

1 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
2 -----x

3 IN RE: GENERAL MOTORS LLC  
4 IGNITION SWITCH LITIGATION,

14 MD 2543 (JMF)

6 -----x

New York, N.Y.  
August 11, 2017  
9:00 a.m.

8 Before:

9 HON. JESSE M. FURMAN,

10 District Judge

11 APPEARANCES

12  
13 LIEFF CABRASER HEIMANN AND BERNSTEIN LLP  
14 BY: ELIZABETH JOAN CABRASER

14 -AND-

15 HAGENS BERMAN SOBOL SHAPIRO LLP (SEATTLE)  
16 BY: STEVE W. BERMAN

16 -AND-

17 HILLIARD MUNOZ GONZALES LLP  
18 BY: ROBERT HILLIARD

17 -AND-

18 BROWN RUDNICK  
19 BY: HOWARD STEEL  
Attorneys for Plaintiffs

20 KIRKLAND & ELLIS LLP  
21 BY: RICHARD CARTIER GODFREY  
ROBERT C. BROCK  
ANDREW B. BLOOMER  
ALLAN PIXTON

22 -AND-

23 KING & SPALDING  
24 BY: ARTHUR J. STEINBERG  
Attorneys for Defendant General Motors L.L.C.

25

1 THE COURT: Good morning. We are here in the GM MDL  
2 matter.

3 Counsel, why don't you just state your names for the  
4 record.

5 MS. CABRASER: Good morning, your Honor. Elizabeth  
6 Cabraser for plaintiffs.

7 MR. BERMAN: Good morning, your Honor. Steve Berman  
8 for plaintiffs.

9 MR. HILLIARD: Good morning, Judge. Bob Hilliard for  
10 plaintiffs.

11 MR. BERMAN: Your Honor, we also have at our table our  
12 bankruptcy counsel on the economic loss side, Mr. Steel, Howard  
13 Steel.

14 MR. STEEL: Good morning, your Honor.

15 THE COURT: Good morning.

16 MR. GODFREY: Good morning, your Honor. Rick Godfrey  
17 from New GM. We also have New GM's bankruptcy counsel with us,  
18 Arthur Steinberg; my colleague, Mr. Bloomer; Mr. Brock; and  
19 Mr. Pixton, who once again is at the front table, your Honor.

20 THE COURT: Thanks for being here earlier than our  
21 usual start time. I think Ms. Kumara may have told you I need  
22 to get out of here pretty promptly today. I have a medical  
23 situation I need to attend to. As you can see, Ms. Smallman is  
24 out. So Ms. Kumara is out front. Just a reminder to speak  
25 into the microphones loud and clear, and we will proceed with

1 the agenda.

2 I don't know if the presence of bankruptcy counsel  
3 suggests that there is more to discuss on the bankruptcy front  
4 than I thought there might be. You're getting me nervous.  
5 Let's start with the bankruptcy proceedings.

6 The letters I received from both parties suggested  
7 that there wasn't much to talk about with respect to the  
8 July 12 bankruptcy ruling at this point, that there may be down  
9 the road. I don't know if that's changed or what have you.

10 I confess I don't quite have a full grasp of what the  
11 implications of that ruling are for the cases that are pending  
12 before me, but I assume that will sort of flush itself out over  
13 time.

14 I am curious what remains to be litigated in the  
15 bankruptcy Court. I think all but the late claims issue have  
16 been resolved, at least of the threshold issues, but the word  
17 "threshold" suggests that there is more to be done there, and  
18 I'm sure there is. So I would love some sense of that.

19 The last question is the letters, including the agenda  
20 letter, have noted any number of appeals that have been filed  
21 from the bankruptcy court's rulings, and I didn't know where  
22 those appeals were filed or headed, which is another way of  
23 saying I don't know if they're coming to me or if I should be  
24 on the look out for them. I'm not eager to get more work on my  
25 plate. I have enough from you guys, but that being said, I

1 don't know if there is something that I should be on the look  
2 out for.

3 So I guess that's all just by way of saying if  
4 somebody can help me out and help me understand what's going on  
5 and what I should be expecting, that would be helpful. I don't  
6 know if Mr. Steel or Mr. Steinberg are the right folks or  
7 counsel here. Make sure you get a microphone though, please.

8 MR. STEEL: Good morning, your Honor. Howard Steel of  
9 Brown Rudnick.

10 With respect to the 2016 threshold issues, Judge Glenn  
11 has issued opinions on all of the 2016 threshold issues.

12 THE COURT: Other than the late claims issue.

13 MR. STEEL: Other than the late claims issue. I'll  
14 address that in a second.

15 There have been numerous appeals of the 2016 threshold  
16 issue opinions. Lead counsel for the economic loss plaintiffs,  
17 personal injury plaintiffs, and certain other plaintiffs have  
18 filed notices of appeal. General Motors has also filed a  
19 notice of appeal. Those recently statements of issue on appeal  
20 and designation of records have been filed.

21 THE COURT: In what court?

22 MR. STEEL: In the bankruptcy court.

23 THE COURT: Where is the appeal being taken? In this  
24 court, or is it the Second Circuit?

25 MR. STEEL: To the district court. Certain plaintiffs

1 have filed related case statements seeking to have it heard  
2 with your Honor.

3 THE COURT: When did that happen? I haven't seen  
4 those.

5 MR. STEEL: They were filed within the last week. We  
6 can send copies if your Honor desires.

7 THE COURT: That would probably be helpful, if only  
8 because it would alert me to what the docket numbers of those  
9 appeals are, I would think.

10 Do they have docket numbers in this court yet?

11 MR. STEEL: I'm not aware that any of them have docket  
12 numbers yet.

13 THE COURT: I think better to have the information  
14 than not, and I can then look into where those things are if  
15 they were supposed to come to me, but I have not yet seen them.

16 So how many of those are we looking at?

17 MR. STEEL: I'm looking at Mr. Steinberg. I think  
18 there are four or five.

19 MR. STEINBERG: Good morning, your Honor. Arthur  
20 Steinberg.

21 The paperwork for the designation of record and  
22 statement of issues was filed two days ago. So the paperwork  
23 itself hasn't gone from the clerk of the bankruptcy court up to  
24 the district court yet.

25 The appeals that were filed by the plaintiffs' side

1 were with regard to the July 12, 2017, order entered by the  
2 bankruptcy court. New GM appealed a June order of the court  
3 and a separate July order of the court.

4 THE COURT: The June order was the Pitterman?

5 MR. STEINBERG: The Pitterman. Correct, your Honor.  
6 The cover sheets that we filed -- I don't know what the  
7 plaintiffs are, but I assume the same -- said the two appeals  
8 that were filed are connected with each other, should be heard  
9 by the same judge, and we referenced those appeals as being  
10 related to the MDL.

11 So we would expect it ultimately to come to  
12 your Honor, but the paperwork hasn't emerged from the  
13 bankruptcy court to the district court yet.

14 THE COURT: So it doesn't sound like it should yet be  
15 on my radar or that I should have received the related case  
16 statements, but I will be on the lookout for them. If you  
17 could send them to chambers just so I can have whatever  
18 information I can have, that would be helpful.

19 MR. GODFREY: Your Honor, would you prefer a letter,  
20 just a cover letter, with the basic information on this from  
21 both parties? We can do that, if that would be helpful to the  
22 Court.

23 THE COURT: Sure. Why don't you do that. On the one  
24 hand, the sooner the better. On the other hand, it doesn't  
25 need to be filed today. I won't give you a deadline, but the

1 sooner the better.

2 Very good. Anything else to say on that front?

3 MR. STEEL: Nothing right now, your Honor.

4 THE COURT: I'm mindful that I already have a few  
5 bankruptcy appeals to resolve relating to this, and they are on  
6 my to-do list. So I guess that list just got longer.

7 The next items are coordination of related actions,  
8 document production, and deposition updates.

9 Is there anything to discuss on those three?

10 MR. GODFREY: Just one point, your Honor. Just a note  
11 for the Court. The last time we were here in July, I had noted  
12 that the Orange County trial was set to start on August 14,  
13 which is this coming Monday. That has been continued at the  
14 request of the parties until October 23.

15 I want to make sure the Court was aware of that since  
16 I had alerted the Court that there was a possibility of some  
17 issues coming up that the Court might be interested in, but  
18 that's two months down the road now. So nothing to worry about  
19 at the current time.

20 THE COURT: Thank you. I saw that in the July 31  
21 related case update. That timing is better for my purposes,  
22 since I'll be in the country at that time preparing for the  
23 next trial here. Good to know.

24 Let's turn then to what may be the biggest ticket item  
25 today, which is the economic loss motion practice and

1 discovery-related issues. I don't know if intervening events,  
2 that is, between your letters and today, have changed anything  
3 as far as you're concerned, the big intervening event being my  
4 granting of the motion for reconsideration that was filed by  
5 plaintiffs.

