

I27TGMC

1 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

2 -----x  
3 IN RE: GENERAL MOTORS LLC  
IGNITION SWITCH LITIGATION,

4 14 MD 2543 (JMF)

5 Conference

6 -----x  
New York, N.Y.  
7 February 7, 2018  
2:30 p.m.

8 Before:

9 HON. JESSE M. FURMAN,

10 District Judge

11 APPEARANCES

12 LIEFF CABRASER HEIMANN AND BERNSTEIN LLP  
Attorneys for Plaintiffs  
13 BY: RACHEL GEMAN

14 HAGENS BERMAN SOBOL SHAPIRO, LLP  
Attorneys for Plaintiffs  
15 BY: STEVE W. BERMAN

16 HILLIARD MUNOZ GONZALES LLP  
Attorneys for Plaintiffs  
17 BY: ROBERT C. HILLIARD  
KATRINA ASHLEY

18 BAILEY PEAVY BAILEY  
Attorneys for Plaintiffs  
19 BY: K. CAMP BAILEY  
20 KEN BAILEY

21 KIRKLAND & ELLIS, LLP  
Attorneys for Defendant  
22 BY: RICHARD GODFREY  
RENEE SMITH  
23  
24  
25

I27TGMC

1 (In chambers)

2 THE COURT: Good afternoon. This is Judge Furman. I  
3 think we are now live. Let me ask who is on the line for  
4 plaintiffs, if you could -- maybe one person could identify who  
5 is on the line or we could go in order.

6 MR. HILLIARD: Judge, good afternoon, this is Bob  
7 Hilliard. I think you just turned the call live, so I don't  
8 know that anyone on the line knows who else is on the line, so  
9 I can't really identify anyone else except Steve Berman who  
10 sent me an email and commented on the music.

11 THE COURT: My understanding is you, Mr. Hilliard, is  
12 on the line, Mr. Berman is on the line, Ms. Gemen is on the  
13 line, and Ken Bailey is also on the line, is that correct?

14 MR. BAILEY: Yes, Ken Bailey and Camp Bailey are here,  
15 sir.

16 THE COURT: All right. And Katrina Ashley is also on  
17 the line?

18 MS. ASHLEY: Yes, your Honor, Katrina Ashley is on.

19 THE COURT: Anyone else for plaintiffs?

20 All right. And what about for new GM?

21 MR. GODFREY: Good afternoon, your Honor, this is Rick  
22 Godfrey with Renee Smith and Allan Pixton and we're all sitting  
23 here together in the conference room.

24 THE COURT: Great. Good afternoon to all of you.

25 Did I miss anyone with speaking privileges?

I27TGMC

1           Just a reminder, since we're on the phone and not  
2 physically present, we do have a court reporter here. Just  
3 identify yourself when you say anything so that the record is  
4 clear as to who is speaking. I can recognize most of your  
5 voices at this point, but the court reporter certainly can't.

6           So thanks for convening on short notice. I did want  
7 to move forward on these issues sooner rather than later, so  
8 rather than await the next conference or try to get you all  
9 together, I figured we should proceed in this fashion.

10           Let me tell you my thoughts on where I stand, having  
11 read the three letters. First of all, I will grant new GM's  
12 motion to file a reply. I'm not sure how significant or  
13 important it was in the mix of things, but I certainly don't  
14 see any reason not to consider it.

15           To make a long story short -- actually I'm not going  
16 to make it short at all, but I don't think that there's a clear  
17 sort of right or legal answer here, and think it's pretty  
18 clear, given the range of precedence out there, that I have  
19 broad discretion on how to structure things in my decision both  
20 with respect to case management and also the appropriate time  
21 for remands or transfers more generally.

22           I have no doubt that keeping the cases before me will  
23 certainly help to promote additional settlements, and I have no  
24 doubt on that score that new GM continues to make diligent  
25 efforts to settle as many of these cases as possible and many

I27TGMC

1 more settlements will be coming down the pike. I don't think  
2 that that reason alone would justify keeping the cases before  
3 me if otherwise there would be no efficiencies gained in having  
4 them consolidated.

5 To put that another way, I think my view is that,  
6 settlement aside, if all we had was case specific discovery and  
7 case specific motion practice to be done and no economy of  
8 scale in keeping them together, then I do think it would make  
9 sense to remand or transfer them, as the case may be, that that  
10 would be the more efficient way to ensure that each case is  
11 moved forward as expeditiously as possible.

12 Candidly, I have a hard time telling where on the  
13 spectrum that I just described this case lies at this point. I  
14 think it's a hard thing to tell. I think there's no question  
15 that the vast majority of kind of the common work has been done  
16 through the common discovery, through the bellwether process,  
17 through the different buckets of cases that we have already  
18 identified and are moving forward on with respect to order  
19 number 140.

