UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE:

GENERAL MOTORS LLC IGNITION SWITCH LITIGATION

This Document Relates To:
Abney, et al. v. General Motors LLC, 14-CV-5810

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14-MD-2543 (JMF)

MEMORANDUM OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

[Regarding Deposition Designation Disputes and the Redaction or Admissibility of the Valukas Report, the Statement of Facts, and the *Path Forward* Report]

The second bellwether trial in this multidistrict litigation ("MDL"), brought by Plaintiffs Lawrence Barthelemy and Dionne Spain and familiarity with which is presumed, is scheduled to begin on March 14, 2016. (*See* Order No. 94 (Docket No. 2183)). Before the Court are various disputes regarding deposition designations and the redaction or admissibility of the Valukas Report, the Deferred Prosecution Agreement Statement of Facts ("SOF"), and the National Highway Traffic Safety Administration ("NHTSA") *Path Forward* Report. (*See* Pls.' March 4, 2016 Ltr. (Docket No. 2412) ("Pls.' Depositions Ltr."); Pls.' March 7, 2016 Ltr. (Docket No. 2430) ("Pls.' Reports Ltr."); New GM's March 4, 2016 Ltr. (Docket No. 2428) ("New GM's Depositions Ltr."); New GM's March 7, 2016 Ltr. (Docket No. 2431) ("New GM's Reports Ltr.")). This Memorandum Opinion and Order resolves some of those disputes and provides procedures with respect to the resolution of other pending disputes.

NEW GM'S "CATEGORICAL OBJECTIONS"

As an initial matter, the Court addresses several "categorical objections" to Plaintiffs' deposition designation disputes, objections that also have some bearing on the parties' disputes

with respect to the Valukas Report, the SOF, and the *Path Forward* Report. (New GM's Depositions Ltr. 1-4).[1]

First, New GM seeks to categorically exclude all designations concerning "other motor vehicle accidents alleging inadvertent ignition switch rotation and/or airbag non-deployment, injuries, and fatalities," on the ground that they run afoul of the Court's "other similar incidents" (or "OSI") ruling. (*Id.* at 2; *see also* *In re: Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 (JMF), 2016 WL 796846 (S.D.N.Y. Feb. 25, 2016) (Docket No. 2362)). Although there is some language in the Court's OSI ruling that could be read to support that argument, New GM takes it way too far. The Court's ruling was concerned principally with the particulars of specific other incidents, in large part because evidence concerning the grim details of other accidents poses an obvious risk of unfair prejudice. *See* 1 McCormick On Evid. § 200 (7th ed. 2013) (noting "the prejudice that [OSI evidence] can carry with it"); *Nelson v. Brunswick Corp.*, 503 F.2d 376, 380 (9th Cir. 1974) (noting that trial courts should bear in mind "the danger that [OSI evidence] may afford a basis for improper inferences"). The Court did not mean to suggest, let alone hold, that Plaintiffs were barred from introducing *any* evidence concerning the existence or number of other suspected incidents of inadvertent ignition switch rotation and New GM's awareness (or investigation) of those incidents. Indeed, to preclude Plaintiffs from doing so (or to categorically preclude evidence tending to show the number of deaths and serious

[1] New GM makes two "categorical objections" to the deposition designations that are not addressed here (except as applied to particular depositions discussed below) — namely, that they include excessive designations concerning airbag non-deployment and that they include cumulative references to the Valukas Report and the SOF. (New GM's Depositions Ltr. 3-4). The Court will address those objections in connection with its rulings on objections to each deposition.

injuries attributable to the defect) would present a distorted view of the facts to the jury and thus undermine the search for truth, as New GM's own admissions make clear that it was on notice of well more than four isolated incidents involving suspected ignition switch rotation and its potential consequences. Thus, while Plaintiffs may not introduce the particulars of incidents other than the four previously approved by the Court (and certainly may not introduce evidence of incidents absent proof that links them to the ignition switch defect, one of the problems with the three alleged OSIs previously precluded by the Court), they are not categorically precluded from introducing "(1) information about GM employees' own experience that evidences notice regarding the switch defect; and (2) general statements referencing multiple accidents." (Pls.' Reports Ltr. 2).[2]

