

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR AUTO SAFETY,)
)
Plaintiff,)
)
v.) Civil Action No. 02-2255 (EGS/JMF)
)
DEPARTMENT OF TRANSPORTATION,)
)
and)
)
NISSAN NORTH AMERICA, INC.,)
)
)
Defendants.)
_____)

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Michael E. Tankersley
D.C. Bar No. 411978
Michele Host
D.C. Bar No. 481453
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

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INTRODUCTION

On April 24, 2003, the day after Plaintiff Center for Auto Safety (“CAS”) filed its motion for summary judgment, defendant National Highway Traffic Safety Administration (“NHTSA”) announced an official action that significantly changed the context of Plaintiff’s requests for access to records in this suit under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

Plaintiff submitted FOIA requests for records that are missing from the public docket concerning NHTSA’s investigation into whether 1994 and early 1995 Nissan Altimas contain a defective air bag so that Plaintiff could evaluate and offer rebuttal to materials submitted in defense of the 1994-95 Altima. In particular, Plaintiff sought materials tendered by Nissan in late 2002 in an effort to persuade NHTSA that the air bag should not be recalled. See Amended Complaint ¶¶ 11-14. However, on April 24, 2003, NHTSA announced that Nissan is conducting a campaign to replace the 1994-95 air bag. In light of Nissan’s decision to replace the potentially defective air bags, NHTSA closed the investigation with a statement that the replacement air bag “should improve the overall performance of these air bag systems in a crash.” See Exhibit J, NHTSA ODI Resume, April 24, 2003.

Because Nissan has now committed itself to replacing the 1994-95 air bags, Plaintiff no longer seeks records relating to the performance of the 1994-95 air bag and the injuries that it has caused. Plaintiff still seeks two categories of records at issue in its motion for summary judgment: (i) test reports concerning the performance of the replacement air bag; and (ii) records that include the part names and numbers for the replacement. See Exhibit I, CAS Letter to NHTSA, May 22, 2003. The issue of whether other categories of records addressed by the summary judgment motions in this case are subject to the FOIA is now moot.

With respect to the test reports and part numbers that are still at issue, Defendants rely entirely on the claim that disclosure is inconsistent with FOIA Exemption 4 because the type of

information that the records contain is customarily withheld from the public, and disclosure would cause substantial competitive harm to Nissan. 5 U.S.C. § 552(b)(4). Plaintiff is entitled to summary judgment rejecting these claims for two reasons. First, Defendants have failed to show that disclosure of the test results or part numbers would result in substantial competitive harm. Nissan and NHTSA have disclosed the test results and part numbers for the 1994-95 air bag, and there is no basis for finding that comparable information about the replacement is commercially sensitive. Moreover, Defendants' contention that Nissan is permitted to market the replacement to Altima owners as an "overall" improvement in safety of the original 1994 Altima, while simultaneously withholding the test reports that would allow the public and Nissan owners to evaluate whether this claim is accurate, is untenable.

Second, Defendants have not complied with FOIA's requirement that parties seeking to withhold records in their entirety demonstrate that the non-exempt information cannot be segregated and released. Indeed, NHTSA's Vaughn Index addresses segregation in conclusory and categorical terms that are patently inadequate, and Nissan's submissions do not cure the agency's inadequate showing. Because Defendants have failed to show that information such as the test results and part numbers cannot be segregated and released without causing competitive harm, Plaintiff is entitled to summary judgment.

SUPPLEMENTAL BACKGROUND: NISSAN'S REPLACEMENT CAMPAIGN AND NHTSA'S STATEMENT CLOSING THE INVESTIGATION

In NHTSA's April 24, 2003 statement closing the investigation of the 1994-95 Altima air bag, the agency observed that it would not have closed the investigation "in the absence of action that addresses our safety concerns." Exhibit J, NHTSA ODI Resume, at 5. Those safety concerns arise from the agency's findings that, although it is rare for air bags to cause moderate-to-serious eye injuries when they deploy, there have been a substantial number of such injuries associated with the 1994-95 Altima. Exhibit J, NHTSA ODI Resume, at 5. Indeed, the

information collected during the investigation indicates that the incidence of moderate to severe eye injuries is 297 times higher for the Altima than for comparable models. More specifically, NHTSA found 37 reports of serious to moderate eye injuries associated with the 249,000 Altimas that Nissan produced in 1994 and early 1995. Id. at 2-3. When NHTSA collected the injury reports for 20 other passenger cars, representing four million vehicles manufactured from 1994-96, it found only two reports of moderate to severe eye injuries associated with air bag deployment. Id. at 3.

Moreover, the 1994-95 Altima is associated with far more injuries than its successor. In Altima vehicles produced after March 31, 1995, Nissan used an air bag with a different inflator and a smaller air bag, and the air bag is folded accordion-style, instead of rolled. Id. at 2.

Although the number of Altima models on the road with this later air bag greatly exceeds the number with the 1994-95 air bag under investigation (336,000 v. 249,000 vehicles), NHTSA did not find any reports of moderate to severe injuries associated with Altimas using the smaller, accordion-style air bag. Id. at 3, 5.

Nonetheless, NHTSA closed the investigation because Nissan announced that “it will conduct a campaign under which it will offer a replacement air bag, free of charge, to all owners” of the 1994-1995.5 Nissan Altima. Id. at 5. The substitute air bag has a different inflator type, less inflator power, and a different bag shape, length, and fold pattern. Id. at 5-6. NHTSA’s statement concludes by asserting that the replacement air bags “should improve the overall performance of these air bag systems in a crash and reduce the likelihood of moderate and severe air bag-induced injury.” Id. at 6. In Nissan’s letter to owners announcing the recall, Nissan makes a similar claim that the replacement reduces “overall risk” and represents that the replacement complies with the applicable Federal Motor Vehicle Safety Standards (FMVSS). See Exhibit K, at 5; see also Exhibit L, Nissan News Bureau, April 24, 2003.

These claims are apparently based on comparing publicly available test reports on the 1994 Altima with its original air bag and undisclosed tests concerning how the Altima performs when the replacement is substituted. Both Nissan and NHTSA have released tests measuring the performance of the 1994-95 Altima in crash tests under the FMVSS No. 208. See, e.g., Exhibit M, Nissan Certification Test Report, FMVSS 208; Exhibit P, NHTSA Vehicle Safety Compliance Test, 1994 Nissan Altima. In Nissan's letter informing NHTSA of its decision to replace the 1994-95 air bags, it states that the substitute air bag complies with a less-rigorous version of this same standard that was adopted after the 1994-95 Altimas were built. Exhibit K, Nissan April 11, 2003 Letter to Associate Administrator for Enforcement at 1-2.¹ Nissan has given NHTSA four reports on tests of the replacement air bag under FMVSS No. 208, and three additional test reports, but all seven test reports have been withheld in their entirety under Exemption 4. See Coleman Decl. ¶ 19.

In light of the announcement that Nissan is offering the substitute air bag to Nissan owners free of charge as a means to improve the overall safety of the 1994 Altima, Plaintiff has narrowed its request to the 56 pages of test reports on the substitute air bag (identified by Defendants as Attachment III.G.) and records containing the part numbers of the substitute air bag (part of the records identified by Defendants as Attachment III.F). Plaintiff is no longer seeking three of the categories of records identified in Plaintiff's Motion for Summary Judgment, namely deployment tests of the Altima air bag that Nissan is offering to replace, images of the testing of the substitute air bag, and names and other information identifying individuals who

¹ As discussed in Plaintiff's Motion, in 1997, NHTSA added an option to FMVSS 208 to temporarily permit manufacturers to certify compliance using a "sled test" in which a crash is simulated, instead of a crash test, in which the vehicle is tested in an actual crash. See 62 Fed. Reg. 12960 (1997). The sled test permitted under this option, identified as "S13," is less reliable than the crash test used in 1994-95, and is a more lenient test of vehicle protection. Id. at 12965-66.

have filed claims for injuries arising from the 1994-95 air bag. Plaintiff's Memorandum at 5-7. Plaintiff also is not seeking the records identified as category 4 in that motion, except for the records within that category that contain part names and numbers. Id. at 6.

