



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
IN RE:

GENERAL MOTORS LLC IGNITION SWITCH
LITIGATION

14-MD-2543 (JMF)

14-MC-2543 (JMF)

ORDER NO. 48

This Document Relates to All Actions

-----x
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’ March 6, 2015 Second Set of Consolidated Requests for Production of Documents to Defendant General Motors LLC (“March 6 Document Requests”) seeks the production of certain documents from General Motors LLC (“New GM”); and

WHEREAS, the parties are continuing to meet and confer regarding the scope of the March 6 Document Requests and New GM’s objections thereto, but wish to narrow their disputes by entering this agreement as to certain New GM documents that New GM believes are protected from discovery by the attorney-client privilege, the work product protection, or other privileges and protections (“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 or other privileges and protections 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 or other privileges and protections with respect to any Undisclosed Information, provided New GM does not offensively use nor make a selective or misleading presentation concerning the Produced Documents, subject to the provisions of Order No. 46 (14-MD-2543 Docket No. 812);

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.* In an effort to narrow disputed issues, New GM has agreed to produce into the MDL 2543 Document Depository (subject to the redactions described in paragraph 6, below) relevant Produced Documents that (i) were shared with or provided to the United States government, including any agency or department thereof, as of the date of submission of this proposed Order to the MDL Court; and (ii) were not inadvertently produced to such entities; and (iii) 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.

2. *Obligation to Provide Notice.* Following the date of submission of this proposed Order to the MDL Court, New GM shall notify Plaintiffs within seven (7) business days of any additional production New GM makes to the United States government, including any agency or department thereof, of relevant New GM documents that are responsive to Plaintiffs' March 6 Document Requests and which New GM believes are protected from discovery by the attorney-client privilege, the work product protection, or other privileges and protections so that the parties can negotiate an additional Rule 502(d) order.

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. Pursuant to this Order, New GM shall not be obligated to produce duplicates of documents identified in paragraph 1, above, or produced under Order No. 23 ("Duplicates") or to identify Duplicates on privilege logs produced by New GM in MDL 2543. Should New GM identify any Duplicates, including on a privilege log produced by New GM in MDL 2543, New GM may provide the Receiving Party with a list of the Duplicates and, as appropriate, remove the entry or entries from the privilege log for those Duplicates.

5. With the exception of certain custodial files discussed below, New GM shall produce the Produced Documents into the MDL 2543 Document Depository in accordance with Order No. 11 (14-MD-2543 Docket No. 295) on a rolling basis to begin 30 calendar days of the entry of this Order and pursuant to paragraphs 48 and 49 of Order 36, with production to be substantially completed no later than June 26, 2015. For witnesses who as of April 10, 2015 are

currently scheduled to be deposed from May 6, 2015 through May 22, 2015 (“Early Deponents”), New GM shall produce any documents from the custodial file of Early Deponents: (a) currently scheduled to be deposed during the first week of May (May 4-8) by April 24, 2015; (b) currently scheduled to be deposed during the second week of May (May 11-15) by May 1, 2015; (c) currently scheduled to be deposed during the third and fourth weeks of May (May 18-29) by May 11, 2015. For deponents that are not Early Deponents, New GM shall produce any documents from the custodial file of a particular deponent at least fifteen (15) calendar days in advance of the noticed deposition date. 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. ___ 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.

6. *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 or other privileges and protections 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 or other privileges and protections 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 privileges or protections by New GM.

d. Nothing in this Order shall be construed to preclude Plaintiffs from seeking relief from the Court on fairness or subject-matter waiver issues based on a good-faith belief that New GM has offensively used or made a selective or misleading presentation concerning the Produced Documents, subject to the provisions of Order No. 46 (14-MD-2543 Docket No. 812).

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 privileges or protections 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 or other privileges and protections with respect to Inadvertently Disclosed Information. The Receiving Party must — unless it contests the claim of attorney-client privilege or work product protection or other privileges and protections 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 or other privileges and protections, 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 sub-paragraphs (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.

g. Nothing in this Order is intended to or should be construed to limit New GM's right to object to the production of documents requested by Plaintiffs as otherwise permitted by the Federal Rules of Civil Procedure.

SO ORDERED.

Dated: April 17, 2015
New York, New York



JESSE M. FURMAN
United States District Judge