

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

ADDISON MOORE, ET AL.,

vs.

FORD MOTOR CO., ET AL.

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CASE NO. 2:07-CV-309

**ORDER**

**1. Introduction.**

On May 2, 2008, the court heard argument on the plaintiffs' first, second, and third motions to compel (Dkt. Nos. 48, 59, 89), and the defendant's motion to compel (Dkt. No. 69). This order resolves the remaining disputes between the parties regarding these discovery motions.

**2. Background and Procedural History.**

The accident giving rise to this cause of action occurred on July 26, 2006, near Lufkin, Texas, when a 2005 Ford F-150 pickup truck ("the subject truck") driven by Mr. David Moore slid out of control and was struck on the passenger side by another vehicle. Mr. Moore sustained fatal closed head injuries during this accident, and his niece, Kyleigh Moore, sustained brain injuries. In this case, the plaintiffs claim that the subject truck is defectively designed and unreasonably dangerous in part because the Ford Motor Vehicle Company ("Ford") failed to equip the truck with Electronic Stability Control ("ESC") systems, and failed to equip the truck with safe occupant restraints systems, such as side air bag systems. In this regard, the plaintiffs contend that these safer alternative designs were available to Ford, and have been used on prior and subsequent Ford vehicles. The plaintiffs also contend that these safety features were recommended for use in the subject model year truck.

On October 3, 2007, the court held a scheduling conference in this case during which Ford objected to the court's proposed disclosure requirement contained in the third paragraph of the court's proposed discovery order. Sustaining Ford's objection, the court allowed Ford to proceed under the disclosure requirements embodied in Rule 26 of the Federal Rules of Civil Procedure. To ensure that the court's June, 2008, trial setting was maintained, the court ordered the plaintiffs to serve their requests for production ("RFPs") by October 18, 2007, and ordered Ford to file and serve any objections by November 2, 2007. The court also ordered Ford to produce any responsive documents by November 21, 2007, and set a hearing on Ford's objections for November 26, 2007.

The November 26, 2007, hearing was held in conjunction with a similar hearing in *Hall v. Ford Motor Co.*, 2:07-CV-312 (E.D. Tex. Jul. 26, 2007). During this hearing, Ford objected to the discovery of information beyond the model year of the subject vehicle. The court overruled this objection, and ordered Ford to produce information regarding other similar incidents ("OSI"), *i.e.* incidents involving a passenger side impact, and accident statistics for all North American light truck vehicles having a 1995 through 2007 model year. Included in this vehicle classification were the Ranger, Explorer, Expedition, F150, F250, F350, Excursion, and any Mercury counterpart.

During this hearing, Ford also objected to providing the plaintiffs with ESC and air bag design information for its future model years, namely its 2009 model year F150 pickup truck. Ford based its objection on trade secret grounds. The court overruled Ford's objection as well, and indicated that Ford could produce the requested information in accordance with the appropriate designation under this court's protective order in this case.

With respect to safer alternative designs, the court ordered Ford to provide the plaintiff with a list of vehicles, worldwide, having ESC and/or side air bags. Upon the production of this list, the

plaintiffs were to identify the make and model year vehicles that were to embody Ford's safer alternative design production. The court overruled Ford's objections regarding the scope and relevance of the safer alternative design production, and carried any further objections by Ford. The court set a status conference for December 20, 2007, to entertain any remaining discovery disputes, and ordered Ford to complete its document production within 21 days.

On November 29, 2007, the court conducted a telephonic discovery hotline hearing at the plaintiffs' request. The subject of the hearing was Ford's repeated failure to tender corporate representatives for deposition. After hearing argument from the parties, the court ordered Ford to produce certain corporate representatives for deposition on or before December 21, 2007. Ford failed to subsequently request any form of relief from the court's order in this regard.