ARGUMENT

I. DEFENDANTS' DEFENSES OF THEIR PROCEDURAL OBJECTIONS ARE WITHOUT MERIT.

Because Defendants' arguments concerning subject matter jurisdiction, joinder and exhaustion raise threshold procedural issues, we address them before turning to the merits. However, for the reasons discussed below and in Plaintiff's Motion for Summary Judgment, the only threshold issue that needs to be decided is whether this Court has subject matter jurisdiction.

A. This Court Has Subject Matter Jurisdiction.

Nissan repeats its claim that joinder of Nissan as a party in this action creates a jurisdictional defect, Nissan Opposition at 30, and NHTSA joins in the argument against joinder. NHTSA Opposition at 24-25. Neither Defendant, however, presents an argument that raises any doubt that the amended complaint is within this Court's subject matter jurisdiction. Plaintiff's claim that FOIA requires that NHTSA release the records at issue arises under federal law and, consequently, this case is within the jurisdiction set forth in 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. Decisions such as Sweetland v. Walters, 60 F.3d 852, 855 (D.C. Cir. 1995), make clear that a defendant's claim that the federal statute does not provide the relief sought in the complaint, or that the plaintiff has sued the wrong defendant, is not properly characterized as a question of subject matter jurisdiction.

In particular, Nissan's claim that it may intervene, but it may not be joined as a defendant, is a misjoinder claim. Even if Defendants had a valid argument that Nissan should not have been joined under Federal Rule of Civil Procedure 19(a), misjoinder would not be a basis for

dismissal, see Fed. R. Civ. R. 21(a), and the argument is moot in light of Nissan's motion to intervene. In addition to being moot, Defendants' discussions of joinder mischaracterize the relevant law:

1. Neither Nissan nor NHTSA dispute that Nissan asserts an interest that falls within the provisions of Rule 19(a) that state that persons shall be joined if they claim "an interest relating to the subject of the action" that will be impaired by the disposition of the action. Nor do Defendants point to any rule or statute that provides that Rule 19(a) is inapplicable in suits under the FOIA. Instead, NHTSA identifies no legal authority for its position while Nissan relies on district court cases that it claims hold that parties other than agencies cannot be joined as defendants in FOIA actions. Nissan Opposition at 30-31; NHTSA Opposition at 24. However, all of the cases that Nissan cites concern efforts to obtain relief against *individuals within an agency* as a substitute for, or supplement to, relief against their agency. None of these decisions address the issue of whether a private party that asserts an interest in records held by an agency may be joined under Rule 19.²

2. The application of Rule 19 in FOIA actions is directly addressed by Weisberg v. Department of Justice, 631 F.2d 824, 829 (D.C. Cir. 1980), in which the Court of Appeals remanded a FOIA action because the district court had not considered joining a private company that claimed a copyright interest in the records at issue. Defendants dismiss Weinberg as "readily distinguishable," Nissan Opposition at 31, but their efforts to identify a meaningful distinction miss the mark. Both Defendants assert that Weinberg is inapplicable because there is no risk that the government would be subject to inconsistent obligations if Nissan is not joined. Id. at 31-32; NHTSA Opposition at 25. This assertion is inaccurate. It is well established that a private party

²Insofar as these cases, all of which predate Sweetland, characterize the issue of whether individuals within an agency are proper defendants as an issue of subject matter jurisdiction, the Court of Appeals' decision in Sweetland demonstrates that that characterization is erroneous.

may bring a “reverse-FOIA” action under the Administrative Procedure Act to preclude the release of business records when it claims that the records fall within Exemption 4 and disclosure would be arbitrary. See McDonnell Douglas Corp. v. National Aeronautics and Space Admin., 180 F.3d 303, 305 (D.C. Cir. 1999).

Moreover, the risk of inconsistent obligations is only one of the possible grounds for joinder under Rule 19(a). The Rule provides that persons should also be joined when the disposition of the case will “as a practical matter impair or impede” their interest in the subject matter of the suit. Fed. R. Civ. P. 19(a)(i). Significantly, the Rule does not require that the plaintiff have an independent cause of action against the person being joined. As in this case, joinder frequently involves circumstances in which the plaintiff’s claim for relief against one party will impair the interest of a Rule 19(a) party against whom the plaintiff could not obtain the same relief. See, e.g., Haas v. Jefferson National Bank, 442 F.2d 394, 398-400 (5th Cir. 1971).

B. NHTSA’s Argument That Plaintiff Was Required to Pursue a Duplicative Appeal Is Irrelevant and Without Merit.

Because Plaintiff now seeks only the test reports and documents containing part numbers, there appears to be no need for this Court to address NHTSA’s argument that Plaintiff’s appeal from the December 23, 2002 request was not sufficient and this Court lacks jurisdiction to hear claims “arising out of the August 7, 2002 FOIA request.” See NHTSA Opposition at 25-28.³ NHTSA’s response to the August 7, 2002 FOIA request does not identify the test reports or documents containing part numbers as documents responsive to that request. See Coleman Decl. ¶ 9. There is no dispute that Plaintiff exhausted its administrative remedies by appealing from the agency’s initial denial of the December 23, 2002 request, and the records that remain at issue

³ NHTSA’s Opposition Memorandum does not repeat its prior argument that Plaintiff is barred from challenging the agency’s Exemption 6 claims, and this issue is moot because Plaintiff is no longer seeking these records in the wake of NHTSA’s decision to close the investigation.

fall entirely within this request. See Coleman Decl. ¶ 12. If NHTSA maintains that its exhaustion argument has some continuing vitality, its arguments should be rejected for reasons discussed below:

1. NHTSA asserts that, even if Plaintiff's December 23 request encompasses all records covered by the August 7 request, Plaintiff was required to pursue appeals with respect to both FOIA requests on the theory that requester who has received an adverse decision may not seek the same records in the context of a subsequent request. NHTSA Opposition at 26. NHTSA cites no statutory, regulatory, judicial or other authority for this contention, and the Court of Appeals recognized that no such restriction exists in Trans-Pacific Policing Agreement v. United States Customs Service, 177 F. 3d 1022 (D.C. Cir. 1999). In that action, the Court of Appeals observed that there was little point in ruling that the FOIA requester's failure to raise segregability during the course of agency appeals and district court proceedings precluded consideration of the issue on appeal because a FOIA requester can always submit a new request for the same records and use the new request to raise issues not litigated during the challenge to the first request. Id. at 1028.

2. Plaintiff's Motion for Summary Judgment also showed that Plaintiff was not required to appeal because this suit was filed before NHTSA's response was received, and the applicable FOIA regulations state that "[a]ny person *who has not received* an initial determination on his or her request within the time limits established by § 7.31 can seek immediate judicial review." 49 C.F.R. § 7.21(c) (italics added). Moreover, the determination that NHTSA mailed on the day that the complaint was filed (November 15) was incomplete under these regulations. 7 C.F.R. § 7.21(a). NHTSA asserts the regulation on the timing of an appeal should be disregarded because Oglesby v. Department of the Army, 920 F.2d 57, 65 (D.C. Cir. 1990), holds that a suit filed before a requester received an agency's response is barred if the

agency “committed its response to paper” before the complaint was filed -- even if the FOIA requester was not aware of the response and the agency had not mailed it. Id. NHTSA Opposition at 28.

Oglesby contains no such holding and, indeed, it does not address this issue at all because the agencies issued their response to the requests at issue in Oglesby “long before” the requester brought suit, so the requester had ample opportunity to pursue an administrative appeal. 920 F.2d at 65. In particular, Oglesby does not hold that a requester is barred from filing suit where, as here, an administrative appeal could not have been filed before the suit because the agency mailed its belated response on the day the suit was filed. The Department of Transportation regulations are binding on NHTSA, and those regulations unambiguously provide that a requester may file suit if it has not *received* the agency’s response. 49 C.F.R. § 7.21(c). Although NHTSA asserts that this regulation is inapplicable because it only applies “where the agency does not respond to a FOIA request and then suit is filed,” NHTSA Opposition at 27-28, the text of the regulation belies this assertion.

