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)

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New York, N.Y.
February 23, 2016
9:36 a.m.

Before:

HON. JESSE M. FURMAN

District Judge

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(In open court; case called)

THE COURT: Welcome back, everybody. I was beginning to miss you all.

We are on Court Call I believe so just a reminder please try and speak into the microphone and to the extent that you gentlemen speak, for example, if you could go to a microphone, that would be great.

We will follow the agenda letter and a couple other matters here and there.

But let's get started. On the bankruptcy proceedings I appreciate the update. Anything that we need to discuss on that. Obviously, the argument I think is on day two of the bellwether trial, but I will be paying attention. Nothing to discuss there.

On the status of the third amended consolidated complaint. I am okay with your proposed schedule for amendment. Anything beyond that that we need to discuss? Very good.

Next is coordination and related actions. Two questions there. Number one, any updates or anything that we need to discuss with respect to related cases and then the question I had raised in my endorsement is whether remains necessary to update me on a biweekly basis. I certainly don't mind the updates. I don't think they hurt. But I'm also -- I wouldn't be opposed if you wanted to do it less frequently or

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only as needed.

But Mr. Godfrey or Ms. Cabraser, yes.

MS. CABRASER: Your Honor, I believe our federal state liaison counsel, Dawn Barrios, is listening in this morning. She couldn't be here. And just on her behalf, to suggest that the biweekly -- the biweekly reports are very helpful. They're helpful to the plaintiffs in terms of federal/state coordination. There are a dozen existing state cases that are set for trial between May 2 and November. There are new cases that are filed. Frankly, it's of great assistance to us on the plaintiffs' side that GM make its reports because it enables us, through Ms. Barrios, to reach out to the state court judges, provide your Honor with contact information, and keep the federal/state coordination going. And the upcoming trial activity suggests to us that that may be more rather than less necessary as we go on.

THE COURT: All right. I think that point is well taken. So I'm persuaded to stay the course. Anything else to discuss there? Any updates beyond what were in the most recent letter?

MR. GODFREY: No updates, your Honor. I would say that the -- as the court knows, in the past I've identified cases that might prove nettlesome. Most times they go away, but sometimes the court has had to make some calls.

We continue to have some concerns about the Missouri

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cases but right now there is nothing that is urgent, that needs to happen now, but we'll see in the next month or so. This is motion practice, and there may be some issues we need to bring to the court's attention, but it's premature at this time. But the three Missouri cases are the ones we've talked about before. It's the Shell case, the Alden case, and the Felix case. But nothing immediate right now needs to be done, your Honor, and hopefully nothing will need to be done longer term, but those are the three cases that still cause us is concerns.

THE COURT: As you know, not a fan of dealing with issues until they are ripe. I appreciate the heads-up but nothing to do at the moment.

Document production and deposition updates. Anything that we need to discuss on those subjects? Very good.

Then that brings us to the bellwether trial No. 2 briefing status. All contested motions are fully briefed and I am actually prepared to rule at this time on all of the plaintiffs' contested motions; that is, plaintiffs' motions in limine numbers 1, 2, 4, 6, and 7. So let me give you those rulings and then I'll have some additional comments with respect to other matters. Plaintiffs' first motion in limine seeks to exclude evidence and argument relating to Mr. Barthelemy's prior convictions and a July 2014 arrest. Beginning with the latter, plaintiff's motion to exclude evidence of the July 2014 arrest is denied. Plaintiffs are

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correct that evidence of the arrest is not admissible for purposes of impeachment. But evidence relating to that arrest -- in particular, statements that Barthelemy allegedly made to the arresting officer denying any recent injuries and statements he allegedly made after the arrest to multiple medical providers that his five days sitting in jail, 24 hours a day, caused him back pain (See New GM's first opposition memorandum at page two) is plainly relevant to, indeed highly probative of, the issue of causation. And in my judgment, the probative value of that evidence is not outweighed, let alone substantially, by the danger of unfair prejudice. See, for example, Picciano v. McLoughlin, 2010 Westlaw 4366999 at page 2 (N.D.N.Y. October 28, 2010) (allowing introduction of the plaintiff's prior arrests because they were relevant to his damages claims); and the Llerando-Phipps v. City of New York, 390 F.Supp. 2d 372 at 380 (S.D.N.Y. 2005) (denying motion in limine to exclude evidence of the plaintiff's prior drug and alcohol use because it was "central" to his damages claims).

Plaintiffs' proposed stipulation that Barthelemy "sat or stood on a hard surface for long periods of time over four to five days and later reported to medical professionals that this may have exacerbated his back pain," that's a quote from page nine of plaintiffs' memorandum, does not suffice, substantially for the reasons stated by New GM at pages four and five of its brief in opposition. That said, I do not see

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any reason to disclose to the jury that Mr. Barthelemy's arrest was for a DWI; instead, consistent with Barthelemy's own alleged statement to one of the medical providers (see New GM's first opposition, Exhibit 4, and it's a Bates number ending in 124), the parties shall say only that he was arrested for "traffic violations." In addition, the Court, that is I, will give a limiting instruction advising the jury that it may consider the arrest only with respect to the issue of causation; that is, causation of Mr. Barthelemy's injuries. And the parties shall confer and propose language for such a limiting instruction no later than one week prior to the beginning of trial.

By contrast, plaintiffs' motion is granted with respect to evidence of Barthelemy's prior convictions. In the circumstances of this case, where Barthelemy remains employed by the same employer and claims lost earnings based solely on changes in his job and compensation structure, the evidence of Barthelemy's prior convictions -- which are either very old or relatively minor -- has limited or no relevance. Any probative value from the correlation between incarceration and lower earning potential is slight and would be substantially outweighed by the obvious prejudice of introducing that evidence. Finally, I will not preclude Mr. Barthelemy from seeking damages for his alleged lost earnings. Although he certainly could have done a better job of disclosing that

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theory of damages, it is not a true lost earning capacity claim that would warrant extensive discovery or expert testimony, as New GM alleges. See pages five to six of its opposition. Instead, the relevant evidence would be evidence of Barthelemy's injuries and employment history, which has surely been pursued through discovery already.

Accordingly, plaintiffs' first motion in limine is granted in part and denied in part.

Plaintiffs' second motion in limine -- which seeks categorically to exclude any evidence or argument with respect to whether the airbags in their car should have deployed can be swiftly denied. The fact that plaintiffs concede that their airbags should not have deployed in their crash does not make any and all evidence that the crash was not a deployment-level event irrelevant or unfairly prejudicial. Such evidence is clearly probative of the severity and cause of plaintiffs' injuries. And the risks of unfair prejudice actually cuts the other way. That is, allowing New GM to present some evidence on the issue will help ensure that jurors do not speculate (incorrectly, no less) about whether plaintiffs' airbags should have deployed, particularly if plaintiffs are permitted -- as they argue they should be and as I will address in due course -- to present evidence of other incidents in which airbags did not deploy were they should have.

To be clear, my ruling should not be construed to give

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New GM carte blanche to introduce any and all, let alone extensive, evidence concerning the fact that the crash in this case was not a deployment-level event. I can and will rule on specific objections at trial. And given that the point is ultimately undisputed, I do think it would be a waste of time to dwell at any great lengths on the issue so I intend to limit the amount of evidence that New GM may offer. But to the extent that Plaintiffs' motion seeks categorically to exclude evidence that the crash was a non-deployment event, the motion is without merit and denied.

