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8 **UNITED STATES DISTRICT COURT FOR THE**
9 **EASTERN DISTRICT OF WASHINGTON**

10
11 GARRETT PAESCHKE,
12
13 Plaintiff,

14 v.

15 GENERAL MOTORS, LLC, a
16 foreign corporation,

17 Defendant.
18

No. 4:16-cv-5050-SAB

**PLAINTIFF’S MOTION TO
COMPEL**

Without Oral Argument
June 29, 2018 at 6:30 pm

19 **I. Introduction**

20 On December 1, 2017, the Court ordered GM to respond to the plaintiff’s
21 Requests for Production Nos. 9 & 15. (ECF No. 84). GM produced some
22 documents in accordance with the Court’s order, but also withheld hundreds of
23 documents and potential evidence by claiming attorney-client privilege and the
24 work product doctrine. Pursuant to Fed R. Civ. P. 37, plaintiff contends a
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1 substantial number of these documents were wrongfully withheld and must be
2 disclosed. Plaintiff's counsel conferred by phone with GM's counsel on March 23,
3 2018, in order to fulfill our meet and confer requirements of Local Rule 37.1. The
4 parties are at an impasse on the production of said documents.
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6 **II. Photographs**

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8 Courts recognize that there are two types of work product, *fact work product*
9 and *opinion work product*. *Ramirez v. Olympic Health Mgmt. Sys., Inc.*, 2008 U.S.
10 Dist. LEXIS 105474, *6-7, 2008 WL 5377882, *3 (E.D. Wash. Dec. 23, 2008).
11 *Fact work product* will be disclosed if the opposing counsel has "substantial need
12 for the information and cannot otherwise obtain its substantial equivalent without
13 undue hardship." *Id.* (citing *United States v. Torf*, 357 F.3d 900 at 906 (9th Cir.
14 2003)). An example of factual work product is photos, because they document
15 injuries sustained and/or the defects in the seater heater systems of subject vehicles
16 and do not reflect the opinions or conclusions of GM's counsel, experts or
17 employees. *See id.*
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21 Here, there is a substantial need for the requested photographs because the
22 plaintiff is pursuing a products liability claim against GM. Photographs of other
23 similar incidents can be used to prove notice of a defect or dangerous condition,
24 causation, and for impeachment purposes. *Pau v. Yosemite Park & Curry Co.*, 928
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1 F.2d 880, 889 (9th Cir. 1991) (stating that if a plaintiff provides a proper
 2 foundation, other similar incidents could be used to establish notice, causation, or
 3 existence of a dangerous condition). *Cooper v. Firestone Tire & Rubber Co.*, 945
 4 F.2d 1103, 1105 (9th Cir. 1990) (Other similar incidents can be used for
 5 impeachment purposes, without a showing of substantial similarity in the products,
 6 when a defendant argues its product is “generally safe”).
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9 Additionally, it is an undue hardship for the plaintiff to obtain substantially
 10 similar photos of what is in GM’s possession, because such photographs were
 11 created as far back as 2009 and possibly earlier. Defects in these vehicles seat
 12 heater systems that have been repaired or altered by this point, and any burn
 13 injuries to persons documented in these photographs would have healed. (See Doc
 14 Id 38945418). Therefore, GM should be compelled to disclose all of the
 15 photographs listed in its privilege log.
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18 **III. Reports/Repair Orders**

19 GM is also withholding documents including a “MDI Report,” a “ESIS
 20 investigator testing of vehicle” and a “Memo and related repair order
 21 documentation gathered at the direction of counsel.” (Document Id 38945398;
 22 38945570; 38945828). All of these documents are not work product protected
 23 because they were prepared independently by third parties and then later obtained
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1 by GM's counsel. *See Ramirez v. Olympic Health Mgmt. Sys., Inc.*, 2008 U.S. Dist.
2 LEXIS 105474, *6-7, 2008 WL 5377882, *2-3; Document Id 38945398.

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4 Like the withheld photographs, all these types of documents in GM's
5 privilege log relate to other similar burn incidents with its seat heater systems. It
6 follows that there is a substantial need for the plaintiff to have access to these
7 documents. This is most necessary here since GM does not even identify which
8 dealerships created the identified reports. As a result, plaintiff has no way of
9 obtaining these documents without undue hardship, assuming these documents still
10 exist elsewhere other than at GM's offices or with their attorneys. Accordingly,
11 GM should disclose all third-party reports, memos, assessments, or similar type
12 documents.