20 Having said that, I am inclined, at least for now, and  
21 I want to emphasize that and I will come back to it, to agree  
22 with new GM that there is more work that can and should be done  
23 within the MDL to both promote settlement but also to identify  
24 and essentially sort, as I said, the wheat from the -- separate  
25 the wheat from the chaff. That is to say, to identify cases

I27TGMC

1 that really have no business going forward or no business being  
2 in the MDL, and more generally to advance cases toward  
3 resolution, recognizing, as I said before, that case specific  
4 discovery is going to happen or has to happen, whether it  
5 happens before me or in the transferor court.

6           Given that, given the ongoing efforts pursuant to  
7 order number 140 to sort of sort through different buckets of  
8 the cases, I am inclined to and do agree with new GM that they  
9 should remain here for now, and therefore am not going to  
10 reconsider what I think had pretty much been my decision  
11 earlier that we were not yet at the time for remand.

12           But having said that, I want to be clear that I'm not  
13 committing myself to hold onto each and every one of these  
14 cases until each and every case is literally trial ready, nor  
15 am I committing myself to following through, and I'll have more  
16 to say on this in a moment, a plan that involved multiple waves  
17 of cases. That is to say I'm not committing myself to  
18 following through on waves two, three, et cetera, if I decide,  
19 based on experience, based on where things stand and how the  
20 litigation is proceeding, that it makes more sense to change  
21 course.

22           And I'm certainly not committing myself to deciding  
23 one hundred separate motions or anything of that sort. I think  
24 the question will arise when the time comes for motion  
25 practice, if there's some sort of omnibus or consolidated basis

I27TGMC

1 on which to proceed, or common issues that I can resolve, and  
2 that there's efficiencies to be gained in presenting to me as  
3 opposed to presenting to dozens of other judges, then I think I  
4 would be inclined to entertain that. If we're talking about  
5 very case specific, fact specific motions with individual  
6 cases, then not only do I not see anything gained by me  
7 handling them all, but I think it would take me months if not  
8 years to resolve them, and at that point it's easier to farm  
9 them out to separate judges.

10 So the bottom line is I will stay the course for now,  
11 but I will continue to evaluate on an ongoing basis where the  
12 litigation stands on the spectrum that I described earlier,  
13 that is to say, whether there are efficiencies to be gained by  
14 proceeding in a consolidated fashion within the MDL or whether  
15 it makes more sense to remand or transfer cases. And in that  
16 regard, it's not all or nothing. Obviously I can make a  
17 decision that some cases are appropriate for remand or transfer  
18 and not all.

19 And that will depend on a variety of factors that I  
20 just described, that is to say how much progress is being made  
21 on settlement, my determination of whether I add any value  
22 above and beyond what other judges would add with less  
23 familiarity with the litigation and the underlying issues,  
24 whether there are common arguments or issues that would resolve  
25 or move forward multiple cases and so forth. And again, that

I27TGMC

1 may change over time, or my understanding of where things are  
2 may change over time.

3           So having said all of that, I am confronted with  
4 really only one proposal that moves things forward along those  
5 lines, and that is new GM's proposal. And for that reason and  
6 because I'm generally okay with it, I am going to adopt it and  
7 leave to you guys to actually memorialize it in the form of an  
8 order. But number one, there are a few modifications that I  
9 want to make to it, and number two, again, I want to reiterate  
10 or reemphasize that in saying that I'm not necessarily  
11 committing myself to carrying through the plan to its utter  
12 complete 100 percent conclusion, that is to say complete  
13 discovery on every individual case.

14           So number one, I generally agree to the sort of wave  
15 approach, and in that regard I sort of treat the first wave as  
16 a bit of a bellwether in the sense that, again, as it proceeds  
17 as we get to the end of it in particular I will be in a better  
18 position to understand and evaluate whether this process makes  
19 sense, whether there's value to be added by me keeping these  
20 cases or not. So in that regard, you should treat the wave as  
21 sort of something of a test case for whether it make sense to  
22 stay this course.

23           I agree that the first wave should be one hundred  
24 cases from the category we're talking about, but mindful of the  
25 examples given in Mr. Hilliard's letter, that is the examples

I27TGMC

1 of sort of the cases that talk tug on the heartstrings a little  
2 bit, I would be inclined to give lead counsel an opportunity to  
3 choose some number of cases based on hardship considerations,  
4 that is, things like financial circumstances of the plaintiffs  
5 involved, the age of plaintiffs involved, the nature of the  
6 injuries involved or the like for inclusion in the first wave,  
7 that is to say, provide for some number of cases of that sort  
8 and not rely solely on the order in which cases were filed.

