

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

TRINITY INDUSTRIES, INC., and)	
THE TEXAS A&M UNIVERSITY SYSTEM,)	
)	
Plaintiffs,)	
)	
vs.)	Civil Action No. 2:12-cv-00046-JRG
)	
JOSHUA HARMAN,)	
)	
Defendant.)	

**DEFENDANT’S OPPOSITION TO PLAINTIFFS’ MOTION TO DISMISS WITHOUT
PREJUDICE AND MOTION AND MEMORANDUM BY DEFENDANT TO INSTEAD
DISMISS WITH PREJUDICE**

Just days after filing their latest of several “Amended Complaint[s,]” Plaintiffs moved to voluntarily dismiss their case without prejudice pursuant to Rule 41(a)(2). Plaintiffs’ initial failure to prosecute this action, including Plaintiffs’ previous attempt to dismiss it without prejudice¹, combined with Trinity’s dismissal of a nearly identical action in the Northern District of Georgia (“NDGA action”) shortly after the complaint was served,² demonstrates that this litigation was little more than a tactical ploy to increase pressure on Harman to stop pursuing his constitutional right to alert the public to Plaintiffs’ fraud.³

Plaintiffs’ claims should be dismissed only upon terms sufficient to mitigate both past

¹ On November 30, 2012, Plaintiffs moved to dismiss this action without prejudice. (Dkt. 14) Defendant opposed that motion and Plaintiffs withdrew their motion on January 17, 2013.

² N.D. Ga. (Atlanta) Dkt. No. 1:13-cv-252-ODE. Trinity maintained this action until they learned on Friday, March 22, 2013, that Harman had retained counsel and obtained an extension to file responsive pleadings. They then filed to voluntarily dismiss on the following Monday, March 25, 2013.

³ Harman’s companies were sued in the Eastern District of Virginia for manufacturing a generic version of Plaintiffs’ product, as originally designed and safety-tested. While that litigation resulted in a confidential settlement, reached on the eve of a hearing on a motion for sanctions brought against Trinity by Harman’s companies, what is significant here is that, on the five occasions when Harman’s product was involved in an end-on crash, it worked perfectly. Plaintiffs are now concerned that Harman will shed the light of day upon their unscrupulous manufacturing and distribution of a product that frequently fails, resulting in death and/or dismemberment.

and future prejudice to Harman. Given Plaintiffs' abusive and dilatory litigation tactics, the Court should grant the dismissal with prejudice, require Plaintiffs to pay Harman's fees and costs, and preserve certain discovery for use in the *qui tam* action.⁴

Plaintiffs' latest Motion to Dismiss the Amended Complaint Without Prejudice is the most recent maneuver in a long saga of procedural fencing designed to delay and frustrate Harman, Defendant here and Plaintiff in the *qui tam* action pending before this Court, from disseminating information of significant public interest that directly affects highway safety.

Guardrails are designed to prevent motorists who inadvertently depart the roadway from encountering hazards. Although guardrails properly perform their function every day, they pose certain hazards. A motorist who impacts the end of a guardrail lengthwise runs the risk of being impaled and killed by the impact. At highway speeds, such an impact is so powerful that the guardrail penetrates both the bumper and the engine block and invades the passenger compartment. The guardrail may skewer the entire vehicle, impaling an occupant. Even if the guardrail does not kill a driver or passenger, it may sever a limb or disable the vehicle.

Guardrail terminals are designed to mitigate this hazard.⁵ Guardrail terminals, including the ET-series designed, manufactured, and distributed by Plaintiffs, were designed to soften impacts by shielding vehicles from the sharp end of a guardrail and slowly dissipating the kinetic energy of the collision by flattening and bending the guardrail. This revolutionary life-saving device has the potential to save thousands of lives if properly designed and installed, including with the use of correct dimensions. Although Plaintiff's initial designs were sound, they changed their designs over the years without telling anybody, including the federal government through which all such changes were supposed to be disclosed and approved before use. These design

⁴ The Amended *Qui Tam* Complaint is being filed today and served tomorrow.

⁵ If a guardrail is simply bent down and buried in the ground, (known as a "Texas turndown") it may cause an impacting vehicle to "launch" and become airborne, which poses a distinct, but no less severe, set of hazards.

changes resulted in an inferior, defective, and dangerous product.