The Court is similarly unpersuaded by New GM's argument that Plaintiffs should be categorically precluded from introducing evidence concerning the four approved OSIs other than excerpts from the Valukas Report, excerpts from the SOF, certain other documentary evidence, and perhaps some expert testimony. (New GM's Depositions Ltr. 2-3). Again, New GM's argument does find superficial support in language from the Court's OSI ruling, but the Court did not mean to suggest or hold that Plaintiffs could not introduce testimony concerning the incidents from current and former New GM employees. So long as it is not unduly cumulative

[2] New GM objects to any evidence concerning the number of ignition switch defect incidents on the ground that "a party must establish a proper foundation" for the individual incidents underlying the number. (New GM's Reports Ltr. at 4 (citing cases)). That is a correct statement of the law, but Plaintiffs do establish a proper foundation here as the data comes from New GM's own statements (in the Valukas Report, in the SOF, and from its own witnesses). That is, New GM cannot argue a lack of "proper foundation" (at least for notice purposes) when New GM itself has attributed a particular incident to the ignition switch defect at issue in this case.

(or otherwise objectionable), such testimony may appropriately be used to elaborate on the incidents discussed in the written exhibits and to provide a little more color to Plaintiffs' case than the cold record would otherwise allow. New GM's last contention with respect to designations concerning OSIs is that some of it violates the Court's "exclusion of evidence 'relating to discovery disputes' and 'litigation misconduct in this case and other lawsuits.'" (*Id.* at 3 (quoting *In re: Gen. Motors LLC Ignition Switch Litig.*, 2015 WL 8130449, at *4 (S.D.N.Y. Dec. 3, 2015))). In this instance, New GM correctly characterizes the Court's rulings (except insofar as New GM asserts that the Court precluded all evidence of litigation "conduct" rather than "misconduct" — a distortion that the Court will assume was inadvertent rather than purposeful). But the only designations identified by New GM do not run afoul of those rulings, as they merely concern information that Michael Gruskin, a New GM lawyer, obtained with respect to the *Melton* case and whether he shared it with others at the company. (New GM seeks to preclude Mr. Gruskin's testimony on other grounds. As discussed below, the Court reserves judgment on those arguments.)

MORE SPECIFIC DISPUTES

The Court turns, then, to some of the parties' more specific disputes. In light of the foregoing, and upon review of the parties' submissions, the Court makes the following rulings:

The Valukas Report: All of New GM's objections are OVERRULED except for (1) its Rule 403 objection to the portion of footnote 677 appearing on page 152 (from "and" through "privilege"); (2) its Rule 403 objections to the text on pages 211-14; (3) its Rule 106 objections with respect to pages 64-65, 105, and 108-09, which are SUSTAINED.

The SOF: All of New GM's objections are OVERRULED.

The *Path Forward* Report: New GM's Rule 401, 402, and 403 objections are SUSTAINED, and Plaintiffs are precluded from introducing the Report in its entirety. In brief, much of the Report concerns NHTSA's handling of the ignition switch defect and is patently irrelevant to the issues in dispute. To the extent the Report is relevant, it appears to be almost entirely derivative of the Valukas Report (not to mention duplicative of information contained in the SOF and deposition testimony). Notably, Plaintiffs present no argument for why the Report is not cumulative, let alone why it should be admitted over New GM's objections.

