UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

In re BRIDGESTONE/FIRESTONE, INC.) TIRES PRODUCTS LIABILITY) LITIGATION) ______________________________) THIS DOCUMENT RELATES TO) ALL ACTIONS) ______________________________)	Master File No. IP 00-9373-C-B/S MDL No. 1373

DEFENDANT FORD MOTOR COMPANY'S MEMORANDUM IN OPPOSITION TO BRIDGESTONE/FIRESTONE, INC.'S OBJECTION TO FORD'S ADJUSTMENT DATA DESIGNEE

Defendant Ford Motor Company ("Ford") respectfully submits this memorandum in opposition to Bridgestone/Firestone, Inc.'s Objection To Ford's Adjustment Data Designee ("Firestone's Objection"), in which Firestone objects to Ford's request to share Firestone's adjustment data with Ford's already-declared statistical expert, Dr. William Wecker. As set forth below, the essence of Firestone's objection is that Firestone's adjustment files are so profoundly secret that only an expert witness without any involvement in automotive or tire-related litigation should be trusted to safeguard them. Yet nothing in Firestone's papers even remotely justifies such an extraordinary restraint on the adversary process – one that would have the prejudicial effect of disqualifying a statistical expert who has already provided testimony in this proceeding. Certainly, an order requiring Ford to retain a brand-new expert, one completely unschooled in analytical techniques common in automotive litigation, is not necessary to protect the confidentiality of Firestone's adjustment data. Appropriate protective orders, enforceable by this Court, can be fashioned to protect any legitimate confidentiality interests Firestone may have.

Firestone's bid to derail Ford's attempts to understand the company's adjustment data is not simply baseless. It is deeply ironic as well. While Firestone has been laboring

mightily to convey the impression that its adjustment data must be treated as crown jewels, even when legitimately demanded by parties (such as its customers) who are not direct competitors of Firestone, it has been pressing one of its direct competitors – Goodyear Tire & Rubber – to allow Firestone itself to study Goodyear's adjustment data. Moreover, Firestone's insistence that Dr. Wecker's brief contact with Cooper Tire disqualifies him from analyzing Firestone's adjustment data stands in stark contrast to the arrangements Firestone presumably has negotiated with its own law firm (Jones, Day, Reavis & Pogue), which also represents Cooper Tire and joined in Cooper's belated effort to retain Dr. Wecker.

Firestone's objection should be overruled. Subject to the confidentiality restrictions the Court has imposed on other discovery materials, Ford should be permitted to transfer Firestone's adjustment data to Dr. Wecker without delay.

BACKGROUND

On June 20, 2001, Firestone and Ford entered into a stipulation regarding expert analysis of Firestone's electronic adjustment data. (*See* Stipulation Regarding Adjustment Data, attached to Firestone's Objections as Exhibit C.) The stipulation was modeled on Judge Shields' Entry for May 31, 2001, which set forth a procedure for plaintiffs in this matter to seek review of Firestone's adjustment data. Under the stipulation, Ford agreed to give Firestone "two business days [ ] written notice before providing [Firestone's] electronic adjustment data to any consultant, expert, or any other third party, in order to give Firestone the opportunity to object to a particular individual receiving the data." (*Id.*)

Pursuant to the terms of the stipulation, Ford's counsel sent a letter to Firestone's counsel on August 3, 2001, giving notice that it intended to provide a copy of the electronic adjustment data to its statistical expert, William Wecker. (*See* Letter From Brian D. Boyle to

Colin Smith, attached to Firestone's Objections as Exhibit E.) Ford's counsel informed Firestone in that letter that Dr. Wecker's curriculum vitae was already of record, since it was attached to Defendants' Opposition to Class Certification (*id.*); Dr. Wecker's résumé was attached to that brief (which was filed jointly by Ford and Firestone) because he provided a statistical analysis regarding rollover accidents that was relied upon by defendants in opposing class certification. Ford's counsel also stated that Firestone's counsel in this matter, Jones, Day, Reavis & Pogue, had sought to retain Dr. Wecker on a matter for Cooper Tire and that if Dr. Wecker entered into a retention agreement on that matter, he would "[o]bviously" take appropriate steps "to protect Bridgestone/Firestone's adjustment data from disclosure outside the firm." (*Id.*)[1]

Despite Ford's assurances, Firestone responded that it would object to providing Dr. Wecker with access to Firestone's adjustment data and filed its Objection with the Court on August 10, 2001, arguing that Dr. Wecker should not be allowed to analyze Firestone's data because – among other things – he has "extensive and ongoing consulting relationships with other automobile manufacturers," which create "a manifest risk of disclosure of this highly sensitive information." (Firestone's Objections at 1.)

