting that I will, but assume that I do. What do you say  
2 to their proposal that they can do this on rebuttal but in  
3 anticipation of your evidence?

4 MS. SMITH: Right. Basically it's their burden of  
5 proof. In their case in chief they have to present admissible  
6 expert evidence on their causation theories, and they wouldn't  
7 be able to wait until we're done and then bring it in rebuttal.  
8 This is basically just saying, we said we wouldn't bring this  
9 evidence in our case in chief, but really we're going to bring  
10 this evidence in our case in chief. I don't -- I'm kind of at  
11 a loss to understand what it is they are proposing to do.

12 THE COURT: I think they're proposing that they  
13 disclaimed an intent to bring it in their case in chief but not  
14 in rebuttal, so they want to be allowed to do it in rebuttal  
15 and they want to be allowed to do it before your case, on the  
16 theory that it's just a more efficient way to proceed.

17 Now there are three options, I think, that I can think  
18 of. One is that that's okay. Again, putting aside the waiver  
19 issues that you've already argued. Two is, that's not okay and  
20 they should be permitted to call them by way of rebuttal but  
21 only after you've presented your case and therefore made any  
22 motions that you want to make at the close of their case  
23 without, obviously, that evidence being part of the record.  
24 Number three is that they're not permitted to do it at all, I  
25 guess.

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1           MS. SMITH: We'll go with option number three, which I  
2 think is a hybrid of one and two, which is they can't hold  
3 something that's something they know about in their case in  
4 chief and hold it for rebuttal. I just don't understand how  
5 that would work. So our option three is, they cannot do it in  
6 their case in chief and they cannot do it in rebuttal.

7           THE COURT: Do you have law to support that? Listen,  
8 in every other trial there hasn't been a rebuttal case.

9           MS. SMITH: Exactly.

10          THE COURT: My approach in a civil case is that the  
11 parties basically know what issues are likely to be raised.  
12 That's the point of discovery, that's the point of depositions,  
13 that's the point of the entire process, really, such that you  
14 can anticipate and address in your case in chief things that  
15 would otherwise quote-unquote be rebuttal. So, you know,  
16 really, unless something is truly unanticipated and comes out  
17 of left field on the defense case -- I mean, I guess in five  
18 and a half years I have never had a rebuttal case in a civil  
19 trial, but I don't know if I would be on firm ground in  
20 precluding a rebuttal case in these circumstances. I've never  
21 been presented with this kind of situation.

22          MS. SMITH: Yes. We are happy to get you case law on  
23 this, but it's my understanding you cannot hold back something  
24 on rebuttal that you reasonably could have anticipated to come  
25 in on your case in chief.



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1 THE COURT: All right. Mr. Shepard?

2 MR. SHEPARD: Thank you, your Honor.

3 THE COURT: Microphone. You forgot very quickly.

4 MR. SHEPARD: Thank you, your Honor.

5 On point one, the *Daubert* challenge from GM was  
6 directed at the following issue: What was the cause, which  
7 accident was the cause of the injuries that are shown on the  
8 April 2017 MRI. Now New GM did not challenge these experts'  
9 ability to look at the MRI and to distinguish between injuries  
10 that looked to be the result of an automobile accident and  
11 chronic degenerative cervical disease. That was not  
12 challenged. What New GM did point out, and fairly so, is that  
13 there were two different accidents and our experts had not  
14 disclosed in their report and had not opined as to any ability  
15 to say that the injuries caused by an accident were our  
16 accident from 2013 or a later accident in 2015.

17 THE COURT: Because your client didn't tell them about  
18 it.

19 MR. SHEPARD: New GM's point was well taken, your  
20 Honor. The ability to look at a 2017 MRI and say that the  
21 accident is from 2013 or 2015, it's not there. And we can't do  
22 it. However, what New GM never challenged, and what we  
23 therefore didn't need to respond to in our *Daubert* response,  
24 was the ability of these experts to say, I can tell the  
25 difference between an automobile accident and chronic

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1 degenerative cervical disease. And what New GM's experts are  
2 going to say when they testify is: There's no accident injury  
3 here at all; I look at the 2017 MRI and all I see is chronic  
4 degenerative cervical disease. In fairness, your Honor, we  
5 need the ability to rebut that and say, incorrect, the 2017 MRI  
6 also shows accident injury. And GM is free to point out -- and  
7 I don't think there will be any dispute about this -- that  
8 there's no way to tell which accident caused that. But it is  
9 not the case, as New GM's expert will say, that the only thing  
10 you see in that MRI is chronic degenerative disease.

11 THE COURT: All right. So to be clear, if they're  
12 permitted to testify, they would not be opining that the  
13 accident caused injury attributable to the 2013 accident as  
14 opposed to the 2015 accident, correct?

15 MR. SHEPARD: Correct, your Honor.

16 THE COURT: Okay. And given that, tell me how this  
17 would be helpful to the fact finder. That is to say, to the  
18 extent that the fact finder's task is to decide what if any  
19 injury is attributable to the 2013 accident, if the experts  
20 can't actually opine on that, how is that ultimately helpful?

