

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

ANGELINA C. SUJATA,

Plaintiff,

vs.

TAKATA CORPORATION, TK
HOLDINGS INC., HIGHLAND
INDUSTRIES, INC., HONDA MOTOR
CO., LTD., HONDA R & D CO., LTD.,
AMERICAN HONDA MOTOR CO., INC.,
AND HONDA OF AMERICA MFG., INC.,

Defendants.

Civil Action No. 3:15-cv-00112-JMC

**PLAINTIFF’S REPLY IN SUPPORT OF
EMERGENCY MOTION FOR
PRESERVATION OF EVIDENCE**

INTRODUCTION

COMES NOW PLAINTIFF, by and through the undersigned counsel and pursuant to the Federal Rules of Civil Procedure and other applicable rules and laws, to reply in further support of her Emergency Motion for the Preservation of Evidence (“Motion”), ECF No. 12, which has been opposed by the Honda Defendants,¹ the Takata Defendants,² and also by a Statement of Interest submitted by Intervenor the United States of America as well.³ Consistent with the Court’s Orders Nos. 13, 16 and 17,⁴ and with her original Motion, Plaintiff seeks a simple Preservation Order from this Court requiring Defendants to uphold their obligation to secure and

¹ American Honda Motor Company, Inc. and Honda of America Manufacturing, Inc. (collectively “Honda” or the “Honda Defendants”).

² TK Holdings Inc. and Highland Industries, Inc. (collectively “Takata” or the “Takata Defendants”). Unless otherwise specified, the term “Defendants” shall refer collectively to the Honda Defendants and the Takata Defendants.

³ On January 21, 2015, the United States of America also filed a Notice of Appearance and Statement of Interest in Opposition to Plaintiff’s Emergency Motion for the Preservation of Evidence. *See* U.S. Mem. in Opp’n, ECF No. 26. Because the United States’ position is in line with the Honda and Takata Defendants’ second and third main arguments, respectively, in their briefings, Plaintiff submits this Reply as a response to that filing as well, but reserves the right, also, to later and more extensively respond should the necessity arise.

⁴ Which include internal references by the Court to the docket in *Lyon v. Takata Corp.*, No. 5:14-cv-04485-JMC (D.S.C. filed Nov. 21, 2014), ECF Nos. 27, 30 and 31, which are hereby effectively also incorporated by reference herein as well.

preserve certain evidence—now solely in their possession—for later use in discovery and in third party testing relevant to future proceedings in this case. Despite Defendants’ attempts to complicate this request, Plaintiff, based on a pressing belief that a Preservation Order is necessary because of an imminent threat of destruction or alteration of discoverable evidence, seeks only to ensure the evidence, including any recall items, is preserved, competently stored, and intact for later analysis and disposition by *all* parties. *See* U.S. Mem. in Opp’n, ECF No. 26, at 10; *see also* Jan. 13, 2015 Hr’g Tr. 8:14-15.

In her Motion, Plaintiff seeks preservation of evidence relevant to her state-law tort claims—a remedy that does not require construction of the National Traffic and Motor Vehicle Safety Act of 1966 or of the National Highway Traffic Safety Administration’s (“NHTSA”) safety testing standards—and does not impinge upon NHTSA’s jurisdiction over recalls. Specifically, Plaintiff seeks only to ensure that a representative sample of parts recovered be preserved and safely stored in the United States for later testing by *all* parties involved. *Id.* Consequentially, Plaintiff does not seek any relief that would conflict with NHTSA’s supervision of Defendants’ voluntary airbag inflator safety recalls.

Recalls of Takata products (“Recalls”) have affected more than 24 million vehicles world-wide. Those Recalls involve certain defective airbag inflators manufactured by the Takata Defendants that are essential and necessary to the proceedings in this case. Reportedly, at present, over 75,000 inflators are being recovered from the field each week—from ten different vehicle manufacturers and in geographic regions across the country.⁵ The inflators are returned to Takata for testing, and thus Defendants exclusively possesses and control a large majority of the necessary evidence in this case.⁶ Also, upon information and belief, some ruptured inflators

⁵ As noted in Ex. 1, attached hereto, Honda has apparently instructed its dealers to withhold removed evidence and to refuse to return those items to the lawful owners of impact vehicles—even when specific requests have been made by the owner to obtain such evidence for use in independent research on the cause of the defects.

⁶ For example, LKQ Corporation, one of the largest national salvage yard operations with corporate offices in Chicago and with hundreds of locations nationwide, has refused a request from Plaintiff’s counsel to allow the purchase of unruptured inflators and furthermore refused to preserve any evidence of communications with Takata or the disposition of relevant evidence that was in its possession. Although counsel for LKQ Corporation refused to answer any questions from Plaintiff’s counsel or to produce documentation, Plaintiff is informed and believes that Takata has arranged—independently and without notice to NHTSA, the Court, or Plaintiffs—to purchase each vital

removed from accident or field vehicles by Defendants in the United States are currently being (or already have been) returned by the Takata Defendants to undisclosed Takata facilities in Japan. These actions could compromise the inflators' integrity and future evidentiary value, and they could become misplaced, lost, or destroyed.⁷

Therefore, the timeliness and efficacy of the Recalls are of vital concern to Plaintiff and highly relevant to her claims. Plaintiff submits that a Preservation Order from the Court is *needed now* to remind Defendants of their duty to preserve evidence and to memorialize, more specifically, their obligations and assurances to maintain and to preserve those parts recovered in the Recalls. Specifically, Plaintiff requests a Preservation Order that memorializes the affirmative representations already made by Defendants and identifies *with specificity* additional prospective obligations⁸ and instructions to ensure the maintenance and preservation of a relevant sample of the defective airbag inflator parts covered by the NHTSA recalls, as well as any other recovered ruptured or unruptured inflators for future analysis and disposition.⁹

inflator and remove them from circulation with unspecified intentions concerning their disposition. This heightens the need for the emergency relief requested herein. *See* Ex. 2, attached hereto.

⁷ Plaintiff first learned of this information during Plaintiff's counsel's investigations in the *Lyon v. Takata Corp. et al.*, 5:14-cv-14485-JMC (D.S.C. filed Nov. 21, 2014), and *Sujata v. Takata, et al.*, 3:15-cv-00112-JMC (D.S.C. filed Jan. 9, 2015), cases. It has, moreover, been confirmed by Takata's counsel in a telephonic emergency hearing held by the Court on January 13, 2015. During that hearing, Takata's counsel represented that Takata would return such evidence to the United States; however, there has not been a final hearing on these matters or a formal order to preserve such evidence in the United States since the emergency hearing. *See* Jan. 13, 2015 Hr'g Tr. 9:5-9.

⁸ To the extent that any inflators have been shipped by Takata to its facilities in Japan, Plaintiff asks that the Preservation Order require those items be promptly returned to the United States to ensure their preservation for later testing under Court supervision.