At the request of the parties, the court cancelled the December 20, 2007, status conference. The plaintiffs and Ford subsequently attempted to limit the scope of production by entering agreements narrowing the plaintiffs' requests. These efforts failed. Although the agreement called for Ford to produce certain documents relating to certain model year vehicles, the plaintiffs unsuccessfully requested Ford to identify by bates ranges the relevant design drawings, design objectives, performance standards, test reports, photographs and videos. With respect to electronically stored information, Ford insisted that the plaintiffs purchase special software to review the documents, or travel to Michigan (on 30 days advance notice) to view documents at a stand alone terminal.

On March 12, 2008, the plaintiffs filed their first motion to compel. As discussed above, the parties thereafter filed additional motions to compel. Oral argument on these motions was entertained during a hearing on May 2, 2008. These motions are now ripe for adjudication.

**3. Discussion.**

**A. The Plaintiffs' First Motion to Compel.**

In their first motion to compel (#48), the plaintiffs move the court for relief from Ford's failure to complete its document production, as well as Ford's failure to tender knowledgeable corporate representatives for deposition. With respect to Ford's document production, the plaintiffs contend that Ford has failed to provide documents in response to twelve requests for the production of documents ("RFPs") regarding Ford's accident statistics, as well as information regarding Ford's safer alternative designs. In this regard, the plaintiffs contend that Ford has failed to produce information in a useable format, and has continued to maintain objections overruled by the court during the November 26, 2007, hearing. Ford contends that the plaintiffs limited their requests by agreeing to narrow the scope of discovery and that Ford has produced some of the requested information, is still looking for some of the requested information, and has offered their electronic information for inspection at its facilities in Dearborn, Michigan.

The court has reviewed the relevant RFPs and determines that they are not objectionable. The court therefore orders Ford to produce any and all documents that are responsive to each RFP by May 16, 2008. Ford's argument that the parties limited discovery by agreement is rejected. The plaintiffs have repeatedly requested that Ford verify the bates ranges of various documents produced pursuant to the agreement, and the court's review of the record indicates that Ford has failed to do so. Ford is therefore ordered to provide the plaintiffs with the corresponding bates ranges for all documents that are responsive to the listed RFPs including any previously produced documents. Additionally, Ford is ordered to provide the plaintiffs with usable versions of any computer programs and data. This information must be produced in its native format or in another format

which is usable by the plaintiffs and their experts. If necessary, programs must be provided to the plaintiffs which access and interpret the data for evaluation. Ford is ordered to file a sworn statement by May 16, 2008, describing the efforts undertaken to search for the documents ordered produced, as well as a description of the documents and software produced in response to this order. To the extent Ford has already produced the information called for in the RFPs, Ford is ordered to include in its sworn statement a description of the previous document production, and the dates when the responsive documents were served on the plaintiffs. The relevant RFPs follow:

1. Any and all documents showing the designs for the Interactive Vehicle Dynamic (“IVD”) or ESC systems implemented on prior model vehicles before the manufacture of the subject vehicle. *See* RFP No. 10.
2. Any and all documents showing the designs for the IVD or ESC system implemented on the F-150 after the manufacture of the subject truck. *See* RFP No. 11.
3. Any and all documents showing the design drawings for the side air bag and curtain implemented on the F-150 after the manufacture of the subject truck. *See* RFP No. 13.
4. Any and all documents showing the design and/or performance standards for the side structure, seat belts, side air bag and curtain, and IVD or ESC systems. *See* RFP No. 14.
5. Any and all documents showing the FMVSS 214, 201, and IVD-ESC testing on the subject model vehicle, and present F-150 models. *See* RFP No. 16.
6. Any and all documents showing all dynamic side impact testing on the vehicle model and present F-150 model truck, including all deformable barrier, vehicle, and pole impacts. *See* RFP No. 17.
7. Any and all documents showing the reports, videos and photographs of the designs and testing referenced above, as well as any computer analysis and modeling. *See* RFP No. 18.
8. Any and all documents showing Ford’s analysis of competitors and/or component manufacturers’ IVD or ESC systems, including all test reports, videos, photographs, and computer analysis for modeling. *See* RFP No. 23.

