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.
March 13, 2015
9:30 a.m.

Before:

HON. JESSE M. FURMAN,

District Judge

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(Case called)

MS. CABRASER: Good morning, your Honor. Elizabeth Cabraser for plaintiffs.

MR. BERMAN: Good morning, your Honor. Steve Berman.

MR. HILLIARD: Good morning, Judge. Bob Hilliard.

MR. SCHOON: Good morning, your Honor. Eugene Schoon.

THE COURT: You are back. I don't know if that's a sign of trouble.

MR. GODFREY: It means I won my bet, your Honor.

Your Honor, Rick Godfrey for New GM, Mr. Dreyer, Mr. Bloomer, Mr. Feller, Mr. Fields, and Mr. Pixton with me.

THE COURT: And, Mr. Peller, do you want to state your appearance for the record as well?

MR. PELLER: Gary Peller for the Bledsoe, Sesay, and Elliott plaintiffs.

THE COURT: Welcome back, Mr. Schoon, and welcome back, Mr. Hilliard, and welcome, Mr. Peller.

We have actually a bunch of things to get through in part from the submissions of the last few days, so I want to start promptly. I had think we are on Court Call. It is operational. Again, a reminder that some judges and/or their staff in related cases may be on the line; and a reminder, as well, to please speak slowly and into the microphones so that the folks who are on the line can hear you.

As you know, my plan is to basically follow the

proposed agenda letter, this one of March 9. I am going to deviate in one respect, however, and start with the last item on the agenda, which is the proposed schedule for upcoming conferences on the theory that that may have some bearing on setting of deadlines and/or briefing schedules that we have will discuss later in the conference.

So I have no objection to essentially moving to a schedule of conferences every other month. I think we are making pretty good progress. We also have a lot else going on in this case. And, also, that is with the understanding that if there is a need for a conference in between prescheduled conferences, that we can always schedule one and come back.

Our next, and I think only, scheduled conference is currently April 8. On the theory that we don't need to meet that soon, it is also right in the middle of Passover and the like, I am inclined to push that off, but also inclined to schedule a conference for sometime in April before the end of phase one discovery and the beginning of depositions.

Everybody is nodding or it looks to me like everybody is nodding so, I will take that as agreement. I would propose either April 24, which is a Friday, or April 29, which is a Wednesday. Do people have --

MR. BERMAN: We had agreed among ourselves on April 24, so you hit it right on.

THE COURT: Brilliant minds think alike. Excellent.

So we will make the next one April 24; and, working from there, unless there is an objection, I would say our next one after that should be June 26, and the one after that poses a dilemma. It would put it on or around August 28. I think I can do that, although my wife may kill me for it, but I recognize that the two weeks prior to Labor Day are sometimes difficult to get any lawyer, let alone a group of lawyers, in any one room together. I am sure you guys will be in many rooms together during that time, but I could do it that day or I am also happy to defer it until after Labor Day and make it on or around September 11, notwithstanding the gravity of that date.

Anyone have thoughts on that?

MR. HILLIARD: We discussed beforehand, Judge, that the only concern -- and it is not a concern big enough to schedule monthly conferences -- is the beginning of the depositions, before we get into the flow, sometimes everyone gets a little cranky about what we can and can't do, what they want to have done and not have done. As long as the court is available, with a quick letter or quick call, we can probably get through and get into our own groove, so to speak.

As to the court's request regarding August, plaintiffs' hope is that we can come back to you because my sense is, having some experience on it, we will have some issues that we just are going to need guidance on, some good-faith disputes about what's gone on and what is going to

happen next.

THE COURT: All right. With respect to the first issue raised, I don't want to say I am always available, but in theory I am always available. If there are disputes even in depositions and they need immediate resolution, obviously I don't want you guys calling me every 15 minutes, which is to say, you should try in good faith to work them out; but, if need be, I am available and you should call me up and I will resolve things as promptly and quickly as I can, either on the record in a deposition or, if you need to submit something, then in rapid submissions.

With respect to the latter, are you saying that a date in August does make sense?

MR. HILLIARD: It does make sense.

THE COURT: Mr. Godfrey is nodding. So why don't we put it down for that August 28 date; and, as we get closer, if it turns out that that doesn't make sense for whatever reason, we can revisit that.

I am inclined to leave it there for now. In the next conference or thereafter, we can schedule further out, but we will also have a better sense of whether it makes sense to keep to the every other month schedule or deviate from that. Everybody in agreement with that?

COUNSEL: Yes, your Honor.

MR. GODFREY: Yes, your Honor.

THE COURT: Can you speak into the microphone, please.

MR. GODFREY: Yes, your Honor. We agree with that.

I should just, for the information of the court, I will miss the June 26 status. There is a trial in Los Angeles. I can't change that. So Mr. Bloomer will take my stead in terms of taking the lead at that status conference.

THE COURT: Mr. Hilliard deprived us of his presence at the last conference. I suppose what's good for the goose is good for the gander, so we will miss you, but understood.

MR. BERMAN: And I have a conflict on the 26th. It is my wife's 50th, and I am surprise her with a trip I planned, so may I be excused?

THE COURT: You know you are on the record, Mr. Berman.

MR. BERMAN: I can tell you my wife does not read the record.

MR. HILLIARD: If Elizabeth and I get invited, we won't be here either.

THE COURT: I think other counsel are certainly competent to handle things in the absence of Mr. Godfrey and Mr. Berman, but it does raise a question of whether a different date makes more sense. Mr. Godfrey is shaking his head no, so I am happy to keep it there.

Mr. Berman?

MR. BERMAN: Same I am happy to defer to my

colleagues.

THE COURT: Very good. So we will schedule them for April 24, June 26, and August 28. I assume you would do this anyway, but whoever is updating the MDL Web site should obviously update it accordingly and make clear that the April 8 conference is no longer happening and that those are the new dates.

MS. CABRASER: We will do that today, your Honor.

THE COURT: Thank you.

All right. Let's turn to the agenda item one, which is coordination in related actions.

Obviously, the main issue, if you will, is Szatowski, the Pennsylvania action. I don't think it would be appropriate for me to go into detail regarding my communications with any of the judges presiding over related actions, but I will say that -- well, I don't know if you were surprised by the orders, but I was quite surprised by the orders and disappointed by the orders. So I will leave it at that. But the question at this point is what to do about it.

I know that New GM was not only seeking reconsideration of Judge Rau's order, but is also seeking a protective order that may accomplish some of the same ends as entry of the coordination order. I guess the first question is where that stands.

MR. GODFREY: Your Honor, it is pending. We have had

conversations with lead counsel and the state coordinating counsel. We are going to try to see, because I think your Honor would want us to try to see, whether there is any other means by which we can get voluntary cooperation with the plaintiff's counsel in the case.

If we are not able to, we will be back in short order because, one, the plaintiff's counsel in that case has threatened New GM with sanctions for seeking to coordinate. We attached his letter to our letter submission in which he is accusing New GM of various misconduct for attempting to comply with this court's order seeking coordination. And, two, he is seeking four of the more, I think everyone will agree, central witnesses in the case. He is seek Mr. DeGiorgio, he is seeking Jacqueline Palmer on the legal staff's deposition, he is seeking Bill Kemp, the chief safety lawyer's deposition, and he is seeking a broad-based corporate representative that will squarely conflict and infringe on this court's ability to manage the case and this court's jurisdiction.

So we are going to do our best to make one more effort, with assistance of lead counsel, but I think if it is unsuccessful, then we are going to file a motion with this court. We have no choice. But I would like to avoid that, I know the court would like to avoid that; and, right now, the protective order, while it is still pending, we are being threatened with sanctions for pursuing that remedy in the

Pennsylvania courts.

So we are caught between our obligations, that is, "we" being New GM, are caught between our obligations to this court and this court's orders and a plaintiff's counsel that says by complying with what this court expects us to do and ordered us to do, we are being threatened with sanctions. We think it is an untenable position that this court has unique and inherent power to address, if as a last resort -- I understand the court views it that way -- we may get there despite our best efforts. We are going to make one more effort, with lead counsel's assistance, but we will know better in this ten-day period. I just don't know

THE COURT: Am I right that the four depositions that are most at issue, if you will, are noticed in the MDL for May and early June, is that correct.

MR. HILLIARD: We have not secured a date for any of them except Ms. Palmer's. And, Judge, I would like to speak to this issue because Matt Casey, the lead plaintiff's lawyer, and I, we are personal friends and professional friends, we have had cases together, and I have been on the phone with him often on this issue. I have suggested solutions that I am trying to work out with him.

One of the solutions is that, between us and GM, we recognize that that case is not a coordinated action and we carve out a certain amount of time for that case and give him

some conditions that he can use our answers, the answers to our questioning in his case. I am talking and working with Mr. Dreyer in that regard.

But, as I have told this court, I have been on the business end of an All Writs Act in the past; and Mr. Casey is, he is one of the better lawyers in Pennsylvania and he is well respected. He understands, and I would be surprised if we need to come back here. I understand the timetable. And we talk often about the issues.

There will need to be some flexibility, my guess is, from General Motors, in giving him the right to appear at the already scheduled depositions, not redeposing someone twice. He understands they will fight that and that it has to happen at the same time.

His corporate rep deposition is a separate issue that I can't offer you any information about the success or not success of trimming that down or sharing a different type of deposition notice yet, but I can represent to you that he understands the need to assist within reason.

Like any good plaintiff's lawyer, he is being aggressive representing his client. He understands he has a good case and the venue he likes, but he also understands this court -- and I have made it clear that you have the been very circumspect about what you are willing to do and try to work things out with the judges and we try to work things out with

the counsel. I think he will. And I will talk to him again after this hearing, if he is not on the phone now, and I will make him aware of where this is headed. But he is aware of it, and my hope is we can have a good rapport as long as GM and Mr. Dreyer can continue to understand that we are going to need to give him some flexibility within reason with regards to the notice.

THE COURT: Okay. Needless to say, my only concern in that regard is, to the extent that there are others out there like Mr. Casey, giving him a little too much might disincentivize or incentivize other lawyers to basically be holdouts as well when I think this can be done in a way that accommodates the interests of the lawyers in the coordinated actions as well.

MR. HILLIARD: Right. That's a fair concern but we have, along with liaison counsel, scoured the country to make sure that we understand the potential universe of cases out there, and GM has advised us of the ones that will not agree to the coordination order. And I don't think that will actually be something that someone else will say, Well, look what you did for Mr. Casey. But we are cognizant of the need to be careful with that.

THE COURT: All right. Well, please keep me up to date on the status of that, and obviously this is something that should be and needs to be resolved sooner rather than

later. My hope is that it can be resolved amicably to everybody's satisfaction and without a need for me to intervene. But if any party perceives the need for me to intervene, then you know where to find me and do it sooner rather than later.

Aside from Szatowski, are there other cases that -- I think the next update letter may be due today or on or about today. I don't think I have seen it. But are there other updates or cases that we need to discuss?

MR. GODFREY: I think, your Honor, that the next update letter will identify five or six other potential coordination matters, but I don't think they are ripe for this court's consideration. In other words, I don't think at this stage that we are going to need the court's intervention or the court to do anything further. If we identify something, we will let the court know promptly. I could go through the names of the cases, but I think some you have heard before. For example, the Felix case in St. Louis, we are still waiting for the court's decision. There is the Gilbert case, another case in Pennsylvania, but that is in the middle of briefing on the coordination order. So I don't see something that has the ripeness of the Szatowski case today.

THE COURT: All right. In the February 27 letter, there was an indication or reference to Lindsay, which is in St. Louis, and their argument was scheduled for March 31. Is

that still going forward?

MR. GODFREY: Yes.

THE COURT: So that one may be ripe, if you will, for some --

MR. GODFREY: Yes.

THE COURT: -- attention.

I will look for the next letter. Again, let me know what's going on in Szatowski. If you do manage to resolve that, let me know that. I would be eager and excited to see that.

MR. GODFREY: Just so the court knows, I will give you the names of the cases where something might come up in the next month and a half.