⁹ *See* NHTSA Campaign Number 08V-593, <http://www-odi.nhtsa.dot.gov/owners/SearchResults> (last visited Jan. 9, 2015) (issued Nov. 14, 2008 and covering certain 2001 Honda Accords and Civics); NHTSA Campaign Number 14V-353, <http://www-odi.nhtsa.dot.gov/owners/SearchResults> (last visited Jan. 9, 2015) (issued June 20, 2014 and covering certain model year 2001-2007 Accord (4-cylinder), 2001-2002 Accord (V6), 2001-2005 Civic, 2002-2006 CR-V, 2003-2011 Element, 2002-2004 Odyssey, 2003-2007 Pilot, 2006 Ridgeline, 2003-2006 Acura MDX, and 2002-2003 TL/CL vehicles); *see also* NHTSA Campaign Number 09V-295, <http://www-odi.nhtsa.dot.gov/owners/SearchResults>, last visited (Jan. 9, 2015) (issued July 29, 2009 and expanding the first recall to include certain 2001-2002 Honda Accords and Civics and 2002-2003 Acura TL vehicles); NHTSA Campaign Number 10V-041, <http://www-odi.nhtsa.dot.gov/owners/SearchResults> (last visited Jan. 9, 2015) (issued Feb. 11, 2010 and expanding the prior recalls to include certain 2001- 2003 Honda Accords, Civics, Odysseys, CR-Vs, Pilots, and certain 2002-2003 Acura TL and CL vehicles); NHTSA Campaign Number 11V-260, <http://www-odi.nhtsa.dot.gov/owners/SearchResults> (last visited Jan. 9, 2015) (issued April 27 2011 and expanding the recalls to include certain 2001-2004 Honda Accords, Civics, Civic Hybrids, Odysseys, CR-Vs, Pilots, and certain 2002-2003 Acura TL and CL vehicles).

Plaintiff respectfully submits the following requests and asks the Court to issue a Preservation Order compelling Defendants to:

- (a) Secure and preserve, in unaltered form, any and all “ruptured inflators” previously removed from accident or defective field vehicles that are currently in the possession of the Takata and/or Honda Defendants in the U.S. and such items that originated in the U.S. that have been shipped to Japan, which are Ordered returned to the U.S.;
- (b) Secure and preserve, in unaltered form, all testing data, video, photographs, test results, electronic files, and communications related to the ongoing inflator testing by the Defendants or their agents or contractors being conducted in the U.S., Japan, or any other foreign territory;
- (c) Set aside and preserve 10% of all “un-ruptured” airbag inflators removed under recall proceedings or purchased from salvage yards, companies, or other used vehicle owners which are currently in the possession of the Honda and/or Takata Defendants; and;
- (d) Establish protocols to ensure that 10% of any additional “un-ruptured inflators” that come into the possession of the Honda or Takata Defendants after the date of this Order will be set aside and preserved until further order of the Court or agreement of the parties.

In support of this request, and to address additional arguments posited in opposition, Plaintiff also responds to Defendants’ briefing as follows:

BACKGROUND

Although Defendants have each briefed their respective arguments, their assertions parrot the points originally presented at the January 13, 2015 emergency hearing. Plaintiff now addresses those arguments. The contents of this Reply should be viewed as responsive to the submissions of both Defendants Honda and Takata and also the briefings filed by the United States.

DISCUSSION

First, the Honda Defendants claim that “Plaintiffs have not demonstrated an ‘emergency’ because there is no colorable threat that evidence that should be preserved will be destroyed.” Honda Defs. Mem. in Opp’n 1, ECF No. 21. Second, the Honda Defendants claim that “Plaintiffs’ requested relief would interfere with Takata’s ongoing testing of inflators—which is

being conducted at the request of NHSTA—and endanger public safety by requiring the unnecessary transportation of hazardous materials.” *Id.* And third, the Honda Defendants claim that Plaintiff’s Motion should be denied because “[P]laintiffs’ demands threaten efforts to coordinate more than 75 personal injury and class actions in a soon-to-be assigned multi-district litigation.”¹⁰ *Id.*

All of these arguments fail, however, as the Honda Defendants have mischaracterized the law in this jurisdiction, misconstrued their role regarding the control and testing of the evidence in this litigation (or lack thereof), and entirely ignored Plaintiff’s intent and purpose in requesting that this evidence be preserved.

The Takata Defendants have also submitted a brief opposing Plaintiff’s Motion. First, the Takata Defendants claim that “[t]he relief sought extends well beyond the preservation of evidence relevant to [Plaintiff’s] lawsuit, which is currently one of only two airbag-related personal injury cases before this Court.” Takata Defs. Mem. in Opp’n 2, ECF No. 27. Second, the Takata Defendants argue that “Plaintiff’s Motion should be denied because there is no emergency.” *Id.* Third, the Takata Defendants claim that “Plaintiff perseveres in [his] request to stay the crucial testing now underway under the oversight of . . . NHTSA . . . [and] testing conducted in furtherance of important public safety goals should not be hindered.” *Id.* at 2-3. Lastly, they claim that “[P]laintiff’s request . . . completely disservices the MDL process that all parties agree should take place.” *Id.* at 3.

These arguments closely mirror the points the Honda Defendants presented in their initial submission and likewise fail. The Takata Defendants misstate the legal standard; downplay Takata’s primary role the possession, control, and transfer of relevant evidence for unsupervised testing to Japan; ignore the Takata Defendants’ own previous bad actions or omissions;¹¹ and

¹⁰ Plaintiff has conferred with as many of these plaintiffs as possible this week, and reasonably believe all agree with the urgency and need for the relief sought in this motion and may intervene in this matter to so support.

¹¹ Takata entities previously failed to produce or disclose important and relevant information to NHSTA related to defects in its products.

overlook the serious limitations on NHSTA’s ability to address or correct those past wrongs. Furthermore and most egregiously, the Takata Defendants have refused to propose a compromise to this dispute—“pre-MDL”—despite the near certainty that it could be weeks or months before a transferee court is designated and situated to address these issues. The potential for transfer by the Judicial Panel on Multidistrict Litigation (“JPML”) does not alter the present obligations of the parties in this lawsuit. Until a transferee court takes up these issues, Plaintiff is likely to experience substantial prejudice if relevant evidence is not preserved. Until that court can rule, the interests of justice require an immediate Preservation Order to maintain the status quo and memorialize the representations made by the parties regarding the preservation of evidence.

I. EVIDENCE PRESERVATION JUSTIFICATION

As noted above, the Honda Defendants first claim that “Plaintiffs have not demonstrated an ‘emergency’ because there is no colorable threat that evidence that should be preserved will be destroyed.” Honda Defs. Mem. in Opp’n 1. The Takata Defendants argue that “Plaintiff’s Motion should be denied because there is no emergency—indeed, there is no actual issue to be resolved at all.” Takata Defs. Mem. in Opp’n 2. However, Honda has vastly mischaracterized the applicable review standard in an attempt to undermine this Court’s general authority to grant preservation orders and ignores that the necessity for such an Order has arisen in this case. Similarly, Takata has downplayed the threat of irreparable injury that Plaintiff will face when certain evidence that is dispositive to the issues in this case is removed from the United States, transported to locations outside the Court’s jurisdiction, or otherwise altered, misplaced, damaged, or destroyed during transit or continued, unrestricted, and improperly-supervised testing.

