UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GARRETT PAESCHKE,

Plaintiff,

vs.

GENERAL MOTORS, LLC, a foreign corporation,

Defendant.

No. 4:16-CV-05050-LRS

ORDER RE PLAINTIFF'S MOTION TO COMPEL AND FOR SANCTIONS

BEFORE THE COURT is the Plaintiff's Motion To Compel And For Sanctions (ECF No. 63). This motion was heard with telephonic oral argument on November 13, 2017. Richard C. Eymann, Esq., argued for Plaintiff. Andrew L. Richardson, Esq., argued for Defendant.

At issue are two Requests For Production (RFPs) served by Plaintiff on the Defendant on November 1, 2016. RFP No. 9 seeks "[a]ll documents related to incidents of GM vehicles seat heaters overheating, including, but not limited to: a. Consumer complaints, letters, memos, and emails (including those from fleet operators); b. Field reports, including dealer field reports; c. Third-party arbitration proceedings; d. Complaints filed with a Court of law; e. Reports by any governmental agencies; f. Internal memoranda, reports or summaries of any kind involving property damage or burn injuries from car seat heaters; and g. Photographs of burn injuries or property damage."

RFP No. 15 seeks "[a]ll documents, including correspondence, memoranda, reports, summaries and compilations related to seat heater burns or the prevention of seat heater burns, submitted to any federal or state agency, including the National Highway Transportation Safety Administration."

In response to the RFPs, Defendant limited the scope of discovery to 2003-2007 GMT800 vehicles with a resistive heated seat system. According to Defendant, the subject vehicle is a 2003 Chevrolet Tahoe which was part of the GMT 800 series manufactured from 2003 to 2007.

Plaintiff has offered to narrow his RFPs to "alleged or confirmed burns from 2002 to 2013 related to all GM vehicles with a seat heating system that utilizes an electrical heating element, a temperature sensor and a control."[1] Defendant has offered to "provide lawsuit and non-in-suit matter claim information for the next generation of full-size trucks and GMT 900 vehicles," although it maintains that information relating to those vehicles is irrelevant to Plaintiff's claims.[2]

I. TIMELINESS OF MOTION TO COMPEL

According to Plaintiff, because of encryption issues, it was not until July 24, 2017, just days before the August 3, 2017 discovery deadline, that he was able to access all of Defendant's files. Plaintiff filed his Motion To Compel on October 9,

[1] At one time, Plaintiff described the subject vehicle as a 2002 Chevrolet Tahoe, but at the oral argument, acknowledged it is a 2003 model which was manufactured at the end of 2002. Plaintiff's injuries were sustained in November 2013.

[2] Defendant's expert, Louis Carlin, asserts "[t]he resistive front heated seat system in the GMT-800 full size trucks and utility vehicles is not substantially similar to heated seat systems used in other GM passenger cars, trucks, and sport utility vehicles." (ECF No. 72 at p. 5, Paragraph 8).

2017, after advising the court at the October 3 summary judgment hearing there was a discovery issue. Plaintiff does not dispute, however, that on December 7, 2016, approximately eight months before the discovery deadline, Defendant objected to RFP Nos. 9 and 15 and indicated it was limiting its response to 2003-2007 GMT 800 vehicles with a resistive heated seat system.

Defendant says that prior to the October 3 hearing, it was not aware of Plaintiff objecting to the scope of discovery provided by GM. According to Plaintiff, Defendant had a duty to correct and supplement its discovery responses, even after the discovery deadline. While this is true, it still does not explain why Plaintiff waited until October 3, two months after the close of discovery, to bring to the court's attention that there was a dispute about RFP Nos. 9 and 15. The encryption issues that arose after December 2016 do not detract from the fact that Plaintiff's counsel knew Defendant intended to limit the scope of its response.

According to Plaintiff, all of Defendant's dispositive motions, "which appear to have formed the basis for the limited scope of GM's discovery responses," were decided after the discovery deadlines and therefore, "GM cannot reasonably argue that these issues should have been addressed before the discovery period ended because the Court did not provide a definitive ruling about the scope of the plaintiff's claims until after discovery ended." (ECF No. 73 at p. 4). The court is not persuaded by this argument. The scope of Plaintiff's claims is in large part determined by Plaintiff's Complaint. The discovery Plaintiff seeks is based on the claims set forth in his Complaint filed April 19, 2016 (e.g., defective design, failure to warn etc.), five and half months before the subject RFPs were served.