The “ET-Plus” guardrail system was tested in 1999 and was approved by the Federal Highway Administration (“FHWA”) in 2000 for use on the National Highway System. Between 2002 and 2005, Trinity secretly modified certain critical dimensions of the ET-Plus. Even though it was obligated to do so, Trinity did not inform FHWA of these changes, and the secretly redesigned product has never received the necessary approvals for installation on highways in each state. Nevertheless, hundreds of thousands of the secretly redesigned ET-Plus end terminals were distributed by Trinity across the United States and in over 60 foreign countries. Harman contends that the secretly redesigned and unapproved ET-Plus terminals are not only illegal, but that they fail at an alarming rate, thereby killing or maiming motorists. Harman believes that these devices are a serious threat to motorists worldwide and has amassed substantial evidence in support of the same. Indeed, despite several years of efforts in different states, Plaintiffs have yet to prove any inaccuracy in any statement made by Harman.

Plaintiffs spuriously argue that Harman has defamed them by, among other things, asserting that their products are dangerous. Defendant asserts the veracity of the information, including a presentation he has shown to various state and federal officials about Plaintiffs’ dangerous highway guardrail terminals (the “Presentation”), and that dissemination to the public, news media, and authorities will save lives. Defendant’s allegations are meticulously documented – in the Presentation and elsewhere – and Plaintiffs’ unsubstantiated denials ring hollow. Nevertheless Plaintiffs have sought, in this and other fora, a prior restraint on Harman’s Presentation despite both (1) its truth and (2) the clearly unconstitutional nature of such relief, even in circumstances far more compelling than Plaintiffs’ attempted whitewash here. *N.Y. Times v. United States*, 403 U.S. 713 (1971) (denying prior restraint, during Vietnam war, of

publication of classified but purloined “Pentagon Papers” detailing counterinsurgency strategy).

Plaintiffs have consistently balked at complying with Harman’s discovery requests, compliance with which would necessitate that Plaintiffs actually provide information corroborating their untoward allegations. Despite the fact that this case has been pending for nearly a year and a half, and despite their clear disclosure obligations under Rule 26 of the Federal Rules of Civil Procedure, Plaintiffs have consistently refused to produce evidence of damages resulting from any defamation. With motions briefed, discovery requests served, and pretrial deadlines approaching, Plaintiffs again propose to dismiss their defamation action without prejudice. The Court should not countenance such manipulative techniques.

Although Plaintiffs have decided to take their ball and go home, they fail to demonstrate any entitlement to (1) fight again another day, (2) escape the costs of their antics, or (3) gain an advantage in prospective discovery obligations in the *qui tam* action. Plaintiffs have, for their part, impugned Defendant by among other things, calling him a counterfeiter without any basis in fact.⁶ Moreover, Plaintiffs’ pleadings and memoranda fail to accomplish anything beyond (1) recounting allegations from the settled patent litigation, (2) denigrating Defendant, and (3) falsely claiming that Mr. Harman seeks financial gain through disclosure.⁷ Plaintiffs’ memorandum contains various *non sequitur* assertions that (1) Harman has yet to serve the *qui tam* complaint (the deadline has not passed and an amended complaint is being filed today and will be served tomorrow), (2) they seek to deprive Harman of a public platform (Harman’s Presentation has been well-received by various government officials), (3) end users remain in

⁶ Mitch Blacher, *Lawsuits Claim Highway Guardrails Impaled, Killed Drivers*. ABC News San Diego April 10, 2013, available at: <http://scripps-cms.endplay.com/web/kgtv/news/investigations/lawsuits-claim-highway-guardrails-impaled-killed-drivers>.

⁷ In fact, Mr. Harman has endured substantial financial and personal sacrifice to bring Plaintiffs’ practices to light. Among other things, he has traveled the country by road documenting the installation of dangerous highway products.

support of the use of Plaintiffs' product (they were defrauded into purchasing it), and (4) Harman hopes to obtain discovery here for use in the *qui tam* action (Plaintiffs' misdeeds are also at issue there and Harman will be entitled to that information in the *qui tam*.) As to the last point, Plaintiffs have good reason for their sensitivity regarding use of discovery across different actions. Plaintiffs' initiation of the EDVA action provided an opportunity for Harman to further refine and corroborate his suspicions about Plaintiffs' unlawful conduct.