II. DEFENDANTS HAVE FAILED TO SHOW THAT DISCLOSURE OF THE TEST REPORTS WOULD RESULT IN SUBSTANTIAL COMPETITIVE INJURY.

A. Tests for Compliance With Federal Standard 208.

In the course of NHTSA’s investigation, Nissan submitted test reports prepared for Nissan to determine whether the Nissan Altima complied with FMVSS No. 208 (1) with the original 1994 air bags, see Exhibit M; (2) with the redesigned air bags introduced in mid-1995, see Exhibit O; and (3) with the replacement air bag that Nissan is now offering free of charge as a substitute for the 1994 air bag. See Plaintiff’s Exhibit B, Response to Request 6(f). Nissan made no effort to restrict dissemination of the reports on the 1994 or 1995 equipment, but

Defendants maintain that releasing any portion of the 46 pages reporting on the performance of the replacement air bag would result in substantial competitive injury to Nissan. See Supplemental Coleman Declaration ¶ 7 (describing FMVSS No. 208 Self-Certification Tests).

Although Defendants' papers do not describe the format of the FMVSS 208 test reports, Nissan's public FMVSS No. 208 reports provide an example of the format. The reports contain results for "Injury Criteria" established by federal regulation to measure the stresses placed on a dummy used to simulate an occupant in the vehicle:

- Head Injury Criteria (HIC) that measure the acceleration at the center of gravity of the head. 49 C.F.R. § 571.208 S6.1.2 (1993);
- Chest Acceleration - a measurement of the acceleration of the center of gravity of the upper thorax, which must be less than 60g's, id. § S6.1.3;
- The compressive force on the left and right upper leg, which may not exceed 2250 pounds. Id. § 6.1.4.⁴

The remainder of the reports describe the characteristics of the vehicle tested, such as the weight, cargo space, tire pressure, and options. See Exhibits M and O. Nissan's reports describe the test method with a terse statement that the test was conducted "[i]n accordance with F.M.V.S.S. No208." Id. The reports include graphs of the forces measured on the dummies during the crash, and before and after pictures of the vehicle. Id.

As we discuss below, Defendants have not presented any basis for concluding that the descriptions of the test vehicle, injury measurements, or other information in the FMVSS No. 208 test reports should be considered confidential under Exemption 4 merely because a test involves an air bag designed to replace the original Altima equipment, instead of Altima vehicles

⁴ Subsequent amendments of FMVSS 208 have modified the Injury Criteria to include a second measurement of head injury criteria, a measurement of the compression of the sternum, and a series of measurements of neck injury. 49 C.F.R. § 571.208 S6.1-6.6. The version of the standard in place in 1994 is attached as Exhibit W.

covered by Exhibits M and O. Moreover, insofar as Defendants claim that the 46 pages contain information on test procedures or protocols that are unique to Nissan, they have not shown that disclosure of the unique procedures would cause substantial competitive injury, or that such information cannot be separated from the rest of the reports.

1. Defendants Have Not Shown That The FMVSS 208 Test Reports Qualify for Exemption Under National Parks.

Defendants' claims that the test reports on the substitute air bag should be treated differently from the FMVSS 208 test reports that NHTSA and Nissan have made public do not withstand scrutiny for four reasons.

First, Defendants have the burden of proving that the requirements of Exemption 4 are satisfied for these specific FMVSS No. 208 tests, and Defendants' failure to meet that burden with adequate declarations warrants summary judgment for the requester. See Public Citizen Health Research Group v. FDA, 185 F.3d 898, 904-05, 906 (D.C. Cir. 1999). Defendants' Oppositions to Plaintiff's Motion for Summary Judgment offer only a single paragraph that specifically addresses these FMVSS No. 208 tests. See Supplemental Declaration of Robert Yakushi ¶ 10.⁵ This paragraph articulates two justifications for withholding these reports: (i) the reports on the performance of the replacement air bag might "be combined with publicly available information about the performance of older air bags to provide a starting point for

⁵ In Defendants' previous submissions, the only evidence that specifically addresses the FMVSS No. 208 tests is a paragraph in the Declaration of Robert Yakushi that contains no discussion of the competitive value of the test results, see Yakushi Declaration ¶ 6.b, and conclusory statements in two declarations submitted by NHTSA's representative. See Coleman Decl. ¶¶ 19, 20; Supplemental Coleman Decl. ¶ 11. Although NHTSA was ordered to submit a detailed Vaughn Index on April 21, 2003, see Doc. No. 21, the document that NHTSA submitted contains no additional details to justify NHTSA's contention that disclosure of the FMVSS No. 208 results would result in substantial competitive harm. See Doc. No. 32, Vaughn Index, p. 7 (addressing Attachment III.G). Instead, the only specific justification offered in the Vaughn Index addresses a photograph in one of the FMVSS 208 reports, not the test results. Id.

determining how air bag design changes affect specific performance features”; and (ii) the performance that Nissan has achieved in these tests “is competitively important information for manufacturers who are working to develop their own depowered air bags.” Supplemental Yakushi Decl. ¶ 10.

Neither assertion satisfies Defendants’ burden of proof because they do not prove that the disclosure of the test results would provide previously unknown information and prove that the information is so valuable that would substantially assist Nissan’s competitors. Defendants’ claim that comparing these test reports with tests on older air bags would provide a “starting point” for studying changes in air bag design does not show substantial competitive injury because no manufacturer would need to “start” with these tests. Air bags have been a part of federal safety regulations since 1972, and air bags with advanced design features date back to the 1970s. See 63 Fed. Reg. 49,958, 49,963-64 (1998); 65 Fed. Reg. 30680, 30740 (2000). There is already voluminous literature in the public domain on changes in air bag design, and all manufacturers have tested and implemented design changes for air bags. See, e.g., Exhibit Q, NHTSA Office of Research and Development, Air Bag Technology in Light Passenger Vehicles, Revision 2, June 27, 2001; see also Advance Air Bag Technology Research, at http://www-nrd.nhtsa.dot.gov/departments/nrd-11/airbags/advabg_rev.html. Defendants offer no evidence that disclosure of the test results for a single air bag would provide substantial insights that are not already available from the public literature or from manufacturers’ own development efforts.

The assertion that disclosure would aid competitors developing air bags by revealing the performance standards that Nissan “has been able to achieve” is also insufficient because Nissan is not competing with anyone in addressing the perceived defect in the Altima. A submitter “can suffer competitive harm only if the information has commercial value to competitors.”

Worthington Compressors, Inc. v. Costle, 662 F.2d 45, 51 (D.C. Cir. 1981). Revealing the performance of the replacement air bag will have little or no value to competitors because no other manufacturer needs to address problems in the 1994 Altima, and no other competitor needs to develop replacement air bags to avoid large numbers of moderate to severe eye injuries. Because these test reports only reveal the performance of a single bag developed specifically to address concerns that a decade-old Nissan model has a unique defect, disclosing the reports is obviously not equivalent to revealing the performance of Nissan's latest air bags for new vehicles.⁶

Second, Defendants argue that the test reports at issue are “of a completely different type from” the FMVSS No. 208 test information that NHTSA routinely discloses because the public test reports involve original equipment subject to the certification requirement of 49 U.S.C. § 30115(a), and replacement equipment is not subject to this requirement. See NHTSA Opposition at 4; see also Nissan Opposition at 20-22. This contention fails for two reasons.

First, there is no dispute that Nissan was legally required to submit the test information to NHTSA, and when compulsory submissions are involved, the applicability of Exemption 4 turns on the commercial value of the information. See National Parks and Conservation Association v. Morton, 498 F. 2d 765, 768-70 (D.C. Cir. 1974). Accordingly, in deciding whether particular information is of the same “type” as information that is routinely disclosed, the relevant consideration is whether the commercial value of the information is similar, not whether the legal

⁶ Tests performed with the 1994 Altima could not be used to demonstrate that another vehicle would satisfy FMVSS No. 208 if the same air bag were used. Air bags are not tested or certified for compliance with FMVSS No. 208 separately from the vehicles in which they are installed because the characteristics of the vehicle, not just the air bag, affect whether the vehicle provides adequate protection in a crash. See 63 Fed. Reg. 12960, 12961 (1997). In sled tests, manufacturers are permitted to use just part of the vehicle in the test, which further limits the value of the test as a measure of occupant protection. See 49 C.F.R. § 571.208 S13.5.

requirements that influenced the creation of the information were identical. Cf. Army Times Pub. Co. v. Department of Air Force, 998 F.2d 1067, 1071-72 (D.C. Cir. 1993) (to justify disparate treatment of similar information under Exemption 5, the agency must show that information withheld is different in a way that implicates the interest protected by the Exemption).

