

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: PORSCHE CARS NORTH
AMERICA, INC. PLASTIC COOLANT
TUBES PRODUCTS LIABILITY
LITIGATION

Case No. 2:11-md-2233

JUDGE GREGORY L. FROST
Magistrate Judge E.A. Preston Deavers

This document relates to: ALL CASES.

ORDER

On July 21, 2011, this Court held a telephonic preliminary pretrial conference in the above captioned multidistrict litigation cases. This Order both memorializes those discussions and disposes of several pending issues.

Appointment of lead counsel. The Court has been presented with a joint proposal for the appointment of interim lead counsel. All of Plaintiffs' counsel agreed to waive a formal evidentiary hearing and preferred to submit the issue of interim co-lead counsel to the Court on their briefs. This Court has proceeded to review the proposal in light of the following factors as outlined in the *Manual for Complex Litigation* (4th ed. 2004):

- qualifications, functions, organization, and compensation of designated counsel;
- whether there has been full disclosure of all agreements and understandings among counsel;
- would-be designated attorneys' competence for assignments;
- whether there are clear and satisfactory guidelines for compensation and reimbursement, and whether the arrangements for coordination among counsel are fair, reasonable, and efficient;
- whether designated counsel fairly represent the various interests in the litigation—where diverse interests exist among parties; the court may designate a committee of counsel representing different interests;

- the attorneys' resources, commitment, and qualifications to accomplish the assigned tasks; and
- the attorneys' ability to command the respect of their colleagues and work cooperatively with opposing counsel and the court—experience in similar roles in other litigation may be useful, but an attorney may have generated personal antagonisms during prior proceedings that will undermine his or her effectiveness in the present case.

Id. at 27. Additionally, no party suggested to this Court that the anticipated billing rates of any counsel evinced a notable distinction.

In light of these factors, the informal discussions had with counsel, and the parties' filings, the Court hereby designates the following firms to act as interim lead co-counsel in this litigation: Cotchett, Pitre & McCarthy, LLP; Isaac, Brant, Ledman and Teetor, LLP; Roddy Klein & Ryan; and Wolf Haldenstein Adler Freeman & Herz LLC. Said counsel possess the apparent experience, qualifications, and ability to serve most effectively as interim lead co-counsel in these proceedings and shall fulfill that function in the currently consolidated cases, as well as in any cases later consolidated. Counsel also meet the requirements of Federal Rule of Civil Procedure 23(g).

Having appointed interim co-lead counsel, the Court will not set forth at this time specific guidelines for how they should function in managing this litigation outside the presence of the Court. Until proven wrong, the Court trusts that given the experience and apparent professionalism of interim lead co-counsel, they will be able to understand their roles and function effectively, efficiently, and economically without micro-management by this Court. The Court does note, however, that interim lead co-counsel shall act as spokesperson for Plaintiffs' counsel in matters of joint or common action before the Court. This does not limit the

right of other counsel to be heard on matters not susceptible to joint or common action or when genuine and truly substantial divergence of opinion exists among counsel. The Court emphasizes that this latter statement does **not** mean that the Court will view favorably the presentation of cumulative views or views that differ only slightly from interim lead co-counsel's views.

Appointment of executive committee. The Court also appoints the law firms of Kohn, Swift & Graf, P.C., Schlanger & Schlanger, LLP, and Bailey Perrin Bailey to serve with interim lead co-counsel as an executive, or steering, committee for Plaintiffs in this litigation. This Court declines to set forth at this time specific guidelines for how the executive committee should function in managing this litigation outside the presence of the Court. The Court cautions counsel, however, that as the *Manual for Complex Litigation* recognizes, “[c]ommittees of counsel can sometimes lead to substantially increased costs, and they should try to avoid unnecessary duplication of efforts and control fees and expenses.” *Id.* at 25.

No appointment of liaison counsel. In light of the fact that Plaintiffs have not requested such an appointment, the Court declines to appoint interim liaison counsel at this time. The Court shall consider such a position if it becomes apparent that the need exists.

