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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re GENERAL MOTORS LLC
IGNITION SWITCH LITIGATION

14 MD 2543 (JMF)

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New York, N.Y.
January 8, 2018
9:45 a.m.

Before:

HON. JESSE M. FURMAN,

District Judge

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1 (In open court)

2 THE COURT: You may be seated. All right. Good
3 morning. Sorry we are getting off to a late start. You are
4 well aware we have had some technical difficulties this
5 morning, as a result of which my understanding is that folk on
6 Court Call may be able to hear us or may not.

7 Unfortunately, I don't think we can hear them, which
8 normally wouldn't matter except that I understand Mr. Bailey is
9 on Court Call, and I had granted him speaking privileges.

10 Mr. Hilliard..

11 MR. HILLIARD: I would like to introduce him, Judge.
12 He actually made it to New York.

13 THE COURT: Lo and behold.

14 MR. HILLIARD: Was going to wait. This is Mr. Kenneth
15 Bailey from Houston, Texas, who is here and ready to speak to
16 the court about some representations made by General Motors.

17 THE COURT: That is good. That makes me a little less
18 grumpy, but I am still a little grumpy. Mr. Bailey, welcome.
19 It is good to have you there. You can stay there for now, but
20 in due course I will certainly want to hear from you.

21 All right. Well, I don't know whether anyone can hear
22 us on the other end, but just a reminder to speak into the
23 microphones. Why don't we start in our customary fashion. For
24 the benefit of the Court Reporter, state your appearances for
25 the record and we'll go from there.

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1 (Case called)

2 MS. GEMAN: Our excuse for Ms. Cabraser isn't so
3 exciting. She has been felled with the flu and apologizes for
4 her absence.

5 THE COURT: That is definitely not as exciting, but
6 perhaps more common. I wish her well and speedy recovery. It
7 is good to have you, Ms. Geman.

8 Happy New Year to everybody.

9 MR. HILLIARD: To put the court in a better frame of
10 mind, it appears Court Call can hear you and are participating
11 at least able to hear both you and counsel.

12 THE COURT: Are or are not?

13 MR. HILLIARD: Are.

14 THE COURT: Wonderful!

15 All right, then. I think I need a moment to reframe.
16 All right. Very good. Let's go. So I think we really only
17 have two items or two and a half items on the agenda, but let
18 me start Items 1 through 4, the bankruptcy proceedings,
19 coordination with related actions, document production and
20 deposition update. Is there anything we need to discuss on any
21 of those fronts?

22 MR. GODFREY: The only thing I mention, your Honor,
23 when we were last here in October, I had put a marker down that
24 you would be learning about certain settlements. What I was
25 referring to was the multistate AG settlement, and that at the

1 time I was hopeful but not as hopeful for the Morris County
2 settlement as well. Those are important inflection points
3 because while your Honor did not see much work yet as a result
4 of those matters, had we been unable to settle them, they would
5 have taken a substantial amount of time. They filled much time
6 of last year for Ms. Bloom, and myself for a small time.

7 They have now been settled, resolved successfully and
8 the court will not have face the challenges it otherwise would
9 have faced had we not been able to successfully settle those
10 including those 49 state multistate AG settlements. That is
11 what I was referring to. The court was, I am sure, hopeful for
12 something else.

13 From my stand point, those were significant matters
14 that would have imposed significant burdens to the court. I
15 couldn't say it to the court at the time, but we have resolved
16 those matters and we have freed up a small amount of time to
17 other matters. The court would like that for reference.

18 THE COURT: I am glad to hear that and thank you for
19 that update. Anything else to discuss on those fronts?

20 MR. GODFREY: No.

21 THE COURT: Let's get into the big ticket item of
22 where we're going from here on the personal injury wrongful
23 death front. Before I get into the mix of that, I did have a
24 question which was that, and I can't say that I've kept sort of
25 scientific traffic track, but it seemed to like in the last few

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1 weeks there has been an influx of directly filed cases.

2 Anyone have any idea what is going on there?

3 MR. GODFREY: No. One of the points that we were
4 going to discuss with the court about the future PI wrongful
5 death docket is that in the last six months, if that trend
6 continues, then we expect another 375 to 415 cases that is
7 coming here. There has been an up-tick in the last three
8 months. There are 66 cases in the last two months. We don't
9 know why that is, but Ms. Bloom has some thoughts on that and
10 she also anticipates another bucket of cases coming into the
11 MDL, I think.

12 She thinks they will come into the MDL. Whether it is
13 by statute of limitations or other issues, the MDL is not
14 static, not like a lot of MDLs where courts get to a point
15 about discussing remand. This is an MDL where there is still
16 is an active, ongoing, additional caseload coming into the MDL,
17 and we expect a fair number of more cases that will get filed
18 and transferred and consolidated here.

19 THE COURT: All right. It seemed to me like a number
20 of new ones were filed by the same counsel. Is that correct?

21 MS. BLOOM: Your Honor, that is correct. In
22 particular, I grouped the three law firms together, the Toups,
23 Dugan and Carlson firms, and they have in August filed for 33
24 plaintiffs, in September for 36 and October for 14 and November
25 for 34, and then just in December for 15. So we are in

1 discussions with those firms, but part of the process is
2 obtaining the information on all of their plaintiffs, and so
3 they also have some who are in the MDL prior to this. We have
4 actually resolved quite a number of cases with them originally
5 and then these are all new filings. So we're in the process of
6 getting the information on these plaintiffs and evaluating
7 those claims, and we'll see where that will take us.

8 Then you are seeing in the docket the beginning of
9 some filings by two other firms that are related, and we're
10 aware of those claims as well and the full number of those
11 claims hasn't hit yet. There are a number that are unfiled. I
12 am not sure whether you will see all of the claims because
13 sometimes we get to a point where we do consider and evaluate
14 dockets and resolve claims before they're filed, or whether
15 they will ultimately hit.

16 I do know these ones they had concerns on their part
17 with respect to statutes of limitations.

18 THE COURT: All right. I assume the plaintiffs fact
19 sheet and Order 108 materials, those are being disclosed,
20 produced, et cetera, in the normal course in these cases as
21 they would in any other case. Is that correct?

22 MS. BLOOM: That's correct. It is not the case,
23 though, that as of the cases filed, those things are
24 immediately handed over. So, in other words, what quite
25 frequently happens is the case is filed and then plaintiffs'

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1 counsel will reach out and start to obtain the documents from
2 medical providers and police reports and all those things, so
3 it takes time for those things to come in.

4 It then takes time for our team of engineers and
5 nurses to evaluate those materials until we can get to the
6 point of looking at the docket of claims.

7 THE COURT: All right. Understood. Your audio seemed
8 to have cut out midway. Hopefully that is not going to reverse
9 my mood change. All right.

10 Well, I think I hear that you're monitoring that and
11 it is something that we'll need to discuss as things move
12 forward because it certainly has implications for the issues
13 that we're about to get into with respect to how to resolve
14 these cases global settlements, et cetera, et cetera.

15 Yes, Mr. Godfrey.

16 MR. GODFREY: What we don't know, your Honor --

17 THE COURT: Do you want to try the other microphone
18 since that one doesn't work?

19 MR. GODFREY: -- what we don't know, your Honor, is we
20 have tried to figure out a way to projecting we think in terms
21 of future filings, and we don't have an objectively fact-based
22 basis to do that other than bits and pieces of information and
23 extrapolations, so we know there will be more filings.

24 We know the bucket of perhaps as many as a hundred,
25 but what we don't know is whether in the last six months which

1 would project 375 to 415 is the trend or whether it is a lesser
2 trend. I wouldn't think it would be a greater trend, but
3 clearly it is not just 1s and 2s. It is a bit of a surprise to
4 us in one sense, but in these kinds of cases -- and there are
5 actually very few cases like this in the MDL context -- this
6 happens toward year three and four sometimes where because of
7 statute of limitations or other reasons there is a spike up
8 toward the end. I think that is what we are seeing now.

9 This is not unexpected, but we don't have a way of
10 putting a boundary condition around it, which I am sure is
11 troubling or concerning your Honor. I wish I could give you an
12 answer to that, but we tried to figure out, but we just don't
13 know.

14 THE COURT: It is not so much troubling as it does
15 complicate figuring out how to resolve all cases since we don't
16 yet even know what that universe is. Mr. Hilliard, is there
17 anything you want to say on this front?

18 MR. HILLIARD: Well, first, Judge, we're all tethered
19 to technology, and now Court Call has lost the audio. I regret
20 to be the bearer of that bad news before I speak on this
21 substantive issue. That seems to be the way it is going. We
22 can jump into what my view is on the up-tick in filings. I
23 know some of those firms like -- would the court like to try to
24 call that Court Call issue before we continue?

25 THE COURT: Hang on. (Pause) Let's give it one stab

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1 at trying to get them. Our system shows that we're still in
2 the call, so I don't quite know what the problem is and we have
3 befuddled the tech people here, but let's give it one shot, and
4 if it doesn't work, we'll have to carry on and you'll update
5 people accordingly, but give us one second.

6 MR. HILLIARD: Sure.

7 (Pause)

8 MR. GODFREY: Does this work now or not?

9 THE COURT: It is back.

10 MR. GODFREY: Okay.

11 THE COURT: Probably just temporarily, though.

12 MR. GODFREY: There is a proceeding in another
13 jurisdiction outside the country where the magistrate can push
14 a button, and counsel can keep talking, but he or she is not
15 going to be heard.

16 THE CLERK: Just one movement.

17 (Off-the-record discussion)

18 THE COURT: I think we need to carry on. Just so you
19 know, I do have a kill switch capability myself. I want you
20 all to know that. Mr. Hilliard.

21 MR. HILLIARD: Thank you, Judge.

22 As I was about to say, substantively I was aware of
23 some of those counsel and I know they had been negotiating with
24 GM unsuccessfully. The core issue is going to be how long the
25 court is willing to hold onto the cases to allow for continued,

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1 and I believe ultimately successful settlement negotiations. I
2 think the cases coming in have already been tried through the
3 bellwether process. I think they, as is this case, the way the
4 world turns, those will be cases that are harder to win and
5 probably need to be tried individually and that is maybe why
6 some of the settlement negotiations are not working.

7 I would invite the court to hear Mr. Bailey in regards
8 to some factual issues that may inform the court's decision. I
9 had also watched intake of more cases into the MDL, and I can
10 speak to the Toups law firm in that it seems negotiations were
11 just unsuccessful, frustrated from the plaintiffs' perspective
12 when they knew they had to get them on file.

13 It wasn't an indication they needed to be into the MDL
14 in order to seek any type of court assistance. They just had
15 to get them on file. They might ultimately and I would
16 encourage the court to do so sooner rather than later, be sent
17 back and tried, frankly. They have some factual liability. GM
18 puts a value on them that the plaintiffs disagree with, and
19 they're at an impasse. I don't think the impasse is going to
20 change. I think that the longer the entirety of the injury and
21 death cases stay in this Court, GM gets an unfair negotiating
22 advantage, and something that was left out of GM's letters,
23 frankly as the court knows, these are real people. The cases
24 have been pending for a long time and this is their lives, and
25 loved ones are either hurt or injured and it is time to pull

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1 the trigger if there is no other assistance the court can give.

2 I respect GM's desire to try to settle the cases. I
3 think there has been a shift in the way it is working and I am
4 unconvinced that the MDL process will aid in getting those
5 cases resolved, and I think that they need to now be allowed to
6 go back to their home court and either try them or address
7 whatever judge is there on whether they should be able to try
8 them.

9 THE COURT: All right. I think we're getting into the
10 thick of the bigger issues, so let's just get into it.

11 Let me start by saying that I think I made clear back
12 in October that I was getting a little antsy and suggested that
13 remand might be approaching at least for some categories of
14 cases. I will tell you that I remain antsy and remain of the
15 view that remand may be getting closer for at least some
16 categories of cases, but perhaps reluctantly I am persuaded,
17 upon review of both sides' submissions and in particular by New
18 GM's, there is more work to be done here before we start
19 remanding a large swath of cases.

20 At the same time, I do wholeheartedly agree with
21 Mr. Hilliard's point and expression of concern about the fact
22 that they're real people behind these cases and his expressions
23 of concern about the pace of the schedule and New GM's proposal
24 which would at least for large categories of the cases, give it
25 another 8 to 10 months of unsupervised settlement discussions

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1 before things began moving forward with any deliberate speed or
2 speed at all.

3 So the bottom line is for now at least I do think the
4 cases should stay here, but I think that we are at the point
5 where things need to really begin moving forward and if that
6 means on simultaneous tracks, then it means on simultaneous
7 tracks. If it means only giving a limited amount of time for
8 settlement before we start moving into other either questions
9 of remand or questions of case specific discovery, then so be
10 it. I guess to put it bluntly, I am certainly not inclined to
11 accept GM's proposal of essentially an 8-to-10-month period of
12 a settlement window before we start moving forward on those
13 cases, whatever "forward" in this context means.

14 There are a lot of different subcategories of the
15 cases and I think that my thoughts vary about between them, so
16 let me get into the particulars and I will also say that there
17 are a few that I think I just need to think a little bit more
18 about. These are big-ticket decisions, and I have only had
19 your letter since Thursday or Friday and I need to think about
20 it and think about what the best approach is.

21 At least as to some I do have some more definitive
22 thoughts. Let me start with those.

23 First, on Phase II Category B cases, these are the air
24 bag deployment cases, I generally agree with the parties' joint
25 proposal; namely, that by the 14th of January, GM will provide

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1 to lead counsel and liaison counsel a list of cases that it
2 believes should be dismissed in light of my decision of last
3 month, that by the 14th of February counsel for each of those
4 plaintiffs will provide to New GM essentially a list of the
5 plaintiffs who agree to voluntarily dismiss, a list of
6 plaintiffs as to whom counsel plans to move to withdraw or some
7 factual basis as to why dismissal is not appropriate, and then
8 by the 28th of February would be a filing of the voluntary
9 dismissals or motions to withdraw by counsel.

