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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

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4 IN RE: GM IGNITION SWITCH LITIGATION 14 MD 2543

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8
9 August 11, 2014
9 11:10 a.m.

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14 Before:

15 HON. JESSE M. FURMAN,

15 District Judge
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1 (In open court)

2 (Case called)

3 THE COURT: You may be seated.

4 Good morning, everyone, and welcome to New York, those
5 of you who are not from New York, and welcome to the Court
6 regardless.

7 What I am going to do is take notices of appearances
8 for temporary lead counsel and counsel for defendants, but
9 given the number of lawyers here, generally I am not going to
10 take notices of appearance from other counsel. Instead I will
11 ask each of you if or when you speak, to just please clearly
12 and loudly identify yourselves and for the benefit of the Court
13 Reporter and for me, for that matter, spell your name. That
14 way we'll get a sense who you are and make a proper record.

15 If you want a record of your appearance at this
16 conference more generally, I think most of you or all of you
17 have already signed in. My intention I think is just to docket
18 that sign-in sheet on the theory that will reflect who was
19 actually here. If you have not signed in, make sure that you
20 find my Deputy before the end of the proceeding to do so.

21 With that, let me ask temporary lead counsel to please
22 indicate your appearances.

23 MR. ROBINSON: Mark Robinson, temporary lead counsel
24 for plaintiffs.

25 MR. BERMAN: Steve Berman for the plaintiffs.

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1 MS. CABRASER: Good morning your Honor, Elizabeth
2 Cabraser, temporary lead counsel for plaintiffs.

3 THE COURT: Good morning to all of you.

4 MR. GODFREY: Good morning. Rick Godfrey, on behalf
5 of General Motors LLC. With me is Mr. Joseph Lines, Mr. Kyle
6 Dreyer. I think Mr. Andrew Bloomer signs the letters to the
7 court.

8 MR. SCHOON: Eugene Schoon, on behalf of Delphi
9 Automotive, PLC and Delphi Automotive Systems, LLC. With me is
10 my partner Mr. Jones also from Sidley Austin.

11 MS. SOWERS: Michelle Sowers, from Continental
12 Automotive Systems.

13 THE COURT: Anyone else?

14 MR. GODFREY: If I may? I neglected Mr. Arthur
15 Steinberg behind me. He is bankrupt counsel for General Motors
16 before Judge Gerber.

17 THE COURT: Anyone else?

18 Let me just say the acoustics in this courthouse are a
19 little challenged. It is a beautiful courthouse. We are
20 working out some of the kinks. I ask each of you to make sure
21 you speak into the microphone and loudly and clear to make sure
22 the Court Reporter and I can hear you, but everyone else
23 present as well.

24 Let me tell you what our agenda is for today beyond
25 what I've already said by way of order. I am going to start

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1 with just a few general principles and housekeeping matters.
2 After that I will turn to the substantive agenda, and in that
3 regard my intention is to basically just follow the agenda that
4 I outlined in Order No. 7 that I issued last Thursday,
5 including discussion of what, if any, discovery to have,
6 consolidated pleadings and the like.

7 Per that order, my intention is to basically hear from
8 temporary lead counsel on behalf of all plaintiffs with respect
9 to those matters, with the exception of the one issue that was
10 raised by the filing of Mr. Peller, Gary Peller, as to which I
11 will give Mr. Peller an opportunity to be heard.

12 After I have heard all of the items on that agenda, I
13 will give other counsel an opportunity to be heard to the
14 extent that they believe that temporary lead counsel has not
15 adequately represented their interests or has not addressed an
16 issue of concern to them. Obviously, if you have a sort of
17 one-off concern that applies to just one case or a few cases,
18 it may be better to just deal with that through a written
19 submission than to take everybody's time here today. I think
20 the principal focus today should be issues of concern to the
21 MDL as a whole and sort of focusing on getting the process
22 squared away.

23 After that I will turn to the applications for
24 leadership positions. My hope and intention is that we will
25 get through all of the substantive agenda before an appropriate

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1 time for lunch, at which point we will break and then when we
2 come back, I will hear from anyone who wishes to be heard with
3 respect to an application for one of those positions.

4 Needless to say, there is a lot to cover, so I intend
5 to keep things moving. I would ask you to all be mindful of
6 the fact that we have a lot to cover as well, so be economical
7 in your own remarks. And again just a reminder, please
8 identify yourselves and spell your names so that the Court
9 Reporter can make an accurate record.

10 Let me also just note that throughout the
11 litigation -- and today is no exception -- I am likely to ask
12 lead counsel and defense counsel to submit proposed orders
13 after any conferences that we hold just to ensure that we make
14 an accurate record and everyone is on the same page. Again
15 today is no exception, so I would just ask you all to pay
16 attention and make good notes on what we're doing so that you
17 can submit an accurate proposed order.

18 With that let me turn to the sort of general
19 principles and housekeeping items that I mentioned as first on
20 the agenda.

21 Number one, let me say my intention is to do
22 everything in my power to ensure and comply with Rule No. 1 of
23 the Federal Rules of Civil Procedure; namely, to ensure that
24 this is a just, speedy and inexpensive determination of the
25 disputes here. That is obviously a massive challenge in this

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1 particular circumstance because at present I think by my count,
2 there are 109 cases, they're pretty substantial cases and this
3 is a pretty complex litigation. That is certainly my task, my
4 challenge, and my mission, and I will do everything in my power
5 to ensure that it is done.

6 By "just," that means justice for both sides to ensure
7 that the resolution, whenever it happens, is fair to both
8 sides, the process is fair to both sides, and within the
9 plaintiffs' side, that is fair to all plaintiffs, in my
10 judgment. As you know, the structure that I have adopted for
11 counsel is appropriate given my present understanding of the
12 case and the present composition of the multidistrict
13 litigation.

14 I intend to monitor both of those, that is my
15 understanding of the litigation and the issues in the
16 litigation as well as the conduct of any counsel that I appoint
17 to leadership positions and I am not adverse to modifying the
18 structure or even specific appointments if the circumstances
19 warrant it.

20 I am also going to be sensitive about stepping on the
21 toes of Judge Gerber and the bankruptcy proceeding and ensuring
22 an orderly process of the litigation of any issues before the
23 bankruptcy court, mindful of the bankruptcy court's exclusive
24 jurisdiction. I will do what I can for that matter to
25 facilitate that litigation in his jurisdiction, but at the same

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1 time I want to ensure that to the extent that there is
2 litigation going on before me, that will ultimately go on
3 before me, that we do what we can do to make sure that we are
4 proceeding as efficiently and speedily as we can.
5 In that regard, my intention, as I think I made clear
6 in the order last week, is to advance the litigation as much as
7 possible, both to push forward cases that will not ultimately
8 or plausibly be subject to any ruling or order by the
9 bankruptcy court, and to ensure once there is a ruling from the
10 bankruptcy court, and any appeals from whatever that ruling is,
11 whatever claims are left can proceed expeditiously and are in a
12 position to do so.
13 I also intend throughout the litigation to encourage
14 settlement as much as possible. Ultimately the best outcome
15 for everybody is one that is negotiated by the parties
16 involved. You are the ones with both the technical expertise
17 and the better understanding and knowledge about the issues in
18 the litigation. I think it is obviously pretty early to do
19 that at this point, and my sense from having read the letters
20 that you submitted -- which I should note were extremely
21 helpful to me -- is it is premature to really get into that.
22 I do want to set up a structure sooner rather than
23 later to facilitate meaningful settlement discussions, and one
24 of the things I do want to focus on if not today, then soon is
25 what discovery would be helpful or necessary in order to

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1 facilitate those discussions.

2 Again I recognize maybe at least with respect to a lot
3 of the cases and claims, we may have to wait until we have
4 rulings from the bankruptcy court to engage in that kind of
5 discussion, but one of my tasks is to do what I can in advance
6 of those rulings to ensure that once you have the benefit of
7 them, you are in a position to swiftly move to those sorts of
8 discussions.

9 I should say that I intend -- and this will be a major
10 factor in my decisions on the appointment of counsel -- I
11 intend throughout this litigation to rely on counsel very
12 heavily. I think you all probably know I am a relatively new
13 judge to the Bench, and that while I have presided over a
14 couple of other multidistrict litigation proceedings, every MDL
15 is different and involves unique challenges, and certainly this
16 one has its own share of particular complexities.

17 My intention and my hope is that I can rely on counsel
18 to educate me as necessary about both the substantive issues in
19 this case, but that is both issues of law and issues of fact
20 and technical issues and the like, as well as more generally
21 best practices and procedures for the handling of litigation of
22 this sort.

23 Needless to say, I have some of my own notions in that
24 regard, and I am taking liberal advantage of the opportunity to
25 consult with colleagues who have presided over these things to

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1 sort out and to give me guidance on that score.

2 In that regard, let me say at the outset, I want to
3 thank temporary lead counsel in particular at this point. I
4 appreciate that you have stepped up and taken the lead in the
5 early stages of the litigation to help me figure out, if
6 nothing else, how to get to this point today.

7 As I indicated in the order appointing you, Order No.
8 1, that appointment is not a precursor to more permanent
9 appointments. I will make those appointments on the merits
10 after hearing from anyone else who wants to be heard from
11 today, but I certainly appreciate the efforts that you have
12 made to date to facilitate things and coordinate with your
13 fellow counsel.

14 Those are sort of the general principles I wanted to
15 articulate at the outset. Let me turn to a couple of more
16 housekeeping-type matters.

17 Number one, this should go without saying, but as with
18 all such things that should be said nonetheless, you should all
19 read my orders. You should also read my individual rules and
20 the local rules and you should do all of that before calling my
21 chambers. My goal is to facilitate the litigation in this
22 case, and in that regard we are in a service business and we
23 are happy to serve, but a lot of the questions that we get by
24 telephone can be readily answered by resort to the orders and
25 the rules.

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1 You should really not be calling unless it is a last
2 resort; that is, you can't figure it out or there is some
3 ambiguity in whatever you have read and you really can't figure
4 it out. I am, of course, asking you if not for my sake, but
5 for the sake of my staff to please try to find the answer in
6 the orders and rules before you call me.

7 In that regard, as you know, I did create the master
8 docket, the MC docket, and that was done for both my benefit as
9 well as yours. It is really intended to identify filings and
10 orders of significance, and it will contain every order of
11 significance that applies to the MDL as a whole. That should
12 assist you in identifying orders that really pertain to the
13 management and logistics of the MDL as a whole.

14 As I stated in Order No. 1, that docket is intended to
15 be limited to orders of significance and filings of
16 significance. The MD docket is already cluttered with a lot of
17 other things; pro hac motions, notices of appearance, orders
18 that pertain to individual cases and the like. That will
19 continue to be the case. The MC docket is really intended to
20 sort of be narrowed down to those things that pertain to the
21 MDL as a whole, and I will continue to file things there if
22 they pertain to most cases or all cases. You should do the
23 same.

24 Order No. 1 identified the categories of things that
25 should be filed in both the MD docket and MC docket. If it

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1 doesn't fall into those categories -- namely, master pleadings
2 or motions that pertain to all or most cases, or things that I
3 direct you by order to file in both dockets -- you should only
4 file it in the MD docket and whatever individual case it
5 pertains to.

6 If there is ambiguity in that regard or you need
7 further guidance, give us a call so there is no need to strike
8 things from the MC docket, but again the order should give you
9 most of the guidance you would need.

10 Let me note, I don't know if it has hit the docket
11 already, but I did receive the parties' joint motion. By
12 "parties," I mean temporary lead counsel and defense counsel or
13 JAM counsel, the joint motion for a preservation order. I did
14 sign that this morning. It may or may not have hit the docket
15 already. If it has not been docketed, it will be docketed
16 soon.

17 I also assume at some point you may want or need
18 something in the nature of a protective order. That is
19 something we can discuss today or soon thereafter.

20 I will note that one thing that I am particularly
21 attentive to in that regard, and this bears emphasis for the
22 litigation as whole, the presumption in favor of public access
23 particularly in a case of this nature where there is widespread
24 public interest in it and press interest in it. I intend to
25 ensure that to the extent, unless there is a reason justifying

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1 something be filed in redacted form or under seal, any filings
2 are public and publicly available to the press and the public
3 alike.