A. Even Absent an Order From this Court, Defendants Have a Duty to Preserve Evidence in This Case That Cannot be Met

Parties have a “duty to preserve material evidence . . . when a party reasonably should know that the evidence may be relevant to [the] anticipated litigation.” *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001). The duty to preserve evidence is triggered “‘when the

party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.” *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (citation omitted); *see also Silvestri*, 271 F.3d at 591; *Thompson v. U.S. Dep’t of Housing & Urban Dev.*, 219 F.R.D. 93, 100 (D. Md. 2003); *Broccoli v. Echostar Commc’ns Corp.*, 229 F.R.D. 506, 510 (D. Md. 2005); The Sedona Conference, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, Principles 1, 5 (2nd ed. June 2007) (the “Sedona Principles”).

Once a party has notice of litigation or “reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” *Thompson*, 219 F.R.D. at 100 (citation omitted). Even if a party “does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation.” *Id.* at 99 (citation omitted). Therefore, even absent the issuance of an Order in this case, Defendants have a duty to preserve any evidence necessary (or that could be reasonably perceived as necessary) to the determination of the issues and matters in this case. That duty extends to documents, data, and tangible things in the possession, custody, and control of the parties to this action, as well as any employees, agents, contractors, carriers, bailees, or other non-parties who possess materials reasonably anticipated to be discoverable in this action. Counsel is under an obligation to exercise efforts to identify and notify the Defendants and other such non-parties, including employees of corporation or institutional parties, of this duty as a matter of law as well.

Here, Defendants’ inability to fully guarantee the preservation of evidence at this time or identify any written protocols to preserve the integrity of the canisters being shipped around the United States raises serious concerns regarding the preservation of evidence. Neither the Honda Defendants nor the Takata Defendants are able to provide competent assurances or fully guarantee that the inflators they collect in the Recalls will be properly preserved in light of ongoing and unrestricted testing by the many different parties who possess them. Such testing

may alter or destroy the inflators. Especially in light of tentative promises or representations made by the United States in its memorandum, Defendants' duties to properly preserve evidence—known to be dispositive to issues in this case—must appropriately be clarified, memorialized, more specifically outlined, and confirmed in a Preservation Order by the Court.

As noted above, over 75,000 inflators are being recovered from the field each week. In accordance with NHSTA instructions, requests, or mandates, approximately 300 of those inflators are being effectively destroyed each day. *See* U.S. Mem. in Opp'n 4; *see also* Jan. 13, 2015 Hr'g Tr. 4:16-17, 6:24-25, 8:14-15. Indeed, as the United States has correctly noted in its memorandum:

The primary testing method Takata currently employs on the inflators is dubbed "instrumented testing." This method records over time the internal pressure of the inflator during deployment and enables the detection of abnormalities in the burn rate of the inflator's propellant, even if no rupture occurs. Since this method involves activation of the inflator and because an inflator cannot be reused once it has been activated, this testing method is destructive testing.

See U.S. Mem. in Opp'n 4-5 (internal citations omitted). Additionally, the United States has noted: (1) that "NHTSA [has] learned in December 2014 that the affected vehicle manufactures [have] formed a coalition through which they intend to perform testing on recalled inflators"; (2) that "NHTSA, as part of its investigative authority, may perform its own testing on recalled equipment"; (3) that "NHTSA *anticipates* that, after its investigation concludes, a large number of inflators will remain intact in the condition when removed from recalled vehicles"; and (4) that "[a] subset of these inflators would, at that time, be *potentially* available to Plaintiff for testing." *Id.* at 5-6, 11 (emphasis added).

More specifically, in support of its argument that "there is no emergency" in this case, Takata has claimed that:

[T]he Takata Defendants have voluntarily undertaken to preserve ruptured inflators retrieved from accidents. Moreover, to the extent unruptured inflators collected through recalls or regional field campaigns are not needed for root cause investigation, the Takata Defendants will extend their voluntary undertaking to preserve those inflators until an MDL court addresses any actual preservation issue in a comprehensive or coordinated fashion.

Takata Defs. Mem. in Opp'n 2. Honda, moreover, has claimed through counsel¹² that “we’re preserving them, there is no need for an emergency order.” Jan. 13, 2015 Hr’g Tr. 9:16-19. Further, the United States has submitted that “NHSTA is willing to consider an accommodation to identify certain inflators for preservation.” U.S. Mem. in Opp’n 11. Yet, the Honda Defendants and Takata Defendants continue to object to the issuance of any Preservation Order that provides the parties with such assurances or preserves the status quo.

As the evidence has shown, both the Takata Defendants and the Honda Defendants have failed, in the past, to uphold their joint obligations to “voluntarily” report dangerous defects to NHSTA, which further justifies such a Preservation Order.¹³ Despite the fact that both Defendants have been on notice, since at least 2004, that the airbags they were manufacturing, distributing, selling, installing, or otherwise utilizing in vehicles were defective, neither acted appropriately to initiate or conduct those reasonable recalls necessary and important to protect the public allegedly based upon “lack of sufficient information to reach a defect determination.”¹⁴ Also, Takata continues to maintain its refusal to acknowledge the known deadly defect or its propensity to cause harm to the public and continues to use the chemical in its airbags thought to play a central role in the airbag ruptures.

Takata’s continued use of ammonium nitrate has caught the attention of lawmakers and NHSTA, however, and as of October 30, 2014, Takata has been ordered to produce documents related to its use of the compound, including detailing every time it has changed its composition, and answer questions related to defective airbag inflators—under oath.¹⁵ NHTSA’s Office of

¹² This is not an issue of lack of trust of Defendants’ counsel, whom Plaintiff respects; it is, rather, a mistrust of a Defendant who is reasonably believed to have previously demonstrated bad conduct in circumstances similar to these circumstances of which Plaintiff is now concerned. The need for a Preservation Order is necessary so that any non-compliance would enable further relief.

¹³ See, e.g., Letters from Jay Joseph, Assistant Vice President, Product Regulatory Office, Honda to Nancy Lewis, Associate Administrator for Enforcement, NHTSA, regarding Honda and Acura Driver Airbag Inflator Safety Improvement Campaigns (June 19, 2014; July 2, 2014) (confirming Honda’s failure to implement safety improvement campaigns under the Safety Act for lack of “sufficient information to reach a defect determination at [the] time.” Exs. 3 & 4 attached hereto.

¹⁴ See *id.*

¹⁵ Aaron Kessler, *Takata, Supplier of Defective Airbags, Ordered to Submit Records*, N.Y. Times, Oct. 30, 2014, <http://www.nytimes.com/2014/10/31/business/supplier-of-defective-airbags-ordered-to-turn-over-its-records.html>.

Defects Investigation (“ODI”) published an ODI Resume for Investigation No. AQ 14-004 initiating an investigation into Honda “in order to investigate the extent and scope of Honda’s reporting failures, as well as the reason(s) for such failures and the steps being taken by Honda to assure full compliance with TREAD reporting requirements.”¹⁶ Moreover, the United States Department of Justice, by federal grand jury subpoena issued by the United States District Court for the Southern District of New York on November 13, 2014, has opened an investigation into whether Takata misled regulators about the number of defective airbags it sold to automakers, including Toyota and Honda.