6 Let me give you my thoughts, unless you have anything  
7 you need to add before I give you my thoughts. Good.

8 So first let me start with the areas of agreement. It  
9 seems like you're in agreement that discovery should not  
10 proceed at this time with respect to the FACC plaintiffs whose  
11 claims have been dismissed, and I'm in agreement with that as  
12 well.

13 Second, on the issue of summary judgment motions, I  
14 want to understand a little better what the proposal and idea  
15 here is. As I understand it, New GM is proposing to file a  
16 summary judgment motion sooner rather than later but limited to  
17 the issue of benefit of the bargain damages. The idea would be  
18 to bring a summary judgment motion on all other issues down the  
19 road as to some or all states depending on my resolution of  
20 that.

21 Mr. Godfrey is nodding his head.

22 MR. GODFREY: Yes, your Honor. The centrality of the  
23 plaintiffs' case has shifted to the major contours of elements  
24 of the benefit of the bargain. That is a discreet legal issue  
25 that the Court's guidance and ruling on will materially



1 expedite and define the case going forward, including whether  
2 there can possibly be a class.

3 We have views on what "benefit of bargain" means in  
4 various states. I'm sure the plaintiffs would disagree with  
5 some of those views, maybe all of them. The Court will have to  
6 decide that.

7 That issue, given the allegations with respect to the  
8 16 states that the Court has already ruled upon, has become a  
9 central question, the contours and outcome of which will be  
10 very significant in terms of a class briefing.

11 We think it's helpful for the Court, indeed necessary  
12 for the Court, to have a firm understanding of the differences  
13 in state law, what the state law provides and doesn't provide,  
14 and the meaning of that catch phrase "benefit of the bargain"  
15 before we embark upon the class certification because it will  
16 dictate, in many respects, how the Court views certain of the  
17 class issues.

18 THE COURT: I put a lot of trust in you guys in  
19 determining how to proceed and what makes sense and doesn't.  
20 So I'm inclined to accept the proposal.

21 I've written something in the neighborhood of 240  
22 pages on the laws of 16 states already and addressed the issues  
23 of benefit of the bargain. I don't know what evidence has come  
24 to light in discovery that would have meaning for you to sort  
25 of shed light on this issue in a summary judgment motion or

1 what the story is.

2 This is partially because I'm, in general, not a fan  
3 of piecemeal motion practice. I obviously have made some  
4 exceptions here for reasons of practicality and otherwise.

5 The idea of having a substantial motion this fall  
6 followed by another one at some point down the line isn't  
7 particularly attractive to me. So I'm just trying to get a  
8 better sense of what light could be shed that would be helpful  
9 in terms of the class certification or settlement or otherwise.

10 MR. GODFREY: We thought hard about this before  
11 proposing it. So this was not a late-night thought to burden  
12 the Court. The Court has accepted the notion advanced by  
13 plaintiffs that they have benefit of the bargain, that they can  
14 make a claim for benefit of the bargain damages. The question  
15 then becomes what is the nature and element of that definition.  
16 What is benefit of the bargain damages. What is the type of  
17 evidence.

18 From the depositions, we think that the plaintiffs,  
19 the representative plaintiffs, don't have it, but we also think  
20 that it would be very illusory for the Court to understand  
21 precisely what benefit of the bargain means and does not mean  
22 as compared to the label that has thus far been applied.

23 This is similar to what happens in a lot of mass tort  
24 cases where the Court will identify, for example, a particular  
25 causation issue and have a separate summary judgment tract on

1 that particular issue because it can materially advance or  
2 materially inform the parties. So it's very analogous to what  
3 is quite common in MDLs involving mass torts of a different  
4 type.

5 So, from our perspective, we know what the deposition  
6 discovery has shown. We believe we know what the law is. The  
7 Court may or may not agree with us on that. We think that the  
8 law and the plaintiffs' claims do not mesh, but we also think  
9 there are some overarching principles that if the Court agrees  
10 with us, that means certain things for class certification.

11 If the Court disagrees with us, it will mean different  
12 things for class certification. It may be equally helpful from  
13 our perspective, but we don't know until the Court actually  
14 rules.

15 Otherwise, we are briefing class certification where  
16 there is a central theory of recovery and a central theory of  
17 measurement of the damages which is undefined for the Court and  
18 undefined by the contours of the record thus far.

19 Therefore, we've analogized this to a classic  
20 causation issue in certain types of mass tort, particularly Big  
21 Pharma cases, for example.

22 THE COURT: Do you anticipate that it would need to  
23 engage in a state-by-state analysis of each of the 16 states?  
24 Or could this be done at a level of generality that doesn't  
25 require that? Or is this some sort of grouping that could be

1 done where the parties, perhaps even in advance, agree to  
2 different approaches to this and put the states in each of  
3 those buckets?

4 MR. GODFREY: We have not discussed this with the  
5 plaintiffs, at least I haven't. Maybe Mr. Bloomer has. Our  
6 contemplation was an omnibus motion but with the law from the  
7 16 states that your Honor has addressed.

8 I don't think it will be materially different for  
9 certain other states. I didn't want to complicate this more  
10 than it might otherwise be. So it was an omnibus motion.

11 If there were particular state differences, we would  
12 draw those out individually. But from our reading of the law,  
13 we think that there are common elements that will drive the  
14 decision-making analysis of the Court that are overarching for  
15 the 16 states on this particular issue.

16 There may be some differences. As to those, we would  
17 brief those separately with a subset. So it is somewhat akin  
18 to -- I hate to say this because we lost this motion, but it's  
19 somewhat akin to the consequential damages issue where we had  
20 an omnibus motion, and then we had as a fallback where there  
21 were some individual state differences, and the Court did not  
22 agree with us on the omnibus motion up until now but then gave  
23 us the Court's views in terms of what to look for in individual  
24 states, which was very, very helpful.

25 So that is how we envisioned it. We did not envision

1 that we would have a brief that says the law of Alabama is X.  
2 The law of New York is Y. The law of Missouri is Z.

3 We envisioned it as here are the principles that the  
4 courts follow when applying all of the states, and if there is  
5 a difference in a particular state, then we would identify that  
6 that says this particular state has the following additional  
7 two elements or the following element to the claim.

8 So, from our perspective, we, frankly, focused on this  
9 in connection with another case we're involved in where we were  
10 discussing an overarching causation issue. We thought we have  
11 the same issue here, but it's on benefit of the bargain  
12 damages.

13 Mr. Bloomer and I had a case on this years ago on a  
14 damages issue similarly where we focused on the damages  
15 question, and it became the determinative factor in the court's  
16 analysis on class certification.

17 THE COURT: Let me hear from someone at the front  
18 table.

19 Mr. Berman, is that you?

20 MR. BERMAN: That's me, your Honor.

21 THE COURT: Just get a microphone, if you can.

22 MR. BERMAN: You said you were relying on the wisdom  
23 of the parties in coming up with this procedure.

24 THE COURT: I get the sense it's more the parties at  
25 the back table in this instance.

1           MR. BERMAN: Exactly. I've heard Mr. Godfrey and  
2 Mr. Bloomer explain it. I still don't understand exactly the  
3 basis of the motion because you've already ruled in certain  
4 states that benefit of the bargain damages are permissible.

5           Having said that, we didn't see a mechanism over the  
6 rules where we can stop GM from moving for summary judgment at  
7 any time they want to. They apparently want to do it now.

8           So, unless the Court stops them and says, I only want  
9 to do summary judgments once, not piecemeal, which is what  
10 they're proposing, then we went along with the schedule with  
11 the caveat that -- New GM seems to think that they've got this  
12 magic bullet, but they want until December to file the brief.  
13 If they've got the magic bullet and they've thought it out,  
14 let's get it on the table like next week or something way  
15 sooner than December.

16           THE COURT: I hear you that it's coming more from the  
17 back table than yours, and I certainly do think I have the  
18 authority to say we're only going to have one round of summary  
19 judgment briefing here and it won't be until X.

20           I will adopt the proposal and allow New GM to file its  
21 motion on this front. I'll adjust the scheduling in a few  
22 minutes when we turn to issues where you don't agree, but  
23 you'll find that I'm a little more in agreement with the  
24 plaintiffs on that front, that we should get things moving more  
25 quickly than New GM proposed.

1           The last point of agreement is that you will meet and  
2 confer regarding essentially application of my two prior motion  
3 to dismiss opinions to the 35 remaining states in an effort to  
4 hopefully obviate the need for further motion practice, and  
5 perhaps you could essentially resolve how the motions or the  
6 decisions apply to those states.

7           I think that's optimistic. I imagine there will be  
8 some points of disagreement, but as I understand it, you'll  
9 meet and confer by December 1 and submit something to me,  
10 either an agreed-upon proposal or some sort of competing  
11 proposals, by December 15.