21 MR. SHEPARD: It's helpful, your Honor, because the  
22 jury will hear from New GM that there's no accident injury at  
23 all. New GM's position will be, the only problems with her  
24 back are from chronic degenerative disease, and I know that  
25 because I've looked at the 2017 MRI. So the fact finder,

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1 hearing that, will think, well, then clearly she wasn't injured  
2 by this accident or any other accident, 2013 or 2015. In  
3 fairness, we need an ability to rebut that and say, although we  
4 can't tell you for certainty whether it was the 2015 or 2013,  
5 jurors, there is accident injury here. So it is not the case,  
6 as New GM is trying to tell you, that a scan of her back in  
7 2017 shows no accident injury at all.

8 THE COURT: Okay. Okay. I think I at least get it.

9 I guess the question I have for each of you is, or the  
10 question I have for myself, is whether it's worth having you  
11 brief this sort of procedural question about anticipatory  
12 rebuttal versus rebuttal now or does it make sense to wait  
13 until I've ruled on the more fundamental issues. It may not  
14 become a relevant issue if I decide that the experts can't  
15 testify at all for one reason or another. But at the same  
16 time -- well, any thoughts on that?

17 MR. SHEPARD: Your Honor, this is the broad discretion  
18 of the Court as to how best to structure the case for the jury.  
19 We're okay with putting on a rebuttal case after New GM is  
20 done. We suggest this because it's in keeping with the Court's  
21 prior procedures and it's the more efficient, condensed way to  
22 get the two sides to the jury. Further, your Honor, I'll say,  
23 we're not intending to use --

24 THE COURT: But I think the question and the argument  
25 that Ms. Smith is making, or would be making, is that to the

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1 extent that you can anticipate evidence or argument in the  
2 defense case that it's your obligation to present that as part  
3 of your case in chief and not essentially sort of wait, lie in  
4 wait or sandbag them by doing it on rebuttal and that in  
5 essence -- to use a phrase from the opinion I filed  
6 yesterday -- this is a little too cute by half to say we're  
7 waiving our right to do this in our case in chief and we're  
8 going to try to do it by rebuttal, and by the way, we want to  
9 do our rebuttal as part of our case in chief.

10 MR. SHEPARD: Your Honor, we're happy to wait, as a  
11 procedural matter, to do the rebuttal. We suggest that is the  
12 most efficient way to present this to the jury.

13 THE COURT: No, I get that, but the question is --  
14 well, all right.

15 Ms. Smith, do you have any thoughts on when or if to  
16 have briefing on the procedural issue?

17 MS. SMITH: I know your Honor would like nothing more  
18 than more briefing in this case, but may I suggest that I  
19 believe, when you consider the *Daubert* issues, what will become  
20 clear is, they've withdrawn the specific causation opinions.  
21 There's nothing left there. This new opinion about generally  
22 could have possibly been caused by an accident is neither  
23 disclosed nor is it helpful to the jury, nor does it pass other  
24 muster under *Daubert* or Rule 702, so I don't think the Court  
25 will need to reach this issue, so may I propose that we hold

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1 off doing additional briefing, if that's acceptable to the  
2 Court.

3 THE COURT: All right. I think I will proceed that  
4 way. Again, you shouldn't read into that any views on the  
5 merits because I haven't resolved them, but I'm hoping to get  
6 you a decision on *Daubert* in the next week or so, as I  
7 indicated, and that would leave adequate time to brief this  
8 issue if it is relevant, and I don't need to make you write  
9 more briefs, let alone receive more briefs, as I've already  
10 indicated. So we'll do that.

11 MR. SHEPARD: May I be heard very briefly, your Honor?

12 THE COURT: Sure.

13 MR. SHEPARD: The specific causation opinion that was  
14 withdrawn in our *Daubert* response brief is not a withdrawal of  
15 these experts' ability to opine as to what the 2017 MRI says  
16 about the difference between a chronic degenerative disease  
17 injury and an accident-caused injury, all right? The *Daubert*  
18 response is a response to a specific argument made by GM, which  
19 is a strong argument, which is, these experts can't tell the  
20 difference between 2015 and 2013. And what our response was  
21 intended to convey to New GM and the Court is, that's right,  
22 they're not going to. That's all we meant to say.

23 THE COURT: All right. Understood. I'll read the  
24 briefs and decide for myself. I just revealed that I haven't  
25 read the briefs yet.

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1           Anything else on Scruggs that we need to deal with  
2 now?

3           MR. BROCK: I was just going to raise the issue as to  
4 whether or not the Court had given any thought to time  
5 allocations for the case.

6           THE COURT: To what allocations?

7           MR. BROCK: Time allocations per party.

8           THE COURT: It's sort of hard for me to do that in  
9 advance of the joint pretrial order, which hasn't been filed.

10          MR. BROCK: That's fine. We can take that up later.  
11 We had talked about it at the end of the last trial just  
12 briefly, and we can talk about it a little bit and be prepared  
13 at the pretrial. That will be fine.

14          THE COURT: Why don't you add to the pretrial order,  
15 if you have views on how much time you think you should be  
16 allocated and whether it should be evenly divided, etc., you  
17 can opine. I'm cautioning you that, as I said in the last  
18 trial, that I think the earlier trials were a bit overtried,  
19 and my intention is to ensure that that doesn't happen. I  
20 think the last one went pretty well and quickly, and I'd like  
21 to replicate that. So be mindful of that and don't be greedy  
22 with what you're asking for.

