UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re BRIDGESTONE/FIRESTONE, INC. ATX, ATX II AND WILDERNESS TIRES PRODUCTS LIABILITY LITIGATION	Master File No. IP 00-9373-C-B/S MDL No. 1373
THIS DOCUMENT RELATES TO: **Colombian Cases:** IP 00-5083-C-B/S; IP 00-5089-C-B/S IP 00-5090-C-B/S; IP 00-5091-C-B/S IP 00-5098-C-B/S; IP 00-5099-C-B/S **Venezuelan Cases:** IP 00-5011-C-B/S; IP 00-5013-C-B/S; IP 00-5065-C-B/S; IP 00-5078-C-B/S; IP 00-5079-C-B/S; IP 00-5080-C-B/S; IP 00-5081-C-B/S; IP 00-5082-C-B/S; IP 00-5084-C-B/S; IP 00-5085-C-B/S; IP 00-5086-C-B/S; IP 00-5087-C-B/S; IP 00-5088-C-B/S; IP 00-5092-C-B/S; IP 00-5093-C-B/S; IP 00-5094-C-B/S; IP 00-5095-C-B/S; IP 00-5096-C-B/S; IP 00-5097-C-B/S; IP 00-5100-C-B/S; IP 00-5101-C-B/S; IP 00-5102-C-B/S; IP 00-5103-C-B/S; IP 00-5104-C-B/S; IP 00-5105-C-B/S; IP 00-5106-C-B/S; IP 00-5107-C-B/S; IP 00-5108-C-B/S; IP 00-5109-C-B/S; IP 00-5110-C-B/S; IP 00-5111-C-B/S; IP 00-5112-C-B/S; IP 00-5113-C-B/S; IP 00-5114-C-B/S; IP 00-5115-C-B/S; IP 00-5116-C-B/S; IP 00-5117-C-B/S; IP 00-5118-C-B/S; IP 00-5119-C-B/S**;** IP 00-5120-C-B/C	

DEFENDANTS FORD MOTOR COMPANY'S AND BRIDGESTONE/FIRESTONE, INC.'S JOINT OPPOSITION TO PLAINTIFFS' MOTION TO SET DISCOVERY AND BRIEFING SCHEDULE ON DEFENDANTS' MOTIONS TO DISMISS VENEZUELAN AND COLOMBIAN CASES ON *FORUM NON CONVENIENS* GROUNDS

Defendants Ford Motor Company ("Ford") and Bridgestone/Firestone, Inc. ("Firestone) respectfully submit this opposition to plaintiffs' Motion To Set Discovery And Briefing Schedule On Defendants' Motions To Dismiss Venezuelan And Colombian Accident Lawsuits On *Forum Non Conveniens* Grounds. ("Pl. Br. ___".)

Plaintiffs ask this court to defer ruling on defendants' *forum non conveniens* motions for six months or longer to allow them to engage in wide-ranging and ill-defined "jurisdictional discovery." Plaintiffs' request should be denied. As discussed below, the discovery that plaintiffs propose is unnecessary for the resolution of defendants' *forum non conveniens* motions. Moreover, plaintiffs' proposal to defer consideration of defendants' motions for up to six months is merely designed to thwart defendants' ability to defend these cases, and to allow these cases to grow roots in the United States, making their ultimate dismissal for trial in Venezuela and Colombia more difficult.[1] The Court should deny plaintiffs' request for jurisdictional discovery, and set a reasonable briefing schedule that will allow adequate time for the plaintiffs to prepare