Plaintiffs' fourth motion in limine seeks to exclude evidence and argument relating to prior lawsuits filed by Mr. Barthelemy. Plaintiffs wisely appear to concede that evidence of Mr. Barthelemy's prior injuries is relevant to the issue of causation. See their reply memorandum at pages one to three. I agree, however, that the fact that Mr. Barthelemy filed lawsuits or otherwise pursued claims with respect to those injuries has limited or no relevance to the issues in this case and whatever little probative value that evidence has would be substantially outweighed by the prejudice of suggesting that Mr. Barthelemy is overly litigious. See plaintiffs' reply at pages three to four. Accordingly, plaintiffs' fourth motion in limine is granted or granted at least in part. That is, New GM may introduce evidence of Mr. Barthelemy's earlier injuries but not of the fact that he

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pursued legal claims with respect to those injuries. Plaintiffs' sixth motion in limine asks the court to exclude "evidence and testimony from Officer David Kramer beyond the facts he actually witnessed," as well as the police report that Officer Kramer, or I think Sergeant Kramer, maybe former Sergeant Kramer prepared. That is plaintiffs' sixth memorandum, pages one and five. To the extent that plaintiffs seek to exclude Kramer's testimony and report as a categorical matter, their arguments are unpersuasive. First, although Kramer did not witness the accident itself, he was on the bridge and witnessed other crashes (indeed, he allegedly suffered a crash himself) near the time of the accident in this case. See New GM's opposition memorandum at page two. Notably, plaintiffs themselves admit that "Kramer can testify about what he personally observed at the scene." That certainly should be a relatively uncontroversial proposition. His testimony about the conditions on the bridge are plainly relevant to the conditions at the time of the crash, and plaintiffs provide no reason to think it would be unfairly prejudicial; it is not, in my view, "thinly veiled OSI evidence," because it bears on the facts of the plaintiff's crash and the causation issues themselves. That is a quote from pages four to five of plaintiffs' memorandum. Accordingly, Kramer has a proper basis for his testimony under Rule 701 and his testimony is admissible under Rules 401

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through 403. I will entertain any specific objections with respect to the portions of Kramer's deposition that are designated by New GM; to the extent that plaintiffs seek to preclude his testimony as a categorical matter, however, the motion is denied.

Plaintiffs' motion is also denied with respect to the accident report. Separate and apart from any application of Order No. 52, plaintiffs themselves more or less concede, and wisely so, that such accident reports are generally admissible under either or both Rule 803(6) or 803(8). See plaintiffs' memorandum at page five as well as Spanierman Gallery, Profit Sharing Plan v. Merritt, 2003 Westlaw 22909160 at page five (S.D.N.Y. December 9, 2003) (collecting cases). Instead, plaintiffs' principal contention is that the report is inadmissible because it was based on inaccurate information and is facially untrustworthy. See their memorandum at pages six to seven. Most of those arguments, however, go to weight, not admissibility. And contrary to plaintiffs' contentions, opinions and conclusions are admissible as part of an investigative report under Rule 803(8), so long as they themselves are based on a factual investigation, as I find they were here. See Beach Aircraft Corp. v. Rainey, 488 U.S. 153 at 170 (1988). Here, Kramer engaged in a factual investigation by observing the scene of the crash and interviewing witnesses. See New GM's opposition memorandum at pages one through four.

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As for trustworthiness, plaintiffs offer no evidence that the witnesses Kramer interviewed were interested or biased, nor do they provide any reason why "specialized skill" in accident reconstruction, as opposed to the experience of a veteran police officer, would be required for a police accident report. That is from page seven of plaintiffs' memorandum. As for timeliness, Kramer began his investigation on the night of the crash; the only delay in completing the report was to complete the investigation itself. See New GM's opposition memorandum at page 14, note 7, as well as Baker v. Elcona Homes Corp., 588 F.2d 551 at 558 (6th Circuit 1978); and Thibodeaux v. WellMate, 2014 Westlaw 1329802 at page 3 (E.D. La. March 31, 2014). Finally, New GM agrees that any inadmissible hearsay within the report can be redacted. See the opposition brief at 15. The parties shall confer with respect to such redactions and raise any disagreements with me with respect to those matters within one week of the beginning of trial.

Accordingly, plaintiffs' sixth motion in limine is denied.

Finally, plaintiffs' seventh motion in limine, as modified by their memorandum of law, seeks to exclude a recorded conversation between an insurance representative and Ms. Spain. That motion is denied. As plaintiffs concede, Spain's own statements are admissible as statements of a party opponent pursuant to Rule 801(d)(2)(B). That is page two of

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plaintiffs' reply. The statements of the insurance representative, by contrast, are plainly admissible to provide context for Ms. Spain's statements. As they are not admissible and will not be admitted to prove the truth of the matter asserted, they do not qualify as hearsay or for that matter present improper opinion testimony. See, for example, United States v. Perez, 2005 Westlaw 2709160 at page two (S.D.N.Y October 20, 2005) (citing cases). The parties' arguments about what Ms. Spain meant when she responded to the insurance representative's comments or questions is ultimately a matter for argument to the jury and for the jury to decide. There is no question, however, that New GM is entitled to introduce her statements against her.

That said, plaintiffs are entitled again to a limiting instruction to make clear that the jury may consider the insurance representative's statements only for context and not for the truth of the matter asserted. And, if requested, I suppose that there is no evidence that the insurance representative has any firsthand knowledge about the accident in this case. Again, the parties shall confer and submit proposed limiting instructions on that point no later than one week before the beginning of trial.

All right. That resolves plaintiffs' open motions in limine. If I'm not mistaken, that leaves only New GM's motion in limine number 20 and the parties' OSI disputes, which are

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obviously related, plus the summary judgment motion.

Is that correct? Am I missing anything?

THE COURT: All right.

MR. BLOOMER: That's correct, your Honor.

THE COURT: Great. So I will reserve judgment on those issues and will rule on them in due course.

I, however, have one thing to say -- or a couple things to say with respect to the issue of OSI. Insofar as it has implications for Mr. Pribanic's case and the upcoming deadlines in that case. I believe, in fact, that one of those deadlines is later this week.

What I want to say is that I agree with New GM that the disclosure and the briefing in this case was not quite what I had in mind when I set up the pretrial process to adjudicate any disputes with respect to OSI. That is to say, that I don't think the disclosure in this case was sufficiently specific. And I certainly don't think that the briefing is sufficiently specific. In my view, both the disclosure and certainly the briefing should specifically identify the specific incidents that plaintiff proposes to introduce and the actual evidence that the plaintiff proposes to offer in connection with each of them; that is to say, which witness will be testifying and/or what exhibits will be offered and then, in the briefing, should discuss in detail the purposes for which each incident is offered and citing applicable law why the incident is

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admissible for that purpose. I'll have more to say on that in connection with the Barthelemy trial in my forthcoming opinion and the implications, if any, for that trial. But I did want to make that clear for purposes of a third bellwether case because those deadlines are rapidly approaching. Any questions? Anything to discuss on that?

I also did have one question. I had understood from the show cause briefing, if I can call it that, that New GM intended to revisit or address the admissibility, or the redaction of the Valukas report and the statement of facts in one or more of their motions in limine. Motion in limine 20 in the OSI preview obviously touched on that and I presume any ruling that I made may have bearing on that, but I don't think I received any motion in limine that was more specifically targeted. Is that correct?

Mr. Godfrey.

MR. GODFREY: Yes. That's correct, your Honor. The summary judgment motion and the two motions the court just identified, depending upon how the court rules, could have impact on the statement of facts in the Valukas report but until the court rules we can't address that.

THE COURT: Refresh my recollection. I didn't establish any process yet to adjudicate disputes in the wake of those rulings, did I?

MR. GODFREY: No. And I was going to raise it at the

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end, but I didn't know whether your Honor was going to rule on it or not today, or what the schedule was. But I was going to ask that question at the end.

So, for example, take OSI. As the court knows, there's extensive OSI in both the Valukas excerpts and in the statement of facts. Depending on how the court rules on OSI, that will bear on that. But we don't have a process. I was going to ask the court a question at the end as to if you were going to grant those motions over and apart and if -- once the court rules on the OSI motion, for example, and if we concluded it had an impact on Valukas report excerpts or the statement of facts, I was going to ask the question at the end how does the court want us to proceed? A letter brief? A motion? That was one of my questions to ask about trial procedures, if you will. We're not at that stage yet, but the court will rule on that, and at that point we'll have to make an assessment.