23          MR. BROCK: Thank you.

24          THE COURT: All right. Good.

25          Next item on the agenda is the Baker Garcia issue, and

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1 I confess I don't really understand what that issue is or I'm a  
2 little bit at a loss. I would think either it does qualify or  
3 it doesn't qualify, and why is there uncertainty about that,  
4 why does it need to be briefed, why is this issue arising, and,  
5 if it doesn't qualify, what happens then?

6 Anyone? Bueller? Bueller?

7 MR. GODFREY: We're canvassing, your Honor.

8 MR. BLOOMER: Your Honor, Ferris Bueller. No, Andrew  
9 Bloomer on behalf of New GM. I think we share the Court's  
10 views as to why it would be briefed. The plaintiffs have  
11 raised this issue with us in a meet-and-confer --

12 THE COURT: Who represents the plaintiffs in Baker  
13 Garcia?

14 MR. BLOOMER: I think it's the Bailey firm.

15 THE COURT: Okay.

16 MR. BLOOMER: And so we were surprised, just given the  
17 fact that discovery is ongoing, the selection was made sometime  
18 ago. We don't agree with the plaintiff's position on it. I  
19 participated in a meet-and-confer last week on the issue, and  
20 the plaintiffs have taken the position that they want to raise  
21 this issue with the Court. We're happy to respond to that. I  
22 think we proposed -- they were planning I think to file,  
23 subject to the Court's agreement, their letter motion on this  
24 today and then we were going to respond early next week. We've  
25 only arrived at that juncture because the parties have a

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1 dispute as to whether that case is properly within the category  
2 it's in. We don't think there is a valid basis to the  
3 plaintiff's position and tried to convince them of that, but  
4 without success, and they seem determined to want to file  
5 something on it.

6 THE COURT: All right. Well, since they're not here,  
7 I don't have much --

8 MR. HILLIARD: I can speak generally, Judge, as we've  
9 been monitoring that on the MDL side, based on my appointment  
10 in it. It seems the issue, according to the Bailey firm, is  
11 that it doesn't qualify as a Category C because they actually  
12 got the repair done to the ignition switch prior to the  
13 accident and there's no issue that the replaced ignition  
14 switch, the repaired ignition switch, was defective, so the  
15 Bailey firm is advising GM this isn't a vehicle that's subject  
16 to the definition of Order 107. Again, I'm just reading the  
17 concerns that the plaintiff's attorneys have about whether or  
18 not proceeding with the effort necessary to try the case should  
19 go to this specific file, given that the client got the  
20 ignition switch repaired and it's not subject to recall.

21 THE COURT: So I don't understand what the claim is if  
22 the repair was made in advance of the accident and there's no  
23 claim that the replacement switch was defective.

24 MR. HILLIARD: One of the dangers of offering --

25 THE COURT: Seems like a more fundamental problem than



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1 whether it fits in Category C.

2 MR. HILLIARD: One of the dangers, Judge, of offering  
3 this information to you semiblind and reading it from here is  
4 that I would anticipate you would either ask that or even a  
5 more fundamental question. I would suggest and perhaps hope  
6 that you would allow this to be dug into a little bit and let  
7 me try to either offer some explanation through a filing or get  
8 to the bottom of it with the lawyer who is representing these  
9 plaintiffs again. We're monitoring the issue and participated  
10 in the meet-and-confer with Mr. Bloomer, but we are not  
11 primarily responsible. But I hear what your concern is. I  
12 know that you want this answer. I don't have it right now. I  
13 may get it before the end of this hearing today, but I simply  
14 don't know.

15 THE COURT: Okay. I mean, I think you ought to get to  
16 the bottom of this because, again, based on what you just  
17 said -- and I recognize that you're not representing them and  
18 there are some dangers in opining, therefore, but --

19 MR. HILLIARD: I'm not passing it off on somebody  
20 else. I will get to the bottom of it, report back to the  
21 Court, and deal directly with GM on this issue. With a short  
22 reprieve.

23 THE COURT: Okay. I mean, if what you said is the  
24 case, then I again think there's a more fundamental issue, and  
25 I think the remedy is not withdrawing it from Category C or the

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1 bellwether program, it's withdrawing it altogether, and I'm  
2 looking back at the initial complaint and what allegations are  
3 made in the complaint. There may be many fundamental problems  
4 on that front as well. But seems like you all need to think  
5 about this and discuss it.

6 MR. HILLIARD: And I read between the lines of what  
7 you just said, Judge, and I share that concern too. I will  
8 find out as soon as this hearing is over.

9 THE COURT: All right.

10 MR. BLOOMER: Your Honor, I just have one thing. The  
11 fundamental issue you raised was addressed on our  
12 meet-and-confer. I did ask, and so our position is, if they  
13 want to dismiss the case, that's their decision. But there are  
14 cases like this. It's a representative case. I did ask  
15 plaintiff's counsel during the meet-and-confer, in your case  
16 are you challenging the adequacy of the recall remedy, and the  
17 answer was yes. Obviously that's been an issue in other cases  
18 that the Court has had as part of its bellwether procedures.

19 THE COURT: I don't think I've had a case where the  
20 accident occurred after the recall was announced, so the issue  
21 has always been whether that evidence is admissible because the  
22 recall postdated the accident. It sounds like this is a  
23 different scenario.

24 MR. BLOOMER: It may be, but if the challenge -- if  
25 it's part of their case and their claims against my client that

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1 the recall remedy was ineffective and somehow had some  
2 involvement in this action, in this accident, then we can  
3 address this in briefing, but I think that firmly fits into the  
4 category which doesn't otherwise limit it.

5 THE COURT: All right. Well, the Bailey firm is not  
6 here. I don't want to get too far out in front of this issue.  
7 But needless to say, I do think we need to get to the bottom of  
8 it and make sure that we're not wasting our time in one way or  
9 another on it.

10 So sounds like they intend to file something by the  
11 end of the day and New GM proposed to respond by Monday, which  
12 is fine with me. It is a holiday, but I'll be working, so if  
13 you all want to file it on the holiday, that's fine by me.

14 Anything else to discuss there?

15 MR. BLOOMER: No. Probably makes sense to get it  
16 resolved sooner rather than later, your Honor. We're happy to  
17 file on Monday.

18 THE COURT: I would think so. And assuming that this  
19 is withdrawn, either because it's dismissed or just withdrawn  
20 from the bellwether program, if you will, what does that mean?  
21 I guess that leaves us with just the one Gray case, is that  
22 correct?

23 MR. BLOOMER: Yes, your Honor.

24 THE COURT: All right. Very good.

25 Next item is --

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1           MR. BROCK: Your Honor, I just want to mention, I  
2 don't think just withdrawing the case from the bellwether case  
3 is an option. I think the plaintiff's options are a dismissal  
4 or they can come to you for relief, but I don't think, after a  
5 case is selected and discovery is under way, that they have the  
6 option of just saying, we decide not to proceed with this case.  
7 It's either they would dismiss the case or they would come to  
8 you for the relief that we've been talking about.

9           THE COURT: Well, I'll reserve judgment on that. I  
10 think it is a valid question. Thinking back, and I'd have to  
11 look at the bellwether orders, you know, the bellwether was  
12 presumed, in essence, that you all agreed on what cases fit  
13 within what category, defined those categories, but I don't  
14 think there was a process to adjudicate as a threshold matter  
15 which cases were in which categories. That being said, GM made  
16 its selection on July 24<sup>th</sup>, Docket No. 4318, so I think to  
17 the extent that the point is that if counsel in that case  
18 believed that it was not actually properly in Category C, then  
19 they really should have spoken up at some point between  
20 July 24<sup>th</sup> and today, and it's slightly problematic that they  
21 didn't immediately say, hey, wait a second, we're not actually  
22 a Category C case. So in any event, I'll leave it there for  
23 now. I'll look for the briefs, and then we'll take it up at  
24 that point.

25           MR. BROCK: I just want to mention one other thing.

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1 I'll look at this as soon as we finish here.

2 I do think, like for some of the other selections,  
3 there is an option to strike a case before expert testimony is  
4 undertaken, so I think that date comes along in November, if I  
5 recall, but I'll need to look at the order again on that.

6 THE COURT: Give me one second on that.

7 December 1.

8 MR. BROCK: December 1? Okay.

9 THE COURT: So that's certainly an option as well.

10 All right. I'll look for those briefs.

11 That brings us to next steps for personal  
12 injury/wrongful death cases. I am well aware of the pending  
13 and long-pending summary judgment motion on the Category B  
14 cases. I don't quarrel with your reminding me of it, but  
15 suffice it so say you don't need to. I wish I could have  
16 decided it already, but I have given you a little small glimpse  
17 of what my docket and life is looking like these days. So I  
18 will get to that as soon as I can. There are only so many  
19 hours in the day, and my focus right now obviously needs to be  
20 on resolving issues in connection with the upcoming trial, so  
21 hopefully I will resolve that sooner rather than later and that  
22 will break the logjam, if you will, at least on that category  
23 of cases.

24 Beyond that, I guess the question is, what else is  
25 there to discuss? At the last conference I had raised a couple

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1 issues that we didn't get a chance to discuss because I had to  
2 leave. One was whether there is any need or it would be  
3 helpful to have something along the lines of the intensive  
4 settlement protocols that Judge Selna had implemented or used  
5 in the Toyota case. Here, I think the sense I got from the  
6 brief discussion we had is that everybody thought things are  
7 thus far proceeding relatively smoothly and there may not be a  
8 need for that just yet, but Ms. Bloom wasn't here, and in any  
9 event, we didn't have time to get into the particulars.

10 I'd also raised the question that we didn't get to at  
11 all with respect to how we should proceed with respect to the  
12 category -- I haven't checked the most recent letter to see if  
13 it's still 349 -- but the plaintiffs who assert ignition  
14 switch-related claims in nonignition switch-recalled vehicles.  
15 I guess the question in my mind is, are there really common  
16 issues in those cases, are they all one-off cases, is there  
17 anything that can be done in the context of the MDL as opposed  
18 to, you know, trying them or adjudicating them individually,  
19 are they within the scope of the settlement discussions that  
20 are ongoing, so on and so forth. And I guess I don't entirely  
21 even understand what that category means. As I understand it,  
22 they're essentially cars that were not recalled in connection  
23 with all these recalls but allegations are nonetheless being  
24 made with respect to ignition switch issues in them, is that  
25 correct?

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1           So I don't know what order you want to take these  
2 issues up in, but those are the things that I wanted to flag.