Second, NHTSA's assertion that the test information is "completely different" because it relates to a "prototype system," NHTSA Opposition at 4, is not true because Nissan is offering to install this air bag, without charge, in the approximately 190,000 1994 Altimas that are still on the road.

For the same reason, Nissan's assertion that it had no obligation to verify that the 1994 Altima will satisfy FMVSS No. 208 when modified with the substitute air bag, Nissan Opposition at 20-21, is false. As mentioned in Plaintiffs' Motion, the statute governing safety standards prohibits manufacturers and repair businesses from rendering equipment installed to comply with an applicable motor vehicle safety standard inoperative. 49 U.S.C. § 30122. NHTSA has recognized that this provision prohibits repair shops and other entities subject to 49 U.S.C. § 30122 from removing original equipment air bags that were installed to comply with FMVSS 208 when the air bags have not deployed.⁷ To overcome this prohibition, the government could grant an exemption if there was a showing that replacing the air bag would provide "an overall safety level at least equal to the overall safety level" of vehicles subject to the

⁷ Exhibit S, Paul Jackson Rice, NHTSA Chief Counsel, May 13, 1991 at 1 ("your repair business would violate Federal law if it were to remove, deploy, disable, or otherwise 'render inoperative' air bags installed in passenger cars"). The opinion letters cited by Nissan for the proposition that certification testing is not required, Nissan Opposition at 22 n.9, are inapposite because none of them addresses repairs that involve removing or replacing functioning air bags or similar equipment. Instead, these letters address modifications to parts like sun roofs or mobile phones that might indirectly affect the vehicle's ability to comply with a safety standard.

standard. 49 U.S.C. § 30113(c)(4).⁸ NHTSA has also stated that the prohibition on rendering safety equipment inoperative is not violated if the modified vehicle meets “the relevant requirements in effect either on the date of manufacture or as later amended.” Exhibit R, John Womack, NHTSA Acting Chief Counsel, April 19, 2001 at 2. If the replacement air bag “negatively affected” the vehicle’s ability to comply with FMVSS No. 208, Nissan’s campaign to replace the original, FMVSS No. 208-compliant air bag would violate federal law.⁹

Consequently, Nissan could not conduct its campaign to substitute air bags in the 1994 Altimas (or any replacement air bag) without verifying that the Altima complies with FMVSS No. 208 when the substitute air bag is installed. Nissan has represented in both its letter to NHTSA and in its letter to owners that the Altima satisfies S13 of FMVSS No. 208 when the substitute is installed. See Exhibit K. That representation to owners is functionally equivalent to the certification for original equipment under 49 U.S.C. § 30115, which is satisfied by placing a label on the Altima that represents that the vehicle complies with the applicable motor vehicle standards. 49 C.F.R. § 567.4 (2002). Nissan’s assertion that the tests on the substitute air bag were not “intended to certify to a Federal Motor Vehicle Safety Standard,” Nissan Opposition at 20, is disingenuous. The FMVSS No. 208 tests that are being withheld have been used by Nissan to certify to NHTSA that the replacement satisfies the standard, and it certainly appears that Nissan intended for these tests to serve this purpose.

⁸ Although NHTSA has not invoked this provision in accepting Nissan’s campaign to replace the 1994 Altima, its statement closing the investigation indicates that it has concluded that this standard is satisfied. See Exhibit J, at 6 (replacement air bag “should improve the overall performance of these air bag systems in a crash”).

⁹ Exhibit T, John Wolmack, NHTSA Acting Chief Counsel, March 26, 1993 at 2; Exhibit U, Philip R. Recht, NHTSA Chief Counsel, October 12, 1994, at 2.

Third, Defendants assert that Nissan has not disclosed the results of FMVSS No. 208 tests to the public, and the Court should only consider the practices of Nissan in evaluating whether records contain the type of information that would customarily not be released to the public. In particular, Defendants assert that National Parks limits the test for confidentiality to evidence concerning the submitter's practices, and that Plaintiff has misstated the legal standard. See Nissan Opposition at 4-5, 19-20; NHTSA Opposition at 3-4.

Defendants' argument misstates both the facts and the law. Nissan, like NHTSA, has disclosed FMVSS No. 208 tests to the public, including tests on the performance of the Altima. See Exhibits M, O. Nissan made no claim for confidentiality when it submitted these FMVSS No. 208 reports to the investigation docket, even though Nissan knew that submission would result in the reports being made available for public inspection. See 49 C.F.R. § 554.9 (communications with manufacturers concerning ongoing investigations are made available for public inspection). Indeed, Nissan's public submissions draw attention to the precise numbers from the test results, boasting that the numbers show that the original 1994 Altima "significantly outperformed" the requirements of FMVSS No. 208.¹⁰ Nissan's public disclosure of these reports and the results belie any claim that Nissan considers all FMVSS No. 208 test results confidential.

Defendants' argument that National Parks precludes considering any disclosures other than those of the submitter is also wrong. Under Defendants' proposed standard, a company that had an idiosyncratic practice of withholding information from the public would satisfy the

¹⁰ See Exhibit N, at 481 ("The highest HIC recorded in any of the Nissan 30 mph crash tests for the right front passenger was 467 (compared with the standard's requirement that the HIC not exceed 1000), and the highest chest accelerations recorded for the right front passenger was 43 g's (compared with the standard's requirement that the accelerations on the chest not exceed 60 g's)").

threshold requirement of National Parks even if all other businesses customarily disclosed the information to the public. Neither National Parks, nor any other case, holds that the test is so limited, and Defendants' argument to the contrary is based on quoting a sentence from the beginning of the National Parks decision, see 498 F. 2d at 766 (referring to disclosure "by the person from whom it was obtained"), and ignoring later sections of the decision, which articulate a broader test. The central issue in National Parks was not defining the threshold test for confidentiality, but deciding whether the agency must also show competitive harm. In summarizing the test at the end of the opinion, the Court of Appeals stated that the district court did not err in concluding that Exemption 4 required that the agency show that the information withheld "was of the kind 'that would not generally be made available for public perusal.'" Id. at 770 (quoting National Parks & Conservation Ass'n v. Morton, 351 F.Supp. 404, 407 (D.D.C. 1972)). The district court's opinion shows that, in evaluating whether this test was met, it did not limit the inquiry to the submitter's desires, but examined general business practices. Moreover, decisions before and after National Parks have understood that the test for confidentiality is an objective test that includes inquiry into how information is generally handled within the relevant business community. See, e.g., Greenberg v. Food and Drug Administration, 803 F.2d 1213, 1217 (D.C. Cir. 1986) (confidentiality established because submitter produced evidence that "its competitors also consider their customer lists to be confidential."); Comstock International (USA), Inc. v. Export-Import Bank of U. S., 464 F.Supp. 804, 807 (D.D.C., 1979) (pointing to "worldwide practice" of commercial banking institutions as evidence that National Parks test is satisfied).

For example, in rejecting an Exemption 4 claim, the court in M. A. Schapiro & Co. v. Securities and Exchange Commission, 339 F.Supp. 467 (D.D.C., 1972), considered not just the

practices of the submitter, but the practices of “competitors and the basic public” involved in the industry, and found that Exemption 4 was not satisfied because “none of the information given could objectively be said to be of the type that one would mind revealing to the public.” *Id.* at 471. A showing by the submitter that it has kept similar information confidential is only the beginning of the inquiry under Exemption 4 because such a showing is not sufficient if the submitter’s practices are aberrant and others normally divulge the type of information at issue to the public.¹¹

Finally, Defendants seek to justify confidential treatment for the tests of the substitute air bag on the basis that Nissan’s reports were not performed by government contractors and, therefore, contain “proprietary protocols,” NHTSA Opposition at 5, or other information that is sufficiently different from publicly available test reports that disclosure would cause Nissan substantial competitive harm. Nissan Opposition at 6-7. In this context, Defendants assert that Plaintiff has misstated the law by arguing that Defendants must show that the information that they are withholding differs from publicly available information in such a way that the

¹¹ Indeed, NHTSA’s regulations on confidential business information are inconsistent with its claim here that disclosures that are not attributable to the submitter are irrelevant. To claim confidential treatment under the regulations, the submitter must not only show that it has not disclosed the information, 49 C.F.R. § 512.4(b)(2)(ii), but must also report on whether the information is available to the public without regard to whether the submitter was the source of the disclosure. *Id.* § 512.4(b)(2)(iii) & (iv).