4 In that regard, in any protective order you should be
5 mindful of that parties in my experience sometimes purport to
6 give themselves authority to file things under seal. As far as
7 I am concerned, I am the only one in this room that has the
8 authority to direct something can be filed under seal, and you
9 can bind yourself to make application to me, but you can't give
10 yourselves permission to do that.

11 With that, let me turn to the agenda I set forth in
12 Order No. 7. The first item on that agenda is whether and to
13 what extent there are claims or cases that are not within the
14 scope of the litigation pending before the bankruptcy court,
15 such as personal injury or wrongful death cases related to
16 accidents or incidents postdating the sale order.

17 Needless to say, the thrust of this issue or question
18 is I want to get a sense of whether and to what extent there
19 are claims or cases that whatever the bankruptcy court ends up
20 ruling are likely to proceed or inevitably will proceed before
21 me, on the theory it might have some bearing on what discovery
22 is authorized at this juncture in the case.

23 My impression is that new GM does not even intend to
24 argue that at least as to the one category I have flagged,
25 namely, post-sale accident and incident claims, that there is

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1 no intention to make any motion to enforce before the
2 bankruptcy court, that is, no intention to argue those types of
3 claims are barred by the sale order and injunction.

4 Let me turn to you, defense counsel, and check if that
5 is, in fact, the case and just get some sort of clarity on that
6 and, if so, how many cases there are in that category and how
7 many other such categories there may be.

8 MR. GODFREY: Yes, your Honor. Rick Godfrey.

9 There are 109 cases thus far in the MDL. Three more
10 lawsuits were filed last week in the federal court. They have
11 not yet been tagged, but they will be tagged for consolidation
12 and transfer here.

13 THE COURT: I remind you, speak into the microphone if
14 you can, please.

15 MR. GODFREY: Sure. Okay. I will bend over if that
16 is okay with the court.

17 There are 109 cases in the MDL. There are 98 of those
18 are economic loss cases. One of the 98 is a mixed case; that
19 is, economic loss plus a personal injury. There are 11
20 personal injury cases. Of the 11, 9 of them are eligible for,
21 at least as we understand the facts, so that is our
22 understanding, we don't know for certain, as we understand the
23 facts, 9 of them are eligible for Mr. Feinberg compensation
24 protocols.

25 Two of them do not appear to be eligible. We have

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1 added up the number of named plaintiffs. To give your Honor a
2 sense, there are 983 named plaintiffs by our count in the MDL
3 thus far. 81 percent of those -- or 794 -- are clearly on the
4 face of the complaint pre-363 sales and injunction order
5 plaintiffs.

6 Another group, 12 percent of them, or 116, we cannot
7 tell from the face of the complaint whether they are presale or
8 post-sale. We just don't know at this point. 7 percent are
9 post-sale, 363 sale parts or vehicles. I think the court knows
10 from our letters what we are referring to when we say, "parts."
11 It could be a presale vehicle with a part that was put in or
12 post-sale vehicle, post-sale vehicle with a presale part that
13 was put in. So that is how we see the cases.

14 Outside of the federal level, I think our August 5th
15 letter in Exhibit B outlines the cases in the state courts by
16 judge, location, et cetera, and I think that is set forth in
17 some detail in Exhibit B of our letter. I can go into more
18 detail if the court wants.

19 Again some of those will be eligible as we read it for
20 Mr. Feinberg's protocols. Some we can't tell, and ultimately
21 they will be Mr. Feinberg's determination, not ours.

22 THE COURT: Okay. I have a couple of follow-up
23 questions. No. 1, the two cases not eligible for the Feinberg
24 protocol, why is that? What is different about those two
25 cases?

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1 MR. GODFREY: The Feinberg protocols have a defined
2 set of criteria for eligibility. As we read the complaint,
3 they do not appear to involve the ignition switch at issue or
4 something else. I don't know in particular, but they don't fit
5 within the criteria as we read it. We could be wrong.

6 The complaints are not as clear as we would like.
7 When we look at the complaints, those two cases do not appear
8 to fall squarely within Feinberg eligibility criteria, although
9 that is Mr. Feinberg's decision, not ours. I am reporting on
10 how we read it and how we read his criteria.

11 THE COURT: Okay. The second question is of the 109
12 cases, how many are stayed either by voluntary stay orders or
13 by order of the bankruptcy court?

14 And I guess more to the point, how many are not
15 stayed? In your July 21 letter, Docket No. 73, I think you
16 indicated that if you include the Phaneuf Elliott cases, which
17 Judge Gerber ordered stayed last week, I think there were 88
18 stayed which would presumably leave something in the
19 neighborhood of 21 or thereabouts that are not stayed. Is that
20 correct? As of that time there were I think only 101 cases in
21 the MDL.

22 MR. GODFREY: I believe the number stayed is 95. I
23 will confirm that for the court, but I believe the number is
24 95. Some have not yet -- as the court knows, we filed two
25 additional motions on the 1st of August. We provided the court

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1 with that. I think it is now 14 is the number, as I recall it.
2 It is in that range.

3 THE COURT: In the neighborhood 14 not stayed?

4 MR. GODFREY: Roughly correct. I will get precision
5 in a few minutes.

6 THE COURT: As a general description, if you had to
7 identify what is or describe those 14 cases, are they the
8 personal injury, wrongful death cases for the most part or what
9 is different about them?

10 MR. GODFREY: I believe those are all, almost all
11 personal injury wrongful death cases.

12 THE COURT: I want a little more clarity on that from
13 somebody because on your description there are 11 personal
14 injury, wrongful death cases, and if there are 14 --

15 MR. GODFREY: I have the note somewhere. I will find
16 that. I should correct one thing. There are 983 cars
17 identified by named plaintiffs, not 983 plaintiffs, vehicles
18 that were identified, 983 vehicles.

19 THE COURT: Okay. What about the cases pending before
20 other courts, before predominantly the state courts?

21 Are any of those subject to voluntary stays or the --

22 MR. GODFREY: Most of those are identified in Exhibit
23 B by detail. Four, there are only four cases where there is
24 either requests for discovery, where your Honor is going, to
25 predict or the possibility of discovery. One is the Melton

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1 case which we will discuss at some point today. One is the
2 Smith case, one is the Beckwith case and one is the Green case.
3 They're in Tennessee, Alabama, Georgia, and the State of
4 California. The rest of those are at a very early stage thus
5 far.

6 What we did in our August 5th letter, we tried to give
7 the court the most up-to-date information we had as of August
8 5th in Exhibit B as to each of those cases, hopefully the
9 judge's name, the court and the status of discovery requests,
10 et cetera.

11 THE COURT: Very good. That is very helpful.

12 Needless to say, part of the reason I wanted to get
13 that information -- and you should factor it into this
14 discussion when we have it in short order -- is to the extent
15 that there is ultimately and inevitably going to be discovery
16 into certain matters, it raises the question of why not proceed
17 with that now as opposed to waiting until the bankruptcy court
18 rules.

19 I recognize whatever ruling the bankruptcy court
20 makes, again subject to whatever appeals there are from that
21 ruling, certainly have a bearing on what the MDL looks like
22 generally. If ultimately discovery is going to be had on
23 certain areas or categories of information, it does beg the
24 question of why we shouldn't proceed with that now, on the
25 theory it will obviously be needed and will be most efficient

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1 and facilitate the claims that survive the bankruptcy court's
2 ruling. Again we can discuss that when we get to that item on
3 the agenda.

4 No. 2, the nature and status of claims against
5 defendants other than General Motors, including but not limited
6 to claims against Delphi and claims against the entity DPHDAS
7 that has indicated that it does not intend to appear. I am
8 trying to get a sense of what role other defendants aside from
9 GM are likely to play here.

10 In particular, with respect to Delphi, there was an
11 indication in the defendant's status letter, again Docket No.
12 73, that Delphi may also seek relief from the bankruptcy court,
13 but it is holding off at the moment on the theory it might not
14 need to, and there were other rationales cited. That gave me
15 some pause because I was wondering whether that ought to be
16 flushed out now as opposed to waiting and whether it might
17 result in delay later on. Maybe there is good reason to hold
18 off.

19 MR. SCHOON: Yes, your Honor, Eugene Schoon, on behalf
20 of Delphi Automotive PLA and Delphi Automotive Systems LLC, we
21 did note that because there are circumstances related to the
22 new Delphi that are similar to circumstances that new GM has,
23 and in some ways they're different.

24 We thought that because Judge Gerber is already under
25 way with analyzing those issues, much of what he'll do will

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1 have a direct or at least a guiding impact on Delphi. Even
2 maybe even more to us, while this case is very important to
3 Delphi, we think Delphi is a very small participant here. The
4 company that I represent -- companies I represent -- didn't
5 come into existence until -- one in 2009 and one in 2011. All
6 of the switches -- and we are talking about switches -- were
7 made by the old Delphi Corp. which is now DPHDAS. The Delphi
8 automotive companies that I represent didn't make any of those
9 switches. So for that reason we think there is a difference.

10 Even if you look just at the switches themselves, this
11 is just a component part of a larger system. The old Delphi
12 had nothing to do with where they were put on the steering
13 wheel, any of the other components, the fact that the power
14 would cut off to the airbags, for example, and perhaps more
15 importantly, GM through its own CEO, has said that GM approved
16 the switch. The old Delphi, the manufacturer of the switch,
17 provided exactly what GM asked for.

18 So there are a lot of reasons why we think it will
19 make sense to hold back a bit. If nothing else, I have already
20 talked to lead, temporary lead plaintiffs' counsel about what
21 any consolidated amended complaint may look like. That may
22 provide some additional clarity, but whatever we do, we will
23 not do anything that would substantially delay any of the
24 proceedings here.

25 This is a GM, in our view, GM-focused case. We will

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1 do everything within our power not to interfere with the
2 orderly progress even if we should have to go to Judge Drain,
3 who handled the old Delphi bankruptcy.

4 THE COURT: My concern, again just to articulate it,
5 to the extent that the proceedings before the bankruptcy court
6 related to GM are obviously, for lack of a better term, holding
7 up kind of proceeding full throttle -- no pun intended -- in
8 this Court, what I don't want to do is allow, wait for Judge
9 Gerber to finish what he is doing with respect to GM and then
10 only when you have seen that, for you to go ahead and file what
11 you're going to file before Judge Drain and have to wait for
12 that to run its course as well. That is the concern.

13 In your view, that is not something I should be
14 concerned about?

15 MR. SCHOON: Yes, your Honor. To the extent we may
16 have to seek relief from Judge Drain, we think it will be on a
17 much more streamlined basis. We'll have the benefit of the GM
18 ruling and the factual issues that GM has to deal with that are
19 just not going to be present. We don't, for example, think
20 there will be any due process argument as to the Delphi
21 entities. There is simply no evidence of any knowledge that
22 the old Delphi had concerning the switch problem at the time
23 that the events were unfolding. All of that developed much
24 later. We don't think so.

25 I am very mindful of that. We are very mindful of it

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1 as we're looking at what the appropriate time is to move.

2 THE COURT: Let me turn to temporary lead counsel and
3 just get your thoughts on this, mindful of the concern that I
4 articulated.

5 MR. BERMAN: Steve Berman.

6 You asked in Question 2 what were the nature of the
7 claims against Delphi, and Delphi built the ignition switch per
8 GM's spec, but the company knew that the switches as built did
9 not meet that spec, so they have been sued because of that.

10 The other defendant, Continental Automotive, built the
11 airbags, but they built them according to GM specification, as
12 we now understand the facts. The claims against Delphi and
13 Continental are for conspiracy, fraudulent concealment and
14 RICO.

15 What we think makes the most sense here, and we
16 suggest to the court is the role of those defendants will be on
17 our minds when we're preparing the consolidated complaint. In
18 the Toyota case, by way of example, you had hundreds of claims
19 that were brought before the consolidated complaint. All kinds
20 of defendants were named. At the end of the day, after
21 consulting with the executive committee and many claimants out
22 there, there were no other defendants other than Toyota, and
23 that may be the case here. I don't know it is the case because
24 lead counsel, whoever they are, will have to consult with the
25 plaintiffs' group out there. It could be one of the reasons I

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1 think you want the consolidated complaint to go forward is to
2 eliminate, if that is going to be the case, defendants who
3 probably want to know whether they're going to be in or out of
4 this litigation.