In a telephone conference with the parties on August 8, Magistrate Judge Shields agreed – at Ford's request – to resolve Firestone's objection on an expedited basis.

ARGUMENT

There is no dispute regarding the overriding significance of Firestone's adjustment data to class certification and merits-related issues in this litigation. As the Court has

---

[1] Firestone's suggestion that Ford's letter did not comply with the stipulation is not fully explained, and in any event without foundation. All of the information sought by Firestone is included in Dr. Wecker's résumé, which, as noted above, Firestone already had.

noted, Firestone has repeatedly relied on its adjustment data to "support its position that it is not necessary to recall any of its tire models beyond those which have already been recalled." (*See* Entry On Plaintiffs' Motion To Compel Production Of Electronic Adjustment Data (May 30, 2001), at 2 (attached to Firestone's Objection as Exhibit A).) Given the strong emphasis Firestone has placed on these data in its defense, this "information clearly is relevant to this litigation," because it will enable the parties "to evaluate, *inter alia*, the accuracy of claims made by Firestone to explain its position regarding expanding the recall to include other models of tires." (*Id.* at 3.)

Notwithstanding the central relevance of Firestone's adjustment data to this litigation, Firestone seeks to obstruct Ford's ability to analyze this information by altogether denying Ford's statistical expert, Dr. Wecker, access to the information. Firestone bears a very high burden in demanding this restraint. After all, Dr. Wecker has been actively involved in this litigation for more than six months, and has submitted testimony on statistical issues that was incorporated into a joint Ford/Firestone brief opposing class certification. Because the loss of Dr. Wecker would be very prejudicial to Ford's defense at this stage in the litigation, Firestone must overcome a steep threshold in seeking to deny him access to the raw data he needs to complete his work. *See City of Springfield v. Rexnord Corp.*, 111 F. Supp. 2d 71 (D. Mass. 2000) (objecting party has burden of proving that there exists a conflict of interest warranting disqualification of expert); *U.S. v. Healthcare Rehab. Systems, Inc.*, 994 F. Supp. 244, 249 (D.N.J. 1997) ("[n]umerous courts" have recognized that the threshold for expert disqualification is substantially higher than the standard for disqualifying attorneys).[2]

[2] *See also English Feedlot, Inc. v. Norden Labs., Inc.*, 833 F. Supp. 1498, 1501 (D. Colo. 1993) (party seeking to disqualify expert faces steeper burden than party seeking to disqualify attorney because "[e]xperts are not advocates in the litigation but sources of information and opinions").

As explained below, there is no justification for this extraordinary restraint. Whatever legitimate confidentiality interest Firestone maintains in its years-old adjustment data can be accommodated through an appropriate protective order. Firestone's objection should be overruled.

I. THE LATE-BREAKING EFFORT BY FIRESTONE'S LAW FIRM TO RETAIN DR. WECKER ON BEHALF OF COOPER TIRE DOES NOT WARRANT DISQUALIFICATION OF DR. WECKER IN THIS PROCEEDING.

Firestone's initial contention is that Dr. Wecker's contact with Cooper Tire – a company that is in competition with Firestone – requires that Ford retain a new expert in this proceeding to analyze Firestone's adjustment data. But Firestone grossly misstates the facts surrounding Dr. Wecker's interaction with Cooper Tire's lawyers. Moreover, whatever contact Dr. Wecker has had with Cooper Tire cannot justify an outright disqualification.

In its Objection, Firestone contends that it is "undisputed that Wecker has entered into a consulting relationship on behalf of Cooper Tire Company." (Firestone Objection at 3.) According to Firestone, Dr. Wecker "has never terminated the relationship and has in fact participated in telephone conferences about his consultation since that time." (*Id.*) The only evidence Firestone offers for this conclusion is that fact that Dr. Wecker responded in the affirmative when asked at his deposition, "Are you consulting at this time, ***or have you ever consulted for***, a tire company?" (*Id.* at 4 (emphasis added).)

Yet, as Dr. Wecker explains in the accompanying declaration (*see* Declaration of William E. Wecker ("Wecker Decl."), attached hereto as Exhibit 1), his affirmative answer to this question at his deposition was based on the fact that he had been contacted by Cooper Tire's lawyers early this year. The important facts are these: Dr. Wecker received a telephone call from an attorney named Alan E. Kraus (with the firm Riker, Danzig, Scherer, Hyland & Perretti

