

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)

14-MC-2543 (JMF)

This Document Relates to All Actions

ORDER NO. 160

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JESSE M. FURMAN, United States District Judge:

[Regarding Next Steps for Remaining Post-Sale Personal Injury Claims]

For good cause shown, the Court adopts the following schedule and procedures for Wave Three Discovery of the Post-Sale Production Part, Service Part, and Key Rotation personal injury and wrongful death cases, as well as an extension of the settlement window for the remaining plaintiffs subject to Order No. 153.

I. PROCEDURES AND SCHEDULE FOR WAVE THREE TARGETED DISCOVERY OF PRODUCTION PART, SERVICE PART, AND KEY ROTATION PLAINTIFFS

A. Identification of Wave Three Plaintiffs.

1. To be eligible to participate in Wave Three, a plaintiff must fit all of the following criteria: (1) the accident that forms the basis of the plaintiff's claims must have occurred on or after July 10, 2009; (2) the subject vehicle must be a Production Part (Phase 1), Service Part (Category A), or Key Rotation (Category C) vehicle (*see* Order No. 107 ¶ 3 (defining categories)); (3) the plaintiff must not have been included in Wave One or Wave Two; (4) the plaintiff must not be subject to a motion to withdraw or currently subject to Order No. 137-type procedures; (5) the plaintiff must not be currently eligible to participate in an aggregate settlement; and (6) the plaintiff's claims must not be subject to a pending motion for summary judgment.

2. By **Wednesday, March 20, 2019**, New GM will file on the main MDL docket a list of the claims eligible to participate in Wave Three targeted discovery. New GM will identify any claimant on the list who is unrepresented by counsel.

3. **By the same date**, New GM shall serve a copy of its submission, along with a copy of this Order, on any unrepresented claimant on the list, and shall file proof of such service on the main MDL docket **within three days**.

4. By **Wednesday, April 3, 2019**, New GM and Lead Counsel shall file on the main MDL docket a joint list of cases eligible to participate in Wave Three. To the extent there is any dispute about this combined list, New GM and Lead Counsel shall address the disputes in a joint letter-brief to the Court on that same date. Once any disputes are resolved by the Court, the resulting plaintiffs shall be referred to as the “Wave Three plaintiffs.”

B. Severance of Complaints.

5. Any Wave Three plaintiffs whose claims are included in a complaint brought on behalf of multiple plaintiffs bringing personal injury and/or wrongful death claims arising out of different accidents or incidents will be severed upon the parties’ joint filing described in Paragraph 4 above. Unless and until the Court directs or orders otherwise, however, the Clerk of Court shall not terminate any such Wave Three plaintiff from his or her original docket. (The Court will direct or order such termination instead after either (a) the plaintiff has filed an amended and severed complaint pursuant to Paragraphs 6 and 7 below, or (b) the plaintiff has been dismissed with prejudice for failure to comply with this Order.)

6. By **Friday, May 31, 2019**, each Wave Three plaintiff shall refile his or her complaint or an amended complaint in this Court and pay any filing fee associated with filing a complaint pursuant to 28 U.S.C. § 1914(a), or be dismissed without prejudice. By **Thursday, June 27, 2019**, any such dismissal without prejudice will automatically convert to a dismissal with

prejudice unless any such dismissed Wave Three plaintiff refiles his or her amended complaint and pays the required filing fee in accordance with this order. *See, e.g., In re Asbestos Prods. Liab. Litig.*, 2008 WL 4290954, at *2-3 (E.D. Pa. Sept. 18, 2008) (requiring amended and severed complaint and payment of filing fee within 60 days on pain of dismissal with prejudice); *In re Seroquel Prods. Liab. Litig.*, 2007 WL 737589, at *3 (M.D. Fla. Mar. 7, 2007) (noting “gatekeeping feature of a filing fee and the cost of managing [] additional cases in the federal court system as a whole, both as part of this multi-district case and once remanded to the transferor or other proper court, as individual cases”). In conjunction with any amended and severed complaint, a Wave Three plaintiff shall also file a Related Case Statement, available at www.nysd.uscourts.gov/forms.php, identifying the new lawsuit as related to these proceedings (*In re General Motors LLC Ignition Switch Litigation*, 14-MD-2543 (JMF)). Any complaint or amended complaint refiled pursuant to this Order shall be treated for all purposes as if it were filed on the date the original consolidated complaint was filed.