9 So what I would propose is that the default is the  
10 hundred cases to be in the first wave would be the hundred  
11 first filed cases as new GM proposes, but that the plaintiff's  
12 lead counsel would have the right to replace up to 15 of those  
13 cases beginning with the one hundredth in order and working  
14 backwards with quote unquote 15 hardship cases of their choice,  
15 that is unilateral choice on plaintiffs.

16 Anyone wish to be heard on that?

17 All right.

18 MR. GODFREY: Your Honor, this is Rick Godfrey, new GM  
19 is agreeable to that.

20 THE COURT: Mr. Hilliard?

21 MR. HILLIARD: Judge, I wanted to make some general  
22 comments, but I'm going to wait until the end and tell you on  
23 your specific question I looked hard at GM's proposal on what  
24 they want do, but I don't think now is the time to comment on  
25 that, given what the Court intends to do, and I respect where

I27TGMC

1 you want us to go.

2 What I would like to do is be sure that 15 would be  
3 enough on the hardship issues, because it is a real issue for  
4 people who are aging or who for some other reason need to cut  
5 in front of the line, so to speak.

6 So subject to perhaps us being able to make sure that  
7 15 will cover it, first I appreciate you allowing us to do that  
8 with the hardship cases, and second, I would like to be sure  
9 that that number is appropriate, and if it isn't, I would  
10 perhaps address it with GM and see if they agree with me and  
11 then advise the Court, but otherwise it seems fair, and thank  
12 you for doing it.

13 THE COURT: Very good. And needless to say, I picked  
14 that number not completely at random, I thought it made some  
15 sense, but it is semi arbitrary.

16 So I think if you think, based on your evaluation of  
17 the number of cases, a certain number would be appropriate, I  
18 just emphasize, and I trust that you would adhere to this, but  
19 the point is really to make exceptions for hardship, not to  
20 give you an opportunity to cherry pick whatever cases you think  
21 would be your strongest cases as things move forward.

22 So with that understanding, if you think that a larger  
23 number than 15 would be appropriate, yes, talk to counsel for  
24 new GM. My hope is that you guys could agree on something that  
25 would make sense, given the actual particulars, but you could

I27TGMC

1 always get back to me on that.

2 Second, I agree with new GM's proposal for essentially  
3 sort of limited or targeted fact discovery and expert  
4 discovery, and on the latter in particular, that each plaintiff  
5 should be required to submit expert reports for any expert that  
6 he or she believes is necessary to establish accident  
7 causation, I will call it, and must make that expert available  
8 for deposition. I do think that that makes sense for the  
9 reasons described by new GM and have taken into consideration  
10 plaintiff's response on that.

11 Third, I generally agree with the proposed schedule,  
12 that is, I recognize today I think was the date that new GM had  
13 proposed to come up with the preliminary list of one hundred,  
14 and I'm assuming that that is not a feasible thing at this  
15 point. But what I would like you guys to do is I want --  
16 basically I think you should aim to have the process of limited  
17 discovery that we just discussed or I just described done by  
18 mid to late August, which is what new GM contemplated in its  
19 proposed schedule. If you want to work backwards from there  
20 and figure out based on that when the list of one hundred  
21 should be settled upon, I think that would make sense. I would  
22 imagine that the list should be settled in the next week or so,  
23 and hopefully we can make up for lost time.

24 I am not, however, at the moment going to commit to  
25 entertaining dispositive and/or Daubert motions in all of these

I27TGMC

1 first wave cases. Consistent with what I said a few minutes  
2 ago, I think it make more sense to defer decision on how to  
3 proceed on that front until the end, or at least near the end  
4 of discovery to see essentially what we are dealing with.

5 In that regard, I think it's akin to how I decide to  
6 proceed on the order 140 categories of cases. I think if some  
7 sort of omnibus motion practice is viable, that is to say GM  
8 provides me with a colorable argument that would dispose of a  
9 number of cases or common issues in cases, that might be  
10 appropriate and a viable option. But if, again, we're talking  
11 about one hundred separate fact specific, case specific  
12 motions, I may decide at that point a remand or transfer is the  
13 more logical option than my trying to work my way through one  
14 hundred separate motions.

15 Two other things on this front. One is I'm not going  
16 to appoint a special master for now. I may come to regret  
17 that, but if I do, I may change my mind. That is to say it may  
18 come to that, but I think, first of all, I would be inclined to  
19 have a better record before I go down that path, and a better  
20 record as well of what the special master's responsibilities or  
21 needs would be.

22 Second, I tend to be of the view that lawyers are less  
23 likely to raise stupid issues, if I could call them that, with  
24 me, if they understand that it means bothering me than they  
25 would if there were a special master in the picture or even a

I27TGMC

1 magistrate judge. For those reasons, and consistent with how I  
2 handled things way back when we started discovery in the MDL  
3 generally, I will keep the issues for now myself.