Nissan asserts that McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999), endorses its claim that only the submitter’s practices are relevant in assessing confidentiality under National Parks. This characterization of the case is erroneous because the portion of the decision that Nissan cites does not address the threshold issue of whether information is of the kind that would not generally be made available for public perusal, but the separate issue of whether the agency’s practice of disclosing line item pricing information precluded the submitter from arguing in a “reverse-FOIA” action against the agency that substantial competitive harm would result if the agency disclosed the submitter’s line item prices. *Id.* at 336.

incremental value of the information would cause substantial competitive injury. NHTSA

Opposition at 8.

Plaintiff has not misstated the test. Common sense and the case law demonstrate that the disclosure of commercial information will not result in substantial competitive harm unless the information reveals something that is both unavailable to competitors and would be substantially valuable to them if it were made available. See Niagara Mohawk, 169 F.3d at 18 (Exemption 4 does not justify withholding if the records "add so little" to what is available to competitors that disclosure would not result in a substantial competitive harm). Thus, to establish substantial competitive harm, an agency must do more than show that the records contain information that competitors do not have, and would have difficulty obtaining through reverse engineering or other means. Such information is not exempt unless the agency proves that the information would also have significant commercial value to the submitters' competitors. See Greenberg v. Food and Drug Administration, 803 F.2d 1213, 1217 (D.C. Cir. 1986) (showing that customer lists were kept confidential and would be prohibitively expensive to reproduce is insufficient where submitter failed to show that disclosure of such lists would impair the basis for its sales); Worthington Compressor, 662 F.2d at 51. Thus, to justify application of Exemption 4 to the FMVSS No. 208 test reports, Defendants must show that the records contain information that is sufficiently different from the information already available to auto manufacturers about FMVSS No. 208 test procedures and performance that disclosure would not only reveal something new, but would cause substantial competitive harm to Nissan.

Defendants have not even remotely satisfied this burden of proof. Defendants' declarations do not show that disclosure of the Injury Criteria measurements or other test results for the 1994 Altima replacement air bag would have any value to competitors who do not need to

develop replacements for the Altima. The portion of Defendants' declarations that purports to make such a claim asserts, in categorical and conclusory language, that test results "could be used by competitors to develop designs and products." Yakushi Decl. ¶ 8. This statement fails to establish substantial competitive harm, particularly given that manufacturers already have access to other tests reports and other literature that provides information that can be used to develop designs and products. See Public Citizen v. FDA, 185 F.3d at 906 (rejecting statements that competitors could use use research information as too conclusory).¹²

Nor do Defendants' declarations show that the FMVSS No. 208 test reports disclose the details of proprietary protocols, much less show that they reveal improvements on the standard protocols that would substantially benefit other automotive manufacturers. For example, Nissan cites paragraphs ¶ 16(b)-(f) of the Yakushi Declaration as evidence that the test reports contain "unique, confidential information about *Nissan's* testing" that would cause substantial competitive harm. See Nissan Opposition at 20. However, the *only* portion of these five paragraphs that states that the FMVSS No. 208 test reports contain unique information is a sentence that states that photographs in one of the four test reports "reveal special lighting used by Nissan." Yakushi Dec. ¶ 16(b) at p. 12. This isolated sentence falls far short of satisfying Defendants' burden of proving that Exemption 4 justifies withholding all four test reports in their entirety.

¹² Nissan's Opposition is also accompanied by the Declaration by Robert J. Gratzinger. Mr. Gratzinger does not state that he has examined the test results at issue here, and his declaration states only that test results, in the abstract, "can reveal information about the way variations in design can affect specified performance factors" and that "margins of compliance" are competitively sensitive. Gratzinger Declaration ¶ 12. Because Mr. Gratzinger's declaration does not specifically address the test results at issue here, or state that these reports would disclose competitively valuable information on "margins of compliance," Defendants cannot rely upon it to satisfy their burden to show that disclosure of these specific reports would result in substantial competitive harm.

2. Defendants Have Not Shown That The FMVSS 208 Test Reports Are Not Segregable.

It is well established that an agency cannot rely on conclusory statements to satisfy its obligation to prove that no segregable portion records released under the FOIA may be released, particularly where, as here, multi-page documents have been withheld in their entirety. “In order to demonstrate that all reasonably segregable material has been released, the agency must provide a ‘detailed justification’ for its non-segregability.” Johnson v. Executive Office for U.S. Attorneys, 310 F.3d 771, 776 (D.C.Cir. 2002) (quoting Mead Data Central, Inc. v. U.S. Dept. of Air Force 566 F.2d 242, 261(D.C. Cir. 1977)); accord Rugiero v. United States Department of Justice, 257 F.3d 534 (6th Cir. 2001). This detailed justification must include a description of “the reasons behind” the agency’s conclusions on segregability that allows the claim to “be challenged by FOIA plaintiffs and reviewed by the courts,” and it should provide a description of “what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document.” Mead, 566 F.2d at 261. The agency fails to satisfy this burden when the Vaughn index and declarations are “‘written in terms of documents, not information,’” because an “‘agency cannot justify withholding an entire document simply by showing that it contains some exempt material.’” Krikorian v. Department of State, 984 F.2d 461, 467 (D.C. Cir. 1993) (quoting Schiller v. NLRB, 964 F.2d 1205, 1209 (D.C.Cir. 1992) and Mead, 566 F.2d at 260). Moreover, the agency’s Vaughn index is inadequate where its description of the information withheld fails to show how that information “is different in any relevant respect from that which has been released voluntarily.” Army Times, 998 F.2d at 1071.

Although Defendants have had ample opportunity to provide such details, and NHTSA has even been ordered to file a second Vaughn index because its first submission was deficient,

Defendants have been unable to show that the FMVSS No. 208 reports are exempt in their entirety. The only portion of NHTSA's second attempt at a Vaughn Index that addresses segregability is a column that contains the word "None" for all documents withheld under Exemption 4. See Doc. No. 32, Vaughn Index. Defendants' voluminous declarations also provide no explanation of why Defendants assert that no portion of the four FMVSS No. 208 reports can be released. To the contrary, the declaration that asserts that the reports reveal confidential information on testing procedures identifies photographs of lighting apparatus that are plainly segregable from the other portions of the report. See Yakushi Decl. ¶ 16(b) at p. 12. Consequently, if this Court concludes that Defendants have raised a material issue of fact under the National Parks standard for any portion of the test reports, it should order that NHTSA disclose the four reports after redacting only that portion for which issues of fact exist.

B. Defendants' Evidence Concerning the Experimental and Quality Confirmation Reports Is Too Vague To Support Their Claims.

In addition to the four FMVSS No. 208 test reports, NHTSA is withholding ten pages described as a "Quality Confirmation" report with a list of Nissan's air bag test protocols and two "Experimental" Reports, one of which is described as tests of the replacement air bag under "specified extreme environmental conditions." Yakushi Decl. ¶¶ 16(a), 16(c), 16(d); Supplemental Yakushi Decl. ¶¶ 9, 12, 13. Aside from stating that these reports do not concern FMVSS No. 208 testing, Defendants' description of the reports is entirely cryptic. As a result, Plaintiff cannot address these reports in the same detail as the FMVSS No. 208 test reports. However, it does not follow that Defendants' declarations are sufficient to support their Exemption 4 claim. Because Defendants have the burden of proof, they "must shoulder the burden of showing affirmatively the absence of any meaningful factual issue," and this burden is

not satisfied by vague declarations. Niagara Mohawk, 169 F.3d at 18 (quoting National Association of Government Employees v. Campbell, 593 F.2d 1023, 1027 (D.C.Cir. 1978)).