THE COURT: Well, suffice it to say I hope to get you opinions on the remaining issues shortly. And in that regard I'm mindful of the approaching trial date and the need to deal with these sorts of things.

I haven't given the issue enough thought is the short answer. I guess what I would say is certainly as a first step I think the parties should meet and confer with respect to the implications of any ruling and, in that regard, only raise to me issues that are in dispute. If you can resolve the

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implications of the rulings yourselves, as you know, that's certainly the preferred method.

I guess what I will do is say the following. I think you should discuss it now with the expectation that you'll have rulings on these issues, if not this week then hopefully early next week, and really hopefully this week. And if you have any suggestions with respect to a process or procedure to follow in applying it to those documents and other issues, you can submit a joint letter telling me. If I don't receive it, or actually either way, I will provide some guidance in whatever my rulings are in my rulings with respect to how you should proceed. But if you want any input into what the process is, then you can submit a letter to me in the next day or two and I'll take it under advisement.

MR. GODFREY: Thank you, your Honor. We will have a conversation with Mr. Jackson and Mr. Hilliard on that. My suggestion was going to be within six days, but we'll talk about it with counsel and see if we have a joint agreement.

THE COURT: Anything else to discuss? Mr. Hilliard? Mr. Jackson?

MR. JACKSON: No, your Honor. May I ask a question. Earlier your Honor made a reference.

THE COURT: Make your way to a microphone, please.

MR. JACKSON: Sorry. Earlier your Honor made reference to the part of the agenda that addressed depositions.

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My understanding is that you were referring to the larger question of depositions for the MDL.

To the extent that there are deposition issues that we wanted to raise to the court specific to bellwether trial two, I would -- we just wondered whether there was an appropriate time to raise that with the court.

THE COURT: I wasn't aware that there were any issues to discuss but we can either do that now or I suppose under the trial witnesses category that's coming up, but since you're standing why don't you do it now and I'll adjust accordingly.

MR. JACKSON: Thank you, your Honor. Essentially I think that we were just hoping for some guidance from the court with regard to how the court understood the process for depositions going forward in terms of what the process should be, if any. It's our understanding that discovery has closed in this case. And we're -- we've been discussing with counsel for GM the fact that they have -- we're attempting to reach a stipulation on a number of different exhibits. And we're hopeful that we will reach a stipulation. It's certainly my goal to avoid having to bring in a bunch of custodians of records, etc. But there have been numerous depositions over the last couple of days. We recently received notice of, for what New GM has called foundational depositions, people that they need in order to introduce certain pieces of evidence. It's like -- it's a lot of people. And, frankly, it's going to

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be daunting if we're required to engage in all of those depositions. We have asked the question and we haven't received an answer yet, on a couple of occasions: What is the basis for conducting a deposition at this stage of the litigation? And what is the -- what is their belief in terms of what justifies that process right now. So we're just hoping for some guidance from the court.

THE COURT: Well it sounds like it might not be ripe for guidance from me because you guys are in the midst of discussing it.

Mr. Bloomer.

MR. BLOOMER: Yes, your Honor. I think there is an issue, as Mr. Jackson says, it's potentially brewing. We take very seriously the court's guidance that the parties should try to reach agreement on issues of foundation for documents. And on February 7, so two weeks ago, we sent the plaintiffs a proposed stipulation relating to 40 case-specific documents. So these are documents specific to this case; medical records, employment records, accident records, things of that nature.

And we have not been able to get agreement on those documents, which we thought should be a fairly routine thing. And we're mindful of what the court said in the January status conference about the need for a sponsoring witness. So we're trying to make sure we have all of our bases covered. But we've for whatever reason --

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THE COURT: Sponsoring witness or stipulation. So I would hope that the parties could cooperate in doing the latter with respect to a lot of the custodial and foundation issues.

MR. BLOOMER: That was our goal, your Honor, was to say can we get stipulations so that we do not need sponsoring witnesses for case-specific documents.

The plaintiffs have -- we've discussed it, but the plaintiffs have objections to that. And so we are in a position where we have no choice, with the sand running through the hourglass, but to notice depositions and take foundational depositions, if we have to, to be able to get this stuff into evidence. Frankly, I haven't encountered this in an awfully long time, if ever, in terms of reaching agreement on the stuff that in these types of cases the parties regularly will get agreement on. So we're hoping to do that. But, we've had 40 case-specific documents and stipulations that have been sitting there since February 7. And we're, understandably, concerned about whether this is actually going to happen.

So I think we're in a position where we have to proceed with these depositions unless something happens really quickly. And if there are going to be remaining objections on 401, 403 grounds, things like that, that we just need to get them teed up so that the court is not facing this in the middle of trial. That is certainly -- that is certainly our goal to be able to do that. It's just that it hasn't happened yet

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because the plaintiffs have objected and, frankly, we don't understand the nature of some of these objections. We've had some foundational depositions already where witnesses are being examined by the other side as to whether a printout of a medical record was actually accurate. You know, the witness has said I see these printouts all the time, I rely on them. So that's what we're dealing with. And we're trying to find a way past it to just get agreement on this kind of stuff. It just hasn't happened yet, which has put us in the position we are, which is why I think Mr. Randall is raising the question he's raising.

MR. JACKSON: Your Honor, just to clarify --

THE COURT: It's Mr. Jackson, to clarify.

MR. BLOOMER: I'm sorry. Mr. Jackson. Mr. Randall Jackson.

MR. JACKSON: Just to clarify. We haven't been sitting on those documents. What we have told counsel for New GM is that we don't intend to contest authenticity for any of the documents that are at issue. And we anticipate not requiring sponsoring witnesses for the bulk of the documents that are reliable. We've raised a number of specific issues with regard to aspects of the documents that we think are inadmissible, and we've attempted to get clarity as to what precisely the exhibits are that are coming in. All of that is sort of something, as your Honor said, that the parties need to

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discuss more.

What is ripe, your Honor, for the court to I think provide guidance on, and the reason that we're asking this now, is your Honor entertained our letter last time about a specific deposition that was noticed, we didn't think was appropriate. We thought we had engaged in a fair amount of meet and confer about it. New GM indicated in the letter to the court that they didn't think we've met and conferred. But we were put in the position of to either not attend the deposition and potentially waive our rights or to attend the deposition and then subsequently notify the court of what our concerns were with regard to the process that had led to it. And right now we're in a situation where there are numerous depositions noticed that we don't think there is a basis, and that there is no basis in the discovery plan that we set out or any of the other orders, for them to notice a series of depositions over the next two weeks. So we're just asking that if the court could give us some guidance on that.

THE COURT: All right. I'm a little bit puzzled and maybe frustrated too because I don't understand where the daylight is. You say you need these depositions because they haven't agreed to a stipulation with respect to authenticity and foundation and Mr. Jackson is telling me that they're not going to contest that. So why can't you reach a stipulation, resolve this issue, and do away with the need for any

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depositions and put aside the question of whether they're proper at this point.

MR. BLOOMER: I think we should be able to, your Honor. But, for instance, we still are getting business record objections to things like medical records and other things. So we're getting arguments like well some of it -- that the record, which is pursuant to the process the parties agreed to with MRC to authenticate medical records. I think the plaintiffs are willing to say, or what they've told us is: Well, we'll agree to some of that as a business record but not other portions of it. And that we don't think makes any sense, given the process the parties engaged in.

We think it should all be able to come in without a sponsoring witness and not to have to do trench warfare on specific objections that relate to whether it's a business record, whether it's foundation.

And so I stand here in front of your Honor saying, yes, this should be relatively easy. But I can tell you for whatever reason we haven't been able to get that stipulation, which we think should happen. And so that's put us in the position we're in.