4 Now if it becomes too onerous, I may, unless  
5 Magistrate Judge Cott in some fashion -- and if need be, I can,  
6 as I said, always revisit the question of whether appointing a  
7 special master is the way to go. So for now, however, I will  
8 stay the course that we have been on.

9 Second, I agree with new GM that any misjoined wave  
10 one cases or claims, if I could call them that, should be  
11 severed and refiled, but I think that it probably makes sense  
12 to coordinate the deadline for doing so with essentially the  
13 process that we have already in place, and that is underway  
14 with respect to order number 140 and the Hilliard Henry  
15 withdrawal motions and so forth. That is to say, we already  
16 have several -- any number of cases that are going through some  
17 process that may result in severance or amendment or voluntary  
18 dismissal, and my guess is it would probably make sense, number  
19 one, to let that process run its course, or number two, and  
20 this may be a footnote to what I said before, it may make sense  
21 to deviate from the hundred cases based on time of filing and  
22 hardship to also carve out perhaps ones that may not ultimately  
23 go very far in light of the order 140 process.

24 So that is my thinking on that piece of your letters.  
25 I also would like you -- well, my inclination is for now, at

I27TGMC

1 least, to set a deadline, if we're looking at concluding the  
2 discovery process on wave one by mid or late August. I would  
3 think it would make sense, as we get close to that date, so  
4 maybe by August 1, to have a proposal from both sides with  
5 respect to -- or sort of see where things stand and, number  
6 one, get your views on what we have learned from the process  
7 with wave one with an eye toward how I should handle those  
8 cases, and number two, get your respective views on wave two  
9 and whether we should be proceeding in the same fashion with  
10 wave two, whether we have learned anything that would justify a  
11 different decision with respect to wave two, and setting a  
12 schedule for that, if appropriate.

13 Anyone wish to be heard on this front?

14 MR. HILLIARD: This is Bob Hilliard.

15 At the end of the process would it help the Court to  
16 also have General Motors' expert report when you're trying to  
17 decide where you are and what to do with the first hundred one?  
18 Because sooner or later if you send it to its home court, we'll  
19 have a right to get that the expert report, and I would guess  
20 if there's going to be a vehicle inspection and a subsequent  
21 expert report it makes sense to have both experts there at the  
22 same time and then have GM ultimately provide both us and the  
23 Court their views of the liability through an expert.

24 THE COURT: So I think I said that I considered your  
25 arguments on that front in your letter and was inclined not to

I27TGMC

1 go that route. I mean my thinking -- and I think this is along  
2 the lines of what new GM proposed in its letter is, in essence,  
3 if there are motions to be made at the end of this process,  
4 they would presumably be summary judgment motions made by new  
5 GM either on the grounds that plaintiffs failed to proffer an  
6 expert in a case and expert testimony is required, or akin to  
7 the airbag deployment cases that for some reason the proposed  
8 expert should be precluded under Daubert, leaving that  
9 particular plaintiff with no expert, and therefore, the case  
10 would need to be dismissed.

11 I guess what I'm struggling to understand is what --  
12 while obviously GM would need to designate an expert and  
13 produce an expert report if the case were headed to trial, how  
14 it would advance things before -- in other words, how it would  
15 give rise to a motion that would potentially be sensible for me  
16 to resolve as opposed to letting that be something that is done  
17 afterwards, I guess.

18 MR. HILLIARD: Look at it from this way, let's say  
19 another court had the MDL and they sent a case to your court  
20 after the MDL was over, you would be faced with a plaintiff's  
21 case coming into your court with the expert report from the  
22 plaintiffs but not yet GM.

23 Though it may not be important to what you're going to  
24 do with the case on remand once the plaintiff's experts report  
25 gets them past Daubert, if it does, it seems to me that just to

I27TGMC

1 not waste more time or double the efforts that while we are  
2 getting our vehicle inspection done or while whatever plaintiff  
3 is getting his vehicle inspection done with his expert and  
4 report, that GM participate in preparing the report, too, their  
5 report or their reply -- and if the remand goes and the case  
6 survives all dispositive motions, then it would simply be ready  
7 to go to trial sooner rather than later after remand.

8           Again, I'm putting it out there for discussion  
9 purposes in regards to make sure that more time is not spent  
10 before the plaintiffs are either in trial or the case is  
11 settled or the case goes away for dispositive reasons.

12           THE COURT: I guess what I'm thinking is if I'm a  
13 transferor judge -- let's say I do remand a case, the case  
14 survives this process and I remand it, presumably, if nothing  
15 further were done within the MDL, I will tell that judge we  
16 have done limited discovery on accident causation but the  
17 parties may have additional witnesses that they want to depose  
18 on that front, we also haven't done any discovery with respect  
19 to injuries and medical costs and the like, medical discovery,  
20 and in addition, new GM's expert discovery hasn't proceeded;  
21 figure out all that and schedule all that. And it's not clear  
22 to me that it would materially change things to defer GM's  
23 accident causation expert to that phase, but maybe I'm wrong.