Takata was also called to testify before the United States Senate Committee on Commerce on November 20, 2014. During those hearings, while the Takata Defendants’ chief executives did admit that the company began an investigation into airbag ruptures in 2007, they claimed that the company had attributed them to manufacturing flaws in the propellant—problems it claimed had since been fixed. “*My understanding is our products in this accident worked abnormally,*” said Hiroshi Shimizu, who is in charge of Takata’s global quality assurance, when prodded by Nevada Senator Dean Heller during the Senate-committee testimony.¹⁷ “*The ammonium nitrate that we are using, it’s safe and stable,*” Hiroshi Shimizu, Takata’s chief quality officer also stated during the hearings, however, as recently as December 2013, Takata filed a patent application that points to lingering concerns over the compound’s vulnerability to moisture and changes in temperature.¹⁸

Likewise, the Honda Defendants have acknowledged their failure to report over 1,700 deaths and injuries for more than a ten-year period up until 2014. As a result, they have agreed, as of January 8, 2015, to pay \$70 million in civil penalties and fines to resolve federal regulators’

¹⁶ *Id.*

¹⁷ Hiroko Tabuchi, *Airbag Compound Has Vexed Takata for Years*, N.Y. Times. Dec. 9, 2014, <http://www.nytimes.com/2014/12/10/business/compound-in-takata-airbags-is-inquirys-focus.html> (confirming that other airbag manufacturers like Autoliv have reported that ammonium nitrate’s sensitivity to temperature changes renders the compound “unacceptable” for typical airbag use, a danger which is only enhanced by the fact that keeping ammonium nitrate sufficiently dry “is generally impractical for most manufacturing situations”) (emphasis added).

¹⁸ *Id.* at 4.

probe into its wrongful acts and omissions and alleged lapses in early warning reporting. In its press release announcing Honda's agreement to pay the penalties, NHTSA representatives emphasized that: "*Honda and all the automakers have a safety responsibility and they must live up to it—no excuses. . . . These fines reflect the tough stance we will take against those who violate the law and fail to do their part in the mission to keep Americans safe on the road.*"¹⁹

Therefore, based upon the results of these investigations, even if Defendants *claim* to act in conformance with federal and state law in their motion papers, neither of these Defendants deserve the benefit of the doubt. The knowing and intentional decisions to (1) voluntarily act or not act to notify the public or voluntarily recall these unreasonably dangerous and defective vehicles with Takata airbags, (2) disclose information or conceal it with respect to Other Similar Incidents ("OSIs") involving these defective airbags, or (3) comply with federal law or violate it by not timely and appropriately reporting information known of with respect to other serious injuries and deaths caused by such airbags to NHTSA reflect a series of historical corporate decisions by both the Honda Defendants and the Takata Defendants (and their upper management) to knowingly and actively conceal information from or misrepresent information to NHTSA and the public. Such conduct, and the failure to act in a reasonable way over the years, justifies the issuance of a Preservation Order to ensure that Defendants' assurances to the Court, as they concern the preservation of evidence in this case, are memorialized.

B. This Court has the Power and Authority to Issue Preservation Orders

A federal court may issue preservation orders as part of its inherent authority to manage its own proceedings. *See Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 136 (Fed. Cl. 2004). In considering whether to grant a motion for a preservation order, the Court of Claims has adopted a standard that requires "that one seeking a preservation order demonstrate that it is necessary and not unduly burdensome." *Id.* at 138. Plaintiff has met this burden.

¹⁹ Sindhu Sundar, *Honda Fined \$70M for Failing to Report Deaths to NHSTA*, Law 360, Jan. 8, 2015, <http://www.law360.com/articles/609568/breaking-honda-fined-70m-for-failing-to-report-deaths-to-nhtsa> (emphasis added).

“The Federal Rules of Evidence require the parties to take steps to preserve relevant evidence, including electronic and physical evidence. Thus, a specific order from the court directing one or both parties to preserve evidence is not ordinarily required.” *United States ex rel. Smith v. Boeing Co.*, No. Civ.A. 05-1073-WEB, 2005 WL 2105972, at *2 (D. Kan. Aug. 31, 2005). In this case, however, Defendants have not willingly complied with this obligation. The *Boeing* court thus recognized that “[t]he courts have inherent power, however, to make such an order when necessary.” *Id.* (citing *Pueblo*, 60 Fed. Cl. 133 at 135). In making such a determination, courts should consider principles of equity and the following factors: “First, how much of a concern there is for the maintenance and integrity of the evidence in the absence of an order; Second, any irreparable harm likely to result absent a specific order directing preservation; and Third, the capability of the party to maintain the evidence sought to be preserved.” *Id.*; see also *Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 433 (W.D. Pa. 2004); *Riego v. Carroll*, No. 08-433-SLR, 2009 WL 3448850, at *2 (D. Del. Oct. 23, 2009).

A Preservation Order is necessary at this stage because Court supervision is needed to ensure the integrity and continued maintenance and preservation of the parts, documents and other tangible items based on Defendants’ demonstrated unwillingness to cooperate and comply with this request. The Order is also necessary to prevent the destruction of essential evidence for Plaintiff’s case. Furthermore, this request is not unduly burdensome for Defendants because no affirmative action is required. Rather, the requested Order will prevent further destruction and degradation of potential evidence.

C. A Preservation Order, in this Case, Is Necessary

As an initial matter, there is great concern “for the maintenance and integrity of the evidence in the absence of an order” because Defendants are actively tainting and vitiating potential evidence. Defendants are currently being investigated for the concealment of airbag inflator defects that have harmed members of the public and are and have been the subject of recent federal investigations, automotive recalls, and ongoing multiple jurisdictional legal actions

for years. A Preservation Order is in the best interests of the parties and facilitates the determination of pertinent issues of fact and law and, ultimately, the outcome of the case. Absent a Preservation Order, irreparable harm to Plaintiff is likely to result.

Furthermore, any burdens imposed on Defendants under the Preservation Order are no greater than the burdens already inflicted by other inquiries and federal or agency-based orders. Defendants also have the capability to maintain the evidence sought to be preserved. As previously discussed, the Honda Defendants have admitted that “Honda North America, Inc. and Honda R & D Americas, Inc. are assisting Takata by performing non-destructive measurements of inflators at facilities in Ohio using CT scanning machinery, and Takata has been performing testing of inflators at facilities in Michigan.” Honda Defs. Mem. in Opp’n 6. The Preservation Order sought by Plaintiff will not thwart the analysis of the product defect, but will simply prevent the removal of pertinent evidence from the United States.

Honda’s admission that “a large majority of these [inflators] are [now] in the [sole and exclusive] possession of Takata” demonstrates the real and immediate threat of the destruction of evidence. Jan. 13, 2015 Hr’g Tr. 8:14-15. United States Senator Scott Kinselmann acknowledged this threat during the Senate Commerce Science and Technology Committee Hearing on November 20, 2014, stating “*Well, I’m going to ask the Secretary of Transportation to Order to do so, but I hope you will cooperate. You know, when I say the system has failed, we’re here because of delay, nondisclosure, as well as potential deception, and concealment. In fact, both your companies entered into settlements that were deliberately and purposefully concealed in Court Orders.*”²⁰ At the same hearing, another senator opined “*They’re [Takata] not even saying they support your [David J. Friedman, Deputy Administrator of NHTSA] recall right now. How can you trust a company, and the answer as to whether or not they support, they can’t give an affirmative answer to that—that is a frightening answer from a company who is*

²⁰ See The Senate Commerce Science and Technology Committee Hearing Transcript 01:29:08 (the “Takata Airbag Defects Transcript”), <http://www.c-span.org/video/?322852-1/hearing-takataairbag-defects> (last accessed Jan. 20, 2015).