12           So I'll look for that. That's fine with me. I would  
13 just ask you to please confer in good faith and to be  
14 reasonable. In my experience, as you've probably seen, I think  
15 in most of these jurisdictions you can find an outlier case or  
16 two that say the opposite of what the weight of authority in  
17 that state seems to say.

18           In that regard, I think in almost every one of these  
19 issues in every one of these states, there is authority that  
20 both parties can hang their hats on.

21           As you've seen, I tend to go with the majority  
22 approach or the weight of the authority. So I guess I'm just  
23 saying that recognizing that you can probably make an  
24 argument -- you're good lawyers. You can make an argument for  
25 anything.

1           Just pick your battles, and hopefully we can minimize  
2 the amount of briefing that we need to do on the remaining 35  
3 states, but obviously we'll see where that goes.

4           Now let's turn to the issues upon which you don't  
5 agree. First is the one that Mr. Berman referred to a moment  
6 ago, which is the briefing schedule for this first summary  
7 judgment motion.

8           As I understand it, Mr. Berman mentioned a December  
9 date. As I understood it, the competing proposals at this  
10 point were only separated by two weeks, namely September 29 and  
11 October 13. Mr. Bloomer is nodding his head. So I'm assuming  
12 that's correct.

13           My proposal is to sort of split the difference and  
14 take a little bit of time away so that it is still fully  
15 submitted by the time that the plaintiffs have proposed.

16           On my proposal, I would have the motion due by  
17 October 6, any opposition due by October 30, and then any reply  
18 due by November 10, which is the date that the plaintiffs have  
19 proposed. I think that may be a court holiday, but I think I  
20 would still have it due on that date notwithstanding that since  
21 you can file on ECF.

22           That splits the difference and gives New GM an extra  
23 week. On the other hand, it gets the motion fully submitted by  
24 the date the plaintiffs have proposed.

25           Any objections?



1 MR. GODFREY: We're okay with that, your Honor. Thank  
2 you.

3 MR. BERMAN: I guess my only concern is New GM has  
4 been preparing this for quite a while, and it's August. So  
5 you're giving them another 45 days to get it ready. You're  
6 giving us 24 days to respond. Maybe give us an extra week.

7 THE COURT: I was trying to --

8 MR. BERMAN: I hear you.

9 THE COURT: -- give you something that you were asking  
10 for. On your proposal, they would have had until the end of  
11 September anyway. So it's only seven days beyond what you have  
12 contemplated.

13 MR. BERMAN: So how about if we get an three extra  
14 days?

15 THE COURT: So you would get until November 2?

16 MR. BERMAN: Correct.

17 THE COURT: That's fine with me. We'll leave the  
18 reply deadline as November 10, but I'll give plaintiffs until  
19 November 2, which I think is the date we're starting the  
20 Doddson trial, to file their opposition.

21 The second issue is the question of proposed  
22 amendments to the 4th amended consolidated complaint. I think  
23 one of the biggest issues you're going to have to address is  
24 what to call the next complaint because fifth starts with the  
25 same letter as fourth. I don't know if you have any thoughts

1 on that. We've been pondering that.

2 MS. CABRASER: Maybe the best amended consolidated  
3 complaint.

4 THE COURT: Or maybe the last.

5 MS. CABRASER: That would be the lack, and we would  
6 not want them to be characterized as lacking anything.

7 THE COURT: Understood. You can ponder what to call  
8 it between now and then.

9 Let me tell you my thoughts on this. I have to say  
10 that I share New GM's skepticism about the appropriateness of  
11 the proposed amendments, that is to say, I think the plaintiffs  
12 have a bit of an uphill fight to show that there is good cause,  
13 which I think is the relevant standard here.

14 Having said that, I don't see how I can categorically  
15 preclude the amount based on the current record and the  
16 parties' letters. New GM's arguments against allowing the  
17 amendment -- this is on page 7 of its letter, which is docket  
18 number 4338 -- are really fact dependent based on who knew what  
19 and when.

20 I don't know the answers to those questions, and I  
21 also imagine that the answers might differ as to some of the,  
22 say, proposed new plaintiffs versus others. So I don't really  
23 see how I can categorically preclude an amendment.

24 I think what may make more sense -- as you have heard,  
25 I'm not eager to invite more motion practice, but I think what

1 would make more sense would be to have the plaintiffs file  
2 their proposed amended complaint with essentially a motion for  
3 leave to amend, and we can then adjudicate it based on what the  
4 actual concrete proposals are and what showing they can make as  
5 to the proposed changes.

6           So that's a little different than I think either side  
7 had contemplated. Maybe not. The plaintiffs essentially made  
8 that argument in their letter but didn't exactly frame it as a  
9 motion for leave to amend. It was more just a yes or no. I  
10 guess what I'm saying is I don't see how I can say yes or no  
11 without knowing more.

12           Mr. Bloomer, it looks like you want to say something.

13           MR. BLOOMER: Thank you, your Honor. Andrew Bloomer  
14 on behalf of New GM.

15           If the Court grants leave to amend and then there is  
16 motion practice on that, I take it that the motion practice  
17 would encompass either the propriety of adding the new  
18 plaintiffs and/or why their claims should be dismissed on the  
19 merits, which is what I think the plaintiffs had in their  
20 proposed schedule.

21           We objected to the addition of the plaintiffs but said  
22 regardless, since you're filling slots that have already been  
23 briefed, we want to reserve our client's right to move to  
24 dismiss them on the merits, and I just want to understand the  
25 scope of what would be contemplated in opposing a motion for

1 leave to amend.

2 THE COURT: I hadn't really thought it all through. I  
3 think you raise an interesting question. I was thinking that,  
4 yes. We would adjudicate the question of amendment, and then  
5 certainly you would have an opportunity to make your  
6 12(b)(6)-type arguments with respect to any new plaintiffs. I  
7 don't know if there are new claims, but I think it's more new  
8 plaintiffs than anything else.

9 Having said that, what your comment points to is maybe  
10 these two things can and should be consolidated. Obviously  
11 futility is a factor in the leave-to-amend analysis. In that  
12 regard, the 12(b)(6) arguments can be made in the context of  
13 the leave-to-amend process, the only difference being really  
14 who files the opening brief.

15 In the normal case, of course, in a motion for leave  
16 to amend, the plaintiff would essentially file the opening  
17 brief and say why the amendment is not futile, and then you  
18 would have an opportunity to make your 12(b)(6) arguments in  
19 opposing, and then they would have the reply, as opposed to I  
20 think the way you guys had sort of proposed doing it, there  
21 would be an amendment followed by 12(b)(6) practice where GM  
22 would be the moving party and file the reply.

23 So I don't have a strong view either way, except that  
24 the most efficient way we can do this and the faster we can get  
25 it resolved I would think the better, particularly if we have a

1 summary judgment motion coming down the pike.

2 MS. CABRASER: Your Honor, we hadn't thought of that  
3 specifically, but we think that makes sense. Certainly it  
4 would be more efficient to combine those arguments.

5 We would be providing the plaintiffs' FACC sheets for  
6 the additional plaintiffs. There are ten or less of those. So  
7 the information would be in the proposed amended complaint.  
8 The FACC sheet would be there. We would be making our  
9 arguments in our motion to amend opening brief.

10 As you know, futility is an argument against  
11 amendment. So this would really be any attack on this pleading  
12 in terms of what is new or different in it, and then once we're  
13 past that, we either have the amended complaint in whole or in  
14 part or we don't, and we move on.

15 THE COURT: Mr. Bloomer.

16 MR. BLOOMER: I think both parties are trying to  
17 figure out a way, your Honor, to try to streamline the  
18 proceedings without kind of sacrificing rights, at least  
19 certainly from our perspective, our right to move to dismiss.

20 If the plaintiffs want to move for leave to amend and  
21 we raise an opposition that addresses both the leave and the  
22 12(b)(6)-type arguments, to the extent we have them, I think we  
23 can accept that. I realize they'd get a reply. I think,  
24 depending on what happens, we may want to seek leave for a  
25 surreply just to kind of --

1 THE COURT: Get the last word?

2 MR. BLOOMER: Get the last word and keep in line with  
3 traditional motion practice on 12(b)(6).

4 THE COURT: I think we can probably wait and see if  
5 that proves to be necessary. I think this is probably the way  
6 to go, just thinking out loud. I think it probably means  
7 getting these things resolved even faster than you guys have  
8 proposed in your competing schedules. So why don't we plan on  
9 proceeding that way.

10 I have been, I think, fairly reasonable, more than  
11 aggressive, in granting requests to file surreplies because I  
12 have generally trusted you guys and your assessment that that  
13 is appropriate and necessary. So, if you think it is here, you  
14 can make an application, and I will consider it in the normal  
15 course.

