UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division

MDL No. 2599
Master File No.: 15-MD-02599-MORENO
S.D. Fla. Case No.: 14-cv-24009-MORENO
S.D. Fla. Case No.: 15-cv-20664- MORENO

IN RE: TAKATA AIRBAG PRODUCT LIABILITY LITIGATION
THIS DOCUMENT RELATES TO: **ALL CASES**

PLAINTIFFS' STATUS REPORT PRECEDING FEBRUARY 28, 2017 HEARING

Pursuant to this Court's Order Appointing Plaintiffs' Counsel and Setting Schedule (ECF No. 393), and in response to the Status Report filed by the Automotive Defendants (ECF No. 1407), Plaintiffs submit this Status Report in advance of the February 28, 2017 hearing to update the Court on the status of this MDL and recent, relevant developments.

A. TAKATA'S PLEA AGREEMENT.

In their status report, the Automotive Defendants, as expected, overstate the significance of Takata's recent plea agreement to these proceedings. Takata's admission of guilt—in a completely separate criminal proceeding to which Plaintiffs were not parties—neither excuses the Automotive Defendants' own reckless, deceptive conduct nor undermines the economic loss claims asserted against them. The evidence Plaintiffs already have collected in this litigation establishes that the Automotive Defendants, staffed with teams of sophisticated engineers, were far from innocent, unsuspecting victims, as they now claim to be. For the Automotive Defendants to call themselves victims insults the real victims here—hundreds of people who have been seriously injured or killed by a device that was supposed to protect them, and tens of

millions of vehicle owners who have been forced to bear the risk of such injury and incurred substantial economic damages, including out-of-pocket expenses, diminution of vehicle value, lost time, and overpayment for an indisputably defective product.

The plea agreement and incorporated statement of facts concern Takata's communication of manipulated or misleading test results to unspecified automotive manufacturers, with the only concrete examples of manipulation described as occurring in 2004 and 2005. (ECF No. 1407-1 at 50-51.) Regardless of the accuracy of Takata's test reports in 2004 and 2005, however, the Automotive Defendants had independent knowledge, that is, other information, that Takata's airbag inflators were not safe well before installing them in millions of vehicles. Indeed, the plea agreement says ***nothing*** about the extent of the Automotive Defendants' knowledge regarding the safety of Takata's inflators. That is because the criminal investigation focused on Takata's conduct, and not the knowledge of the Automotive Defendants.

Documents produced so far in discovery show that the Automotive Defendants were well aware of the risks inherent in filling a metal canister with ammonium nitrate—the notoriously unstable chemical compound Timothy McVeigh used to bomb the Oklahoma City federal building in 1995—and placing it in a steering wheel or dashboard. The Automotive Defendants also were aware that rupture after rupture, both during testing and in the field, confirmed how dangerous and defective Takata's airbags were. In fact, following one such rupture in 2009, one Automotive Defendant chillingly and accurately described the event as "one in which a passenger protection device was transformed into a ***killing weapon***." Despite this knowledge, the Automotive Defendants continued to equip their vehicles with Takata's ticking time bombs and misrepresent to the unsuspecting public that their vehicles were safe, ultimately causing the largest automotive recall in United States history.

Why did the Automotive Defendants act so recklessly? According to documents produced in discovery, including their own, they were focused on the low price of Takata's inflators and concerned that if they stopped using Takata's inflators, they might not have a sufficient supply, which would prevent them from selling vehicles and generating billions of dollars in revenue. Indeed, some of the Automotive Defendants continued to sell vehicles equipped with ammonium-nitrate inflators in 2016, well ***after*** allegations of Takata's test-result deception became public, completely disproving their claim that they would have acted differently had they been told the truth about Takata's test results.

Although more work remains to be done in discovery, the following are only a few examples of the evidence uncovered thus far with respect to just a few of the Automotive Defendants:

Honda

- Honda's emails and internal documents show that it picked Takata's inflators due to their relative "inexpensiveness."
- In 1999 and 2000, Honda was intimately involved in the design of Takata's ammonium-nitrate propellant and chose the "batwing" shape, over Takata's objections.
- During testing of Takata's inflators in 1999 and 2000 at Honda's ***own*** facilities, at least two inflators ruptured.
- In 2004, ten years before the national recall, Honda learned of a field rupture in Alabama, which severely injured the driver.
- In 2006, Takata's manufacturing plant in Mexico suffered a massive explosion fueled by ammonium nitrate, of which Honda was made aware.
- Before Honda initiated its first, narrow recall in 2008, at least 8 ruptures had occurred in Honda vehicles—six in the field and two during the design phase.
- By the end of 2009, at least 14 field ruptures had occurred in Honda vehicles, including the first fatality.

- By the end of 2011, at least 27 field ruptures had occurred in Honda vehicles, still three years before it initiated a nationwide recall.

- In 2012, documents show that Honda believed that Takata was an "untrustworthy company," yet still continued to use Takata's inflators for several more years and refused to initiate a nationwide recall.