If Mr. Jackson is standing here saying there will not be an objection to things that are business records and that they do not need to go in with any sponsoring -- that they're in and they do not need a sponsoring witness and that, for

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instance, with a medical record we can examine Ms. Spain or Mr. Barthelemy with that medical record without an objection, then I think we should be able to get this done pretty quickly, but that has not been their position to date.

THE COURT: Mr. Jackson, I mean I should -- again, I don't really understand what the dispute is here. To the extent that there are issues beyond authenticity that you're not willing to concede, I would think that a stipulation could preserve your ability to object on other grounds. But if these custodians are being called and deposed for purposes of just identifying something as a business record, that does seem like a pointless exercise for both sides and a waste of time and the precious time that you have between now and the beginning of trial. So, I guess I'm just voicing my frustration as to why you guys can't get this resolved and deal with it.

MR. JACKSON: And, your Honor, we completely agree. We don't have any desire to waste any time on this. I think we have been the party that has been forthright in saying we want to stipulate as to authenticity and as to business records.

THE COURT: But you've have a proposed stipulation since February 7. It's now February 23, so.

MR. JACKSON: Because we've asked a couple of very specific questions, your Honor, about what the scope of these records are. There are two very sensitive issues with regard to these records that I don't want to speak about here that

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relate to certain medical issues that we've asked the question to GM. We only recently got the beginnings of an answer to that question as to what exactly is the scope of what they're trying to put in.

Besides, that there's just one other thing, your Honor. We've also asked them: Is there going to be some agree of reciprocity here? Are they willing to say in good faith that they are willing -- that they are going to be willing to similarly stipulate to the authenticity and the lack of getting a sponsoring witness for the uncontested exhibits that we intend to put in. We haven't gotten an answer to that question.

Those are all questions that I think the parties can work out. I agree with the court. There's not that much daylight but, regardless, they have noticed a long series of depositions, as we're tending to work these issues out, and we don't think that it's fair for us to, as we're trying to get answers to basic questions we're trying to get answers to, especially when we have stated in good faith that it's our intention to stipulate and they haven't responded to that. We don't think that it's fair that we're going to be required to attend depositions throughout the country over the next two weeks when discovery is closed and there is no basis for the depositions.

THE COURT: I'll tell you what. I want you guys to

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meet about this today, see if you can work out a stipulation and resolve or at least limit the number of issues that are in dispute; and if you can't, I want letters from you tomorrow with specifics about what is at issue, what depositions are needed or not needed and we'll deal with it.

As a general matter, I'm in agreement with Mr. Jackson that I don't quite understand why depositions should be going on at this juncture in the case. Quite frankly, with respect to the first bellwether trial, I was surprised to learn in the middle of the trial that there were depositions going on in the middle of trial, but both sides seemed to be okay with that so I didn't say anything about it. I think it would be a little bit -- given that I didn't say anything about it and given that both sides were in agreement in the last trial, I think it might be a little bit unfair for me to rule categorically at this point that they're not going to be permitted. But as a general proposition I think that discovery ended and this isn't what we should be devoting the time to. But I also think that we shouldn't need to be devoting this time and you should be able to work this out.

So I want you to meet today. If you can't resolve it, you can address in letters tomorrow with specificity what the issues are, what the specific records or exhibits are that are at issue and I will tell you how we're going to proceed. All right.

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MR. JACKSON: Thank you, your Honor.

MR. BLOOMER: Your Honor, thank you.

MR. GODFREY: Your Honor, I want to make one point because I think the court needs to be aware of the fact. The parties had agreed at the start of the bellwether process to an MRC process to avoid all this. The problem here is the plaintiffs no longer feel bound by the MRC process which is why we're in this position.

THE COURT: What is MRC?

MR. GODFREY: It was authentication -- it was a certificate from the provider of records saying they are business records, etc. Now they don't want to follow that. If they take deposition, then the consequences are -- that's why we had the deposition in the last trial.

This should be solvable. We shouldn't be in this position. But we should have had an answer before now. And when Mr. Jackson says well there's an issue here and an issue there. No, it's not. There's been a flatout refusal to agree with this. And I'm glad to hear this morning that he has a different position. I hope that we get this resolved. If not, we will be back because we are out of time. We are running out of time.

THE COURT: Good. You are both running out of time and I would think that you can both get this done and resolve what needs to be done without the need for much, if any,

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intervention from me. So I trust you will make your efforts to do that.

Next is trial exhibits and demonstratives. I did receive the proposed order from counsel yesterday. I generally think that an order of that sort is a good idea and in general I'm okay with it but I have two comments. The first is I would think that if we could revise it so that it is not -- so that it would apply to future bellwether trials, it would make sense to do that, which is to say that to the extent that we can peg the deadlines just X number of days in advance of trial rather than specific dates, I think it would be helpful for purposes of the MDL going forward. And I'll have more to say on the bellwether process in short order.

The second, and maybe this is more significant for immediate purposes, is under the process that you have outlined disputes would not be presented to me for my resolution until 8 a.m. on the day that they are relevant. And that, quite frankly, just doesn't give me enough time to resolve disputes. And it's one thing if these are disputes that I can simply say yes or no and doesn't require any much thought, let alone research. But in my experience that hasn't necessarily been the case here. And given that, I don't know how you expect me to get to the courthouse or when you expect me to get to the courthouse. But presenting these things to me at 8 and expecting me to be able to rule on them by 9 is just not

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realistic.

So, I'm inclined to say that I need them by the prior evening at the latest. I would say by 7 or perhaps 8 at the latest. Let's say 7. And I think that presumably means that, working backwards from that, the other deadlines need to be adjusted by twelve hours or so.

So, why don't you guys talk about it with those two things in mind and submit a proposed revised order that addresses those two issues. But bottomline is you need to give me enough time to think about these things and to give you rulings and if you don't it's going to have some serious implications for an orderly trial.

Any questions? Any issues on that?

MR. GODFREY: I hate to ask, but is 7 o'clock enough time for the court? We could try to do it by 6 or 5. I want -- I appreciate the Court's comment. I know how hard the Court worked in the first trial and I saw sometimes that problems were caused by the 8 a.m. filings. So taking that into -- the court's comments into account, if 7 o'clock is workable, then that would be great for us, but if you need an hour or two earlier, we'll try to do that as well. We'll discuss it with the plaintiffs. I just want to be fair to the court.

THE COURT: I mean the more time the better. Let me put it that way. If you're prepared to and can get it to me by

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5 p.m. that would be fantastic.

MR. GODFREY: I think we'll try to do that then, your Honor.

THE COURT: Very good.

One other note that I think I may have mentioned it in connection with the first trial, but if not I'll say it now. I do, if it's not too late, I think you should strive to have a slightly simpler system for numbering exhibits in trial No. 2. I found it extremely confusing that there was exhibit 124.6235. And I'm quite confident in saying that the jury would have found it difficult if they had been asked to deliberate. I think, if I'm not mistaken, that the point and the number following the point usually referred to a page number. I think it would be easier just to say exhibit X page number Y and leave it at that. But in any event if you could strive to have a simpler system for referring to exhibits, that would be helpful.

Trial confidentiality. I am fine with adopting the same protocol that was used in the first trial. In fact, unless and until I order otherwise I think that that protocol should apply to any further trials in the MDL. Anything else to discuss on that?

Trial witnesses. Anything to discuss beyond what we just discussed?

MR. GODFREY: Yes, your Honor. And I think we will

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have a meet and confer about this. I spoke with Mr. Hilliard this morning. If we can't resolve it, I think we'll have letter briefing, at least I request it. So this goes back to Mr. Gruskin who the court has considered before.

THE COURT: I noticed he was on the list of witnesses on the JPTO.