Two specific considerations show that Plaintiff is entitled to summary judgment because Defendants' proof of substantial competitive harm falls short. First, although Nissan's declarations assert that these test reports contain information that is "highly confidential," they do not demonstrate that disclosure of the information would provide substantial competitive advantage to Nissan's competitors. See Yakushi Decl. ¶¶ 16(c), 16(d). Not all information that businesses keep secret is commercially valuable, and the agency must show that competitors could use the information in a way that would result in substantial harm to the submitter. See, e.g., Niagara Mohawk Power Corp., 169 F.3d at 18 (confidential price information may not be entitled to Exemption 4 protection where competitors do not compete based on price); Greenberg, 803 F.2d at 1217 (confidentiality of customer lists does not establish Exemption 4 claim where competition may depend on other factors). Moreover, because the record shows that other manufacturers have not marketed air bags with the eye injury problems associated with the Nissan Altima, these test will not have substantial value to Nissan's competitors. Consequently, defendants have failed to prove this essential element of their claim.

Second, as with the FMVSS No. 208 test reports, Defendants have failed to meet their burden of proving that no portion of these ten pages of reports can be released without causing substantial competitive harm. NHTSA's Vaughn Index is entirely inadequate to justify its claim that no portion of the three reports are segregable, and the agency cannot avoid its obligation to provide an adequate Vaughn Index for judicial review by relying on the submitter's assertions. Nissan asserts that the reports are not segregable because they are organized in tables that list various performance factors and the results. See Supplemental Yakushi Decl. ¶¶ 12, 13, 14.

However, there is no evidence that every one of the performance factors listed in the table reveals information that would result in substantial competitive injury, and the rows of the table revealing factors that are not sensitive are certainly segregable. Insofar as Nissan's Exemption 4 claim rests on its assertion that the thirteen photographs in one of the Experimental Reports depict Nissan's "on board instrumentation packages," or other Nissan testing equipment, Yakushi Decl. ¶ 16(b) at p. 12 and ¶ 16(e), even if Defendants were to show that disclosing pictures of the equipment could result in substantial competitive harm, the two pages of images are segregable from the report.

III. DEFENDANTS HAVE FAILED TO SHOW THAT DISCLOSURE OF THE PART NUMBERS FOR THE REPLACEMENT AIR BAG WOULD CAUSE SUBSTANTIAL COMPETITIVE INJURY.

Plaintiff's Motion for Summary Judgment challenged Defendants' claim that the materials in "Attachment III.F" that include part numbers for the substitute Nissan air bag are exempt under Exemption 4 because there was no showing that the part numbers could not be segregated, and Nissan's claim that disclosure of the part numbers would result in substantial competitive harm is untenable. See Plaintiff's Memorandum at 25-26. Defendants' Oppositions fail to raise any genuine issue of material fact to refute these points.

First, Defendants do not claim that the part numbers are inextricably intertwined with other information. Consequently, Defendants' assertions that records that contain the part numbers "contain far more than just part number and coding information," Supplemental Yakushi Decl. ¶ 23; see also Nissan Opposition at 17, are irrelevant. Plaintiff has now limited its request to the part names and numbers.

Second, the only identifiable basis for Defendants' claim that disclosing the part numbers for the replacement air bag would result in substantial competitive harm is the assertion that "the

vehicle model coding process used by Nissan is confidential.” Supplemental Yakushi Decl. ¶ 23; Yakushi Decl. ¶¶ 15(j), (k) at pp. 10-11. The evidence shows that this is not entirely true. Nissan has released, without any claim of confidentiality, the part numbers associated with the original air bags used in the Altima from 1993-1997. See Exhibit V, Passenger Side Air Bag Service Part Numbers. The parts for which Nissan is withholding the numbers would replace some of these air bags, and Defendants have provided no reason why the part numbers for the replacement would be commercially sensitive when part numbers for the equipment that it is designed to replace are readily available to the public.

CONCLUSION

For the reasons set forth above, the Court should deny Defendants’ motions for summary judgment, enter summary judgment for Plaintiff, and order NHTSA to (1) disclose the test reports identified as Attachment III.G; and (2) disclose the records containing the part numbers of the replacement air bag.

Respectfully submitted,

Michael E. Tankersley
D.C. Bar No. 411978
Michele Host
D.C. Bar No. 481453
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

May 23, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR AUTO SAFETY,)
)
Plaintiff,)
)
v.) Civil Action No. 02-2255 (EGS/JMF)
)
DEPARTMENT OF TRANSPORTATION,)
)
and)
)
NISSAN NORTH AMERICA, INC.,)
)
)
Defendants.)
_____)

**EXHIBITS TO PLAINTIFF'S REPLY
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

- Exhibit I.** Center for Auto Safety Letter to NHTSA, May 22, 2003.
- Exhibit J.** NHTSA ODI Resume, April 24, 2003.
- Exhibit K.** Nissan April 11, 2003 Letter to Associate Administrator for Enforcement.
- Exhibit L.** Nissan News Bureau, April 24, 2003.
- Exhibit M.** Nissan Certification Test Report, FMVSS 208, 1994-Early 1995 Altima Passenger Air Bag"(Attachment M) .
- Exhibit N.** Nissan Letter to Vehicle Integrity Division, May 31, 2001.
- Exhibit O.** Nissan Certification Test Report, FMVSS 208, 1995.5-1997 Altima Passenger Air Bag (Attachment O).
- Exhibit P.** NHTSA Vehicle Safety Compliance Test, 1994 Nissan Altima (report text, appendices omitted).
- Exhibit Q.** NHTSA Office of Research and Development, Air Bag Technology in Light Passenger Vehicles, Revision 2, June 27, 2001, available at Advanced Air Bag Technology Research,
http://www-nrd.nhtsa.dot.gov/departments/nrd-11/airbags/advabg_rev.html.

- Exhibit R.** John Womack, NHTSA Acting Chief Counsel, April 19, 2001, available at, <http://www.nhtsa.dot.gov/cars/rules/interps/files/21771.rbm.html>.
- Exhibit S.** Paul Jackson Rice, NHTSA Chief Counsel, May 13, 1991, available at, <http://www.nhtsa.dot.gov/cars/rules/interps/files/2988yy.html>.
- Exhibit T.** John Wolmack, NHTSA Acting Chief Counsel, March 26, 1993, available at, <http://www.nhtsa.dot.gov/cars/rules/interps/files/8262.html>.
- Exhibit U.** Philip R. Recht, NHTSA Chief Counsel, October 12, 1994, available at, <http://www.nhtsa.dot.gov/cars/rules/interps/files/10173.html>.
- Exhibit V.** Nissan Part List, Attachment GG.
- Exhibit W.** 49 C.F.R. § 571.208 S6 (1994).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR AUTO SAFETY,)
)
 Plaintiff,)
)
 v.) Civil Action No. 02-2255 (EGS/JMF)
)
 DEPARTMENT OF TRANSPORTATION, and)
)
 NISSAN NORTH AMERICA, INC.,)
)
 Defendants.)
 _____)

**PLAINTIFF’S STATEMENT OF MATERIAL FACTS AS
TO WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to Local Rule 7.1(h), Plaintiff hereby submits this statement of material facts as to which there is no genuine dispute.

1. Defendant Department of Transportation is an agency of the United States.

Answer ¶ 4. National Highway Traffic Safety Administration (“NHTSA”) is a component of the Department of Transportation, and it has possession of and control over the records that plaintiff seeks. Answer ¶ 5.

2. The NHTSA conducted an investigation entitled "Passenger Air Bag – Related Facial Eye" involving Model Year (“MY”) 1994 through early MY 1995 Nissan Altimas.

Answer ¶ 1. NHTSA opened a preliminary evaluation (PE01-008) containing a problem description stating “complaints allege that deployment of the front passenger air bag in minor to moderate severity crashes caused eye injuries to the occupants of the right front seat.” Answer ¶

7. The investigation was upgraded to an Engineering Analysis (EA01-015) on August 9, 2001.

Answer ¶ 8.

3. On June 28, 2002, NHTSA officials met privately with representatives of Nissan to discuss the agency's investigation. Answer ¶ 11.