5 THE COURT: What I hear you saying is that there are
6 concerns here, but we ought to just defer them until later and
7 when you have a better sense of the claims you're pressing and
8 so forth. Is that correct?

9 MR. BERMAN: That's correct. We have already agreed
10 to meet with counsel for Delphi and get further clarification
11 on their role and consider that as well.

12 THE COURT: All right. Very good.

13 MR. SCHOON: Thank your Honor.

14 THE COURT: Turning to No. 3, the question of whether
15 I should withdraw the reference with respect to any claims or
16 proceedings that are currently pending before the bankruptcy
17 court. This is an issue on which I did share my preliminary
18 views; namely, I am disinclined to go that route because of the
19 interrelated nature of the claims in this case, on the theory
20 Judge Gerber is in a better position to interpret his prior
21 orders and figure out what is and isn't subject to those orders
22 and that it will just cause undue complications to withdraw the
23 reference as to some subset of claims or proceedings.

24 This is definitely an area where I might benefit from
25 some education and argument from counsel. It may be something

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1 that warrants some sort of motion practice or briefing, which
2 is to say, that maybe this is something that I hear from you
3 but we decide should be briefed. Let me turn to temporary lead
4 counsel and ask you to address this.

5 MS. CABRASER: Good morning, your Honor. Elizabeth
6 Cabraser, temporary lead counsel.

7 We think the court's insight that the consolidated
8 complaint should be filed sooner rather than later provides the
9 key to this issue. You heard from GM's counsel on how they
10 categorize the claims. We categorize them somewhat differently
11 based on our review of the complaints thus far.

12 We see many claims arising from post-bankruptcy
13 purchases of post-bankruptcy vehicles. We see many
14 post-bankruptcy crashes. We see many complaints, at least 36,
15 that allege conduct on the part of new GM that began after the
16 sale.

17 The complaints, because they were filed at different
18 times by different counsel with different perspectives
19 representing clients with different circumstances, don't
20 provide a key or categorization of those claims. We think the
21 role of the consolidated complaint is to set forth in separate
22 counts and separate sections an organization of claims so that
23 we have a basis for discussion and briefing after the
24 consolidated complaint is on file as to whether and to what
25 extent a withdrawal of the reference is necessary or

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1 appropriate.

2 It may well be that most of the work of this MDL, most
3 of the discovery involved the allegations against new GM or the
4 conduct of the recall and for other post-bankruptcy conduct
5 based on liability theories that are independent of the issue
6 of assumed and retained liabilities that is before Judge Gerber
7 today. If we organize the consolidated complaint in a way that
8 separates those claims, that it will be important for this
9 Court to use devices such as Rule 42 to sever, and at least it
10 would enable briefing and determination on withdrawal of
11 reference issues to be made on a basis on which the issues are
12 joined.

13 I think right now the discussions tend to pass each
14 other a little bit because we are coming at this from different
15 perspectives. Mr. Berman will address the timing and procedure
16 for getting that consolidated complaint on file, but we intend
17 to file it within 60 days, and we would hope that the permanent
18 lead counsel would consult with all plaintiffs' counsel in the
19 preparation and organization of that complaint. It would be, I
20 think, an exercise in at least confusion to at least to brief
21 and determine withdrawal of the reference today before everyone
22 has had complaint as a template.

23 THE COURT: That certainly reinforces my belief which
24 I articulated in Order No. 7, it is prudent to get that
25 consolidated pleading filed sooner rather than later. It will

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1 help clarify matters not just for me, but also for Judge Gerber
2 perhaps.

3 What I hear you say is basically to defer this issue
4 until after a consolidated pleading is filed so that everybody
5 has a better sense what we are arguing about and we can figure
6 out a briefing schedule if that is the appropriate way to
7 handle it at that point. Is that correct?

8 MS. CABRASER: That's right. We also submit that
9 won't delay discovery or pretrial proceedings here because the
10 focus of so many complaints and the consolidated complaint will
11 be primarily on new GM post-2009 and, of course, the discovery
12 of witnesses and the documents will relate across the board.
13 This is the MDL court under 1407 in charge of discovery that
14 will be coordinated not only with the state courts that are
15 proceeding, but with the bankruptcy court as well.

16 THE COURT: Does anyone want to be heard on defense
17 counsel's side?

18 The upshot is I am inclined to agree, we should
19 basically get a consolidated pleading filed at which we have a
20 better sense of what we are and aren't talking about.

21 MR. GODFREY: We agree with your Honor's preliminary
22 view that Judge Gerber should continue to do what he is doing.
23 I don't think there is anything more that I need to add
24 currently in light of the court's indication, other than two
25 quick points. The court is not yet aware on late Friday the

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1 parties, under the processes outlined by Judge Gerber, entered
2 into 290 groupings of stipulated facts.

3 I think in an MDL, at least in my experience, it is
4 unprecedented at the start of the MDL you have a mass of core
5 stipulated facts by the parties that will then frame the
6 proceedings going forward so we can talk about discovery later,
7 but we are way beyond that.

8 We have got a core group of the key facts that are
9 stipulated which is unprecedented pursuant to the process set
10 up by Judge Gerber which we hope and believe will enable Judge
11 Gerber to resolve the threshold issues. There will be a
12 discussion with him on the 18th, a status about that because
13 the going-forward plaintiffs are seeking some discovery.

14 I think the the only point -- I looked at my notes.
15 Of 109 cases, 92 are stayed, four we expect to be stayed
16 because they are subject to our new motions to enforce. The
17 remaining 13 are either personal injury or a post-petition
18 vehicle. So it is different. That gives you the precise
19 numbers that you asked for earlier. I checked my notes, and
20 those are the numbers.

21 MR. ROBINSON: Michael Robinson.

22 Regarding discovery, I think that is No. 10 on your
23 issue agenda, at that time I would like to address what counsel
24 just said. By my silence, I want to make sure we will respond
25 to that.

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1 THE COURT: Understood.

2 MS. CABRASER: There is one thing I forgot to mention.
3 I think it is part of an orderly case management here for your
4 Honor's consideration. It is very typical in MDL's for the MDL
5 transferee court to stay motion practice until a case
6 management order and sequencing can issue.

7 We think it would be appropriate here in the interim
8 before the consolidated complaint is filed for a similar stay
9 with respect to parties that are before the court in these
10 proceedings. One thing we don't want to have happen, Judge
11 Gerber has a full plate right now. GM filed a couple of
12 motions last week. We would not be amenable to seeing such
13 additional motions filed by GM to try to increase the ambit of
14 the bankruptcy court. If we can preserve the status quo until
15 that consolidated complaint is filed with respect to motion
16 practice by anyone, it might help start us organized and keep
17 us organized.

18 THE COURT: Motion practice is later on the agenda as
19 well and we will get there. My initial reaction, I have ample
20 authority to limit control and schedule motion practice in
21 cases before me, but I am not sure that my authority either
22 does or should extend to motions that may be filed before Judge
23 Gerber. That might be taking things a bit too far for my
24 purposes recognizing, of course, that that obviously does have
25 some implications for me. We can discuss that in due course.

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1 Let's turn to the next item on the agenda, which is
2 the issues raised by the filing of Mr. Peller, Docket No. 195,
3 notice of conflict within the plaintiffs' group. It overlaps,
4 as many of these things do, and as we just saw, obviously the
5 agenda is not, each item is not seamlessly isolated in its own
6 right. This overlaps with the question that we'll turn to
7 later regarding the appeal filed by the Phaneuf plaintiffs as
8 well as the next issue on the agenda, issues arising from cases
9 involving parts or issues unrelated to the ignition switch
10 defect.

11 It is my initial inclination to think that the
12 conflict, as stated by Mr. Peller -- and I see Mr. Peller is
13 present, yes --

14 MR. PELLER: Yes.

15 THE COURT: -- the conflict as stated by Mr. Peller is
16 exaggerated if not nonexistent or that it is not one that we
17 need to address or take on at this point.

18 Among other things, temporary lead counsel in their
19 own status letter, that is Docket No. 72, argue that, as we
20 just discussed, some of the claims are not or may not be
21 subject to sale order and injunction. As to those claims, some
22 discovery if not all discovery should proceed, which is
23 effectively, as I understand it -- and maybe I am
24 misunderstanding something -- the same argument that Mr. Peller
25 has made in his filing or intimated at.

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1 Now, in any event, I am inclined to think along the
2 lines of the footnote in Order No. 5, which set up counsel
3 structure. That structure is adequate for present purposes at
4 least and it is premature to address any of the conflicts or
5 potential conflicts that might arise within the universe of
6 plaintiffs in this litigation.

7 Many of those that may arise or are likely to arise I
8 think can be addressed adequately through the use of committees
9 and the structures intended to provide lead counsel and the
10 executive committee with an appropriate degree of flexibility
11 to create such committees as appropriate.

12 Further, as I indicated before and in the orders
13 themselves, the structure and the appointments I make are
14 subject to modification based on developments including, but
15 not limited, to whatever rules the bankruptcy court may make.

16 The other thing is that I will be definitely
17 considering in making my appointments both to the lead counsel
18 and executive committee mindful of the different categories of
19 cases and ensuring that they're adequately represented in
20 whatever the leadership structure is.

21 Having said all of that, let me actually first hear on
22 the theory Mr. Peller has had something of a say in his filing.
23 Let me hear from temporary lead counsel if you have anything
24 you want to say in connection with that filing before I turn to
25 Mr. Peller.

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1 MS. CABRASER: Thanks, your Honor.

2 Your Honor, I think you have put it aptly, there will
3 inevitably be differences of opinion with respect to timing and
4 sequencing and tactics. That is healthy. We have those
5 discussions amongst plaintiffs' counsel. We have done our best
6 as temporary lead counsel to listen to and consider, work with
7 all counsel to come up with our best temporary view of how the
8 litigation should proceed.

9 We did the same with Mr. Peller. We respect his
10 positions on behalf of his plaintiffs. There are many
11 plaintiffs and claims that are similar, and so, of course, we
12 have had similar discussions with other counsel.

13 The other issue that Mr. Peller raised in his filing
14 was a concern about privilege. We take that seriously. We
15 have done our best to preserve it. As this litigation goes on,
16 the court's entry of the Federal Rule of Evidence 502 (d) order
17 will assure everyone on both sides of the V, that there
18 wouldn't be waiver, inadvertent or otherwise, of information or
19 documents that are truly privileged. That will facilitate
20 discovery and discussion.

21 THE COURT: In your filing, Mr. Peller, it wasn't
22 clear to me you were actually seeking any sort of relief so
23 much as putting me on notice of what you thought were issues
24 lurking here, but let me turn to you.

25 I know also since that filing there have obviously

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1 been some developments on your end, namely, Judge Gerber's
2 ruling with respect to the Elliott matter. I don't know if
3 there is anything you want to add.

4 MR. PELLER: Yes, your Honor, I appreciate and my
5 clients appreciate this opportunity to address the court.

6 Let me start with a structural statement, and then
7 with the court's indulgence, I would like to describe the
8 ethical obligations I feel I am under in terms of my
9 obligations to my clients that make it mandatory that the case
10 management issues that leadership has pressed upon the court
11 have to take a back seat to the question of the bankruptcy
12 court's subject matter jurisdiction over the lawsuits that I
13 filed on behalf of several clients.

14 As the temporary leadership has explained the
15 situation to the court and with GM, they have divided up claims
16 that they believe the bankruptcy court may have jurisdiction
17 over, and those claims, personal injury claims mentioned that
18 both sides agreed the bankruptcy court would have no
19 jurisdiction over.

20 However, your Honor, there is an important third
21 category of claims over which the bankruptcy court has no
22 jurisdiction, and those are claims that are asserted against a
23 non-debtor, new GM by a third party that asserts independent,
24 nonderivative breaches of duties that that non-debtor owed to
25 plaintiffs, consumers and members of the public.

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1 It is our position the bankruptcy court lacks subject
2 matter jurisdiction over those claims categorically. The
3 leadership's letters to the court to this point have only
4 informed the court of due process infirmities of the alleged
5 application of the 2009 sale order to the plaintiffs before the
6 bankruptcy court and, respectfully, have neglected the subject
7 matter infirmities. The subject matter infirmities the Sesay
8 plaintiffs believe are important because in our understanding
9 of the jurisdiction of a court of limited jurisdiction, subject
10 matter jurisdiction is a predicate to and must be established
11 before any case management, case management discipline can be
12 imposed.