The court concludes the issues pertaining to RFP Nos. 9 and 15 could have and should have been brought to the court's attention much sooner. Nevertheless, the court cannot justify that as a reason for denying Plaintiff's Motion To Compel. For reasons discussed below, Plaintiff is entitled to the benefit of additional information from the Defendant in order to have a fair opportunity to prosecute his product

liability claims. It is also a matter of public interest that this additional information be disclosed by Defendant. Because trial in this matter has been continued and there will be a concomitant extension of pre-trial deadlines, it is not apparent there is any prejudice to Defendant.

II. SCOPE OF DISCOVERY

Fed. R. Civ. P. 26(b)(1) states:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Defendant maintains Plaintiff's discovery requests are overbroad "as the seat heater system alleged by Plaintiff to be defective is not the same or substantially similar to seat heater systems in other GM vehicles." Citing *Gibson v. Ford Motor Co.*, 510 F.Supp.2d 1116, 1120 (N.D. Ga. 2007), and *Piacenti. Gen. Motors Corp.*, 173 F.R.D. 221, 225 (N.D. Ill. 1997), Defendant claims it is Plaintiff's burden to prove "substantial similarity." In *Piacenti*, the court requested the plaintiff file an opinion from an expert verifying sufficient similarity such that the requested discovery could be deemed relevant to the issue of liability. Plaintiff in the instant case has not submitted an expert opinion on "substantial similarity." In *Gibson*, the court found the plaintiffs, in their submissions, had failed to "present any concrete, specific, fact-based comparison to show that the . . . vehicles are sufficiently similar . . . [and] contain, at most, general, unspecific and conclusory claims of similarity."

A number of other courts, however, have found it is the defendant's burden to establish lack of "substantial similarity." In *McKellips v. Kumho Tire Co., Inc.*, 305 F.R.D. 655, 671 (D. Kan. 2015), the court stated:

> Placing the significant burden of proving substantial similarity on a plaintiff to obtain discovery in the first instance would be misplaced, given that the plaintiff has not yet obtained the information it would need to prove substantial similarity. Moreover, the defendant and not the plaintiff would have access to the information necessary to prove or disprove substantial similarity of the defendant's other products.

See also *Companhia Energetica Potiguar v. Caterpillar Inc.*, 307 F.R.D. 620 (S.D. Fla. 2015)(because courts must employ a liberal discovery standard, appropriate that Caterpillar demonstrate why the discovery is beyond the broad relevancy standards); and *Albee v. Continental Tire North America, Inc.*, 2010 WL 1729092 (E.D. Cal. 2010) at *7 (information necessary to determine whether the products are similar will ordinarily be within the control of the manufacturer and/or designer and the rules cannot be read as requiring proof of similarity before a party may discover evidence of similarity).

In *McKellips*, the district court noted that in the Tenth Circuit, the "substantial similarity" rule does not require identical products, nor does it require comparison of the products in their entireties. Instead, the rule requires "substantial similarity among the variables relevant to the plaintiff's theory of defect." 305 F.R.D. at 676, citing *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1248 (10th Cir. 2000). "If evidence of other accidents is used to prove notice or awareness of the dangerous condition, then the substantial similarity rule may be relaxed, and the similarity issue becomes one going to the weight of the evidence." *Desrosiers v. MAG Indus. Automation Systems, LLC*, 675 F.Supp.2d 598, 602 (D. Md. 2009), quoting 3 LOUIS R. FUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY §18.02[1]b]. *Desrosiers* involved an individual who died when his clothing became entangled in the unguarded rotating spindle of a boring and milling machine. The court determined that the "salient characteristic" was a rotating spindle or similar rotating part and if other products had that characteristic, incidents involving them might provide relevant evidence. 675 F.Supp.2d at 603. The court added that "if an incident suggests that lack of a guard may have contributed to the entanglement, that

incident may provide relevant evidence even if the machine involved is not a boring machine as in some of these incidents." *Id*. The court found "the case law and treatises clearly instruct that at the discovery stage, and especially if the evidence is sought for purposes of showing notice, substantial similarity should be liberally defined" and that "[s]imilarly, there appears to be a relaxation of the standard where a design defect is alleged." *Id*. The same was also recognized in *Fine v. Facet Aerospace Products Co.*, 133 F.R.D. 439, 442 (S.D. N.Y. 1990), a case relied upon by Defendant in the instant case.

Notice and design defects are at issue here. Plaintiff's Complaint alleges Defendant "knew that the subject SUV's electrically heated front seats were dangerously defective and unreasonably dangerous to those using it . . . ." and that it knew this at the time of the design and "later as it received consumer's feedback, concerns and complaints of burns." (ECF No. 1 at Paragraph 4.3). It alleges the "window, door lock and seat heater controls [were] so close together as to create confusion in use or inadvertent switching of the heater to the 'on' position." It alleges there was not an "adequate safeguard to prevent the electrically heated front passenger's seat from reaching dangerously high temperatures." (ECF No. 1 at Paragraphs 4.4(b) and 5.2(b) and (c)). And it alleges there was a failure to provide adequate warnings and instructions of the danger of burns from electrically heated front seats. (ECF No. 1 at Paragraphs 4.3(c) and 5.2(e)).