4. During the course of the investigation, Nissan revealed that it had requested that its supplier develop an alternative air bag for the Altima for use as a “service part.” Plaintiff’s Exhibit B, Response to Request 6.

5. On July 11, 2002, NHTSA issued an “Information Request” to Nissan formally requesting certain information from Nissan under 49 U.S.C. § 30166. Among other materials, the Information Request requested complete documentation of the development and testing of the proposed “service part” by or on behalf of Nissan. Answer ¶ 12; Plaintiff’s Exhibit A, Request 6.

6. Nissan has requested that NHTSA treat certain data and information submitted to the agency in connection with the Nissan Altima investigation as confidential business information and withhold this information from the public. The data and information for which Nissan has requested such treatment include data and information about the “service part” that Nissan submitted to NHTSA in response to the July 11, 2002, Information Request. Answer ¶ 14.

7. On April 11, 2003, Nissan informed NHTSA that it had decided to conduct a campaign under which it will offer to replace air bags in all 1994-1995.5 Nissan Altimas with the service part, free of charge. Plaintiff's Exhibit K.

8. On April 24, 2003, NHTSA announced that, in light of Nissan’s decision to offer to replace the air bags in the Altimas covered by the investigation, NHTSA had decided to close the investigation. Plaintiff's Exhibit J. The memorandum announcing the closing of the investigation states that the agency would not have closed the investigation "in the absence of action that addresses our safety concerns," id. at 5, and that the replacement air bag "should

improve the overall performance of these air bag systems in a crash and reduce the likelihood of moderate and severe air bag-induced injury." Id. at 6.

9. The replacement air bag that Nissan is offering to Nissan owners free of charge differs from the air bags originally installed in the 1994-95 Altimas. The replacement has a different inflator type, less inflator power, and a different bag shape, length and fold pattern. Plaintiff's Exhibit J at 5-6.

10. Nissan's letter to NHTSA announcing the campaign to replace the 1994-95 air bags represents that the Nissan Altima complies with S13 of the applicable Federal Motor Vehicle Safety Standard (FMVSS), Standard 208, when the replacement air bag is installed. Plaintiff's Exhibit K. Nissan's letter to Altima owners concerning the replacement air bags represents that the replacement a Federal Motor Vehicle Safety Standard adopted after the Altima was produced in 1994 and 1995. Id.

FOIA Requests

11. In an August 7, 2002 letter to the NHTSA FOIA Officer, plaintiff requested, pursuant to the FOIA, disclosure of correspondence, notes, calendars, and all other records relating to the June 28, 2002 meeting between NHTSA officials and representatives of Nissan. Answer ¶ 15.

12. In a letter dated September 11, 2002, NHTSA acknowledged receipt of plaintiff's FOIA request. The letter stated that the agency would take an extension of ten working days to respond to the request pursuant to 49 C.F.R. § 7.33, and that the agency "would therefore expect that an answer will be provided to you by September 20, 2002." Answer ¶ 16.

13. On November 15, 2002, the same day that this action was filed, NHTSA mailed a letter dated November 14, 2002. Declaration of Michael Brooks ¶ 3. Enclosed with the letter

were certain documents responsive to the August 7, 2002 FOIA request. The letter also stated that the publicly available portions of Nissan's submissions would appear in the agency's public file on no later than November 22, 2002. Answer ¶ 19.

14. In a letter dated December 23, 2002, plaintiff requested from NHTSA, pursuant to the FOIA, disclosure of "[a]ll records, documents, and materials, including all records in electronic, video or CD-ROM format, that have not been placed in the public file maintained at Technical Information Services, relating to the Nissan Altima Air Bag Investigations PE01-008 and EA01-015." Answer ¶ 21.

15. On January 24, 2003, NHTSA sent a response to plaintiff's December 23, 2002, FOIA request. Answer ¶ 22. The letter disclosed that NHTSA was releasing certain responsive materials as enclosures to the letter but stated that other responsive materials were being withheld pursuant to exemptions in the FOIA, or would not be made publicly available until February 28, 2003. In particular, the letter stated that NHTSA is withholding four attachments submitted by Nissan pursuant to Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4). Plaintiff's Exhibit E, Letter of January 24, 2003.

16. On January 28, 2003, NHTSA received an administrative appeal from plaintiff in which plaintiff challenged NHTSA's January 24, 2003, letter responding to plaintiff's December 23, 2002, FOIA request. Answer ¶ 23; Plaintiff's Exhibit F.

17. On February 25, 2003, NHTSA sent a response to its administrative appeal. Answer ¶ 24. The response included two CDs containing records responsive to Plaintiff's FOIA requests and stated that the agency is withholding materials related to the investigation under 5 U.S.C. § 552(b)(4), (5), (6), and (7)(A), and as personal notes. See Nissan Exhibit 5, Letter of February 25, 2003. The response stated that NHTSA was withholding 87 pages and two CD-

ROMs submitted by Nissan on the basis that disclosure would cause Nissan substantial competitive harm. Id.

18. After NHTSA announced that it had decided to close the investigation in light of Nissan's campaign to replace Altima air bags, Plaintiff narrowed the records that it is pursuing under the FOIA to 56 pages described as test reports on the replacement air bag, and records containing the part numbers of the substitute air bag. Plaintiff's Exhibit I.

Information in the Public Domain/Prior Disclosures

19. Nissan and NHTSA have released reports on tests performed to determine whether the Nissan Altima complies with FMVSS No. 208 to the public. See Declaration of Michael Brooks ¶ 9; Plaintiff's Exhibits M, O, and P. The reports that are publicly available include reports on tests performed for Nissan to determine whether the 1994-1995 Nissan Altima complies with FMVSS No. 208. See Plaintiff's Exhibit M. These reports include measurements of injury criteria, graphs of data collected during testing, descriptions of the test vehicle and photographs of the test. See Plaintiff's Exhibits M, O, and P.

20. Information on the designs used in air bags designs, design changes introduced by automotive manufacturers, and air bag performance is publicly available. See, e.g., Exhibit Q, NHTSA Office of Research and Development, Air Bag Technology in Light Passenger Vehicles, June 27, 2001; see also Advanced Air Bag Technology Research at http://www-nrd.nhtsa.dot.gov/departments/nrd-11/airbas/advabg_rev.html.

21. Information on the protocols for testing the performance of air bags, including procedures for testing compliance with FMVSS No. 208, is publicly available. See Declaration of Michael Brooks ¶¶ 5, 6, and 7.

22. Information on part names and numbers for the Nissan Altima is publicly available. This information includes part names and numbers for passenger air bags installed in Nissan Altimas produced during the 1990s. See Plaintiff's Exhibit V.

Contested Records

23. Among the records that NHTSA is withholding are four reports on tests that Nissan performed to determine whether the 1994-95 Nissan Altima complies with Federal Motor Vehicle Safety Standard (FMVSS) No. 208 when the Altima's original air bag has been replaced by a substitute air bag described by Nissan as a "service part." Coleman Decl. ¶ 19; Supplemental Coleman Decl. ¶ 7; Doc. No. 32, Vaughn Index, p. 7. These four reports are set forth in 46 pages that have been withheld in their entirety. These tests are described as FMVSS 208 Self-Certification Test Reports and are numbered K4X01N001, K4X01N002, K4X01N003, and K4X01N004. Id.

24. These Self-Certification Test reports relate to certification of an air bag for the Nissan Altima. Coleman Decl. ¶ 19.

25. Each Self-Certification Test report identifies the specific FMVSS No. 208 requirement examined, a list of test categories, test conditions, and data graphs. Supplemental Coleman Decl. ¶ 7.

26. NHTSA has withheld two pages described as a "Quality Confirmation" report. Coleman Decl. ¶ 19; Doc. No. 32, Vaughn Index, p. 6. Both pages contain test items and results divided into several categories of performance information and airbag characteristics. The first page is in Japanese and English. The second page contains the same information as the first without English translations of the test results. Supplemental Coleman Decl. ¶ 7.