24           Mr. Hilliard?

25           MR. HILLIARD: Except the clear line seems to be

I27TGMC

1 liability versus damages. And if it gets remanded with an  
2 order to you, to the home court saying here are my orders,  
3 here's what I believe where the case is, the only thing that's  
4 left is fact specific medical testimony and damages, all  
5 causation liability on both sides have been done.

6 And Judge Furman, I'm not suggesting that the Court's  
7 idea in regards to where you want to go with the first wave  
8 needs adjusting for the first wave purposes, I'm simply  
9 wondering if we do both the causation experts now and it does  
10 get remanded, there's going to likely be a quicker ability to  
11 finally get to trial if that's where that specific case is  
12 headed.

13 THE COURT: I hear you on that.

14 Mr. Godfrey, anything you want to say?

15 MR. GODFREY: Your Honor, I think your instincts were  
16 correct. The goal here was to position these cases for  
17 settlement, if possible, as quickly as possible, or to tee up  
18 dispositive motions because they either don't have an expert or  
19 their expert cannot establish causation.

20 Having GM provide an expert report is not going to  
21 advance the ball in the transfer, or if the Court ultimately  
22 decides to remand it, by even a single day, given all the other  
23 witnesses that will have to be deposed and the other fact  
24 discovery that will have to be done. There's no purpose to it  
25 in terms of what we are trying to achieve in light of the last

I27TGMC

1 status conference on January 8, which is to cull the cases down  
2 to those cases that have merit, in our view, versus those that  
3 don't have merit, in our view, and obviously the Court will  
4 decide whether our view is correct or not.

5 But the addition of an expert by new GM isn't going to  
6 advance the ball by a single day. Because the way this  
7 works -- and your Honor knows this as well I do -- once you  
8 transfer the cases, they're assigned to a judge, they will have  
9 a status, look at all the stuff that has to be done, and the  
10 expert discovery, to the extent there's undone expert  
11 discovery, and the plaintiff's part or defendants part will be  
12 done at the same time, and it will not pick up a single day.  
13 What it will do is impose unnecessary cost, and it will not  
14 help us at this time in terms of what we're trying to achieve  
15 and I think what the Court has directed us to try to achieve.  
16 So as I start my comments, I agree with your instincts and I  
17 think I have given my position in response to the question you  
18 asked.

19 THE COURT: All right. Mr. Hilliard, go ahead.

20 MR. HILLIARD: Just briefly, Judge. So I see it not  
21 as a one-way street. The tension is, as the Court started to  
22 really recognize, is when is delay unreasonable? And delay is  
23 just tied into an MDL sometimes but it's necessary in order to  
24 get a document done.

25 And I disagree with Mr. Godfrey, respectfully to him,

I27TGMC

1 that having them be required to produce their expert reports  
2 now will not trim some of the subsequent delay. I can  
3 appreciate what he's telling you. He's telling you get the  
4 plaintiff's report to us, then either dismiss the case or we'll  
5 settle it, but in reality, the second part of that equation  
6 doesn't always happen as is indicated by Mr. Bailey who is on  
7 the phone and what's going on with his docket right now.

8 So again, I think the Court -- what you want us to do  
9 is make sense, and we're going to do it. I would just ask the  
10 Court to consider that this is not just for settlement  
11 purposes, and I don't know if the Court was, again, by example,  
12 remanded to the Southern District of New York, Judge Furman's  
13 Court, and you had one single case, if there would be less  
14 delay than otherwise by having still GM expert needing to do  
15 inspections, needing to do reports and needing to be deposed  
16 versus just the plaintiffs and the medical doctors. Only  
17 reflecting on the tension of the delay as it builds over time.

18 THE COURT: All right. I hear you. And I think, if I  
19 haven't made it clear, I am certainly sensitive to your  
20 argument that justice delayed is justice denied and eager to  
21 really move this forward, as I said, more aggressively than  
22 reasonably at this point.

23 I think I'm inclined to stick with my initial  
24 inclinations and to agree with Mr. Godfrey that when push comes  
25 to shove, while there's some attraction to being able to say to

I27TGMC

1 a transferor judge that liability discovery is basically done  
2 and all you need to do is damages, but when push comes to shove  
3 a transferor court would be able to schedule this in a way that  
4 the need for expert discovery from GM would not add a single  
5 day to the schedule.

6 So I think this probably makes sense. I will think  
7 about it and can always revisit it. I can also, come August or  
8 September or whenever we figure out where these cases stand, it  
9 may pay at that point to proceed as to some number of cases on  
10 the expert front with respect to GM, but I think for now I will  
11 stick with my initial inclinations.