[1] Plaintiffs' brief misleadingly asserts that defendants have been unwilling to grant plaintiffs reasonable time in which to oppose their *forum non conveniens* motions. This is not the case. On January 5, 2001 (the date plaintiffs' opposition to Ford's *forum non conveniens* motion was due) plaintiffs' counsel, Mr. Diaz, called Ford's counsel, John Beisner, to discuss plaintiffs' desire to conduct discovery prior to responding to Ford's *forum non conveniens* motion. During that call, the primary discovery Mr. Diaz indicated he had in mind was exploring the sources of tires used on vehicles sold in Venezuela and Colombia, and the sources of elements of the vehicles sold in those countries. Mr. Beisner responded that the information sought by Mr. Diaz could be readily ascertained through inspections of the vehicles or tires – which are, of course, not in defendants' possession – rather than through extended formal discovery. *See* Letter from John H. Beisner, to Victor M. Diaz, Jr., dated Jan. 11, 2001 (attached hereto as Exhibit 1). Ultimately, defendants proposed extending the time for plaintiffs' to respond to defendants' motions to February 9, 2000, while agreeing to discuss alternatives with Mr. Diaz. Defendants have since agreed to grant plaintiffs an additional two week extension

Footnote continued to next page

their opposition briefs (including any necessary affidavits), while allowing for the prompt resolution of defendants' motions.

I. THE DISCOVERY PROPOSED BY PLAINTIFFS IS UNNECESSARY TO THE RESOLUTION OF DEFENDANTS' *FORUM NON CONVENIENS* MOTIONS

Plaintiffs argue that before this Court considers dismissing these cases for refiling and trial in Venezuela and Colombia, the parties must engage in months of jurisdictional discovery to determine the location of virtually all of the evidence that could be used to support the parties' legal theories, including evidence relating to where the tires at issue were produced and tested, where the vehicles and tires at issue were designed, and where information relating to tire failures and rollover accidents was compiled and analyzed. (Pl. Br. at 12.) This argument is a red herring.

Defendants do not dispute that documents and other evidence relating to plaintiffs' liability theory – including certain documents relating to the design, manufacture, testing and analysis of the tires and vehicles at issue in these cases – are located in the United States.[2] Nor does it appear that plaintiffs' take issue with the fact that key "case-specific or damage witnesses" and other evidence are located in Venezuela and Colombia. (Pl. Br. at 10.) It is not surprising that in these cases, as in most product liability lawsuits filed by foreign plaintiffs against manufacturers located in the United States for accidents that occurred abroad, relevant evidence will be found both in the

---

footnote continued from previous page

– through January 23, 2001 – to file their opposition briefs, should this court deny their request for discovery.

United States and in the fora where the accidents occurred. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (upholding dismissal on *forum non conveniens* grounds even though "records concerning the design, manufacture, and testing of the propeller and plane [were] located in the United States," because case-specific witnesses and evidence were located in Great Britain, beyond the reach of the court's compulsory process); *Danser v. Firestone Tire & Rubber Co.*, 86 F.R.D. 120, 124 (S.D.N.Y. 1980) (dismissing product liability suit on *forum non conveniens* grounds where evidence relating to plaintiffs' liability theory was located at defendants' Ohio headquarters, but where case-specific evidence was located in West Germany and the Netherlands, where the accident occurred.)

Given that it is undisputed that evidence relating to plaintiffs' claims and defenses is located both in the United States and in Venezuela and Colombia, plaintiffs' request to take months of jurisdictional discovery to determine the precise location of documents and evidence makes little sense, and "would defeat the purpose of [defendants'] motion." *Piper*, 454 U.S. at 258. The authorities cited by plaintiffs certainly do not support their proposal.

Plaintiffs' primary authority, *La Seguridad v. Transytur Line*, 707 F.2d 1304 (11th Cir. 1983), was an admiralty case that involved the loss of goods being shipped from Miami to Venezuela. Because the parties did not know where the goods at issue were lost (Miami, Venezuela or in between), it was not clear either to the parties or

---

footnote continued from previous page

[2] Significantly, plaintiffs nowhere argue that such evidence is located in Florida or Alabama, the jurisdictions where plaintiffs chose to file their lawsuits, and where, barring

Footnote continued to next page

to the court what documents or witnesses might be relevant, or even what the parties' claims or defenses would be.[3] The Eleventh Circuit remanded the case to the district court for clarification of the basic facts and issues underlying the case, holding open the possibility of future dismissal on *forum non conveniens* grounds.