10 Now, a couple of thoughts. One, is I am inclined to
11 think that those submissions, if you will, or documents should
12 probably be filed on the docket, so I can keep track of sort of
13 where things stand and your respective views on how many cases
14 are in the mix.

15 Two, I had one concern, which is it may be all
16 plaintiffs think I got it right in my decision, but would
17 voluntary dismissal allow for appeal from my decision in
18 December? I imagine there might be some category of plaintiffs
19 who would concede perhaps grudgingly but would concede that my
20 decision would require dismissal of their cases but would want
21 to preserve the issue for review elsewhere. Would voluntary
22 dismissal allow that, or do we need to think of some other
23 means by which those cases would be resolved that would
24 preserve the issue for later review? I don't know.

25 Mr. Hilliard.

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1 MR. HILLIARD: A good point. I hadn't given it much
2 consideration, but it seems like we could potentially identify
3 the subgroup of cases that want to preserve the right to appeal
4 specifically and then carve out either, either leave them on
5 the docket or by some agreement with dismissal if the court
6 wants them off the docket, allow them the right to retain the
7 appeal.

8 THE COURT: I think what I am hypothesizing, there may
9 be plaintiffs and counsel who would concede that their cases in
10 my view no longer have any merit, but don't necessarily want to
11 voluntarily dismiss; and, therefore, lose whatever rights they
12 may have. I don't think the solution to that is to leave them
13 on the docket. I think they should be resolved in that
14 scenario, they should be resolved and there is no reason to
15 keep them around. Indeed, under the Supreme Court's decision
16 in Gelboim, they would presumably have the right to appeal now
17 and wouldn't have to wait the conclusion of MDL proceedings at
18 large. Mr. Godfrey is standing.

19 MR. HILLIARD: I am not ready want to give it some
20 thought. Frankly, if they're going to be dismissed and the
21 court wants to address retaining the right to appeal --

22 THE COURT: Don't give me wrong. I don't want anybody
23 to appeal anything.

24 MR. HILLIARD: -- retain the right.

25 THE COURT: Mr. Godfrey.

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1 MR. GODFREY: I have faced the issue before, and there
2 are two solutions to the court's question:

3 One is voluntary dismissal with prejudice pursuant to
4 the order, and we can work on crafting the language so it is
5 clear they're being dismissed pursuant to the order that
6 specifically granted summary judgment as to that case.

7 Alternatively, we move for summary judgment, a fairly
8 pro forma motion, the court grants it, the applicant has the
9 same effect. It needs to be with prejudice, a final order, and
10 that is the only way preserve the right to appeal. Otherwise,
11 it remains on the docket, at which the court has indicated it
12 is not interested in doing that. I agree. There are two ways
13 to do this: One, craft an order and do this by agreement; the
14 other is we file a motion, the court applies the ruling to the
15 particular case.

16 Those are the two options I think the court has.

17 THE COURT: All right. Why don't you guys discuss
18 this, you have a little bit of time given the schedule I have
19 laid out or accepted and you can sort it out. I would think
20 these are, what I am hypothesizing are cases where everybody is
21 basically in agreement at least as to what should happen in
22 this Court, given that I would think whatever the least onerous
23 way of getting done what needs to be done would make sense, so
24 if you can agree upon the language of an order without the need
25 for motion practice, great. If it is easier to do it as an

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1 uncontested motion, that is fine as well, but I think you guys
2 can hopefully sort it out to everyone's satisfaction.

3 That leads to the question what to do next. I think
4 GM proposes that following the process that I just laid out, it
5 would file a summary judgment motion as to any cases that
6 essentially resist dismissal in whatever form that would come,
7 and plaintiffs more or less proposed that we wait to see how
8 many cases remain and sort of what the specific nature of those
9 cases is, that is, what basis they believe they have to not
10 dismiss.

11 Now, I agree with the plaintiffs on this score. How I
12 think we should proceed may well depend on how many cases are
13 left over after that process plays out, and I think it would be
14 helpful to get a sense of what the numbers and general nature
15 of the remaining disputes is. I think we should either come
16 back shortly after; that is, either have a conference after
17 that conference would play itself out or you can quickly update
18 me and give me your thoughts how we should proceed from there.
19 Maybe that is the better first step.

20 Also, and this is a theme that will return, there are
21 two concerns that will recur as we discuss these different
22 categories. One is to the extent that I entertain motion
23 practice on this front, I am inclined to think it would make
24 more sense to proceed in some sort of show cause form and put
25 the burden and the onus in the first instance on any plaintiffs

1 who believe their cases should not be dismissed in light of my
2 decision to basically make the case why their case is different
3 and should not be dismissed, with an opportunity for GM to
4 respond. I think that makes more sense in the sense that the
5 landscape right now would suggest to me that every case in that
6 category probably would result in dismissal unless there is
7 something unique about it.

8 The second is, and I am not sure how, this is one of
9 the reasons I want to wait and see what number we are talking
10 about, I have a little bit of concerns in a number of these
11 categories GM proposed filing an omnibus motion, and that
12 sounds well and good, but if we are dealing with 50 plaintiffs
13 all of whom are represented by different counsel, GM can file a
14 single motion, but then we are talking about the potential of
15 50 separate oppositions I will have to wade through. I don't
16 know how to handle that and minimize the briefing on and
17 burdens on me. Yes, Mr. Godfrey?

18 MR. GODFREY: A suggestion for the court. Mr.
19 Hilliard is has been point pursuant to various court orders
20 lead counsel. This issue has come up in other MDLs in which I
21 have been involved. I think if Ms. Cabraser were here, she
22 would confirm that.

23 Generally the court has asked Mr. Hilliard to
24 coordinate with counsel for one brief or two briefs and
25 directed that there be one brief filed or two briefs, whatever

1 the court thinks is appropriate and that the lead counsel is
2 responsible for coordinating. I don't want to put a burden on
3 Mr. Hilliard, but that is one of the burdens you assume when
4 you are lead counsel. That is how it has been handled
5 elsewhere, and pretty successfully in most other cases.

6 I haven't had a case where -- I had cases where almost
7 every judge expressed your Honor's concern, but eventually they
8 all gravitated to okay, lead counsel, you heard the other
9 counsel, to get a single omnibus reply brief, give you a little
10 extra time to do that, but that us how it has been handled.

11 THE COURT: I don't think we need to resolve this now.

12 I think that would make sense if it were amenable to a
13 single order or one or two briefs. My concern is that
14 particularly in some of these categories, if they're kind of,
15 each case is a unique set of facts or sui generis issues it
16 won't necessarily lend itself to that kind of omnibus response
17 and we would have to have separate briefs. That is a reason to
18 wait before we decide on a briefing schedule to see what
19 remains after we shake the trees and see what falls out.

20 Mr. Hilliard.

21 MR. HILLIARD: Judge, we will wait, but I am not
22 opposed to that generally, and since Court Call is not working,
23 my team can't hear me, I can't commit. It sounds reasonable.
24 Once we get to the other side of the trees and look at it, I
25 think if it is doable, I can sit down with Mr. Godfrey and we

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1 can come up with a plan and advise the court. It didn't cause
2 my knees to buckle when Mr. Godfrey said it. It seems like
3 something at least can be looked at seriously.

4 THE COURT: All right. You were sitting, so I don't
5 know how you would know if your knees buckled. At least we
6 have the first steps on that category.

7 The next category I want to discuss is what New GM
8 describes as no plausibly pled defect causation claims. I
9 agree with New GM on this front here, too, we should shake the
10 trees through some sort of process to see what we are talking
11 about. It may be many of those cases can and would be
12 dismissed in one form or another, or alternatively that
13 plaintiffs would amend the complaints with respect to those
14 claims either to cure whatever deficiency New GM alleges there
15 to be or clarifying the cases don't belong in the MDL because
16 they're not actually ignition switch cases.

17 Having said that, I am concerned about GM's proposal
18 for the omnibus motion for precisely the reasons I just
19 mention, the process of triggering dozens if not hundreds of
20 individual responses. The other thing, it is my general
21 practice in an ordinary case where the defendant files a motion
22 to dismiss is to issue an order that basically says plaintiff
23 has an opportunity to amend under Rule 15, this is your one and
24 only chance to amend to cure whatever deficiencies are alleged
25 in the defendant's motion. You can amend by X date or you can

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1 oppose the motion by that date, but again this is your one and
2 only chance to amend, and then depending on whether the
3 plaintiff amends, the defendant can indicate whether it stands
4 by the original motion, it wants to file a new motion, or wants
5 to answer the complaint. I am not sure here we would proceed
6 by way of an answer.

7 I guess my thinking sort of based on that is that we
8 should adopt some sort of procedure along those lines here.
9 Maybe the answer is GM should file its omnibus motion, but
10 rather than plaintiffs opposing, we should basically see how
11 many would be dismissed based on that motion, how many would
12 amend based on that motion, and then get a sense of how many
13 would oppose the motion just on its own and we can then decide
14 the best way forward at that point.

15 Does that make sense, back table?

16 MS. SMITH: Just a point of clarification, your Honor.

17 So for many of these complaints, the issues I think
18 your Honor has recognized with these omnibus filings where
19 literally -- an example, my favorite example is from the
20 Phillips claim part of the Hayes complaint, 14 CV 10023, where
21 there is a general allegation of defective vehicle, serious
22 personal injuries, it lists defective vehicles subject to a
23 recall.

24 You go to a chart that is appended at the end of the
25 complaint. None of the defective vehicles are listed for

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1 Phillips. The vehicle listed for Phillips is a Ford. We think
2 a lot of these claims, if we do this process, are going to drop
3 out for the reasons you have noted, but we want some kind of
4 finality, too, so I am wondering if this a process where we
5 file our omnibus motion to dismiss, and not only do plaintiffs
6 have to say they're going to amend but have to respond with
7 something that is concretely passing Rule 11, plausible defect
8 claim of some sort or they actually will be dismissed by this
9 Court.

10 THE COURT: What I am proposing is you should file an
11 omnibus motion, and I am thinking out loud here so we can
12 refine this, but you file an omnibus motion and then plaintiffs
13 either amend, state that they intend to oppose the motion based
14 on the existing pleading, but with the understanding that they
15 don't get to amend later to remedy whatever defect you think
16 there is in that pleading, or they would consent to dismissal
17 in some fashion or other.

18 But bottom line is I guess those will be the three
19 options, but the opposition to the motion wouldn't necessarily
20 be filed until we have a better sense of how many fall in that
21 category, and then we can decide the best way to proceed on
22 that front either by way of consolidated response or separate
23 responses or what have you, not to mention depending on how
24 many amend, you may then have intend to move as to those
25 complaints as well if you don't think they cure the defects.

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1 MS. SMITH: Yes. We think that process makes sense.
2 We may have to work out some of the specifics, but I think in
3 general that makes sense.

4 THE COURT: Okay. Do you have any thoughts of timing
5 on an omnibus motion on that front or do you want to -- I
6 suspect that we're going to end up where I leave it to you guys
7 to kind of refine these procedures and propose, submit a
8 proposed order that really gets into the nitty-gritty in the
9 way we are not necessarily going to today. If you want, I can
10 leave the deadline open and you guys can factor that into that
11 discussion.

12 MS. SMITH: I think that would be helpful. We
13 definitely would intend to file these soon to get these,
14 hopefully a lot of these cases off your docket sooner rather
15 than later.

16 THE COURT: To be clear, if the vehicle at issue in
17 any case is a Ford, I hope that that would not require motion
18 practice for me to resolve, but it doesn't sound like it would
19 be a difficult motion, either.

20 THE COURT: Mr. Hilliard, is there anything you want
21 to say on that front?

22 MR. HILLIARD: No, your Honor. That makes sense. I
23 am taking notes.

24 THE COURT: Very good. The next category are what New
25 GM identifies as sort of statute of limitations/proposed cases.

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1 Once again, I agree with New GM that we should move
2 forward, but again I would think that we should do so in
3 stages. I think New GM -- I can't remember what New GM's
4 proposal was at this point. I need to look at it. I think
5 what we here, I would propose that New GM notify plaintiffs,
6 claimants by February 1st of its view that their cases are
7 barred by the statute of limitations or statute of repose and
8 request a response, let's say, within three weeks or so of
9 either voluntary dismissal if the plaintiff is persuaded or at
10 least a response as to why plaintiff is not persuaded, and then
11 once again I would think let's see what is left over from that
12 process, and then we can discuss what the most sensible way
13 forward is in terms of motion practice and opposition and
14 structuring. Does that make sense?

15 MR. GODFREY: Your Honor, it does. Those dates work
16 for us. That makes perfect sense from our perspective.

17 THE COURT: One question I did have on that front,
18 obviously statute of limitation is generally a defense. In
19 that regard, it can't be dismissed on a 12 (b)(6) motion unless
20 it is clear on the face of the complaint.

21 I noticed in your letter you said motion to dismiss or
22 summary judgment. I guess the question it raises in my mind is
23 whether any additional discovery is needed or if the
24 plaintiffs' fact sheets, Order 25 and Order 108 materials
25 suffice, if we need to do anything other than just proceed with

1 motions?

2 MS. SMITH: If I could address this point.

3 I think for our contemplation with these motions are
4 to be the most conservative, go after the most low-hanging
5 fruit. For example, for statute of limitations, if you just
6 take the pleading and it said the accident occurred on March
7 2010, you can take judicial notice the recall was announced
8 February 2014, the state has a one-year statute of limitations,
9 it is done under any state law. It could be a motion to
10 dismiss.