7. To facilitate the assignment of these new cases to the undersigned for inclusion in the MDL and the orderly termination of Amending Plaintiffs from their initial dockets (as of the date of the newly filed amended and severed complaint), each Amending Plaintiff shall (1) prominently note in the Related Case Statement that he or she is an existing plaintiff in an existing case, citing the case name and docket number of that case; (2) reference in the Related Case Statement the MDL Order pursuant to which he or she is filing an amended and severed complaint; and (3) attach as an exhibit to the Related Case Statement a copy of the original complaint in which the Amending Plaintiff is already associated.

C. Wave Three Discovery Scope and Timing.

8. **Scope of Targeted Discovery.** Case-specific discovery of Wave Three plaintiffs shall be limited to: (a) the scope of the plaintiff’s accident causation claims (*e.g.*, is plaintiff

claiming that an ignition switch rotation caused the accident, caused air bag non-deployment, or both?); (b) the sequence of events leading up to and during the accident; (c) whether the ignition switch rotated during the accident sequence; and (d) whether the air bag should have deployed during the accident.

- a. **Written Discovery**: Written discovery and document production shall be limited to substantially complete Plaintiff Fact Sheets (“PFS”) and compliance with Order No. 108. In addition, New GM may serve non-duplicative targeted interrogatories or requests for production of documents limited to accident or air bag non-deployment causation issues in the specific accident as defined above. In turn, New GM will produce individual Vehicle Packages for each plaintiff’s vehicle (if not already produced). *See* Docket No. 3081, Order No. 107, ¶ 5. There will be no additional written discovery of any party during this phase of discovery without leave of Court.
- b. **SDM and Vehicle Inspection**: If the subject vehicle and/or SDM download is available, Wave Three plaintiffs shall make those available to New GM for inspection and/or retrieval.
- c. **Non-Privileged Case-Specific Documents in New GM’s Possession**: To the extent New GM has in its possession as of the date of this Order any data downloads of the subject vehicle or other non-privileged case-specific materials (*e.g.*, vehicle photographs, actual parts of the subject vehicle, accident reports, insurance or other third-party records relating to the subject incident), New GM shall make such items available to the Wave Three plaintiffs for inspection, retrieval, and/or review.
- d. **Fact Depositions**: Wave Three fact discovery depositions shall be limited to: (a) Wave Three plaintiffs;¹ (b) the investigating police officer(s); and (c) two scene or first responder witnesses. As to the last category, each party may select one deponent if there is any disagreement over who those two scene/first responder witnesses should be, and if one party does not pick any scene or first responder deponent, the other party may select two scene/first responder deponents. The number of deponents in categories (b) and (c) above may be increased by agreement of the parties and/or by order of the Court. There will be no additional depositions of parties or third parties during this phase of discovery without leave of Court.

¹ Should the case proceed past the stage of Wave Three discovery and any related dispositive motion practice, the deposition would remain open to address other issues, such as damages, injury causation, *etc.*, at a later date. New GM would not need to seek leave of the Court to continue that deposition under the one-deposition rule.

- e. **Expert Discovery:**² Wave Three plaintiffs are required to submit written expert reports, including all reliance materials in compliance with Order No. 74 (Docket No. 1279), for any expert necessary to establish accident or air bag non-deployment causation under applicable state law, and plaintiffs must also produce their expert(s) for deposition after the written reports are supplied to New GM's counsel.
- f. **No Waiver:** By participating in Wave Three, the parties do not waive their rights to take additional discovery consistent with the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the Court's orders.

9. **Timing.** The targeted discovery described in Paragraph 8(a) - (e) above shall proceed on the following schedule:

- a. Targeted, case-specific fact discovery of Wave Three plaintiffs shall commence on **Wednesday, May 1, 2019**, and shall conclude by **Friday, September 20, 2019**.
- b. On **Wednesday, May 15, 2019**, New GM shall file a notice on the main MDL docket of any Wave Three plaintiffs who have not submitted a substantially complete PFS, have PFS deficiencies, or have not complied with Order No. 108. The parties are to meet and confer to resolve any disputes.
- c. On **Thursday, June 20, 2019**, any remaining disputes concerning the PFS or Order No. 108 compliance of the Wave Three plaintiffs shall be submitted to the Court.
- d. On **Thursday, June 27, 2019**, any Wave Three plaintiff who has not submitted a substantially complete PFS or produced all materials required to be produced under Order Nos. 25 and 108 may be subject to a motion to dismiss. Upon notice from New GM, any Wave Three plaintiff not in compliance with his or her discovery obligations under this Order will have one week to comply with this Order or face dismissal without prejudice. If within one month following his or her dismissal without prejudice, a Wave Three plaintiff complies with this Order, or otherwise contests his or her dismissal, he or she may move to vacate the dismissal. Any Wave Three plaintiff who does not do so will be dismissed with prejudice upon a second notice from New GM.