In contrast to *La Seguridad*, there is no dispute that each of the automobile accidents in these cases occurred in Venezuela or Colombia, and involved residents of those countries. Nor is there any doubt that plaintiffs will be claiming that the tires and vehicles in these cases were defective, and that defendants will be asserting defenses based on plaintiffs' contributory negligence, third party liability, product misuse and alteration, assumption of risk, and other common product liability defenses. *See e.g.* Defendant Ford Motor Company's Answers, Defenses and Affirmative Defenses to Plaintiffs' Complaint, *Albers et al. v. Bridgestone/Firestone, Inc., et al.*, IP-00-5081-C-BS. Plaintiffs' proposed discovery would do little or nothing to elucidate the issues, particularly given the inability of this court to compel the production of third party witnesses and evidence located in Venezuela and Colombia. *See Piper,* 454 U.S. at 258 (rejecting plaintiffs' argument that extensive investigation is required before deciding *forum non conveniens motion*")[4]; *see also Van Cauwenberghe v. Biard*, 486 U.S. 517,

---

footnote continued from previous page

a *forum non conveniens* dismissal, their cases are likely to be tried.

[3] The *La Seguridad* court did not hold, as plaintiffs suggest, that dismissal would be appropriate only if defendants first stipulated to liability. (Pl. Br. at 13.)

[4] Plaintiffs argue that this Court cannot grant a *forum non conveniens* dismissal without first requiring the parties to develop a "detailed statement of claims and theories of recovery and defenses, and the corresponding identification of relevant witnesses and documents." (Pl. Br. at 7.) However, in *Piper*, the U.S. Supreme Court rejected any such requirement, holding that any requirement that defendants "submit affidavits identifying

Footnote continued to next page

529 (1988) ("the district court's [*forum non conveniens*] inquiry does not necessarily require extensive investigation").

Plaintiffs also rely on *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), for the proposition that the party opposing a *forum non conveniens* motion is entitled to fact-based discovery. In fact, the *Fitzgerald* court disagreed with this proposition. Upholding the district court's imposition of a protective order barring most discovery, the Second Circuit observed:

> [A] motion to dismiss for *forum non conveniens* does not call for a detailed development of the entire case; rather, discovery is limited to the location of important sources of proof. It is undisputed that the proposed depositions dealt with topics for which full information was already available. Nor did the district court abuse its discretion, on this motion to dismiss for *forum non conveniens*, in failing to require detailed disclosure by the defendants of the names of their proposed witnesses and the substance of their testimony.

Id. at 451 n. 3.[5] The detailed factual investigation sought by plaintiffs is unnecessary. The court should deny their motion for discovery.

---

footnote continued from previous page

the witnesses they would call and the testimony these witnesses would provide" was "not necessary." 454 U.S. at 258. As the Court noted, defendants moved for dismissal "precisely because many crucial witnesses are located beyond the reach of compulsory process, and thus are difficult to identify or interview." *Id.*

[5] The remaining cases on which plaintiffs rely either do not involve *forum non conveniens* issues, or are otherwise distinguishable. (Pl. Br. at 6.) In *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 182 (3d Cir. 1991), the Third Circuit reversed a *forum non conveniens* dismissal because it determined that the court in the alternative forum would not be able to compel the production of third party evidence or witnesses located in the United States. No such concern exists in these cases, given defendants' willingness to grant plaintiffs full access to all discovery conducted in the MDL proceedings. If Plaintiffs cases are tried in Venezuela and Colombia, plaintiffs will have access to any and all evidence they would have if these cases were tried in the United States.