Even more sadly, Plaintiffs engage in a transparent and provincial attempt to cast aspersions on opposing counsel, objecting to their numbers and geographical origin: "within the last 30 days, nine lawyers from two separate out-of-state law firms (Boies Schiller & Flexner and Durette Crump (sic)) have entered appearances on behalf of Harman in both this defamation and the *qui tam* action pending before this Court." Dkt. 65, Page 3. Plaintiffs' resources far exceed Harman's, yet they distribute a defective product worldwide, initiate frivolous litigation in Georgia and Texas, and complain that Harman has retained a diverse team of attorneys.

PROCEDURAL HISTORY

On September 2, 2011, Plaintiffs filed an action against Harman's companies in the Eastern District of Virginia, alleging, among other things, that the safe terminals Harman's companies installed infringed Plaintiffs' patents. ("EDVA action")⁸ Plaintiffs retained five attorneys from three different offices of a law firm headquartered in Pennsylvania. Plaintiffs' recalcitrant approach to discovery imposed far greater costs on Harman and his companies than vice versa. Harman was forced to brief fourteen motions to compel in that action, thirteen of which were granted.⁹ That litigation was finally settled late last year on the eve of a hearing on a motion for sanctions brought by Harman's companies against Plaintiffs.

⁸ E.D. Va. (Alexandria) Dkt. No. 1:11-cv-937-CMH-TRJ. Notably, Plaintiffs availed themselves of the opportunity to amend their complaint.

⁹ The remaining motion was mooted when Plaintiffs used the documents in issue at a deposition.

This litigation was initiated by Plaintiffs on January 30, 2012, while the EDVA action was still pending. Late last year, after ten months of inactivity in this action, Plaintiffs moved to dismiss their original Complaint without prejudice. Harman vigorously opposed that motion (Dkt. 16) and the arguments asserted therein are hereby incorporated by reference. Harman requested that Plaintiffs pay his costs and attorney fees, or in the alternative, that the dismissal be with prejudice. Harman also sought to retain documents produced in the EDVA action for use in any future litigation. Plaintiffs' reply brief (Dkt. 17) denigrated Harman's decision to retain for his companies a quality legal team and to vigorously pursue exoneration through legitimate discovery and motion practice. ("[S]corched earth litigation efforts in Virginia, e.g. Mr. Harman's decision to pay a team of ten Jones Day attorneys (at Washington D.C. hourly rates) to file 'fourteen motions to compel' and a 'summary judgment brief'") (Dkt. 17, Page 3) The reply brief, however, conspicuously omitted to mention (1) the substantial resources Trinity and Texas A&M dedicated to fighting Harman and his companies around the country, and (2) that Harman's companies' motions to compel were well-founded in law and fact and well-received by the court. Although Plaintiffs attempted to justify dismissal of their complaint in this case by noting the relative inactivity of the docket at that time, thus seemingly lessening the prejudice and expense to Harman, (Dkt. 17, Page 6), they finally filed a withdrawal of their motion (Dkt. 24) without explanation and announced instead their intent to file an Amended Complaint.

Plaintiffs' actions during the next half year caused costs to mount for all parties at an accelerated pace as a confused series of filings ensued. Plaintiffs moved for leave (Dkt. 29) to file an amended complaint,¹⁰ propounded discovery on February 18, 2013, and then again on April 13, 2013, demanded supplemental responses to discovery from Defendant, refused to

¹⁰ For simplicity's sake, this chronology actually omits mention of certain docket entries which were later superseded.

provide discovery requested by Defendant, necessitating deficiency letters and several attempts to meet and confer, filed a flurry of notices of appearance (Dkts. 50, 52, 53), filed a procedurally defective Amended Complaint (Dkt. 57), then a procedurally proper Amended Complaint (Dkt. 59) and then filed a motion to withdraw (Dkt. 60) their motion for leave to amend their pleadings, apparently on the basis that they did not need leave to file, after all. Plaintiffs now seek leave to voluntarily dismiss the operative complaint that, under their interpretation of this confused history, they filed less than one month ago. Prior to Plaintiffs filing their motion to dismiss, Harman engaged in substantial efforts to (1) gather information responsive to Plaintiffs' discovery requests, (2) propound his own requests, (3) begin and almost complete his response to the Amended Complaint, (4) engage in a meet and confer regarding Plaintiffs' discovery deficiencies, (5) exchange correspondence with Plaintiffs regarding discovery and (6) otherwise ready himself for motion practice and trial on a very tight schedule.