13 My clients --

14 THE COURT: Let me interrupt. If you could move about
15 an inch further from the microphone, it might make it a little
16 easier to hear you.

17 MR. PELLER: I will need a few moments to state the
18 interests of the Sesay plaintiffs that led them to notify the
19 court of adversarial relationship and to particularly
20 articulate the public safety issues that are implicated in what
21 otherwise may seem to be a technical disagreement about
22 jurisdiction and coordinated proceedings.

23 As my description will make clear, the underlying --

24 THE COURT: Slow down a lot. You may be speeding up.
25 I am mindful of the fact I am telling you you don't have a

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1 whole lot more time. That is true because I have read
2 everything you have filed before me.

3 I have also read some of what you have filed in the
4 bankruptcy proceeding and I have read Judge Gerber's opinion.
5 The question I have for you, just to cut to the chase, is you
6 will obviously have an opportunity, if you avail yourself of
7 it, to appeal from Judge Gerber's order and you may do that.
8 That is a means by which you can tee up your argument as to
9 subject matter jurisdiction.

10 MR. PELLER: Yes.

11 THE COURT: Beyond that --

12 MR. PELLER: Yes.

13 THE COURT: -- is that not adequate to raise and tee
14 up the issue you're raising now or --

15 MR. PELLER: It is not.

16 THE COURT: Why don't you focus on telling me why that
17 is the case and you think it can be teed-up if not through the
18 appeal.

19 MR. PELLER: The Elliotts will be appealing, the
20 Elliott plaintiffs will be here on direct appeal as soon as
21 that order is entered by Judge Gerber. The Sesay plaintiffs I
22 represent were brought before the bankruptcy court and will
23 begin the process all over again. They will have three days,
24 according to the scheduling order that leadership and GM
25 acquiesced in, to make a series of complex arguments about

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1 subject matter jurisdiction and other constitutional
2 infirmities we believe infect the existing bankruptcy court
3 proceedings.

4 That three days is a very short time. It reflects the
5 lack of, respectfully, lack of attention to the need, the
6 possibility that lawsuits might be filed over which the
7 bankruptcy court has no subject matter jurisdiction; and,
8 therefore, shouldn't be stayed.

9 The stake for my clients are these. When I began
10 representation of my clients, there was a pending motion to
11 dismiss. Their pro se papers were before Judge Jackson in the
12 Federal District Court, for the United States District --
13 District of Columbia. I thought that the appropriate,
14 professional thing to do upon reviewing the complex
15 multi-tribunal, tribunals that GM had taken their case to was to
16 amend their complaint in order to repair the deficiencies that
17 GM had identified.

18 GM did the unusual step of refusing to consent to
19 amendment of the pro se complaint and went to Judge Gerber
20 after we had actually filed our motion to amend, induced the
21 bankruptcy court to order us to withdraw that pleading from the
22 active consideration before Judge Jackson. When we notified
23 Judge Jackson of that unlawful assertion of power over her
24 docket by an Article I Judge, she after hours and after our
25 order entered at 7:20 that evening, mooted Judge Gerber's order

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1 by granting our motion to amend.

2 THE COURT: Mr. Peller, I understand you have some
3 strong views and strong arguments to make. My question for you
4 is you'll have ample opportunity to raise the arguments that
5 want to make I am sure before Judge Gerber. To the extent you
6 lose there, there is an opportunity to appeal.

7 What is your application, if any, at this juncture,
8 mindful of the fact you will have an opportunity to appeal any
9 adverse orders from the bankruptcy court?

10 MR. PELLER: It is a complex situation, your Honor,
11 and I am sorry it has taken me so long to make it clear to the
12 court. My clients are under a threat, constant threat of being
13 held in contempt of court by GM. My understanding is the
14 appropriate way to protect my clients is to establish the lack
15 of subject matter jurisdiction.

16 THE COURT: You are litigating that issue before the
17 bankruptcy court, and if you lose, you will have an opportunity
18 to appeal it to this Court.

19 MR. PELLER: Yes. I believe it is prejudicial for the
20 leadership, purporting to represent the interest of plaintiffs,
21 to come into the bankruptcy court as they did last week and
22 speak in front of the bankruptcy court, alleging a position
23 that is inconsistent with the petitions of plaintiffs in this
24 proceeding. It is in nobody's interest to have cases that do
25 not belong before Judge Gerber in that court.

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1 When I met and took up representation of my clients,
2 they were driving very unsafe cars. I know I needed an avenue
3 of judicial relief available if I was going to move to get them
4 out of those unsafe cars.

5 GM, and with the absence unfortunately of leadership I
6 tremendously respect, but GM and the leadership acquiesced in
7 the state procedure in the bankruptcy court that virtually
8 closed every courthouse door in any attempt to get my clients
9 out of their unsafe cars. To this day, the Elliotts continue
10 to drive cars that --

11 THE COURT: Slow down.

12 MR. PELLER: -- of death and serious injury.

13 THE COURT: You can have a seat.

14 As far as I have heard, you will have ample
15 opportunity to raise these arguments by way of litigation you
16 have before Judge Gerber and by way of appeal. I am not
17 persuaded I need to deviate from what I have done thus far or
18 intend to do in short order. You can go back there.

19 Issue No. 5, any issues arising from those cases that
20 involve parts other than ignition switches, there were two
21 cases cited in the defendants' letter of July 21. That is the
22 Andrews cases. From reviewing the applications of counsel for
23 leadership positions, I think there may be a couple of others
24 that were either omitted from that list or post-dated the list,
25 the Stevenson and Jones cases as well.

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1 I am trying to get a handle on the number of cases in
2 the MDL that implicate parts other than ignition switch and
3 what implications that has for either case management or
4 otherwise going forward.

5 MR. BERMAN: First, maybe the court knows this, but
6 there is a little confusion about what an ignition switch is I
7 want to alert you to. We have the 2.1 ignition switch vehicles
8 that were recalled in February and March of this year. Those
9 are the subject of the stay order or stay motion in the
10 bankruptcy court.

11 When we were working out the preservation order which
12 dealt with those 2.1 vehicles --

13 THE COURT: When you say "2.1," you mean 2.1 million?

14 MR. BERMAN: 2.1 million. It became clear to the
15 three of us we have different terminology for what an ignition
16 switch case is because in June and July of this year, GM
17 recalled 10.8 million cars for what we believe are also
18 ignition switch defects.

19 For example, on June 13th, 2014, GM recalled 500,000,
20 2010 to 2014 Camaros. That is new GM vehicles that were are
21 not implicated by the bankruptcy. Because the cars' ignition
22 switch can be bumped by your knee, that is the same issue that
23 was in the 2.1 million cars. There is an issue here that we
24 have to, when we talk about ignition switch, we should be aware
25 the parties might not agree what that means, okay?

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1 That gets us to the Andrews case and related cases.
2 We don't think that there are any issues from a case management
3 standpoint that you need to address now because when we filed
4 the consolidated complaint, we will be discussing with all of
5 the counsel what to do with the interrelationship between the
6 ignition switch cases and the non-ignition switch cases.

7 Let me give you a little background on that. One of
8 the things I think I did and Mr. Pitre did you will be hearing
9 from because we work on the damage issues in the Toyota case,
10 there actually were very few cases in the history of the United
11 States that dealt with how do you measure diminution of value.
12 It is not like a stock market case where people have been doing
13 this for years or an antitrust case where there are models.

14 We had to find an expert. We found an expert and
15 began to analyze it, and it could be that the best interests of
16 ignition switch plaintiffs and non-ignition switch plaintiffs
17 to have unified theory of damages, namely, it is not the defect
18 that caused the damage, it is the accumulation of over 50
19 recalls that tarnished the brand. What we want to do is sit
20 down with all the plaintiffs' lawyers and hash out do we have a
21 unified complaint or do we have the Andrews non-ignition parts
22 cases be a subclass of itself and on a different schedule.

23 So I think the consolidated complaint will help answer
24 how the leadership sees that issue, and it could be that we
25 have different discovery tracks. I don't know that that is

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1 something we will have to discuss with all counsel.

2 THE COURT: All right. I am detecting a theme here.
3 These two can and should be deferred until after the filing of
4 the consolidated complaint.

5 MR. BERMAN: Yes.

6 THE COURT: Defense counsel, do you wish to be heard?

7 MR. GODFREY: Briefly.

8 First, the court is correct there are four cases in
9 the MDL by the names Andrews, Jones, Sauer and Stevenson that
10 implicate parts or aspects of the motor vehicles that are
11 different than the ignition switch.

12 Andrews, as I think the court already knows, has the
13 ignition switch, but --

14 THE COURT: There are 34 others.

15 MR. GODFREY: -- there are 34 others. At one point we
16 lost count in the plaintiffs' complaint. It is the kitchen
17 sink. When a consolidated complaint is filed, that will flush
18 out the relationship between the theories of liability, whether
19 those theories survive the sale order and injunction, whether
20 they include successor liability or something different.

21 As we see it -- and I put a footnote in our letter
22 which the court has read -- we think allegations as we
23 understand them thus far overlap and are substantially similar.
24 We really don't know.

25 The only other comment I would make is that we did

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1 work out a preservation order, and I will comment on that a
2 little bit later. There is a terminology difference between
3 the parties that will probably get worked out as we work
4 through some of the issues, preservation order issues.

5 We are taking on the preservation order we started
6 with the original recall, the originally three recalls, the
7 ignition switch and will work that out cooperatively with
8 temporary lead counsel. We are going to move in stages to the
9 next set when we know more as to how best to preserve and
10 fulfill the court's admonition, but not have GM become a
11 warehouse for the parties to come back. There is a difference
12 in terminology. We will work that out. They will clarify
13 that, we will work that out and clarify that until the
14 consolidated complaint.

15 MR. SCHOON: I won't argue my motion to dismiss now,
16 but I want to note none of these additional recalls would have
17 involved the old Delphi entities or new Delphi entities when it
18 came to the manufacture of switches.

19 THE COURT: Okay. Let's move on to Item No. 6, the
20 status of any related cases not currently part of MDL,
21 including but not limited to cases pending in state court.

22 I know from defense counsels' letter of August 5th
23 that there was an oral argument or proceeding before the state
24 court in Georgia in connection with the Melton case two days a
25 ago. I saw reference in the press to the motion to dismiss

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1 that case was denied. Trial was scheduled for sometime in the
2 Spring of 2016.

3 I guess let me turn first to temporary lead counsel
4 and find out: One, if there are any updates beyond that and
5 what is attached to the defendants' letter of August 5; and
6 number two, what implications this has for the MDL going
7 forward.

8 MR. ROBINSON: There are various cases with claims for
9 damages occasioned solely by the conduct of the new GM, and
10 Melton is such a case. In Melton, the allegation is that GM
11 fraudulently concealed evidence from the Meltons. So that is
12 something that new GM did and that is the focus of that case.

13 So there was removal, but it was remanded back to
14 state court, and as you heard, there was a motion to dismiss
15 that was denied Saturday morning. As I understand it, the
16 judge issued an order requesting written discovery by August
17 26th of this month, on September 27th documents and privilege
18 log.

19 I do think that that is a case that does not involve
20 the Bankruptcy Bar. It is something based on conduct that new
21 GM did. I think that is the focus of the Melton case.

22 THE COURT: What bearing does that have on our
23 proceedings here, or in your view it can proceed on a separate
24 track, Mr. Robinson?

25 MR. ROBINSON: I think that actually it is a state
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1 court case. When I talk about discovery later, I think the
2 fact that there is discovery going on in that case, has been
3 ordered in that case may be something the court may want to
4 consider. I would like to reserve that until we get to
5 discovery.

6 THE COURT: Mr. Godfrey.

7 MR. GODFREY: Mr. Robinson is correct that the motion
8 to dismiss was denied. General Motors has evaluated its
9 options given the judgment of dismissal which is still of
10 record, judgment with prejudice of record that is not set
11 aside.

12 The court did order the beginning of discovery. Mr.
13 Robinson correctly outlined the dates as I understand them.
14 The lawyers for the Meltons are in the jurisdiction of this
15 Court. The Beasley Allen firm has eight cases here in total.
16 Mr. Cooper has five cases here in total. They are subject to
17 this MDL. Mr. Cooper is seeking a position and has been
18 recommended by temporary lead counsel to have a position on the
19 executive committee. In terms of coordination, the court has,
20 as Judge Gerber put it at May 2, may not consider other courts
21 but certainly control parties and their counsel.