Footnote continued to next page

II. PLAINTIFFS' DISCOVERY PROPOSAL WILL SEVERELY PREJUDICE DEFENDANTS

Aside from being unnecessary, the discovery scheme advocated by plaintiffs is fundamentally unfair to defendants. Because this Court has the power of compulsory process over witnesses and evidence located in the United States, but not over third-party witnesses and evidence located in Venezuela and Colombia, any jurisdictional discovery that this Court ordered would inevitably be one-sided. Through such discovery, plaintiffs will attempt to confirm what everyone already knows – that evidence relating to the design, testing, manufacturing and analysis of the types of tires and vehicles at issue in these cases is located in the United States.

However, defendants have no corresponding mechanism to compel the production of such evidence in Venezuela and Colombia. Defendants cannot compel the testimony of third party witnesses who are likely to have critical evidence relating to the condition and maintenance of the tires and vehicles actually at issue in these cases, the circumstances of the accidents and subsequent investigations, and plaintiffs' medical treatment and damages. Indeed, unless and until these cases are dismissed and refiled in Venezuela and Colombia, defendants have virtually no means to develop the factual record necessary to formulate and prove their defenses.

This disparity not only counsels the denial of plaintiffs' motion to take jurisdictional discovery, but the prompt dismissal of these cases for refiling and trial in

---

footnote continued from previous page

Venezuela and Colombia, where all parties will have a level playing field.[6] *See Piper*, 454 U.S. at 258 (upholding dismissal so that case could be refiled in forum where case specific witnesses were subject to compulsory process); *Danser*, 86 F.R.D. at 124 (same); *Fitzgerald*, 521 F.2d at 453 (same). Indeed, this case is virtually indistinguishable from *Piper*, which involved allegations of a manufacturing defect that resulted in an aircraft crash in Scotland. Even though "records concerning the design, manufacture, and testing of the propeller and plane [were] located in the United States," the Supreme Court affirmed the district court's dismissal on *forum non conveniens* grounds. *Piper*, 454 U.S. at 257. As the district court found, plaintiffs were all citizens of Scotland, and:

> Witnesses who could testify regarding the maintenance of the aircraft, the training of the pilot, and the investigation of the accident – all essential to the defense – are in Great Britain. Moreover, all witnesses to damages are located in Scotland. Trial would be aided by familiarity with Scottish topography, and by easy access to the wreckage.

Id. at 242. Because "crucial witnesses and evidence were beyond the reach of compulsory process, and because the defendants would not be able to implead potential Scottish third-party defendants" the court concluded it would be unfair to proceed to trial in the United States, even though much of the evidence relevant to plaintiffs' liability theories was located in the United States. *Id.*

---

[6] Because case-specific evidence is located in Venezuela and Colombia and is beyond the compulsory process of this court, defendants cannot obtain this information unless and until these cases are dismissed and refiled in Venezuela and Colombia. The longer dismissal of these cases is delayed, the greater the risk that relevant evidence located in Venezuela and Colombia will disappear, or that witnesses' memories will fade. Defendants should not be prejudiced by plaintiffs' desire to stall the dismissal of these actions.

Not surprisingly, plaintiffs utterly fail to address the negative impact of the unavailability of compulsory process on defendants' ability both to provide more specific information about the location of witness and documents in Venezuela and Colombia in support of their *forum non conveniens* motions, and to adequately defend their claims. What is more surprising is plaintiffs' disparagement of defendants' offer to allow them access to all discovery conducted in these MDL proceedings, and their cryptic remark that this offer is "fatal" to defendants' motions. (Pl. Br. at 15.)