16 I'll leave it to you to propose deadlines for that. I  
17 think if plaintiffs can still file the proposed amendments by  
18 August 25, that would be great. If they weren't contemplating  
19 doing that with a motion -- that may be ambitious, particularly  
20 if we're now essentially consolidating the sort of contemplated  
21 12(b)(6) motion practice with a motion for leave to amend. It  
22 may be that we can still push that deadline back a bit and have  
23 that resolved quickly, if not more quickly than contemplated in  
24 your proposed schedules.

25 So can I leave it to you to confer and come up with a

1 proposed schedule?

2 MS. CABRASER: Yes, your Honor. We'll confer on that,  
3 and we'll come up with a schedule. It will be somewhat later  
4 than the August date, but I think it will end up being more  
5 expeditious.

6 THE COURT: Great. I trust that you will, again, be  
7 reasonable and proceed in good faith on the question of  
8 futility and that you're not going to make arguments that  
9 really amount to reconsideration of a decision that I've made  
10 in the first two motions that I've resolved, which is another  
11 way of saying that you can reserve your rights and the relevant  
12 footnotes as you regularly do, but I don't expect to see  
13 arguments that are really taking issue with rulings I've made.

14 It's one thing to make new arguments based on the  
15 specific allegations concerning those plaintiffs. It's another  
16 thing to reargue points that as far as I'm concerned, are  
17 settled. So I trust that you will hear me loud and clear on  
18 that front and not seek to re-litigate issues that I've already  
19 decided.

20 So I'll look for your proposal on that. If you can  
21 incorporate it into the proposed order memorializing what we're  
22 doing here today, great. If you need additional time, that's  
23 fine as well as far as I'm concerned, but I'll leave it to you  
24 and trust that you'll submit it to me as soon as you can.

25 That leaves the bigger issue of sort of the structure

1 of future motion practice. I did, number one, review other  
2 MDLs and some of the decisions cited in your letters, I think  
3 more plaintiffs' letter than New GM's letter, but I did review  
4 other MDLs and spoke to other MDL judges to get a sense of  
5 their experiences in these matters.

6 The bottom line is I do not intend to proceed in the  
7 manner that New GM is proposing, that is to say, as I  
8 understand it, briefing summary judgment and class  
9 certification as to all 51 states and D.C.

10 As I indicated before, I'm not a big fan of piecemeal  
11 motion practice, but I think adopting that approach would  
12 really involve a significant delay before we even got to motion  
13 practice because of the need for discovery.

14 GM has made clear that it would take the position that  
15 it's entitled to take discovery of every plaintiff in every  
16 state that is subject to motion practice. I think it would be  
17 a while before we even got to motions. Frankly, what those  
18 motions would look like and what a ruling would require from me  
19 are things that I shudder to think about.

20 I think it makes a lot more sense, as I think I had  
21 intimated at the July conference, to adopt some sort of  
22 bellwether-type approach along the lines of what I think I  
23 suggested last month and what the plaintiffs have proposed, and  
24 that does seem to be the way that, if not most other MDLs of  
25 this sort facing similar issues have proceeded, but certainly



1 the way that many have with some success.

2 I think that a decision on essentially some number of  
3 the states that I have already addressed on the motions to  
4 dismiss would help inform the settlement discussions that I  
5 assume are either ongoing or would be ongoing. In any event, I  
6 think it's likely that we would be able to apply those  
7 decisions in some streamlined fashion to other states down the  
8 road.

9 So that's a long way of saying that I agree with the  
10 plaintiffs that some sort of bellwether approach is warranted  
11 here, which raises the question of sort of how to choose the  
12 bellwether states, if I can call them that. I include D.C. as  
13 a state, even though as every resident of D.C. would tell you,  
14 it is certainly not a state.

15 I am inclined to pick two to be agreed upon jointly by  
16 you, and I hope that you could agree jointly of the 16 that I  
17 have addressed sort of the two that would make the most sense,  
18 either from the perspective that the most plaintiffs are in  
19 those or they're most representative of the 51 states or at  
20 least the 16 states that I've resolved.

21 I just think that given the amount of briefing and the  
22 decisions you already have from me, that you guys could  
23 actually agree upon that. If you can't, I'm inclined to think  
24 that you should submit letter briefs to me, and then I'll  
25 decide.

1           This is not like the personal injury/wrongful death  
2 cases where I'm in the dark about the specifics of the cases  
3 and, therefore, not in a good position to choose. I obviously  
4 know quite a bit about the 16 states that we're choosing among.

5           So, if you can't agree, I think you can submit your  
6 views on which of those states we should adopt, and I could  
7 then make that decision. I would rather not have to do that,  
8 but I'm certainly prepared to do that, if necessary.

9           So my inclination is to say two and leave it to you to  
10 try and meet and confer and either submit something, an  
11 agreed-upon kind of schedule and protocol identifying those two  
12 states or competing proposals, and I'll then resolve things  
13 that you don't resolve.

14           I would say in the mix of that if in the course of  
15 talking about it, you guys decide, based on the particular  
16 facts of either the number of plaintiffs or the categories of  
17 state laws involved, if you think that a number other than two  
18 makes sense -- I'm not interested in 16, but if three or four  
19 would make more sense than two, I'm certainly open to that. As  
20 an opening bid, I would suggest two.

21           Mr. Berman.

22           MR. BERMAN: Your Honor, Ms. Cabraser and I were  
23 talking this morning, and coincidentally we came up with two as  
24 well. We bounced around four, five, six. It doesn't matter.  
25 We thought we could do one because that's going to guide a lot

1 of future thinking, but maybe there is a difference in law that  
2 might be helpful. So we came up with two.

3 We'll certainly try to agree with GM on which two.  
4 The only thing I think we need to do is then have a timetable  
5 for selection and more letter briefing on the issue.

6 THE COURT: Let me hear from the back table. If you  
7 guys sit down and talk and look at the particular states and  
8 decide that we could do this as to only one state -- and there  
9 are several MDLs that have done that, and I think that it has  
10 benefited the litigation even where it's been limited to one  
11 state and bellwether trials limited to one state or what have  
12 you -- I'm certainly open to that.

13 Two is sort of an abstract number. I guess what I'm  
14 intimating is the devil may be in the details. If it turns out  
15 that one can be as useful or three would be more useful, I'm  
16 certainly open to that. Again, two is the opening bid.

17 Mr. Bloomer, Mr. Godfrey.

18 MR. GODFREY: I think we would like to reflect upon  
19 it, your Honor. The last time I did this in this court, that  
20 is, the Southern District in front of Judge Scheindlin, we  
21 settled on four.

22 I don't recall whether that was agreed to by the  
23 parties or we each got two, in other words, the pick two  
24 lottery. The plaintiffs picked two, and we picked two.

25 I don't recall Ms. Cabraser was directly involved. I

1 believe it was one of her colleagues. They had some  
2 advantages, both from a numeric perspective and geographic  
3 perspective that more appropriately canvassed the differences  
4 in the law.

5 I'd like to reflect upon it. I understand the Court's  
6 direction. We will have this discussion. I know that we do  
7 not think one is appropriate. Two, three, or four -- we'll get  
8 together with the plaintiffs and see if we can agree. If not,  
9 then we'll brief it for the Court's consideration.

10 THE COURT: Great. Sounds good. Let me leave it to  
11 you to try and hammer all this out. In terms of a schedule,  
12 I'm not prepared, for any number of reasons, to actually go  
13 through each and every one of the dates.

14 I'd be inclined to leave that to you to try and hammer  
15 out with the one statement from me that I'm more in agreement  
16 with the plaintiffs' proposal than I am with New GM's in terms  
17 of how to proceed with the actual schedule which I think gets  
18 things done more quickly than New GM, but it may be that having  
19 resolved the big-picture issue, you guys can reach some  
20 agreement, even if it means modifying the plaintiffs' proposal  
21 here and there.

22 So why don't I leave it to you in the first instance  
23 and see if you can agree on a schedule that fits with the  
24 overall structure that I have proposed, and we'll take it from  
25 there.

1           How long do you want to confer and submit something to  
2 me? Would two weeks be sufficient?

3           MR. BERMAN: Two weeks would be sufficient from our  
4 perspective.

5           MR. GODFREY: Yes, your Honor.

6           THE COURT: So I'll give you two weeks from today to  
7 submit something, either agreed upon -- and if not agreed upon,  
8 then in the normal course with competing letter briefs. That  
9 exhausts that issue.

10           The last issue is the status of bellwether trial  
11 number 9. I like that you guys keep the numbers. It makes my  
12 colleagues think I'm trying many more cases than I am.

13           Is there anything to discuss on this front? I have a  
14 couple minor sort of administrative things that I would propose  
15 based on lessons learned from the last trials. I'm also open  
16 to hearing if you guys think there are any ways that we could  
17 proceed differently that would help you and make things run  
18 more smoothly. I think the last trial actually ran pretty  
19 smoothly, all things considered.