MR. GODFREY: Yes. It's a may call. And then last night we received their designations of deposition. And I looked at those this morning. There's 24 witnesses listed by deposition. For 23 of them, not Mr. Gruskin, the average length of the deposition designations is a page of material in terms of the line items, etc. that it takes a page. For Mr. Gruskin they've listed 16 pages, basically more than 20 of the other witnesses combined.

I hesitate to suggest that one might see gamesmanship here because, after all, he is listed as a may call. After all, his involvement was very limited. His involvement, if any involvement, will depend in part on the court's OSI ruling. Where, as we've said before, Mr. Gruskin is the person who is managing the litigation and he's central to efforts to alternatively resolve this short of trial. And for reasons that escape our understanding, particularly given that all their lawyers who are listed on their deposition designations are Ms. Palmer for half a page of designations, Mr. Millikin for half a page of designations, people far more centrally

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involved, at least as we've understood the plaintiffs' case until now. We think that the deposition designations, the listing of it, is not in good faith, to be perfectly candid. We're not sure why they were raising these issue. We will have this discussion. I raised it with Mr. Hilliard. Perhaps they can explain it to us. But we're going to ask that the court -- we may wait to see the OSI ruling, we're going to ask that we get to the bottom of this because we can't keep going through this each time about listing Mr. Gruskin simply to try to -- I'm not sure what purpose is served by this.

Mr. DeGiorgio is listed for a page and a quarter. Mr. Gruskin somehow is 16 pages. There's just, objectively looking at it, it just -- it's gamesmanship going on here. We don't see any other basis for them listing him. There's just nothing that he adds to the case.

So if we can't work this out we'll be filing a motion to allow Mr. Gruskin to appear at the trial without being at the risk of being subpoenaed, and we will test the validity of the designations.

But we'll try to work this out. I raised this with Mr. Hilliard but I've not had a chance to talk about it, Mr. Jackson, just came in last night, and it is -- the facts speak for themselves.

THE COURT: I'm not inclined to get into it now. There is a process in place to resolve deposition designation

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disputes and a deadline to raise them with me and I think you should adhere to that. My hope is that you can work this out or at least minimize the issues that I need to resolve. But I'll leave it to you to discuss. All right.

Very good. Anything else on the trial witness front?

That brings us to deposition designations. And the deadline for counterdesignations I think is next Monday, if I'm not mistaken. And consistent with what I just said the deadline for raising disputes with me is March 4. I do want to just underscore and repeat again that my intention in setting that deadline is to have all disputes presented to me on these issues before trial. That is to say, the last trial I sort of entertained these issues in real time throughout the trial and I think that is not an ideal approach. And I will be less forgiving of failure to comply with the deadline in this trial. So everybody should hear me loud and clear with that and to the extent that there are disputes, present them to me by March 4 but not before you try to work them out in good faith with one another and minimize the issues that are in dispute.

I should also say, this probably goes without saying, but my rulings on the disputes in the Scheuer trial presumptively apply here. I recognize there may be distinctions particularly depending on my rulings with respect to the open motions, but unless there is some difference in either the law or the facts that would warrant differential

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treatment of the depositions, you should assume that my rulings remain the same and, put it another way, this is not an opportunity to seek reconsideration or reargument of things that I decided in the last trial. Anything else to discuss on the deposition designation front?

That brings us to the bellwether trial procedure. The threshold question that I posed in my endorsement -- yes, Mr. Jackson. Get to a microphone though. Maybe you and Mr. Pribanic can switch seats.

MR. JACKSON: I'm sorry, your Honor. Just on the deposition designation front. Just wanted to raise a question with your Honor as to whether or not the court would be willing to entertain -- this ties in with what your Honor previously mentioned -- whether your Honor would be willing to entertain a motion to the extent that the parties are unable to reach an agreement and we've attempted to but I don't think that we have -- we've been able to so far.

With regard to how the depositions are going to be played. It's my understanding previously the court ruled that the court wanted all of the depositions played for any particular witness at one time. And we understand that ruling. That makes sense to us. We were curious as to whether or not the court would consider a modification that involved splitting, at least with regard to when those depositions were played, splitting the portion that is played by the plaintiff

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and then designating the portion that is played by the defense after that; playing them at the same time in the case but making a distinction at the trial between the two portions.

THE COURT: I'm skeptical, but how do you propose to make that distinction?

MR. JACKSON: I think there are a number of ways we can do it mechanically, your Honor. But I think that the basic thing that we would do is just say we're playing the plaintiffs' designated portion of the deposition and then saying we're playing the defense portion of the designated portion of the deposition. There are a few reasons for that, your Honor. One of them is --

THE COURT: It makes no sense in the sense that often -- and this was certainly the case in the first trial -- plaintiff may designate these lines on one page and then lines on the next page and then a defendant designates a handful of lines between those two and it would make -- defeat the point and undermine the reasoning behind my ruling, which I think I made clear in the first trial, that the jury needs to understand the context for those designations. So to take it out of context and force New GM to play those two lines after the fact when the jury won't know where it falls within the deposition just doesn't make sense.

I'm open, if you think that there is some other way of doing this. For example on the video or on a transcript to

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accompany the video, having a label on it that says "plaintiff" or "GM" or something like that so that the jury is mindful of who designated.

I also don't think it ultimately matters. I mean the jury is going to be told that they need to consider all of the evidence in reaching a verdict. And at the end of the day, all things aside, I don't think it's going to matter for the jury whether something was designated by the plaintiffs or designated by New GM.

So I don't really think it matters. If you can think of an idea that allows for it to be played in an uncut way that allows you to specify for the jury, I'll consider it. But unless you can come up with an idea like that the answer is no.

MR. JACKSON: We appreciate that, your Honor. So we'll discuss that possibility. What your Honor raised was one of the possibilities we were evaluating. We'll discuss that with counsel for New GM and potentially raise that.

The other thing, in the event we can't come up with a mechanical solution that works, that we discussed raising with the court is whether or not the court would be willing to give some sort of an instruction that just makes it clear to the jury that these are portions that have been designated by both parties.

THE COURT: I did that in the last trial and I will do that again and I will tell them that there is a process for

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both sides to identify portions that are to be played at trial and for me to resolve any disputes and that this is the product of that. If you have any new language that you would propose for me to use for that I'm certainly open to it. But I did that the first trial and I'm prepared to do it again.

MR. JACKSON: Thank you.

THE COURT: Anything else on that issue?

MR. BLOOMER: No, your Honor. We agree it should be just played sequentially in the manner that testimony is given.

THE COURT: Very good.

Bellwether trial procedure. The threshold question is whether there's any reason we can't discuss it now. I know the requests, as I indicated, had been for a telephone conference. I don't know if there were reasons for that.

MR. BERMAN: Yes, your Honor. That was an error. I apologize.

THE COURT: Microphone, please.

MR. BERMAN: It was an early draft of our letter where we requested a telephone conference because we thought we were going to get it teed up earlier. We then met with GM. They agreed that we would file our brief; that we would mention the briefing schedule on the status conference. And I apologize. I looked at that letter so many times I didn't realize it still requested a telephone conference.

THE COURT: No worries. But -- no worries.

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I am prepared to address it now and let me give you my thoughts on that having reviewed both sides' letters. The short answer is that I'm unpersuaded by the lead counsel that we should abandon the bellwether system at this point for many of the reasons discussed by New GM in its letter in opposition. That is not to say that the bellwether system is perfect. Far from it. As I've said before, I think it's an expensive way of yielding data for settlement purposes and arguably too small a dataset to yield statistically significant data at that, although as I made clear in the order denying Mr. Cooper's motions, I think it's a mistake to focus only on the bellwether trials in the MDL. The dataset is broader than that. It includes other related trials as well. But the bottomline is that I'm not aware of and the parties haven't suggested to me a better alternative. It sort of brings to mind the old Churchill quote, that is to say, paraphrasing, "Bellwethers may be the worst means of settling mass tort cases except for all other means," and I think that there's something to be said for that here.