11 Statute of repose may be more likely to be something
12 more of a summary judgment because sometimes the issue is one
13 when the car was first sold or when it first was manufactured.
14 So that may be a summary judgment, but again that information
15 is readily available. It is not something we need discovery.
16 We're only seeking at this point ones that we believe are very,
17 very clearcut and will be very straightforward motions.

18 THE COURT: All right. I have thrown out what -- do
19 you want to say anything on this, Mr. Hilliard?

20 MR. HILLIARD: Just consumer defect is another issue,
21 whether it happened in 2010 and the defect was concealed by
22 General Motors and you didn't understand what caused the
23 accident, I would like to see each case before generally
24 agreeing that particular fact pattern or other like it are
25 low-hanging fruit.

1 THE COURT: I am assuming Ms. Smith is hypothesizing a
2 case where it wasn't filed until, say, 2016, so it is more than
3 a year after announcement of the recall, so there is no
4 concealment issue --

5 MR. HILLIARD: Correct.

6 THE COURT: -- any longer.

7 MS. SMITH: Exactly. We are assuming no matter what
8 the states' tolling, discovery rule, anything, it didn't start
9 ticking until the later of the recalls publicly announced or
10 the accident, whichever is later.

11 THE COURT: Let me say a couple of things.

12 One, is I think that makes sense. What I am saying
13 here, I do think we should be figuring out processes to kind of
14 separate the weed from the chaff and get rid of the cases that
15 don't belong here for whatever reason either because they're
16 not really MDL cases or because they're clearly meritless or
17 pertain to Fords, or what have you.

18 I am not particularly eager to be flooded with dozens
19 or hundreds of difficult motions, so I think really this is
20 kind of a sorting mechanism, and we should be focusing on, to
21 use your phrase, the low-hanging fruit at least in the first
22 instance. With that, hopefully you guys can have a
23 back-and-forth.

24 The second thing I will say, I threw out dates of
25 February 1 and February 21. I think what I will do is again I

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1 will leave to you to sort of take what we're discussing today
2 at kind of the 10 or 20,000 foot level and really sit down with
3 each other and try to work out a schedule that would make
4 sense. I think I'll take the dates with a grain of salt
5 because I think what would make sense is kind of aligning these
6 in such a way they all kind of came to fruition roughly at the
7 same time so we can go through this process again; that is, you
8 can submit letters saying now we have a better idea of what the
9 landscape is, this is how we agree to proceed, and simply come
10 back and convene with that data in mind. If you guys can kind
11 of coordinate each of these categories in a way that makes
12 sense, that would be helpful.

13 MR. GODFREY: I am assuming, though, that while you're
14 not necessarily wedded to February 1st, my take-away and our
15 take-away is do you want us to be moving expeditiously on this?

16 THE COURT: Yes.

17 MR. GODFREY: I want the the framework for any
18 negotiations so we don't end up presenting something to the
19 court that the court says no, no, you didn't get the message
20 right.

21 THE COURT: I guess let me throw out I would think by
22 the end of February it would be good to have a sense of the
23 particulars in these categories so we can reconvene maybe in
24 the beginning of March and have a more informed and
25 in-the-weeds discussion of each of these categories and how we

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1 should move forward.

2 MR. GODFREY: That is the guidance I needed. Thank
3 you.

4 THE COURT: I should also say in general, I am
5 shifting from reasonable but aggressive to just aggressive.
6 I'll take it a step at a time.

7 All right. The next, this isn't so much a category as
8 I guess a question to you, Mr. Hilliard, the letters indicate
9 you're intending to move as to some number of additional cases
10 to withdraw as you did with some number in the fall. Is that
11 correct? And where does that stand?

12 MR. HILLIARD: I don't have any more information to
13 give the court. I know that in discussing it as far as the
14 Hilliard-Henry docket, discussing it with Mr. Henry's firm, we
15 found another smaller group of cases that fit the category of
16 the need to let the clients know that we have an intent to
17 start the process of withdrawing.

18 I hadn't focused on that much coming in here this
19 morning, but I can quickly advise the court in the next day or
20 two where it stands. If you want some movement information, I
21 just don't know right now.

22 THE COURT: Why don't you submit a letter to me within
23 the next week letting me know what the situation is on that
24 front, what your anticipated timing is. I would imagine we
25 would follow the same sort of procedure we followed the last

1 go-around, but I would like to move forward on that sooner
2 rather than later just because that process takes a while to
3 play itself out.

4 MR. HILLIARD: I will. I will get you the exact
5 numbers as well.

6 THE COURT: Great. The next category is, and this is
7 the last category on which I have more definitive views is the
8 presale order claims.

9 First, with respect to the 16 states in which I have
10 already resolved the question of successor liability,
11 recognizing that it sounds like there is a motion to reconsider
12 at least in part coming down the pike, I am a little confused
13 about the positions of the parties. In GM's letter it proposes
14 summary judgment briefing, but in Mr. Hilliard's letter he
15 indicates that there have been some discussion if not agreement
16 about exchanging lists and narrowing disputes over the course
17 of this month. So I am not quite sure what happened there.

18 I guess my initial reaction is that as with some of
19 these other categories, maybe it does make sense to kind of
20 exchange lists in the first instance to see if there is -- it
21 may be plaintiffs concede the cases arising under those, at
22 least the states' laws that I thought I had a list in here,
23 California, New York, et cetera, maybe they would concede would
24 require dismissal under my order, and again recognizing that
25 some may want to preserve their rights to appeal, it may not

1 require motion practice.

2 On the other hand, it sounded like plaintiffs might
3 think at least in some instances they had a basis to oppose
4 that. I don't know. Mr. Hilliard, did you have any --

5 MR. HILLIARD: I don't know that the issue is ripe
6 right now. I know that we're about to start talking to GM what
7 to do with the cases that lost the successor liability ruling
8 on where they're going to go, what their options are.

9 I know there has been some shift by GM in regards to
10 their position, and I had hoped that after this hearing we
11 could talk to GM about what to do with the cases that lost
12 successor liability.

13 Frankly, Judge, the issue to me is where would they be
14 remanded to, and would they be subject to the court's ruling in
15 regards to successor liability, and did they have any other
16 venue options, and that is why I began this by saying it is not
17 ripe yet because we are still trying to digest what we do with
18 those cases and talk to GM about what we believe their rights
19 may be and see what GM's position is.

20 THE COURT: All right. So let me throw out there then
21 that I think you all should discuss this in some process
22 similar to the ones that we've proposed with respect to these
23 other categories. Again maybe with GM providing a list in the
24 first instance of cases that it thinks should be dismissed
25 based on my two prior rulings, and plaintiffs can respond

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1 either by dismissing or conceding the cases would need to be
2 dismissed based on those rulings, or providing some basis to GM
3 why they believe that isn't the case.

4 My inclination is here, too, it would make sense if
5 there were any remaining disputes, proceed by way of order to
6 show cause-type procedure where the onus is on the plaintiffs
7 who claim their cases don't need to be dismissed, to explain
8 why that would be the case, given my rulings. But once again I
9 think it would make sense to see sort of what remains on the
10 tree before we decide precisely how and how quickly to do that
11 since it may have some bearing on the briefing procedures and
12 the like.

13 So why don't you fold that into these discussions and
14 again try to sort of figure out by the end of February what we
15 are talking about more specifically.

16 Mr. Godfrey.

17 MR. GODFREY: That, I think there is merit, much merit
18 to what the court has suggested and we agree that that makes
19 some sense. I think that is a better proposal than perhaps
20 either side had presented to the court. The court knows we'll
21 be filing a motion for reconsideration, but it is a narrow
22 motion on one particular point, so I won't comment further. It
23 is not a omnibus motion in terms of each state. It is a narrow
24 motion about the law in one state. It is a precise point.

25 THE COURT: All right. I am glad to hear that.

1 MR. GODFREY: Since the court had raised it in comment
2 twice, I thought I would say we understand the rules on
3 reconsideration, so it is a very precise point regarding the
4 law of the State of New York.

5 THE COURT: I look forward to seeing it.

6 As you have seen from I think plaintiffs' motion for
7 reconsideration which I granted, I am not adverse to admitting
8 when I think I am persuaded I moved too hastily or got
9 something wrong. There are lots of states' laws and
10 certainly -- anyway, it is a possibility, I will concede.

11 So we'll do that on the 16 states. There is obviously
12 a more robust dispute with respect to the other 35 states. I
13 will confess that the thought of deciding the issues under 35
14 additional states makes me ill, but having said that, I don't
15 think it makes sense to remand those cases for decisions on
16 those issues just yet. At least at the moment that is my
17 inclination, but I will think more about that.

18 For now I do agree with plaintiffs and am reinforced
19 by the letter from Ms. Cabraser or Mr. Berman, Ms. Cabraser,
20 wherever it was from, that at a minimum we ought to await a
21 decision on the trial in the bankruptcy court before we decide
22 to proceed since that may have a material bearing on these
23 issues, and in the meantime you all and I have my hands full on
24 many other fronts anyway. Mr. Godfrey.

25 MR. GODFREY: I have one modest suggestion to add to

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1 what the court has just said. The 16 states that the court has
2 considered I think fairly cover the waterfront. There may be
3 the state of Alaska, I haven't looked at that law, but I think
4 that fairly covered the waterfront.

5 (Continued on next page)

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1 MR. GODFREY: I think it's a part that we refer to the
2 Court's request the parties ought to at least take a stab and
3 see whether we agree that the state of North Dakota has decided
4 under Delaware law it may well be in 35 states the parties have
5 reached agreement on some of them and just present that to the
6 Court. The Court can then decide how it wants to proceed. But
7 I don't see why the parties in light of the Court's guidance
8 thus far can't at least make a good faith stab at trying to see
9 whether or not this is a pretty precise and narrow issue of
10 law. Is this state law in California or Michigan? And then
11 reach their agreement or non agreement. If we can't agree but
12 if we could agree and take ten states off the board, why not?

13 THE COURT: I think that probably makes sense.
14 Somebody remind me of the briefs on the remaining 35
15 jurisdictions with respect to the manifestation issues on
16 unjust enrichment such that those are due February 22; is that
17 right? Maybe it make sense to fold it into that discussion and
18 see if agreement can be reached as to those 35 with respect to
19 the issues of success or liability as well.

20 Mr. Berman.

21 MR. BERMAN: I think that would retreat from the point
22 of our letter because there's no sense in trying to figure this
23 out in our view until we see what happens on the motion to
24 enforce. If the motion to enforce is granted, then we're into
25 a different issue and that is whether any recovery elsewhere

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1 precludes the success or liability claim. If the motion of
2 force is denied, then this becomes ripe again. But right now
3 we're still in that no man land. So why should we meet and
4 confer and figure out a hypothetical?

5 THE COURT: Let me ask you this. I mean, I have not
6 yet done the 35 state survey of success or liability in those
7 35 states but let us hypothesize that there may be a state out
8 there that is as clear cut as I thought that Delaware law was.
9 And presumably, if that is the case and if you would sort of
10 agree to that recognizing that you lost the argument on
11 Delaware, then that can be taken off the table without regard
12 for what happens in the trial with Judge Glen and I don't know
13 if that was what Mr. Godfrey was alluding to but at a minimum
14 it makes sense for GM to open the discussion to you regardless
15 of what happen in the trial before Judge Glen. These are cases
16 that essentially are clear-cut based on my prior rulings.

17 What you say you to that?

18 MR. BERMAN: That's fine.

19 THE COURT: Why don't you fold this into the
20 discussion that you are going to be having in terms of
21 precisely how to proceed and the deadlines for doing so. But I
22 would think that GM should in the first instance identify
23 states that it thinks based on my prior rulings are clear-cut
24 and it doesn't require any further ruling from Judge Glen on
25 the trial. And again, sort of stick to the low hanging fruit

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1 on that front. And if there are states that are a little bit
2 more complicated or whether the trial may matter recognizing
3 that GM may not believe that they matter then we'll at least
4 reserve on those and revisit this after Judge Glen has issued
5 his ruling.

6 All right. Then the last category of presale order
7 claims or the non ignition switch claims. Once again, I'm a
8 little bit confused. GM's letter suggests that everybody's in
9 agreement that those cases should be deferred. But in
10 Mr. Hilliard's letter he proposes, he indicates that there's
11 disagreement about who should decide the question of whether
12 there was a due process violation. Plaintiffs I think take the
13 position that I should and GM at least on that letter seems to
14 be of the view that Judge Glen should.

15 So what's the story there?

16 MR. GODFREY: Well, two points. One, we think and
17 maybe Judge Glen would disagree with us. We think he should
18 decide issues just as he apply to these cases. But unless the
19 plaintiffs are moving to withdraw the reference from Judge
20 Glen, we think the cases are properly before Judge Glen. He
21 should decide in the first instance just as he decided the
22 other bankruptcy cases that are now before your Honor on
23 appeal. That's how we think we should proceed.

24 THE COURT: Mr. Hilliard?

25 MR. HILLIARD: We're not withdrawing the reference

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1 judge. I think our point was, you're in the weeds on the facts
2 of the non core recall cases and you have made enough rulings
3 and have a lot of judicial reserve as to those facts and it
4 makes sense. And it's fine with me if Judge Glen does it or
5 you do it, but he knows nothing about those other cases. Yet,
6 you know everything about the defect or -- well, not everything
7 but everything that we've presented to you about that.

8 And right now GM's position is there is no finding yet
9 of due process violations except for the core recall cases and
10 sooner or later we have to figure out should there be based on
11 similar concealing facts or not.