In fact, the procedure proposed by defendants was suggested by the U.S. Supreme Court, and has been endorsed by numerous courts granting *forum non conveniens* dismissals. In *Piper,* the Supreme Court noted that where sources of proof are located in the United States, "district courts might dismiss [on *forum non conveniens* grounds] subject to the condition that defendant corporations agree to provide the records relevant to plaintiff's claims." 454 U.S. at 257 n. 25; *see also Fitzgerald,* 521 F.2d at 453 (affirming dismissal based on condition that, on court order, defendants produce documents and witnesses in the alternative forum); *Danser,* 86 F.R.D. at 124 (conditioning dismissal on defendants' agreement to produce documents and evidence for use in trial in the alternative forum). Given defendants' willingness to condition dismissal on plaintiffs' access to and participation in discovery conducted in these MDL proceedings, prompt dismissal on *forum non conveneins* grounds is the only way to insure that defendants will have access to sources of proof necessary to defend this cases at trial.

III. PLAINTIFFS' REQUEST TO TAKE THE DEPOSITION OF DEFENDANTS' FOREIGN LAW EXPERTS SHOULD BE DENIED

In addition to their call for extensive factual discovery, plaintiffs argue in passing that they should be allowed to depose defendants' foreign law experts. (Pl. Br. at 15.) This request should also be denied.

The Federal Rules of Civil Procedure treat the determination of foreign law not as an issue of fact but "as a ruling on a question of law." Fed. R. Civ. P. 44.1. In the context of *forum non conveniens* motions, the determination of whether a proposed alternative forum is adequate is usually based on expert affidavits as to foreign law. *See* 9 Moore's Federal Practice ¶ 44.1.04 [2][b] (Matthew Bender 3d ed. 2000). In support of their argument that Venezuela and Colombia are adequate alternative fora in which to try plaintiffs' claims, defendants have submitted declarations of experts in the laws of those countries relating to Venezuelan and Colombian courts and civil procedure. These declarations are consistent with the numerous published cases cited in defendants' briefs in which courts have found that Venezuela and Colombia are adequate alternative for a for the litigation of claims.

Given that defendants' experts address only questions of law, it is highly questionable whether any "discovery" relating to the substance of their declarations is appropriate. *See, e.g.*, Advisory Committee Note of 1970 to Fed. R. Civ. P. 33 ("interrogatories may not extend to issues of 'pure law'"); Advisory Committee Note of 1970 to Fed. R. Civ. P. 36 (noting that rule "does not authorize requests for admissions of law unrelated to the facts of the case").

Even if such discovery were appropriate, plaintiffs have not identified in any declaration a single statement with which they take issue.[7] Plaintiffs' apparent inability to rebut the assertions of law proffered by defendants' experts suggests that their request for discovery is made primarily for the purpose of harassment and delay, rather than clarification of any legal issues. Rather than requiring the parties to engage in the expense and delay involved in taking the depositions of defendants' experts – each of which resides outside the United States – plaintiffs should submit their own affidavits in Venezuelan and Colombian law. If plaintiffs manage to raise any real questions of law, those can be addressed at the appropriate time through further briefing, affidavits, the Court's own research, or other appropriate mechanisms. Fed. R. Civ. P. 44.1.

[7] Plaintiffs' primary complaint with defendants' declarations is that they cite Venezuelan and Colombian statutory law rather than case law, even though plaintiffs recognize the primacy of statutory law in civil code countries. (Pl. Br. at 15.) If plaintiffs believe that the statutes cited by defendants' experts are inaccurate based on the case laws of those countries, they should identify those inaccuracies by submitting affidavits of their own experts.

CONCLUSION

For all of the reasons stated above, plaintiffs' motion for discovery should be denied. Defendants respectfully request that the court set a reasonable briefing schedule that will permit the prompt resolution of defendants' motions to dismiss on *forum non conveniens* grounds.