*responsible for ensuring that all information about the danger of these airbags is made public. You should just err on the side of safety.”*²¹

II. WITH THE ISSUANCE OF AN ORDER, PLAINTIFF MAINTAINS THAT NHSTA’S REGULATORY AUTHORITY AND INVESTIGATIVE POWERS NEED NOT BE COMPROMISED

The Honda Defendants claim that “Plaintiffs’ requested relief would interfere with Takata’s ongoing testing of inflators—which is being conducted at the request of NHSTA—and endanger public safety by requiring the unnecessary transportation of hazardous materials,” Honda Defs. Mem. in Opp’n 1-2, and the Takata Defendants claim that “Plaintiff perseveres in her request to stay the crucial testing now underway under the oversight of NHTSA . . . [and] testing conducted in furtherance of important public safety goals should not be hindered,” Takata Defs. Mem. in Opp’n 3. To the contrary, however, the Order sought should not interfere with any ongoing testing by any party or hamper any efforts by the NHTSA to coordinate testing results and complete its investigation into this related matter pursuant to its jurisdiction. The Order is only intended to preserve any recovered “ruptured inflator” evidence and “un-ruptured inflators” from a representative statistical sampling from each U.S. state for the use in future MDL consolidated proceedings and for testing by independent third parties and the NHTSA. The United States has submitted that “NHSTA is willing to consider an accommodation to identify certain inflators for preservation.” U.S. Mem. in Opp’n 11.

As noted by the Honda Defendants, “millions of vehicles from multiple manufacturers have been recalled to address concerns about the safety of Takata airbags,” and in fact, it is exactly for that reason that Plaintiff seeks the preservation of evidence. Honda Defs. Mem. in Opp’n 2. Defendants claim that “[a]t NHSTA’s behest, Takata is in the midst of an intensive testing campaign to try to definitively determine the root cause of problems in a small fraction of inflators.” *Id.* Defendants admit that, “[t]o facilitate testing and analyses, Honda has recovered recall and Safety Improvement Campaign parts and provided them to Takata,” and states that, as part of the “special Pipeline and Hazardous Materials Safety Administration (“PHMSA”)

²¹ *See id.* at 02:15:55.

procedures, has instructed “all of its independent Honda and Acura dealerships to return original inflators to Takata within 48 hours of removal. *Id.* However, at the Senate Commerce Science and Technology Committee Hearings on November 20, 2014, even David J. Friedman, the Deputy Administrator of the NHTSA, admitted that:

[I]t’s been made clear to us they do not have good quality control and do not have good record keeping because further down the road, they had to update indicating they had not provided us with that information. That is one of the key reasons we are demanding under oath they provide us answers about all of these recalls. All of the tests they’ve done on air bags.

....

*Senator, I’m not a lawyer, so I don’t know the exact meaning of probable cause. But I will say I don’t trust that they [the Honda and Takata Defendants] have provided us with [everything] . . . with—we know that they have not always provided the auto industry with accurate information of all the loss involved. We haven’t gotten the information we need. We’re looking into this. I have serious concerns and will hold them accountable based on the findings.*²²

Plaintiff is not requesting that Defendants take further action in regard to the parts and componentry that have been returned to the United States. Rather, Plaintiff is asking the Court to *prevent* removal of such materials from the United States, which would render such evidence inaccessible to both Plaintiff and to federal investigative authorities, such as NHTSA. A Preservation Order that the physical evidence identified by Plaintiff be maintained in the United States would ensure access by both the government and private litigants.

A. The Honda and Takata Defendants’ (and NHSTA’s) Pre-Emption Arguments Fail

Defendants have also argued Plaintiff’s requests are barred either by preemption or by NHTSA’s alleged “primary and exclusive jurisdiction” over safety issues. Defendants’ interpretation of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381, *et seq.* (the “Safety Act”) is misguided.²³ Plaintiff’s requests are not preempted by the Safety Act,

²² See Takata Airbag Defects Tr. 02:36:28 (emphasis added).

²³ See Takata Defs. Mem. in Opp’n 14 n.10 (claiming “[m]anagement of airbag recalls and the airbag testing program is the job of NHSTA—not th[is] Court”)

which gives the Secretary of Transportation the authority to regulate motor vehicles and motor vehicle equipment.

The Supreme Court has made clear that “[p]re-emption fundamentally is a question of congressional intent.” *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). In this case, Congress explicitly stated that it did not intend to preempt state-law remedies in connection with vehicle safety in general and in connection with recalls in particular. Many cases support Plaintiff’s position. See, e.g., *In re: Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig. (Toyota Acceleration)*, 754 F. Supp. 2d 1145, 1194-95 (C.D. Cal. 2010) (Plaintiffs’ claims for injunctive relief were not preempted by the Safety Act); *Rosen v. J.M. Auto Inc.*, No. 07-61234-CIV., 2008 WL 9901501, at *2-14 (S.D. Fla. Mar. 6, 2008) (Plaintiffs’ claims for injunctive relief, as authorized by Florida state law, were not preempted by the Safety Act); *In re Ford Motor Co. Speed Control Deactivation Switch Prods. Liab. Litig.*, MDL No. 1718, 2007 WL 2421480, at *4-5 (E.D. Mich. Aug. 24, 2007) (rejecting Defendant’s argument that claims for loss of use during recall were preempted because “the fact that Defendant[] may have to pay damages for its failure to have sufficient replacement parts on hand does not interfere with the enforcement of the [Safety Act]”); *Stroderd v. Yamaha Motor Corp., U.S.A.*, No. Civ.A. 04-3040, 2005 WL 2037419, at *5 (E.D. La. Aug. 4, 2005) (rejecting the argument that “any state suit concerning the administration of a motor vehicle recall conflicts with the Safety Act and is precluded”); *Chamberlan v. Ford Motor Co.*, 314 F. Supp. 2d 953 (N.D. Cal. 2004); *Marsikian v. Mercedes Benz USA, LLC*, No. CV 08-04876 AHM (JTLx), 2009 WL 8379784 (C.D. Cal. May 4, 2009); *Kent v. DaimlerChrysler Corp.*, 200 F. Supp. 2d 1208 (N.D. Cal. 2002).

The Safety Act does not vest a federal agency with the exclusive authority to regulate the subject matter in question (motor vehicle safety), and its structure does not suggest that Congress intended for any remedies to be exclusive. On the contrary, “the Supreme Court has suggested that the [Safety Act] was not ‘intended to centralize all authority over the regulated area in one decision maker: the Federal Government.’” *Littel v. Bridgestone/Firestone, Inc.*, 259 F. Supp.

2d 1016, 1024 n.11 (C.D. Cal. 2002) (holding that the Safety Act did not preclude state-law claims alleging that tractor trailers were defective because they did not include anti-lock brakes (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286 (1995))).