22 It is a difference in viewpoint to suggest the Melton
23 case does not involve new GM conduct. The Melton case is
24 designed to set aside the settlement so they can sue over the
25 allegations involving Mr. DiGiorgio and what old GM did, et

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1 cetera, and very much involves the same discovery, the same
2 issues here. Once you get by the judgment, which we will
3 continue to raise, and once you get by the settlement
4 agreement, which the court rejected, the judges rejected our
5 argument.

6 The court on Saturday issued a scheduling order. We
7 will be happy to provide a copy of that to the court once we
8 discuss how the court wants updates periodically, and another
9 agenda item, the court did set a trial date for April of the
10 Year 2016.

11 That is all I have to say about Melton, but I do think
12 there is an inherent challenge of coordination between this MDL
13 and the lawyers appearing in this MDL for other parties in
14 those and those same lawyers, the discovery that they seek in a
15 case which we find indistinguishable in the state court of Cobb
16 County, Georgia.

17 THE COURT: Are there other cases other than the
18 Melton case that are proceeding that I should be -- the short
19 answer is there is. Of the other cases proceeding in state
20 courts or for that matter in federal courts not yet been
21 transferred here, are there ones that you want to flag?

22 MR. GODFREY: The August 5th letter, you need a
23 microscope to see the little footnotes, at least I do, it
24 identifies where it has been no discovery or discovery has been
25 requested. There are four cases where, by our count, discovery

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1 has been requested. I identified those earlier. Melton was
2 one of them. Green, Smith and Beckwith, and they pending in
3 Tennessee, Georgia, Alabama and in California.

4 Mr. Cooper or Mr. Beasley from the Beasley Allen firm
5 are involved in three of those. The Beckwith case, which I
6 believe is in California, I don't know the counsel there. It
7 is at the very early stages, and the only case thus far I would
8 say discovery has -- there is an order of a court to proceed
9 with discovery is the Melton case.

10 THE COURT: All right. Yes, Ms. Cabraser.

11 MS. CABRASER: Briefly -- and I know GM made you aware
12 of this -- there is a Texas MDL was recently formed. There are
13 only four cases involved in that thus far. They're in the very
14 early stages. One of them is the Adams case I know about
15 involves a post-bankruptcy crash from late December 2013.

16 That MDL provides an opportunity to coordinate
17 discovery interjurisdictionally between the two courts.
18 Additionally, we would note that the inclusion of counsel in
19 leadership that do have state court cases pending also provides
20 an opportunity to coordinate discovery and other matters going
21 forward, and a number of MDL courts have taken that into
22 consideration as a positive factor in structuring their own
23 cases.

24 THE COURT: My sense is there is not a whole lot more
25 we can or should say on this topic now except to say this is

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1 something I am attentive to and mindful of the need to
2 coordinate with my state counterparts. That was a significant
3 factor in my creating the federal-state liaison position and
4 plaintiffs' leadership.

5 So it is something I will want to hear more from
6 counsel on, and when there is someone appointed to that
7 position, that person in particular I would love any and all
8 suggestions you have for the ways in which I can coordinate
9 with my state counterparts in ways that would facilitate the
10 litigation here and obviously advance the interests of all the
11 parties involved.

12 I will state that, and we can move on to the next
13 topics. A process for review of cases filed directly in this
14 district to ensure they're properly included in the MDL. I
15 did, as you know, authorize direct filing of cases because I
16 think it is more efficient and in everybody's interest or maybe
17 in everybody's except the Clerk's Office in this district
18 interest to do it that way.

19 I also want to ensure that there is some sort of
20 process to flag cases if counsel on either side believes
21 they're not properly included in the MDL. I am mindful of the
22 fact you know more about these cases usually than I do and my
23 determination on relatedness is often based on a fairly cursory
24 review of complaints and whatever the statement of relatedness
25 is that counsel makes.

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1 The threshold question is if anyone has any idea how
2 many more such cases there are out there or are likely to be
3 filed? I am guessing the answer is no, nobody really has any
4 idea.

5 Mr. Godfrey, you're laughing. I will turn to you
6 first.

7 MR. GODFREY: I wish we knew, your Honor. I would
8 think that once the leadership structure is established, given
9 the size and number of the members of the plaintiffs' bar, that
10 there will be a process where they can amend and add in without
11 having much of a disruption to the court where they add another
12 plaintiff here or there or whatever.

13 We don't have any way of knowing at this point. The
14 number of cases being filed has been on a weekly count, been
15 reduced as compared to what it was two months ago. As I said,
16 we had three last week. I am sure we'll have notice, e-mail
17 notices at midnight from the automatic service that another one
18 was filed over the weekend.

19 I just picked it up. This will go on a while, and
20 hopefully with the establishment of the lead counsel structure,
21 the plaintiffs will be able to, through easy amendment, solve
22 that problem for all of us or at least the court.

23 THE COURT: Let me suggest a procedure in the meantime
24 at least. I am inclined to think once the leadership structure
25 is in place, it will facilitate things as well.

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1 What I would suggest, thus far I have basically been
2 following the related case procedures that this Court uses and
3 which were recently modified, and I think I will continue to do
4 that, but I do want to ensure again that if any party believes
5 that a case is improperly included in the MDL, it has an
6 opportunity to be heard on that. You shouldn't assume just
7 because I make a preliminary determination that something
8 appears to be included, that perhaps there is a wrinkle to it
9 or nuance to it that I might not be aware of.

10 What I would suggest -- and I am happy to hear your
11 views on it -- is basically within, let's say, five days of a
12 case being accepted and deemed related and consolidated with
13 the MDL, if any party has an objection to the inclusion of that
14 case in the MDL, it can file a letter motion indicating that
15 objection and articulating why it should not be included in the
16 MDL, that the other side or the counsel who has filed the
17 related case has three days in which to respond in similar
18 fashion, that is, by letter on ECF. Then I will make a
19 determination whether the case should be included.

20 If there is no such filing, I will assume that no one
21 has an an objection, and any objections to inclusion of a case
22 would be waived and we would just proceed.

23 Does that make sense, Mr. Godfrey?

24 MR. GODFREY: It makes eminent sense, but I make one
25 slight modification request to perhaps ease the burden on the

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1 court. If you made it within seven days, in the meantime you
2 imposed a meet-and-confer obligation upon plaintiffs' lead
3 counsel and GM, we can probably work most of these out and take
4 the burden off the court. That way we'll act as filter to make
5 it easy and facilitate -- lessen the burden on the court than
6 have you get a bunch of letters. If we had had a chance to
7 talk, we would have worked it out amongst ourselves.

8 MS. CABRASER: It is disconcerting to say so, but the
9 procedure that we were going to propose is precisely that once
10 appointed liaison meet and confer with GM counsel on new filings
11 that come in, they will presumably be identified on the civil
12 cover sheet, noting the MDL as a related case or not.

13 If they seem to involve on the face of the complaint
14 allegations that belong here, counsel can meet and confer and
15 advise the court. There will publicly be few, if any,
16 disagreements either between liaison counsel and GM or between
17 the filer and those counsel.

18 THE COURT: That sounds good to me.

19 One thing I am sensitive to, if plaintiffs counsel
20 files a case directly in this district, it may not have served
21 it on GM, and as resourceful as GM is and likely as they are no
22 know about it, there may be circumstances they don't know about
23 it until I enter an order in the MDL. This is not inconsistent
24 with what I said a moment ago as modified by Mr. Godfrey. I
25 would basically essentially say the deadline is seven days from

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1 the time that I enter an order deeming it related or included,
2 mindful you may think that I made the initial determination
3 incorrectly, and you can be heard on that, and in the meantime
4 you should confer before filing any objections.

5 Does that make sense?

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

7 THE COURT: Since I have already included some cases,
8 why don't I say seven days from the date on which I make my
9 appointments to the leadership positions, that basically you
10 should confer with respect to any cases that have already been
11 included and deemed related, and if there are any objections or
12 tweaks on those, that seven days, within seven days of my
13 appointment of the leadership, you should make yourselves heard
14 on that, all right?

15 Let's turn to the next matter, which is a fairly big
16 topic; namely, suggested procedures for coordination of this
17 litigation with the bankruptcy court litigation, and we have
18 already discussed the related state court litigation to some
19 extent. Maybe bankruptcy court is the bigger issue at the
20 moment.

21 I will say that I have been in regular communication
22 with Judge Gerber. I am mindful I may be called upon to review
23 some of his orders and decisions, and in that regard I am
24 sensitive and careful about not discussing substantive issues
25 with him that may ultimately come to me or other judges of this

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1 court for review.

2 One of the JPML, Judicial Party on Multidistrict
3 Litigation's primary reasons of assignment of this MDL to this
4 district was opportunity to coordinate things with the ongoing
5 bankruptcy litigation. The only way to take advantage of that,
6 and I am mindful that it is Judge Gerber and I to communicate
7 on a regular basis to ensure we are not stepping on each
8 other's toes logistically or on a procedural matter and
9 proceeding fairly efficiently and in a logical matter.

10 I am not sure if anyone has any suggestions beyond
11 that. Again this is something that once I appoint liaison
12 counsel who is tasked with facilitating communications between
13 counsel and those proceedings and the courts, maybe that is
14 something we can defer until that appointment is made.
15 Obviously, this is something that I will want counsels' views
16 on.

17 Is there anything else that should or can be said?

18 MR. ROBINSON: Only other thing I might add, temporary
19 lead counsel and proposed executive committee members have
20 actually been the ones who actually retained the designated
21 counsel, the counsel designated by Judge Gerber as the leaders
22 in the MDL, the bankruptcy, and so I think that when you do
23 appoint lead counsel and your committee or executive committee,
24 that kind of coordination we have now should be carried on with
25 the bankruptcy-designated counsel.

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1 THE COURT: I certainly agree.

2 MR. GODFREY: I assume if not, we would request that
3 obligation continue, and in your first pretrial order, Page 14,
4 you imposed upon us the obligation to periodically notify the
5 court by filing of events in the bankruptcy court of
6 significance. We intend to continue to do that. It is a good
7 way of ensuring that your Honor's aware of something of
8 significance like the Elliott ruling takes place. I assume
9 that will continue.

10 THE COURT: Yes, that certainly should continue.
11 Unless and until I modify the order, it has to continue. I
12 think I will often be aware of those developments even before
13 you notify me of them. It is better safe than sorry.

14 Item 9 on the agenda, and I appreciate we are making
15 good progress here, is whether and if applicable to what extent
16 plaintiffs should file a consolidated complaint, and how and
17 when counsel should be given an opportunity to object if claims
18 are omitted from that consolidated pleading.

19 MR. GODFREY: I apologize. I had perhaps misread the
20 court's agenda, but I thought Item 8 also included coordination
21 with state courts. I have a suggestion for the court to
22 consider in that regard.

23 THE COURT: Sure. I thought we had covered that
24 earlier, albeit under a different agenda item.

25 MR. GODFREY: I was thinking mechanistically, first I
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1 think it would be good if every two weeks or whatever time
2 period your Honor feels is more appropriate, that as we did
3 with the joint status letter of July the 28th, the lead counsel
4 and the defendants collectively file a letter, we have
5 schedules and updates on matters taking place of significance
6 that would possibly enhance or interfere with this Court's
7 coordination and oversight in this MDL. I think two weeks is
8 probably right at the start, but minds can differ on that.
9 That kind of rigorous notification would be good for all
10 concerned, particularly the court.

11 Secondly, I think that we take, as the court knows, we
12 take no position on in terms of which members of the
13 plaintiffs' are appointed to the committee. I know many of
14 them. I have respect for them. I do think one criteria ought
15 to be that for people who are active in the state courts, if
16 they're being proposed for leadership positions, that I think
17 you have the unique opportunity, as Ms. Cabraser suggested,
18 unique opportunity to coordinate in various state courts
19 through counsel because they're present in this case,
20 particularly if they're in a leadership position.

21 Third, I do think that the Manual for Complex
22 Litigation suggests this, and there are a variety of ways of
23 doing this, but the Texas MDL gives this Court an opportunity
24 to on procedural or efficiency matters I think confer with the
25 judge there. We provided the order in our August 5th letter so

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1 we are not, if you will, tripping over each other and we can
2 actually have an efficient and coordinated process between the
3 various jurisdictions.