27. NHTSA has withheld two pages described as "Experiment Report, Report No. K4IVO1A." Doc. No. 32, Vaughn Index, p. 8. This report consists of one page in Japanese and a second in English. Coleman Decl. ¶ 19; Yakushi Dec. ¶¶ 16(c), 16(d). The report contains a preface, identification of the tested item, findings/results, and judgment criteria. Supplemental Coleman Decl. ¶ 7.

28. NHTSA has withheld 6 pages described as "an Experiment Report, Report No. K4XIV02A." Doc. No. 32, Vaughn Index, p. 8. This report consists of (a) two pages containing thirteen photographs of an air bag test; (b) two pages of graphs charting time v. speed and time v. pressure; and (c) a two page report, one page in Japanese and one translated English version. Coleman Decl. ¶ 19; Supplemental Coleman Decl. ¶ 7.

29. NHTSA has withheld two pages of prototype production request forms indicating part numbers and part names for a passenger side frontal air bag developed at Nissan's request as a replacement for the air bag in the 1994-95 Nissan Altima. Coleman Decl. ¶ 18; Doc. No. 32, Vaughn Index, p. 4.

30. NHTSA has withheld two single-page Specification Tender Forms from Nissan to suppliers that contain the airbag module assembly's part numbers. Supplemental Coleman Decl. ¶ 6; Doc. No. 32, Vaughn Index, p. 5.

31. NHTSA has withheld two single-page Design Notes for Production. The first design note (issued March 23, 2001) identifies part and part numbers for the airbag module. The second design note (issued April 30, 2001) is identical except that it identifies different parts and part numbers. Supplemental Coleman Decl. ¶ 6; Doc. No. 32, Vaughn Index, p. 5-6.

32. Defendants have not produced any evidence that Nissan faces competition in developing replacement air bags for the 1994 Nissan Altima, or in developing or marketing

replacement air bags to address objections that the air bag causes moderate to severe eye injuries such as those attributed to the 1994 Altima. Nissan's statements announcing its campaign to replace air bags free of charge indicate that its decision to market the replacement is based on adverse publicity and customer satisfaction issues, and they do not identify any competitors that offer competing replacement equipment. See Plaintiff's Exhibit L, Nissan News Bureau, April 24, 2003; Exhibit K, Nissan April 11, 2003 Letter to Associate Administrator for Enforcement at 1.

33. The Vaughn Index prepared by the agency for the records at issue in this suit addresses segregability of the records with a column in which the entry for every record withheld under 5 U.S.C. § 552(b)(4) is "None." Doc. No. 32, Vaughn Index. The declarations submitted by the agency address segregability in conclusory terms. See Coleman Decl. ¶ 21; Supplemental Coleman Decl. ¶ 16.

Respectfully submitted,

Michael E. Tankersley
D.C. Bar No. 411978
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

May 23, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR AUTO SAFETY,)
)
 Plaintiff,)
)
 v.) Civil Action No. 02-2255 (EGS/JMF)
)
 DEPARTMENT OF TRANSPORTATION, and)
)
 NISSAN NORTH AMERICA, INC.,)
)
 Defendants.)
 _____)

PLAINTIFF’S RESPONSE TO DEFENDANTS’ STATEMENTS OF MATERIAL FACTS

Pursuant to LCvR 7.1(h), Plaintiff hereby submits the following response to Defendants' Statements of Material Facts As To Which There Is Not Genuine Dispute.

Defendant Department of Transportation’s Statement of Material Facts

Plaintiff believes that the following portions of the Department’s Statement are not material facts as to which there is no genuine dispute:

¶ 5. The statement that NHTSA “responded” to the August 7th FOIA request on November 14, 2002, is not material and is disputed. See Declaration of Michael Brooks ¶ 2.

¶ 11.c The Department’s description of Attachment III.F is inaccurate because it does not acknowledge that these records include the part names and numbers included in these records. See Coleman Decl. ¶ 18; Supplemental Coleman Decl. ¶ 6. The disclosure of the part names and numbers is the only issue that remains in dispute with respect to these records.

¶ 11.d The Department’s description of the 56 pages of test reports as information that “relates to experimental tests” is inaccurate. The vast majority of the 56 pages are not described

as experimental, but as reports relating to certification of the vehicle's compliance with Federal Motor Vehicle Safety Standard No. 208. Coleman Decl. ¶ 19; Supplemental Coleman Decl. ¶ 7.

¶ 11.e This paragraph of the Department's statement is conclusory description of the Department's position, not a statement of fact that is supported by the record.

Plaintiff notes that paragraphs 11.a, 11.b, 11.c and 13, address records that are no longer in dispute. See Plaintiff's Exhibit I.

Defendant Nissan North America's Statement of Material Facts

Plaintiff believes that the following portions of Nissan's Statement are not material facts as to which there is no genuine dispute:

¶¶ 17, 18, 19, 53, Nissan's statements that Nissan does not release the type of information at
87, 88, 89, 90, issue in the records at issue is not accurate, unless the "type of
111 information" is arbitrarily defined to exclude information that Nissan has
released to the public. Nissan has released test reports concerning whether
Nissan vehicles comply with Federal Motor Vehicle Standard No. 208
without making any claim that such reports are confidential business
information. See Plaintiff's Exhibit N, Nissan April 11, 2003 Letter to
Associate Administrator for Enforcement, at pp. 467-68, 481; Plaintiff's
Exhibit M, Nissan Certification Test Report, FMVSS 208, 1994-Early
1995 Altima Passenger Air Bag"(Attachment M); Nissan Certification
Test Report, FMVSS 208, 1995.5-1997 Altima Passenger Air Bag
(Attachment O). The production request forms and design notes

referenced in Nissan's statement (§§ 52, 86) contain part numbers and names for Nissan equipment. See Supplemental Coleman Decl. § 6). Information on the part numbers and names for Nissan equipment, including Altima air bags, has also been released. See Plaintiff's Exhibit V, Nissan Part List, Attachment GG.

§§ 20, 21, 26, 28 These paragraphs of Nissan's statement set forth statements of opinion, rather than fact, and the statements are not material to the issues presented in this case because they are general and do not specifically address to the value of the information at issue in this case. For example, Nissan's statement that the automobile industry is "highly competitive" (§ 20) does not address the material issue of whether Nissan faces actual competition in producing replacement air bags to address perceived defects in Nissan vehicles, or the 1994 Nissan Altima in particular. Because Nissan has announced a campaign to provide replacement air bags to owners for free, see Plaintiff's Exhibits J, K, and L, the market for Altima replacement air bags is not a market in which Nissan is competing against others for business.

§§ 98, 101, 102, 103, 108, 114, 117, 118, 119 These paragraphs of Nissan's statement are set forth in conclusory terms that are insufficient to support summary judgment, and fail to address the fact that detailed information about air bag performance, test protocols, and air bag design changes is already available to auto manufacturers from

literature in the public domain or from their own development efforts. See Plaintiff's Exhibit Q, Air Bag Technology in Light Passenger Vehicles, June 27, 2001; Declaration of Michael Brooks ¶¶ 5, 6, 7; Advanced Air Bag Technology Research at http://www-nrd.nhtsa.dot.gov/departments/nrd-11/airbas/advabg_rev.html.

¶ 99 Nissan's statement that the records relate to a "prototype service part" is inaccurate. Nissan has announced that it is offering replacement air bags to all owners of the Nissan Altima model that was the subject of NHTSA's defect investigation. See Plaintiff's Exhibits J, K, L.

¶¶ 104, 106, 107, 110, 121, 122. Nissan's statements concerning photographs in test reports are too vague and imprecise to support summary judgment. These statements do not specify whether some or all of the photographs contain the images that Nissan seeks to protect, and fail to address the basis for withholding individual photographs.

¶ 100 Nissan's statement that the FMVSS No. 208 certification tests were not used for "new vehicle certification" is accurate, but immaterial, because the tests were used to determine whether the replacement developed for Nissan could lawfully be used to replace certified new vehicle safety equipment. See Plaintiff's Exhibit B, Response to Request No. 6; and Exhibits J and K.

Plaintiff notes that paragraphs 22-25, 27, 29-37, 40-51, 54-85, 91-94, 124-130, address records that are no longer in dispute. See Plaintiff's Exhibit I.

Respectfully submitted,

Michael E. Tankersley
D.C. Bar No. 411978
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

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