In the midst of this litigation, Plaintiffs filed and then promptly voluntarily dismissed the almost identical NDGA action. That litigation was initiated by Plaintiffs on January 23, 2013, and then voluntarily and unilaterally dismissed on March 27, 2013, after Harman and his companies went to the time and expense to retain counsel in Atlanta.

Having waged a costly and vexatious multijurisdictional and multi-front battle against Harman, Plaintiffs recently moved to dismiss their Amended Complaint without prejudice but fail to state any valid reason why they should be permitted to file again, in Texas or elsewhere.

ARGUMENT

I. DISMISSAL SHOULD BE WITH PREJUDICE AND PAYMENT OF HARMAN'S COSTS AND ATTORNEYS' FEES DUE TO PLAINTIFFS' EGREGIOUS CONDUCT

Plaintiffs' frivolous, successive, and vexatious attempts to sue Harman multiple times, only to settle or dismiss when confronted with his unexpected fortitude, should not be tolerated

when done by anyone, but particularly, as here, where one is a publicly traded company doing business with hundreds of sovereign entities around the world. *Cf. Horsley v. Johnson*, 197 F.3d 134 (5th Cir. 1999) (reversing dismissal of drug dealer's third successive habeas petition without prejudice and instead dismissing with prejudice). Because Plaintiffs have flouted the rules of civil procedure, they should be subject to involuntary dismissal under Rule 41(b), which presumptively operates as an adjudication on the merits.

The workings of Rule 41 were explained in *Cooter & Gell v. Hartmarx*, 496 U.S. 384 (1990), which has particular application to situations where a defendant seeks to recoup expenses from defending successive suits. The court stated:

The foregoing interpretation is consistent with the policy and purpose of Rule 41(a)(1), which was designed to limit a plaintiff's ability to dismiss an action. [This was necessary to prevent] the annoying of a defendant by being summoned into court in successive actions and then, if no settlement is arrived at, requiring him to permit the action to be dismissed and another one commenced at leisure. . . . Rule 41(a)(1) . . . allow[s] a plaintiff to dismiss an action without the permission of the adverse party or the court only during the brief period before the defendant ha[s] made a significant commitment of time and money. Rule 41(a)(1) was not designed to give a plaintiff any benefit other than the right to take one such dismissal without prejudice. . . . Rule 41(a)(1) does not codify any policy that the plaintiff's right to one free dismissal also secures the right to file baseless papers. . . . If a litigant could purge his violation of Rule 11 merely by taking a dismissal, he would lose all incentive to stop, think and investigate more carefully before serving and filing papers.

Even when the likelihood of future expenses is substantially diminished when the dismissal is with prejudice, as it should be here, the Fifth Circuit considers shifting the expense of vexatious litigation to the plaintiff. *Schwarz v. Folloder*, 767 F.2d 125 (5th Cir. 1985) (remanding for determination of whether costs and attorneys' fees should be awarded against plaintiff in light of recognized presumption in favor of award of costs and court's failure to fully articulate its

rationale for denying such an award.)¹¹ Plaintiffs' litigation tactics underscore the possibility that Harman will incur further expenses before Plaintiffs finally cease their smear campaign.