12 And in speaking to Mr. Berman and Ms. Cabraser, there
13 may be some tension but I would prefer the Court consider
14 taking up that issue ultimately just because of what you know.

15 THE COURT: So my strong reaction -- well, let me
16 actually withhold that for a moment. Can somebody remind me
17 where that stands before Judge Glen? I was under the
18 impression that that was one of the core issues what he was
19 grappling with on remand for the circuit, that number one was
20 refining -- I'll wait for a second.

21 MR. BERMAN: Can we have one second?

22 THE COURT: OK.

23 (Pause)

24 THE COURT: So I thought there were two issues. One
25 is refining what precisely is an ignition switch plaintiff

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1 versus non ignition switch plaintiff. I think he did rule on
2 that back in June or July of last year.

3 And then the second was whether there's a due process
4 violation of the non ignition switch plaintiffs and that's one
5 that I don't remember precisely where it stood. I thought that
6 he was discussing the need for discovery on those issues and
7 what have you.

8 Mr. Godfrey is shaking his head.

9 MR. GODFREY: Well, we view his November 15 ruling --
10 that may be Judge Gerber's ruling -- as having decided the
11 issue. Plaintiff's may disagree with that but that's our
12 threshold position that we have before Judge Glen. That's why
13 we think that Judge Glen should have the case. If they want to
14 file a motion to withdraw, we'll consider it. There obviously
15 are things that this Court should decide. But in this
16 particular instance, we think that Judge Glen is the
17 appropriate person to decide and particularly since it deals in
18 part with a November 15 order which I believe is Judge
19 Gerber --

20 THE COURT: I'm pretty sure November 15 and December 1
21 were both Judge Gerber.

22 MR. GODFREY: I can't remember because both judges
23 worked very, very diligently hard at a seamless transition, so
24 I don't recall but I think it's Judge Gerber at the time and
25 that's an issue that I think Judge Gerber should decide in the

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1 first instance.

2 THE COURT: I guess this is re-enforcing my belief
3 that this is something for the bankruptcy court in the first
4 instance. I don't precisely know or remember as I've made
5 clear where that stands but I think Judge Glen would be the
6 proper person to sort that out and then to the extent that any
7 issues remain I've decided them --

8 MR. HILLIARD: Your Honor, given counsel table's
9 whispers on the front row, I would recognize it is a hot button
10 issue and I'm going to confer with Mr. Berman and Mr. Cabraser
11 but right now I'm not sure the Court's incorrect on that.

12 THE COURT: I am going to assume that's in Judge
13 Glen's court both literally and figuratively and I'll leave it
14 there for now.

15 All right. That leaves the production part and
16 service part vehicles and the key rotation and Category C cases
17 which are the two categories that I think I need to think more
18 about before I decide how to proceed but I did want to discuss
19 a little bit.

20 First, as I think I already intimated, I do not intend
21 to accept or adopt GM's promotion of giving GM until August or
22 November to try and settle the cases before either remanding or
23 moving on to case specific discovery and motion practice. I
24 recognize as we discussed at the outset of this conversation
25 that there are some new cases. But at least with respect to

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1 cases that had been in the MDL the order 108 materials were due
2 in I think October of last year and GM's been at this for quite
3 a while, my view is that we are at a point where cases should
4 be moving forward in one form or another and in one form or
5 another. I don't plan to give another eight months for that
6 process to play itself out. If that means that -- and I don't
7 mean to suggest that settlement discussions should cease. I
8 think it just means we need to move into essentially proceeding
9 on parallel tracks at a minimum.

10 Having said that, for me to decide whether remand is
11 appropriate as to some or all of these cases or not, I think I
12 need to get a better handle on what kind of discovery would be
13 involved for motion practice for that matter to get a sense of
14 what efficiencies are gained about proceeding here, as opposed
15 to remand.

16 Neither of you got into much detail about kind of what
17 discovery would look like, what the issues would be, whether if
18 we're talking about the sort of particulars of police who
19 responded to a particular accident, then it's not clear to me
20 what advantage I would have in presiding over discovery of that
21 sort versus remanding to the transfer of courts. If on the
22 other hand, there's still sort of overarching commonalities
23 that would result in efficiencies, then perhaps there is and
24 one of you suggested in a footnote that one possibility is to
25 appoint a discovery master who could get further into the weeds

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1 and then perhaps have a discovery plan by groups of cases and
2 maybe that's a way to go. But I guess I just wanted to have a
3 little of bit discussion of what discovery here would look like
4 and what we're talking about.

5 So, anyone want to --

6 MR. HILLIARD: Judge, I think that all the discovery
7 generally has been completed. My view is that the case
8 specific discovery should be done in the home court or in the
9 transfer, where ever the case was transferred to. The idea of
10 a remand package by this Court that we worked with GM to put
11 together that sets out all the court's general rulings on
12 liability, rulings on what experts can and can't talk about
13 will likely go a long way. I feel the Court that it gets
14 remanded to will defer to all of the rulings this Court has
15 made. I can't think of any general discovery left to do on
16 specific cases that won't be a repeat.

17 THE COURT: All right. I think maybe I should have
18 started with the back table because really the question is
19 persuade me that there are efficiencies to be gained by
20 proceeding here on those fronts as opposed to remanding the
21 fashion that Mr. Hilliard proposes. Let's talk about the two
22 categories separately. Start with the production part and
23 service part of vehicles first.

24 MR. GODFREY: So there's three levels to think about
25 this. One is that the generic and perhaps we should provide

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1 the Court with some basic views from both the new treatise or
2 new publication but the notion of remanding non trial ready
3 cases is an abration under model MDL practice. So we start
4 with a proposition that there are some guidelines which we can
5 get into now or provide the Court a three or four page letter
6 setting forth the MDL best practices that are contrary to
7 suggestions here. One -- is the cases before the Court
8 considers remand should be trial ready. Another concept is
9 that the common issues all have to be decided. There are still
10 common issues here for which there have been no decision. Some
11 of the claims for example, claim that the recall repair didn't
12 work. That is in the class. You can't split claims. They
13 want people to go back on a non trial ready case to a district
14 court or somewhere else where the class has the same people in
15 it as the class.

16 So there's a whole series of these what I'll call
17 generic consideration. And one of the standards that is
18 developed Judge Weinberg -- and Judge Scheindlin -- I had a
19 case. I'm actually no longer involved in the case -- but
20 before Judge Scheindlin retired, MTV products liability cases
21 filed in 2000 or 1999. The class was denied in 2002 and the
22 cases have been ruling through on individual basis. Most
23 courts take the position today that they don't remand until
24 they are confident that all possible settlement alternatives
25 have been exhausted. There is no way to have a global

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1 resolution and that the MDL is the place in which to do it.

2 And the statistics bear this out.

3 One of the things and of course we are very proud of
4 and we could do a segmentation in terms of how many cases were
5 here originally versus how many are here now -- should be very
6 proud of the fact that 1720 cases have been settled here. That
7 works for the number set in state court cases, not that GM
8 hasn't tried. We will be happy if the Court wants us to
9 provide a kind of you view of what the MDL best practices
10 guidelines are and how they fit this case. So it's one general
11 answer to the Court's question.

12 Secondly, we think that there are some issues yet
13 there are in common that have not yet been decided for some of
14 these cases. And one threshold question, for example, is claim
15 splitting for the people that are remanded part of the class or
16 not because the class is going to be here. In issue here, the
17 MDL touchstone is overlapping issues that can drive resolution
18 and all of the issues in the personal injury cases except for
19 whether they hit an icy road for some of the cases, whether the
20 eight-year-old was driving the car or whether it was four, all
21 of those issues are before the Court in the class context and
22 that will help drive the resolution as well.

23 Then finally, the third level is the reason we
24 suggested this special discovery master and sometime you have a
25 special settlement master is because the Court leverages the

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1 centralization and charges the parties on addresses schedule
2 to, OK, I've got a discovery master. You're going to provide
3 two new GM the information that order number --

4 THE COURT: 108?

5 MR. GODFREY: I was thinking 121 -- 108 requires and
6 we are going to have to have an evaluation and that generally
7 works very well in these cases and that is somewhat similar to
8 what we proposed with Mr. Bailey that maybe we didn't propose
9 under an aggressive enough schedule. But the idea is to have
10 someone who will take a look and try to drive resolution by
11 groups of plaintiff's counsel by groups, individual plaintiffs
12 because otherwise you are left with an abstract bucket of
13 claims that we think we don't have any information about. They
14 have no real value. Maybe the plaintiffs think they have real
15 value but that's not apparent to us and it becomes difficult
16 for us to settle those cases.

17 There are many tools yet in the Courts MDL toolkit
18 that the Court can use to drive resolutions. And as I say, the
19 statistics are that Judge Pullman in New Orleans and Judge
20 Weinstein has written about this. One of the criteria for
21 considering remand is in packages because there's downsides to
22 remand to the courts receiving the cases exhaustion of the
23 possibilities of settlement being trial ready and we are not in
24 that stage. We understand the Court's concern and we're
25 prepared to move aggressively. I'm not longer saying

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1 reasonably. But there are many tools and one of the tools we
2 suggest in our footnote.

3 THE COURT: All right. Can you flesh out when you say
4 that there's common discovery can be conducted, can you flesh
5 out what you are talking about on that front? Either now or if
6 you think it would be more helpful to put it in a letter, you
7 could do that. But I guess that's really the heart of the
8 question that I'm asking. And I recognize that there is a
9 higher level issue here about what an MDL here is does and when
10 cases should be remanded. I'm familiar with the best practice
11 and familiar with the manual obviously and those are the kinds
12 of things that I want to give more thought to. And I will say
13 right now I'm inclined to agree with you that we're not yet at
14 the point of remand, much as I am tempted to. But I guess what
15 I'm really trying to get a sense of is what case specific
16 discovery would look like, how best to structure it, whether
17 there are common issues, whether appointing a discovery master
18 who could handle all this with the sort of bigger picture
19 issues coming to me makes sense, what kind of groupings we
20 would be talking about and so forth.

21 I mean, at the end of the day if these cases are
22 remanded they are going to be doing case specific discovery
23 there any way. So if the cases are not resolved whether
24 globally or individually, that's what's going to happen.
25 Whether that happens here or there almost doesn't matter but

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1 since I think we're sort of there, I think we should begin that
2 process whether here before regardless, I guess is what I'm
3 trying to say.

4 So, Mr. Godfrey.

5 MR. GODFREY: I'm thinking to be fair to the Court
6 maybe we should put together a five page or seven-page letter
7 with our views and answers to several questions that the Court
8 raised and do it in a week or so and the Court can then think
9 about it. Plaintiffs if they want to respond it's appropriate.
10 This is always an inflexion point in these cases as to how best
11 to proceed to the next stage. I just think if the Court steps
12 back this has been up until now from a judicial efficiency an
13 MDL gold standpoint a remarkably successful MDL. If you think
14 about all that has been accomplished, it's quite unusual.

15 And so in the context for which we're having this
16 discussion I think the question is what are the best next steps
17 and I think a letter addressing, obviously, it's an advocacy
18 case but addressing in terms of our view to the Court the next
19 best steps these two categories, I think that may be the best
20 way to proceed. I'd leave it to the Court as to how the Court
21 thinks we should address this.

22 THE COURT: I think I said to you before, flattery
23 will get you no where. I think that makes sense. Why don't
24 you submit a letter within a week and then I'll give plaintiffs
25 a week to respond. But what I'm interested in is neither

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1 flattery, nor the kind of here is the best practices. You've
2 presented that in the letter that you submitted that we're
3 discussing now in terms when remand is appropriate. What I'm
4 interested in is your view of literally what discovery and
5 cases if they were to remain here how best they would be
6 organized, what common issues there are, how I think that we
7 could maximize the efficiency proceeding in some form and how
8 you would propose proceeding, whether it's with a discovery
9 master, whether it's in groups, whether these are the common
10 issues to be resolved in common discovery could be conducted
11 and so forth really getting into that.

12 MR. GODFREY: Ten pages max, seven pages max, what do
13 you prefer?

14 THE COURT: Between seven and ten I prefer seven. Why
15 don't you see if you can do seven.

16 MR. GODFREY: Then could we have ten days? Ms. Smith
17 is having a heart attack. I think she's taking the laboring
18 oar.

19 THE COURT: Ten is fine. I don't think that'll make a
20 material difference.

21 Mr. Hilliard, can you respond within a week?

22 MR. HILLIARD: A week is fine, judge.

23 THE COURT: OK. Very good.

24 Let me ask two other questions on this front and maybe
25 you can get into this in these letters as well. First, I don't

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1 think GM mentioned anything on this score but plaintiffs,
2 Mr. Hilliard in his letter said something about GM proposing a
3 sort of Category B type bellwether process as to some of these
4 cases but I don't know what that's about because I didn't see
5 any reference to it in GM's letter.

6 Anyone?

7 MR. GODFREY: We think we'd might know what it means
8 but since he is author of the letter, perhaps, we should hear
9 from Mr. Hilliard first.

10 THE COURT: All right. Let me ask what may or may not
11 be a related question but before I do that let me ask a factual
12 question which is, do we know how many of the cases in this
13 category were outfitted with the 190 switch if I could call it
14 that, the issue that was at issue?

15 MS. SMITH: I don't believe we know that but we could
16 certainly find out, try to find out.

17 THE COURT: I am thinking out loud here but is one
18 option certifying a limited issue class with respect to say the
19 cases, cars with the 190 switch and to the extent that the word
20 "verdict" is not preclusive having a trial limited question of
21 whether the 190 switch is or isn't defective? That would apply
22 across the board to cases with the 190 switch. Obviously, the
23 word "verdict" is some data on that point but it is not
24 reclusive with respect to all cases that have the 190 switch.

25 I have been scratching my head as to why no one has

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1 proposed limited issue -- in this case. So I'm not doing so
2 myself. I don't know if that is an issue with respect to the
3 law that you think is not a viable option or if it's just a
4 strategic decision on both sides that you don't want to put
5 your eggs in that basket.

6 MR. BERMAN: We actually had raised the idea of
7 limited issue classes a long time ago and it didn't go any
8 where.

9 THE COURT: With me?

10 MR. BERMAN: Yes. Way, way back. So maybe it's
11 something we could address by letter as well because we've
12 actually thought about that and we kind of took another turn
13 when we got to the bellwether three stay class. But there is
14 some overlap that you are pointing out between the issue coming
15 up and the class cert and some of these personal injury cases
16 that are out there.

17 THE COURT: Mr. Godfrey is looking skeptical.

18 MR. GODFREY: Not just skeptical, number one. We
19 assume we would see their proposal on the April 6 class motion.
20 So that's not shocking that they would be thinking about that.
21 But I'll be very interested, number two, to see how they
22 attempt to circumvent Judge Scheindlin's opinion. When they
23 tried that she wrote a lengthy opinion.

24 THE COURT: Slow down.

25 MR. GODFREY: Judge Scheindlin wrote a lengthy opinion

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1 which is published F.R.D 2002 in which she explained why the
2 issues class would not work in a similar case. Ms. Cabraser
3 was on the opposite side of that from me but that's an opinion
4 we will certainly be citing to the Court as one of the various
5 reasons why issues class is very specifically a 23C4 class
6 not -- unconstitutional and contrary to the rules.

7 THE COURT: All right. So does that make sense to
8 leave that to the class certification briefing? That would be
9 only in the economic loss cases strictly speaking and there is
10 obviously on overlap with what Mr. Berman alluded to between
11 the economic loss cases and wrongful death cases on this front.
12 And I guess to me it's at least, I would like a better sense of
13 whether that is a viable tool in my toolbox with respect to
14 resolving portions of the case that remain in the MDL. So I
15 don't think if it makes sense to leave it to the class
16 certification briefing or makes sense to move it into the
17 discussions that you are going to be having about these case so
18 that we can discuss it at the beginning of March. I don't know
19 what you thoughts are.

20 MR. BERMAN: I think we should move it or at least
21 give us on plaintiff's side about ten days to think about
22 whether they want to move it into the discussion. I'll look at
23 the case law Mr. Godfrey is citing. But my recollection is the
24 Second Circuit has looked favorably on the issue of classes.
25 So maybe we can have ten days to either write a letter or

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1 contact GM and say we do want to make this part of the
2 consideration of the next steps.

3 THE COURT: Why don't you all discuss it first among
4 yourselves and then you can present it to me in the proposed
5 order that ties all of what we're discussing today up into a
6 nice neat little bow. Whether that is, we think that it makes
7 sense to have letter briefing on this or whether it's a viable
8 option or you want to leave it to the class certification
9 briefing that's coming down the pike or if there's some third
10 approach, I'll leave it to you to think through together. But
11 I do think it overlaps some of the issues we are discussing or
12 it might make sense to think about it in that context to decide
13 whether that is a viable option with respect to resolving some
14 of the cases that remain after we, to use a metaphor, not to
15 beat a dead horse after we shake the trees.

16 Mr. Godfrey, is that OK?

17 MR. GODFREY: Two points. One, we shouldn't brief the
18 class issues twice.

19 THE COURT: Agreed.

20 MR. GODFREY: That's what's being proposed.

21 Two, so you don't have to search for it, it's 209
22 F.R.D 323 July 16, 2002 opinion by Judge Scheindlin.

23 THE COURT: Thank you.

24 I will certainly take a look at that. And I do agree
25 with you that we shouldn't have to, not only shouldn't have to

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1 litigate the class certification issues twice but I will not
2 allow you to do so but maybe there is a way of threading the
3 needle here that makes sense to -- I would need to think more
4 about it and I think you all do as well. So I think you should
5 discuss it and then we should decide but we're not going to
6 brief these things twice.

7 MR. GODFREY: If the plaintiffs, for example, were to
8 say that they are serious about a C4 class on the 190 switch,
9 if that were a serious proposal and we assumed it was going to
10 take place on economic loss but if they were to do, there's no
11 reason they couldn't fold that into their April 6 filing.
12 That's the schedule we're currently on for class certifications
13 and so if that's something that they are now seriously
14 proposing to pursue then that is the logical time to do it. It
15 won't change the briefing schedule. It won't change anything.
16 I can think of or think about that further. But off the top of
17 my head, in terms of how the Court's docket is not interfering,
18 the Court's current schedule to avoid briefing the issue twice,
19 that would be the time to do it. We'll have some further
20 thought but what I'm thinking about from a -- I try to put
21 myself in your Honor's position -- how would I want to manage
22 this? That's a logical point where it would fit in if they
23 were to pursue it that way, then we would brief it accordingly.

24 THE COURT: That may be so but give it some thought
25 and just think through whether there's some way -- well, think

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1 through the options.

2 All right. Last category is the Category C key
3 rotation cases.

4 Let me start by just expressing the fact that I'm a
5 little bit irked to be blunt. I thought I had been very clear
6 that if a case was selected as a bellwhether then subsequently
7 dismissed that you guys should flag that in some way and I
8 don't think you did this with respect to the replacement
9 Category C cases. It wasn't until the -- or if you did, I
10 somehow missed it. It wasn't not a big enough flag. But it
11 wasn't until Mr. Hilliard's letter that I realized the two
12 cases that JAM had selected as replacements last year had been
13 either stricken or dismissed in November and we don't I think
14 now have a category C case. Is that correct?

15 MS. SMITH: That is correct, your Honor.

16 THE COURT: On the one hand it frees up my June or
17 whatever month I currently was holding off for trial. On the
18 other hand, I was operating on the assumption that I had
19 another trial coming down the pike and it wasn't until reading
20 these letters I realized that wasn't the case.

21 So having said that, I guess the question is what to
22 do about that now? And I am a little bit scratching my head in
23 the sense that GM is proposing another round of replacement
24 cases but number one has to overcome my skepticism that having
25 had discovery on eight cases already why that bleeds into

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1 number two, my concern that if I allowed the selection of
2 replacement cases that we would just be going through the same
3 process yet again curing what that means. But in any case, I
4 don't know if it makes sense to do that.

5 And number three, and overarching that is my
6 puzzlement as to why if these cases both disappeared in
7 November it wasn't until these letters that I heard anything
8 about that or GM's view that a new case should be selected.

9 So let me start with the back table. The onus is on
10 you to persuade me that a replacement is needed at this point.

11 MR. GODFREY: First, let me apologize. I was not
12 aware that we had not flagged that for the Court. We will do
13 better. I'm a bit surprised. But I do apologize to the Court
14 on behalf of all parties that we should have done that. I am
15 very surprised that you are surprised which is not what should
16 happen in this case and we will do better next time.

17 THE COURT: Maybe it's a failing on my end. I'll look
18 into that but in any event, it certainly escaped me until these
19 letters.

20 So what is to be done now?

21 MS. SMITH: So for your Honor's concern I think we all
22 realize we have gone through many rounds with the Category C
23 and I certainly appreciate the Court's skepticism on that
24 score. It is such an important group of cases though where its
25 own unique animal where just like the 190 switch issue was its

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1 own unique animal and we all learned a lot from what types of
2 evidence would come in and what won't. Those issues were
3 certainly teased out further through a trial process. This
4 with be similar but different. These are not cobalt recalls
5 but they are cars that we did actually recall for a defect
6 which is different than the 190 switch but they're also
7 different in terms of a history and would raise related but
8 very different issues in terms of the type of evidence that
9 could come that I think would be helpful to us not only valuing
10 those cases but also would helpful to the extent any of the
11 cases were ever remanded or transferred, a Court to have
12 guidance to how to try those cases. There is a substantial
13 number of them and a big tranche that has never gone to trial.

14 In terms of your Honor's point on waiting until now to
15 raise replacement issues. I have to confess I'll apologize for
16 that as well. I think the issue when your Honor put the point
17 to us and said let's try to figure out what we are going to do
18 personal injury-wise, it made us take stock and I must confess
19 it took us a while come to this overall menu of options and
20 this was one of them. So I'll add another apology for waiting
21 for that.

22 MR. GODFREY: What happened and this is I think both
23 parties we, the December status was canceled. I think we had
24 planned on raising that Category C -- canceled. It fell
25 through the cracks, our plans and I realize that now I am

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1 concerned about this but that's what happened and we'll do
2 better next time.

3 THE COURT: All right. For the record, I think it was
4 canceled only after we checked and both sides said there was
5 nothing to discuss at the conference.

6 All right. I guess if you could, Ms. Smith or
7 Mr. Godfrey, two concerns I have. One is I guess a question.
8 Is this really one category or there are five or six different
9 recalls there are at issue in what we're calling Category C.
10 Is there commonality among them or are there really
11 subcategories here, query whether one bellwether trial provides
12 you with the information that you would need with respect to
13 all categories within the Category C.

14 The second question is, is this going to be deja vu
15 all over again? If we pick a replacement case, is that case
16 going to disappear for one reason or another? And if so, what
17 does that mean? And if so, why should we go through those
18 motions? But I'm not sure what the alternatives are.

19 MS. SMITH: So Category C you are exactly right. It
20 compasses several different recalls and many, many different
21 models of cars but what they do have in common is the reason
22 why I think we all agree with the Court to make it its own
23 category is that they have in common, their not the cobalt. So
24 they don't have this -- report history that is directly on
25 point. They are cars that GM did recall for safety defects.

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1 So we did at certain points recall it saying there are safety
2 defects in at least some of these vehicles. That makes it
3 unique. Is there a different story such as Impala versus the
4 Malibu?

5 But in terms of delaying the types of admissible
6 evidence in non cobalt cases that in fact were recalled for
7 defect, this category was will I think serve as a good lesson
8 for either this Court or other courts in terms of what are the
9 limits of cobalt evidence that comes in, for example? When you
10 have a case that may, a recall that may have resulted from a
11 read across from the cobalt but in fact is laden with as much
12 the cobalt history.

13 I think there are certainly differences but I think
14 the commonalities would make it a very valuable bellwhether
15 category in and of itself for future cases and probably more or
16 just as important for settle values to see where we are.

17 THE COURT: And then the question about would this
18 happen again?

19 MS. SMITH: We would endeavor very hard to try to pick
20 a case, that is one that we think both sides would be willing
21 to take to trial. Maybe it's not a slam dunk for us but to the
22 extent that cases end up going away, I do think we all learn a
23 lot from those two. We might know that plaintiffs as they did
24 with the two cases that they dismissed the Category C that
25 they're going to dismiss those and not take any money for them.

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1 That tells you about valuing those cases or case where maybe we
2 would settle before trial because we think that's risk. So
3 even if they we do have deja vu it does go a way toward
4 informing settlement values and informing what courts and what
5 we think about the merits of the case.

6 THE COURT: Last question for you, if I were to
7 entertain new bellwhether selections what's the theory at this
8 point behind just having them be GM selections as opposed to
9 having both sides somehow pick cases either without strikes or
10 back to the old each side picks two and the other side strikes
11 one kind of approach?

12 MS. SMITH: I think our proposal would be that each
13 side picks two and each side strikes one. I'm not sure that we
14 worded that artfully in the letter but our intention was not
15 that it be solely GM.

16 THE COURT: Then I have another question. What about
17 trying a new approach here if I entertain bellwethers at all
18 which is allowing each side to pick two and then you all at
19 some appropriate point brief to me which of the four cases
20 should go to trial and why it's representative and would be
21 helpful in resolving the category and then I pick the two of
22 the four that we try?

23 MS. SMITH: That sounds like an interesting approach.
24 We need to look at it a little further but it sounds intriguing
25 and a little different and would move the cases along in some

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1 way and help processing the MDL.

2 THE COURT: Mr. Hilliard, let me throw it open to you
3 to respond to whatever you want to respond to but the main
4 question for you is I understand you think all these cases
5 should be remanded but assuming I disagree and on the theory
6 that one way or another some of these cases would presumably
7 have to be tried why not continue with the bellwhether process
8 that has in many ways succeeded?

9 MR. HILLIARD: The success of the bellwhether I
10 believe is over. But given the Court's question I assume you
11 are going to consider it, I agree with what you say, the very
12 end of your discussion with GM and that is the issue, judge, is
13 when we get to strike their side and pick our -- you don't get,
14 as you've seen, you don't get a case that has enough value to
15 warrant going to trial so the lawyer who has the case chooses
16 to dismiss because you have sore neck with great liability and
17 he doesn't want to send his client to New York. If the Court
18 thinks that there is some common issues that might help a
19 global resolution of Category C and you know my position on
20 that, so I won't argue with the Court if you believe that to be
21 the case, then we do need help picking a case that is going to
22 provide real information instead of a no liability case or a
23 zero damage case which really does affect a jury trial.

24 And I would just respectfully say, judge, that the
25 cost of preparing a bellwhether case or a Category C given that

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1 they've done discovery on eight already, six where there
2 particular versus the value gain and the delay caused is not
3 worth it.

4 But I do really, I want to end with I have been in
5 front of the Court now for three and a half years and I'm not
6 going to put flattery fog inside of here. But I will say that
7 your suggestion does make sense and may prevent the cases from
8 going away at the last minute if you are intent on trying
9 another bellwhether case in Category C.