Laura Andres: New GM's objection to Andres's testimony as a categorical matter is OVERRULED. First, the defect in one ignition switch platform arguably put Old GM on notice that it should check for the problem in other platforms; indeed, Andres herself testifies that she was concerned about the problem afflicting other vehicles. (*See* New GM's Depositions Ltr., Ex. 2-D ("Andres Tr.") 82:23-24). Second, the testimony is relevant to Spain's fraudulent misrepresentation claim, as it goes to what Old and New GM knew about the defect (and when) and whether they were aware of other facts they had a duty to disclose. New GM offers no reason why Andres's testimony would be more prejudicial and likely "to incite jurors to render a verdict based on anger" here than it was in *Scheuer*, where the testimony was admitted (albeit over New GM's objection). (New GM's Depositions Ltr. 6). Finally, for the reasons discussed above, the Court agrees with Plaintiffs that Andres's testimony about her own experiences — including her efforts to report what she viewed (with seemingly good reason) as an obvious safety problem and how she was treated — does not run afoul of the Court's OSI ruling. As for New GM's specific objections to Plaintiffs' designations, all are OVERRRULED, except for the objections to 62:4-5, 62:22-63:12, which are SUSTAINED.

Brian Everest: New GM's categorical objection to Everest's testimony is on firmer ground insofar as the majority of his testimony concerns airbag non-deployment and it was not until 2012 that he even learned that there might be an issue with respect to ignition switch torque. (New GM's Depositions Ltr., Ex. 2-K ("Everest Tr.") 141:11-17). In view of the fact that airbag non-deployment is not an issue in this case and that there is other evidence concerning the connections between airbag non-deployment and inadvertent ignition switch rotation (evidence that, Plaintiffs may argue, should have alerted, or did alert, Old GM and New GM to the defect), the Court agrees with New GM that such testimony is a waste of time and potentially confusing. In the Court's view, however, that does not call for excluding *all* of Everest's testimony, as testimony concerning his knowledge of the torque problem is more highly probative of New GM's knowledge of the defect. Accordingly, New GM's objection is SUSTAINED with respect to all designations between 13:4 and 138:5 of the transcript. New GM's objections to the remainder of the designated testimony, including its specific objections to 150:6-163:24, 167:16-25, and 168:22-171:20 are OVERRULED.

REMAINING DISPUTES

That leaves the parties' disputes with respect to the testimony of Mr. Gruskin and Plaintiffs' medical history. (Pls.' Depositions Ltr. 1-4; New GM's Depositions Ltr. 8-10, 14-17). In addition, Plaintiffs' letter addresses the admissibility of New GM's Attorney Case Evaluations relating to the *Chansuthus*, *Sullivan*, *Rose*, and *Melton* incidents, but New GM does not address them in its letters. (Pls.' Depositions Ltr. 8). Similarly, New GM's letter addresses the admissibility of testimony from Brian Stouffer, but Plaintiffs do not address it in their letters. (New GM's Depositions Ltr. 14). The parties should be prepared to address all of these issues at the Final Pretrial Conference tomorrow.

In addition, the Court believes that the parties should confer in the first instance with respect to whether and how the Court's rulings above affect their remaining deposition designation disputes (that is, for all witnesses other than Andres and Everest). (*See id.* at 2 n.1 (requesting that the Court "direct the parties to work in good faith" to apply any rulings on New GM's "categorical objections" to the deposition designation disputes)). To that end, unless and until the Court orders otherwise, the parties shall submit a joint letter to the Court by **March 10, 2016**, at **5 p.m.** advising the Court with respect to which, if any, objections to deposition designations are withdrawn. (To the extent that a party withdraws an objection in light of the Court's rulings above, it is nevertheless preserved for later review.)

Further, to facilitate orderly resolution of the parties' deposition designation disputes, Plaintiffs shall advise the Court at the Final Pretrial Conference of any depositions they intend to play during first two days of trial. Going forward, counsel shall advise the Court at least forty-eight hours before playing any particular deposition to ensure that the Court has time to adjudicate any unresolved disputes and the parties have time to implement the Court's rulings.

SO ORDERED.

Dated: March 8, 2016
New York, New York

JESSE M. FURMAN
United States District Judge