Lindsay is one that is in St. Louis County. Gilbert is a second that is in Philadelphia County. The Lindsay judge is Judge Jamison. The Gilbert judge is Judge Rau.

Then there is Mathis, which is in Augusta County, Virginia. That is Judge Ludwig.

Then there is the Felix case, Judge Dowd, which we have spoken about at the last conference that I know the court is familiar with.

And then there is the Goodman case, which is Judge Duryea, in Lee County, Florida.

THE COURT: That's the Deloitte & Touche case?

MR. GODFREY: Yes, correct. Thank you, your Honor.

THE COURT: I think all of those have been mentioned in prior letters.

Anything else to discuss on the coordination front? Very good.

The next item on the agenda is New GM's document productions. I don't think at least on item two that there is anything raised for discussion or that needs my attention, except perhaps to the extent that it relates to the third item on the agenda, which arguably could impact the schedule a little bit, or at least New GM raises the specter of that. So let's turn to that, unless there is anything to discuss specific to item 2. All right. Everybody is shaking their heads no.

So, item no. 3, the custodial file searches, I did receive and review your submissions the other day regarding the items that are in dispute on that score.

Before I turn to those, though, one housekeeping matter, which is, the plaintiffs have filed a motion to seal Exhibit B to their submission. That motion is docket number 643.

If I haven't made it clear before, I am fairly religious, so to speak, about the presumption in favor of public access to judicial documents. So, given that, if a party wants something to be filed under seal or in redacted form, it is incumbent upon you to file a motion. As far as I

am concerned, it can be a letter motion explaining why the sealing or redaction are consistent with the presumption in favor of public access under Second Circuit law.

I will also say in that regard, and I have published on this, so you can look for it, in my view, the mere fact that the parties have agreed that a document is designated as confidential or highly confidential does not, in itself, justify overriding the presumption in favor of public access. It may be there is a legitimate reason for the document to be confidential or highly confidential, but you need to explain that beyond simply saying that this has been designated as confidential in the discovery process. So that is some guidance going forward.

But with respect to Exhibit B, which I think, I take it that New GM is really the party in interest, which is to say that it is New GM's desire to keep it either under seal or in redacted form, (a) is that correct; and (B), if so, do you want to speak to the merits of keeping it under seal? Mr. Bloomer?

MR. BLOOMER: Yes, your Honor. Andrew Bloomer on behalf of New GM.

In terms of the merits, your Honor, the documents at issue -- and obviously we didn't see that before or know that they were going to be part of the motion before they were filed, but, I think, nonetheless, address the company's internal business procedures and issues relating to the

ignition switch, that the complicating issue here is that there are certain processes that may relate to a product or a part that is used in the past but still may be relevant to the company's business operations today that it keeps confidential, it does not show to others, and may use as part of its ongoing manufacturing processes. So the reason these documents were designated as such is because the company believes they contain that type of information. I am not sure any of them -- I am just looking, I know they were marked confidential. I'm not sure if any were marked highly confidential.

THE COURT: No. They are all marked confidential.

MR. BLOOMER: Right. So that's, your Honor, essentially the rationale. And if the court would like, we would be happy to submit, if this is the court's pleasure, a short submission on that with legal authorities making that case. We can proceed on that, or however the court wishes.

THE COURT: Tell you what. I think in this instance I will allow it to remain under seal in part because, quite frankly, I think one of the factors in the balancing test is the value or importance of it as a judicial document and here, in my view, it has very marginal importance, which is to say, I think it was submitted to me simply for purposes of saying that the search terms proposed by New GM essentially exclude documents that would otherwise or clearly be relevant, and in that regard I'm not sure I even needed to see examples per se.

I was happy to take the representation.

So in light of that and in light of the stated and proffered reasons, I will allow it to remain under seal. But, going forward, again, just be sensitive to my interest in this matter and if you do want something to be under seal, explain to me why that is justified and why redaction is not an appropriate or more appropriate course. All right?

MR. BLOOMER: We understand. Thank you, your Honor.

THE COURT: So I will grant the plaintiffs' motion on that score.

Turning to the merits of the dispute, I have some thoughts I will share in a moment. But, before I do, I did want to express a small note of frustration about both sides about the fact that this is only coming to my attention now. I know that New GM raised that in particular in its letter, namely, that the lead counsel didn't propose search terms until, as I understand it, March 3. I don't understand that and would be happy to hear some explanation for it; but, quite frankly, given GM's claim that an agreement on the terms is critical to satisfying its discovery obligations by the May 5 deadline, I am not quite sure which New GM didn't raise and press the point earlier itself, which is to say, both sides were aware that agreement on this was supposed to happen and, to the extent that it was critical, it could have been raised earlier. In retrospect, I obviously should have set a deadline

for it, and I blame myself a little bit for that, but you guys both know how to raise an issue if there is something critical, and I don't understand why it only came to my attention this week.

I am happy to leave it at that. I am also happy to let you address that if you want.

Mr. Berman.

MR. BERMAN: Yes, your Honor. The reason that this issue, from our perspective, is coming up on a short schedule for you is it is our belief and our experience that search terms are first proposed by the party that has the documents. And, in fact, if you look at Mr. Jensen's declaration, paragraph 19 to 23, he talks about how he is testing the search terms against the GM documents. So, like the post-repair searches GM sent to us in the first instance, its suggested search terms because it is running those terms against its documents. We have nothing to test.

So typically what happens is the party that has the documents searches their database and says, Here is what we think the terms should be. And then we say, okay, we have looked at that. Could you run some more searches, because we are going to modify what you have given us, which is exactly what we did here. So when we got their search terms, which we had been expecting earlier, because they are the ones who have to produce these documents in time for the depositions, is,

one, we are waiting for them. We figured they were doing this work. So the minute they gave us the search terms, we went out and hired an expert, we worked with that expert, and we got back to them.

THE COURT: Remind us when they gave you the search terms.

MR. BERMAN: They gave us the search terms in February, late February, and it took us three weeks to get back to them. We should have gotten back to them quicker than three weeks. I agree with that.

THE COURT: Anyone want to speak at the back table?

MR. BLOOMER: Yes, your Honor. If I can just briefly, our experience, my experience personally has been somewhat different from what Mr. Berman describes. Ordinarily, including in MDLs I have had and been involved in, where the party is asking for the documents, it has an interest in identifying what it is it wants, and so many times we have received at least the initial set of search terms from the plaintiffs. It is their discovery. It is what they are asking for.

This is also somewhat of a different situation in that prior to this issue, there are three plus million pages of documents that have been produced back on October 22. So it's not typical that you have millions of pages of documents that are produced before search is begun.

But I think our bottom line position is if, going forward, the plaintiffs want to have a default position that New GM should propose the search terms for the discovery that the plaintiffs have requested and they seek and the documents they want, we can entertain that and we can discuss that, and I am sure we can come to an agreement on that. But it hasn't been my experience that the party that's not propounding the discovery comes up with the search terms on behalf of the party that's seeking that discovery.

THE COURT: A couple of thoughts. One, you should have that discussion so that there is an understanding of who, in essence, is going to move first on this front going forward. Two, this is a collaborative process or adversarial yet collaborative, I should say. You have worked very well together to pick your battles and figure out where you can agree in the interest of moving this forward; and, in that regard, I would have thought that this was something where, frankly, both sides would have had an interest in raising this, having a discussion as to who was going to propose the terms first and resolving it sooner rather than later.

So all that is to say, again, I don't think either of you has sort of satisfied me that this shouldn't and couldn't have been raised sooner and in that regard I am not inclined to put a whole lot of stock in the complaints or possibility that this is going to affect or have some bearing on the meeting of

the deadlines and the like. It is what it is and it should have been raised sooner, but we will proceed to discuss the merits.

So some thoughts, first, I agree with the plaintiffs that limiting searches by including model names or numbers would not be reasonable. I think it is both common sense, as they say, and the documents submitted as Exhibit B confirm this, that many relevant communications won't necessarily include the model name and number and I think in that regard it is an arbitrary limiter.

I think, at the same time, I am not completely unsympathetic to New GM's complaint about having to go through 230,000 or 400,000, depending upon your benchmark, additional documents. I noted that footnote 3 in plaintiff's letter indicated a willingness to adopt the model name and number with respect to documents, certain categories of documents, namely, documents from certain committees and the like, but I don't know how much of a difference that makes. So really, one question is, is that a large universe? Does that effect the 230,000 or 400,000 figure substantially? What's the story there? Who wants to address that? I would think, Mr. Bloomer, that might be you.

MR. BLOOMER: Your Honor without having the opportunity to analyze it in detail, I don't think it is material. I think, your Honor, the fundamental issue here is

one of timing. It is a question of what can be done consistent with other obligations the company has in this case, in other cases, another matters, that are quite substantial. So if we are talking about a different timeline, that's a different conversation, and that is something we have raised with lead counsel.

But the position my client can't -- particularly when our position, for purposes of satisfying the mandate of the MDL, is one deposition per witness -- be put in a situation where we are told you are getting this, you are getting it at this point -- putting aside, we will accept our share of the blame on that -- but get it done by such and such a date. Because this is additive. It is not being done in a vacuum. And there are just practical realities to that.

So it may well be -- and the reason I say I don't think it is material is it may not be and it may not even be material under a May 5 deadline. But it may be that substantial completion for May 5, depending upon the scope of what the court rules or what the parties otherwise agree to, is a little more elastic than a hard stop on May 5, because we are certainly doing our best. Our motivation has been to get the documents for use in depositions to avoid unnecessary fights down the road. That's really what we have been attempting to do. If that is not a concern, I don't think it should be a concern given prior positions plaintiffs have taken. You

recall in November they said we can take depositions in January. We don't need documents. We have already got three plus million. We have a lot. If that's not a concern, that's fine. If it is an issue, then that's why we raise it with the court.

THE COURT: A couple of thoughts and then a question. One, I am not interested in extending the May 5 deadline. That, to me, is a critical intermediate deadline and our schedule writ large and, as you know, I am very, very consistent and eager to keep to that schedule, for all sorts of reasons, including the fact that it enables me to sort of keep the coordinated actions on board, which is in as much your interest as it is mine.

Number two, I am not interested in having multiple depositions. I have said that clearly before and it is in everybody's interest, I think, to ensure that critical witnesses are deposed only once.

So those are two overriding principles that are going to govern here. I don't quite know what it means in practice. I guess the question I have is, maybe the answer is -- well, I guess plaintiffs have proposed that you basically turn over the documents to them and allow them to review for relevance and, given the 502(d) order or the possibility of a supplemental one, that that would address any concerns you have with respect to privilege. I understand that the prior orders contemplated

that documents, subject to triggered or responses to search terms would be further reviewed, but be that as it may, maybe in order to meet the deadline and in order to ensure that the deposition schedules go forward and in order to protect you from multiple depositions for your witnesses that that is the appropriate course.

Any comments?

MR. BLOOMER: On that, your Honor, I know order 11, I believe it is, contemplates -- and the parties agreed to this -- review for it is not just privilege, but there is review for responsiveness and basic relevance. As the company's lawyers, I think we have a serious obligation to review what's produced in discovery, and I don't think we can simply do that. I don't think it is consistent with our obligations to say whatever comes up in search terms just gets produced. And the reality of it, I haven't had an MDL or another litigation where that has been done, and the reason is, and I think this was demonstrated in the papers, there will be all sorts of things that search terms, even if they might otherwise pick up relevant documents, are going to pick up that are completely irrelevant?

THE COURT: Pizza Bowl.

MR. BLOOMER: Pizza Bowl. And I am not so concerned the Pizza Bowl.

THE COURT: And I don't know what the Pizza Bowl is.