- When Honda finally initiated a nationwide recall in 2014, at least ***77*** field ruptures had occurred in Honda vehicles, a figure that grew to at least ***117*** by March 2016.

Toyota

- Toyota chose Takata's inflators "primarily" because of costs, even though, as early as 2003, Toyota had "large quality concerns" about Takata, and considered Takata's quality performance "unacceptable."

- In 2003, a Takata inflator ruptured at a Toyota facility during testing.

- In 2009—five years before the nationwide recall—Toyota became aware of a field rupture in a Toyota vehicle.

- At least 15 ruptures occurred in Toyota vehicles by 2014, when a nationwide recall was initiated.

- Despite the recall, Toyota continued to equip and sell vehicles with inflators containing non-desiccated ammonium nitrate.

Ford

- Ford chose Takata's inflators over the objections of Ford's own inflator expert, who was opposed to the use of ammonium nitrate because of its phase instability and moisture sensitivity—characteristics that make ammonium nitrate unsuitable as an inflator propellant and have contributed to ruptures.

- Ford approved the use of Takata's inflators even though it was aware that they did not meet the USCAR specifications that Ford itself helped draft. These specifications, as early as 2000, singled out separate requirements for inflators containing ammonium nitrate, acknowledging their unique risks.

- Ford overrode the objections of its own inflator expert because Takata was apparently the only supplier that could provide the amount of inflators that Ford needed—as one document states, Ford had "a gun to its head so it had to accept ammonium nitrate." This "gun" was of Ford's own making, as it failed to secure a backup supplier for inflators.

- Ford was aware that Takata's ammonium-nitrate inflators were cheaper than safer guanidine-nitrate inflators.

- Ford was aware that numerous ruptures had occurred during testing of Takata's inflators in November 2004.

- Recognizing the risk of Takata's ammonium-nitrate propellant, Ford insisted on adding desiccant, a drying agent, to the propellant for certain inflators beginning around 2005—yet for almost a decade after that, it continued to equip and sell vehicles with inflators containing non-desiccated ammonium nitrate.

Nissan

- Nissan switched to Takata's inflators primarily, if not solely, to reduce costs—approximately $4 per inflator.

- In late 2005, Nissan began investigating adding desiccant, a drying agent, to the ammonium-nitrate propellant because of concerns that moisture would destabilize the existing propellant.

- In August 2006, eight years ***before*** Nissan initiated a nationwide recall, another automaker told Nissan that it had rejected Takata's inflators because they were too risky, warning Nissan that Takata's inflators had "a lot of potential problems," that they used a "risky propellant . . . explosive with phase changes not correctly under control," that they had a "hard design . . . not correctly adapted to the risky propellant," and that "pellets can jump out of the inflator."

- One month after Nissan received this specific warning, Takata made a presentation about guanidine-nitrate inflators, reporting that they would be significantly more expensive; following the presentation, Nissan continued to use ammonium-nitrate inflators.

- In 2008, Takata reported that Takata's testing revealed instances of "energetic disassembly," one of the many euphemisms for ruptures, in passenger-side inflators.

- By the end of 2014, at least 8 field ruptures had occurred in Nissan vehicles, and by the end of 2015, at least 13 field ruptures had occurred.

BMW

- Even though Plaintiffs have the fewest records for BMW, because BMW AG has refused to accept service or produce records through its subsidiary, the limited documents produced thus far still show that BMW was culpable.

- Documents show that "cost saving" drove BMW to choose Takata inflators.
- In 2003, a Takata inflator in a BMW ruptured in Switzerland, with a metal shard ripping through the airbag.
- In 2009, Takata alerted BMW of ruptures in other manufacturers' vehicles that used the same inflators that BMW used.
- In March 2010, BMW told NHTSA that it was unaware of any field incidents, despite the fact that it knew of the 2003 rupture in Switzerland.

As these examples demonstrate, there is significant, concrete evidence, not simply allegations, showing that the Automotive Defendants were aware of how dangerous and risky Takata's inflators were, but continued to use them anyway because they were cheap, misleading consumers into believing that their vehicles were safe. Takata's plea agreement—reached in a criminal proceeding that did not and could not address the Automotive Defendants' civil liability to Plaintiffs—cannot make this evidence magically disappear.[1]

Although the evidence shows that the Automotive Defendants were, in fact, aware of the risks of using Takata's inflators, it is not necessary for Plaintiffs to establish this fact to prevail on all of their economic loss claims. The Automotive Defendants are simply wrong to claim that Plaintiffs "must prove that the Automotive Defendants knew, when they sold the vehicles at issue, the inflators were defective and could rupture upon deployment." (ECF No. 1407 at 2.) Indeed, some of Plaintiffs' claims, such as the implied warranty of merchantability claims, do not even have a knowledge element, and those claims that do have a knowledge element do not require complete, subjective knowledge of the precise risk to find the defendant liable.

In short, Takata's plea agreement does not undercut Plaintiffs' economic loss claims against the Automotive Defendants.

