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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 REPLY IN SUPPORT
OF MOTION TO COMPEL**

With Oral Argument
July 19, 2018 10:00 am

19
20 The plaintiff’s motion should be granted. Defendant General Motors, LLC.
21 (“GM”) produced documents in response to a Court Order Compelling Discovery
22 in December 2017. Included in the production by Defendant in January was a
23 lengthy Privilege Log listing hundreds of documents excluded from the
24 production.
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1 **I. Plaintiff's Motion to Compel is Proper and Timely.**

2 This is not merely a Motion brought following the close of discovery as
3 GM implies, nor is it untimely, given the notification provided to GM. This is a
4 motion brought following an Order compelling GM to produce documents it had
5 previously withheld. See **ECF No. 84**. GM produced several DVDs containing
6 hundreds of pages of documents, which Plaintiff's counsel had to upload, review,
7 and update to their database a very time-consuming process. See Declaration of
8 Richard C. Eymann in Support of Plaintiff's Reply re: Motion to Compel filed in
9 support hereof ("Eymann Decl."). Included with this production was a
10 significantly deficient Initial Privilege Log. In response to a letter we sent, GM
11 supplemented the Privilege Log in an attempt to comply with FED. R. CIV. P.
12 26(b)(5). *Id.*

13 Following review of the documents produced consisting of nearly two
14 thousand pages and in an attempt to analyze the extensive Privilege Log, on
15 March 6, 2018, the same day the Final Witness and Exhibit Lists were due,
16 Plaintiff served a Subpoena Duces Tecum on GM and defense counsel requesting
17 the documents listed on the Privilege Log be produced to the Court for *in camera*
18 review, so that the Court could determine which documents were actually
19 privileged. *Id.* This Subpoena is mentioned in GM's response, but not factored
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1 into their calculations in support of their complaints regarding timeliness.
2 Accordingly, GM had notice of Plaintiff's dispute regarding the Privilege Log
3 shortly following its production of documents responsive to the Court's Order to
4 Compel (ECF No. 84).
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6 GM's continued reliance upon *Rogers v. Brauer Law Offices, PLC*, No.
7 CV-10-1693-PHX-LOA, 2011 WL 3665346 (D. Ariz. Aug. 22, 2011) in its
8 responses to Plaintiff's motions to compel is incorrect. The nine factors
9 considered by the court in *Rogers* do not apply to the plaintiff's motion, because
10 the defendant in *Rogers* brought a motion to compel two months after the
11 discovery deadline when the plaintiff refused to produce *any records* related to
12 her overtime claim against the defendants. *See id.*; FED. R. CIV. P. 26(e). Here,
13 the discovery deadline is not a relevant factor as GM was responding to the
14 Court's Order compelling it to produce documents previously withheld and/or
15 which GM had an ongoing duty to produce. *See ECF No. 84.*
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20 **II. Plaintiff Fulfilled His Duty to Meet and Confer.**

21 Although Plaintiff's counsel inadvertently got the date of the meet and
22 confer conference wrong in the initial Motion, Plaintiff has spoken to
23 Defendant's counsel and sent letters and emails discussing this matter. *See*
24 Eymann Decl. Plaintiff's counsel is convinced the parties are at an impasse. *Id.*
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1 This dispute all started in 2017 with correspondence and meet and confer
2 conferences on October 24 and October 26, 2017. *See* **ECF Nos. 69** and **69-1**.
3
4 Nothing was resolved, leading to the Court’s Order Granting Plaintiff’s Motion
5 to Compel. Those meet and confer conferences included discussions over
6 documents presently being withheld, such as testing data and photographs of
7
8 other similar incidents.

9 **III. Plaintiff has Provided a Basis for Disclosure of Privileged Documents.**

10 In Plaintiff’s original Motion to Compel, information was sought regarding
11 other similar incidents for all GM vehicles with a similar seat heating system.
12 This included a request for presumably privileged documents as Request No. 9
13 sought “[a]ll documents related to incidents of GM vehicles seat heaters
14 overheating, including, but not limited to: a. Consumer complaints, letters,
15 memos, and emails (including those from fleet operators); b. Field reports,
16 including dealer field reports; c. Third-party arbitration proceedings; d.
17 Complaints filed with a Court of law; e. Reports by any governmental agencies;
18 f. Internal memoranda, reports or summaries of any kind involving property
19 damage or burn injuries from car seat heaters; and g. Photographs of burn injuries
20 or property damage” and Request No. 15 sought “[a]ll documents, including
21 correspondence, memoranda, reports, summaries and compilations related to seat
22 heater burns or the prevention of seat heater burns, submitted to any federal or
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1 state agency, including the National Highway Transportation Safety
2 Administration.”

3 Judge Suko considered the substantial similarity standard and specifically
4 ordered GM to produce the documents requested in Plaintiff’s Request for
5 Production Nos. 9 and 15, which included reports, testing, and photographs of
6 alleged or confirmed burns to persons from 2002 to 2013 related to all GM
7 vehicles with the same or substantially similar seat heater controls. **ECF No. 84**
8 at p. 7. The Court stated:

9
10 The information the court orders to be produced is relevant to Plaintiff’s
11 claims and proportional to the needs of this case, considering the
12 parties’ relative access to the information, the importance of it in
13 resolving the issues in the case, and the fact that its likely benefit to
14 resolving the issues in the case outweighs the burden or expense of
15 producing it. Defendant is undoubtedly no stranger to products liability
16 litigation, presumably including litigation related to heated seats.