20           Let me first just ask: Is there anything sort of  
21 substantive to discuss or any issues on that front?

22           Is Susman Godfrey trial counsel for plaintiff on that  
23 case?

24           MR. HILLIARD: Co-trial counsel. My law firm is going  
25 to co-try it with them. So they will be here at probably the

1 status conferences involving the Doddson trial, but we'll be  
2 co-lead counsel on that.

3 THE COURT: Good. I was beginning to miss you,  
4 Mr. Hilliard. I'm glad to hear that.

5 Anything substantive to discuss, Mr. Brock?  
6 Mr. Hilliard?

7 MR. BROCK: The case is proceeding to trial in the way  
8 we would expect. I don't think we have anything to discuss.

9 MR. HILLIARD: In discussing the last couple of  
10 trials, specifically, the last one, and then reflecting on the  
11 others, it seems that the streamlinedness is working, and the  
12 amount of time that we think we need versus the amount of time  
13 that we need is less.

14 Perhaps both sides have the courage now to say, we  
15 only need a week and we can get it done in a week instead of  
16 extending the proposed time. It helps with the jury panel, as  
17 well as helps with the preparation of experts.

18 THE COURT: Yes. I think that was all true. I would  
19 say to the amount of time you think you need and the amount of  
20 time you actually need, I would actually add a third category,  
21 which is the amount of time I'm going to give you.

22 MR. HILLIARD: That should probably be category one.

23 THE COURT: I can't remember if you were here or if it  
24 was folks from Weitz & Luxenberg. I think that the first  
25 couple trials, with all due respect, were somewhat overtried.

1           I understand why that might have been the case and how  
2 much is at stake in each of these cases. I do think in the  
3 last one we were sort of approaching a better equilibrium in  
4 terms of paring it down and remembering that it's about an  
5 individual accident. So I would urge you to continue with  
6 that, and I will do my part as well when the time comes.

7           A couple things that I wanted to note just in advance  
8 and would invite you guys to also discuss with each other and  
9 among yourselves, if there are ways to tweak the procedures  
10 that we have been using, that would be helpful or make things  
11 more efficient from your perspective. That is to say, any  
12 lessons learned from the last trial or two, if you have any  
13 thoughts on that, feel free to propose them to me. I'm  
14 certainly open to changing the way we do things.

15           A couple things on that front. One is I don't know to  
16 what extent you guys have conferred in advance of the motion in  
17 limine deadlines about motions in limine, but I get the sense  
18 that more discussion might be beneficial, that is to say, that  
19 in each trial I think there have been motions that have  
20 essentially been mooted because they're not really disputed or  
21 the disagreements turned out to be a lot narrower than the  
22 opening brief seems to think.

23           I would think that you might save yourselves some  
24 trouble and ultimately me some trouble in what I have to  
25 ultimately read if you could kind of discuss that ahead of time

1 and figure out more precisely what you actually do need to  
2 brief as opposed to what might be agreed upon.

3           Second, with respect to deposition designation  
4 disputes, it would be helpful, when you file the sort of  
5 omnibus letter and transcripts and so forth -- I think in the  
6 past ones you have not identified which party is calling which  
7 witness, and I think I mentioned in the last trial that I was  
8 trying to get ahead of things and ended up reviewing, during  
9 the plaintiffs' case, some witnesses that were actually GM  
10 witnesses, and, therefore, I ended up needing to do that  
11 anyway, but it would just be helpful in terms of me triaging  
12 and knowing what I need to prioritize.

13           Third, because I think your resources exceed my  
14 resources on this front, I would like one or the other of  
15 you -- I would propose New GM -- to take on the task of copying  
16 the jury questionnaires when we have a copy of the final  
17 version of them and provide them to the jury department to  
18 distribute to the jury pool. Is that acceptable?

19           MR. BROCK: Yes, your Honor.

20           THE COURT: That's it from me on this, but I would  
21 invite you to discuss among yourselves if you think there is  
22 anything that I can do or should be doing differently that  
23 would be helpful and make things run more smoothly.

24           The next item is the trial setting for bellwether  
25 number 11. I have to say I'm a little puzzled because I



1 understand that May 7 was a date that I came up with on my own,  
2 in part, quite frankly, to protect my summer.

3 I looked back at your proposal on this front, which is  
4 docket number 4298, and you guys had initially proposed June 25  
5 as a trial date. So I don't know why all of a sudden you're  
6 not available until August, and part of what is animating my  
7 asking that is, quite candidly, I can't try this case in August  
8 for any number of reasons.

9 A, it would be hard to find a jury. B, my own  
10 schedule doesn't really permit it. And then complicating  
11 matters further, September really isn't an available option  
12 either.

13 There are pretty much two days every week in September  
14 that I would be off for Jewish holidays, and many jurors would  
15 also be unavailable anyway, all of which is to say that if we  
16 don't try it before I would say July or before, we're really  
17 looking at an October trial date at the earliest, and that  
18 doesn't strike me as ideal.

19 So I guess I wanted to get a sense of A, what's  
20 changed; and B, what the conflicts are. You guys have a pretty  
21 large number of lawyers working on these things. I understand  
22 if one or the other person has a conflict. I get it. There is  
23 a lot of time between now and then, and other people can fill  
24 in. So what's going on?

25 MR. BROCK: Your Honor, the trial conflict -- this is

1 Mike Brock for GM.

2           The trial conflict is mine. I have a case scheduled  
3 for trial in Washington, D.C. on April 30. It's expected to be  
4 a three- to four-week trial. I am available to try a case in  
5 this court I really feel like June 11 or later. The last case  
6 I tried here I tried with a two-week break from a four-week  
7 trial out in Kansas. I feel like that's something that I can  
8 do and can be available to do.

9           We did look at earlier dates. We didn't know if  
10 your Honor would have availability, say, in late March. Allan  
11 Pixton and I and others on our team tried to see if we could  
12 work out a schedule that might work for March. It just looked  
13 like it would be very difficult to do, even if your Honor had a  
14 date in March. As it turns out, Mr. Hilliard had a trial  
15 conflict I think in April anyway.

16           So that's the issue we face. I have talked to my  
17 client about having another lawyer lead a trial here in the  
18 MDL. They have expressed a strong preference that I lead the  
19 cases here. So, for better or worse, that's where we are.  
20 That's why we were trying to find a way for me to be able to do  
21 that.

22           THE COURT: Mr. Hilliard, I don't know who is trying  
23 it for the plaintiffs.

24           MR. HILLIARD: Unlike Mr. Brock, we have more than one  
25 rooster in the henhouse. You pick the date, and we will be

1 there. There are plenty of executive committee members that  
2 would like to step up and try it.

3 There are the potential of the actual lawyers who  
4 represent the plaintiffs that might be available, with  
5 assistance, to try it. I would not be available to do it  
6 personally. But, again, the Court and the case does fine  
7 without me, as we've done twice already.

8 So whatever date that works for Mr. Brock and the  
9 Court, I can represent that I am sure there is a trial team  
10 that could be available and come and try it, given the Court's  
11 comments that started this discussion.

12 THE COURT: So give me one moment to figure out a  
13 couple things on my end.

14 How is June 18, 2018?

15 MR. BROCK: Yes for us.

16 MR. HILLIARD: Yes, sir.

17 THE COURT: June 11 would be challenging on my end. I  
18 think the 18th is better than your original proposal of the  
19 25th because it's less risk that we would run into the July 4  
20 holiday. So we'll do that.

21 Why don't you guys look back at the schedule. The  
22 schedule was obviously predicated on a trial date of May 7.  
23 Obviously the more time I have to do what I need to do, the  
24 better.

25 Recognizing that we're now a month plus later, if you

1 want to give yourselves a little more time on some of the  
2 things, that's fine with me. If you have any proposed  
3 modifications, why don't you talk about them to each other, and  
4 we'll go from there.

5 Next is supplemental briefing on successor liability.  
6 Sorry to give you more briefing. I'm sorry to give myself more  
7 briefs to read. As you can see, I thought it was appropriate  
8 for a couple reasons.

9 Without intimating whether I agree with the  
10 plaintiffs' characterization of New GM's proposal as a fishing  
11 tactic or not, I am inclined to agree with plaintiffs that it's  
12 unnecessary to proceed in the manner that GM has proposed and  
13 likely only to result in more delay, given the arguments made  
14 by GM thus far, and they're summarized a bit in the agenda  
15 letter but the portion attributable to the plaintiffs, but  
16 certainly the arguments that have been made to me thus far.

17 I don't quite understand why we would need to proceed  
18 in that manner and why GM couldn't make the arguments that it  
19 thinks are to be made based on the information that it  
20 currently has.

21 I think it would make more sense to stick with the  
22 current plan, which is simultaneous briefing by August 24 with  
23 the understanding, perhaps, or the caveat that New GM or the  
24 plaintiffs, for that matter, could always seek leave to file a  
25 supplemental brief, that is, supplemental supplemental brief.