12 Anything else to be said on what I have discussed?

13 MR. BAILEY: Your Honor, this is Ken Bailey, if I  
14 could speak for a moment.

15 THE COURT: You may. Why don't you tell me where  
16 things with your situation.

17 MR. BAILEY: First of all, it's my understanding from  
18 what I have learned from various people, we have the largest  
19 group of GM cases out there that haven't been settled. I don't  
20 know what or how many of these hundreds cases that we have that  
21 we're going to have to be forced with the order that the judge  
22 is going to submit. I have been focusing, per your previous  
23 hearing, on getting ready for a mediation on Friday. It was  
24 actually supposed to be today but GM elected to postpone it I  
25 guess for this hearing. I'm going to have to spend more time

I27TGMC

1 on evaluating what the burden of these expenses are going to be  
2 on my clients. So that's going to be factored into any  
3 settlement amounts that I could even offer to GM.

4 I just am concerned, again, about the burden that I  
5 have to my client to go out there and start the discovery  
6 process. I just want the Court to be aware of that. I would  
7 like the ability, with your permission, sir, to come back and  
8 advise you of what the burden is going to be, if possible. It  
9 may not have any impact, but I would like to request the  
10 opportunity to do that. And I just think it's -- this is just  
11 my opinion, sir, that this is a unilateral expense that is  
12 being thrown on my clients, and we'll do what the Court provide  
13 for us to do, sir.

14 THE COURT: I hear you, and thank for sharing your  
15 thoughts on that. Obviously, I would always obviously give you  
16 an opportunity to be heard, since Mr. Hilliard is lead counsel  
17 for purposes of the personal injury/wrongful death cases,  
18 confer with him before submitting anything to me on the theory  
19 that there may be broader interests at stake, and you can  
20 coordinate things as appropriate, but if need be, you could  
21 always submit something to me.

22 I guess the only reaction I have, you should proceed  
23 with the mediation, and I will keep my fingers crossed that  
24 that is fruitful for both sides, I guess, and I think under  
25 order 140 you're supposed to report back to me by the 15th of

I27TGMC

1 this month with respect to whether the discussion was fruitful  
2 and how you want to proceed if not.

3           The only thing I would say is I recognize and hear  
4 what you're saying, but if I were to accept lead counsel's,  
5 Mr. Hilliard's, proposal and remand all these cases to the  
6 transferor courts, it would presumably involve proceeding full  
7 speed ahead with full discovery on each and every one of these  
8 cases in potentially far-flung jurisdictions. So while I  
9 recognize and hear what you say about costs, the fact of the  
10 matter is I think the alternative will ultimately involve  
11 potentially greater costs for individual plaintiffs than  
12 proceeding under a consolidated fashion here. That's all I  
13 will say for now. I hear what you said, and if you wish to be  
14 heard further when you have more information, you may do so.

15           That brings me to the second issue that was discussed  
16 in your letters, and that's the category C issue, and  
17 specifically whether I should entertain more bellwethers. I do  
18 believe that we should have a couple more bellwethers. I think  
19 the bottom line is even though you have obviously done  
20 discovery with respect to a number of these cases, that it  
21 ultimately would be a little more helpful if we actually saw  
22 one or two go to trial.

23           To help ensure that the cases are representative and  
24 survive to trial, I do believe that my proposal that the  
25 January 8 status conference makes sense, that is to sort of

I27TGMC

1 incorporate an element of choice on my part in what cases are  
2 selected for trial.

3 New GM proposed three modifications to my modified  
4 approach. Let me address those. First, new GM proposed that  
5 each side pick three cases and then there would be one strike  
6 for each side. I will adopt that modification. I think it  
7 does provide a modest check in the process and allows for --  
8 well, I think it provides a modest check, and that's a good  
9 enough reason to have it.

10 The second proposed modification is that I be required  
11 to pick one case from each side, that is to say, to the extent  
12 we'll have two trials that one would be a GM pick and one would  
13 be a plaintiff pick. I am not going to take that approach. I  
14 certainly agree that that should be a factor, maybe even a  
15 presumption in the cases that I select for trial, but I think  
16 that I should have the flexibility to choose the cases that  
17 make the most sense given the posture of the MDL writ large and  
18 given the cases in the pool and also agree with lead counsel  
19 that an ex-ante requirement could influence the selection of  
20 cases at the front end in ways that aren't conducive to the  
21 bellwether program. So I assure that I will take into  
22 consideration whose picks are which and probably try to have  
23 one from each side, but I'm not going lock myself into that  
24 ex-ante.

25 And lastly, I think both sides agree that only the two

I27TGMC

1 cases selected for trial would be subject to discovery, and  
2 that there would be a requirement that any case that's part of  
3 an omnibus complaint at the moment be severed, and that GM file  
4 an answer. I think that that makes sense.