² For clarity, medical expert discovery, including expert reports for, or depositions of, medical causation witnesses, are not required to be provided and are not permitted except by agreement of the parties.

- e. By **Thursday June 27, 2019**, New GM shall produce the documents and information required by Paragraphs 8(a) and 7(c), above.
- f. On **Monday, July 15, 2019**, Wave Three fact discovery depositions as described in Paragraph 8(d) above may commence.
- g. Wave Three plaintiffs shall disclose their expert witnesses and submit any written reports, including all reliance materials in compliance with Order No. 74 (Docket No. 1279), required under Fed. R. Civ. P. 26(a)(2)(B), on or before **Tuesday, October 29, 2019**.
- h. Wave Three plaintiffs shall present their expert witnesses for deposition on or before **Monday, December 2, 2019**. The Parties are ordered to use good-faith efforts to coordinate depositions so that experts who have been retained by multiple Wave Three plaintiffs are deposed utilizing the fewest calendar days possible. In other words, expert depositions relating to multiple cases should be consolidated on the fewest calendar days possible. Notwithstanding the foregoing, this Paragraph does not abrogate any provisions of Order No. 36 (Docket No. 604).

D. Wave Three Notice/Motion Practice.

10. **Air Bag Deployment Notice.** By **Wednesday, July 10, 2019**, New GM will file a list of Wave Three plaintiff claims that it has identified as ones it believes should be dismissed in light of the Court's December 28, 2017 Opinion and Order. *See In re GM LLC Ignition Switch Litig.*, 2017 WL 6729295, at *1 (S.D.N.Y., Dec. 28, 2017). By **Monday, September 2, 2019**, counsel for the Wave Three plaintiffs included on that list will file on the main MDL docket: (1) a list of the Wave Three plaintiffs who agree to voluntarily dismiss their claims; (2) a list of the Wave Three plaintiffs as to whom counsel plans to move to withdraw; and (3) a list of the Wave Three plaintiffs who intend to press their claims, along with the factual bases as to why those plaintiffs believe dismissal is not appropriate. By **Monday, September 9, 2019**, those plaintiffs who agree to dismiss will file voluntary dismissals, and counsel for plaintiffs who intend to withdraw will file motions to withdraw.

11. **Statute of Limitations/Repose Cases.** By **Wednesday, July 10, 2019**, New GM will file a list of Wave Three plaintiff claims that New GM believes are barred by applicable

statutes of limitation or applicable statutes of repose. By **Monday, September 2, 2019**, counsel for the Wave Three plaintiffs included on that list will file on the main MDL docket: (1) a list of the Wave Three plaintiffs who agree to voluntarily dismiss their claims; (2) a list of the Wave Three plaintiffs as to whom counsel plans to move to withdraw; and (3) a list of the Wave Three plaintiffs who intend to press their claims, along with the basis as to why those plaintiffs believe their claims are not barred. By **Monday, September 9, 2019**, those plaintiffs who agree to dismiss will file voluntary dismissals, and counsel for plaintiffs who intend to withdraw will file motions to withdraw.

12. **“No Plausibly Pled Defect / Causation” Cases.** By **Wednesday, July 10, 2019**, New GM will file its motion to dismiss Wave Three claims that New GM believes should be dismissed for failure to state a claim. By **Monday, September 2, 2019**, counsel for Wave Three plaintiffs included in that motion will file on the main MDL docket: (1) a list of the plaintiffs who agree to voluntarily dismiss their claims; (2) a list of plaintiffs as to whom counsel plans to move to withdraw; and (3) a list of the plaintiffs who intend to press their claims (specifically identifying which plaintiffs intend to amend their complaints). By **Monday, September 9, 2019**, those plaintiffs who agree to dismiss will file voluntary dismissals, and counsel for plaintiffs who intend to withdraw will file motions to withdraw. Plaintiffs desiring to amend their complaints will file amended complaints on their respective individual dockets by **Monday September 23, 2019**.

13. New GM shall not include any plaintiff on any of the lists described in Paragraphs 10 through 12 above, if that plaintiff was previously included on a list pursuant to Order No. 140, unless newly discovered evidence or information provides a basis for that plaintiff’s inclusion on a list and was not known to New GM at the time of the plaintiff’s inclusion on the Order No. 140 list, or the plaintiff was prematurely dropped from the Order No. 140 process because his or her

counsel withdrew. In the event a plaintiff subject to Order No. 140 whose counsel did not withdraw is included on a list provided for in Paragraphs 10 through 12 above, New GM shall provide to Lead Counsel the basis for inclusion of the plaintiff, including a description of the newly discovered evidence or information, and shall provide any newly discovered evidence to Lead Counsel at Lead Counsel's request.