MR. BLOOMER: So the reality is, that's part of the process. I think it is a necessary part of the process. I think it is basically contemplated by best practices in e-discovery, and I think the company's lawyers have an obligation to do that. So it is not something where I think our position would be that that is really the right alternative. I think there might be other alternatives that the court could consider. In fact, these are ones that the parties have suggested in terms of using maybe either GM's search terms or some modification of plaintiffs' and then use a broader set put on a longer production track. I don't know if the court would consider that consistent with the May 5 deadline. That's something that has been discussed, that's a possibility. But I have unease of a solution that just says despite what has been contemplated or ordered by the court in terms of what both parties or all parties can do, pitching that over the side and just providing documents that are HIPAA search terms.

THE COURT: In the letters you raised an issue with respect to the consolidated document requests, and lead counsel raised an issue with respect to the timing of production vis-à-vis custodians and depositions and the like. Candidly, I don't think I have my head wrapped around those issues, and it may just be this is part of a larger discussion, but do you want to address that? In other words, I don't know what I am

being asked to do in that regard except being told that this is a problem for you and it is a problem for me.

MR. BLOOMER: Fair enough.

On that, I am not sure if the parties -- and I know someone in front of me will correct me if I am wrong about this. On that particular issue, the parties are continuing to meet and confer.

THE COURT: And what is that particular issue?

MR. BLOOMER: That particular issue is what to do with the 425-plus consolidated document requests that were served on January 30, and then there is actually a second consolidated request that was served last Friday. The parties are meeting and conferring on that.

We gave the plaintiffs a proposal that I understand from their letter they don't like. They have told us they are working on a counterproposal, so we will look at that and continue to engage them in good faith. So I don't think there is an immediate action for the court to weigh in there. What I do think it is important for the court to understand in terms of thinking about these issues, even in the limited context of phase one, is that the use of search terms are going to be important. And, as I said, since our motivation is to try to get as much done as we can for use in depositions to avoid unnecessary fights, even where we have -- we can say, look, this is phase two discovery, we have until October 30 and we

are honestly, your Honor, we are not doing that, and what we are trying to do is to get as much of this done as we can. Search terms are going to be critical to that and agreement on search terms are going to be critical on that. So I think we need to discuss it further with plaintiffs, but what we would ideally like to do is essentially be able to reach perhaps a global agreement on search terms and use those search terms to address a lot of discovery. Why? Because that's the fastest way to do this. We can do it the old fashion way, which is we go through 425-plus requests, object, say what we can agree to, say what we can't agree to, they get it in a month or whatever, then we come back and we have motion practice before the court, and then we are producing documents quite late. We are trying to avoid that.

So I think the important point is that we have been motivated to try to address search terms as a potential solution because the reality is, in every MDL I have been involved in, you get lots of discovery requests, you usually have large potential document collections and you need to use search terms to get through them.

THE COURT: All right. Does anybody at the front table want to address these issues?

MR. BERMAN: First let me take the search term issue and then I will talk about the consolidated requests if that's okay.

On the search term issue, what we are hearing from GM is "too many." You are asking for too many documents. We have a delta 400,000 or 230,000, whatever the number is. And I submit to the court that "too many" is not the metric. The metric in search terms is whether our search terms are yielding qualitative discovery, and I think your Honor recognizes that-- putting the model number in there is truncating relevant discovery.

I came across a quote that I thought was good that I think would guide the discussion here, the New York State Bar Association's best practices in e-discovery, page 24, says, "The search results should be tested after the search has been conducted to verify that the search was complete, accurate, and identified relevant documents."

And what GM has not offered to the court from their expert, Mr. Jensen, is that our search terms are not yielding a lot of relevant documents. They come up with two examples, but that's not it. It doesn't say that I have run plaintiffs' numbers or search terms and they don't yield a fair and accurate pool of relevant documents. So that really brings us to GM saying, not really that they are not relevant, what we are asking for, but it is a burden on us. And I submit to the court that that is not very persuasive argument. We are talking about 19 custodians and if there is 230,000 or 300,000 documents that we are yielding on our search terms and their

terms are not, in this day and age, when GM serves us with millions of documents, we get contract lawyers. Everyone gets contract lawyers. Unfortunately, because of the recession and slowdown in the legal community, there are talented people out there you can hire like that. You can get them in your office in 24 hours. They come from good law schools. They have experience. They can crunch through these documents in no time at all.

The second thing they could do is they can just turn them over. Mr. Bloomer talked about some kind of theoretical concern that lawyers have about turning documents over because they may contain irrelevant information. So what? They are governed by protective orders. If they are irrelevant, the burden is on. Us, we are willing to hire the contract lawyers to go through it, and they haven't really come up with any prejudice.

So I would urge your Honor, since we haven't heard really and there hasn't been any showing that these documents are not relevant, that they won't promote justice in this case, they should be produced on our search terms and they should be produced by May -- in a timely fashion.

THE COURT: Do you want to address the consolidated request issue and larger timing issue?

MR. BERMAN: Yes.

On the consolidated request issue, we are working with

them. We agree that we should agree to search terms, and we are going back and forth both on narrowing our consolidated requests. In order to get this done on time, we are going to take 400 requests and we are going to serve them with 50. We are going to say, okay, we are going to give you a rifle shot here. We are going to agree on the search terms if we can or, again, come to court.

What we won't agree to right now is that the search terms that we are using for these custodians govern the rest of the case, because other custodians and other issues of phase two issues and maybe phase three issues may need new search terms as we get into other defects, for example. So we are not going so say whatever you ordered here, that's it. We think there may need to be other search terms.

And on the timing of the other issue that they raised, they have an obligation under the deposition protocol to produce custodial files, and they seem to think they can't meet those deadlines and meet the deadlines for production of the phase one custodians. I don't think that issue is ripe yet. It may come up very quickly and we may need to do some letter briefing on that, but we see no reason at this point that GM can't produce these documents, phase one custodians in a timely fashion and meet the deposition custodial file requirements at the same time.

THE COURT: Okay. With respect to the consolidated

discovery request issues and discussions, is that something that I should set a deadline for resolution and/or submission of competing proposals.

MR. BERMAN: I think it should.

THE COURT: When, in your view, should that be?

MR. BERMAN: If we can't reach agreement by the end of next week, we should submit letter briefs two or three days thereafter would be my view.

THE COURT: Mr. Bloomer?

MR. BLOOMER: Your Honor, I think that sounds fine. I guess it depends on when we are going to get the 50 rifle shot document requests. If we get them tomorrow, that's doable. If we get them next Thursday, that's a problem.

THE COURT: I don't think we need the rifle shot pejorative in there, but when do you expect that, Mr. Berman.

MR. BERMAN: We can get it to GM by Tuesday.

THE COURT: So if you get those by Tuesday, can you -- well, is it practical to set a deadline for the submission of either an agreed upon proposal or competing proposals by let's say the Wednesday after, which would be March 25?

MR. BERMAN: That's fine with us, your Honor.

THE COURT: Mr. Bloomer?

MR. BLOOMER: Your Honor, we will make that work.

THE COURT: Great.

I will give you my views on the search terms in a

moment, but there are a couple of other disputes on that score that the letters raised. First is GM's proposal to remove the quote/unquote wild card searches on the words essentially "change" and "replace" or variations thereof. This is for threads 5 and 6 of some of the recalls, but the letters don't go into much detail, if any, about that issue. Can somebody elaborate on that, essentially how big a deal is this and what is at stake.

Mr. Berman?

MR. BERMAN: I don't know. Maybe I can defer to GM. I don't know how much additional documents are required if we do a wild card search. We do know that when we have reviewed the documents, we have seen documents that would not be produced if we cabined the thread the way that GM is doing, and that's our concern. I don't know what the burden is. This is what you normally do with search terms, if the other side says, I use this modifier it kicks out another couple hundred thousand. I haven't heard that on this issue.

THE COURT: What about the issue with respect to replacing the "and" connectors in threads 1 and 2 for one of the recalls with "within 12" connectors.

MR. BERMAN: The same thing. We are reviewing documents. We are seeing responsive documents that we believe would not be captured if you do it GM's way. And, again, I don't know what our modification does in terms of numbers.

THE COURT: Mr. Bloomer.

MR. BLOOMER: Your Honor, on the issue of their same documents, I will take the last issue first. We are seeing documents that our search terms wouldn't hit, and they are giving as examples of that documents that were produced as part of the millions of pages that were produced in October. The phase one search terms relate to seven specific recalls. The purpose of those search terms is to collect documents related to those recalls, not to produce documents that have already been connected and produced once.

So we have scoped out -- and I don't know the precise answer of how many more the connector would or would not bring in. I think we have clearly demonstrated with the what we have put before the court that there is going to be irrelevant material brought in that's part of that review process. We have scoped our proposal in light of whether it is feasible to do within the time allowed and the fact that this isn't being done in a vacuum. The company has, just in this litigation alone, categories of documents it is producing in ongoing productions as part of phase one. It has got 47 categories of documents that are now being searched for to produce as part of the phase two order.

THE COURT: I got it.

MR. BLOOMER: This is additive, and that's the concern, your Honor, and it is the question of the addition of

what within the time period? What we have done is to say, this is what's doable within the time period that the parties have.

THE COURT: But you don't, standing here, have numbers on what the delta is, if you will, with respect to the two issues I have just ranked, the "change" and "replace" and --

MR. BLOOMER: No, not a specific delta, your Honor, but I do think an important point, criterion, is that phase one encompasses seven recalls. We scoped our search terms to address those recalls not to address and pick up things that have already been searched for, collected, and produced.

THE COURT: All right. I am going to side with the plaintiffs on these issues. Number one, the search terms will not be limited by the make or model numbers, however, with a couple of notes on that. Number one, if it turns out that -- I would recommend that you explore, as you do these searches, if there are, as you do it, further limits that would make sense, that would not exclude clearly relevant documents, as I think the limit proposed would, and would make both sides tasks easier, then you should discuss those and you are welcome to come back and propose them to me.

Furthermore, if it turns out that, in going through whatever the delta is, that that delta really is substantially nonresponsive or otherwise irrelevant documents, then it is without prejudice to coming back to me and saying, Judge, look, this really is the burden that we told you it might be.

But the bottom line is, right now, I am in agreement with Mr. Berman in saying that merely identifying that there are those additional number of documents doesn't suffice because they may well be highly relevant.

With respect to the more particular issues, that is, the "change" and "replace" and the "and" versus "within 12," as well the "fob" and "modification" and "accessory" issues, if New GM wants to submit something to me by, let's say, next Tuesday indicating what the specific burdens or deltas would be with respect to that and why that should matter, then I am open to reconsideration on that issue. But unless and until I order otherwise, the plaintiffs' search terms on that score will be used as well.

You have a couple of choices to make. You can hire more lawyers. You can turn all this stuff over and allow them to do some of this review with the protection of the 502(d) order. But suffice it to say, I expect that the May 5 deadline will be met and that we won't have any issues on that score.

Turning to the next issue, which is the consolidated requests for production issue, is there anything else that we need to discuss on that? I take it you are meeting and conferring on it. Is that the issue that we have just discussed?

MR. BERMAN: It is. Nothing that I think we need to raise from plaintiffs' perspective.

THE COURT: So we have the March 25 deadline for submission of either an agreement or competing proposals.

Let's turn to the deposition protocol order. I did receive and review your competing proposed orders and supporting letter briefs. One threshold question that I have is similar to something I indicated you should be prepared to address with respect to the common benefit assessment order, which is whether and to what extent counsel, in coordinated actions, were consulted or aware of these proposals insofar as it obviously implicates their interests and/or rights. I will say that I am inclined not to enter any order until I have actually conferred with judges in those actions just to see if they have any views on this, but before I do that, I wanted to ask you about the input of counsel in those actions.

MR. HILLIARD: Your Honor, yesterday coming up to New York I spoke with Dawn Barrios, who reached out to all of the consolidated action attorneys with the order more than once to be sure that we had their input and their views as to if they felt they were having a fair shot during the depositions, and she advised me that there were no objections that she received from any of them at all.

THE COURT: When you say the proposal, obviously there is a difference between -- there are competing proposals here, and they do relate to the --

MR. HILLIARD: Plaintiffs' proposal, Judge.

So the one issue that we really are stuck on is how much time to give the consolidated attorneys on the deposition, and GM had wanted to confer more time than we thought was necessary, given that we will coordinate with them and discuss and be flexible with very good attorneys if they think they want more time or they want less time.

That was what I understood to be the pinnacle issue in regards to the protocol.

THE COURT: Let me ask you, I assume I am wrong in assuming, let me put it that way, that this is primarily an issue with respect to a subset of the more critical witnesses as to whom the seven-hour -- well, there will be more interest in posing questions to and, if that is correct, why isn't the provision in I think it is order number 32, paragraph 8, that allows for a request to be made for leave to depose for more than seven hours, why isn't that sort of the safety valve here to say that plaintiffs' counsel in the MDL and plaintiffs' lawyers in the coordinated actions can confer in advance of the depositions, and if the plaintiffs' lawyers in the coordinated actions don't believe that one hour would suffice for their purposes, then an application can be made for more time? I think it would be better to do it in advance of the deposition, but even if need be if something arises in the deposition, call me and deal with it that way.

MR. HILLIARD: Your prediction is right, Judge. We

intend to seek additional time for key witnesses to the court prior to the deposition after conferring with General Motors. To give consolidated attorneys a certain amount of time on the non-key witnesses, so to speak, might encourage them to simply to use it, you know, when it is not needed. And, again, it is not in a vacuum. We are working with and discussing how it could be divided up and, keep in mind, it is the minimum. If, for example, someone in the consolidated action comes to me and says, look, I need two hours with this witness, and I say why? If it makes sense, we can give it to him. It is a minimum he gets is the hour and the argument for GM is do they get 1.5 or 1. But to make sure that I was clear, we do intend to discuss with GM and seek the court's help, if necessary, on getting more time with the ground zero of witnesses that will be set up in the summer months.

THE COURT: Okay. Mr. Bloomer or Mr. Godfrey? I guess same question to you. Why isn't that sort of the safety valve, if you will, that would resolve? My concern here, I will tell you, I am leaning toward the plaintiffs' proposal of the five, one, and one with respect to the category one witnesses. But, in part because I am inclined to think that, with respect to the witnesses who matter most, we can deal with it by either allocating additional time, which I understand you might not want with some regularity, but recognizing that this is in your interest, as well, to ensure that these witness are

deposed only once, notwithstanding that there are other actions out there that might make sense and/or if there is a dispute among plaintiffs' counsel that can't be resolved, they can submit it to me. If I am not persuaded that more than seven hours is necessary, but there is a dispute, then a provision could be had that that dispute is submitted to me and I can allocate as I see fit.

MR. GODFREY: Two points. One, the plaintiffs' proposal will create an incentive to have most or many more depositions longer than seven hours than otherwise, because by setting it at five hours and coordinating with the state counsel will only get one hour, the default will be, We need more time, and they will have duplicative questions.

THE COURT: But I get to decide whether they get it.

MR. GODFREY: But I am just giving the court a forewarning. We are trying to force the plaintiffs to negotiate within a limited time so they make judicious decisions about when to ask the court for more time rather than we have got to fight the solution, otherwise this is going to be the default, give us time.

THE COURT: One idea, thinking out loud here, is maybe we should set a deadline by which requests for more than seven hours as to any witness should be made, providing of course for, you know, some provision in extraordinary circumstances for leave to be sought thereafter, but a sliding scale, so it

forces the plaintiffs lawyers to confer with their colleagues and decide before the depositions start which deposition they anticipate wanting more time, and then they can make an application and I can consider it as a whole. And presumably if they request it as to every witness, the answer is going to be no. So they have to be judicious in that regard.

MR. GODFREY: That would create one proper incentive that we could embrace.

THE COURT: Okay.

MR. GODFREY: Second point, in our proposed order, paragraph 3(i), essentially what we have done is to set up saying plaintiffs can always agree to give more time. We are trying to preserve a balance between the state court lawyers and the MDL lawyers that we believe would appeal to judges and the plaintiffs' counsel. We are trying not to phase on it so it doesn't look one-sided, and that is what we are trying to do.

But if they want to agree, you know, Mr. Hilliard said they only need X hours and they can agree, that's allowed under the proposal we made. We are very concerned with the optics and optical census because perception is reality, and the perception is that they have got to fight for more time or all they are going to keep bothering the court to get extensions of time. We see that as a problem.

THE COURT: Slow down.

MR. GODFREY: You may be correct that you have ameliorated part of that with the court's proposal we embrace, but that is the point on the 4.5 versus the 5.

THE COURT: Mr. Hilliard, do you want to address my proposal of essentially giving you a deadline?

MR. HILLIARD: It's a perfect idea, Judge. I'm not saying that just because you said that, but it is a perfect idea because we have a good sense, and I don't think it is any subtlety as to who we are going to need more time with, and I can sit down with Mr. Bloomer or Mr. Godfrey in the next 14 days and tell them, of the witnesses, these are the ones we are going to need more time and more than likely, given my experience, we will be able to work out a deal, an agreement as to those witnesses.

THE COURT: Okay. So here is what I want you to do. Again, subject to my conferring with the judges presiding over related actions, I am inclined to go with the five, one, one as long as the order is modified to indicate, number one, that counsel should confer in advance and seek leave to add time if either MDL counsel thinks that five hours is insufficient or counsel in the coordinated actions doesn't think that one hour is sufficient. Number two, is that if there is a dispute regarding the allocation of that time limit, that's essentially the default. But counsel in the MDL and/or counsel in coordinated actions can always come to me and seek reallocation

in any given deposition. And then, number three, I do think it makes sense to set a deadline by which essentially a global list of witnesses as to whom you would seek leave to depose for longer than seven hours is sought, again with the proviso that there may be witnesses after that, circumstances that arise, but I think the standard should be set higher at that point with respect to those witnesses.

So why don't you confer with respect to modifying the order along those lines. My interest would be to have you submit it to me sooner rather than later so I can confer with my colleagues and we can have this in place well in advance of the beginning of depositions, which is coming upon us.

So is there a date next week by which you think you can revise it consistent with those remarks?

MR. HILLIARD: Yes, say Friday of next week if Mr. Fields and I or Mr. Bloomer and I will get down to brass tacks on that.

In that regard, Judge, just since it seems like this is the general area, unless we need to talk about that issue a little more, I want to talk about the depositions themselves and bring the court into the loop.

THE COURT: What's that?

MR. HILLIARD: I need to bring you into the loop with regards to not just the hours, but we are trying to get dates in the books for all of the current GM employee depositions.

We are assigning the depositions to executive committee members throughout the summer and, no fault of GM's, I am sure, but we are having difficulty in securing specific dates, and getting pressures from executive committee members in regards to scheduling their summer in relation to their assignments. So there may be a need to get the court's assistance. And once we request an individual, there is a window within which they have to agree to the date or suggest a different date. The slowness, again, I am not putting it on GM, it's just giving us practical headaches with the assigned lawyers in an executive committee who want to do the depositions, but given that they are all through the summertime, we cannot give them their date until GM says "confirmed in Detroit for this date," and it has become a real issue, not more of an esoteric issue.

THE COURT: All right. A couple of things. One, I want to resolve this order before we get into that. Two, I am inclined not to even get into that right now. This is something that really seems like something that you all can sort out. I don't think I should be in the business of setting your schedules and identifying dates and figuring this out. I really don't want to be bothered with that. So try your darnedest. Both sides, please, in good faith discuss these things and try to sort it out. If you need intervention, again, you know how to find me. You should deal with it sooner rather than later and, notwithstanding the fact that I won't be

happy about it, you should come back to me if you need it. But really, really try not to bother me with that.

First, I want a revised version of the order by Thursday, not by Friday. Second, there was the other area of disagreement that I do want and need to address, so let me raise that now. But before I do that, not withstanding the fact that I said I would table the scheduling issue until after we resolved the order, Mr. Godfrey, anything you want to say on that, given that I said you should try and work it out and hopefully not bother me with it?

MR. GODFREY: We will work it out. We will do so as promptly as we can. But, with all due respect, I am not terribly concerned about some particular plaintiffs' lawyers' vacation in August, when I have given them dates and requests for 90 witnesses on top of everything else. We are doing the best we can. I am not taking a vacation this summer, partly because of this case. So that is not an issue for us. We are going to give them the dates. We are doing the best we can. But that urgency of apparently someone's vacation at a particular time, and they want a particular date.

THE COURT: Understood, but try to sort it out sooner rather than later and respect the fact people have various commitments. I am sure you can sort it out. Given the number of lawyers here, I am sure that accommodations can be made so that everybody is satisfied, including me.

Turning to the second area of disagreement, that is the, essentially, time left over in the event that the allotted time is not used. Once again, I find myself largely in agreement with the plaintiffs' proposal. I am concerned that the defendant's proposal is too rigid and doesn't allow for counsel in coordinated actions, let alone in GM, to use any leftover time. And, again, as I think Mr. Godfrey said a minute ago, appearances here matter, and I think it is better to indicate that counsel in those coordinated actions may be able to use that time as well.

One concern that New GM raised is the possibility of abuse, that plaintiffs could reserve a majority of their time for rebuttal and, in effect, change the order the examination provided for in the order. I am inclined to think that that can be addressed by the addition of some sort of language to the effect that, except in extraordinary circumstances, rebuttal won't exceed a certain amount of time, which is to say that, for a sort of presumption, but not a hard and fast cap, or that rebuttal will be limited by the scope of the other side's prior examination on the theory that that will ensure that you can't go too far beyond -- well, I think that would be self-executing in a sense or simply that an expectation that, in good faith, the parties' primary examination is expected to be the bulk of the examination. And that if there is any abuse or problems, they can be raised with me either in the course of

an actual deposition or, if this becomes a pattern, can be raised with me and I can revise the order or deal with the situations as they arise.

I would be inclined to think that if language to that effect was added that this wouldn't be a problem or that the concern that New GM raised wouldn't actually be a concern, but any thoughts? Mr. Hilliard.

MR. HILLIARD: Given that the court doesn't need and doesn't like to micromanage the things that we should do, my suggestion to GM was, look, when we get started, the issues you are afraid of will not occur. We will take a full and direct examination. As a practical matter there may be things covered later that we will have to cover, revert the hours. And I understand, Judge, before we get started there is some tension about, well, we don't want abuse, and there won't be.

My preference, Judge, is that the hours revert, not the topics revert. Because if there is a bad faith direct examination that lasts 20 minutes, the first thing they are going to do when it comes back around to me and I use four hours is they are going to get you on the horn and say, Look what Hilliard did. We are not going to do that.

But reversion shouldn't be complete and unfettered. If there is an issue, they can probably raise it with me and we will fix it. If there is an issue that I disagree with or there is abuse by the coordinated action or lead counsel or

executive committee orders that we can't work out, and I will represent to you, especially given the scheduling response of the court, we will work it out and we will be able to make it work once the depositions begin.

THE COURT: All right. But why not write something into the order to that effect, which is to say, not a hard and fast -- again, I am inclined to think that a hard and fast cap is not appropriate, in part for the reasons you articulated, but I think general principles can be written into the order such that if there is abuse in either an individual deposition or, even better, in a pattern of depositions then that can be raised, and there is sort of a standard by which it is measured.

MR. HILLIARD: Right. We agree and don't object to that at all. It's as if the witness were here, whatever the court's rules would be on a redirect or recross-examination, within reason, because I think there may be times during a deposition where topics on my redirect would come up which were not addressed through others questioning; and as long as it is not abuse or excessive, I would like to be able to have the option to explore those within reason. Again, it all has to come down to everyone is going to operate in good faith and exercise their questioning completely. And just the way the world turns, there are is going to be topics that come up or are thought of during the course of the rest of the deposition

that we may want to explore. So that is a long answer to I agree that with the general understandings that the order makes.

THE COURT: I agree, assuredly.