B. The Court Should not Defer to NHSTA Based on the Doctrine of Primary Jurisdiction

Federal courts have almost uniformly declined to defer to NHTSA under the doctrine of primary jurisdiction. *See, e.g., In re Toyota Motor Corp. Hybrid Brake Mktg., Sales, Practices & Prods. Liab. Litig.*, 890 F. Supp. 2d 1210, 1224 (C.D. Cal. 2011) (declining to apply primary jurisdiction at the pleading stage because “Plaintiffs’ claims are based on California consumer protection statutes and common-law breach of contract, not the [Safety Act], and do not require resolving questions of compliance with NHTSA regulations”); *Toyota Acceleration*, 754 F. Supp. 2d at 1199-1200 (declining to apply primary jurisdiction in a factually apposite case where “the claims that Plaintiffs assert in this case do not arise under the Safety Act or NHTSA regulations; rather, they are based on California statutes, the [Magnuson-Moss Warranty Act], and general contract and tort principles”); *Kent*, 200 F. Supp. 2d at 1218-19; *In re Gen. Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig. (GM Truck Fuel Tanks)*, No. MDL 961, 1993 WL 204116, at *7 (E.D. Pa. June 10, 1993); *O’Keefe v. Mercedes-Benz USA, LLC*, No. 01CV2902, 2002 WL 377122, at *4 (E.D. Pa. Jan. 31, 2002). Those decisions recognize that application of the doctrine of primary jurisdiction is unwarranted for several reasons.

First, because Plaintiff does “not challenge a safety standard or any NHTSA regulation,” the need for uniformity and consistency in the regulation of business is not implicated. *Kent*, 200 F. Supp. 2d at 1218 (internal quotation marks omitted); *see also GM Truck Fuel Tanks*, 1993 WL 204116, at *3-4. Second, Defendants cannot identify (nor have they identified) any specific conflict between these actions and any NHTSA investigations of the same problem. Under those circumstances, there is no basis for deferring to NHTSA. *Kent*, 200 F. Supp. 2d at 1218; *see also GM Truck Fuel Tanks*, 1993 WL 204116, at *4 (“Courts will not apply the doctrine of primary jurisdiction where no fundamental conflict exists between the common law remedies and the

statutory scheme since little danger remains for non-uniform enforcement.”). Third, because state-law claims arising from vehicle defects are within the conventional competence of courts, there is no reason to defer to NHTSA’s supposed specialized expertise. *Kent*, 200 F. Supp. 2d at 1218-19; *GM Truck Fuel Tanks*, 1993 WL 204116, at *6.

Finally, in deciding whether to defer to NHTSA, the Court should consider whether NHTSA “has the power to immunize certain regulated conduct from liability and thus alleviate the need for judicial intervention.” *GM Truck Fuel Tanks*, 1993 WL 204116, at *3 (citing *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213 (1966)). Because compliance with NHTSA regulations does not insulate Honda from liability in this case, there is no reason to defer to NHTSA. *Id.* at *6. Ultimately, here, Plaintiff is not seeking any order that conflicts with “any on-going NHTSA investigation of the same problem.” *See Silvas v. Gen. Motors, LLC*, No. 2:14-CV-89, 2014 WL 1572590, at *2 (S.D. Tex. Apr. 17, 2014); *see also Bussian v. DaimlerChrysler Corp.*, 411 F. Supp. 2d 614, 628 (M.D.N.C. 2005) (holding that deference to NHTSA is appropriate when there is an ongoing investigation regarding the alleged defect). Therefore, because Plaintiff does not intend to take any action that would conflict with any ongoing NHTSA investigations into the airbag inflator defects, *Silvas* and *Bussian* do not apply to this case.

III. MDL INTERFERENCE

Lastly, Defendants claim that Plaintiff’s Motion should be denied because “[P]laintiffs’ demands threaten efforts to coordinate more than 75 personal injury and class actions in a soon-to-be assigned multi-district litigation.” Honda Defs. Mem. in Opp’n 1-2. In contrast, Plaintiff’s efforts to preserve evidence could only help those involved in the mass tort lawsuit. Plaintiff has concerns with both the progress and the efficacy of the recalls (in that consumers are waiting a long time often only to receive parts that are themselves problematic) and believes it is imperative that a process be established to control the evidence at issue in these cases.

As Defendants have correctly observed, Plaintiff has filed a Notice of Appearance in the *In re Takata Airbag Products Liability Litigation*, MDL Case No. 2599 (“MDL 2599”), and

agrees that the Takata cases “should be consolidated and litigated in a single federal forum before an experienced jurist with MDL experience within the impacted States.” *See* Honda Defs. Mem. in Opp’n 3 (citing MDL 2599, ECF Nos. 140, 177 at 4). Additionally, Plaintiff agrees that the “primary goal” of the MDL proceedings “is to promote the ‘convenience of parties witnesses and . . . the just and efficient conduct of such actions.’” *Id.*

Ultimately, however, the actions have not yet been joined, and other discovery actions have been stayed “pending final determination by the [JPML] on the propriety of transfer and coordination of this action with other related litigation.” *See* Honda Defs. Mem. in Opp’n 3 (citing MDL 2599, Doc. No. 1, at 4). Therefore, Plaintiff has filed this Emergency Motion for the Preservation of Evidence, and comes now to maintain her request for the immediate entry of an Preservation Order with this Reply, not only to preserve the right to inspect and test the evidence for the benefit of the presently-filed cases, but also to preserve evidence for the benefit of all others injured by Honda and Takata’s continued wrongdoing and fraud. *See* Pl.’s Mot. 1-2, ECF No. 12.

IV. CONCLUSION

For the reasons stated herein, Plaintiff reiterates the request for a Preservation Order preserving the evidence identified in the Motion. More specifically, Plaintiff requests that Defendants be compelled to:

- (a) Secure and preserve, in unaltered form, any and all “ruptured inflators” previously removed from accident or defective field vehicles that are currently in the possession of the Takata and/or Honda Defendants in the U.S. and such items that originated in the U.S. that have been shipped to Japan, which are Ordered returned to the U.S.;
- (b) Secure and preserve, in unaltered form, all testing data, video, photographs, test results, electronic files, and communications related to the ongoing inflator testing by the Defendants or their agents or contractors being conducted in the U.S., Japan, or any other foreign territory;
- (c) Set aside and preserve 10% of all “un-ruptured” airbag inflators removed under recall proceedings or purchased from salvage yards, companies, or other used vehicle

owners which are currently in the possession of the Honda and/or Takata Defendants;
and

- (d) Establish protocols to ensure that 10% of any additional “un-ruptured inflators” that come into the possession of the Honda or Takata Defendants after the date of this Order will be set aside and preserved until further order of the Court or agreement of the parties.

Finally, Plaintiff requests that the Court’s Order be deemed effective immediately and to remain in effect unless and until it is modified or superseded by ruling of this Court, the JPML, and/or the Transferee Court to which this case may be assigned by the JPML.

Dated: January 30, 2015.

Respectfully submitted,

MOTLEY RICE LLC

By: /s/ Kevin R. Dean
Joseph F. Rice, Esq. (Fed I.D. 3445)
Kevin R. Dean, Esq. (Fed I.D. 8046)
Jodi Westbrook Flowers, Esq. (SC 66300)
W. Taylor Lacy, Esq. (Fed I.D. 9929)
Kathryn A. Waites, Esq. (Fed I.D. 11959)
28 Bridgeside Boulevard
Mount Pleasant, South Carolina 29464
Phone: (843) 216-9152
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kdean@motleyrice.com

ATTORNEYS FOR PLAINTIFF



1441 Main Street, Suite 1200
Columbia, SC 29201
Phone: 803.726.7420
Fax: 803.726.7421

Joel H. Smith
Direct: 803.726.7422
Email: joel.smith@bowmanandbrooke.com

January 29, 2015

VIA EMAIL

Drew@TheCooperFirm.com

Drew Ashby
The Cooper Firm
531 Roselane Street, Suite 200
Marietta, GA 30060

Re: Takata Airbag Recall

Dear Mr. Ashby:

Honda North America has asked me to respond to your inquiry to Greg Gibbons at Ed Voyles Honda about retaining recalled components. Unfortunately, Honda and Acura dealers are not allowed to return these airbag modules to customers. You are certainly aware that the inflators in these modules contain hazardous materials. In addition, a risk of fragmentation and rupture has been identified with respect to some of these canisters. Others are being replaced under a Safety Improvement Campaign. As a result, Honda has established a protocol with the DOT for the transport and handling of these modules. All of these are currently being returned to Takata under that protocol. Due to safety concerns Honda is not at liberty to return these modules to you.