Attorney fees. No less than every ninety days, all counsel for Plaintiffs shall forward a written account of their record of time and expenses to an attorney designated by the executive committee. Failure to provide such information as required may result in this Court's refusal to consider non-compliant counsel's application for fees and expenses should any class action plaintiff prevail. The monitoring attorney designated by the executive committee shall, in the event that any written account appears to be an outlier notably exceeding the time and fees of

comparable counsel, contact the Court immediately.

Case caption and case numbers. This litigation currently consists of the following actions: *Suter v. Porsche Cars North America, Inc.*, Case No. 2:11-cv-56; *Spagnoletti v. Porsche Cars North America, Inc.*, Case No. 2:11-cv-460; *Graas v. Porsche Cars North America, Inc.*, Case No. 2:11-cv-461; and *McIntosh v. Porsche Cars North America, Inc.*, Case No. 2:11-cv-506. Previously, the Court consolidated these four cases into Case No. 2:11-md-2233. (ECF No. 2.) This Court now also consolidates into Case No. 2:11-md-2233 each of the remaining cases for pretrial proceedings: *Dudley v. Porsche Cars North America, Inc.*, Case No. 2:11-cv-480; *Weisman, Ltd. v. Dr. Ing. h.c. F. Porsche AG*, Case No. 2:11-cv-481; *Conrad v. Porsche Cars North America, Inc.*, Case No. 2:11-cv-521; and *Wust v. Porsche Cars North America, Inc.*, Case No. 2:11-cv-590. The Clerk shall assign any related case subsequently received that currently lacks a Southern District of Ohio case number such a number; this Court shall then consolidate any such case into Case No. 2:11-md-2233.

Every filing in this litigation shall bear the following caption:

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**IN RE: PORSCHE CARS NORTH
AMERICA, INC. PLASTIC COOLANT
TUBES PRODUCTS LIABILITY
LITIGATION**

Case No. 2:11-md-2233

**JUDGE GREGORY L. FROST
Magistrate Judge E.A. Preston Deavers**

This document relates to: _____.

When a pleading or other court paper is intended to apply to all actions, the words “ALL ACTIONS” shall appear on the line next to the words “This document relates to” in the caption as set forth above. When a pleading or other court paper is intended to be applicable only to one, some, but not all, of the cases governed by this order, the party filing the pleading shall indicate the actions to which the pleading is intended to apply in the line next to the words “This document relates to.”

The Court **DIRECTS** the Clerk to correct the caption in Case No. 2:11-md-2233 from “Suter v. Porsche Cars North America, Inc.” to “In re: Porsche Cars North America, Inc. Plastic Coolant Tubes Products Liability Litigation.”

Administrative closure of individual cases. Given the prior consolidation of the individual cases involved in this litigation and the future consolidation of any additional cases, as well as the fact that the parties must file their documents only in Case No. 2:11-md-2233, the Court **DIRECTS** the Clerk to **ADMINISTRATIVELY CLOSE** each individual case, subject to subsequent reactivation if and when necessary. (Case Nos. 2:11-cv-56, 2:11-cv-460, 2:11-cv-461, 2:11-cv-480, 2:11-cv-481, 2:11-cv-506, 2:11-cv-521, 2:11-cv-590.)

Consolidated amended complaint. Within thirty days from the entry of this Order, Plaintiffs shall file a consolidated amended complaint that shall set forth all claims, utilizing subclasses as necessary and as discussed in the telephone conference. Any defendant named in the consolidated amended complaint shall respond within forty-five days after service. Any defendant named in the various complaints filed in each individual case prior to consolidation need not respond to those pleadings.

Status conferences. As discussed during the informal discussions, this Court shall set periodic status conferences. The parties shall confer prior to the status conference and file with the Court, no later than two days prior to the conference, an agenda of issues to be addressed. Counsel should not regard this filing as an opportunity to present argument. Rather, the proposed agenda should simply set forth those issues the parties seek to discuss with the Court. If any matter on the agenda is not resolved during informal discussions held at the status conference, the Court will set the matter for a subsequent in-court hearing. Following each status conference, the Court will issue an order memorializing the issues addressed and resolutions reached therein. The Court shall set the Second Telephone Status Conference following the parties' filing of a report on the results of their meeting that must occur within fourteen days from the filing of the consolidated amended complaint.