With respect to the reversion issue, which I was a little confused about, New GM objected to the reversion of time language, and I am confused because the part of the language in the redline that was submitted to me says "any allotted time not used by MDL plaintiffs or counsel in coordinated actions shall revert back to the MDL plaintiffs."

If I understood new GM's objective correctly, that should say "any time not used by defendants or by New GM shall revert back to." Am I confused about something? I didn't understand the last sentence that is struck in the redline.

MR. HILLIARD: I think that what we wanted was that any time GM did not use of the seven hours reverts back to MDL or coordinated action counsel.

THE COURT: That's not what it says.

MR. HILLIARD: Could be.

(Counsel confer)

MR. HILLIARD: So, last-minute agreement that was between my partner and Mr. Berman, any time they don't use it, it does not revert back to us. Is that right?

MR. BERMAN: If GM gets an hour at a deposition and they don't use it, we are not asking for the unused time back.

THE COURT: Is that --

MR. GODFREY: Yes. One of our problems was that if we didn't use our hour, that we understood the plaintiffs to be saying they wanted to then take it, and that was one of our problems. So that's why we objected. So if they are saying now that if they use their time, it comes time for New GM, and we use 20 minutes, we don't use our hour, it doesn't revert. The deposition is over.

MR. BERMAN: That's correct.

THE COURT: Good. See? That was easy.

So, in that case, again, by next Thursday I want you to submit a revised proposed order for my consideration again including both the new language regarding a deadline to seek leave for longer than seven hours and counsel conferring and submitting disputes to me as well as a modification or addition of some sort of language with respect to the sort of concern that New GM had about sandbagging, that the rebuttal would be excessive, if you will.

I would think you can work out general language on that score and/or a specific procedure to resolve any disputes that would alleviate the concerns here.

Mr. Godfrey, you are standing.

MR. GODFREY: One point of clarification. I apologize if it is clear to everyone but myself, but I think I need to know what's going to go in this order.

We have solved one of our principal objections about GM time reverting to our opponents, and that's good. We appreciate the court's assistance on that. But I am unclear on whether or not the plaintiffs, in the way this is now being set up, they finish with all of their time and then GM goes last or whether they think they get multiple rounds.

There is a reason for a deep water float. It did not exist in a vacuum. It came after months of discovery. And while I agree that counsel wants to operate in good faith, I have been around a long time, and I have been at a lot of depositions.

So I would like clarity, because it seems to us the plaintiffs finish, GM is done, we are done with the deposition or that GM has reserved time. But what I don't want to have happen, which I have seen before, is they go three hours, GM goes, and then suddenly, oh, we are now going to go round two, then round three, and then round four. These things need to be worked out in advance.

I have seen auctions in depositions where people say, you give me five, I will give you five more for this one. You give me ten minutes now.

Either you work on it in advance or there needs clarity. Otherwise I am afraid we will be back to the court, notwithstanding the good faith of counsel. So we should have clear rules on how this proceeds, so we don't end up, after the

first four depositions, coming on back to court on an issue that we all know has existed in the past that this order is designed to prevent.

THE COURT: Okay. I did just address this. My view is there should be clear standards, not clear rules, which is to say, I disagree with your proposal to say that it is capped at 30 minutes and it is allocated entirely to MDL counsel for all sorts of reasons, including the fact that there may be scenarios where that is arbitrary and unfair. And, again, I think that to the extent that counsel in the coordinated actions have an interest here, it should be clear that they may have an opportunity at that stage to ask additional questions.

I think that clear standards are helpful. I think standards should be set so that, if there are disputes, you can come back to me, and if there is a protocol, if you will, to do so, that is precisely what I said you should talk about and propose to me by next Thursday. If there is not agreement on what those clear standards should be, then submit it to me and I will make up my mind, again, after conferring with my colleagues.

As a general principle, I am in agreement with the plaintiffs' view that essentially it should sort of go back to the sequence provided in the order and proceed along those lines until each side has completed or exhausted its allotted time, which is to say that unused time doesn't revert to them.

We have resolved that issue.

But to the extent that the concern is that the plaintiffs will ask only a minute of questions and then say, It's your time, and then ask five hours after, I think that that can be dealt with with clear standards and a provision that allows for resolution of any disputes. Good. I am done with that issue.

Number 6 has been mooted, electronically stored information preservation issues, by entry of order number 38 the other day.

Number 7 I don't think we need to discuss. Again I am quite pleased with the Web site and think the proposal to provide notice to new counsel so that they are aware of the Web site is a sensible and good one.

Let's turn to the common benefit assessment order and then after that Mr. Peller can have -- we will turn to Mr. Peller's issues.

On the common benefit assessment order, I would say in general I am quite pleased with that. I think it is impressively thought out and laid out and I am also pleased with the proposed assessment. My understanding, I am aware of a recent study of assessments in MDLs, and my understanding is that the proposed assessment here is on the lower end of the spectrum, which I think is good and should help induce participation and coordination.

I have a few issues. The first question is, per my endorsement, whether and to what extent counsel in related actions have been heard on this issue or should be heard? And, again, as with the deposition protocol, my intention is to confer with my colleagues just to see if they have any views or want to provide any input on it, but let me ask you about the counsel end of things.

MS. CABRASER: Thank you, your Honor. Elizabeth Cabraser.

Yes, one of the reasons that this order has had a lengthy gestation period was discussions with a number of state court lawyers. Federal state liaison counsel was intimately involved in the development of the common benefit order and our concern to promote and incentivize coordination, and that, of course, is one reason that we are able to propose an assessment on the low end of the scale. Yes, we agree that it is appropriate that your Honor have whatever opportunity you think appropriate to confer with your judicial colleagues in the state court action before entry of the order. We just want the court to be aware that a substantial amount of discussion and consideration has gone into the process before we proposed it to the court.

THE COURT: All right. Good. I am pleased with that. It sounds like that process worked as it should.

Let me raise a few more specific questions and/or

concerns.

First, several paragraphs of the proposed order seemed to contemplate -- I think paragraphs 20 and 43 are the ones that I have flagged -- that a higher assessment may be set for later participation, which I do think makes sense. It does address the concern that a lawyer sort of swoops in at the tail end of this thing, maybe even after settlements have been reached in other cases, if we get there, and essentially having not contributed much, is only assessed 3 percent and maybe more, as I understand, has been done in other MDLs.

I guess my question, and I don't know if it is impractical at this point, is it makes sense to be a little bit more specific in this order with respect to either what constitutes later participation or with respect to what the rate will be in that instance or whether it should be a sliding scale of some sort. I can't say that I know precisely how this has been done in other MDLs. I am under the impression that "late" is often defined as something like 90 days, or something to that effect, after a specified settlement date. It may be premature to get into that level of detail, but I did want to raise the question. So any thoughts?

MS. CABRASER: Yes, your Honor. It has been done both ways in other cases. There are a few orders that have a specific increased assessment that kicks in at a specific date. I think that the Celebrex order had such a provision. I would

also submit that the experience with that has been mixed because oftentimes that deadline passes too quickly and then we have a scenario where, somewhat later, participants come in under the earlier assessment. And, for that reason, we went back and forth between specific and nonspecific and we defaulted here to nonspecific. But we certainly could make it more specific. We just thought, given this case, where we have yet to embark on depositions, it is relatively early days, it made some sense to leave it open.

THE COURT: Okay. Does it make sense to write into the order that that issue will be revisited at a certain time?

MS. CABRASER: We could that, your Honor. We could certainly -- implicitly, I guess, any order is subject to amendment, but we could pick either a date or an event and say that the court will revisit the order at that time.

The only concern, I guess, that we would have with that is that that be overinterpreted to mean that, notwithstanding fact that the people are participating in the order now in a specific percentage, it might be subject to change, and we are trying to provide a sense of security on that.

THE COURT: Okay. That relates to another question I had, which is, and you have more experience in this regard than I do, should provision be made for a scenario in which hypothetically the fund is essentially underfunded and the 3

percent figure is revisited even as to cases that have already paid into it? Maybe it's not likely or worth it and to the extent that you want to provide security to folks who are participating, that would just raise their anxiety levels to a degree that makes it not worth it, but I wanted to raise that question.

MS. CABRASER: Your Honor, that has been done in previous orders, and if it were to be done here, I think perhaps a very simple statement that the court reserves jurisdiction under the common benefit doctrine to revisit the amount of the assessment or other provisions to avoid unjust enrichment are in the interests of justice so that that would limit that revisitation to very extraordinary circumstances.

THE COURT: Okay. I think it probably does make sense, even if I think it is unlikely that that would come to pass, but just so that it is clear on the face of it.

I think with respect to the higher rate for later participation, I guess my inclination is not to write in a specific date into the order, but to have it on your radar screen and my radar screen as something, you know, to revisit in a few months down the road, when the issues of settlement start to become riper, which is something I will discuss in due course today.

Mr. Godfrey, you look like you want to say something.

MR. GODFREY: In reverse order, I agree with the

court, leaving flexibility on the later assessment determination, I think that's the more prudent course.

I am not certain I understand the implications of the insertion of the term that the court just outlined with respect to revising the assessment. New GM cannot be in a position where a settlement is done, 3 percent is withheld, and then six months later is told it should have been 4 percent withheld. So I am assuming we are not suggesting that.

THE COURT: No. I think the issue would be, in essence, put plaintiffs and plaintiffs counsel on notice that they might be asked to kick a little bit of whatever they received back into the fund if it turns out that equity and justice require it.

MR. GODFREY: We have no concern about that. I suspected that was where the court was going, but I wasn't clear. I wanted to make certain I understood.

THE COURT: Ms. Cabraser, am I correct about that?

MS. CABRASER: Yes, your Honor. Once a defendant has withheld a particular assessment for a settlement, I think the defendants' obligation is over in that regard and any additional obligation would fall on the plaintiff, usually the plaintiff's counsel.

THE COURT: Good. Next question I had is, to the extent that the proposed order contemplates the appointment of a CPA with respect to the fund, is there timing in which we

should do that? Should that be written into the order process for appointment, etc.

MS. CABRASER: Your Honor, I don't think -- once this order is entered, I think it governs settlements reached thereafter. We could add a provision for the submission of proposed CPAs say within 30 days or 60 days after the entry of the order? That might mean that GM would have to withhold for a little while until the account is set up and CPA is in place, but it wouldn't be a long period of time.

THE COURT: All right. Why don't you do that and let's make it 30 days on the theory that it is in everybody's interest to do it more quickly.

MS. CABRASER: Okay.

THE COURT: Next, paragraph 34 of the proposed order, this is a slightly smaller question or concern. It defines payment of gross monetary recovery to quote/unquote include amounts paid to plaintiffs' counsel, which raised the question in my mind whether it doesn't include payments made directly to a plaintiff or, in theory, to a third party on behalf of the plaintiff. But I assume it should and is meant to.

MS. CABRASER: It should and is meant to. That is just such a rare circumstance. I guess it could occur if there is a pro se plaintiff, but we can provide for that.

THE COURT: All right. I think it would make sense to clarify that.

Next, and last I think, I have two concerns regarding assessments in coordinated actions. First, paragraph 37 says, "Consideration will be given by the court to an order by the coordinated action court setting an assessment amount at less than 3 percent," and I guess the question in my mind is what does that mean? What does it mean to say that consideration will be given and how will that work in practice? I know that some analogous orders or some common benefit orders in other MDLs actually specify a lower rate in coordinated state actions, Prempro and Fen-Phen come to mind. I don't know if that's appropriate here, but it just raised a red flag for me that "consideration will be given" as just such a vague standard or phrase that I don't know what it would mean if I were a lawyer or a judge in a coordinated action.

MS. CABRASER: Your Honor, the reason for an express lower assessment in the diet drugs litigation, Fen-Phen, was that discovery and a document depositories were actually in place and utilized in the state court action so that the MDL was not the only place for discovery, as it is here.

I'm not sure of the situation in Prempro, but I think it was the same.