4 Finally, and we would get to this later, there should
5 be and we have done this before in a case, Ms. Cabraser, we
6 should have a single document depository where we have whatever
7 documents are produced, one depository, and we work out the
8 procedures for who has access to it.

9 We shouldn't have a document depository in State A,
10 State C, MDL. We should have coordination of that. That will
11 take a little bit of time to take out, not like a month or so,
12 but will take sitting down between the parties and having
13 discussion for a few hours. Those are my discussions on that
14 for the court to consider. Thank you.

15 THE COURT: Great. That is very helpful.

16 I don't know if any of you want to add or respond. I
17 think those suggestions are well taken. A lot of them are in
18 the nature or suggest that this is a topic, obviously, a topic
19 we will return to many times, but a topic most helpful to
20 return to once a leadership structure is in place and you can
21 confer with one another.

22 There is eminent sense in a single-document
23 depository, and that is something counsel can work out. If
24 there are disagreements, I am happy to adjudicate them. I
25 imagine that is something you're in a better position to work

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1 out. That needs to wait until we know --

2 MR. BERMAN: We agree with the idea of a letter every
3 two weeks. We might want to talk about that in connection with
4 the later agenda item on conferences because we are going to
5 suggest we have a monthly conference preceded by a letter so we
6 probably don't want to have too many letters if your Honor is
7 inclined to do that. We agree we should begin, whoever the
8 leadership is, to work out a single depository as soon as
9 possible.

10 THE COURT: Great, I agree we should address that in
11 connection with the agenda item on conferences and
12 communications.

13 All right. Turning then to Item 9, the consolidated
14 complaint issue, Ms. Cabraser mentioned Mr. Berman would
15 address this. I gave my tentative view any consolidated
16 complaint was warranted sooner rather than later and should not
17 delay review of discovery. That view has been reinforced by
18 discussion we had today. Let me turn to you and see what you
19 have to --

20 MR. BERMAN: We are going to accept your
21 recommendation.

22 THE COURT: That is always a good idea!

23 MR. BERMAN: And proceed with the consolidated
24 complaint. On timing, our thoughts are as follows.

25 We want to move forward quickly, but one of the things

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1 we have to do to give the court some understanding of the task
2 involved, is there is dozens of cases with hundreds of
3 plaintiffs. We have to get a plaintiff fact sheet developed.
4 We have to figure out who the class representatives will be.
5 We have to figure out what state laws, whether it is one state
6 or 50 states. That takes a little time.

7 We were thinking the following: That within 45 days
8 of appointment, the lead counsel would make available on some
9 kind of secured site a draft of the complaint. We would then
10 give any counsel seven days to object to the form and scope of
11 the complaint, and that would give us some time after that to
12 file the complaint within 60 days of appointment.

13 Then if we did not include a claim that someone
14 thought should be included, they would have an opportunity to
15 persuade the court why that claim should be included. This is
16 kind of what we did in Toyota. We did it the other way around.
17 We filed the complaint, people had time to object afterwards,
18 and we had an opportunity to amend. It might be better for us.

19 I am proposing a --

20 THE COURT: That makes eminent sense. Mr. Godfrey, is
21 there anything you want to say on that?

22 MR. GODFREY: Not really. We took a different
23 position in our letters to the court, as the court knows, but
24 in light of the court's comments, I have nothing further to
25 add. Thank you.

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1 THE COURT: I should say, it was a joke you should
2 accept my recommendation. What I said earlier about looking to
3 you for guidance is actually more important. If you think I am
4 off base and that I should consider a different path, I am
5 relying on you to make your views heard, and I will give them
6 due consideration.

7 I will accept that proposal and so adopt the deadlines
8 and structure that Mr. Berman has proposed. 45 days from
9 appointment of leadership, lead counsel will make available a
10 draft consolidated complaint for review of all plaintiffs'
11 counsel in some secure fashion. There will be seven days in
12 which to make objections within in-house, so speak, to lead
13 counsel and then 60 days from appointment, a consolidated
14 complaint should be filed.

15 In terms of a process thereafter, my hope is that that
16 will flush out and address whatever objections are made, but I
17 imagine that some people may still have objections even after
18 you think, maybe two weeks after or a week after filing of the
19 consolidated complaint an opportunity to file objections with
20 me.

21 MR. BERMAN: A week should do it and maybe a week for
22 us to respond or whoever lead counsel is to respond.

23 THE COURT: All right. I will give one week after
24 filing to file any objections, one week for lead counsel to
25 respond, and I think I will not allow for replies unless leave

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1 is granted. If somebody thinks a reply is warranted, on notice
2 they can make an application for leave to file it.

3 Is it necessary or prudent to set a deadline for
4 joinder of any new parties separate and apart from the
5 consolidated pleading? I don't know if that, if that is
6 something we can or should address at this juncture or
7 something we should address later.

8 MR. BERMAN: Your Honor, given that we don't have
9 access to discovery yet, we don't know when we are going to
10 start discovery, it is premature to set a deadline at this
11 point.

12 THE COURT: I am inclined to agree. Mr. Godfrey?

13 MR. GODFREY: I can't argue that, your Honor.

14 THE COURT: Let's turn to what may be described the
15 big megillah. To those of you less familiar with New York
16 terminology, that means the big issue, whether and to what
17 extent I should allow or authorize discovery at this point and
18 pending a relation by Judge Gerber.

19 I gave my tentative view in Order No. 7. I am
20 inclined to believe at least some discovery should proceed now;
21 namely, General Motors should -- and other defendants to the
22 extent applicable -- should be required to produce any and all
23 relevant and nonprivileged materials that have been or are
24 later, insofar as it is a continuing obligation, provided to
25 Congress, NHTSA or any other government agencies and to the

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1 investigative team led by Mr. Valukas. Upon review of the
2 submissions to date, we also may need to discuss the need for
3 discovery in aid of any preliminary injunctive relief that
4 plaintiffs may seek.

5 Plaintiffs basically stated an intention to renew the
6 motions that had been filed in the Kelly case in Benton and to
7 the extent there is any discovery necessary for that, it may be
8 something we need to address at this point.

9 Mr. Robinson, you indicated you were --

10 MR. ROBINSON: Yes, your Honor.

11 Number one, I would say we proposed to the court that
12 the court allow the categories that the court did say it was
13 inclined to order in Order No. 7, and that is the discovery in
14 the past or going to be given later to Congress, NHTSA, the
15 government agencies, the DOJ, the Valukas team, the 41 million
16 documents. You also said factual statements contained in the
17 notes of witnesses interviewed by Mr. Valukas and the no
18 depositions.

19 I think this: I think, frankly, obviously plaintiffs
20 want to get going with discovery. If we can get this, that
21 would be a heck of a start. Frankly, I did a little
22 investigation with what was going on with Congress and the
23 types of documents they got and the format in which they got
24 the documents, your Honor. As I understand it, they received
25 documents where it was possible and extracted text, so these

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1 documents were searchable. I assume when Mr. Valukas' team got
2 these documents, they had to be searchable for that team to
3 look at 41 million documents in three months. I have seen some
4 reference in the Valukas report to 41 million documents and I
5 have read in the papers 41 million pages. Whatever it is,
6 there is a lot of material to review.

7 I do think probably this will be an area for a
8 meet-and-confer between defense counsel and plaintiff counsel
9 like we just did on the preservation order we submitted to you.
10 We do think we have to look at things such as there is an issue
11 regarding what documents are privileged. Are there documents
12 that went to counsel, Office of General Counsel, people that
13 have been fired by GM, et cetera.

14 I don't want to get too deep into it, but I do think
15 there is a reason for a meet-and-confer on this and there may
16 be a another conference maybe on the phone or in person with
17 the court on this matter. That is No. 1. We would accept your
18 proposal that you did in the Order No. 7.

19 In terms of the -- one thought, earlier Ms. Cabraser
20 talked about using Rule 502 (d) which allows a clawback. So if
21 there are documents later on deemed to be privileged or
22 whatever that are produced, they would have that clawback
23 capability. That would be the way to expedite some of the
24 transfer of documents.

25 I do think the meet-and-confer can set up a

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1 comprehensive discovery plan. What concerns is us we want the
2 MDL to lead discovery in this litigation. As you heard, there
3 are at least three or four cases in state court where discovery
4 is ongoing. What is good about that is that Mr. Cooper, he is
5 appointed to the executive committee, has told us he'd
6 coordinate with the MDF. You have Mr. Miles also on some of
7 those cases, if he also has been recommended as a member of the
8 executive committee.

9 I do think it is going to take some state-federal
10 coordination on discovery. We did that in Toyota. In the
11 beginning we had people doing discovery all over the country,
12 and then basically we were able to get ahead of the game with
13 Judge Selden, and we work with everybody and made, as counsel
14 said, if we get one place where all the documents are, then we
15 can give them to state courts or if they sign protective
16 orders, et cetera.

17 I think that we can do what we did in Toyota here,
18 your Honor, and that is get one database, one place where all
19 the documents sit and then work with state court plaintiff
20 lawyers. We want to make sure we cooperate with the orders,
21 for example, in Melton. I think we can do that if GM and
22 plaintiffs' counsel can work together like we did in the Toyota
23 case.

24 That was a long list of issues. You talked about
25 comprehensive discovery plan. I think that is also something

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1 that would involve a meet-and-confer between counsel and
2 plaintiffs' counsel. Plaintiff, we have ideas, obviously, but
3 I do think we should have a joint comprehensive plan that would
4 actually involve the state courts as well, your Honor.

5 There is going to be some discovery or may be some
6 discovery, limited discovery hopefully in the bankruptcy court,
7 but since the lawyers here in this courtroom here have been
8 involved for about four months with that bankruptcy, at least
9 watching it, trying to protect it and working with counsel, if
10 there is discovery to be taken, we in the MDL can take that
11 discovery. I think that's what we hope that the lawyers that
12 we've hired that are working with the bankruptcy court would
13 allow us to do. That may be a way so that we don't have to
14 take the discovery twice if there is discovery ordered in the
15 bankruptcy court.

16 I think we need electronic discovery, document
17 depository and database. I said that. Then you also mentioned
18 appointment of discovery masters. We did that in Toyota. We
19 had two eminent retired justices of the California Court of
20 Appeals that work for a company called JAMS. They were the
21 discovery masters in Toyota, and basically we also had an
22 electronic discovery master as well helping them.

23 I think we need to do that. I think maybe that would
24 be worth another meet-and-confer between plaintiff and defense
25 counsel, where we hopefully maybe get somebody here. We have

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1 already talked to people at JAMS, for example, in New York
2 here, but I am sure defense counsel will have their
3 suggestions. I think we have a meet-and-confer and try to work
4 out discovery masters sooner rather than later.

5 Frankly, an ESI master, I don't know that law is
6 evolving in electronic stored information and frankly I think
7 we've got to work that out in this case as well.

8 Those are my thoughts. If there is anything else or
9 any questions, I will be happy to answer them.

10 THE COURT: The immediate question is what, if
11 anything, we do today. I think in general, I am in agreement
12 with you, number one, that some degree of discovery is
13 warranted at this point. If anything, I raise as a question
14 whether the limited discovery that I contemplated or
15 tentatively ordered in Order No. 7, whether it should go beyond
16 that, to the cases or claims in dispute that survive a ruling
17 by Judge Gerber or parallel state court litigation, that will
18 involve the same discovery. There is an argument to be made we
19 may as well proceed and get it done.

20 That is a big picture question, which is to say, is
21 there an argument for just proceeding full speed ahead and
22 going --

23 MR. ROBINSON: Personally, in my whole life it seems
24 like I have done a lot of product discovery, but basically I
25 personally think we could do that now. I am happy that the

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1 court suggested some hybrid approach. I would say this, your
2 Honor:

3 There are new GM-assumed liabilities in the amended
4 sale, it is clear. If you look at Section 2.3 (a) (IX), it
5 clearly talks about injury, deaths, accidents and incidents
6 after the closing date. At Page 69 of the sale order, which is
7 Section 6.15, your Honor, there are new GM-assumed claims for
8 the Tread Act and the Safety Act. Those involve such things as
9 reporting problems like defects to NHTSA, recalls, et cetera.