Having said that, I think I've made clear I am very open, indeed interested and eager, to consider alternatives or perhaps more to the point additional tools for purposes of helping to settle the cases that remain in the MDL even tools that are new and creative. But I haven't yet been presented with any particularly good options on that score and I haven't,

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despite some research, come up with any myself beyond the ones that I've already floated and were not met with at least unanimous agreement here.

I certainly don't think that remanding cases for trials to -- and the transfer to courts is a good idea. In my view it would only make matters worse as we would still have the bellwether trials; they would just be spread out and with a greater risk of inconsistent rulings and the like. All of which is to say I think that the benefits of the MDL remain and I think remanding them at this point would undermine the benefits and the purposes behind the MDL.

All of that is to say that unless and until I am presented with a better option or come up with a better option I intend to stay the course on the theory that it is the best and perhaps only option for resolving the individual cases in the MDL and yielding data to be used to settle other cases. But I do encourage you, as I have before, to think creatively about other options and to discuss them with one another.

There are two things that I would say in particular with respect to that, that you I think should think about and perhaps discuss. The first is whether there is any potential benefit -- and I'm not convinced that there would be, I want to be clear about that -- but any potential benefit to engaging in some sort of aggregated or even global summary judgment practice with respect to cases, personal injury and wrongful

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death cases in the MDL. I don't know if that make sense. I don't have enough of a sense of the individual cases in the MDL, let alone the different state laws that might apply. But query whether there is some sort of global or aggregated motion practice that could be done with respect to, for example, whether there is or isn't a postsale duty to warn under state law or the like that might streamline things and bring some clarity.

Now, again, I want to be clear. I'm not persuaded that that's the right way to go. Indeed, I would be -- you would need to persuade me that it's not actually creating more work rather than less. And it might make more sense to continue as we have done, that is to say, tether motion practice with respect to individual cases and presumably apply those rulings to future cases as we go along, but I think it's at least worth pondering whether there's anything of that sort that might facilitate settlement discussions.

I also think it's worth at least thinking about whether the remaining trials are, in fact, representative of the cases in the MDL. And, as I made clear in the initial orders and in my rulings on Mr. Cooper's motions, that is ultimately the purpose of the bellwether process. It is not intended for either side to pick cases that are strong for that side only. It is really to pick and identify representative cases.

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Again, I'm not in the position to say whether the remaining cases are or aren't representative but legal merits aside, Mr. Cooper's motion did make the valid point, in my view, that there -- or at least the observation that there had been many cases that have been consolidated into the MDL since the bellwether trials were selected and I certainly think it's at least worth thinking about whether any of them would be worthwhile trial candidates either in lieu of whatever trials have been scheduled or arguably in addition to those trials. That is to say, the answer may not be to replace one of the trials that have been scheduled given the work that both sides have already done with respect to those trials, although I will say that that is a classic sunk cost fallacy, which is to say that I'm not sure that one should evaluate work already done in evaluating whether it makes sense going forward to stick with a plan. But it may make sense to add more trials to the mix or perhaps to remand some of those cases to other judges so that trials can go on during the time that the remaining -- the upcoming bellwether trials are happening or, for that matter, for me to try and get other judges in this district to try cases so that we can do so simultaneously. But I don't know if that's doable. I don't know if that's desirable. And, again, I'm not in a position to say whether the cases that have been added to the MDL since the bellwether trials were selected are or aren't more representative but I certainly think the point

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is worth at least thinking about.

Bottomline, just to repeat, is that I do want you to continue to think about options. But having said that, lead counsel have not provided me with any more valid or persuasive reasons to deviate from the present course than Mr. Cooper did in his motion. So unless and until I order otherwise we will plow ahead with the bellwether as the best system that we have.

Any questions? Anything to discuss on that?

That brings us to the question of settlement. And let me say the following -- well let me ask if there's anything to discuss on that. I have a few things to discuss myself. Anything to discuss on that?

I know that New GM's application with respect to keeping certain documents under seal with respect to the memorandum of understanding. I believe the deadline to oppose that has passed. So it's unopposed. I'll address that in due course. Anything else that you want to raise?

MR. GODFREY: Simply that we have, as the court I believe knows, we have said before we're willing, that is the company is willing to discuss resolution short of trial with people who have brought claims. We've had a number of discussions. Whether they will bear fruit, it's too early to tell. And we will keep the court advised in due course.

THE COURT: I appreciate that.

The question I have, which is not inconsistent with

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that. On the whole I think you guys know what you're doing and have tended to make progress on your own but I guess I wanted to float the question of whether at this juncture it might be appropriate to identify somebody who could basically play the role of trying to get people to a table and figure out ways of settling cases.

I recognize that the terms of the memorandum of understanding are at least right now confidential. I recognize that the Feinberg protocols were set up and run by Mr. Feinberg and to some extent may also be confidential.

I also recognize that the first trial did not end with a verdict but there are several trials coming up in the coming months.

I guess the question I have, and this goes to also something, potential alternatives or additions to the bellwether process, is whether it might make sense for me to appoint a special master or for you to choose a private mediator or for Magistrate Judge Cott, who does this for a living and does it quite well in my experience, to basically take a more active role and try and facilitate discussions and come up with ideas and perhaps think creatively along the lines of what I said a few minutes ago about other ways that cases might get to the settlement finish line. So I did at least want to raise that question.

Mr. Godfrey.

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MR. GODFREY: Without revealing precisely, I think the court should assume we're making -- when I said we've had conversations, they involve hundreds of cases. We're making good progress. We don't think that we need the assistance of someone yet. Part of it is just getting basic data so we can evaluate, both sides can look at it.

But we are not -- there's a separate team, that's one reason Ms. Bloom is here -- there's a separate team that has been working away daily to see whether or not we can make progress. And our judgment is that at this point we do not need any outside assistance. I think we're making -- we feel like we're making the same kind of progress that eventually lead to Mr. Hilliard's settlement, but we won't know for a while. It doesn't happen overnight.

THE COURT: Mr. Berman.

MR. BERMAN: Yes, your Honor. I think that we -- this is now talking about the economic loss cases only.

THE COURT: It is or is not?

MR. BERMAN: Is. Just economic loss.

With respect to the economic loss case, because Rule 23 is involved and because millions of potential class members will be looking at this settlement, Ms. Cabraser and I have always felt in these cases that it's important for you to know that there was someone else in the room who was making sure that there was no collusion, which is one of the things that

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comes up under Rule 23; there was no conflicts, that those conflicts, if there were any, were handled from the get-go.

And so I raised with Mr. Godfrey the notion of having a mediator appointed by the court before we really got into it. And GM doesn't agree that's necessary. But we still feel that because of the Rule 23 concerns that will be raised and presented to the court in any settlement, that it is a good idea earlier rather than later to get a mediator involved.

THE COURT: Mr. Godfrey.

I guess my immediate comment is there are, obviously, any number of Rule 23 settlements that are approved even without the assistance of a mediator. On the other hand, courts often do, as I have before, noted the involvement of an mediator as reinforcing the -- a finding that the settlement was reached at arm's length and so forth.

So I do think that the point is valid; that it can actually be very helpful in both doing away with objections in the first instance as well as helping a court rule on them.

Yes.

MR. BERMAN: Can I add just one thing before Mr. Godfrey goes; and that is, you're correct that there are many Rule 23 cases where there is no mediator or special master. But I think there's very few class actions of this profile where that happens. I can't think of any that I've been involved with. And I know, for example, Ms. Cabraser is

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lead counsel in Volkswagen, and I'm on the committee. The first thing the judge did there was to appoint a special master to settle it.

THE COURT: Which is not an incidental part of why I'm raising this issue.

Yes.