So we didn't want to affirmatively provide for separate assessments by the various courts. The only coordinated proceedings outside the MDL that we are aware of would be the Texas MDL, which is a small state MDL, which is a

small one. So that provision could be omitted. It is really a placeholder. We didn't know how to get more specific about it, your Honor, other than to recognize that your Honor is in consultation with judicial colleagues and state courts. Frankly, I think this provision was an artifact of other orders in which the MDL assessment has been substantially higher than the 3 percent that we have concluded here was appropriate.

THE COURT: All right. I do think that the lower assessment here is likely to make it less of an issue. It relates to the second concern I had on this score, which is that paragraph 10 of the participation agreement says that the agreement does is not intended to result in essentially two assessments, assessments in the MDL and assessments in the coordinated action.

MS. CABRASER: Correct.

THE COURT: But I don't think there is any provision to that effect in the order itself.

MS. CABRASER: We can certainly insert one, your Honor. That is the intent. I think it is unlikely here that there would be multiple assessments; but if there were, we don't want anyone to be charged twice. Frankly, in a situation like that, the plaintiffs' committees and the courts would have to resolve that so that the money that was withheld was appropriately credited or used in multiple jurisdictions. We actually have more of an issue on that in Toyota. We do have

the provision that you are suggesting in the Toyota action because there is not only an MDL, there is a very active California coordinated proceeding, and the courts worked together to come up with a uniform assessment there.

THE COURT: All right. Why don't you revise paragraph 37 to, in light of our conversation, incorporate the substance of paragraph 10 of the participation agreement, and I would propose that you include some procedure whereby if counsel can't work it out that it is submitted I think to me to resolve maybe in consultation with or after conferring with whatever judicial colleagues are involved in the state court side of things. But I would think it should be clear sort of how a dispute on that score is to be resolved if it can't be worked out. All right?

MS. CABRASER: Yes, your Honor, we will.

THE COURT: Is it realistic to ask you to get a revised draft, in light of our discussion, to me by next Thursday as well so that I can circulate these things together?

MS. CABRASER: Absolutely, your Honor. We will try to get it to you before then.

THE COURT: Great. Excellent.

Mr. Godfrey, I assume you don't have much of a dog in this fight. Anything you want to say?

MR. GODFREY: Thank you, your Honor.

THE COURT: All right. With that, let's turn to the

issues raised by Mr. Peller's objections and motion to reconsider order number 29.

Mr. Peller, I appreciate your patience this morning. I do think you will need to come up here somewhere, but why don't you stay there for a moment and then if or when you want to address me, you can approach.

Let me say a couple of preliminary things.

Number one, I do think that these are complicated issues, that, as I think I originally flagged and as Mr. Peller's submission notes, in fact as all the submissions note, the law is a little bit unclear and unsettled. I also think it is a very important issue to really both sides and to all the individual plaintiffs. In that regard, you know, I don't -- I am grateful to Mr. Peller for raising it and to all the parties for their helpful briefing on it.

I am inclined, number one, to sustain, if that's the right word, Mr. Peller's objections with respect to dismissal of his complaints and thereby reinstate them under the provisions and procedures laid out in order number 29. I recognize that to some extent the claims that are raised by his clients may overlap with the claims in the consolidated complaints but, by lead counsel's own admission, they don't entirely overlap, so there is some uniqueness, if you will, to them, and that alone I would think constitutes good cause within the meaning of order number 29. And I think that takes

care of things for now.

However, I think that Mr. Peller also raises some valid points with respect to order number 29 more generally. For starters, upon reading the order, I myself am somewhat unclear about the procedures in certain respects. Most notably, it provides for dismissal without prejudice of the complaints listed in the exhibit and provides that any plaintiff can object and seek reinstatement upon a showing of good cause as I just mentioned, and then the next paragraph, this is page 3 of the order, states that any claims and defenses that are "dismissed without prejudice and reinstated pursuant to the preceding paragraph but which are not included" in the amended consolidated complaints to be filed by June 4 shall be dismissed with prejudice. What is left unstated and therefore is unclear to me is what the effect is with respect to complaints that are dismissed without prejudice but are not reinstated, which presumably would apply to all the complaints, other than those that Mr. Peller has sought reinstatement of if I do in fact sustain his objection and reinstate those complaints. That is to say, as far as I could tell, the order is silent as to whether and when those complaints are dismissed with prejudice, and I think some clarity is needed in that regard.

Second and in any event I think Mr. Peller raises some valid points with respect to the due process rights of

plaintiffs who are not named in the consolidated complaints, in particular, that order 29 doesn't provide any opportunity or means by which they can object to their exclusion from the amended consolidated complaints to be filed by June 4. And that is to say that I had think under the plain terms of order number 29, lead counsel is essentially delegated in unilateral authority to decide what claims are made and, by extension, what complaints are then dismissed with prejudice.

I know New GM suggests -- and this is at page 10 of its brief -- that, in the event of disagreement, an objector could seek a ruling from me, but the fact of the matter is that order 29 doesn't actually provide for that and appears to make dismissal with prejudice essentially self-executing upon the filing of the amended consolidated complaints.

Second, my question, and I think it is raised by Mr. Peller's submission, is if a case is dismissed with prejudice, what is the effect of that? That is to say, are the claims distinguished such that plaintiff can't recover as a member of the class if in fact a class is ultimately certified, which is to say, if their complaint and claims are dismissed with prejudice, one would think that those claims are done, over with, and they might be given preclusive effect such that they can't partake in any class recovery. Second, if class certification is denied, dismissal with prejudice I would also think would presumably preclude those individual plaintiffs

from pursuing their cases individually, and that doesn't necessarily strike me as fair or reasonable given that consolidation is not intended to affect the substantive rights of individual parties.

All that is to say that I am ultimately inclined to think that order number 29 did in fact go too far in trying to streamline and coordinate things and, in doing so, did violence to the principle that, as I said, coordination doesn't distinguish substantive rights and that the MDL process is intended to deal with common issues but leave case-specific issues in individual cases, if they are not subsumed in the resolution of those common issues, to be resolved, if need be, in the transfer courts.

Now, I want to be clear, I do view and continue to view the consolidated complaints as critical tools to organize motion practice both here and in the bankruptcy court; to deal with the class certification, which I assume is coming down the pike; and to help manage the discovery process. But I also do not think that those should come at the expense of individual litigants or their due process rights, more to the point.

I am inclined to think that the problem lies in the provisions of order 29 that deal with dismissal with prejudice after June 4, that either those should be changed so it is not with prejudice and provides that it is either without prejudice or that cases can be reinstated and stayed, which I think is

ultimately all that Mr. Peller is actually asking for, or that the date upon which that dismissal could be had or might be had is basically pushed back to sometime at or after the time when class certification issues are resolved on the theory that if the class is certified and the plaintiff is within the class, presumably that moots their claims; and if the plaintiff opts out of the class, then they would be entitled to pursue their claims individually and there would be no ambiguity or confusion arising from the purported dismissal of their claims with prejudice. And in fact that's, as I understand it, what lead counsel proposes as an alternative suggestion in their brief.

Actually, more to the point, I think that's how lead counsel indicated their view of order 29 actually operates. I don't think as it is written it is clear that it does that, and what I am proposing is that we make it clear that it does that or clarify in the manner that I have just described.

I recognize that obviously for the folks at the back table, Mr. Godfrey, that this provides GM with less finality than it might like or than order 29 as currently written provides, but I am inclined to think that it is what it is and that that is the best we can do while preserving the due process rights of individual litigants, and I also think that it may end up being that you get a lot of finality out of doing it in the manner that I just described, given the potential

outcomes of any motion practice before the bankruptcy court or here given the potential outcome of any class certification motion practice and so forth, which is to say, again, Mr. Peller doesn't, as far as I can tell, seek reinstatement and to litigate his cases now; but, rather, seeks reinstatement and a stay those cases, recognizing how the consolidated complaints can in fact be helpful in this regard. And litigation with respect to those consolidated complaints may ultimately moot or preempt any individual complaint obviously through the motion to dismiss process, Rule 23, or the bankruptcy court, for that matter. And to the extent that it doesn't, I guess my view is that New GM isn't entitled under the law to the finality that it perhaps wants.

So those are my current views or where I currently am on the question. I don't necessarily have views on the best way to revise the order in light of those concerns, that is to say, whether cases can just be reinstated and stayed or whether to convert it to dismissal without prejudice or whether to provide the dismissal with prejudice would come at or after the class certification process, let alone the issues raised in a footnote to Mr. Peller's submission about the different means by which a ruling on a motion to dismiss can be applied or addressed to other cases. But that is sort of where I stand at the moment.

Here is what I propose. My deputy just advised me,

which I was not paying attention to, that we have only one court reporter today, so I am going to take a five-minute break to give her some time. So let's take a five-minute break in which you guys can confer, use the facilities. But I want you to talk among yourselves and Mr. Peller about what I just said, and that may well guide our discussion in five minutes.

MR. SCHOON: Your Honor, when we resume, this is because my client and co-counsel Mr. Papilla, and I know some other defendants are on the phone, if we could just remind counsel to speak directly into the microphone. I am getting reports that they are having a hard time picking up.

THE COURT: It's ironic that you ask that without speaking into the microphone yourself. Duly noted.

We will pick up in five minute.

(Recess)

THE COURT: Let's pick up where we left off. I should say, I need to finish this by noon, no later, for my own personal reasons, so it puts a limit on how long we can discuss this.

To put a finer point on what I said a moment ago -- I am happy to hear your reactions and thoughts, and you are welcome to try to persuade me to change my views, but unless you do, my inclination is to essentially grant the motion for reconsideration and direct you to essentially confer with respect to a revision of order number 29 consistent with what I

have just discussed and to include Mr. Peller in those conversations and see if we can sort of work it out so that it preserves the spirit of the order 29, that is to say, it is an effort to streamline, clarify, and coordinate this MDL in an efficient fashion, but preserves due process rights of individual litigants.

Mr. Berman.

MR. BERMAN: Given your time schedule, I will be brief. We agree that we should do that.

THE COURT: You learned something from my exchange with Mr. Hilliard before.

Yes, sir.

MR. FELLER: Your Honor, Leonid Feller for New GM. I am going to take a shot, not at changing your mind, but maybe at finding a middle ground that does protect the due process rights of the individual plaintiffs but then also does provide some measure of finality and certainty and can give purpose to the MDL proceedings.

Your Honor, understanding your concerns, this is what Mr. Peller understands the effect of what the court is proposing. This is from page 1 of his reply brief, docket number 571. "Because they are not parties to the consolidated pleadings, certain plaintiffs will not be bound by any ruling the court might render with respect to those pleadings."

And that at note 7, "Certain plaintiffs' pleadings

cannot be expected to be final until they have had an opportunity to pursue discovery regarding their factual allegations, discovery that may or may not be encompassed by the discovery pursued pursuant to the consolidated pleadings insofar as those pleadings do not assert the same facts and legal theories for recovery as the pleadings of certain plaintiffs."

In other words, what Mr. Peller wants is to be able to sit by, for his plaintiffs to be able to sit by in this MDL, allow motion practice on the consolidated complaint, for that motion practice to have no impact on his pleadings and what he can later do, to allow discovery and everything we have been talking about today with respect to the coordinated actions, whether in state court or here and in depositions once and to be able to start all over again should he later choose to, your Honor, and that does not seem to be an outcome that we see as reasonable or gives effect to what we are trying to accomplish in the MDL.

THE COURT: What was the second thing you were quoting? You said --

MR. FELLER: Your Honor, it is from his reply brief. It is docket number 571, page 4, note 7.

THE COURT: I don't see that language in there.

MR. FELLER: I am happy to hand it up, your Honor.

THE COURT: I have it. That's not the problem.

MR. FELLER: It is 8 lines from the bottom, starting "certain plaintiffs."

THE COURT: That's footnote 8, sir.

MR. FELLER: Oh, that's right.