5 I also do agree, however, with lead counsel that where  
6 a new complaint needs to be filed, that is a case severed and  
7 refiled, that it should be treated essentially as an amended  
8 complaint in the original case, that to say that it should have  
9 any affect on the statute of limitations type issues from the  
10 filing of a new case. Whether something would be timely would  
11 basically be a function of whether it would have been timely if  
12 it were filed in the existing case.

13 Mr. Godfrey, you agree with that?

14 MR. GODFREY: Your Honor, I could not possibly  
15 disagree, I don't think, with that.

16 THE COURT: Good. Glad to hear that.

17 MR. GODFREY: I was thinking about it but I could not  
18 come up with a reason that would not fail the stupid argument  
19 test.

20 THE COURT: Excellent. You vindicated my view that  
21 people are less likely to raise stupid arguments with me.

22 I guess the question is in terms of giving you  
23 marching orders to come up with a proposed order what the best  
24 way to proceed is, I think it make sense from our experiences  
25 in prior chapters of this to probably choose a trial date or

I27TGMC

1 trial dates and then work backwards from those.

2 I don't know if you guys have another suggestion or if  
3 it's a viable option to chose trial dates now or if you want to  
4 caucus with one another and propose a few options for trial  
5 date and then we can communicate with you which makes sense and  
6 work backwards from there, but what are your thoughts?

7 MR. GODFREY: Your Honor, I think in light of the need  
8 to caucus about the hundred, I think we should work backwards  
9 and get with you for our recommendations or suggestions to you  
10 within a week from today. Would that work for the Court?

11 THE COURT: That works for me.

12 Mr. Hilliard, does that work for you?

13 MR. HILLIARD: It does. Can you give us an idea of  
14 when you would hope we would try these cases, Judge, so we'll  
15 have the bookends of what months we're looking at?

16 THE COURT: Sure. Remind me -- I know some of the  
17 earlier letters had some of the statistics in there, but how  
18 many months typically it took to work cases up in the prior  
19 phases? Anyone have that at their fingerprints?

20 MR. HILLIARD: Mr. Pixton is on the call and he's  
21 usually good for that information, Judge.

22 MR. PIXTON: Off the top of my head, your Honor, I  
23 think it was eleven -- the older ones I haven't checked, but  
24 usually about an eleven month time frame.

25 THE COURT: All right. Well --

I27TGMC

1 MR. GODFREY: Could we try to target November,  
2 December of this year.

3 THE COURT: That was actually what I was looking at.

4 MR. GODFREY: I think we can do that. Well, A, I  
5 think we know what the Court has directed the parties to do,  
6 and B, I certainly think we can get it done by November,  
7 December time frame, if that works with the Court.

8 THE COURT: I think that probably does. Why don't you  
9 work on that assumption, maybe one in November, one in January,  
10 but work on those assumptions, and if you want -- I don't  
11 necessarily think this needs to be done through formal filings  
12 on ECF, if you come to -- if you come up with a couple dates  
13 that would work on your ends and want to float them by my  
14 staff, we could essentially get back to you whether that would  
15 work on our end and then you can incorporate that into a  
16 proposed order, if that makes sense and would be easier.

17 MR. GODFREY: I think we can do that, your Honor,  
18 thank you.

19 THE COURT: All right. Anything else that you guys  
20 want to discuss?

21 MR. HILLIARD: Your Honor, I know that the issue will  
22 come up on the bellwether case, and I don't know that there's  
23 any way around it, but historically the cases that look like  
24 liability, potential damage on GM, are resolved before trial.

25 We talked to the Court about it, and the Court

I27TGMC

1 commented on if they're bellwether and they could settle those  
2 cases, where are we doing bellwether if they know how to  
3 evaluate and settle cases? That issue has been almost a  
4 hundred percent of the time on the cases that both sides  
5 thought would probably end up with a jury verdict in favor of  
6 the plaintiff.

7 I don't know that that's going to change. I don't  
8 know if there's any way around it, given when they offer good  
9 money plaintiff may want to take good money. But if the  
10 purpose is to understand category C overall value, as the Court  
11 heard me say, and I'm going to participate in the November  
12 trial date, it's fine with me. I don't know that it will  
13 really inform ultimately the docket settlements, but maybe  
14 something that happens between now and the time that case  
15 settles or goes to trial will inform it.

16 So I will assure the Court I will participate both  
17 aggressively and in good faith to do everything I can to get  
18 the cases ready and the entire docket settled, but that's a  
19 fear of mine in regards to which one is going to get tried, if  
20 any, ever.