10 Frankly, in some states like California, Florida,
11 Washington, Arizona, and there are others, the unfair
12 competition laws in those states allow a class action to be
13 based on the type of violation, say, of the Tread Act or Safety
14 Act. GM has said well, there is no direct right of action for
15 the Tread Act, but that begs the question because as Judge
16 Selden said in the Toyota case, when he ruled that California
17 unfair competition, the unlawful act prong applied and could be
18 used as a basis for an economic loss claim, that the Tread Act
19 violations could be used for economic loss recovery.

20 Frankly, under California law, the California Supreme
21 Court and the 9th Circuit also, I can give you the cite, they
22 basically say that that type of claim, the Tread Act claim or
23 some sort of law, even if there is no private right of action
24 can be used for this unlawful act prong of the unfair
25 competition law in California.

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1 Frankly, I can give you a couple of cites. Basically
2 Judge Selden, he says the Tread Act forms the viable basis for
3 recovery under the unlawful prong of the UCL, and neither party
4 contests this. Toyota didn't even contest it, in re: Toyota
5 Motor, 790 F. Supp. 2d, 1152. Then this is 9th Circuit case,
6 Cyber Sound Records versus UAB Corp., 517 F.3d 1137, at 1152,
7 the 9th Circuit held under the sweeping standing provisions of
8 the California UCL, Section 17 to 200, does not require a
9 plaintiff prove that he or she was directly injured by the
10 unfair practice or that the predicate law provides for a
11 private right of action.

12 So I am not asking you to rule on this, but I do think
13 there is a basis to start discovery if nothing more regarding
14 the injury death accidents. For example, there is a case
15 before you called the Ani case. As I understand it, Mr.
16 Hilliard is in court here, he filed it, there is 622 post-sale
17 accident plaintiffs in that Ani case. That would allow
18 discovery under the Section 2.3 (a)(IX) regarding injury and
19 death accidents.

20 Then there is a large number of cases that are filed
21 in this MDL, especially the ones that were originally with
22 Judge Selden and now brought here before you, your Honor. That
23 make the same arguments that Judge Selden found as a viable
24 claim in the Toyota case. I think that there is good reason to
25 get going in discovery. You have got discovery going in other

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1 states such as Georgia.

2 But I do think that a meet-and-confer is appropriate,
3 that we should probably meet-and-confer sooner than later and
4 then I think at some point we come back to you with a plan. I
5 do think it ought to be a comprehensive discovery plan at some
6 point with respect to for what is going on with Judge Gerber as
7 well.

8 I am trying to focus on cases where there is new GM
9 assumed liabilities, so they're not affected by the bankruptcy
10 litigation and also new GM independent liabilities unaffected
11 by the sale order. For example, Mr. Berman talked about these
12 cars were just recalled that were post-sale vehicles that have
13 problems with their ignition switch, but they're made by new
14 GM.

15 Even if say a part came from Delphi or something back
16 before the sale order, there is case law, Hornbook tort law
17 that allows that type of case to be brought because the
18 manufacturer, General Motors, is liable for the complete
19 vehicle. If one part, they chose to put a part in that came
20 from old GM or Delphi, the case law is clear on that.

21 I just think there is a lot of reasons to get going
22 with discovery sooner rather than later, and I would recommend
23 a meet-and-confer. I think we should come back to this Court
24 and maybe give you a plan.

25 Another thing is this. Once we do this consolidated

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1 complaint, and if we can get this done in two months or 60
2 days, that might be a time to maybe have our comprehensive
3 settlement plan presented to you. Those are my thoughts, your
4 Honor. Sorry I took so long, but it is a complicated issue.

5 THE COURT: Yes. As I said, it is the big megillah.

6 You indicated you wanted to be heard on the stipulated
7 facts that were, groups of facts or what Mr. Godfrey said
8 earlier about the facts that were filed in the bankruptcy
9 proceeding.

10 MR. ROBINSON: The only thing is this. We are working
11 with them on stipulated facts in the bankruptcy court, and now
12 frankly there is a large number facts aren't stipulated to, and
13 that is the problem. If we had a complete, total stipulation
14 of facts, we'd be happy. I don't think that those stipulations
15 of fact will help us get to the issues such as due process and
16 some of the other issues in the bankruptcy court.

17 I don't think that that really is going to get us very
18 far in this litigation. I do think at some point we need to
19 get these documents that were given to the government, we need
20 to get these interviews, we need to get the initial material
21 that the court recommended in Order No. 7 and maybe start
22 taking depositions as well.

23 Or if Judge Gerber does order depositions in the
24 bankruptcy court, plaintiffs' counsel would, we think we would
25 like to talk to our designated counsel who I think are here

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1 today and suggest maybe we take those depositions.

2 I don't know if that answers your question. This is
3 not an easy thing when you're talking about discovery.

4 THE COURT: It is not easy at all.

5 The immediate question is what, if anything, to do
6 today. What I am hearing you say is -- let me back up. I am
7 inclined to agree with your view that the best course here --
8 and this is will be the case for a lot of issues that arise in
9 this litigation -- is to give the parties time to
10 meet-and-confer and see what, if anything, they can agree upon
11 and narrow the issues in dispute that get teed-up for me.

12 As a general description, that is I think a much
13 better way to proceed. Here in particular, it is the best way
14 to proceed. I don't think that that can be done until there is
15 obviously a more permanent leadership structure or the
16 personnel is in place.

17 I guess the question I have, if am I hearing you
18 correctly, you propose essentially waiting until I make the
19 appointments, allow you some time to confer before I set any
20 deadline, or would you propose we set deadlines for the
21 production of certain things today?

22 MR. ROBINSON: I haven't heard GM object. Maybe they
23 will object to your proposal in Order No. 7. The process
24 should begin in the collection of the documents that you said
25 that they should provide us and then maybe giving us those

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1 documents on a rolling basis. As I understand it, they have
2 given numbers of documents to Congress. Though out of 41
3 million documents, I understand they gave a million pages to
4 Congress. I think that they're giving documents to other
5 agencies, Department of Justice possibly.

6 I do think we should start that. They're already
7 collecting those documents. As long as they can give it to us
8 in some sort of a searchable format maybe on a rolling basis,
9 that would help us. We have a lot of lawyers here that could
10 go to work and start looking at those documents.

11 I do think that some level of production along the
12 lines of your limits in Order No. 7, where we don't take
13 depositions now, but you give us the documents to review and
14 maybe start giving us the transcripts of the interviews of the
15 people mentioned in the Valukas Report. I would like to hear
16 from General Motors.

17 THE COURT: Mr. Godfrey, let me turn to you. I am
18 guessing you do have some views on this. Let me give you a
19 sense of where I stand and then you can express agreement or
20 disagreement and that may help facilitate things.

21 No. 1, I am inclined to believe, as I stated in Order
22 No. 7, some limited discovery should at a minimum proceed, and
23 I am inclined to think some of it can proceed now. In
24 particular, if there are categories of those documents, I am
25 assuming the documents provided to Congress and other

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1 government agencies may be in this category as to which there
2 aren't any plausible privilege claims, there is no reason not
3 to get the ball rolling on your providing those and maybe table
4 the other stuff, and I imagine there may be more privilege
5 issues, for example, with respect to the Valukas materials,
6 that that can await appointment of counsel and a
7 meet-and-confer process on the theory that might facilitate
8 litigation of those issues.

9 Beyond that, my inclination is to agree with Mr.
10 Robinson, that basically wait until there is leadership in
11 place, allow you an opportunity to meet-and-confer and then
12 come back sooner rather than later and presumably make this one
13 of the first orders of business after there's a permanent or
14 interim leadership structure in place to really hammer this out
15 and figure out what you can agree upon and what you disagree
16 and figure out some process whereby you can each make your
17 views heard, and I can then decide on the question and then
18 defer the questions regarding, for example, the document
19 depository, comprehensive discovery plan, appointment of
20 discovery masters and the like until that point when you've had
21 an opportunity to confer with one another.

22 That is sort of a general description of where I
23 stand, but now you can speak.

24 MR. GODFREY: Thank your Honor.

25 Before addressing discovery, let me just say that the
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1 rendition of how Mr. Robinson reads the 363 sale order in his
2 attempt to dress up --

3 THE COURT: Don't, don't address the merits yet. I am
4 sure we will get there, but --

5 MR. GODFREY: I don't want my silence to be deemed as
6 acquiescence.

7 THE COURT: Understood.

8 MR. GODFREY: There is a complicated balancing of
9 competing interests. I think the court is struggling, as
10 anyone would be, to know how best to spread the needle here to
11 manage the litigation which is in several jurisdictions to
12 protect plaintiffs' rights and protect General Motors' rights.
13 I will address my comments in three buckets.

14 The third bucket, which I would like to start with, if
15 the court orders some discovery, just mechanistically how do we
16 view it take place at this stage:

17 One, we agree there should be no depositions;

18 Two, we agree on the necessity for protective and
19 confidentiality order. We understand the court's comments.
20 There are some documents, I will identify them for the court.
21 The board of directors minutes contain very sensitive
22 information. We can work that out in a meet-and-confer;

23 Three, we agree with the court's comments on Page 1 of
24 its pretrial Order No. 7, the fourth line from bottom with
25 respect to relevant and nonprivileged materials. I want to

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1 underscore that language because when we get to the Valukas
2 documents, as they have been referred to, and the Valukas raw
3 interview notes and some other things with government agencies,
4 that is an important concept relative to non-privilege;

5 Fourth, we agree on the document depository;

6 Five, I wholeheartedly agree on necessity for
7 meet-and-confer and I strongly suggest when the lead counsel
8 are appointed and their executive committee is appointed,
9 whoever is in charge of the state coordination, Mr. Cooper or
10 someone else, be intimately involved with that meet-and-confer
11 so we do it one time, not multiples so we don't have to bother
12 your Honor but other courts, too.

13 Finally, two other comments. I have had wonderful
14 success from my standpoint in terms of just efficiency and fair
15 evaluation using magistrate judges as compared to special
16 discovery masters. There is the power of the court that is
17 inherent in that. I leave that to the court's discretion, but
18 I strongly recommend any number of experienced magistrate
19 judges of this Court are more than capable and, indeed,
20 superior, in my view, to other alternatives. That is not to
21 say --

22 THE COURT: Are you saying superior to me?

23 MR. GODFREY: No. I am assuming you don't want to sit
24 down with Mr. Robinson and Ms. Cabraser for hours on end,
25 assuming they're appointed, to argue about nuances of --

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1 THE COURT: You know what happens when you assume?

2 MR. GODFREY: I look forward to that.

3 THE COURT: Let me just interrupt and cut to the
4 chase. I think what I hear everybody saying is that for the
5 most part, this should be deferred until after appointment of
6 permanent leadership counsel and an opportunity for you to
7 meet-and-confer, and that really does make sense for the
8 reasons I articulated before.

9 The question I would like to hear you on is whether
10 there is any category of discovery again that the documents
11 provided to Congress strike me as the most potential example
12 where there isn't a need for meeting and conferring, although
13 maybe there is. And there are items in there that would be
14 subject to a protective order, or I can't image you have a
15 valid privilege claim, but maybe there are arguments and issues
16 that would benefit awaiting the meet-and-confer process as
17 well.

18 One alternative is also to just give you fair warning
19 that those are the kinds of documents that you will have to
20 swiftly turn over and will give you an opportunity now pending
21 the appointment of counsel and an opportunity to
22 meet-and-confer to get the ball rolling on collecting those in
23 a form you would be able to swiftly provide, on the theory at
24 the next conference we can simply set more specific deadlines
25 and that will be a category of materials that you'll have a

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1 sooner deadline rather than later one, which is to say, that
2 you should be taking advantage of the time between now and then
3 to do what you need to do to do it quickly.

4 Why don't you address that specific question which is
5 a larger way of saying we should defer this till the next
6 conference altogether or categories of documents you think can
7 be ordered disclosed now?

8 MR. GODFREY: That is my second bucket, the different
9 categories. My third bucket is my hopefully attempt to
10 persuade your Honor to reconsider your preliminary views. I
11 understand where we're going on this.