THE COURT: I think footnote 7 is the answer to your concern, which is to say, I will clarify with Mr. Peller in a moment, but I don't think he is suggesting that the litigation with respect to the consolidated complaint will have or can have no impact on individual actions. He cites the fact that other MDLs have used various procedures, and I averred to this earlier, which is to say that after I rule on the motions to dismiss with respect to the consolidated complaints or anticipated motions to dismiss, that an order to show cause could be issued directing individual plaintiffs to show why the ruling shouldn't be applied to them. I could leave it to transfer courts to resolve whether and to what extent my ruling applies to them and so forth.

I think the notion is, I mean, an MDL is in theory is not supposed to consolidate things for all purposes and have everything resolved in the transferee court. Although, as a practical matter, I recognize often it does work out that way, I think the idea is to the extent that his cases raise issues that are specific to his cases and are not implicated by the common issues and common facts in the consolidated complaints, that the MDL process isn't necessarily the place to resolve

those and they could be left for the transfer court or left for me to clean up after we resolve the issues with respect to the consolidated complaint.

So I didn't hear him to suggest that he can sit idly by and litigation with respect to the consolidated complaints is irrelevant to him.

MR. FELLER: I think that's what he says in his papers, but I do think that. I think that, for example, with regard to his RICO claim. He has a RICO claim. So far lead counsel have chosen not to include that in their consolidated complaint. If they choose not to include it and Mr. Peller has an individual action all on his own and that RICO claim is never addressed in motion practice, then we end up back in the transfer and we potentially start over with respect to that claim. That claim is not unique to Mr. Peller or his clients. That claim could be pursued by lead counsel should they choose to.

THE COURT: My question to you, thinking out loud again, is can't we deal with that kind of scenario -- and the RICO claim does strike me as the most obvious one, and this is a concern that I had myself -- I mean, I do think there is something to be said for lead counsel taking the lead, thus the name, on the consolidated claims and making their assessments as to what the strongest legal claims are and the like. At the same time, I think you have an interest, to the extent that

there are claims or theories that are not really specific to one case, and the RICO claim may be a good example, to providing a mechanism whereby you litigate that in front of me through the MDL process. So is it the answer we deal with motion practice with respect to the consolidated complaints and if you think that there are any things like the RICO claims that implicate some critical number of other claims out there that you can essentially seek leave from me to pursue motion practice with respect to those and we give lawyers like Mr. Peller an opportunity to respond on the theory that lead counsel has made his decision and those claims shouldn't be included in the consolidated complaint?

MR. FELLER: Sure, except we have got 115 individual economic loss plaintiffs out there.

THE COURT: Right, but he is the one who has raised any concerns on this score.

MR. FELLER: Exactly, your Honor.

so it seems, at least I think to me, that the far simpler solution to this process is, and I agree with the court that parts of order 29 need to be clarified. I think the clear intent, and if you go back to the December status conference transcript, was that everything is dismissed with prejudice on June 9. The far simpler --

THE COURT: 4.

MR. FELLER: June 4.

The far simpler solution, your Honor, Mr. Peller has filed a complaint that the JPML has transferred to this court. We have lead counsel. We have a two consolidated complaints. Mr. Peller has filed an objection. His claims and his clients and the claims and clients of any of those 115 individual complaints can be included in the consolidated complaint, and then we have a single consolidated complaint and we go forward with motion practice and then class briefing on that consolidated complaint.

The due process concern that Mr. Peller raises is a function of the fact that his clients and his claims are not included. So, simply put, he has made an objection, and part of that objection is asking to be included. And if he is included, there is no -- every individual plaintiff has a choice. They can ask to be included in the complaint. If they do then, as a general rule, they should be subject to the objection process and the court ruling that it is completely frivolous. But if they don't --

THE COURT: The first argument, as I mentioned, order 29 doesn't actually provide for that objection process with respect to the amended consolidated complaint.

MR. FELLER: And I agree. But I think if you go back to the December status conference transcript and if you look at what Mr. Berman said, that's clearly the intent is to dismiss with prejudice now and then give them until June 4 to do

whatever claims they want to include and at that point they are done with prejudice, and order 29 of that does discuss later filed complaints right after June 4 and those are also dismissed with prejudice.

THE COURT: Let me ask you, the concern that you mentioned before, why isn't another option to push back the dismissal with prejudice date to on or about or shortly after the decision on class certification on the theory that the plaintiff can then opt out? And at that point it may be that Mr. Peller is the only one who opts out. And I am not suggesting he will and I am not suggesting that I will certify a class. But if he opts out, then there may be only one RICO claim left, and maybe the answer is you litigate that in the transfer court. Or if there are multiple opt-outs and they implicate common issues that were excluded from the consolidated complaints, then we come up with a process at that point to litigate and have motion practice with respect to those issues.

I would love for a more efficient process and to do it all in one fell swoop, but maybe that's the answer. And Mr. Peller, again, has really only asked that his action be stayed and preserved, but not to proceed now.

MR. FELLER: Two answers now.

One, as between where we start now, and never having any date where complaints are dismissed with prejudice, I think

we would certainly agree that sometime closer to class certification is better than no date at all. That's one.

But, two, I don't think we need to do that because the problem with doing that is you have got motion practice before class certification. We would like to do motion practice all at once. If he is not in the consolidated complaint at motion practice time, we don't litigate the RICO claim, then we litigate a motion to dismiss, if something survives, it survives. We get to class cert., deal with class cert. and then we have to deal with RICO on the back end.

We don't need to do that. If we get him into the consolidated complaint, we litigate all at once, we do the motions to dismiss all at once, and then all we are saying, in terms of claims that are dismissed with prejudice, is that individual class claims as they exist today are out and are dismissed with prejudice. If a class is certified in the MDL, if that happens at some point, then there is no reason that Mr. Peller and his clients, even if their class claims are dismissed with prejudice today or June 4 or whatever the date is, there is no reason that they, as individuals, still opt out of whatever class is certified and pursue their individual claim.

THE COURT: All right. Let me hear from anyone at the front table if you want to be heard, and then I will turn to Mr. Peller.

MR. BERMAN: I think I would defer to Mr. Peller at this point.

MR. PELLER: Thank you, your Honor.

Plaintiffs appreciate the ruling you made or suggestion you made with respect to our motion for reconsideration.

Did you want me to respond to Mr. Feller's points?

THE COURT: Yes.

First of all, am I right that you are not suggesting that a ruling on the consolidated complaint would have no impact or could have no impact on individual complaints?

MR. PELLER: Absolutely not, your Honor. We agreed with your responses to Mr. Feller. It is our understanding of the proper procedure.

THE COURT: So then, more generally, to the extent that you want to respond.

MR. PELLER: I had a couple of questions for clarification.

First, in response to Mr. Feller's suggestion, I don't think there is any basis or reason to dismiss the class claims of the plaintiffs that I represent at this time, particularly since they assert non-ignition switch safety hazards in the cars. Those might be class certified by a transfer court if they are not asserted in a consolidated complaint, don't become the subject of class certification here, and there would be no

basis to dismiss those class claims now.

The point of clarification I had is, I wasn't sure in the earlier conversation whether the court intended to ask for an order that would be a dismissal without prejudice upon the filing of the amended consolidated complaints. We don't think that would be an appropriate procedure for many of the same reasons as stated in our present papers, your Honor, but specifically the burden on the plaintiffs -- most of the plaintiffs I represent are low income. The burden of a dismissal without prejudice would be that we would have to refile, pay all the expenses of refiling, and then likely only to be transferred right back here because of the common questions of fact to the extent that we have asserted that the non-ignition switch defect issues emanate from the same culture of disregard for safety issues that the lead counsel and most of the plaintiffs in this MDL assert.

THE COURT: Why isn't the answer to that to provide some sort of reinstatement procedure along the lines of what order number 29 does for the current status? In other words, I think that Judge Lynch's decision in the Global Process case that you cited in your own papers is actually a very sound and wise decision in the sense that he provided a mechanism, a deadline whereby cases would be dismissed unless a plaintiff's lawyer, like you, assiduously I think is the word he used, sort of pursued the individual claimant's rights, and that would

have the effect of essentially sorting things out. And if somebody doesn't want to pursue it, as you have, then I am not sure that it doesn't make sense that their case would be dismissed and they could choose to put their eggs in the consolidated complaint basket, but allowing you to seek reinstatement either on a showing of good cause or otherwise essentially preserves your ability to proceed without the need to refile.

MR. PELLER: I think that makes sense, your Honor. As we state in our papers, though, I don't think there is any basis in the federal rules for involuntary dismissal, even if it is without prejudice, simply based on the fact that the consolidated complaint might make similar allegations.

THE COURT: I think you are wrong about that for the reasons stated by Judge Lynch, which is to say that I think I can treat a party's failure to seek reinstatement as consent to consolidation and superseding, if you will, by the consolidated complaint. So I don't think it is a Rule 41 issue. I think it is a case management issue and, for the reasons that he stated in his opinion, I think I would be on firm ground in treating it that way.

Let me ask you, Mr. Berman, to just address one point. I do think that the issue raised with respect to GM's interest in resolving -- you know, let's take the RICO claims as a good example, I. Don't want you to get into why you did or why you

didn't choose to include them in the consolidated complaint. I don't think that's my concern. But I think there is a valid point that New GM, as to those claims or other claims that may be out there like it that implicate more than one case, that they have an interest in the MDL and resolving and getting a ruling on those issues.

Do you have any thoughts on how that could be accomplished short of directing you to include them in the amended complaint, which I am disinclined to do for all sorts of reasons.

MR. BERMAN: It probably depends on how the case turns out. So we represent those claims. The class members and Mr. Peller's clients are in my class, okay? So if we go and certify and we settle, then he can opt out. If we lose, there is a judgment against us. I think the judgment would include all claims that could or should have been brought by the class. So we certify it, we go to trial, we didn't include those claims, the judgment would, I think, bar any claims that could have been brought arising out of those circumstances.

So there is a way to resolve that without litigating it, and I think it is our job as class counsel to decide which claims we want to litigate on behalf of the class. If we didn't have that ability, it would be a nightmare, as you can imagine.

THE COURT: I agree with that. Again, I am inclined

to think and maybe the RICO claims are the only claims that are in this bucket, but I am inclined to think that there can be a procedure whereby New GM can seek a ruling on issues even if you didn't elect to bring them in the --

MR. BERMAN: There is nothing to stop GM from moving to dismiss Mr. Peller's RICO claim if we don't bring it.

THE COURT: All right.

MR. FELLER: Two quick points.

THE COURT: Yes.

MR. FELLER: Your Honor, one is, again, we have got 115 individual economic losses and we have got almost 500 economic loss plaintiffs. We have got one objection. So I think New GM, and I think I can speak for defendants, subject to cleaning up the language, it is not clear to us that you need to throw out order 29 because we have one objection. We can deal with the one objection and we can deal with Mr. Peller and his clients and his claims.

THE COURT: Agreed, except that I think he, again, raises some valid points in that regard, even if he is the only one who had the courage to bring them to my attention. I am inclined to do what's right and what I think is consistent with principles and due process. So here is what I propose to do. In essence, I propose to grant the motion for reconsideration and direct you to confer, again, including Mr. Peller, who is a representative of the objector class, if you will, and either

submit a proposed agreed-upon revised amended order or propose dueling orders along with letter briefs in the same manner that you have done in other cases, let's say two weeks from today. Does that seem reasonable?

Mr. Berman.

MR. BERMAN: It does.

There is one more issue. I know you are out of time. Can we flag it and maybe talk about at the next status conference?

THE COURT: One more issue on this front?

MR. BERMAN: Yes, order 29. It is the June 4 date for filing the consolidated complaint. We anticipated, and maybe the court did, because there is language in order 29 that we would have a ruling from Judge Gerber by then. The consolidated complaints was an enormous amount of work, as you know.

THE COURT: Obviously.

MR. BERMAN: And it seems to us it makes little sense, without a ruling from Judge Gerber, for us to do all this work, for example, on the pre-sale point, which we are clearly going to get some guidance, and file the complaint that may not mean much, that we are going to have to do over. So we want to flag the issue and maybe we can talk about it, what is the appropriate date for the filing of those complaints.