MR. GODFREY: I think it's premature to consider that. We have motion practice and, again, hardly driven by data in the plaintiffs' position. Ms. Cabraser and I have done two settlements together; one with special master -- actually a magistrate judge who was terrific a couple years ago and one without. They were both high profile. There is no set rule here.

I think that this current time though is premature because depending upon where plaintiffs are there may be nothing to discuss. We have motion practice, etc.

If we have a view that says a special master or magistrate judge might be helpful, then I think there's plenty of time to let the court know that. But we don't think so at the present time.

THE COURT: I will think about it. I think my inclination is that at some point it would be appropriate to have somebody else in the room and you guys can, perhaps mindful of that observation, begin talking about: A. when that time would be; and B. who it should be. There are three

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options: Appointment of a special master, the referral to Judge Cott who, as I said, does this for a living and does it quite well; or a third is the appointment of a private mediator by the parties. So you can think about it.

But I think the point is well taken and I think at some point it would probably be appropriate to do. And whether I think, Mr. Hilliard, you should involve yourself in those conversations, I take Mr. Godfrey's point it sounds like, and that's part of the reason that I haven't pressed the point, that New GM is sort of making progress without an outsider being involved. But to the extent that somebody could potentially facilitate settling cases on both sides of the spectrum here, then I think it would be helpful.

MR. HILLIARD: On behalf of the personal injury and death cases, Judge, that are still in the MDL and are not part of the settlement, what I found -- and I disagree with Mr. Godfrey in that there are two court-appointed special masters who are both trusted and respected by both sides and they have done a lot of assistance to make sure that we meet in the middle, so to speak, in regards to outstanding issues. If there are -- we're doing a survey now on the remaining cases, which goes back to what the court said before about whether or not there should be more bellwethers or should be some replacements given that everyday there's more cases being filed into the MDL.

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So if there are lawyers who have more than one case, then there's an aggregate issue where you are going to need the assistance of someone to decide who gets what and how much and not the lawyer representing more than one client.

There are two folks who are already working in earnest everyday on this. And so I think what I'm going to reach out to GM and say is it's time now to have the court appoint someone to more generally help and assist with personal injury and death settlements with the remaining docket as GM and those plaintiffs see fit rather than wait until later. And I understand Mr. Godfrey right now doesn't agree, but I think ultimately they will need to be appointed because most lawyers have more than one case and it seems like since we both have worked well with these fellows down in Louisiana, that they are probably at the top of the list, just to give you a heads-up as to what probably is going to happen.

THE COURT: You can continue to discuss that.

Can you speak in open court about what the status is with respect to that process or is that something that we shouldn't do here?

MR. HILLIARD: We can generally say that it is moving along, and there are specific dates that have been met and will be met. And other than that, the rest is still confidential.

THE COURT: Ms. Bloom, anything that you want to add to that?

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MS. BLOOM: That sounds right to me.

THE COURT: Why don't you continue to think and discuss these issues, mindful of my comments, but I do think that these are things that I'd be interested in pushing and pushing reasonably but aggressively on. So I will certainly return to them in the next conference and on other occasions.

That leaves the schedule for additional status conferences. We obviously have the final pretrial conference with respect to bellwether trial No. 2 on March 9 beginning at 9 a.m. We will, as I did last time, interrupt that when there is a jury that I can address with respect to the questionnaire. But that's when I will see at least some of you next.

In terms of more general status conferences, mindful of your suggestion that we can go to an every six weeks kind of schedule, I was going to propose the following dates for the next two conferences; the first of Friday April 15 -- we can celebrate tax day together; and then second is Friday June 3. Anyone have any problems with either of those dates?

MR. GODFREY: I think those dates will work for us, your Honor. Thank you.

THE COURT: All right. Speak now or hold your peace.

MR. HILLIARD: Then they will work.

THE COURT: Very good. Let me just emphasize a couple upcoming deadlines and then I will address the counsel issues that I adverted to in my endorsement.

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The motion to dismiss with respect to the third amended consolidated complaint is due on Wednesday. And opposition is due April 9. Reply is due April 30. Hang on one second.

(Pause)

Ms. -- well actually she's no longer Ms. Barnes she's Mrs. Smallman has helpfully pointed out that I will be naturalizing citizens on Friday, June 3. So that date does not actually work for me. One moment.

(Pause)

Can we do Thursday, June 2?

MR. HILLIARD: Is this another speak now?

THE COURT: Yes.

MR. HILLIARD: That's fine with us, Judge.

THE COURT: Mr. Godfrey.

MR. GODFREY: I'm sorry, your Honor. I didn't hear the question.

THE COURT: If we can change the June conference to June 2 instead of June 3.

MR. GODFREY: Absolutely, your Honor.

THE COURT: Very good.

So the motion to dismiss on the economic loss front is due Wednesday. Opposition April 9. And reply April 30.

The Yingling briefing starts on the 26th with the OSI disclosures and, excuse me, submission and on the 4th with

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dispositive motions and Daubert motions. And I'm assuming that you are mindful of the upcoming deadlines, and there are several, in the Barthelemy and Spain trial.

One reminder with respect to trial exhibits. Each side should submit one hard drive with all of their exhibits and a hyperlinked exhibit list. I think you did that the last go around although there may have been some -- in any event that's what you should do.

Anything else to discuss from your end? Otherwise I'll turn to the counsel issues that I have adverted to.

Mr. Brock.

MR. BROCK: I have one issue and I can certainly do it last. But it just relates to the courtroom in which we will try the next case. I had the impression -- I hope there hadn't been an order on this that I missed -- but I had the impression from some of your comments during trial No. 1, I think you were speaking about the utility of the vehicle being in the courtroom at the time; that your preference might be to have the trial in this courtroom. And so I just was going to see if that's the case and so we could be thinking about that from a technology standpoint.

THE COURT: I'm pretty sure you did miss an order on this.

MR. BROCK: I'm sorry. I apologize.

THE COURT: I can't offhand remember which order it

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was precisely. I'm guessing -- well, in any event, I did indicate that I would hold the trial in this courtroom and though I would make an overflow courtroom available and would consider doing jury selection and possibly openings and closings in the larger courtroom. I haven't resolved how to -- whether to do that. There are issues -- technical issues and the like. But the bottomline is I had indicated, and I think I gave you a deadline to object if you had any problem with it, that I was going to hold trial in this courtroom and nobody did object. So that is the plan.

Mr. Jackson.

MR. JACKSON: Your Honor, we saw that order. We also thought that with regards to the issue that the court left open, this would be our opportunity to speak to the court on our preference. Of course this courtroom makes sense to us, as the court has already ruled, for the trial.

We would ask the court if it is technologically feasible to do jury selection and jury addresses in the larger courtroom. It might -- I think that this case is likely to have a greater attendance on those days and in my experience when the courtroom is packed for an opening statement it can be something of a distraction to the jurors. Also I think that it's a bit more difficult to conduct jury selection with a large group of potential jurors in a smaller courtroom, just our ability to see everyone I think is a little bit easier in

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the larger courtroom so that would be our request.

THE COURT: Although the lighting is better in here than in the other courtroom. I'll take that under advisement. It was order No. 94 for the record.

MR. BROCK: Thank you, your Honor. And apologies for that.

THE COURT: No worries. I will consider that and also the technical issues, because there are some, given the existence of an overflew and your desire to use, as I imagine you have, the media for purposes of openings and the like. Probably easier to do jury selection in another courtroom because it doesn't involve the use of technology and maybe I'll do that and then do opening here with an overflow elsewhere, but I'll think about it.

Yes, Mr. Brock.

MR. BROCK: In the time that we had to spend with jurors at the conclusion of the Scheuer case, we did hear from a couple that they had difficulty hearing at times. I know that was an issue about getting to a microphone and getting away from it. But I think, obviously, them being able to hear what's occurring is what we're all here for. And we'd be fine with this courtroom for the openings.