1           If there is something in the declarations that are  
2 filed in the first instance that changes the situation in some  
3 material way, I think that enables us to stick with the current  
4 schedule but allows GM, if it learns something from the factual  
5 declarations that are filed that it changes things in some  
6 meaningful way, it gives New GM an opportunity to tell me what  
7 that is. I would think that that would be a better way to  
8 proceed. That's what I would propose.

9           Thoughts. No thoughts?

10          MR. GODFREY: I have thoughts. I thought Mr. Berman  
11 was going to say something.

12          THE COURT: It looks like he is.

13          MR. BERMAN: I am. On Wednesday we informed General  
14 Motors that we plan on presenting papers in the bankruptcy  
15 court next week, perhaps as early as Tuesday, that would ask  
16 the bankruptcy court to issue a claims estimation order  
17 pursuant to the sale agreement.

18          And under the sale agreement, your Honor, the Guc  
19 Trust has the authority to go to the bankruptcy court and to  
20 compromise claims. In the event the Guc Trust makes a  
21 determination that claims exceed \$35,000,000, to ask the Court  
22 to issue an estimation order that would require New GM to issue  
23 stock that would be put into an account for the benefit of,  
24 actually, our class.

25          And pursuant to that estimation order, we're going to

1 ask the bankruptcy court to issue that order which would  
2 require GM to put up stock that's worth roughly a little over  
3 \$1,000,000,000.

4 THE COURT: Correct me if my understanding of this is  
5 wrong. I take it this is the so-called "accordion feature";  
6 that essentially the estimation order would trigger the  
7 accordion feature?

8 MR. BERMAN: That's correct.

9 THE COURT: This might be what Mr. Godfrey was fearing  
10 would be the --

11 MR. BERMAN: Yes. We gave GM a heads-up, as I said,  
12 this week. I don't think that this changes your briefing idea  
13 because the fact of the matter is that you recognize the  
14 positions New GM has taken with respect to successor liability.  
15 We're not going to have a resolution of this proposed  
16 settlement. I suspect that GM is not going to just quietly  
17 agree to issue \$1,000,000,000 worth of stock.

18 THE COURT: I'm pretty confident in sharing that  
19 prediction.

20 MR. BERMAN: I'm also pretty confident that the sale  
21 agreement actually gives GM no rights to object, but we'll  
22 fight that out.

23 THE COURT: I intimate no view on that.

24 MR. BERMAN: So I think that we should continue with  
25 the briefing, but I wanted to give the Court a heads-up that

1 there will be some new facts on the table next week.

2 THE COURT: I appreciate that heads-up. I think, if  
3 anything -- I understand from the grumpy looks at the back  
4 table that you're not happy about the accordion feature issues  
5 here. Those are not my concern, at least in the  
6 first instance.

7 I think to the extent that these implicate me, that  
8 suggests to me that you'll have the information before the  
9 deadline that I've imposed, and we can just proceed as I had  
10 already planned.

11 Any reason otherwise, with the caveat, I suppose,  
12 Mr. Godfrey and Mr. Bloomer, that if upon seeing what  
13 plaintiffs file on Tuesday, you need additional time to sort  
14 through what it all means, that you can always seek a  
15 reasonable extension, and I would consider it. Obviously the  
16 sooner we can get briefing, the better, as far as I'm  
17 concerned.

18 Your thoughts. I don't want to hear your thoughts on  
19 the accordion feature issue. You'll have plenty of  
20 opportunity, I'm sure, to air those, whether you have any right  
21 to or not. I'm sure you'll make those arguments but not to me,  
22 at least in the first instance.

23 Any issues with what I have said on the successor  
24 liability issues before me?

25 MR. GODFREY: Well, both issues are going to be before

1 your Honor. Let me address the first issue, which is the  
2 successor liability briefing.

3 I think, in light of what your Honor has said with  
4 respect to the option of having supplemental briefing if we  
5 deem it necessary, then that is acceptable to New GM.

6 With respect to the second issue though, I have some  
7 points that your Honor -- this is a marker. This is not going  
8 to be in the bankruptcy court.

9 At my age, I'm seldom surprised, and I'm never  
10 shocked. But a day and a half ago, I was both surprised and  
11 shocked when we were given a bare-bones description of this  
12 settlement agreement.

13 This is not a compromise by the Guc Trust or the  
14 plaintiffs' claims in the bankruptcy court. This is a complete  
15 surrender and sellout using GM's money to pay for a settlement  
16 that was not defended against, claims that were meritless that  
17 were asserted.

18 Let me express, in no uncertain terms, how we view the  
19 proposal.

20 THE COURT: Let me stop you, only because I want to  
21 get out of here as I suggested. I don't mean to cut you off  
22 and not give you an opportunity to be heard on this, but I  
23 don't think this is the time or place to do it.

24 You'll have plenty of opportunity in the  
25 first instance, I would think in front of the bankruptcy court,



1 even if it's ultimately an issue that I'll need to resolve or  
2 even some higher court.

3 Am I wrong about that?

4 MR. GODFREY: Yes. We are going to file a motion to  
5 withdraw as soon as permissible, withdraw the reference from  
6 the bankruptcy court and this court.

7 The notion that they can settle for no material money  
8 from the Guc Trust -- the Guc Trust has \$400,000,000 in assets.  
9 They're getting \$15,000,000, as we understand it, assigning  
10 rights, agreeing to a \$10,000,000,000 claim. And supposedly GM  
11 has no rights when they take a billion dollars of our money.

12 That is not going to stand. We're going to withdraw  
13 the reference. We're going to bring it to the Court. This is  
14 collusive. There are cases on point that we can refer the  
15 Court to.

16 This has got all the indicia of a collusive  
17 settlement. They are awaiting a time-barred defense. We have  
18 no idea upon what basis and what expert the Guc Trust had,  
19 which I doubt, by which they are not contesting \$10,000,000,000  
20 in claims.

21 And that is the trigger mechanism by which they claim  
22 New GM has no choice but putting up a billion dollars. That is  
23 not going to happen without this Court hearing and ruling on  
24 the issues.

25 We have unfairness issues. We have the indicia of

1 collusive issues. We have the fact that General Motors has  
2 been excluded. And you heard this morning that supposedly we  
3 have no rights to even object. I don't think that in our  
4 country when someone is told to give a billion dollars to  
5 someone else, we have some rights to object, including notice  
6 and opportunity to be heard.

7           So, from a marker perspective, we're going to file a  
8 motion. We're going to brief the motion. We're going to  
9 attack the settlement, and it's going to be before your Honor.  
10 We're going to do it as soon as we can permissibly do it.

11           THE COURT: The marker is laid. I'll look for the  
12 motion. The question is your arguments seem to me to be more  
13 geared towards the merits of the issue than the forum in which  
14 it should be litigated, at least in the first instance.

15           In proposing that the reference be withdrawn may be  
16 the fact that it's a collusive agreement, if it is -- I  
17 intimate no view on the matter -- is a factor to consider in  
18 that analysis.

19           The question that occurs to me, thinking out loud, is  
20 why you can't make those arguments to the bankruptcy court in  
21 the first instance, recognizing that they may ultimately come  
22 to me.

23           MR. GODFREY: That's a good question. Since  
24 your Honor said I should keep this short, but there is an  
25 answer to that.

1           THE COURT: I trust the answer will be clear from your  
2 motion.

3           MR. GODFREY: It will be very clear, but we can talk  
4 about this further in the motion. One simple point for  
5 your Honor to consider. This is on behalf of a putative class,  
6 among other things.

7           Your Honor has got the class before the court. This  
8 Court is going to decide Rule 23 issues, not the bankruptcy  
9 court and not some quasi class which has the same implications.

10          This has come up before in other cases where the court  
11 has said, no. That's the MDL's court's purview we think. So  
12 there is significant overlap between the issues, both in terms  
13 of the merits of the claims and the class issues and in terms  
14 of notice issues that this Court has the jurisdiction over and  
15 that this Court should have the primary role over.

16          So we will lay this out for the Court, but make no  
17 mistake. General Motors objects to this. We believe that it's  
18 brought an indicia of collusiveness. Frankly, what the few  
19 facts we were told are, they've got \$400,000,000 in assets from  
20 the Guc Trust for \$15,000,000.

21          They are released from all liability for this alleged  
22 \$10,000,000 claim, and General Motors is supposed to put up a  
23 billion dollars to make it all right. General Motors has been  
24 excluded from the settlement negotiations and had no knowledge  
25 of the terms of the settlement negotiations.

1           If you look at the terms of the accordion feature, we  
2 don't believe that they can do this.

3           THE COURT: Understood. I will look for it. If you  
4 want to discuss with each other a briefing schedule for that  
5 motion, you're certainly welcome to, and you can propose it to  
6 me.