[1] Although the plea agreement may be admissible against Takata as an admission by a party opponent, the general prohibition on hearsay precludes the Automotive Defendants from even using it against Plaintiffs.

B. STATUS OF DISCOVERY.

Plaintiffs and Defendants are continuing to pursue fact discovery. In their status report, Defendants request that the Court set a fact-discovery deadline in the fall of 2017. This request was a surprise to Plaintiffs, as Defendants did not confer with Plaintiffs in advance of presenting it to the Court, in violation of the Southern District of Florida's Local Rules. In any event, Plaintiffs oppose Defendants' requested deadline, because it will severely prejudice Plaintiffs by not providing sufficient time to complete discovery, and will unfairly reward Defendants for delaying discovery.

The imbalance in the number of depositions taken thus far is telling. While Defendants have deposed more than 70 class representatives, Plaintiffs have deposed only 10 Takata fact witnesses and 18 witnesses from the Automotive Defendants. In large part, this imbalance is a product of the Automotive Defendants refusing to schedule depositions of their witnesses within a reasonable amount of time after the issuance of deposition notices, and their insistence on a deposition protocol that limits Plaintiffs to an initial set of 10 depositions per Defendant group. Plaintiffs issued an initial set of deposition notices for fact witnesses of Automotive Defendants in late October and early November and requested dates for the depositions in December or January. Because of the initial limit of 10 depositions, Plaintiffs only noticed several depositions per Automotive Defendant at first. With few exceptions, the Automotive Defendants refused to make their witnesses available on or near the dates requested, and instead offered dates in February, March, or April. And even then, several depositions had to be postponed because Automotive Defendants realized that they had failed to produce *thousands* of documents, many in Japanese, from the deponents.

For example, Plaintiffs noticed the depositions of seven Honda witnesses on October 27, 2016, seeking deposition dates in December and January. Honda objected to producing three of the witnesses—two of whom are former employees, and one of whom Honda asserted did not have relevant knowledge. Honda produced one of the remaining four witnesses for a deposition in mid-December. The other three witnesses were scheduled to be deposed in late February and early March, almost ***four months*** after the issuance of the deposition notices. But two of those three depositions had to be delayed even further, because Honda discovered that it had failed to produce *thousands* of documents from the deponents. Those two depositions are tentatively scheduled for late-March, ***five months*** after the issuance of deposition notices. Plaintiffs have encountered similar unjustifiable delays with the other Automotive Defendants.

Although the Automotive Defendants may commit to presenting their witnesses in a timely manner in the future, and Plaintiffs will seek the assistance of the Special Master if additional unwarranted delays occur, some delays will be unavoidable due to the need to depose some witnesses in Japan, the translation of thousands of Japanese documents, and the protocol that the Automotive Defendants insisted upon. Plaintiffs have been informed that it takes at least six weeks to schedule a deposition in Japan, as special visas must be obtained and a specific room at the U.S. embassy or consulate must be reserved. Additionally, once Plaintiffs reach the 10-deposition limit for a Defendant group, Plaintiffs may need to litigate before the Special Master for permission to take additional depositions. As there are at least 30 relevant witnesses for each Automotive Defendant, simply gaining permission to notice depositions will delay the progress of discovery.

Lengthy delays in the production of documents have also interfered with discovery. Most of the Automotive Defendants have only recently completed production of Japanese-language

documents, and the Takata Defendants are still producing documents on a rolling basis. One Automotive Defendant—BMW AG—is still contesting service and has yet to produce a single document. Additionally, in reviewing the documents that have been produced, Plaintiffs have discovered significant problems in the productions that have required time to correct, and have identified glaring deficiencies, such as the failure to produce documents from certain important witnesses. Discussions with the Automotive Defendants to address these issues are ongoing, and some issues will need to be litigated before the Special Master.

Moreover, because of the large volume of documents that already have been produced, especially Japanese-language documents, Plaintiffs need a substantial amount of additional time simply to finish reviewing and analyzing documents. Even though more than 50 attorneys from 13 Plaintiffs' firms have been tirelessly reviewing documents, a significant amount of documents still must be reviewed. As the Automotive Defendants did not complete production of English-language documents until one-and-a-half years after the litigation began, and did not complete production of Japanese-language documents until almost two years after the litigation began, it would be unrealistic to expect Plaintiffs to review all the produced documents in just a matter of months.

Given the delays Defendants have created and the scope of this eight-defendant MDL, it would substantially prejudice Plaintiffs and unfairly benefit Defendants to set the fact-discovery cutoff in the fall of 2017. Instead, Plaintiffs respectfully request that the Court hold monthly status conferences to ensure that the case continues to move forward without any unwarranted delays, and that in the fall of 2017, the Court assess how much additional time is needed to complete fact discovery. This would give the parties the opportunity to litigate this eight-defendant MDL efficiently, yet effectively, without unduly prejudicing Plaintiffs' rights.

Dated: February 27, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of the Court via CM/ECF and served upon all counsel of record via delivery of Electronic Notices of Filing on February 27, 2017.

By: */s/ Peter Prieto*
Peter Prieto