14. By **Friday, October 4, 2019**, Lead Counsel and New GM will file a joint letter identifying the number of — and proposing next steps to address — any remaining disputed Wave Three claims that were subject to one or more notices or motions, including next steps for plaintiffs who desire to amend their complaints.

E. Wave Three Settlement Status Updates And Next Steps.

15. By **Friday, July 12, 2019**, New GM and Lead Counsel will submit to the Court a joint letter reporting on the status of Wave Three settlement efforts. Thereafter, counsel shall keep the Court apprised of Wave Three settlement efforts in the monthly related case update letters, in accordance with Paragraph VI of Order No. 127 (Docket No. 4253). *See* Docket No. 3726.

16. By **Tuesday, December 10, 2019**, New GM and Lead Counsel shall meet and confer regarding proposed next steps for Wave Three cases and remaining Production Part, Service Part, and Key Rotation plaintiffs, and submit joint or competing letter-briefs (not to exceed ten single-spaced pages) setting forth their positions.

17. The Wave Three deadlines herein may be stayed or modified by agreement of the parties or by order of the Court for good cause shown.

II. EXTENSION OF SETTLEMENT WINDOW FOR ORDER NO. 153 PLAINTIFFS

18. The window for settlement of the Order No. 153 claims is extended 60 days from the date of this Order, at which time the parties will report on settlement efforts and propose next steps for any remaining claims.

III. PROCEDURES AND SCHEDULE FOR PLAINTIFFS KRISTEN FREEMAN AND TIMEIL SEALS

19. With respect to Kristen Freeman, a Plaintiff in *O'Quinn, et al. v. General Motors, LLC*, No. 16-CV-8229, and Timeil Seals, a Plaintiff in *Brown v. General Motors, LLC*, No. 16-CV-5947, the following procedures and schedule shall apply:

- a. **By April 30, 2019**, New GM shall disclose its experts on the issues of the timing of airbag deployment, as well as whether a key rotation did occur and caused or contributed to Plaintiffs' accident or injuries.
- b. **By June 15, 2019**, Plaintiffs shall depose New GM's experts.
- c. **Within three weeks of the completion of the foregoing depositions**, counsel for New GM and counsel for plaintiffs Freeman and Seals shall propose next steps.

IV. PROCEDURES AND SCHEDULE FOR PLAINTIFFS HAROLD CLEVELAND, JR., AND COREY GABRIEL

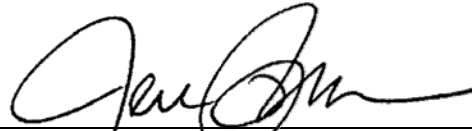
20. Upon review of the parties' competing letter-briefs, *see* Docket Nos. 6500 and 6502, the Court is skeptical that it will be able to grant summary judgment in New GM's favor with respect to the claims of Harold Cleveland, Jr. and Corey Gabriel, Plaintiffs in *Gabriel, et al. v. General Motors, LLC, et al.*, No. 15-CV-7843. Substantially for the reasons set forth in Plaintiffs' letter, *see* Docket No. 6500, the testimony of Mr. Gabriel would seem to create a genuine dispute of material fact, with the credibility of that testimony being an issue for a jury. That said, the Court will give New GM an opportunity to persuade the Court otherwise. To that end, the following procedures and schedule shall apply to Plaintiffs Cleveland and Gabriel:

- a. **By Friday, April 19, 2019**, New GM shall file any motions to exclude Plaintiffs' expert under Federal Rule of Evidence 702 and *Daubert* and for summary judgment on the issue "of whether an unintended ignition switch and/or key rotation could have and did occur prior to air bag deployment." The motions shall be supported by a single, consolidated memorandum of law not to exceed thirty-five pages.
- b. **By Friday, May 17, 2019**, Plaintiffs shall file any opposition, supported by a single, consolidated memorandum of law not to exceed thirty-five pages;

- c. **By Friday, June 7, 2019**, New GM shall file any reply, in the form of a single, consolidated memorandum of law not to exceed fifteen pages.
- d. In an effort to avoid the need to engage in motion practice, the parties shall participate in a settlement conference prior to the motion deadline. If the parties wish to do so under the supervision of the Court (that is, either under the supervision of Magistrate Judge Cott or as part of the Court-annexed mediation program), they shall so advise the Court by **March 5, 2019**.

SO ORDERED.

Date: February 26, 2019
New York, New York



JESSE M. FURMAN
United States District Judge