If you have any questions please feel free to give me a call.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Joel Smith', is written over a light blue circular stamp.

Joel H. Smith
Partner

JHS/tmb

Dean, Kevin R.

From: Nick Jakubowski <npjakubowski@LKQCORP.com>
Sent: Tuesday, January 27, 2015 2:51 PM
To: Dean, Kevin R.
Cc: Waites, Kathryn A.
Subject: RE: Takata Airbag Recalled Salvage Inflators

As we are not party to the litigation, I will not be holding any documentation. You can subpoena Takata for any of its communications. I will not answer your question with respect to communications, nor comment on your assumptions.

Nicholas P. Jakubowski
Assistant General Counsel
LKQ Corporation
500 W. Madison St., Suite 2800
Chicago, IL 60661
T: (312) 621-2742 | F: (877) 484-0658

From: Dean, Kevin R. [mailto:kdean@motleyrice.com]
Sent: Tuesday, January 27, 2015 1:44 PM
To: Nick Jakubowski
Cc: Waites, Kathryn A.
Subject: RE: Takata Airbag Recalled Salvage Inflators

Thank you Nick and I will certainly abide by your request. Please put in place a litigation hold on all electronic data and emails related to any Takata related recalled inflator issues please.

So, I am correct that Takata has contacted your company and arranged for or in discussions to purchase back all recalled unruptured inflators. If I don't hear back, I will assume that to be the case.

Thank you,

From: Nick Jakubowski [mailto:npjakubowski@LKQCORP.com]
Sent: Tuesday, January 27, 2015 11:29 AM
To: Dean, Kevin R.
Subject: Takata Airbag Recalled Salvage Inflators

Mr. Dean,

I am an attorney for LKQ Corporation. You or your firm may not contact any employee of LKQ Corporation or its subsidiaries any further. Any future communications should come to me only. LKQ will not sell you or your firm any airbag inflators.

Sincerely,

Nicholas P. Jakubowski
Assistant General Counsel

LKQ Corporation
500 W. Madison St., Suite 2800
Chicago, IL 60661
T: (312) 621-2742 | F: (877) 484-0658

From: Dean, Kevin R. [<mailto:kdean@motleyrice.com>]
Sent: Friday, January 23, 2015 4:16 PM
To: Dave Brown
Cc: Waites, Kathryn A.; 'billmcallister@LKQCORP.com'
Subject: RE: Takata Airbag Recalled Salvage Inflators

Dave Brown
LKQ Corporation
60 Telfair Place
Savannah, Georgia 31415

Dear Dave:

Please accept this email to confirm our second call this afternoon as it concerns the below request to purchase all of LKQ's Takata recalled inflators.

To confirm, you have been directed by "upper management at corporate" (I understand LKQ Corp is headquartered in Chicago, IL) to halt all sales to me or any of my investigators/technicians of any and all of the involved recalled inflators because they are either being returned to "dealers" or "Takata" under some purchase arrangement. This information is consistent with my technician, Mike Shepard who received the same general information this morning from LKQ Corp's McAllister Auto location in Cades, SC.

I would ask that in the interest of public safety and consistent with Court preservation inquiries, that you forward this email to your "upper management" or LKQ Corp. attorneys and request that they please contact me. Please advise them I object to the sale of this inventory to Takata which I am concerned could be destroyed or not properly preserved.

I am attaching a temporary Order from a Federal Judge in SC that touches upon the importance of evidence preservation. I ask that LKQ's attorneys please contact me to discuss and so that I can request their cooperation on my efforts to preserve this vital evidence in our SC Court for the protection of public safety.

Thank you very much for your time and candor today,

Kevin

Kevin R. Dean | Attorney at Law | Motley Rice LLC
[28 Bridgeside Blvd. | Mt. Pleasant, SC 29464 | kdean@motleyrice.com](#)
[o. 843.216.9152](#) | [c. 843.834.1130](#) | [f. 843.216.9267](#)

From: Dean, Kevin R.
Sent: Friday, January 23, 2015 11:43 AM
To: 'djbrown@lkqcorp.com'
Cc: Dean, Kevin R.; Waites, Kathryn A.
Subject: Takata Airbag Recalled Salvage Inflators

Dave:

Per our call this morning, I am interested in arranging a purchase of ALL salvage inflators contained on the attached list from ALL LKQ corporate locations Nationwide. My purpose is solely for legal purposes related to evidence preservation and later use in testing as well as public safety. We will not be using these inflators in re-installations. I will be happy to sign any release of liability in favor of LKQ.

Please let me know something today if at all possible before your inventory is depleted any further.

Thank you,

Kevin R. Dean | Attorney at Law | Motley Rice LLC
[28 Bridgeside Blvd. | Mt. Pleasant, SC 29464 | kdean@motleyrice.com](#)
o. [843.216.9152](#) | **c.** [843.834.1130](#) | **f.** [843.216.9267](#)

[Confidential & Privileged](#)

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Please consider the environment before printing

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RECEIVED
By Recall Management Division at 2:21 pm, Jun 20, 2014

HONDA
American Honda Motor Co., Inc.
1919 Torrance Boulevard
Torrance, CA 90501-2746
Phone (310) 783-2000

June 19, 2014

14V-351
(3 pages)

Ms. Nancy Lewis
Associate Administrator for Enforcement
NATIONAL HIGHWAY TRAFFIC SAFETY
ADMINISTRATION
Attn: Recall Management Division (NVS-215)
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Honda and Acura Driver Airbag Inflator Safety Improvement Campaign

Dear Ms. Lewis:

On June 19, 2014 Honda Motor Co., Ltd. (HMC) decided to conduct a safety improvement campaign for the driver's airbag inflator in certain model year Honda and Acura vehicles listed below. Honda has not made a determination that a safety defect exists, however we are choosing to participate in the collection of parts in order to support ongoing investigation.

As discussed with NHTSA ODI staff, this safety improvement campaign is not being conducted under the Safety Act. We are submitting this letter in a format consistent with the requirements of 49 CFR, Part 573 for the sake of clear communication; however Honda does not have sufficient information to reach a defect determination at this time.