9. A copy of the purchase agreement or agreements with the component supplier that designed, manufactured or tested the IVD/ESC system implemented on the F-150, the side air bags for head protection on the F-150 model, the integrated seats utilized on Ford's LTVs or SUVs, as well as the pretensioners that fire in side impacts and/or rollovers. *See* RFP No. 37.
10. A copy of all litigation tests concerning performance of IVD/ESC systems for 1995 to the present. *See* RFP No. 38.
11. A copy of all litigation tests concerning performance of side air bags for head protection from 1995 to present. *See* RFP No. 39.
12. A copy of all litigation tests concerning performance of seat belt buckle and retractor pretensioners and integrated seats from 1995 to the present. *See* RFP No. 40.

If necessary, the plaintiffs are given leave to supplement their expert reports to accommodate information provided by Ford in its supplemental document production. The plaintiffs' supplemental reports are due on or before May 23, 2008.

Turning to Ford's 30(b)(6) deposition testimony, the plaintiffs contend that Ford failed to tender corporate representatives for some of the topics noticed by the plaintiffs. In response, Ford cites to employee turn-over and work-related commitments to explain its failure to tender the appropriate witnesses for these depositions. In support of its contention, the plaintiffs have provided the court with deposition excerpts showing the deponents' lack of knowledge on the noticed topics. Ford failed to provide the court with any counter-designations to refute the plaintiffs' allegations in this regard. Therefore, the court bars any direct or rebuttal trial testimony from Ford on the following topics, which correspond to the appropriate topics in the notice of deposition:

2. The risks of loss of control in side impacts that Ford was aware of when it designed and manufactured the 2005 F-150 regular cab pickup, including:
  - a. frequency of accidents allegedly caused by loss of control and the alleged benefits in reducing these risks by ESC, RSC, or IVD;
  - b. when Ford became aware of how head injuries and deaths occur in side

- impacts;
  - c. the annual number of side impacts recorded in the United States from 1995 to the present;
  - d. the annual number of head injuries from side impacts in the United States from 1995 to the present;
  - e. the annual number of fatalities from head injuries in side impacts in the United States from 1995 to the present;
  - f. the annual number of head injuries from impacts with the B-pillar or interior of the vehicle in side impacts in the United States from 1995 to the present;
  - g. the annual number of brain injuries from head impacts with the striking vehicle or objects outside the vehicle in side impacts in the United States from 1995 to the present;
  - h. Ford's research and analysis of how head injuries and deaths occur in side impacts;
  - i. the number of head injuries from impacts with the B-pillar or interior of the vehicle sustained to occupants involved in side impacts in Ford F-150 models from 1995 to the present;
  - j. the number of head injuries sustained from head impacts with the striking vehicle or objects outside the vehicle in side impact collisions of F-150 pickups from 1995 to the present;
  - k. other side impact incidents, claims, and lawsuits involving Ford's F-150 models from 1995 to the present, including the F-250 or F-350 truck models, that were involved in side impacts where a head injury was allegedly sustained to an occupant in a side impact collision and there was an allegation that the head injury was caused from a defect in the design or marketing of the vehicle's handling or control, seat belt, side structure, or the lack of a side air bag system or IVD/ESC/RSC system.
4. The alternative designs that Ford considered, but did not implement for the vehicle model regarding minimization of the risk of head injuries in side impacts including:
- b. why the alternative designs were not implemented;
  - c. why the IVD, ESC, or RSC designs were not implemented;

- d. why a side air bag system for head protection was not used on the vehicle model;
- g. the performance standards or design objectives for Ford's IVD, ESC, and RSC systems and side air bag systems for head protection that were used in other vehicles from 1995 to the present;