("Riker, Danzig")) in February 2001, one month after he was retained by Ford in this matter, inquiring whether he would be available to provide consulting services to Riker, Danzig and Jones, Day, Reavis & Pogue (lead counsel for Firestone in this proceeding) in connection with litigation involving Cooper Tire. (*See* Wecker Decl. ¶ 2.) The call lasted about thirty minutes. (*Id.*) Thereafter, Mr. Kraus sent Dr. Wecker a draft retention agreement, but the agreement proved "unacceptable" to Dr. Wecker. (*Id.* ¶ 3.) Dr. Wecker subsequently left two messages for Mr. Kraus to discuss his reasons for not being able to sign the agreement but "never heard back" and, in any event, never "signed the retention agreement. (*Id.* ¶ 4.)[3]

That single telephone call is the sum total of Dr. Wecker's interaction with Cooper Tire's lawyers. As his declaration attests, neither he nor any of his colleagues "has performed consulting or analytical work of any kind for the lawyers for Cooper Tire," nor have they performed "statistical or other analyses for these lawyers." (*Id.* ¶ 7.) Moreover, "no requests for any such analyses have been made by those lawyers, or are pending today." (*Id.*) Thus, Firestone's statement "that Wecker has continued to act as a consultant for Cooper, admits it in sworn testimony, and has never advised anyone to the contrary" (Firestone's Objection at 4) is seriously misleading.

Even if there had been a meeting of the minds between Dr. Wecker and Cooper Tire's lawyers, it would not matter. An appropriate protective order can be fashioned to restrain any disclosure of Firestone's adjustment data to Firestone's competitors (including Cooper Tire),

---

[3] After Firestone objected to Dr. Wecker's review of its adjustment data on the ground of his supposed involvement with Cooper Tire, Dr. Wecker reviewed his company's files and determined that two of his colleagues participated in conversations with Mr. Kraus in May 2001 concerning possible consulting work for Cooper Tire, and that the Riker, Danzig firm was billed a total of 3.05 hours for Dr. Wecker's call and those additional calls. (Wecker Decl. ¶ 5.) Dr. Wecker did not participate in these calls and, indeed, was unaware of the calls until the subject Firestone Objection caused him to search his firm's files. In any event, Firestone's contention that Dr. Wecker " participated in telephone conferences" with Cooper Tire's lawyers since the initial phone call from Mr. Kraus in February (Firestone's Objection at 3-4) is simply untrue.

or other third parties. *See Tellular Corp. v. VOX2, Inc.*, No. 00 C 6144, 2001 U.S. Dist. LEXIS 7472, at *6 (N.D. Ill. May 31, 2001) (defendant's fear that plaintiff's proposed expert would use materials improperly in his position as a sales manager were fully addressed by protective order which required that confidential materials be used only for purposes of the subject litigation). Moreover, as Dr. Wecker avers in his declaration, he is prepared to refrain from providing consulting services to any tire company – Cooper Tire included – if the Court concludes such a restraint is appropriate. In short, Dr. Wecker's fleeting interaction with Cooper Tire's lawyers is not a legitimate basis for disqualifying Dr. Wecker from participating in the most important phases of this proceeding.

II. FAR FROM WARRANTING DISQUALIFICATION, DR. WECKER'S EXPERIENCE IN AUTOMOTIVE LITIGATION IS PRECISELY WHY FORD SHOULD BE PERMITTED TO TURN TO HIM FOR ANALYSIS OF FIRESTONE'S ADJUSTMENT DATA.

In addition to misstating the facts concerning Dr. Wecker's contact with Cooper Tire, Firestone overreaches when it contends that Dr. Wecker's involvement in automotive litigation must disqualify him from presenting all relevant statistical testimony in this proceeding. (Firestone's Objection at 1.) The notion, apparently, is that any expert with experience in automotive-related litigation cannot be trusted to safeguard the confidential status of Firestone's adjustment data. This is obviously wrongheaded.

For one thing, Firestone's insistence that any statistical expert whose "regular area of [ ] expert consulting testimony is analysis of . . . warranty data" for automotive as well as tire companies must be disqualified from testifying in this proceeding (Firestone's Objection at 5) would plainly obstruct the truth-finding process. Enforcement of the unprecedented restriction demanded by Firestone would deprive Ford (as well as the Court and any finder of fact) of the most qualified testimony available. The simple fact is that Ford retained Dr. Wecker precisely

because he has deep familiarity with – and unparalleled experience in – automotive litigation. Dr. Wecker knows how to structure the analysis of warranty information, to spot and present trends, and to correlate his statistical observations with engineering information. Far from justifying the extraordinary remedy of disqualification, Dr. Wecker's experience in automotive litigation and his longstanding relationship with Ford eminently qualify him for his role in this proceeding. Firestone should not be permitted to use concerns over the confidentiality of the company's historical adjustment data to compel Ford to locate a new expert at this stage of the proceeding, and to select that new expert from among the statisticians least qualified to provide testimony in this case.