3           MR. GODFREY: Your Honor, I think the parties  
4 suggested that we would be having a meet-and-confer to discuss  
5 a number of these things. Ms. Bloom can address this, and I  
6 may have some comments on settlement when we get to that topic.

7           THE COURT: You've got to speak up and more slowly. I  
8 didn't understand what you just said and I'm sure the court  
9 reporter didn't either. Say again?

10          MR. GODFREY: Fair enough. I think that we had  
11 suggested in the status agenda letter that we would be having a  
12 meet-and-confer to discuss a number of these topics, and I  
13 think that rather than basically take the Court's time this  
14 morning without having thought through what might make sense,  
15 we should have that meet-and-confer with our counterparties.  
16 As to the settlement question, I think Ms. Bloom can comment on  
17 that. I may have some additional comments when we get to the  
18 settlement portion of the agenda. But my suggestion to the  
19 Court is, we understand the question, and I think that it would  
20 be better, from our perspective -- unless the Court wants us to  
21 hypothesize other alternatives, I think it would be better for  
22 us to have a meet-and-confer and have an organized presentation  
23 to address the Court's more specific question. That would be  
24 my suggestion to the Court.

25          THE COURT: All right. That's fine with me.

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1           Mr. Hilliard, given that, I'm not sure you need to be  
2 heard, but --

3           MR. HILLIARD: I think you were moving towards the big  
4 remaining elephant in the room, Judge, and that's the  
5 prebankruptcy dockets. They're pretty robust. I know that the  
6 Hilliard-Henry docket and a few others are either going to need  
7 to be tried or disposed of in some way. I know that to date  
8 General Motors has clearly said, look, we're not saying we're  
9 not interested, we're just saying we're just not interested  
10 now. So I wanted to be sure the Court's aware that they're not  
11 being ignored either by General Motors or by my insistent  
12 discussions with General Motors about, let's talk about these,  
13 but sooner or later they have to go somewhere and be addressed,  
14 either on a one-off basis because they're all -- they've all  
15 been bellwethered, and they're simply pre '09 accidents, so  
16 these are folks who are still waiting to address how that might  
17 relate with the first question of the day, which is, what's  
18 going on with the bankruptcy in regards to settlement? How  
19 does this affect this MDL? You know, my sense is there is a  
20 little bit of inertia in regards to the EL cases because of the  
21 trial that sat in December. The special master, Layn Phillips,  
22 now has a date with the EL team to discuss whether or not  
23 there's a mechanism to resolve those cases prior to the  
24 December trial study. And my other sense is that sooner or  
25 later the buckets of cases that are prebankruptcy and that are



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1 injury and death will likely be addressed by General Motors,  
2 and my suggestion to them is, you know, makes some sense to do  
3 it in conjunction with the EL, since there is a court-appointed  
4 special master. That said, I've been very successful both with  
5 Ms. Bloom and Mr. Brock and Mr. Dreyer in discussing dockets of  
6 cases without help from a mediator. I've found them to be both  
7 attentive and reactive, once they get the greenlight from their  
8 client, but right now, you know, they've been pretty clear that  
9 that greenlight has yet to come as to those dockets of cases.

10 THE COURT: All right. And there are a few things  
11 packed in there that I want to respond to.

12 First is, it doesn't feel from my end that there's  
13 inertia on any front in this MDL, but that's neither here nor  
14 there.

15 Second is, I think by term -- I'd have to look at the  
16 order of appointment -- that Mr. Phillips was appointed solely  
17 with respect to the economic loss claims. Now I had floated at  
18 the last conference whether he could be used in connection with  
19 personal injury/wrongful death cases and indicated that you all  
20 should discuss that and perhaps address it in your proposal,  
21 and then the proposed order did limit it to economic loss. So  
22 at the moment those are the terms of his appointment. Now it  
23 may be that at some point down the road that could or should be  
24 revisited and the scope of his appointment should be expanded.

25 There's obviously, as I mentioned at the last

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1 conference, also Judge Cott, who could be available in  
2 individual instances to help. But I did want to just note  
3 that.

4 And then the last question I have is, well, I'm trying  
5 to think of how the presale order cases on the one hand --  
6 there's no difference substantively between them and postsale  
7 order cases. It's just a function of the date of the accident.  
8 And in that regard, you know, to the extent that we've  
9 bellwethered cases from Phase I or Categories A, B, or C or  
10 what have you, I would think that those are serving the same  
11 function with respect to those pools of cases as they are with  
12 respect to the postsale order. I guess the question I have is,  
13 are there issues with respect to the bankruptcy litigation and  
14 appeals that are either pending before me or being briefed  
15 before me that have a bearing on settlement in those cases, and  
16 if so, can you flag those for me. I guess I'm just trying to  
17 figure out what, if anything, is holding those cases up at this  
18 point.

19 MR. HILLIARD: I believe that's a back table question,  
20 Judge.

21 THE COURT: I agree.

22 MR. GODFREY: We're conferring, your Honor.

23 THE COURT: All right. I mean, the other option is,  
24 you could put this within the scope of the things that you're  
25 going to confer with --

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1 MR. GODFREY: Yes.

2 MS. BLOOM: That's exactly what I was suggesting, yes,  
3 is that we'll address your issue about the interplay of the two  
4 courts and the prebankruptcy cases in that five-page letter,  
5 your Honor.