10 THE COURT: Intent my might be the --

11 MR. HILLIARD: Consider if you are reasonably
12 considering.

13 MR. GODFREY: I think the Court's raised an intriguing
14 and important idea. If it's OK with the Court we'll let the
15 Court know by Friday whether we've agreed to your proposal on
16 each side submit two and brief the Court and then the Court
17 will decide what -- that's -- I've not seen that done before
18 but our reaction is that may very well be a solution to the
19 challenges or questions that the Court has raised. So if we
20 have the Court's -- to file a letter by Friday saying, yes, if
21 we agree but I think it's something I've not faced but I see
22 what the Court is trying to get to and very intrigued by it.

23 THE COURT: All right. Well, why won't don't you
24 discuss it among yourselves and with each other. I haven't
25 resolved what I want to do here. I think you're probably

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1 getting a sense that my inclination is probably to grudgingly
2 agree that additional bellwethers make sense here on theory
3 that I recognize the inefficiencies choosing more choice cases
4 still. But to push back on Mr. Hilliard's proposal the
5 alternative to a remand the other cases to other courts and
6 presumably you would then be engaging in cases of discovery in
7 hundreds of different forums and any number of these cases
8 might go to trial. I think before we go that route it probably
9 does make sense to try what we can here.

10 My concern is quite obvious. I don't want to go
11 through these motions again. And if there is some better
12 way -- the idea behind the bellwhether process is that the
13 cases to be tried should be representative of whatever category
14 they should be selected from. For whatever reason I don't
15 think that's working with respect to the selection process of
16 Category C. So I threw out my selection not to say I've
17 decided that's how it should go but potential alternatives that
18 might yield the case with number one, in some meaningful way
19 that would assist you in resolving the larger swath of cases in
20 that category.

21 So why don't you maybe talk on each side within each
22 side and then to each other and if you want to submit separate
23 letter joint letter or something in let's say ten days, just
24 giving me a sense of what your thoughts are in those fronts.
25 In the meantime I'll give it some thought and will tell you how

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1 we're going to proceed.

2 MS. SMITH: Your Honor, may I request, would it be OK
3 if we included this issue in our other letter on specific
4 proposals going forward in ten days?

5 THE COURT: I think that would make sense. And then
6 Mr. Hilliard would have the week to respond and include it in
7 that and then in light of that I'll give you ten pages.

8 MS. SMITH: You answered my next question. Thank you.

9 THE COURT: Is that OK?

10 MR. HILLIARD: It is, judge.

11 THE COURT: So that brings us to the settlement
12 related issues on this front and that's where Mr. Bailey comes
13 in as well. I think the questions here are whether to appoint
14 some third party either special master or mediator whether that
15 would be for global settlement purposes or just with respect to
16 the Bailey cases and with respect to the Bailey cases, if I
17 could come call them that, whether that would be to engage in
18 aggregate mediation on an aggregate basis or an individual
19 cases. Let me just frame the cases a little bit and then hear
20 from Mr. Bailey.

21 If I'm not mistaken, there seems to be agreement at
22 least between you, GM, and Mr. Bailey that Robert Black of
23 Houston. I don't know him but the Robert Black is the
24 appropriate person to play the role of third party mediator
25 type. I guess the question I have is maybe it would make sense

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1 to appoint him either with respect to the Bailey cases alone or
2 with respect to all cases and then sort of leave him to decide
3 how best to proceed. I would think in the first instance it
4 would make sense to, if a third party has not been involved in
5 discussions heretofore to have a third party really try hard to
6 resolve these cases on an aggregate basis before engaging in
7 what I can only imagine would be a fairly laborious method to
8 resolve all these cases on a one-off or case-by-case basis.

9 And if Mr. Hilliard thinks that Mr. Black would be an
10 appropriate person then, perhaps, he would could be appoint for
11 all purposes with respect to the personal injury wrongful death
12 cases. Obviously, Judge Cott has been available but I don't
13 think he has the kind of time that would be needed to kind of
14 get into the weeds of these issues either on an aggregate basis
15 and certainly not on a case-by-case basis.

16 I guess what I'm throwing out is maybe it would make
17 sense to appoint someone. We have someone on the economic loss
18 front but to appoint someone on the personal injury/wrongful
19 death front and leave it to that person to decide whether there
20 is a meaningful opportunity to resolve all cases, some subset
21 of cases, whether that's by firm or by category or it requires
22 case-by-case adjudication or mediation. Thoughts? And I don't
23 know if Mr. Hilliard wants to take the first stab and --

24 MR. HILLIARD: Judge, Bob Black is a very respected
25 mediator and I would have no problem representing to the Court

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1 that he may be of assistance. I think the bigger issue is
2 going to be on the remaining cases is valuation. And as the
3 Court has pointed out over and over, sooner or later there is
4 going to be an impasse with no more discovery left to do on
5 cases that GM and the plaintiff's attorneys across the country
6 just do not agree with an never will.

7 So if we do go to Mr. Black and the Hilliard Henry
8 cases go under other dockets or buckets of cases, that's fine
9 but I would encourage that there be a pretty short window to
10 see if it could happen. And if it doesn't happen in March when
11 we come back we do something with these cases.

12 THE COURT: Well, I think I made clear at the outset
13 that that's certainly my intention. I'm at the point where I
14 think we need to be proceeding on parallel tracks. So I guess
15 to lay my cards a little bit more on the table, I think it
16 probably would make sense to appoint somebody whether that's
17 Mr. Black who now sounds like would be acceptable to everybody
18 that I would need to hear from or otherwise but to appoint
19 someone, have that person really engage in whatever efforts are
20 appropriate on whatever level is appropriate to try and resolve
21 as many as of these cases if not all of them but simultaneously
22 move forward whether that means remanding cases or moving to
23 case specific discovery of motion practice or what have you.
24 But I think we are at a point where we really should be
25 proceeding down both tracks simultaneously.

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1 Folks at the back table want to speak up before I hear
2 from Mr. Bailey or should we let him have a word?

3 All right. Ms. Bloom, go ahead, but use the
4 microphone

5 MS. BLOOM: It may make sense as Mr. Bailey's docket
6 to have Mr. Bailey speak first. You've raised a combination of
7 issues there. So it just depends what order you want to take
8 them in.

9 THE COURT: All right. Let me hear from Mr. Bailey.

10 MR. BAILEY: Your Honor, thank you for letting me come
11 here today. Before I get started, I'd like to tell madam court
12 reporter, I'm gonna talk slow and you are going to be able to
13 understand everything I say.

14 We got started, your Honor, and I understand the
15 solution is what we're after. I got that. I've been around
16 long enough. But here is where we are today where I'm very
17 concerned about any optimism about getting this done. We have
18 provided data that GM had requested well over a year ago. We
19 have not had one request since then for any substantial or any
20 data that I know of. We started off the negotiations back in
21 at a mediation session in December of last year. During that
22 period of time the defendant has not increased the amount of
23 money that they offered even though we have dropped down our
24 demand. I have repeatedly asked them that I'm entitled to an
25 offer in response to my demand. They have refused to do that.

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1 What they chose as their avenue is to come up with this burden
2 that's going to put on these plaintiffs and myself to go out
3 and have individual mediations. The cost of that to the client
4 bringing those people in, putting them up and having to be
5 there on the scene during the mediations process I think is a
6 burden that they should not carry.

7 On the other hand, if there's some way to start their
8 discussions where we do a give and take, I respect people's
9 right to make a decision that they don't want to pay an amount
10 of money. That's their right. But I also and my clients have
11 a right not to accept some demands that they've put on us. For
12 example, they have told me that until I come to this amount of
13 money they're not going to respond.

14 Now, I've been negotiating for 35 years every kind of
15 case multi-hundreds. I thought I'd seen it all. I've never
16 seen where somebody told you that you had to get to this amount
17 of money or they were not going to give you a response to your
18 demand. I'm just saying that I oppose the individuals. It's
19 too much of a burden on my clients. It's going to extend.
20 You're saying August. That's what they requested. I don't
21 know if we could get it done by August.

22 So my comments are I'm asking him to do something like
23 is normal in a mediation settlement negotiations and I'm asking
24 the Court to impose that on him.

25 THE COURT: All right. So I guess my question to you

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1 is two things. Number one, to push back on you in a little bit
2 of the way that I did on Mr. Hilliard, I recognize why you
3 would want to resolve these cases in bulk and why it is costly
4 and onerous to do them individually. But at the end of the
5 day, I don't have the judicial power to force GM to settle on
6 the terms you want to settle for. They either do or they
7 don't. Settlement is consensual. And if you can't reach an
8 agreement and consensus on a number, then these cases need to
9 proceed. Now where they proceed is an open question. But if
10 they have to proceed on an individual basis, then either they
11 will settle individually. You may have some clients who are
12 willing to take whatever they're willing to offer in an
13 individual case and I do think you have some professional
14 responsibility obligations to convey whatever offers are made
15 in an individual case bull. But I'll leave to you to decide.

16 And they don't settle on an individual case, then each
17 of them will have to be tried on an individual basis, which is,
18 obviously, more onerous ultimately than even resolving them on
19 a case-by-case basis.

20 So I do want to say that by way of I hear you. I
21 understand your views on this and I certainly think if there's
22 a way of getting to yes at an aggregate level, frankly at a
23 global level it'll make my life and everybody's life here
24 easier. But if that's not an option, then the system is built
25 to try cases on an individual basis and that's really the only

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1 remaining option.

2 Having said that, I guess the question that I want to
3 put to you is the one that I started with which is that if
4 Mr. Black is agreeable to everybody, why not appoint him and
5 give him cart blanche to sit you guys down and if he can get
6 both sides to a number that they agreed to on a bulk basis,
7 great. And if he can't, then he can start trying to settle
8 swaths of your case or ultimately deal with them on a
9 case-by-case basis if that's the only viable option. And in
10 the meantime I've already indicated I think pretty loud and
11 clear that I'm not going to give them until August to let that
12 process play out and in the mean time we're going to move
13 forward. Why not do it that way?

14 MR. BAILEY: We have advised the clients, every one of
15 them, of the letters that they sent in on their individual
16 offers. Did that ten days ago or a week ago or whatever. So
17 that has been, our obligation to do that has been satisfied.
18 And I understand that the remedy in the long term is each case
19 will go back individually. But right now my clients are not
20 getting their day in court.

21 THE COURT: And that's going to change. I assure you
22 of that. Because I think I've made it loud and clear again, we
23 are moving forward in a way that I think we have not yet. I
24 think we are reaching an inflection point to use Mr. Godfrey's
25 words whether that means that the cases will be remanded and

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1 proceeded separate forum or it means they will go forward on an
2 individual basis in this forum is something I will still
3 decide. But one way or another they are going to be moving
4 forward and in that regard I think individual plaintiffs will
5 understand and feel that their cases are progressing in a way
6 that they may be justifiably have felt that they haven't up to
7 this point.

8 So your cases are going to move forward. I can assure
9 you of that.

10 MR. BAILEY: As to Mr. Black, I know I have had a
11 couple of dealings with him in the past. I know his reputation
12 of being fair and a good mediator. There is nothing out there
13 that's not very, very positive about his ability to mediate
14 complicated litigations.

15 THE COURT: All right. So Ms. Bloom, do you want to
16 weigh-in here?

17 MS. BLOOM: Sure. Let me just give some context and
18 then address Mr. Bailey's specific set of claims. On the
19 settlement front GM continues to be very active. So you don't
20 see all the activity that occurs but one of the things that we
21 did in September was we settled a docket of claims that was 682
22 of them. Some of them are here and some of them are else
23 where. Once we said and we did that with a different mediator
24 who was involved and it was successful. And then we actually,
25 each settlement sort of moves in different ways. And that

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1 settlement we initially had a mediator who helped bring the
2 parties together and then we closed the deal in one-on-one
3 conversations.

4 There's been a lot of work that goes into aggregate
5 settlement like that. In that case we had settlement neutral
6 who then allocates that pot and a bunch of work goes into that
7 with us expressing our views about the values of the cases and
8 the other side expressing their views. There's actually a
9 reconsideration process that occurs, and all of that is going
10 on now. So I don't want you to, the Court get the impression
11 that on the GM side we have been off doing other things because
12 we do all of this at the same time.

13 THE COURT: Can I interrupt you for a moment because I
14 don't want you to hear anything that I've said as expressing
15 frustration or a sense that you are not working really, really
16 hard to resolve that cases. I know you have been. And for the
17 most part I think you've done a remarkable job in doing that.

18 I think that the plaintiff's expression and concern
19 that there are real people behind this 1800 remaining cases and
20 at some point they are entitled to know that their cases are
21 moving forward again in whatever form that may be, that at some
22 point that that really does have to begin to take precedence
23 and I don't think that moving those cases forward means that
24 you should halt those efforts to resolve those cases. I just
25 think that in a way that I haven't heretofore, I should really

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1 be saying by all means continue that with Mr. Black, with our
2 neutrals, whoever you want but at the same time we now need to
3 start moving those 1800 cases forward. So you should not hear
4 any criticism whatsoever on that.

5 (Continued on next page)

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1 MS. BLOOM: Thank you, your Honor.

2 I also just want you to get some visibility into the
3 process as you figure out how to get your head around this
4 because what has occurred is really not a one size situation
5 fits all, and so that is why I am sort of giving you some of
6 this context. We had that big aggregate settlement that worked
7 for that group of lawyers.

8 Also in the same time at year end we had plaintiff
9 liaison counsel, the Weitz & Luxenberg firm, we settled some 10
10 of their claims. They didn't want the involvement of the
11 mediator. We worked one-on-one with them, and they wanted
12 individual settlement demands and settlements for each of their
13 clients, so we didn't do an aggregate settlement in that
14 context.

15 At the same time, we were at a stage where we were
16 moving into, except for the Bailey docket, addressing all of
17 the smaller dockets of claims. We had settled in aggregate
18 fashion with a number of big plaintiff lawyer groups, and we
19 started to make that process at year-end, so there were nine
20 other law firms where we engaged in much smaller-sized
21 settlements.