To the extent Firestone has any well founded interests in shielding its historical adjustment rates from public view, those interests can be served through entry of a supplemental confidentiality order – one that would "protect Firestone's interests" without "deny[ing Ford its] right to sue the expert of [its] choice." (*See* Entry Regarding Plaintiffs' Expert Ken Pearl (June 15, 2001).) Subject to the Court's discretion, such an order could certainly require Dr. Wecker to take special steps to safeguard the data against disclosure to unauthorized third parties, and it could require Dr. Wecker to remove or destroy all copies of Firestone's adjustment data at the conclusion of his involvement in this proceeding. Such an order could also require Dr. Wecker – in the event a court in another case purported to compel him to disclose Firestone's adjustment data – to withdraw as an expert from that separate proceeding in order to protect the data. *Cf. Tellular Corp.*, U.S. Dist. LEXIS 7472, at *6 (refusing to disqualify plaintiff's expert where defendant argued that he would inevitably misuse its confidential information because of his role as a sales director in a related business). Indeed, the Court could even enter an order conditioning Dr. Wecker's access to the data on his agreement that he would not perform any

work for any tire company, or analyze the adjustment data of any other tire company, for the duration of this litigation. While Ford does not believe these additional conditions are required or would be appropriate in the case of Dr. Wecker, similar conditions were imposed by the Court with regard to plaintiffs' expert, Mr. Pearl, who, unlike Dr. Wecker, is a tire expert who has routinely done work for tire companies. Further, Dr. Wecker has indicated in his declaration that he would "refrain from performing any consulting or analytical work for any other tire company for the duration of [his] engagement" in this matter, if asked by the Court to do so. (Wecker Decl. ¶ 9.)

There is no basis for concluding that Dr. Wecker cannot be trusted to comply with any protective measures imposed by the Court. Firestone certainly offers none. Indeed, there is no more reason to think that Dr. Wecker may fail to comply with the provisions of a protective order than there is to believe that Firestone's lead counsel, Jones, Day, may fail to provide appropriate protection to Firestone's trade secrets notwithstanding its joint representation of Firestone and Cooper Tire. *See Tellular Corp.*, 2001 U.S. Dist. LEXIS 7472, at *6 (rejecting defendant's concern that plaintiff's expert could not be trusted to maintain confidentiality; "the Court has no reason to question [the expert's] candor in agreeing to be bound by the protective order and to only use confidential material disclosed to him in the present litigation"). That should be the end of the matter.

CONCLUSION

Firestone's position with regard to Dr. Wecker is difficult to square with other actions it is taking in this litigation. Firestone is currently embroiled in a dispute with Goodyear over a subpoena and motion to compel, in which Firestone seeks from Goodyear – a direct competitor – the very same type of "highly sensitive information" that it wishes to shield from

Ford's longstanding expert here. Goodyear has objected to providing the adjustment information out of a concern that it would "give a competitor . . . insight into the internal thought processes and strategies of Goodyear" (*see, e.g.,* Goodyear's Memorandum In Opposition To Firestone's Motion To Compel Production at 10 (filed Aug. 10, 2001), but Firestone has vigorously argued that these concerns do not justify Goodyear's desire to withhold the data. According to Firestone, "Goodyear's objections are without merit" because "[t]he requested information is fundamentally relevant to the issues in this MDL proceeding" and "Firestone has shown a substantial need for the information." (*See* Bridgestone/Firestone, Inc.'s Memorandum In Support Of Its Motion To Compel at 1, 2 (filed July 10, 2001).)

In seeking to compel Goodyear to produce the same type of data that Firestone seeks to withhold from Dr. Wecker, Firestone stated: "Firestone has no objection to additional protective mechanisms that would serve to allay Goodyear's concerns, so long as such additional mechanisms do not sacrifice Firestone's legitimate right to discover relevant information needed for its defense in this proceeding." (*Id.* at 15.) Ford could not have put it any better. Firestone's objection should be overruled.

Dated: August 17, 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
1000 Capital Center South
201 N. Illinois Street
Indianapolis, Indiana 46204
(317) 237-3814

ATTORNEYS FOR DEFENDANT
FORD MOTOR COMPANY

DC1:484202.1
499683_1

CERTIFICATE OF SERVICE

Service of the foregoing was made by hand delivery or by placing a copy of the same into the United States Mail, first class postage prepaid, this _____ day of _______________, 2001, addressed to all counsel of record appearing on the Panel Attorney Service List, and others, as necessary.

____

Randall R. Riggs
LOCKE REYNOLDS LLP
201 N. Illinois Street, Suite 1000
P.O. Box 44961
Indianapolis, Indiana 46244-0961
(317) 237-3800

499683_1