THE COURT: Well it is definitely desirable for the jury to be able to hear. The acoustics in this courthouse are not great, but one of the considerations that I had was that a

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smaller courtroom would probably be better on that than a larger. But I will consider the issues and let you know how I intend to proceed at the final pretrial conference.

MR. BROCK: We may have an exemplar vehicle that we will want to use in trial No. 3, the Yingling case. We'll bring that up at another time, whether it can be accommodated in this courtroom.

THE COURT: All right. You'll have to persuade me that it is appropriate and necessary and discuss it with Mr. Pribanic.

Anything else to discuss before my last remarks?

Yes.

MR. HILLIARD: In regard to the IT of this courtroom. I was speaking to Ms. Barnes about this podium to our left.

THE COURT: That's Ms. Smallman.

MR. HILLIARD: I apologize. Work on that.

THE COURT: As am I. As is she, I imagine.

MR. HILLIARD: And he as well.

So the podium to our left, I'm told that it is non-moveable but it is really the one that has the touchscreen and the ability to use the ELMO, and there would be another podium here. I'm seeking the court's permission to explore if it can be moved over so that there would be one really good technologically up-to-date podium that we could use for witness examination. I'm not sure it's possible. But I understand

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that it's pretty much in place right now and we could get with the gentleman that we met last night and see if there's a way, without disruption or anything bad happening to your carpet, much less than a vehicle, to see if it can be permanently put in a place where we can address a witness from one podium.

THE COURT: You are more than welcome to explore it and if you find out anything that would be interesting let me know. My understanding is that it's not doable but maybe it's doable to add another screen over there. Obviously you showed your ability to be creative on this front in trial No. 1 and if you can come up with anything that's not disruptive or unreasonable I'm certainly open to it. So talk to the gentleman that you spoke to and if you can figure out something go ahead.

MR. HILLIARD: Thank you, Judge.

THE COURT: I'll address this at the final pretrial conference also, but to the extent that you can get me whatever orders you need for purposes of Courtroom Connect or anything of that sort, obviously that was a little bit of an issue in the last trial, the sooner the better would probably be helpful.

The last thing I wanted to say, as I said, I have a few things I want to raise with respect to counsel that were prompted by the briefing on Mr. Cooper's motions, although I have already made clear my views on those motions and the

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merits thereof.

First, I am a little bit concerned and familiar about the representations that Mr. Shadowen made to Judge Breyer with respect to your role in the MDL; that is, he represented that the Scheuer trial, "Concludes your involvement in the bellwether cases for GM." That is docket number 2243 at page 10. And I'm a little puzzled by that representation, given my understanding that you are counsel in four of the remaining five bellwether cases, not to mention lead counsel with primary responsibility for personal injury/wrongful death cases. And although you've reached a tentative settlement with respect to most of your cases; number one, that is not a consummated settlement just yet; and number two, there remain approximately 1700 personal injury and wrongful death cases above and beyond those cases. All that is to say that while I am pleased with the amount of progress we have made in the MDL, I think it's fair to say that a substantial amount of work remains. I'm a little bit concerned by that representation. I don't know what extent Mr. Shadowen got out a little bit ahead of himself or whether he was authorized to say it. I did want to raise that concern.

MR. HILLIARD: And I appreciate it too, Judge. He misspoke. I had told Mr. Shadowen that the next two trials I was going to play more of a supporting role, not lead trial lawyer role. I'm here to say, I hope the court has seen that I

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intend to work just the same as I had up to this date through the end of this litigation. I don't intend to go anywhere unless there's a direction pointed by someone that I should.

I apologize for that. But I spoke for Mr. Shadowen. That was not an instruction I gave him, nor the intent that I wanted him to convey.

There are multiple chances to be in MDLs and be able to work simultaneously, which is what I hoped he would have conveyed, and that would have only been my purpose. I would not have neglected this MDL for that one.

THE COURT: I'm pleased to hear that, but did want to raise the issue.

More broadly, I hope I made it clear that I did not think that there was any merit to Mr. Cooper's motion to remove you as counsel; and that is to say, that there is no basis to remove you. I do want to just say that I think it would make sense to think about whether assuming that the settlement with respect to the 1400 or so cases goes through and the vast majority of your cases are resolved, whether at that juncture it might make sense to think about appointing either another lawyer in addition to you or having another lawyer take the lead with respect to personal injury and wrongful death cases, that is to say somebody with a larger critical mass of cases remaining in the MDL. I want to be clear I'm not suggesting any -- I just wanted to raise that as an issue for you to think

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about and lead counsel generally to think about and it may make sense to revisit it at some point. I don't think the time has come to do that and it may not be necessary because, as I think I made clear in the opinion, I think that you have generally done a terrific job in your capacity as lead counsel but I did want to just float the thought.

Anything you want to say on that?

MR. HILLIARD: Judge, to put this to rest the settlement that I entered into with GM has absolutely nothing to do with my commitment or my time or my energy that I'm willing to maintain in this MDL to the very end. I enjoy it. I was honored by the appointment. I don't want to, after this settlement is completed and it will be successfully completed in the next couple of months, it does not in any way adjust my personal or professional drive to help this court successfully finish this MDL in a very positive way. But I take your words and I'll consider those.

THE COURT: And to be clear I was not suggesting anything to the contrary. And I have no doubt that those would be -- that would be how you would continue to perform in the MDL in this role.

Second, on a related subject, I know that Ms. Cabraser was appointed lead counsel in the VW MDL and Mr. Berman was appointed to I guess the steering committee or the executive committee in that MDL. I congratulate both of you on those

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appointments. I do want to make sure that that is not going to pose an issue for us either. You're obviously here and I have no doubt that you will continue to do what you need to do with respect to this MDL but, needless to say, the amount of work for this MDL alone is pretty substantial. I'm not sure what, if anything, to do about it other than to just raise the issue and indicate that I want to make sure that there is no interference with what we need to do.

Ms. Cabraser.

MS. CABRASER: Yes, your Honor. I appreciate that as well. I thought very long and hard about whether to apply for a role in the Volkswagen MDL in the first place and to accept the appointment as lead counsel in the second place because I recognize my ongoing commitment to this court and it's a commitment that I take very seriously. I concluded that I could and certainly would spend all the time and effort and resources necessary to perform both roles. I'm very fortunate in the Volkswagen case to have a large and very talented and well resourced PSC, including Mr. Berman. And we're also very fortunate in this MDL to have a very strong executive committee and so as both cases go on we'll work together within each leadership structure to make absolutely sure that we are here for this court; that we are here for the court in San Francisco and everything else in my professional and personal life, to the extent I have one, is secondary to those commitments and

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the appointment here came first.

THE COURT: Well I don't want to deprive you of a life outside of these two MDLs but I do want to make sure that everybody is doing what they need to do in fulfilling their respective roles and, again, trust that you will continue to do so as you have.

The last thing I wanted to say is that just to underscore and reemphasize that per the language of order No. 8, the leadership appointments that I made were personal to the appointee; that is to say, I did not appoint firms to lead counsel or to the executive committee. I appointed the individual applicants. At various points in the briefing, Mr. Cooper's motions, for example, there were references -- just this is by way of example, it's not the only one -- to Boies, Schiller being a member of the executive committee. Boies, Schiller is not a member of the executive committee. Mr. Boies is a member of the executive committee. And I don't want anybody to misunderstand or have any mistake about this, that members of the executive committee can certainly avail themselves of the resources of their firm as I made clear I expect that they would do in order No. 8. But when push comes to shove, the individual leadership appointees are responsible for ensuring that they fulfill the roles that they were appointed to and I don't want anybody to misunderstand that. So I just wanted to make that clear and was concerned by some

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of the references in the briefing.

All right. That concludes what I had to discuss today. Anything else before we adjourn?

All right. If not I will see you on March 9 and I will look for your order memorializing what we've done today in a couple days. Thank you very much.

(Adjourned)

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