22 At the same time, then, the big groups of cases that
23 are left, we started to think big picture, as you asked us to
24 do. Every law firm with whom we settled has zero bag
25 deployment claims, so your Honor's motion has really helped us

1 in that respect and will eliminate bunches of cases. We also
2 started to think about the low-hanging fruit.

3 So the two big dockets now that were out there at the
4 moment besides the smaller ones where we have now been making
5 success in many cases, it may not make sense even to get a
6 mediator involved. We have been resolving some of these by
7 phone. The cases that remain are the Bailey docket and also
8 now the Toups, Dugan, Carlson folks. We used a different
9 mediator with Toups, Dugan and Carlson and reached aggregate
10 settlements with all three firms before.

11 That settlement mediator was Daniel Balhoff, the same
12 mediator we used for Bob Hilliard's docket, the same mediator
13 we used for Elizabeth Cabraser's docket. So my sense, not
14 having yet engaged with Mitch and James and Fred under new
15 claims, is it will make sense to use Daniel Balhoff once we
16 have gotten to the point of aggregating the information about
17 their claims and being able to engage. The idea that
18 settlement discussions with those larger docket claims have
19 reached an impasse is false.

20 We have already reached claims with those firms, and a
21 different mediator may end up being appropriate. As to
22 Mr. Bailey's docket, he is the only lawyer other than Bob's
23 docket of claims with whom the general counsel of GM has met.
24 We have gone to meet with Bob with -- we have taken GM's senior
25 lawyers on three different occasions down to Houston to meet

1 personally with Ken, and we have given the docket attention at
2 the highest levels and valued it the way that we valued it. We
3 have done that in the first instance with one mediator.

4 We then switched to informal discussions, and we have
5 now gotten to the point where it appears to us as if we needed
6 to try something new. So one thing that we offered was what if
7 we tried a different mediator altogether, and the parties now,
8 because he is a Houston lawyer, are agreed on a Houston-based
9 mediator that both parties respect. We think that will be
10 helpful.

11 We think, though, that given where we are in
12 evaluations, the aggregate process has probably broken down
13 with respect to this docket. We don't see eye-to-eye, and so
14 we have taken the approach now in the last months, October,
15 November and December, of valuing every single claim, a
16 bottoms-up approach and offering for every single plaintiff a
17 settlement. So the idea that everyone keeps expressing on the
18 plaintiff's side of all of these plaintiffs deserving their
19 time, we have given. We know that is based on the information
20 received about each claim.

21 Before any claim goes back to state court, whenever
22 that occurs or back to some other federal court, we want the
23 opportunity to have engaged with that plaintiff and figured out
24 if we can resolve the case. We think it is our duty. We think
25 it is the duty of the court. The case shouldn't go back

1 without having engaged in that way.

2 So we expressed to Mr. Bailey and his son that while
3 we remain open to having Mr. Black try to deal with things in
4 an aggregate manner, we really think the time has come where we
5 probably need to engage on every single individual, and there
6 will be some who will accept the offers and there may be some
7 who don't. At that point we can see what is left and we may
8 need to engage them on discovery. We haven't reached that
9 point yet because we need the opportunity to have seen whether
10 somebody will accept an offer.

11 It is very different to talk about that in the
12 abstract as opposed to when you have a mediator present with
13 both parties there. So GM, our counsel, our in-house person,
14 is coming. The plaintiff needs to come. We have had quite a
15 number of settlement resolutions now in the smaller dockets
16 when we do deal individual-by-individual, and it makes quite a
17 difference for the individual to be there, for them to hear
18 from GM and for the two parties to meet, and we have made
19 progress in that way.

20 So our view is that we're at that point. You asked me
21 from time to time what we think can help, and I am telling you
22 here we are really of the view that individual negotiations at
23 this point for the claims may get rid of some of those claims
24 before we need to engage in discovery and other things.

25 THE COURT: I guess it doesn't seem to me that these

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1 things are necessarily mutually exclusive. If everybody is
2 agreement Mr. Black is the right party at least as to the
3 Bailey docket, then it seems to me proceed with Mr. Black.

4 I would present these arguments and issues to him in
5 the first instance, and you can get more into the weeds than
6 you can or should with me in terms of the history of your
7 negotiations and whether an aggregate settlement is a viable
8 option or not. I certainly think it makes sense to exhaust the
9 efforts to resolve Mr. Bailey's cases on an aggregate level
10 before you start to get into a case-by-case mediation process,
11 but I think it make sense for Mr. Black to be the one who is in
12 the weeds on those issues and decides how best to proceed and
13 where the pressure points are and whether the issue is to press
14 GM to come back with a better offer or Mr. Bailey to come back
15 with a lower demand, or what have you, and whether those
16 efforts have been exhausted and we need to proceed on an
17 individual-by-individual case basis.

18 It seems to me there is not a whole lot of daylight on
19 that front. Am I wrong about that? I guess the two questions
20 I have are: One, does that need to be -- I mean you've
21 enlisted the aid of neutrals with a bunch of these different
22 firms -- do you need me to play a role in the appointment of
23 Mr. Black, or if you're both in agreement, can you just take
24 care of that on your own and you can update me as appropriate,
25 you could proceed on your own.

1 The second question is, Mr. Hilliard has thrown out
2 the possibility of having global settlement discussions. I
3 don't even know if that is a viable option here given the
4 different categories of cases, given the number of different
5 lawyers involved. It seems to me that that would be a very
6 very difficult thing to accomplish even as much as I would like
7 it to happen.

8 It sounds to me like maybe it does make sense to
9 proceed with Mr. Balhoff, if that was the name, with respect to
10 the firms that he has been successful with in the past than to
11 enlist Mr. Black with respect to Mr. Bailey's docket and so
12 forth and to Ms. Bloom. My questions to you are:

13 Number one, do I need to be involved in the
14 appointment of Mr. Black if everybody is in agreement he is the
15 person?

16 Number two, is it appropriate to leave it to him to
17 decide whether to proceed on an aggregate basis or case-by-case
18 basis as to the Bailey docket?

19 Number three, is there any possibility of enlisting
20 someone to help achieve a global settlement, or is that really
21 not a viable option here?

22 MS. BLOOM: So as to Mr. Black, the parties both agree
23 that he may be a helpful mediator. I think the place we were
24 coming to asking for help is that we would like an order such
25 that if the aggregate discussions are failing, that we do get a

1 process where we can do individual mediations for this docket
2 where the other side is compelled to bring their plaintiff to
3 the table so that we can have that session. So that's the
4 piece that the other side hasn't agreed, where we want to move
5 forward having such sessions.

6 THE COURT: All right. Mr. Bailey, do you want to
7 come back to the microphone. It seems to me that maybe it is
8 best to have you guys meet with Mr. Black, make a stab at a
9 global settlement, but it does seem to me that if you exhaust
10 those efforts with Mr. Black's assistance, then the only two
11 options to move forward are: Number one, settle the cases on
12 an individual basis or to proceed with discovery on an
13 individual basis, but one way or another you have to move
14 forward on an individual basis at that point.

15 MR. BAILEY: Your Honor, I am again saying Mr. Black
16 has the reputation, and we are very, very acceptable to having
17 him involved in any type of a mediation.

18 On the other hand, I am not optimistic about it, and
19 the reason is because even though they have never made a move
20 on their amount that we were negotiating for 13 or 14 months,
21 when they gave out their individual settlement amounts, the
22 total of those individual amounts is 25 percent of what they
23 have stood out for 13 or 14 months. I don't know how you go
24 backwards and think you're going to have some success on an
25 individual basis, but I am willing to accept Mr. Black.

1 THE COURT: I tell you what. Why don't you guys
2 enlist Mr. Black ASAP, and why don't you report back to me in a
3 month where things stand, whether you've met with him, whether
4 those discussions have been fruitful or not, and you each --
5 and by "you each" -- new GM and Mr. Bailey can tell me if they
6 have not been successful, where you see things going from there
7 out.

8 I think it is likely, Mr. Bailey, that at that point I
9 would probably be amenable to entering some sort of order that
10 would require individual and case-by-case mediations because I
11 think the only alternative at that point, if you're not able to
12 reach an aggregate settlement, is individual, case-by-case
13 adjudication, and that is certainly more costly than trying to
14 resolve cases on an individual basis at least in the first
15 instance.

16 Report back in a month. I will see where things stand
17 at that point, and with the understanding that some sort of
18 case-by-case process is going to come down the pike, maybe that
19 will help you guys make some progress on an aggregate basis in
20 the first instance.

21 Now, anything else to be said on that front?

22 MS. BLOOM: No, your Honor. Thank you.

23 MR. HILLIARD: There is one point that Mr. Bailey
24 brought up that new GM concedes in its letter that might help.
25 Mr. Bailey's point is well taken from my perspective, that

1 plaintiffs are coming into Houston personally on cases that
2 don't have that much value and are being charged with those
3 expenses. GM suggests in its letter to the court in-person or
4 videoconferencing participating by the plaintiffs makes sense
5 which would greatly reduce the out-of-pocket ultimate expense
6 of that individual plaintiff. I would just make sure that the
7 court would be okay if they do individual mediations, that the
8 plaintiff may participate remotely?

9 THE COURT: So we're not there yet.

10 I said report back in a month and see where things
11 stand, and I will be cautiously optimistic and perhaps this
12 whole problem will go away through some sort of aggregate
13 settlements. If it doesn't, in this day and age all you need
14 is an iPhone to have a person -- I didn't mean a product
15 plug -- all you need is a phone for someone to participate
16 remotely, and I wouldn't think particularly with low-value
17 cases it would make any sense to force plaintiffs to come to
18 Houston and incur the experiences that would involve.

19 Let's give a stab at the aggregate front first, all
20 right? Since we're on the issue of settlement, let's just jump
21 to that issue on the agenda letter and come back to the motion
22 to compel. I would like to wrap things up in the next 15
23 minutes or so if that is feasible. We have been at this for a
24 while, but I would rather power through and get done if we can.

25 Anything else on the settlement front? There is the

1 mediator on the economic loss side of things. Anything to
2 update me about there or anything to discuss?

3 MR. GODFREY: Just as a status, your Honor, we met on
4 December 1st in Newport Beach, California. Our next mediation
5 session is April 16th, Steve? It is April 16th before the
6 Judge.

7 THE COURT: All right. Anything else?

8 MR. GODFREY: No.

9 THE COURT: Very good. Anything else other than the
10 motion to compel? All right. Let's talk about that.

11 I am scratching my head a little bit about this one.
12 The threshold question I have is the sort of legal question of
13 what authority there is to serve a request for the production
14 of documents on counsel as opposed to the parties in a case.
15 Counsel isn't, strictly-speaking, a third party, but it is not
16 a party within the meaning of Rule 34, so it seems like an odd
17 situation.

18 I don't know if you have authority for the proposition
19 that an RFP can be served on counsel as opposed to party
20 through counsel, but can you help me out?

21 MR. GODFREY: Sure. That was out of an abundance of
22 caution. Let me set the time table for what happened. This is
23 what we call a whack-a-mole situation. You whack a mole here,
24 and it pops up behind you.

25 THE COURT: I know the game, but --

1 MR. GODFREY: We served our subpoena on Top Class
2 Actions. Class counsel moved to quash. Your Honor rejected
3 all their arguments, privilege and all, et cetera. We then
4 filed a motion to compel because Top Class Actions didn't
5 cooperate in the State of Arizona. We briefed it again. We
6 won it again there.

7 Top Class Actions is producing some materials now.
8 The depositions are coming up, and our request to the
9 plaintiffs had define terms like you, including your lawyers,
10 but Top Class Action says there are materials that the lawyers
11 have that went to them directly, we should talk to the lawyers.

12 Now we could have taken the position that said it is
13 already covered by the document request to the plaintiffs, but
14 out of an abundance of caution, we served the lawyers saying
15 Top Class Action essentially is saying you got this, so now
16 they're making all the same arguments your Honor already
17 rejected.

18 We could have served a subpoena on them. It didn't
19 seem to us we had to go jump through that hoop, but that is why
20 this is whack-a-mole. How many times do we have to have courts
21 rule on the same issue, reject the same arguments being made
22 when we have already requested it both from the named
23 plaintiffs and from the TCA, and it is more than covered under
24 existing requests that have been validated by the court.

25 THE COURT: Okay. I am not sure you answered my

1 question.

2 MR. GODFREY: We think it is already covered by the
3 preexisting request. Maybe we will serve by subpoena. If we
4 serve by subpoena, we'll be back here in a week or in a day on
5 the same issue.

6 THE COURT: I need to look back at the prior letters
7 and my order, and obviously should have done that before today,
8 but I don't recall work product being raised as an issue in the
9 prior litigation.

10 MR. GODFREY: It was. Work product and privilege were
11 raised. The problem we have is, and we have outlined this in
12 our responsive letter, you can't claim work product and
13 privilege on communications that the site says are not, are not
14 privileged communications. We're not asking for their work
15 product or their privileged communications, but they're
16 claiming -- and your Honor already ruled on this issue, as did
17 the District Court Judge in Arizona -- what we are claiming is
18 not work product and not privileged.

19 THE COURT: So I am just searching your prior letter
20 for the word "work product," and they don't appear, which leads
21 me to think that that issue was not actually briefed.

22 Now, but your response raises a different question,
23 which is, are the actual forms and web pages available?
24 Plaintiffs' letter suggests they're not, but that some sort of
25 similar type of page may be available through the way back

1 machine. I didn't actually look at the link, but it does seem
2 to me the question of whether the confidentiality component of
3 either privilege or the work product doctrine is met here.