6 THE COURT: I was actually thinking that you should  
7 address it in the context of your discussions about essentially  
8 where we're going on all the personal injury/wrongful death  
9 cases and settlement/remand/, you know, intensive settlement  
10 protocols and so forth.

11 MR. GODFREY: Ms. Bloom and I were debating that, as  
12 your Honor observed, and I always lose out when I debate with  
13 Ms. Bloom, so I think we'll note it in the letter that we file  
14 about the interplay with bankruptcy, but I think the  
15 meet-and-confer is the better way to go here to at least have a  
16 structure to this discussion that might be helpful to the  
17 Court.

18 THE COURT: Okay. I think that's right. And I think  
19 in the context of that meet-and-confer, number one, again, you  
20 should talk about the intensive settlement idea, and I don't  
21 mean to be suggesting that I have a view that it is appropriate  
22 here or not. It may not be. I'm just trying to figure out  
23 what, if anything, I can do to move things along. But second,  
24 and it may be that the way New GM has framed the different  
25 categories in its update letter is the way to go, but it would

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1 be helpful I think to take a step back and look at each of  
2 those categories, and I know on Category B, for example, that  
3 what you need is a ruling from me, but with respect to the  
4 other categories, you know, just sort of talk amongst  
5 yourselves on each side separately, individually, and then  
6 together about sort of where you see these cases heading, you  
7 know, whether and when remand might be appropriate, whether the  
8 presale order cases are different in any way, and if there are  
9 any issues that I can or should resolve to deal with those and  
10 what have you. I guess I'm just trying to get a sense of what  
11 I can do to sort of move each of those categories forward.  
12 Again, I understand Category B, what the answer to that is, but  
13 I don't have as good a sense with respect to some of these  
14 other categories.

15 MR. GODFREY: I think what the Court is really asking  
16 us is whether at the current time the parties can outline for  
17 the Court a path to what we refer to as the end game resolution  
18 for the MDL, and I don't know whether we're at that stage yet  
19 or not, but I think that's what you're really asking, because  
20 all these specific questions that the Court has raised really,  
21 when you package them together, ask the ultimate question, what  
22 does this look like and how do we resolve it, over what period  
23 of time, and what's the expense, and it may be premature to  
24 identify the precise path, although we are very far along after  
25 three years and we certainly should have that discussion, and I

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1 think that's what you're really asking, unless I'm missing the  
2 point of the Court's questions.

3 THE COURT: No, that is exactly what I'm asking. But  
4 what I'm suggesting is it might be helpful to discuss that in  
5 the context of each of these categories. So say for Phase I  
6 cases, you know, my sense is, the bellwether process has run  
7 its course, you guys suggested that you had what you needed on  
8 that front, and for the most part my understanding is that  
9 those cases are now essentially in settlement discussions and  
10 New GM has been prioritizing cases or lawyers who have multiple  
11 cases, and sort of where that stands, where you see that  
12 headed, how long you think that process should be allowed to  
13 play out before cases start to get remanded, because if there's  
14 nothing further for me to do in that category, then I think  
15 that is the next step, after giving you whatever appropriate  
16 time you need to try and resolve them before we remand, or, if  
17 I'm wrong about that, what else we should be doing in that  
18 category.

19 And then for example, with respect to these  
20 nonignition switch or ignition switch-related claims and  
21 nonignition switch vehicles, you know, what that category  
22 involves. You know, do you envision a bellwether process with  
23 respect to those cases, are there common issues among them or  
24 are they really one-off issues, is there anything to be done  
25 here that we haven't already done, and so forth. And then with

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1 respect to the presale order cases, is there anything specific  
2 to those cases, you know, and in particular is there anything  
3 that I should be doing that I haven't already done and could do  
4 and are there any rulings that I should be making or  
5 prioritizing that would help you kind of expedite and move the  
6 process along as to each of these categories. Those are the  
7 kinds of questions that I would love your thoughts on and I  
8 think we should aim to discuss at the next status conference.

9 So if you want, maybe a week before the next status  
10 conference, to submit something on that, like a joint letter, I  
11 would think a joint letter could be feasible. What are your  
12 thoughts?

13 MR. HILLIARD: That's fine with us, Judge.

14 One other thought is, should Mr. Phillips be amenable  
15 and GM be amenable, and the economic loss plaintiffs are also  
16 amenable, if the Court would allow us to submit an amended  
17 order inviting the personal injury and wrongful death plaintiff  
18 docket to that mediation.

19 MS. CABRASER: Your Honor, Elizabeth Cabraser. From  
20 the standpoint of the economic loss plaintiffs, what we need to  
21 consider, and we will consider that, is, Mr. Phillips'  
22 appointment is to focus on economic loss three years into the  
23 litigation. We hope he'll be able to do that as a priority.  
24 We can see how things developed. I appreciate Mr. Godfrey's  
25 statement about an overall end game. We're all starting to

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1 think about that. We'll see how things develop, but the one  
2 thing I wouldn't want to see is for us to lose the little bit  
3 of momentum we have with Mr. Phillips, who's given us a date  
4 after coordinating his very complicated and busy schedule as an  
5 in-demand mediator and our schedules. So we'll take that under  
6 advisement, but at this point we'd request that the order  
7 remain in place.