12 Let me start with Congressional documents to give you
13 a sense what we are dealing with. It is not as simple as
14 turning over a disc. There are 1.35 million pages produced to
15 NHTSA, approximately. There are 1.6 million pages produced to
16 the Congress, and there were some discs, as I understand it. I
17 don't know what the pages are on that. Cumulatively between
18 the two, it is over 3 million pages. I wasn't involved in
19 that. That is what I have been told. It is a bulk of
20 material.

21 THE COURT: You know 1.6 and 1.3 does not exceed --

22 MR. GODFREY: I know that. I will give you a number.
23 I get something less than 3.2. They said there are other
24 materials as well. My point is whatever the numbers total to,
25 it is a substantial amount of numbers.

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1 THE COURT: Just keep your voice up.

2 MR. GODFREY: Privacy concerns, there are
3 confidentiality concerns, being sensitive to your Honor's
4 comment on confidentiality.

5 For example, board of directors minutes. The Valukas
6 Report, as I have explained once before to designated counsel,
7 cited a number of board of directors minutes for the negative
8 proposition the issues at hand before this Court never reached
9 the board. In the ordinary case you never see there was a
10 relevant document.

11 If they're in the production we are willing to turn
12 over if the court orders. Because it is competitive
13 information in them, they need to be Bates stamped, and this
14 will take several weeks to get it organized in a fashion that
15 could be turned over. As to privilege issues, I understand
16 there are clawback issues if there are inadvertent productions.
17 So there are clawback issues. We can work that out in the
18 meet-and-confer.

19 On Congress, Congress and the NHTSA productions, that
20 is the one more easily dealable set, but it will take some time
21 to work through the issues, and the meet-and-confer will do
22 that.

23 As to Valukas Report documents, there is a
24 misunderstanding. I have spoken at some length to Mr. Valukas,
25 and there are not 40 million pages of materials which are, in

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1 the phrase of the court, relevant and nonprivileged. What Mr.
2 Valukas did was, many defendants' counsel, including myself,
3 have done, we generally don't let a witness self-select which
4 documents he or she is relevant. We say give us every document
5 on your computer, every document that can fall into these
6 categories, and we take a very broad purview.

7 He collected millions of documents, many of which have
8 nothing to do with this matter, many of which have privilege
9 issues. And so this is a bit like, in terms of the Valukas
10 review documents, a bit like saying to the defendant if you
11 reviewed 40 million to produce 10 million, I want to see the 30
12 million you determined were not relevant, responsive or
13 privileged on other matters. It is a broad search by
14 custodian, by boxes that they found and in hard copy so they
15 could from that filter down to try to find relevant
16 information.

17 It is not something -- and plus, he adds, talked to
18 his colleagues yesterday morning, they're not sure if they can
19 replicate and identify at this point all of the documents.
20 That would be the hard boxes in storage. There is a
21 misunderstanding what the Valukas voluminous documents are.

22 THE COURT: It didn't take them that long to do the
23 report altogether.

24 MR. GODFREY: He has a big team working on this.

25 THE COURT: All right.

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1 MR. GODFREY: As to Valukas interview notes.

2 THE COURT: Let me interrupt in the interests of time
3 if nothing else. What I am hearing persuades me that we should
4 just put this off until the next conference and there is a
5 permanent leadership team or interim leadership team on
6 plaintiffs' side and you have opportunity to meet-and-confer.
7 It doesn't surprise me there are more complications and issues,
8 if you will, on Valukas Report front than there are, for
9 example, with Congress and NHTSA and the like.

10 What I hear you saying is that there may be some
11 complications even as to those, and my inclination is, in fact,
12 to defer it all until the next conference after you have had an
13 opportunity to meet-and-confer and mindful that those
14 categories of documents you will be likely ordered to turn over
15 sooner rather than later, so you can take whatever steps you
16 think you can take without meeting and conferring with
17 plaintiffs' counsel between now and whenever that conference
18 is. Make sense?

19 The third bucket was you were going to try to talk me
20 out of doing anything of this altogether. I don't want to
21 deprive you of that chance. Maybe that just means we should
22 limit your remarks to that and we can defer the rest until
23 later.

24 MR. GODFREY: I would like to add one sentence, if I
25 might, under Valukas raw interview notes. They're his work

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1 product. We have never seen them. General Motors has never
2 seen the raw interview notes. Mr. Valukas intends to stand on
3 work product, and many of the interview notes, roughly half
4 were cited in a footnote or otherwise in the Valukas Report,
5 roughly half have never been cited. There are a lot of issues,
6 but Mr. Valukas offered to file a letter with the court
7 outlining this. I as now I am certain I can communicate this
8 for him.

9 New GM doesn't have the interview notes of Mr.
10 Valukas. I don't have them. They have never been shared.
11 That will be an issue that will ultimately, if the plaintiffs
12 persist in, will ultimately have to be decided by motion. I am
13 hopeful they will honor the work product doctrine of Mr.
14 Valukas.

15 THE COURT: I don't want to get into this now. That
16 is definitely something you will need to discuss, and if there
17 is disagreement, as it sounds like there may be, we'll figure
18 out a process to resolve it.

19 MR. ROBINSON: The only thing I would add is this, is
20 that on September 27th they're giving Mr. Cooper the documents,
21 whatever they're going to produce in the Melton case. I really
22 believe what your Honor had requested, and that is the NHTSA
23 and Congress documents be given to us. If there are problems
24 with privilege or protected information on the documents, I
25 still think they should be able to give those to us. It may

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1 drag out and maybe until September 27th.

2 I think that we have momentum here and I do think
3 that -- I don't know when to come to court next. Given what is
4 going on in Georgia, they are going to produce documents, they
5 should produce -- at least start to produce something here.
6 Also I do think we should have a meet-and-confer on this whole
7 production issue as well.

8 THE COURT: All right.

9 MR. GODFREY: I think I find myself and new GM finds
10 itself in a rather odd position.

11 THE COURT: Keep your voice up.

12 MR. GODFREY: A rather odd position.

13 We have a sale order injunction that bars the
14 prosecution of the lawsuit and we filed our motion to enforce
15 against suits which on their face implicate the conduct of old
16 GM. Judge Gerber then set about a process that was agreed to
17 by the designated counsel, which were retained by the temporary
18 lead counsel, and the designated counsel and the temporary lead
19 counsel entered into three scheduling orders with Judge Gerber
20 which provides for a stay of all discovery.

21 Those are orders that are still extant, were not
22 appealed or not challenged, but were agreed to. The temporary
23 lead counsel and most other people in this MDL, the vast
24 majority entered into a voluntary stay stipulation which said
25 that they agreed not to seek discovery and would only seek it

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1 at a certain point in time if they thought appropriate before
2 Judge Gerber.

3 Judge Gerber has set out a process which has been
4 working which resulted in something that I think is
5 unprecedented. We will file with the court this week 290 fact
6 groupings, and they have subparts. I didn't add them up to get
7 each individual fact, but there is a mass of core facts that
8 are stipulated to, and Judge Gerber has set about a process to
9 resolve the threshold issues which will help facilitate and
10 materially advance what this Court will ultimately need to do.

11 So we're in the odd position where temporary lead
12 counsel and designated counsel have not asked for discovery
13 before Judge Gerber. They have signed stipulations saying they
14 would not ask for discovery until they appear before Judge
15 Gerber. Judge Gerber has three orders saying no discovery
16 unless he authorizes it.

17 And now I think your Honor can see the issue that we
18 face. I think there is a process that is working in the
19 bankruptcy court to materially aid this Court to resolve the
20 issue, and I think that process ought to be given its
21 opportunity to be pursued and resolved which I think will
22 materially aid the court.

23 If we are correct, this litigation will become a very,
24 very small MDL. If we are not correct, then it will be a
25 different MDL, but I find it somewhat of an interesting

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1 juxtaposition in terms of the relationship between the orders
2 that might issue here and the orders and agreements that were
3 reached below are diametrically in opposition to each other. I
4 think the process we outlined before Judge Gerber which thus
5 far all parties have agreed to except for the Elliotts and
6 Phaneuf plaintiffs is efficient, one that will materially
7 advance the interests of this litigation. That is my pitch, if
8 you will, to reconsider your preliminary views.

9 I thank you for considering that.

10 THE COURT: Mr. Robinson, you can have a seat.

11 I am not persuaded, for the reasons I stated in my
12 Order No. 7. I do think that at least some discovery and the
13 nature, timing and scope of that discovery is to be determined,
14 would be helpful here, would advance this litigation, would not
15 materially impede and, in fact, may facilitate the litigation
16 going on before the bankruptcy court. And, needless to say, 13
17 of the 109 cases by your own admission are not subject to any
18 sort of stay. I think I am well within my authority of
19 proceeding in that fashion and do intend to. The devil is in
20 the details and scope timing and detail of it will be worked
21 out.

22 I am not going to do anything further on this subject
23 today. I do think and sort of hope and assumed I might order
24 some disclosure, but now I am persuaded there are issues in the
25 least controversial buckets, if you will, that need to be

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1 discussed. What I will do is wait until counsel has been
2 appointed, allow you to meet-and-confer and then we can come
3 back and proceed in that fashion, mindful as well there is
4 discovery going on in connection with these state matters.

5 It is now 1:14. What I think I am going to do, I
6 hoped to get through all of the substantive matters before
7 lunch so we could turn to the applications for leadership
8 positions, but in the interests of the Court Reporter, if not
9 everyone else, we are going to take our lunch break now.

10 I will limit it to 45 minutes and we can return at
11 2:00 o'clock. What I will ask you to do in the meantime, the
12 remaining issues on the substantive agenda are:

13 No. 1. Any other preservation issues, mindful that I
14 signed the proposed order this morning;

15 No. 2. Briefs schedule and process for adjusting
16 motions, including the few that were cited in Order No. 7;

17 No. 3. Settlement. My sense is it is pretty
18 premature, but I want to excuse that and reinforce the
19 interests of everybody coming up with a process for those sorts
20 of discussions.

21 And then the last item is communications going
22 forward, the need and timing for regular conferences or regular
23 submissions and the like. Maybe you can, to the extent you
24 haven't already, discussed those things during the break so
25 that we can proceed swiftly through them.

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1 Included in that I would say if you want to discuss a
2 proposal vis-a-vis I think the next conference should focus not
3 entirely or exclusively, but discovery, we should address in
4 more detail than we just did. If you want to have some
5 preliminary discussions about timing and structuring that, that
6 might be helpful when we return.

7 Before we break, let me just quickly read, there was
8 some ambiguity in the applications for leadership positions as
9 to who did and didn't want to speak today. I will read the
10 list of those who I think did request an opportunity to speak,
11 and if you are on the list I read and you actually upon
12 reflection don't want to be heard, you can let my law clerk
13 know that. If you are not on the list I am about to read and
14 you would be like to heard, let my law clerk know that, which
15 is to say, let her know if there are any changes.

16 I want to reiterate what I said in the order which is
17 if you choose not to be heard, that will not prejudice your
18 application in any way. It is just if you -- I want to give
19 anyone an opportunity to be heard for a few minutes. I have on
20 my list are as follows -- and get the Court Reporter spellings
21 later: In alphabetical order, without regard to the position:

22 Marry Alexander, Benjamin Bailey, Steve Berman,
23 Jeffrey Block, David Boies, Jane Conroy, Lance Cooper, Jonathan
24 Cuneo, W. Daniel "Dee" Miles, Matthew Doebler, Michael Donovan,
25 Don Downing, Lewis Eidson, Andrew Friedman & Company. Robin

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1 Greenwald, Robert Hilliard, Adam Levitt, Lester Levy, Michael
2 Kelly, Jonathan Michaels, David Mitchell, Adam Moskowitz,
3 Alyson Oliver, Frank Pitre, J. Douglas Richards, Mark Robinson,
4 Mark Seltzer, Patrick Stueve, Roland Tellis, Harley Tropin and
5 Tina Wolfson.

6 Again if there is no change, if you're on the list
7 properly or not on the list properly, you do not need to do
8 anything. If there is any amendment to that list, I will ask
9 you to speak to my intern for the summer, if I can impose on
10 her. Ms. Sonenfeld is sitting in the front row in the middle
11 raising her hand now. Let her know right now as you file out
12 and we'll make any adjustments we need and we'll turn to that
13 after lunch.

14 Be back here at a minute or two before 2:00 so we can
15 start promptly at 2:00.

16 (Luncheon recess)

17 (Continued on next page)

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