4 It turns on what the folks understood, whether the
5 communications were going to counsel, whether they would be
6 available to third parties and the like, and that presumably
7 requires understanding exactly what they saw and what the pages
8 said, and how can I decide that? Or are they available to me
9 to look at to resolve that?

10 If you read the two letters, one suggests the things
11 were completely confidential and the consumers filling them out
12 understood they were going to counsel and for the purposes of
13 legal advice. Your letter makes it seem as though that is
14 completely not true. How do I resolve that?

15 MR. GODFREY: There are two easy ways to do it:

16 Number one, you can look at what the web site says for
17 people filling out the forms, it was not legal advice, not
18 confidential, et cetera.

19 THE COURT: And how do I do that?

20 MR. GODFREY: Your Honor was looking at the documents
21 themselves? As I read their letter, they said they have 440
22 electronic form submissions received, TCA forms. Page 2 of
23 their December 20 letter, which is Docket 4890, I think your
24 Honor can take any number of those, I suspect the forms are all
25 the same and look at them, look at the web site advertisements

1 and reach a conclusion whether or not there is any basis for
2 privilege for work product. I don't see how it can be work
3 product. You're right, I am not in the first letter, I can't
4 find the phrase "work product," either, so it is privilege that
5 is being briefed apparently.

6 On Page 2 of their letter, they identify 440
7 electronic forms. They have 50 e-mails exchanged between them
8 and this third party, an unknown number of submissions, and I
9 don't know what that refers to. The normal way the court would
10 do this, which I don't see any reason to depart from here, is
11 to have a privilege log, either both a privilege log for 447
12 forms, here are 50 for the court to look at or you list them
13 out, and then the court picks 20 or each side picks 10 or 15 to
14 make their point and the court can see in-camera. That is
15 normal. It is not a ton of documents, it is a discrete set
16 of materials. Mr. Berman has identified two categories he can
17 easily look at.

18 I shouldn't impose work on the court, but in terms of
19 the way it is normally done, a court or magistrate judge would
20 look at this in-camera, take a half hour or hour to determine
21 whether or not these things, in light of the web site we have
22 quoted, and we provided screen-shots or whatever, are
23 privileged or work product or not. You have already ruled on
24 the privilege issue. Work product is unchanged. They don't
25 become work product because someone sends a form to an

1 attorney. That doesn't make it work product.

2 THE COURT: Can you just clarify one other thing,
3 which is that plaintiffs' letter is helpful in breaking it down
4 what I understand to be two or three categories: Co-mingled
5 submissions; so-called privileged submissions; and the e-mails.
6 As I understood it from that letter, new GM has already
7 co-mingled submissions. Is that incorrect? In other words,
8 you got those from Top Class directly?

9 MR. GODFREY: I spoke to Mr. Pixon about this
10 yesterday. He is taking a deposition of Top Class'
11 representative.

12 THE COURT: When is that deposition scheduled?

13 MR. GODFREY: I believe it is in three weeks. It is
14 coming up soon. We have gotten some production, but production
15 is not yet done. So I don't know whether they're co-mingled,
16 what was co-mingled or not. I am not sure I understand that
17 phrase in this context because we don't think there is
18 co-mingling of privileged or non-privileged. That deposition
19 is coming up. We will have their production before that
20 deposition. The production is not yet done. That is the best
21 answer I can give the court.

22 THE COURT: Mr. Berman, do you want to respond.

23 MR. BERMAN: Yes, your Honor. With respect to the
24 three categories, one category is approximately 3100 forms that
25 we received directly from putative class members. Those we

1 think are clearly privileged under the Barton case cited in
2 your letter. We don't think we have to go there with an
3 in-camera submission. Mr. Godfrey didn't answer your question
4 about procedure here where they have served us. We are not a
5 party. Rule 34 doesn't allow that.

6 Assuming we put off the eventual subpoena, there's
7 another fight because again these are privileged documents.
8 These people contacted us. The form says the purpose, your
9 communications can be viewed by a lawyer. There is no other
10 reason for a lawyer to review the communication other than to
11 give the client advice whether the client may have a claim. We
12 think as to that group, the story is over.

13 If your Honor wants to see the other two groups which
14 we think are covered by the work product for the reasons we
15 explained in our letter, we would be glad to submit them
16 in-camera.

17 THE COURT: And those other two groups are the emails?

18 MR. BERMAN: Emails between my firm and Top Class
19 Action and the co-mingled documents.

20 THE COURT: Was I wrong in understanding Footnote 5 in
21 your letter suggests that GM has the co-mingled submissions and
22 the emails?

23 MR. BERMAN: GM has the co-mingled submissions and
24 emails from plaintiffs that were subject, bellwether states
25 being plaintiffs, not from putative class members. As I

1 understand it, they became plaintiffs as a result of this
2 process. They're going to get whatever Top Class Action has in
3 the production the court ordered in Arizona.

4 THE COURT: Keep your voice up, please.

5 MR. BERMAN: They should have this, but we are willing
6 to give you the form to look at irrespective of whether or not
7 the production by Top Class Action is going to be complete.

8 THE COURT: So I guess the question is it certainly
9 seems to me I should have the form because I do think some of
10 these issues may turn on that. I will take a look at the
11 Barton case, which I hadn't done. Mr. Godfrey thinks the way
12 to proceed is to submit these things for my in-camera review.

13 Do you agree with that, or do both of you think
14 additional briefing is required, or do you think I have what I
15 need to resolve this?

16 MR. BERMAN: How about two pages when we submit the
17 in-camera to address the very precise point about whether the
18 form is indicative or not of the indicia of respective
19 attorney-client relationship or the work product.

20 THE COURT: All right. That is fine with me.

21 Mr. Godfrey, let me just ask you, you seem to dismiss
22 out of hand it is work product. Why isn't it work product if
23 it was done at the request of counsel for the purposes of
24 litigation?

25 MR. GODFREY: Well, as we understand it, it wasn't.

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1 This is an advertisement not by counsel, it was by Top Class
2 Actions.

3 THE COURT: Acting as an agent for counsel and at
4 counsel's request.

5 MR. GODFREY: It is not disclosed to the party filling
6 out the form, and what it says is the TCA web site warns that
7 legal information is not legal advice. The TCA advertises the
8 MDL. It says the information provided by user to TCA through
9 this web site is considered not confidential, not proprietary,
10 and I am quoting.

11 THE COURT: What are you reading?

12 MR. GODFREY: From their web site. This is on Page 3
13 of our letter to you, dated the 15th of December, Docket 4875.

14 So this wasn't set up, as we understand it -- and if
15 our understanding is wrong, I am sure Mr. Berman will correct
16 me -- this wasn't set up, it said. We want people who are
17 clients and here's communications, not that you contacted us,
18 here is our communication, we want to get information from you.

19 This was set up as a web site seeking to solicit by
20 the web site Top Class Actions people who might want to sue
21 General Motors. They were told to fill out a form. They're
22 given warnings it is not confidential, et cetera, and
23 unbeknownst to us, unbeknownst to them, it went to Mr. Berman's
24 firm. That is how we understand this worked.

25 The notion that that becomes work product in light of

1 the express statements on the web site, there is no authority
2 for that. You have already ruled on the privilege issue, but
3 we are happy to give you two pages. The one thing that did
4 concern me, which I learned just now, I thought we were talking
5 about 447 plus 50, and then some other category, but apparently
6 there are 3100 other forms. That is not any more work product
7 or privilege, it seems to us, than the 447. So that is a
8 fighting issue from our perspective also.

9 In terms of how to proceed, I think two pages is fine.
10 I think submitting them to your Honor is fine. We have laid
11 out now several times why these materials are not work product.
12 We are not asking for Mr. Berman's evaluation of the forms.
13 That clearly would be work product, there is no question about
14 that. That is not what we are talking about here.

15 We are talking about some person, Joe Schmo on the web
16 sees the web site, sees the disclaimer, sends in a form. That
17 is just not privilege and it is not work product.

18 THE COURT: I do think it seems to me this is coming
19 down to what the actual web site and forms said. In that
20 regard, it would be helpful to see whatever is available and
21 get your takes on those.

22 I am a little confused about the different categories
23 here. I think -- am I right? As I understand it, there were
24 essentially three categories, and this is by way of trying to
25 figure out what you should be submitting to me. There is the

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Conference

1 50 emails. It doesn't seem to me it would be particularly
2 onerous. Submit the 50 emails, and I will take a look at them
3 in due course.

4 I don't know if the remaining forms, if I need to see
5 if it would suffice to just see one if they're all the same for
6 all intents or purposes or for purposes of what I need to
7 decide or there is distinction among either the co-mingled 447
8 category or the 3100 other category, if I am getting those
9 numbers correct.

10 What I understood the categories to be is 447 were in
11 the three days or four days worth of forms were going and
12 perhaps unwillingly or unknowingly to Top Class and Hagens
13 Berman. What Hagens Berman might have thought is that they
14 were communications directly with counsel. It turns out they
15 weren't only with counsel, and then as I understood it, maybe I
16 am wrong, the 3100 are ones that did only go to counsel. Is
17 that correct?

18 Is there a difference among the web pages or forms
19 that were filled out for those purposes or is that just a
20 question of coding behind the scenes where things were being
21 sent?

22 MR. BERMAN: I believe those are three categories.

23 Whether the forms are exactly the same, that would be
24 something we would get clarified when we submit them to you
25 in-camera. It would be my intention to give you the 3100

I18JGM3

Conference

1 forms, whatever Top Class Action form was being used and all
2 the 50 emails.

3 THE COURT: Meaning one form, two forms and 50 emails?

4 MR. BERMAN: Yes.

5 THE COURT: Why don't you see if that makes sense. If
6 it turns out there are material differences that would
7 necessitate more than just the two forms, obviously, I would
8 need those. I don't know what we are talking about here.

9 Very good. Time-frame? If this needs to be resolved
10 in three weeks, I need it sooner rather than later. Do you
11 want to say within a week?

12 MR. BERMAN: That is fine.

13 MR. GODFREY: That is fine. My only reluctance about
14 a single form is I have never seen these in terms of what
15 they're withholding. I can't tell whether one form fits all
16 for each of the categories, so we are not talking about all the
17 documents, I can give the court 100 or 200 each and let the
18 court pick out one or two or let the court thumb through them.

19 These are not terribly difficult things to figure out.
20 We are blind here in terms of what they're withholding, so it
21 is hard for me to say that makes sense. I don't know if there
22 are material differences and how that will be determined. The
23 timing your Honor suggests works.

24 THE COURT: I am a bit blind as well. I am not sure
25 how best to proceed here.

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Conference

1 MR. BERMAN: I would go through them all. If I see
2 there are differences, we'll give you a sample of every
3 variation we find.

4 THE COURT: Good.

5 MR. BERMAN: I don't think there will be, but we will
6 do that.

7 THE COURT: I will take your representation on that.
8 I will take those within a week and give you up to three pages.
9 I will throw you a third page given the letterhead takes up
10 some space.

11 All right. That exhausts the things we need to cover
12 other than scheduling another conference. Is there anything
13 else we need to raise before we turn to that? All right. I
14 will take your silence as a no.

15 So if you guys are discussing the various things that
16 you need to be discussing and sort of shooting for the end of
17 February to kind of see how things shake out, unfortunately I
18 am starting a criminal trial in the beginning of March that is
19 supposed to last a few weeks and will make it a little
20 difficult to see them all. Would the week of March 19th, maybe
21 toward the end of that week, maybe the 23rd work for you all?
22 And, if so, then maybe you can work backwards from there to
23 figure out the dates that would make sense on the various
24 processes that you'll be discussing.

25 So I am throwing out March 23rd as an option.

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Conference

1 MR. HILLIARD: It works for -- I am not speaking for
2 Mr. Berman or Ms. Cabraser, but it works for me, Judge.

3 MR. GODFREY: It works for me as well, your Honor.

4 THE COURT: Mr. Berman?

5 MR. BERMAN: It is good for me.

6 THE COURT: Ms. Geman?

7 MS. GEMAN: It is good for me, your Honor. I am
8 checking with Ms. Cabraser, but let's calendar it.

9 THE COURT: Can you --

10 MS. GEMAN: I am.

11 MR. BERMAN: I know it won't work with Ms. Cabraser
12 because we are in the same other case together. Since this is
13 largely a PI-driven docket, I suggest perhaps we can go ahead
14 with Ms. Geman.

15 MR. GODFREY: I couldn't hear what Mr. Berman was
16 saying.

17 MR. BERMAN: I am pretty confident this won't work
18 with Ms. Cabraser. This is largely a PI docket, and I think we
19 can work with Ms. Geman instead of Ms. Cabraser.

20 THE COURT: That is fine with me. If it doesn't work
21 with Ms. Cabraser, is it just that one day or the whole week?

22 MR. BERMAN: I don't know the whole week. We are
23 together on that one case.

24 THE COURT: What if we did it on, say, March 22nd,
25 would that make a difference or not so much?

1 MR. BERMAN: If I were in her shoes, I would be
2 preparing on March 22nd for the 23rd.

3 THE COURT: Let's leave it March 23rd.

4 If, upon getting in touch with her and talking among
5 yourselves, you think it would be make sense to revisit that,
6 you can communicate with Ms. Loveland and my Chambers and we'll
7 sort something out.

8 You should update the web site which, among other
9 things, still has the December conference on it I noticed
10 yesterday. You should take that off and today's as well. I am
11 inclined not to schedule a conference beyond that March date at
12 this point. We can do that in March. Anyone disagree? All
13 right. Thank you. This was a long conference, but it was I
14 thought productive and making progress and good to see you all.

15 Happy New Year. We are adjourned.

16 (Court adjourned)

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