8 THE COURT: Well, I'm certainly not amending it as we  
9 sit here now, but it's something that you all should discuss  
10 amongst yourselves. And I would say I share Ms. Cabraser's  
11 concern -- I'll put it that way -- that, you know, I think I  
12 did agree with lead counsel that a mediator was appropriate at  
13 this juncture, in particular with respect to the economic loss  
14 claims, because I felt that the time was ripe on that side of  
15 things and the progress was ongoing on the personal  
16 injury/wrongful death side and therefore less necessary, but  
17 that having a mediator involved would perhaps jump-start things  
18 on the economic loss side, and I remain of that view, which is  
19 another way of saying that I do think that should be his  
20 priority, and my only hesitation about expanding the scope of  
21 his appointment would be if that somehow distracted him or, you  
22 know, made it more difficult for him to kind of focus and  
23 prioritize the economic loss things. But if, based on your  
24 discussions with one another and with him, it seems that he  
25 could be helpful on the personal injury/wrongful death side of

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1 things and it wouldn't detract from his ability to be helpful  
2 on the economic loss side of things, then I don't think I have  
3 any objection or problem in principle to expanding the scope of  
4 the appointment. But that's my primary concern and, relatedly,  
5 whether it's as necessary because I think progress is being  
6 made. But I think these are among the issues to discuss in the  
7 context of the sort of end game discussions which Mr. Godfrey  
8 has alluded to.

9 So why don't you submit a joint letter addressing all  
10 these issues one week in advance of the next status conference  
11 and then we can discuss them as needed at that time and decide  
12 how to proceed.

13 I had also raised, and we didn't get to in the last  
14 conference, the question of whether there are other cases like  
15 the Anglin case, that is, presale order cases that had been  
16 closed because of the bankruptcy proceedings and essentially  
17 not reopened. I don't know if you know the answer to that or  
18 if there's anything to be done on that other than just sort of  
19 wait and see if any plaintiff's lawyers wake up and suddenly  
20 realize that they might have an issue on that score.

21 Anyone have anything they want to say?

22 MR. HILLIARD: One of the things that have come up in  
23 bankruptcy, Judge, is that sooner or later, should there be an  
24 agreement found to exist between Guck and the plaintiffs, that  
25 the notice that Guck is proposing with information provided by



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1 GM would be very, very broad and would include notice of, if  
2 you have a personal injury or wrongful death claim or an  
3 accident that occurred in any of these vehicles, you may have a  
4 claim. Frankly, other than that, I have not gotten, received  
5 calls or -- like we did early on in this litigation from  
6 lawyers and said, we have one, what do we do and where do we  
7 go. But in discussing with the other side in bankruptcy court  
8 about the purpose of the notice, they wanted it to be brought,  
9 and there may be a client or a customer that gets the notice of  
10 the Guck settlement, if it ever occurs and if notice ever goes  
11 out at that level, where they might appear and say, I didn't  
12 know that there was a defect and here I am.

13 THE COURT: Well, that's a different issue, and I  
14 really don't want to get into that. I think Anglin, if I  
15 remember the circumstances correctly, was a case where a suit  
16 was filed but the plaintiff essentially consented to either  
17 dismissal or closing of the case because of the bankruptcy  
18 court's ruling and then post the Second Circuit ruling  
19 essentially said, hey, you know, now we want to reopen the  
20 case. And my question is, are there other cases that are  
21 actually lawsuits that have been filed that would fall within  
22 that category that we should be mindful of or not? I'm not  
23 interested in lawyers or potential plaintiffs who haven't yet  
24 realized they might have a claim. I think there are all sorts  
25 of issues there, and I don't want to get into them. And it may

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1 be that we should just leave things be and if other lawyers pop  
2 up like Anglin, we'll deal with them when they pop up. But  
3 maybe there's no need to figure that out yet.

4 MR. HILLIARD: I don't know of any right now.

5 THE COURT: Okay. So I'll leave that be.

6 Anything else on the settlement front to report? I  
7 infer that things are proceeding with respect to Mr. Phillips,  
8 and I heard a December 1 date that you have at least a  
9 preliminary meeting, is that correct?

10 MS. CABRASER: That's correct, your Honor. That's  
11 been set for Newport Beach, I believe.

12 THE COURT: Okay.

13 MR. GODFREY: December 1 with Judge Phillips in  
14 California, next week Mr. Berman and I are seeing each other a  
15 lot. We're having a mediation in Orange County. Don't know  
16 whether that will result in anything or not.

17 And then we may -- I guess I'd say stay tuned.  
18 There's something else that in the not-too-distant future we  
19 may be able to bring the Court to by way of settlement. We're  
20 not yet there and see whether it takes place, but it's moving  
21 in the right direction.

22 THE COURT: That's tantalizing. Okay. Anything you  
23 do want to tell me?

24 MR. GODFREY: It's a small marker, your Honor. I just  
25 don't like surprises for the Court.

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1 THE COURT: Okay. Anything else that you want to  
2 actually share or -- all right. Very good.