17 *Id.* at p. 8. Accordingly, the basis for Plaintiff seeking privileged documents has
18 been well established and is known to GM. It would appear that GM is simply
19 refusing to produce the information ordered by the Court because it does not
20 want Plaintiff to see the same under the pretext of “privilege”, making the present
21 Motion necessary.

22 In order to determine whether confidential documents should be subject to
23 discovery under Rule 26(b) courts have at times required *in camera* inspection of
24 the documents. *Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d Cir.1992); *In re*
25 *Vargas*, 723 F.2d 1461 (10th Cir. 1983), *appeal after remand* 727 F.2d 941 (10th
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1 Cir. 1984), cert. denied 469 U.S. 819, 105 S.Ct. 90, 83 L.Ed.2d 37 (1984);
2 *Overlake Fund v. City of Bellevue*, 60 Wn.App. 787, 810 P.2d 507 (1991), review
3 *denied* 117 Wn.2d 1022, 818 P.2d 1098 (1991), approving in camera inspection
4 of documents by trial court to resolve dispute over applicability of attorney work
5 product privilege to requested production of documents. Here, the Plaintiff is
6 making such a request for the Court to determine the applicability of the privilege
7 to the documents withheld in light of the Order to Compel (**ECF No. 84**).

9 As an example of withheld documents, GM argues that Plaintiff has failed
10 to show a substantial need for photographs of other similar incidents. GM then
11 places the burden on Plaintiff to acquire these documents “elsewhere.” As stated
12 in Plaintiff’s Motion to Compel (**ECF No. 113**), it is an undue hardship, if not
13 impossible, for the Plaintiff to obtain substantially similar photos of what is in
14 GM’s possession as such photographs were created as far back as 2009 or earlier.

16 This type of factual work product shows injuries sustained and/or defects
17 in the seat heater systems of GM vehicles and can be used to prove, as
18 illustration, notice of a defect or dangerous condition, causation, and for
19 impeachment purposes.

21 GM also states that Plaintiff has failed to show substantial need for work
22 product documents, which it identifies as documents gathered by “GM’s Agents
23 in anticipation of litigation” and “assessments of claims prepared by GM
24 Employees in anticipation of litigation and to communicate their analysis to GM
25 legal counsel”, stating that these documents are protected. As stated above, the
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1 substantial need for this information was set forth in Plaintiff's original Motion to
2 Compel (ECF No. 63) and the Court's Order granting said Motion (ECF No.
3 84).

4 Despite GM's deficient description of withheld documents, Plaintiff has
5 been able to identify that it has withheld reports, testing of vehicles, and data
6 sheets which relate to other similar burn incidents with GM seat heater systems,
7 and as such, plaintiff has a substantial need to have access to these documents in
8 preparation for trial.
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10 **IV. The Privilege Log Fails to Establish that GM's Privilege Claims are**
11 **Meritorious.**

12 Plaintiff has done the best they can to identify documents they believe GM
13 is withholding, including photographs, reports/repair orders, and data sheets.
14 However, the Initial Privilege Log and its Supplemental Privilege log after
15 Plaintiff complained, consists of "generalized" statements that lack sufficient
16 detail to establish a prima facie showing of privilege. *Equal Employment*
17 *Opportunity Comm'n v. BDO USA, L.L.P.*, 856 F.3d 356, 362 (5th Cir. 2017)
18 (recognizing that the party asserting privilege must bear the burden of proving
19 that a claim of privilege applies); *Nutmeg Ins. Co. v. Atwell, Vogel & Sterling A*
20 *Div. of Equifax Servs., Inc.*, 120 F.R.D. 504, 510 (W.D. La. 1988) ("Accordingly,
21 the proponent must provide the court with enough information to enable the court
22 to determine privilege, and the proponent must show by affidavit that precise
23 facts exist to support the claim of privilege.").

1 As illustration, GM’s Privilege Log lists what Plaintiff knows to be “Case
2 Activity Reports” simply as “Legal summary of claim.” The only reason
3 Plaintiff even knows what this document is at all is because it is a redacted
4 document, so plaintiff has at least the partial document. Hundreds of other
5 similar documents have not been produced in any form and the descriptions are
6 either vague and general or contain words such as “legal” that give the
7 appearance of privilege. Without an *in camera* review, Plaintiff cannot know
8 what of these hundreds of documents are properly withheld and which should be
9 produced.
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11 **V. Conclusion.**

12 Based the plaintiff’s Motion and Reply, we are respectfully request that the
13 Court grant relief requested. Plaintiff would be agreeable to a Special Master
14 being appointed to review the documents.
15

16 RESPECTFULLY SUBMITTED this 27th day of June, 2018.

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

18
19 BY: s/ Richard C. Eymann
20 RICHARD C. EYMANN, WSBA #7470

21 *Attorneys for Plaintiff*
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 27TH day of June, 2018, I electronically filed
3 the foregoing with the Clerk of the Court using the CM/ECF system which will
4 send notification of such filing to the following participants:
5

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13
14 s/ Richard C. Eymann
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