7           In the absence of that, it sounds like GM is planning  
8 to file the motion at some point soon regardless. Unless and  
9 until I see otherwise, the local rules and default schedule  
10 will apply.

11           As for the successor liability briefing, we'll stick  
12 with the existing plan with the understanding that if there is  
13 need for supplemental supplemental briefing, that is to say,  
14 another round, then you'll let me know.

15           I want to say two notes on that. That is not to give  
16 you an opportunity to reply. I am contemplating simultaneous  
17 briefing. So I would grant an additional round of briefs only  
18 if there is something new learned from the submissions on that  
19 date that changes things in some material fashion that you  
20 think you need to address. It's not an opportunity to reply to  
21 the other side's arguments.

22           The second is that I'm not going to set a deadline  
23 right now for that additional briefing or page limits for that  
24 matter because I'm hoping and assuming that it won't be  
25 necessary.

1 I do caution you that you're not going to have a lot  
2 of time and you're not going to have a lot of pages. If you do  
3 propose another set of briefs, keep both of those in mind.

4 MR. GODFREY: I think we understood that, your Honor.  
5 At this point, I think we understand your views on supplemental  
6 briefing.

7 THE COURT: Good.

8 Let me also just say on the briefs that you will be  
9 filing in the next couple weeks on this front, I would endeavor  
10 to make them, as much as you can, sort of standalone briefs,  
11 that is to say, on the one hand, you don't need to waste time  
12 on the preliminaries, the background, etc.

13 I know what the issues are. I have obviously  
14 addressed a lot of the issues in the opinion that I handed down  
15 a week or so. You can cut to the chase and brief the issues  
16 under that law, as I indicated, and address the effects, if  
17 any, of the settlement with the Guc Trust.

18 Having said that, to the extent you can write it so  
19 that my clerks and I don't need to keep looking back at the  
20 prior set of briefs, that would be helpful for two reasons.

21 One is, as I'm going to tell you in a minute or two,  
22 today is Ms. Kumar's last day with me. Actually, last Friday  
23 was. She's actually just done me the courtesy of coming to  
24 this to make things easier in transitioning.

25 She helped me on that motion and won't be around when

1 your supplemental briefs come in, which is to say that I'll  
2 have another clerk without the same institutional memory and  
3 background on this helping me.

4 The second is while I certainly have read all the  
5 materials, it will be several months basically since I have  
6 done so. The less that I have to go back and reread things,  
7 the better. I would just ask you to keep those in mind in  
8 terms of how you write those briefs.

9 MR. GODFREY: Your Honor, I have a question on that.  
10 Would it be helpful for us, if we are referring back to another  
11 brief, to just attach as an exhibit the selected pages from  
12 that brief?

13 THE COURT: Yes. I think that would be helpful  
14 actually.

15 MR. GODFREY: I think we'll do that, if that's  
16 acceptable to the Court.

17 THE COURT: I think that is. Otherwise, leave my  
18 remarks standing. I gave you my guidance, but that would be  
19 helpful, if you think it's necessary.

20 MR. GODFREY: Thank you.

21 THE COURT: Settlement.

22 Mr. Berman, did you have something else you wanted to  
23 add?

24 MR. BERMAN: Yes. We've been silent at the front  
25 table with respect to Mr. Godfrey's comments.

1           THE COURT: I understand. Certainly you'll have an  
2 opportunity to be heard.

3           MR. BERMAN: That's all I need to say.

4           THE COURT: Understood. Good.

5           On the issue of settlement, I received the first  
6 monthly inventory of cases, which is very helpful and will be  
7 helpful going forward.

8           On the question of the appointment of a mediator, I'm  
9 happy to hear from both sides on that front. I am of the view  
10 that we are getting to the point where having somebody in place  
11 who could be helpful certainly on the economic loss side but  
12 perhaps even on the personal injury/wrongful death side,  
13 recognizing that Judge Cott only has a limited amount of time  
14 available on his calendar, that would probably make sense.

15           I'm open to suggestions on that. I'm open to  
16 suggestions on who that person could be. I think in our  
17 closed session last time, I threw out a couple names that I was  
18 thinking of.

19           I know from looking at an order that Judge Selna  
20 entered in the Toyota matter, which I also wanted to mention --  
21 I gather that Patrick Juneau was appointed to him to serve as a  
22 sort of mediator capacity in that litigation.

23           I don't know Mr. Juneau or what the experience was  
24 like, but I mention his name as a possibility. So I'm open to  
25 your thoughts and suggestions here, both in terms of timing and

1 in terms of moving things forward.

2 The only other thing I wanted to throw out is I  
3 referred to an order of Judge Selna that he issued, and I read  
4 an order that established an "intensive settlement" process or  
5 protocol.

6 I guess the question I have -- and this applies to  
7 personal injury/wrongful death as much as anything -- whether  
8 it might make sense now or sometime down the road to enter an  
9 order along those lines.

10 I think thus far I've left this largely to you guys,  
11 and I think it's largely been okay thus far. I guess I'm just  
12 throwing that out there as another possibility.

13 Mr. Berman, it looks like you want to say something.

14 MR. BERMAN: Yes, your Honor. You mentioned earlier  
15 that you assumed settlement discussions were ongoing. There  
16 have been no settlement discussions since we made a demand on  
17 GM.

18 We don't think settlement discussions are likely to  
19 get started, unless a mediator gets the parties together. We  
20 don't think we should wait for the benefit of the bargain  
21 briefing for several reasons. A decision is three or four  
22 months off at the earliest.

23 Second, it's my experience and Ms. Cabraser's  
24 experience that so-called "important rulings" might make the  
25 case harder to settle. If GM loses that, which we think they



1 will, then the price of settlement goes up. What that  
2 typically forces a defendant to do is to look for the next big  
3 ruling to get them out of the hard spot they're in.

4 So we think that you should appoint a settlement  
5 mediator. That mediator can then reach out and decide what the  
6 appropriate steps are. We think we should either agree or  
7 submit names within a week.

8 This is not a complicated thing, to come up with a  
9 potential mediator, and we've been raising this repeatedly, and  
10 we've suggested a couple names to GM.

11 Ms. Cabraser and I were talking about this, and we  
12 can't come up with an MDL that we've been involved in --  
13 between of two of us it's been an embarrassing number of  
14 MDLs -- where we didn't have a mediator appointed at this stage  
15 of the case. So I think now is the time, and I think  
16 Ms. Cabraser wanted to talk about the intensive.

17 MS. CABRASER: Yes. Thank you, your Honor.

18 I do agree with Mr. Berman that the time is now. The  
19 procedure need not be a complicated one. The parties should be  
20 directed to meet and confer and either agree on a name or  
21 submit names.

22 There is a very small universe of people who have the  
23 experience and confidence of both sides. You mentioned one  
24 name that might be a possibility. I don't think it will be a  
25 problem, either agreeing on a name, if the parties are directed

1 to do that.

2 With respect to the intensive settlement program from  
3 Toyota, your Honor, you're right. That was a program to deal  
4 with personal injury and wrongful death claims. The economic  
5 claims were settled through a class action settlement.  
6 Mr. Juneau was the mediator for that process.

7 The intensive settlement program has been -- it's  
8 taken some time, but it has been successful. There are a  
9 literal handful of personal injury cases left in that MDL to be  
10 resolved. Everything else is resolved.

11 It's not that different from the private ordering that  
12 has gone on so far in GM for the injury claims. What's  
13 different is that everyone in the MDL or in the state court  
14 cases has an opportunity to use the same procedure.

15 There is a protocol. It's streamlined. There is the  
16 assistance of a settlement master if required, but the  
17 experience has been that most of the claims settled in private  
18 discussions between counsel for those plaintiffs and a  
19 settlement counsel for Toyota.

20 We make reports -- we still do -- every month or so to  
21 Judge Selna in writing and at a status conference, and that's  
22 really provided the engine to resolve all of those claims. I  
23 think at this point there is one case that is headed to trial,  
24 an individual case. The rest are resolved.

25 THE COURT: I'll tell you what. In the interest of

1 time, let's table that until the next status conference, and  
2 you guys can confer on it between now and then and essentially  
3 tell me if there are any additional procedures, protocols,  
4 processes, whatever word you want to use, that you think would  
5 facilitate and help in the ongoing discussions that I know are  
6 going on on the personal injury/wrongful death side,  
7 particularly recognizing that we're going to be getting at some  
8 point to a stage where New GM has to deal with lawyers who have  
9 only one or a handful of cases as opposed to larger groups of  
10 cases. So, for now, let's just discuss the mediator issue.  
11 Let me hear from Mr. Godfrey or Mr. Bloomer.

12 I am inclined to agree with Mr. Berman and  
13 Ms. Cabraser and think that the time is ripe and we ought to  
14 name someone and get that ball rolling, and that person can  
15 sort of, you know, facilitate discussions and do what is  
16 appropriate and what have you. I'm inclined to think that the  
17 time has come.