3 Anything else? Any new business? Otherwise, I think  
4 we need to talk about the next date.

5 MR. GODFREY: There was one other thing, your Honor.  
6 And I really hate to raise this because of your Honor's  
7 comments earlier. It's not about the topic you've been clear  
8 you don't want to talk about, so I'll just start by saying  
9 that. I did want to remind the Court that under the Court's  
10 prior briefing schedule, we're filing our benefit of the  
11 bargain summary judgment motion on plaintiff's claimed economic  
12 loss damages this Friday. And so I know the Court's seen a lot  
13 of briefs and I didn't want you to think we're just  
14 operating --

15 THE COURT: I am well aware of that. I am aware of  
16 that, I'm aware of the motion to amend, I'm aware of the motion  
17 to remand in one of the member cases, I'm aware of the  
18 supplemental briefing in the successor liability claims, I'm  
19 aware of the 19 bankruptcy appeals that are either fully  
20 submitted or on their way to being fully submitted. I am well  
21 aware of all of that, believe me.

22 MR. GODFREY: I just didn't want to be --

23 THE COURT: The bearer of bad news?

24 MR. GODFREY: I'll just sit down then, your Honor.

25 THE COURT: Mind you, I don't mean to chill you from

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1 filing things that actually do warrant being filed, but I just  
2 want you to be a little sensitive to the situation.

3 All right. Next status conference, we have a final  
4 pretrial conference in connection with Scruggs on  
5 October 25<sup>th</sup>. We could to some extent, I suppose, address  
6 MDL-related issues in that context, but that's not too far off,  
7 and I know the Orange County trial was within days of that and  
8 therefore all of you may not be here, so I guess the question I  
9 have is when we ought to reconvene. And then we obviously have  
10 the trial. So any thoughts?

11 MR. BERMAN: On our side of the table, we're thinking  
12 after Thanksgiving, sometime after Thanksgiving. And I know  
13 that we're going to be here in the bankruptcy court on  
14 December 4<sup>th</sup>, so maybe the 5<sup>th</sup>?

15 Oh, the final pretrial for bankruptcy is the 5<sup>th</sup>.  
16 Well, somewhere around that, either the day before or the day  
17 after. I think we're all in town.

18 THE COURT: So I have a trial in another matter  
19 scheduled for the 6<sup>th</sup>, meaning the 4<sup>th</sup> might be better on my  
20 end. Is that --

21 MR. GODFREY: The 4<sup>th</sup> would work for us, your Honor.

22 THE COURT: Okay.

23 MR. BERMAN: Sold.

24 MS. CABRASER: Sold, your Honor.

25 THE COURT: All right. So December 4<sup>th</sup>, 9:30, the

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1 usual time.

2 And in addition to the usual agenda letter, you'll be  
3 filing a week before that this letter on sort of settlement and  
4 end game issues writ large. Anything else?

5 MR. BROCK: I have one extraordinary request on the  
6 scheduling. I think I have this right, that our next trial is  
7 scheduled to begin on Thursday, November the 2<sup>nd</sup>?

8 THE COURT: Correct.

9 MR. BROCK: And I wanted to inquire if it would be  
10 possible for us to conduct our pretrial conference maybe Monday  
11 of that week once we're all here, unless you feel like that is  
12 too late in time to do it, but --

13 THE COURT: Well, unfortunately, you're forgetting the  
14 reason that the start date was postponed to Thursday, which is  
15 that I'm in Florida for the MDL conference Monday through  
16 Wednesday. So unless you all want to do it in Palm Beach, I  
17 think --

18 MS. SMITH: That would be fine, your Honor.

19 MR. GODFREY: We can work with that schedule,  
20 actually, your Honor.

21 MR. BROCK: That would be easier for me.

22 The reason for my request is I'm taking my  
23 grandchildren to Disneyworld that week, that last week in  
24 October. But I will work it out.

25 THE COURT: All right. The other thing is -- well,

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1 yes. We'll leave it as is. I apologize for not being able to  
2 accommodate you on that.

3 Anything else?

4 MR. SHEPARD: Briefly, your Honor, to go back to the  
5 issue from the Scruggs trial, the Court heard argument earlier  
6 today about the issue of whether certain opinions by  
7 Dr. Keepers and Lo, whether plaintiff had somehow waived those  
8 opinions in the *Daubert* response brief. That argument was  
9 raised by New GM last night in their reply letter for the Court  
10 and there has been argument, but I wanted to offer the Court,  
11 just to let the Court know that it has not been briefed in the  
12 *Daubert* motion. So when your Honor turns to those, this issue  
13 of waiver isn't going to be presented in written form. And I'd  
14 request the ability to brief that, and I can work out a  
15 schedule with opposing counsel, so your Honor has something on  
16 that issue in writing. It's an important issue and it hasn't  
17 yet been fully briefed.

18 THE COURT: All right. I'm not going to entertain  
19 that just yet. I'll look at the briefs myself. I mean, I  
20 think the briefs are what the briefs are, and if you didn't  
21 respond to an argument, then I think it's therefore been waived  
22 or unopposed. I'm not going to give you another opportunity to  
23 brief it. So what's done is done.

24 All right. Just a reminder that on the 25<sup>th</sup> we're  
25 set to start at 9:00, not 9:30, and I'll be interrupting the

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1 conference to address the prospective jurors whenever they are  
2 convened. So I will see some of you at 9:00 on the 25<sup>th</sup>. I  
3 will be hearing from all of you in one form or another, I'm  
4 sure, and I'll see most of you in December.

5 So we are adjourned, and have a pleasant day.

6 ALL COUNSEL: Thank you, your Honor.

7 THE LAW CLERK: All rise.

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