Dated: January __, 2001

Respectfully submitted,

_____

John H. Beisner
Stephen J. Harburg
O'MELVENY & MYERS LLP
555 13th Street, N.W., Suite 500 West
Washington, DC 20004-1109
(202) 383-5370

_____

Randall R. Riggs
LOCKE REYNOLDS LLP
201 N. Illinois Street, Suite 1000
P.O. Box 44961
Indianapolis, Indiana 46244-0961
(317) 237-3814

ATTORNEYS FOR DEFENDANT
FORD MOTOR COMPANY

_____

Mark J.R. Merkle
KREIG DEVAULT ALEXANDER &
CAPEHART, LLP
One Indiana Square, Suite 2800
Indianapolis, IN 46204-2017
Telephone: (317) 636-4351
Facsimile: (317) 636-1507

Frances E. Prell
Colin P. Smith
Edward F. Ryan
HOLLAND & KNIGHT
55 West Monroe Street, Suite 800
Chicago, IL 60603
Telephone: (312) 263-3600
Facsimile: (312) 263 578-6617

ATTORNEYS FOR DEFENDANT
BRIDGESTONE/FIRESTONE, INC.

CERTIFICATE OF SERVICE

Service of the foregoing was made to the following counsel of record this _____ day of _____, 2001:

Plaintiff's Liaison Counsel-Personal Injury
William E. Winingham
Wilson Kehoe & Winingham
2859 North Meridian Street
P.O. Box 1317
Indianapolis, IN 46206
(via Hand Delivery)

Plaintiffs' Co-Lead Counsel-Personal Injury
Mike Eidson
Colson Hicks Eidson
255 Aragon Avenue, 2nd Floor
Coral Gables, FL 33134-5008
(via Federal Express)

Plaintiffs' Co-Lead Counsel-Personal Injury
Victor M. Diaz
Podhurst Orseck Josefsberg, et al.
25 West Flagler Street, Suite 800
Miami,FL 33130
(via Federal Express)

Plaintiffs' Liaison Counsel-Class Action
Irwin B. Levin
David Cutshaw
Richard Shevitz
Cohen & Malad
136 North Delaware Street, Suite 300
Indianapolis, IN 46204-2529
(via Hand Delivery)

Plaintiff's Lead Counsel-Class Action
Don Barrett
Brian Herrington
Stephen Ashley
Barrett Law Office
404 Court Square North
P.O. Box 987
Lexington, MS 39095
(via Federal Express)

Counsel for Bridgestone Corporation
Thomas S. Kilbane
Robin G. Weaver
Joseph C. Weinstein
Squire Sanders & Dempsey LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114
(via Federal Express)

Counsel for Bridgestone Corporation
Thomas G. Stayton
Ellen E. Boshkoff
Baker & Daniels
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204
(via Hand Delivery)

Counsel for Firestone, Inc.
Hugh R. Whiting
Mark Herrmann
Stephen J. Brogan
Jones Day Reavis & Pogue
901 Lakeside Avenue
Cleveland, OH 44114
(via Federal Express)

Counsel for Firestone, Inc.
Colin P. Smith
Frances E. Prell
Edward F. Ryan
Holland & Knight
565 West Monroe Street, Suite 800
Chicago, IL 60603
(via Federal Express)

Counsel for Firestone, Inc.
Mark J.R. Merkle
Krieg DeVault Alexander & Capehart, LLP
One Indiana Square, Suite 2800
Indianapolis, IN 46204-2079
(via Hand Delivery)

Local Counsel for Ford Motor Company
Robert Toland
Dylan J. Walker
Cabaniss Conroy & McDonald LLP
Three Glenhardie Corporate Center
1265 Drummers Lane, Suite 200
Wayne, PA 19087
(via Regular Mail)

Local Counsel for Ford Motor Company
D. Alan Thomas
Greg Schuck
Huie Fernambucq and Stewart, LLP
Suite 800, Regions Bank Building
417 North 20th Street
Birmingham, AL 35203
(via Regular Mail)

John H. Beisner
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Suite 500 West
Washington, DC 20004-1109
(202) 383-5300

Randall R. Riggs
LOCKE REYNOLDS LLP
201 N. Illinois Street, Suite 1000
P.O. Box 44961
Indianapolis, Indiana 46244-0961
(317) 237-3814

DC1:461596.1