In an attempt to correct its failure to tender appropriate 30(b)(6) witnesses, Ford offered to tender Mr. Paul Schmitt and Mr. Jim Carene for deposition on March 5, 2008. Shortly before Mr. Schmitt's scheduled deposition, however, Ford advised the plaintiffs that he would not be produced for his deposition due to other work-related commitments. Instead of initiating a hotline conference with the court to resolve this dispute, as was requested by the plaintiffs, Ford unilaterally refused to honor its previous agreement. Ford's argument that it offered to produce Mr. Schmitt at a later date is unpersuasive. Ford delayed the relevant 30(b)(6) deposition until the eve of plaintiff's expert designation, then unilaterally cancelled the deposition and ignored the plaintiff's request to involve the court. The court has already ordered Ford to produce corporate representatives once in this case, and Ford's practice of delaying the identification of 30(b)(6) witnesses and refusing to honor its agreements is tantamount to no appearance on these issues.

Additionally, Mr. Carene, during his deposition, admitted that he had no knowledge on the following topics. As such, the court bars any direct or rebuttal trial testimony from Ford on the following topics as well:

1. The name, address, and telephone number of the design release engineer for the P221 F-150 model and all subsequent F-150 models concerning the evaluation, development, design, testing, and release of electronic stability control (ESC), Roll Stability Control (RSC), Advance Trac, seat-integrated restraints with and without padding for the retractor housing, pretensioners, side impact air bags, torso bag, side impact curtains, safety canopies, and side impact and rollover sensing systems;
2. The design release process for the P221 F-150 model and all subsequent F-150 models concerning the development, design, and testing of the Electronic Stability

Control (ESC), Roll Stability Control (RSC), AdvanceTrac, seat-integrated restraint systems with and without padding for the retractor housing, pretensioners, side impact air bags, torso air bags, head thorax bags, side impact curtains, safety canopies, and side impact and rollover sensing systems;

3. The product planning of the safety devices referenced above, as well as all budgets concerning the evaluation, development, design, testing and implementation of the safety devices;
4. The dates the above-referenced safety designs were implemented on the F150 models;
5. The reasons why the designs were not implemented on earlier models; and
6. The designs, design objectives and performance standards, and testing of each of the designs.

**B. The Plaintiffs' Second Motion to Compel.**

In their second motion to compel (#59), the plaintiffs move the court for relief from Ford's failure to produce documents regarding the safer alternative designs on Ford's 2009 model year F-150 pickup truck. During the May 2, 2008, discovery hearing, the court ordered Ford to produce any and all testing documents relating to the plaintiffs' safer alternative design theories for the 2009 F-150 pickup truck by May 9, 2008. The court also ordered Ford to produce by May 9, 2008, any and all software design documents regarding the ESC system that is currently planned to be used with the 2009 F-150 as they currently exist. During the hearing, the court also denied the plaintiffs' request for inspection of the 2009 model year F-150 at this time.

**C. The Plaintiffs' Third Motion to Compel.**

In their third motion to compel (#89), the plaintiffs' move the court to compel Ford to supplement its expert reports with all of the related materials relied upon by their experts. In response, Ford indicated that it would produce the requested information by the discovery deadline. This motion is therefore denied as moot in light of Ford's representation to the court.

**D. The Defendant's First Motion to Compel.**

In its first motion to compel (#69), Ford moves the court to compel the production of documents pertaining to Kyleigh Moore, such as relate to her pre- and post- accident medical condition. The court heard argument on this motion during the May 2, 2008, discovery hearing, and disposed of this motion through various rulings from the bench. This motion is therefore granted to the extent indicated by the court during the May 2, 2008, discovery hearing.

**4. Conclusion.**

The court maintains the current trial setting in this case. Ford's practices in resisting relevant discovery and refusing to tender 30(b)(6) witnesses in a timely manner are consistent with its prior conduct in this court. In addition to the relief contained herein, the court will entertain further requests for relief at the pre-trial conference once the court has reviewed Ford's sworn statement concerning the production the court has ordered.

SIGNED this 9th day of May, 2008.

  
CHARLES EVERINGHAM IV  
UNITED STATES MAGISTRATE JUDGE