Even if the Court decides that dismissal without prejudice is warranted, it should still require Plaintiffs to pay Harman's costs and reasonable attorney fees. In fact, the argument would be even stronger because Harman would reasonably apprehend the possibility of being sued again. In *American Cyanamid v. McGhee*, 317 F.2d 295 (5th Cir. 1963), the Fifth Circuit deferred to the trial court's discretion in not dismissing with prejudice under Rule 41(b) but conditioned the Plaintiff's right to refile on the prior payment of the defendant's costs and fees. The court held that such a condition was well within the court's prerogative under Rule 41 to establish "such terms and conditions as the court deems proper." Where a plaintiff successfully dismisses a suit without prejudice under Rule 41, courts in other circuits also often grant the defendant an award of costs or fees. For example, in *Combrito v. Kelley*, 764 F.2d 122, 133 (2d Cir. 1985), the court held that "[t]he purpose of such awards is generally to reimburse the defendant for the litigation costs incurred, in view of the risk (often the certainty) faced by the defendant that the same suit will be refiled and will impose duplicative expenses upon him." *Wright and Miller* also agree with this practice. 9 Fed. Prac. & Proc. Civ. § 2366 (3d ed.) ("the district judge at least should require that the plaintiff pay the costs of the litigation and that practice has become commonplace.") More recently, the Fifth Circuit again approved such an approach. *Mortgage Guaranty Ins. Corp. v. Richard Carlyon Co.*, 904 F.2d 298 (5th Cir. 1990) (dismissing appeal by plaintiff who objected to requirement that it pay fees as a condition of dismissal without prejudice.).

¹¹ Given Plaintiffs' gratuitous remarks about the undersigned counsel it should be noted that the Schwarz Court cited the following passage from an unreported case: "It is unbecoming for the plaintiffs to hail the defendant into court by means of false allegations and then to complain when the defendant hires skillful, experienced and expensive advocates to defend against those allegations. Having wrongfully kicked the snow loose at the top, [plaintiff] must bear the consequences of the avalanche at the bottom." *Id.* at 134.

II. THE PRESENTATION SHOULD BE UNSEALED EVEN IF THE CASE IS DISMISSED

Plaintiffs' proposed dismissal order fails to make any provision regarding the unsealing of the Presentation, attached as Exhibit A to Defendant's Answer, and the lifting of the various written and oral orders governing its dissemination. This oversight (or deliberate obfuscation) is alarming to Harman because (1) Plaintiffs' primary motive in bringing this action was to prevent Harman from conveying his message, and (2) this issue has been the subject of substantial briefing and argument, at considerable expense to Harman. Most notably, Harman's Motion to De-Designate the Presentation remains pending. In the event that the court dismisses this action, the Court should grant this motion, or, in the alternative, vacate its sealing order with regard to the Presentation. Because Plaintiffs are voluntarily dismissing their action, and, at least for the time being, are not pursuing such claims elsewhere, they can no longer justify any restraint on Harman's constitutional right to disseminate information to government officials and the media. As discussed more fully in the pending Motion to De-Designate, the sealing order is unconstitutional if it is construed to prevent Harman from using the Presentation.

In early March 2012, Plaintiffs requested (Dkts. 6, 7, and 8), and received on an interim basis an order sealing a copy of the Presentation in the Court file. (Dkts. 11 and 12 Page 14:16-23) After issuing various discovery and case management orders (Dkts. 18, 19, 20 and 21), the Court made it clear in the telephonic conference of February 26, 2013, and in an order issued the next day (Dkt. 42) that the Court construed its blanket protective order as barring Defendant from publicly disseminating any information in the Presentation. Although Harman respectfully disagrees with that conclusion, he has scrupulously abided by the Court's order since. The next day, Harman moved (Dkt. 41) to de-designate the Presentation. Defendants opposed that motion (Dkt. 43) and Harman then filed a motion for leave (Dkt. 63) to file a reply along with his brief.

(Dkt. 64) Later that week, Plaintiffs filed their motion to dismiss without prejudice, in an attempt to avoid both the unsealing and the other discovery and motions mentioned above.

Plaintiffs would, with the dismissal of this case, have no claim pending anywhere that any statement by Harman in the Presentation or elsewhere is defamatory. Because any justification or allegation supporting the designation of the Presentation as confidential is gone, Plaintiffs cannot justify maintenance of the seal. *White Rosebay Shipping v. HNA Group*, C-12-096, 2012 WL 6629891 (S.D. Tex. Dec. 18, 2012) (vacating a sealing order because there was no continuing reason for its maintenance). Plaintiffs also cannot meet the burden that is required for what is essentially a gag order. *See, e.g. Texas R. Civ. P. 76a* (setting forth standards for gag orders); *Ford v. City of Huntsville*, 242 F.3d 235 (5th Cir. 2001) (vacating confidentiality order sealing settlement agreement due to district court's failure to consider Texas public records law.)