18 What are your thoughts on giving me a name or names by  
19 let's say a week from now? Hopefully you can agree. If you  
20 can't, I can pick someone from a short list that you guys can  
21 agree upon.

22 MR. GODFREY: I think the Court knows what our  
23 position is. I'm happy to provide Mr. Berman and Ms. Cabraser  
24 a long list of MDLs where no mediator has been appointed at  
25 this stage.

1 THE COURT: I'm not interested in that.

2 MR. GODFREY: I think we're beyond that, given the  
3 Court's comments. So I think we will come up with a  
4 recommended procedure list. It's a relatively small pool.  
5 Some people are, frankly, disqualified for being in that pool  
6 for various reasons.

7 Mr. Feinberg would be one. The name you mentioned  
8 would be another for various reasons. So I think we will have  
9 a conversation with them and see whether we can come up with an  
10 agreed procedure. And, if not, then I think we submit  
11 competing short briefs. This is not very complicated. We are  
12 not in favor of an intensive settlement program. Part of the  
13 issue here, frankly --

14 THE COURT: Let's table that for the next conference.

15 MR. GODFREY: I wasn't sure what was tabled and what  
16 was not, given the Court's question to me.

17 THE COURT: Let's just focus on the mediator. Can you  
18 get back to me within a week, either with an agreed-upon person  
19 or, if you can't, submit competing proposals or what have you  
20 on that date or at least a proposal of how we should proceed?  
21 Is that reasonable?

22 MR. GODFREY: I would prefer if we could have until  
23 the following Monday.

24 THE COURT: That's fine.

25 MR. GODFREY: That's ten days or something I think, if

1 that's agreeable.

2 THE COURT: That seems fine by me.

3 I think that's August 21, if I'm not mistaken,  
4 Mr. Berman.

5 MR. BERMAN: That's fine, your Honor.

6 THE COURT: So August 21 I'll hear from you in some  
7 form or fashion. Obviously, the more you can agree upon, the  
8 better. I don't think this would warrant full-blown briefing  
9 is my inclination.

10 MR. GODFREY: No. I think this is a one- or  
11 two-pager, frankly, where we would either have agreement or,  
12 here are the names that we propose. There are the names that  
13 they propose, and here is the procedure that we propose and  
14 that they propose, and the Court should decide from the list.

15 THE COURT: That sounds good in the abstract, but I'll  
16 leave it to you to try and discuss.

17 Mr. Hilliard.

18 MR. HILLIARD: This mediator is expected to also  
19 potentially address the injury and death cases? Is that what  
20 the Court indicated?

21 THE COURT: I think the focus should be on economic  
22 loss, in part because things have been proceeding at pace on  
23 the personal injury and wrongful death side. I guess I'm open  
24 to your thoughts on that question. I think, in the ideal  
25 world, having somebody who could assist on those but with the

1 primary focus being on the economic loss front would be  
2 helpful.

3 MR. HILLIARD: I'm not sure that we need it yet as  
4 we're still talking and have not hit a loggerhead with regard  
5 to the injury and death cases, as the entire docket seems to be  
6 shrinking.

7 Mr. Berman and Ms. Cabraser just whispered that it was  
8 four economic losses, which is just fine with me, but there  
9 will be a point I think that there will be one-off cases that  
10 will need to be addressed through some sort of process,  
11 primarily not the focus of whatever mediator is appointed, but  
12 should that mediator be directed to focus on these cases, then  
13 maybe I'll have some input on who is selected.

14 THE COURT: I think it would be nice to leave the door  
15 open. I'm inclined to agree that right now it seems less  
16 necessary on that front, if only because things have been  
17 proceeding relatively smoothly, and Judge Cott has some time  
18 available certainly if there are one-off issues here or there.

19 I think the ideal would be if we name someone down the  
20 road if the time comes when it would be helpful if that person  
21 could be available for that purpose, and I can't think of  
22 reasons why such a person would be precluded or conflicted from  
23 doing it.

24 In any event, why don't you guys talk about that and  
25 see if that makes sense or if there is something I'm not

1 thinking of.

2 MR. BROCK: I know we're in a hurry, but I was just  
3 going to mention that Mr. Kyle Dreyer, who you met at the first  
4 trial -- he was my trial partner in that case, as well as Wendy  
5 Bloom -- are working close to full time on settlement issues.

6 They are continuing to examine documents and dockets.  
7 They are meeting with plaintiffs' counsel. There have been a  
8 few occasions where we thought a mediator might be beneficial,  
9 and we actually would agree with an opposing party to have one  
10 come in and actually mediate a docket.

11 I will talk to them about this, but I think that they  
12 feel that the process is working pretty well in terms of what's  
13 happening now.

14 THE COURT: That's my sense as well. It may also be  
15 that if there are one-off cases where a mediation would be  
16 helpful, but it wouldn't be hard to find someone just to step  
17 in and be a mediator for that.

18 Let's take up the intensive settlement protocol-type  
19 issues and whether there is anything else that can be done on  
20 the personal injury/wrongful death side at the next conference.  
21 Maybe Ms. Bloom should be here on that front, but I'll leave it  
22 to you.

23 On the other issues that I flagged, given the time,  
24 unless you think there is any urgency to it, I would propose  
25 that we table the discussion of the 349 plaintiffs who have

1 asserted ignition-switch-related claims and non-ignition switch  
2 recall claims for the next conference. I think that may be  
3 something that Ms. Bloom could also be helpful with respect to  
4 anyway.

5 For that matter, I don't think there is any urgency to  
6 the question posed about the Anglin case, whether there are any  
7 other cases out there like that. You could also let me know  
8 also in a brief letter.

9 I just wanted to figure out if there was a need for  
10 some sort of procedure to either identify or give notice to or  
11 some such thing. I don't know if there are a bunch of those  
12 cases out there or if I was going to get motions of that sort  
13 in other cases.

14 So let's just figure out when we're next reconvening,  
15 and then we will wrap things up.

16 Any thoughts, given all the things going on, of when  
17 it would be helpful to return?

18 MR. GODFREY: We had had a discussion pursuant to the  
19 Court's request, that is, Mr. Berman, Ms. Cabraser, and myself.  
20 I think we settled on the first week of October time period.

21 MS. CABRASER: That would work timing-wise I think for  
22 plaintiffs, except for Tuesday, October 3, and Friday,  
23 October 6, which leaves essentially the Wednesday and Thursday  
24 of that week.

25 THE COURT: The Thursday is a Jewish holiday. So it's



1 out for me.

2 MS. CABRASER: That is correct.

3 THE COURT: I could do Wednesday, October 4. Does  
4 that work for everybody?

5 MR. GODFREY: That does, your Honor. Thank you.

6 THE COURT: So we will set it for Wednesday,  
7 October 4. The normal starting time of 9:30 should work for  
8 me. So Wednesday October 4 at 9:30.

9 The last thing I want to say -- I referred to this  
10 earlier -- is that this is Ms. Kumar's last day helping me out  
11 on this case. Number one, I wanted you to know that so you  
12 could take an opportunity after the conference to say your  
13 good-byes and thank her for all the work she has done because  
14 she has done a tremendous amount to benefit you all.

15 I just want to say publicly, as I did on similar  
16 occasions in the past, and thank her for all the work she has  
17 done. This is a tall order, as you can imagine, in my  
18 chambers.

19 She has really done an incredible job of making sure  
20 the case remains on the rails for the most part and that I'm  
21 doing as good a job as I can do. Whether you all agree that I  
22 am doing a good job is not something I'll ask you, but I just  
23 want to thank her for everything she has done to help. It's  
24 been a tremendous asset to me, and I will miss her, and we will  
25 deal with the transition.

1           I also wanted to take a moment to introduce -- I have  
2 a clerk who will be starting in September who, for reasons  
3 within chambers, is going to be taking over the GM docket, if  
4 you will, Kristen Loveland, who just arrived from Europe last  
5 night but who has agreed to be here this morning to sit through  
6 this and transition with Ms. Kumar.

7           In the meantime, Sam Adelsberg, who is also here and  
8 is currently in my chambers, is going to be attending to the  
9 docket between now and when Ms. Loveland starts. So you can  
10 introduce yourselves to her and him.

11           And Ms. Kumar will be sending an email to everyone to  
12 just make sure you have the relevant contact information, but I  
13 wanted to mainly thank her publicly and commend her publicly  
14 for everything she has done to help.

15           With that, I wish you all a pleasant rest of your  
16 summers. I will see you in early October. I'll be hearing  
17 from you in various ways between now and then. We are  
18 adjourned. Thank you and have a good day.

19           MR. GODFREY: Thank you, your Honor.

20           MS. CABRASER: Thank you, Your Honor.

21           (Adjourned)

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