21 THE COURT: Right. I hear you, and it's certainly a  
22 concern of mine as well. I don't know what there is to do  
23 about it, if there's anything to be done about it. I don't  
24 think I can order new GM not to make a proposal, and I  
25 certainly can't order a particular plaintiff not to accept

I27TGMC

1 something that he or she decides is in his or her interest to  
2 accept. But I'm open to suggestions. I will brainstorm on my  
3 end and think if there's anything to be done that sort of  
4 provides any greater assurances that these cases would actually  
5 go to trial, but if you come up with anything --

6 MR. HILLIARD: Short of a mock trial where you give us  
7 the fact pattern and say we'll try this fact pattern just to  
8 get a verdict and understand the value, because it's  
9 understandable to me that GM will come in before trial on a  
10 case where liability is strong, given the facts of the entirety  
11 of this tragedy, to settle the cases I don't fault them for it  
12 at all. But I do want to keep on the table and keep as a  
13 discussion point with the Court the fact that these category C  
14 cases are waiting, and if this is really an intent by GM to  
15 understand and inform the docket, then it has yet to be borne  
16 out. And Mr. Godfrey and his firm, and we're professional  
17 friends and I respect them and what they're doing, but I do  
18 want to keep this position on the table as we move forward and  
19 talk about it.

20 THE COURT: All right. Well, I hear you.

21 MR. GODFREY: I guess I would just say that my silence  
22 should not be deemed acquiescence. And, of course,  
23 Mr. Hilliard is completely in control of this because he didn't  
24 have to make offers going forward with GM in these cases.

25 THE COURT: I hear both of you, and obviously a

I27TGMC

1 settlement requires a meeting of the minds on both sides, so  
2 I'm not sure either side bears the blame. If GM is offering up  
3 money that the plaintiff is interested in taking it, it is what  
4 it is. But I can't think offhand of anything to be done about  
5 this problem except to keep our fingers crossed that it doesn't  
6 rear its ugly head again. But if either of you guys has any  
7 thoughts thinking outside the box or within it, talk to one  
8 another and certainly float it to me. I'm open to suggestions  
9 and sensitive to the issue.

10 All right?

11 MR. GODFREY: Thank you, Judge.

12 MR. HILLIARD: Thank you, your Honor.

13 THE COURT: Anyone have anything else to say, say who  
14 you are first and tell me if there is.

15 All right. Very good. So Mr. Godfrey, when you said  
16 you would get back to me within a week, was that with proposed  
17 orders on these fronts as well, or is that sort of the schedule  
18 of trial and then work backwards from there?

19 MR. GODFREY: My intention was to schedule a proposed  
20 trial, and with respect to the one hundred I think --

21 Mr. Pixton, the draft order within about a week, or  
22 more time?

23 MR. PIXTON: Maybe two.

24 THE COURT: How about this, I think -- my sense is  
25 that you should be able to propose an order on the first wave

I27TGMC

1 of the hundred sooner rather than later because that really  
2 doesn't require coordinating with us for trial dates. So why  
3 don't do you try to do that within the week, and within a week  
4 also propose some trial dates, and then you'll have two weeks  
5 to propose an order for category C bellwethers.

6 Does that make sense?

7 MR. PIXTON: That will work, your Honor.

8 THE COURT: Great. I thank everybody, and these are  
9 important --

10 MR. HILLIARD: Sorry, your Honor, this is Bob  
11 Hilliard.

12 As you were talking Mr. Godfrey I was trying to think  
13 outside the box, because I hadn't really vetted this  
14 completely, but I wanted to share it with Mr. Godfrey and you.  
15 If there's a way to -- and I will talk to Rick about it, and  
16 maybe if you wanted to ever get off the ground, but a type of  
17 focused jury trial where the fact pattern is agreed to and a  
18 jury in your court is selected to determine, based on a fact  
19 pattern liability, and potentially damages, I'm not sure. And  
20 I wanted to just drop that into the outside the box gray matter  
21 of everybody to see if that would prevent a settlement at the  
22 eleventh hour and allow everybody to really get a jury's view  
23 of liability and value.

24 THE COURT: Well, why don't you guys --

25 MR. GODFREY: We considered that three years ago, and

I27TGMC

1 for good and valid reasons did not accept that at the time, but  
2 we'll revisit it.

3 THE COURT: Why don't you guys talk to one another. I  
4 think I floated the idea of summary jury trials three years  
5 ago, and I think one or both sides wasn't particularly  
6 interested.

7 I don't know, Mr. Hilliard --

8 MR. HILLIARD: We are wiser, Judge, now.

9 THE COURT: And I appreciate that, and think it's  
10 important to continually rethink things and learn from the  
11 experiences that we have had.

12 Now your proposal sounds to me like a mock trial  
13 exercise and I have some Article III case or controversy issues  
14 or concerns there, but I don't think they're really ripe to get  
15 into at the moment. Why don't you guys bounce things around  
16 and think creatively, and if you have any thoughts I'm open to  
17 them, as you know. If we need to rethink things or modify  
18 things, then we will.

19 All right. Thank you. I appreciate you're taking the  
20 time, and have a good day.

21 o0o