13 **IV. Data Sheets and PowerPoint Presentations.**

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17 GM has withheld dozens of "Early Technical Assessment System Data
18 Sheets" concerning GM seat heater systems based again on claimed attorney client
19 privilege and the work product doctrine. Courts have held that "attorney-client
20 privilege protects confidential disclosures made by a client to an attorney in order
21 to obtain legal advice, . . . as well as an attorney's advice in response to such
22 disclosures." *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997) (quoting
23 *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996)). However, it is
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1 | important for the Court to note that GM has the burden of establishing the existence
2 | of an attorney-client privilege, because not all communications with counsel are
3 | privileged. *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009); *Ruehle*, 583
4 | F.3d at 607-608 (stating "[t]he fact that a person is a lawyer does not make all
5 | communications with that person privileged.")(quoting *United States v. Chen*, 99
6 | F.3d 1495, 1501 (9th Cir. 1996); *Tri-State Generation & Transmission Ass'n v.*
7 | *Mitsubishi Int'l Corp.*, 2016 WL 3854455 (D. Ariz., July 15, 2016)(recognizing
8 | that an accident report created by a third-party at the request of counsel was not
9 | privileged, because the report served the dual purposes of preventing the
10 | reoccurrences of accidents in addition to preparing for litigation)). Simply adding
11 | the name of an attorney to such documents does not miraculously create a
12 | privilege.
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17 | Courts are to consider attorney client privilege of documents according to
18 | the "because of" standard which looks at "the totality of the circumstances and
19 | affords protection when it can fairly be said that the 'document was created because
20 | of anticipated litigation, and would not have been created in substantially similar
21 | form but for the prospect of that litigation.'" *United States v. Torf (In re Grand*
22 | *Jury Subpoena)*, 350 F.3d 1010, 1016 (9th Cir. 2003), *amended by* 357 F.3d 900,
23 | 908 (9th Cir. 2004)(emphasis added)(quoting *United States v. Adlman*, 134 F.3d
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1 1194 at 1195 (2nd Cir. 1998)); *See also* Charles Alan Wright, Arthur R. Miller,
2 and Richard L. Marcus, 8 *Federal Practice & Procedure* § 2024 (2d ed. 1994)).
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4 Here, all of GM's engineering assessments and analysis would have been
5 created in substantially similar forms, because pursuant to Washington law, and
6 virtually all other states, manufactures have a statutory duty to learn about
7 dangerous conditions in its products and take proper steps to warn consumers. *See*
8 RCW 7.72.030(1)(c) (A product is not reasonable safe... where a reasonably
9 prudent manufacturer should have learned about a danger connected with the
10 product after it was manufactured. In such a case, the manufacturer is under a duty
11 to act with regard to issuing warnings or instructions concerning the danger).
12 Therefore, all of the engineering assessments and presentation materials identified
13 in GM's privilege log serve a statutory requirement and should not be withheld
14 under a specious claim of attorney client privilege.
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18 **V. Insufficiencies in Privilege Log**

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20 GM's also provided vague and insufficient descriptions of the withheld
21 documents in its "privilege log." For example, under the title of general
22 description GM says it will only state that the documents are "legal." (Document
23 Id 38945425). This description does not provide plaintiff with any insight of what
24 such documents contain and/or whether GM's privilege claim is valid. As such,
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1 these claims of privilege should be rejected by the Court unless GM can first
2 properly identify the document and secondly support a valid claim of privilege.
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4 **VI. Conclusion**

5 Based on the forgoing, GM clearly continues to withhold numerous
6 documents, as this is its second attempt to comply with the Court's Order. As such,
7 the plaintiffs contend that the only way to ensure that GM is not improperly
8 withholding relevant and non-privileged documents is for the Court to appoint a
9 Special Master to review all the withheld documents in its privilege log and if the
10 Special Master determines a privilege does not exist provide the plaintiffs with all
11 nonprivileged documents.
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15 RESPECTFULLY SUBMITTED this 30th day of May, 2018.

16 **EYMANN ALLISON HUNTER JONES P.S.**

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19 BY: s/ Richard C. Eymann
20 RICHARD C. EYMANN, WSBA #7470

21 *Attorneys for Plaintiff*
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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2018, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following participants:

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s/ Richard C. Eymann
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