Applicable procedural rules. Except as otherwise provided herein or by further order of this Court, the Federal Rules of Civil Procedure and Local Civil Rules of the United States District Court for the Southern District of Ohio shall govern all further proceedings herein. Accordingly, unless otherwise ordered by this Court, the parties shall adhere to the default briefing schedule set forth in S. D. Ohio Civ. R. 7.2.

***Pro hac vice* applications.** Each attorney who is not already a member of the bar of this Court but who seeks to act as counsel for any party in these proceedings must apply for admission *pro hac vice*. The Court will not waive the fee for *pro hac vice* admission. The Magistrate Judge shall address such motions.

Electronic filing. All counsel must register for electronic filing with the Court.

Pending motions.¹ In light of the consolidated amended complaint discussed below, the Court **DENIES WITHOUT PREJUDICE** all the moot motions pending in any consolidated case. (ECF No. 15 in 2:11-cv-56; ECF No. 20 in 2:11-cv-461.) The Court also **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' Plaintiffs' motion to appoint counsel (ECF No. 12) and motion for entry of their proposed pretrial order (ECF No. 17). Similarly, this Court technically **GRANTS IN PART** and **DENIES IN PART** Defendant's motion for entry of a proposed pretrial order. (ECF No. 18.) The Court has adopted or declined to adopt select provisions from the proffered orders as appropriate in drafting this Order.

Stay. In addition to the previously noted stay of all deadlines for the filing of answers, the Court also *sua sponte* **STAYS** all discovery save for discovery related to the personal jurisdiction issue discussed during the telephone conference. The parties shall meet and confer within fourteen days from the entry of this Order regarding any need for conducting discovery unrelated to the personal jurisdiction issue and shall inform the Court of the results of that meeting.

Protective Order. The parties shall also meet and confer within fourteen days from the entry of this Order regarding any need for a protective order.

Duty to preserve evidence. The Court recognizes that the parties disagree as to the need for a reminder of the duty to preserve evidence that may be relevant to this litigation. Counsel for Porsche Cars North America, Inc. explicitly acknowledged the duty. As explained in the

¹ For ease of reference, the Court refers to motions filed in more than one case only by their docket numbers in Case No. 2:11-md-2233. This Order also applies to each corresponding document filed in each consolidated case.

telephone conference, however, the Court nonetheless recognizes the necessity of such a reminder.

The duty to preserve evidence extends to documents, data, and tangible things (to be interpreted broadly) in the possession, custody, and control of the parties to this litigation, and the employees, agents, contractors, or other non-parties who possess materials reasonably anticipated to be subject to discovery in the litigation. Counsel are under an obligation to exercise efforts to identify and notify such non-parties, including employees. The parties shall interpret this directive to preserve evidence broadly to accomplish the goal of maintaining the integrity of all documents, data, and tangible things reasonably anticipated to be subject to discovery in the litigation, including but not limited to electronically stored information. Counsel shall inquire of the respective clients if the business practices of any party involve the routine destruction, recycling, relocation, or mutation of such materials and, if so, shall direct the party, to (a) halt such business processes, (b) sequester or remove such material from the business process, or (c) arrange for the preservation of complete and accurate duplicates or copies of such material.

Discovery disputes. In the event of any discovery dispute, the parties must call the Court before filing any dispute-related motions. The Court will permit briefing if it is unable to resolve the dispute during a status conference.

Travalio issue. During the telephone conference, the Court raised the issue of its having appointed counsel Greg Travalio to serve as a Federal Rule of Civil Procedure 71.1 commissioner in an unrelated case, Case No. 2:08-cv-554. As this Court discussed with the parties, that case neither involves issues nor parties related to the current litigation. Although

recognizing that no conflict existed, Defendant's counsel sought to discuss the issue with Porsche Cars North America, Inc.

Within fourteen days from the entry of this Order, counsel shall file a notice with this Court indicating whether the appointment issue creates a perceived appearance of impropriety that would necessitate Travaglio removing himself from this litigation until his commissioner services have ceased. The Court reminds counsel, including Travaglio, that Travaglio has indicated that said services will be complete in December 2011.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE