



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)

**ORDER NO. 23**

*This Document Relates to All Actions*

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JESSE M. FURMAN, United States District Judge:

**[Protecting Privileged Materials Under Federal Rule of Evidence 502(d)]**

Defendants (also referred to herein in as the “Producing Party”) and Lead Counsel for the Multidistrict Litigation (“MDL”) 2543 Plaintiffs, including members of Plaintiffs’ Executive Committee and Liaison Counsel (also referred to herein as the “Receiving Party”) having consented thereto, and for good cause shown,

WHEREAS, Plaintiffs have requested the production of certain documents from General Motors LLC (“New GM”) that New GM believes are protected from discovery by the attorney-client privilege, the work product protection, or other privileges and protections; and

WHEREAS, Plaintiffs dispute New GM’s assertions of privilege and protection over certain documents (“Disputed Documents”); and

WHEREAS, the parties have met and conferred to narrow the scope of their disputes concerning the Disputed Documents; and

WHEREAS, New GM has agreed to produce certain Disputed Documents (“Produced Documents”) on the condition that, among other things, the production will not waive the attorney-client privilege or the work product protection with respect to any undisclosed communications or information including opinion work product that New GM may redact (“Undisclosed Information”); and

WHEREAS, Plaintiffs have agreed not to assert that the production of the Produced Documents in the MDL waives the attorney-client privilege or the work product protection with respect to any Undisclosed Information;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Produced Documents, including the substance and the content thereof, shall be subject to and governed by the terms of this Order (“Rule 502(d) Order” or “Order”), as set forth below. Unless otherwise stated in this Order, the Produced Documents, including the substance and content thereof, are also subject to the terms of MDL Order No. 10 (14-MD-2543 Docket No. 294) that was entered by the Court on September 10, 2014.

The purpose of this Order is to expedite the flow of discovery material, and to facilitate prompt resolution of disputes over privilege, pursuant to the Court’s inherent authority, its authority under Federal Rule of Civil Procedure 26(c) and Federal Rule of Evidence 502(d), and judicial opinions interpreting such Rules.

1. *The Produced Documents.* New GM produced into the MDL Document Depository the following four separate privilege logs identifying and providing a detailed basis for withholding specifically listed documents on the basis of privilege and/or work product protection: (i) the Congress Privilege Log dated October 2, 2014; (ii) the Consolidated and Amended NHTSA Privilege Log dated October 2, 2014; (iii) the Melton II Privilege Log dated October 2, 2014; and (iv) the Valukas Report Privilege Log dated October 10, 2014 (collectively the “Privilege Logs”). New GM provided courtesy copies of these same Privilege Logs to Plaintiffs’ counsel in a case pending in Georgia state court, entitled *Melton v. General Motors LLC*, No. 14A1197-4 (Cobb County, Georgia), which has adopted the MDL Coordination Order (Order No. 15, 14-MD-2543

Docket No. 315). Plaintiffs disagree with New GM's privilege assertions over certain documents identified on the Privilege Logs.

2. In an effort to narrow disputed issues, New GM has agreed to produce (subject to the redactions described in paragraph 5, below) certain documents that were previously identified on the Privilege Logs. Specifically, the "Produced Documents" shall include documents that were (i) previously identified on one or more of the Privilege Logs and (ii) for any documents that were previously identified on the Consolidated and Amended NHTSA Privilege Log, are dated prior to January 31, 2014; and (iii) were shared with or provided to the United States government, including Congress or any other agency or department thereof; and; (iv) were not inadvertently produced to such entities; and (v) are not subject to and will not be subject to any claw back letter or other requests for return of the documents, including requests for return of documents that were inadvertently provided to government entities but were not responsive to requests from those entities.

3. New GM's agreement to produce the Produced Documents is expressly subject to and covered by, among other things, the entry of this Rule 502(d) Order.

4. New GM shall produce the Produced Documents into the MDL Document Depository in accordance with Order No. 11 (Dkt. 295) on a rolling basis to begin 20 days from entry of this Order, with production to be completed no later than February 27, 2015. New GM shall designate each page of the documents they are producing pursuant to this Order with the following legend: "*Produced Pursuant to MDL Order No. 23 and FRE 502(d).*" With respect to any tangible items or electronically stored Produced Documents produced in native format, the appropriate legend shall be marked on the face of the tangible item or media containing electronically stored Produced Document, if practicable, or by written notice to the Receiving Party at the time of production

5. *Redaction of Certain Opinion Work Product.* Prior to producing the Produced Documents into the MDL Document Depository, New GM may redact portions of the Produced Documents that contain opinion work product or highly sensitive non-responsive information, (“Redacted Information”). New GM shall provide to this Court for *in camera* review Redacted Information in any Produced Documents, if so requested by the Court (either *sua sponte* or upon proper application by the Receiving Party).

6. *Waiver Regarding Produced Documents; No Subject Matter Waiver.* This Order is entered pursuant to Rule 502(d) of the Federal Rules of Evidence.

a. By disclosing or producing the Produced Documents in the MDL Document Depository, New GM has not waived any privileges or work product protection as to any Undisclosed Information or Redacted Information and its subject matter, and fairness does not require production of any such Undisclosed Information and its subject matter.

b. The disclosure of the Produced Documents in the MDL shall not constitute or be deemed a waiver or forfeiture of any claim of privilege or work product protection that New GM would otherwise be entitled to assert with respect to the Undisclosed Information and its subject matter in this proceeding or in any other federal or state proceeding.

c. The disclosure of the Produced Documents in the MDL shall not constitute and shall not be deemed or considered a subject matter waiver of the attorney client, work product, or of any other privilege or protection by New GM.

7. *Right to Claw Back Produced Documents.* If New GM discloses communications or information in connection with this Order that New GM thereafter claims is privileged or protected or beyond the scope of this Order and was inadvertently produced (“Inadvertently Disclosed

Information”), the disclosure of such communications or information shall not constitute or be deemed a waiver or forfeiture of any claim of privilege or work product protection or any other privilege or protection that New GM would otherwise be entitled to assert with respect to the Inadvertently Disclosed Information and its subject matter in this proceeding or in any other federal or state proceeding.

a. A good-faith representation by New GM that such production was inadvertent or mistaken shall be sufficient to establish that the production was inadvertent.

b. New GM may assert in writing attorney-client privilege or work product protection with respect to Inadvertently Disclosed Information. The Receiving Party must – unless it contests the claim of attorney-client privilege or work product protection in accordance with sub-paragraph (c) – within five business days of receipt of that writing, (i) return or destroy all copies of the Inadvertently Disclosed Information, and (ii) provide a certification of counsel that all of the Inadvertently Disclosed Information has been returned or destroyed. Within 20 days of receipt of the notification that the Inadvertently Disclosed Information has been returned or destroyed, New GM must produce a privilege log with respect to the Inadvertently Disclosed Information.

c. If the Receiving Party contests the claim of attorney-client privilege or work product protection, the Receiving Party must – within 10 days of receipt of New GM’s claw back notice – move this Court for an Order compelling disclosure of the Inadvertently Disclosed Information (a “Disclosure Motion”). The Receiving Party must seek to file the Disclosure Motion under seal and must not assert as a ground for compelling disclosure the fact or circumstances of the disclosure, and may not disclose, rely on or refer to any of the Inadvertently Produced Information.

d. The parties may stipulate to extend the time periods set forth in subparagraphs (b) and (c).

e. Inadvertently Disclosed Information that is sought to be reclaimed by the parties to this case pursuant to this Order shall not be used as grounds by any party or non-party to argue that any waiver of privilege or protection has occurred by virtue of any production in this case.

f. New GM retains the burden of establishing the privileged or protected nature of the Inadvertently Disclosed Information. Nothing in this paragraph shall limit the right of any party to petition the Court for an *in camera* review of the Inadvertently Disclosed Information.

SO ORDERED.

Dated: November 14, 2014  
New York, New York

  
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JESSE M. FURMAN  
United States District Judge