III. THE COURT SHOULD CONDITION ANY DISMISSAL ON THE PRESERVATION OF THE "PATENT LITIGATION DOCUMENTS" FOR DISCOVERY IN THE QUI TAM AND ANY FUTURE DEFAMATION ACTION

As mentioned above, Harman's companies vigorously contested the EDVA patent action. Harman's independent investigation and experiences as a road contractor had already alerted him to serious concerns about Plaintiffs' products. However, Harman's extensive discovery efforts, through his companies, in the EDVA action unearthed further evidence, which will buttress Harman's federal *qui tam* claims currently pending before this Court.¹² These documents are also critical to defending any future defamation action, should this Court not dismiss with prejudice. The settlement of the EDVA action and then the unilateral dismissal of this action should not result in the forfeiture of those documents. As explained in the following paragraphs, however, this is one of the goals Plaintiffs seek to achieve through their dismissal motion.

¹² As Plaintiffs themselves have noted in an attempt to cast aspersions on Harman, discovery efforts in the patent case, which unearthed valuable information for pursuing the *qui tam*, were conducted by a large and talented team of lawyers at substantial expense to Harman and his companies.

It is not surprising that Plaintiffs' Motion for Voluntary Dismissal was filed after the completion of briefing on their motion to quash a subpoena to the law firm of Jones Day (Harman's counsel in the EDVA action) which subpoena sought documents discovered in the patent litigation.¹³ It appears by both the timing and nature of Plaintiffs' motion that the instant dismissal motion is designed, at least in part, to prevent Harman from accessing documents from the EDVA action which are highly relevant in this action and the *qui tam case* pending before this Court. As background, Harman requested discovery of these documents for this defamation case. Trinity responded that the documents were already in the custody of patent counsel in the EDVA action. When Harman sought the documents from his companies' patent counsel, Plaintiffs inexplicably moved to quash the subpoena in the Eastern District of Virginia. Harman opposed the motion to quash on April 29, 2013, and then Plaintiffs moved to dismiss the instant action a few days later on May 2, 2013, citing, among other things, Harman's intention to repeat his discovery efforts here. (Dkt. 65, Page 4) Plaintiffs fail, however, to articulate why highly relevant documents compiled at great expense in the EDVA patent case should not be preserved and retained for use in the *qui tam* action or in any future lawsuits brought by Plaintiffs, who will be neither harmed nor burdened by such relief. These documents were well-organized and placed in searchable databases at great expense. These documents are at risk of being destroyed, at least in this form, without this Court's intervention.

As Harman asserted in his opposition (Dkt. 16, Page 6) to Plaintiffs' previous motion to dismiss, Plaintiffs have already recognized that the documents from the EDVA action are relevant here, and they have agreed to permit Harman's counsel in the EDVA action to retain those documents so long as this litigation remains pending. Plaintiffs' concession in that regard,

¹³ That motion was set to be heard on May 20, 2013, but was postponed by mutual agreement of the parties in light of Plaintiffs' current motion.

which was before the *qui tam* complaint was unsealed by this Court, implicitly recognized that these documents were obtained and compiled at great expense to Harman and the entities he controls and were directly relevant to the issues in the defamation case, which are also at the core of the *qui tam* case. In order to prevent the loss of critical documents and preserve the fruits of Harman's previous efforts, Harman's counsel should be allowed to retain the documents produced in the EDVA action, at least for as long as any controversy remains pending between the parties, and until all of the parties' claims, including in the *qui tam*, have been finally adjudicated on the merits.

Garcia v. Peebles, 734 S.W.2d 343, 347 (Tex. 1987), held that the trial court had abused its discretion in entering a protective order preventing a litigant from exchanging information with other litigants. This decision was cited with approval in *Idar v. Cooper Tire & Rubber*, 2011 U.S. Dist Lexis 26013 (S.D. Tex. Feb. 17, 2011). The Texas Supreme Court explained why shared discovery facilitates the purposes of the Federal Rules:

Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses.