In *Brownlow v. General Motors Corporation*, 2007 WL 2712925 (W.D. Ky. 2007), at issue was a second-generation U-Van which rolled over, leaving the teenage plaintiff a quadriplegic. The court found discovery of information concerning prior models of GM's U-Van would be relevant to issues of defect, notice of defect and

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GM's possible failure to respond to an alleged defect[3], whereas information related to later models of the U-Van "would remain relevant to reasonable alternative designs and their performance." *Id*. at *6. According to the court: "Information relating to the feasibility and effectiveness of alternative designs, and GM's knowledge of potentially safer designs, is highly relevant and thus discoverable." *Id*. at *7. The court observed that Fed. R. Evid. 407 does not apply when evidence of subsequent remedial measures is offered to prove the feasibility of precautionary measures. *Id*.

Considering the relaxed "substantial similarity" standard which applies when there are notice and design defect issues, and considering the relevancy of alternative designs as precautionary safety measures, Defendant will be required to produce the information requested in RFP Nos. 9 and 15 regarding and limited to: 1) alleged or confirmed burns to persons from 2002 to 2013 related to **all** GM vehicles with the same or substantially similar seat heater controls as on the subject 2003 Chevy Tahoe (controls located on the door), and any subsequent changes in the design and placement of the seat heater controls in those vehicles; 2) alleged or confirmed burns to persons from 2002 to 2013 related to **all** GM vehicles in which there was a design change made to the seat heaters intended as a safeguard to prevent overheating (e.g., automatic and related heat reduction/shut-off mechanisms when a certain temperature is reached); and 3) alleged or confirmed burns to persons from 2002 to 2013 related to **all** GM vehicles in which seat heater warnings were not included in the owner's manual for the vehicle, but which were included in subsequent editions of the owner's manual. **This information should be provided as soon as possible, but in any event, no later than thirty (30) days from the date of this order.**

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[3] Evidence of prior accidents involving the same product under similar circumstances is admissible to show notice to the defendant of the danger, to show existence of the danger, and to show the cause of the accident. *Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88, 97 (3rd Cir. 1983).

Plaintiff's product liability claims raise issues that call for receipt of information not only about vehicles other than those in the GMT 800 and 900 series (including full-size trucks), but vehicles with heated seat systems other than resistive heated seat systems (e.g. forced air systems). Information about burns from forced air systems is just as potentially relevant to the issue of Defendant's notice about the danger of burns from heated seats, especially to individuals, like Plaintiff, with sensory loss below the waist.[4] A change in the design of a forced air system to prevent burns has potential relevancy to the issue of feasibility of alternative designs as precautionary measures. Indeed, it may be the forced air system itself represents an improvement over the resistive heated system or in other words, a feasible precautionary measure.

The information the court orders to be produced is relevant to Plaintiff's claims and proportional to the needs of this case, considering the parties' relative access to the information, the importance of it in resolving the issues in the case, and the fact that its likely benefit to resolving the issues in the case outweighs the burden or expense of producing it. Defendant is undoubtedly no stranger to products liability litigation, presumably including litigation related to heated seats. Considering its resources, it should not be overly burdensome or expensive for it to produce the information.

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[4] The record thus far does not indicate that Plaintiff is alleging there was a malfunction of a particular component of the resistive electrical heated seat system in the subject 2003 Chevrolet Tahoe. Instead, what Plaintiff appears to allege is the system worked as designed, but simply got too hot and burned individuals, especially those, like Plaintiff, with sensory loss below the waist.

III. CONCLUSION

Plaintiff's Motion (ECF No. 63) is **GRANTED** to the extent set forth above. As there has been no failure by Defendant to comply with a court order regarding Plaintiff's RFPs, there is no basis for awarding sanctions pursuant to Fed. R. Civ. P. 37(b)(2). Furthermore, the court will not award expenses to Plaintiff pursuant to Fed. R. Civ. P. 37(a)(5) because the court finds "other circumstances," namely Plaintiff's delay in raising the discovery issue after reasonable notice of Plaintiff's limitations on the scope of discovery, make an award of expenses "unjust." Fed. R. Civ. P. 37(a)(5)(A)(iii).

IT IS SO ORDERED. The District Executive is directed to enter this order and forward copies to counsel.

DATED this 1st of December, 2017.

s/Lonny R. Suko

LONNY R. SUKO
Senior United States District Judge