THE COURT: All right. I think that's a valid point,

one that can be tabled until the next conference or, to the extent that we don't hear anything from Judge Gerber in the interim, we can deal with it at that time.

Mr. Peller, is my resolution of your issues okay with you, which is to say, you will be part of the meet-and-confer process and submit something you may agree with them, you may not, but give you an opportunity to be heard and two weeks from today, okay?

MR. PELLER: Yes, your Honor. Thank you.

THE COURT: What I will propose, just to ensure, I do think in retrospect that I should have been more careful about this back in December, even if there is an agreed upon order, I would like you to submit it on ECF so that other lawyers who are party to the MDL can see it and provide them with, let's say, three days in which they can respond to the proposed order in case there are other thoughts and/or objections out there. And you can write that into the order memorializing what we have done here today.

All right. I should also say I will decide, based on my felt need and schedule, I may write on this because I do think it is an area of the law that is complicated and a little bit unclear. I may decide that it is not worth my time, in which case I won't write on it. But I am, for the reasons stated, granting the motion for reconsideration and will certainly revise and enter an amended order of some sort. It

remains to be seen of what sort.

All right. Turning to the next issue, issue number 10, I take it you are meeting and conferring on that. Really, actually, issues 10 and 11 I think you are meeting and conferring on both those issues, and my questions are, number one, what the status is of those discussions and, number two, whether I should impose any sort of deadline for those discussions or leave you to continue them.

MR. HILLIARD: Judge, as to your first question, I am hopeful on number 11, the documents that Mr. Bloomer and I speak of are the Southern District of New York Department of Justice documents pursuant to our subpoena, and we are waiting on a 502(d) draft from Mr. Bloomer to get those documents sooner rather than later into the discussions are ultimately going to be fruitful based upon my conversations with him.

Board of directors issues, there was an e-mail that went out to GM today in regards to the coming meet-and-confer. I would request a little more time, and I think that we can cooperatively get to either an agreement or the specifics of our disagreement. I have had some pretty frank conversations with Mr. Bloomer, and I am leaning towards his representations about why we may not need as much as we think we do, and I am hopeful that we can report it gets done.

THE COURT: My inclination is to hope and assume that you guys can work these issues out, mindful of my caution

earlier with respect to the search terms issue, which is, to the extent there are issues that might impact our schedule and your ability to meet whatever deadlines that I have already set, it is in your interest to raise them in a timely fashion, because if you don't, you are going to be stuck having to comply anyway.

If you think I should set a deadline with that caution in mind, I am happy to do it, but I guess my reaction to hearing you is not to do it and leave you guys to try to work it out.

MR. HILLIARD: We will know whether we need a deadline by early next week. If it turns out that we reach an impasse, we will notify you and the court can put a deadline on it. Again, I think it is probably the court's preference, too, that we can do it quickly without deadlines imposed, and these are two issues that have moved forward pretty successfully. We have scheduled more talks early next week, and I think that by Monday or Tuesday if we notify the court we need a deadline it will be because something shifted.

THE COURT: Okay. Mr. Bloomer, are you agreed?

MR. BLOOMER: Yes, your Honor. I generally agree. We have been discussing these issues. What I would note, though, is that these are phase two discovery issues. These are not phase one discovery issues. So I think there is some time. We will want to work through some of the complicated issues. We

are in the process of doing so. So I don't, in general, disagree with what Mr. Hilliard said and I don't think a deadline is necessary. I think everyone has an interest in moving on these things as expeditiously as possible, but I just wanted to set the context for those discussion.

THE COURT: All right. Very good.

Trying quickly to run through the remaining issues. First, New GM filed the motion to dismiss with respect to personal injury/wrongful death plaintiffs who had not filed substantially complete fact sheets. I note that I think there was a response filed by one plaintiff yesterday. For all I know, there have been others since I last checked the docket. But I presume that there is no need to discuss procedures laid out in order number 25, and we will go from there.

Mr. Hilliard.

MR. HILLIARD: That's right, Judge. Frankly, the notice of defect was missed. We weren't aware of it when they filed the motion to dismiss. 265 of those involve my personal clients, HMG's personal clients, and I will report that 255 of those are now completed. As to the remaining 10, we dismissed seven last month, two will be dismissed today, and there is one nonresponsive client. We are now working with the other attorneys who have either been tagged along or filed directly into the MDL to get them in compliance, and we have numbers that I will tell you are positive. GM and I will file a

certification with the court next Thursday indicating where we are, and I do understand the consequences of not getting it done, but I will report it looks like over 95 percent of it will be cured and the rest, by agreement, will be probably be dismissed.

THE COURT: And by next Thursday you anticipate submitting, so I should hold off on doing anything until then.

MR. HILLIARD: Please.

THE COURT: All right.

Mr. Fields.

MR. FIELDS: Your Honor, Barry fields for New GM.

I generally agree with that. The process, of course, is that the plaintiffs will certify that they have filed substantially completed plaintiff fact sheets. So even though the deadline for submitting the certification or the response to the motion to dismiss is Monday, what I proposed to Mr. Hilliard, given that they appear to be making progress, is that they be given until Wednesday night to file their certifications. And then on Thursday what we would do, New GM would file a new revised exhibit to the motion to dismiss. So your Honor at that point in time could understand the more narrow universe of plaintiffs who have not complied with Rule number 25. And, based on the information we have received thus far, it appears that the number of plaintiffs who will be on that exhibit should be on the order of 30 to 50, but that

remains to be seen depending upon how many certifications we get.

THE COURT: Okay. So to the extent that is a request for an extension to Wednesday night, it is granted. I guess what I just would like is -- and I will leave it to you guys to work out the best way to do it -- is clarity on whatever you submit on Thursday, whether it be a joint submission or stipulation or something, I just want to know if there is a dispute or if there is no dispute, if it is clear under the terms of order 25, and I don't want to dismiss a claim if there is actually a live dispute. But if everybody agrees, then it is obviously not an issue. So as long as you can sort of flag that for me and make it clear that should be fine.

MR. FIELDS: Your Honor, do you have a time on Thursday? Is it also okay for us to file that submission on Thursday, and do you have a preference on the time of that submission?

THE COURT: No. There is no urgency here, I don't think, so no.

Status of economic loss, plaintiff fact sheets, any issues there to discuss?

MR. BERMAN: There are two, only two plaintiffs who did not fill out the economic loss sheet. We have notified GM who they are, and I assume GM may move to dismiss those clients.

There were also a number of economic loss plaintiffs who were included in GM's motion to dismiss the PI deficient fact sheets. We have consulted with New GM, and they agreed that those clients are economic loss clients and not personal injury clients, so you will see a stipulation on March 16 withdrawing the motion as to seven of those plaintiffs. That leaves four that were, we believe, economic loss plaintiffs that were in what was the Ashworth complaint. We reached out to the Ashworth counsel to find out what their situation is. We have urged them to called Mr. Hilliard. So we are still working on locating and trying to figure out what the situation is with the Ashworth plaintiffs.

THE COURT: Again, just make sure that it is clear to me what I am supposed to do before I dismiss any complaints or claims, that there is no dispute for me to resolve on that score.

Mr. Bloomer, did you want to say something?

MR. BLOOMER: Just briefly, your Honor. I think what the parties discussed before the conference, so I think we are in agreement is on the -- Mr. Berman is correct there are, I think, two plaintiffs who haven't submitted. There are also some other deficiencies. I am not going to characterize them as major, but just some missing declarations on one or two. What I would suggest is we build into the conference order a procedure similar to what we are doing on the personal injury

plaintiff fact statement side, so they have two weeks to correct them. And if that doesn't happen, we file a motion to dismiss without prejudice within 30 days, so follow the same procedure that we otherwise have, but just build it into the conference order.

THE COURT: I think that makes sense.

MR. BERMAN: We do.

THE COURT: The status of case specific discovery for the potential bellwether cases, I don't really need to get into detail, particularly since I want to end in about two and a half minute. I assume it is under way.

MR. HILLIARD: It is.

THE COURT: The last issue, I don't know if it requires discussion, if it does, it gets a minute of it now.

In New GM's letter of March 11 primarily concerning the Szatowski case, there was an issue raised in the second paragraph regarding the use of documents protected by attorney/client privilege or work product at depositions. I didn't want to overlook that. It wasn't on the status letter, maybe because it was submitted before that March 11 letter. Is that something that we can table until the next conference and/or resolve on the papers between now and then?

MR. GODFREY: We cannot table it to the next conference, but we are going to engage in a series of meet-and-confers to see whether and to what extent we can get

agreement on the scope of the privilege, the use of the documents, etc. To the extent there is not an agreement, then we will promptly notify the court by the end of next week and we will do a prompt series of letter briefing.

What we need, your Honor, is, for example, I am defending a senior member of the legal staff who is the third deponent. I need rules of the road so we are not an hour or two before the court because I just instructed her not to answer a bunch of questions. So there are a series of privilege questions, a series of privileged topics that we are going to have to work through, either get agreement or not get agreement, tee it up with the court. But we are going to need the court's ruling because otherwise the depositions, given the nature of some of the documents produced in this case, run the risk of having a lot of problems out of the start, which I think are avoidable with the court's guidance.

THE COURT: All right. So your proposal is you will meet and confer and submit something either agreed upon or competing proposals by next Friday?

MR. GODFREY: No. By next Friday we will inform the court whether we have reached agreement. So if we have not reached agreement, within ten days of that we will have a mutual exchange, same time. This is not something where the issues are particularly steep. I just don't know how particularly the plaintiff sees it compared to how we see it

and what issues we can compromise on.

THE COURT: All right. No problem as to the next Friday deadline. I would say if you haven't reached agreement, maybe submit competing proposals by the following Friday. I want to make sure you have rulings, also mindful the holidays in the beginning of April.

MR. GODFREY: Fair enough.

THE COURT: Our next status conference is now April 24, right, yes?

MR. BERMAN: Yes.

THE COURT: Also at 9:30 in the morning.

I do want to put one item on the agenda which is settlement, something that I raised in the very first conference but I haven't raised recently. I'm not suggesting that this case should be settled right now; but, again, as I said at that first conference, I do think at some point there ought to be discussions in some form and some sort of alternative dispute resolution process that is pursued. I don't know if the time is ripe to begin discussing those, but I would like you to discuss whether the time is ripe to begin discussing those and, if it is, to discuss it and plan to address that at the next conference. We don't need to say anything further about that now.

Mr. Berman.

MR. BERMAN: 15 seconds, because I know you are in a

hurry. But we would like to save you and your clerk some work on choice of law. I think we have reached an agreement on choice of law, so you can expect a stipulation, I hope, next week.

THE COURT: Wow, all right.

Mr. Godfrey.

MR. GODFREY: To save the court some work, we are about to have 15, 20 partners enter appearances. If one or two, as written, suggest that since they had not had prior appearance in this case they are going to pro hac vices, I would ask on behalf of myself and Mr. Dreyer's firm -- Mr. Dreyer is in the same position -- if you are a Kirkland lawyer, do we have to file a pro hac vice or, just, like the ones before, because order number two said if you entered an appearance in the court prior to the transfer, you don't have to file a motion pro hac vice in this court. Now I have a bunch of partners coming in for the depositions, as does Mr. Dreyer, and I can't tell whether we have to inundate the court with motions for pro hac vice.

THE COURT: I don't see why you would be relieved from doing so. Among others things, we want our money.

MR. GODFREY: I have no answer to that, your Honor.

THE COURT: Why don't you see if you can come up with an efficient way to presenting them all to me. Make a package so I can deal with them in one fell swoop. But I don't see any

reason or basis to relieve you of the obligation to subject themselves to my jurisdiction through that process.

I will expect the order memorializing what we have done here, consistent with whatever order is setting forth that process.

Anything further before having to run? We are three minutes past.

MR. HILLIARD: No, Judge. Thank you very much.

THE COURT: Thank you all for your patience. Thank you again, Mr. Peller, for being here, and have a good day.

We are adjourned.

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