In addition to making discovery more truthful, shared discovery makes the system itself more efficient. The current discovery process forces similarly situated parties to go through the same discovery process time and time again, even though the issues involved are virtually identical. Benefiting from restrictions on discovery, one party facing a number of adversaries can require his opponents to duplicate another's discovery efforts, even though the opponents share similar discovery needs and will litigate similar issues. Discovery costs are no small part of the overall trial expense. *Order Amending Federal Rules of Civil Procedure*, 446 U.S. 997, 1000 (1980) (Powell, J., dissenting); A number of courts have recognized that allowing shared discovery is far more efficient than the repetitive system now employed. Federal courts, for instance, have overwhelmingly embraced this practice in order to streamline discovery. *Phillips Petroleum Co. v. Pickens*, 105 F.R.D. 545, 551 (N.D. Tex. 1985); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 154 (W.D. Tex. 1980); *Parsons v. General Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980).

Garcia, *Id.* at 347 (Select citations omitted). In *Wilk v. American Medical Assoc.*, 635 F. 2d

1295 (7th Cir. 1981), the court granted New York State, which had brought an action in a New York federal court, access to documents that had been produced in a related action in the Northern District of Illinois. The court recognized the inherent “wastefulness of requiring the State of New York to duplicate discovery already made,” and stated that “[a] bona fide litigant is entitled to his day in court. That the expense of litigation deters many from exercising that right is no reason to erect gratuitous roadblocks in the path of a litigant who finds a trail blazed by another.” 635 F.2d at 1300-1301.¹⁴

The Manual for Complex Litigation encourages the sharing of documents in related cases even where a standard umbrella protective order has been entered: “Even where the protective order contains a provision prohibiting such use . . . the court should balance the continuing need for protection against the efficiency and judicial economy that may result in release.” Manual for Complex Litigation (4th ed. 2004) § 11.432. In *Massey Coal Services, Inc. v. Victaulic Co. of America*, 249 F.R.D. 477 (S.D. W.Va. 2008), plaintiffs sought documents that they wanted to share with public authorities because they believed (as Harman believes here) that the documents showed that Defendants’ product was both defective and dangerous. The court agreed, stating that, “it was possible that these documents may lead to damaging conclusions when considered with other documents or testimony, but that is not the court’s concern.” *Id.* at 484. The court allowed the documents to be released, because the court found that defendants did not show good cause for continued protection under Rule 26(c).

Harman therefore respectfully requests that any dismissal here be conditioned on these documents being maintained, that Plaintiffs’ be precluded from taking any steps to destroy the documents, that Trinity be precluded from taking any steps to require Jones Day or any other

¹⁴ This would seem to apply even more forcefully to a situation where a litigant seeks discovery in an action that he was involved in through his companies, thus obviating any possible “free riding” argument.

document custodian to dispose of the documents, that the documents be preserved by Plaintiffs, and that the Court order that the documents are discoverable in the *qui tam* action pending before the Court. At a minimum, preservation of the documents without efforts by Plaintiffs to destroy or dispose of the documents, or seek to require anyone else to destroy or dispose of the documents, is necessary to protect Harman's rights and thwart Plaintiffs' tactics.

CONCLUSION

Plaintiff's speech clearly implicates the public interest and safety. Plaintiffs are attempting to use harassing and vexatious litigation tactics, economic coercion, and threats of prosecution to silence criticism of a dangerously defective product. Given Plaintiffs' clear record of past dismissal tactics, any resolution of this case should be with prejudice. Moreover, given that Plaintiffs antics have imposed substantial expense, Harman requests that the Court award costs and fees. Harman should be allowed to pursue his public safety campaign, including his *qui tam* litigation before the Court, without continued threat of a defamation action.

Accordingly, Defendant respectfully requests that this Court DENY Plaintiffs' Motion to Dismiss Without Prejudice and instead DISMISS THIS ACTION WITH PREJUDICE as to each Plaintiff, award costs and reasonable attorney fees in an amount to be determined, and enjoin defendants from filing any future claims based on the same or substantially similar statements, declare that any restriction on dissemination of the Presentation is vacated or lifted and preserve the documents from the EDVA patent litigation for use in the *qui tam* and any other future actions between the parties.

Filed: May 16, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Michael Beltran, certify that a true and correct copy of the foregoing has been served on counsel for all parties via the Court's CM/ECF system this the 16th day of May, 2013.

/s/Michael Paul Beltran
Michael Paul Beltran