Name of manufacturer: Honda Motor Co., Ltd. (HMC)
Honda Mfg. of Alabama, LLC (HMA)
Honda of America Mfg., Inc. (HAM)
Honda of Canada Mfg., Ltd. (HCM)
Honda of the U.K. Mfg., Ltd. (HUM)
Honda de Mexico, S.A. de C.V. (HDM)

Manufacturer's agent: Jay Joseph
American Honda Motor Co., Inc. (AHM)
1919 Torrance Blvd.
Torrance, CA 90501-2746

Identification of potentially affected vehicles:

Certain model year Honda and Acura vehicles that were originally sold in, or ever registered in, geographic locations known for high absolute humidity: Alabama, Florida, Georgia, Hawaii, Louisiana, Mississippi, South Carolina, Texas, Puerto Rico and the U.S. Virgin Islands.

| <u>Make/Model</u> | <u>Description</u> |
|---------------------------|--------------------------|
| Honda Accord (4-cylinder) | All 2001-2007 model year |
| Honda Accord (V6) | All 2001-2002 model year |
| Honda Civic | All 2001-2005 model year |

Ms. Nancy Lewis
 June 19, 2014
 Page 2

| | |
|-----------------|--------------------------|
| Honda CR-V | All 2002-2006 model year |
| Honda Element | All 2003-2011 model year |
| Honda Odyssey | All 2002-2004 model year |
| Honda Pilot | All 2003-2007 model year |
| Honda Ridgeline | All 2006 model year |
| Acura MDX | All 2003-2006 model year |
| Acura TL/CL | All 2002-2003 model year |

Description of the basis for the determination of the vehicle population:

The vehicle population was based on manufacturing records and market occurrences of the involved symptom.

Identification of component:

Component: Driver's Airbag Inflator
 Country of Origin: USA
 Manufacturer: T.K. Holdings, Inc.
 Contact Name: Kazuo Higuchi
 Address: 888 16th Street NW - Suite 800
 Washington, DC 20006
 Telephone No.: (202) 729-6332

Total number of vehicles: TBD

Condition:

Certain Honda and Acura vehicles operated in areas that are known for high absolute humidity may contain a driver's (frontal) airbag inflator that could produce excessive internal pressure. If an airbag deploys with excessive internal pressure, it may cause the inflator to rupture. In the event of an inflator rupture, metal fragments could pass through the airbag cushion material possibly causing injury or fatality to vehicle occupants.

Timeline:

- Aug 6, 2013 Honda received a claim via a NHTSA Hotline complaint of an energetic deployment of a driver's airbag inflator in Florida, outside of the previous recall range. This is the only occurrence outside of the recall range in a Honda or Acura vehicle.
- Oct 10, 2013 Honda inspected the vehicle involved in the allegation of the energetic airbag deployment and confirmed the affected airbag module serial number.
- Oct 22, 2013 Honda and Takata began a joint investigation with the manufacturer of the airbag inflator.
- Jan 22, 2014 Honda and Takata provided an interim investigation report to NHTSA ODI, and continued investigating potential causes of the inflator rupture.

Ms. Nancy Lewis
June 19, 2014
Page 3

Jan-Jun, 2014 Honda and Takata conducted part collection and analysis, focusing on the same production lot as the ruptured inflator.

May, 2014 Takata received approval from the owner of the vehicle that experienced the inflator rupture to conduct material testing and other analysis on the parts retrieved from the vehicle.

Jun 13, 2014 NHTSA contacted Honda to discuss the possibility of conducting a safety improvement campaign to support the ongoing investigation of the cause of energetic driver's airbag inflators, focusing on locations in the U.S. that experience high absolute humidity levels and high temperatures.

Campaign Plan:

The owners of all vehicles will be contacted by mail and asked to take their vehicle to a Honda or Acura automobile dealer. The dealer will replace the driver's airbag inflator, free of charge. Owner notification letters will reference this being conducted as a safety recall.

| | |
|--|---------------|
| The estimated date to e-mail preliminary notification to dealers: | TBD |
| The estimated date to provide service bulletin to dealers: | TBD |
| The estimated date to begin sending notifications to owners: | TBD |
| The estimated date of completion of the notification: | TBD |
| Proposed owner notification letter submission: | June 19, 2014 |

Manufacturer's campaign number: TBD

Sincerely,

AMERICAN HONDA MOTOR CO., INC.



Jay Joseph
Assistant Vice President
Product Regulatory Office

JWJ:cmb

RECEIVED

By Recall Management Division at 11:11 am, Jul 02, 2014

HONDA

American Honda Motor Co., Inc.
1919 Torrance Boulevard
Torrance, CA 90501-2746
Phone (310) 783-2000

July 2, 2014

14V-351
(3 pages) Amended

Ms. Nancy Lewis
Associate Administrator for Enforcement
NATIONAL HIGHWAY TRAFFIC SAFETY
ADMINISTRATION
Attn: Recall Management Division (NVS-215)
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Honda and Acura Driver Airbag Inflator Safety Improvement Campaign

Dear Ms. Lewis:

On July 1, 2014 Honda Motor Co., Ltd. (HMC) decided to conduct a safety improvement campaign for the driver's airbag inflator in certain model year Honda and Acura vehicles listed below. Honda has not made a determination that a safety defect exists, however we are choosing to participate in the collection of parts in order to support ongoing investigation.

As discussed with NHTSA ODI staff, this safety improvement campaign is not being conducted under the Safety Act. We are submitting this letter in a format consistent with the requirements of 49 CFR, Part 573 for the sake of clear communication; however Honda does not have sufficient information to reach a defect determination at this time.

Name of manufacturer: Honda Motor Co., Ltd. (HMC)
Honda Mfg. of Alabama, LLC (HMA)
Honda of America Mfg., Inc. (HAM)
Honda of Canada Mfg., Ltd. (HCM)
Honda of the U.K. Mfg., Ltd. (HUM)
Honda de Mexico, S.A. de C.V. (HDM)

Manufacturer's agent: Jay Joseph
American Honda Motor Co., Inc. (AHM)
1919 Torrance Blvd.
Torrance, CA 90501-2746

Identification of potentially affected vehicles:

Certain model year Honda and Acura vehicles that were originally sold in, or ever registered in, geographic locations known for high absolute humidity: Alabama, California, Florida, Georgia, Hawaii, Louisiana, Mississippi, South Carolina, Texas, Puerto Rico and the U.S. Virgin Islands.

| <u>Make/Model</u> | <u>Description</u> |
|---------------------------|--------------------------|
| Honda Accord (4-cylinder) | All 2001-2007 model year |
| Honda Accord (V6) | All 2001-2002 model year |
| Honda Civic | All 2001-2005 model year |

Ms. Nancy Lewis
 July 2, 2014
 Page 2

| | |
|-----------------|--------------------------|
| Honda CR-V | All 2002-2006 model year |
| Honda Element | All 2003-2011 model year |
| Honda Odyssey | All 2002-2004 model year |
| Honda Pilot | All 2003-2007 model year |
| Honda Ridgeline | All 2006 model year |
| Acura MDX | All 2003-2006 model year |
| Acura TL/CL | All 2002-2003 model year |

Description of the basis for the determination of the vehicle population:

The vehicle population was based on manufacturing records and market occurrences of the involved symptom.

Identification of component:

| | |
|--------------------|--|
| Component: | Driver's Airbag Inflator |
| Country of Origin: | USA |
| Manufacturer: | T.K. Holdings, Inc. |
| Contact Name | Kazuo Higuchi |
| Address: | 888 16 th Street NW - Suite 800 Washington, DC 20006 |
| Telephone No.: | (202) 729-6332 |

Total number of vehicles: TBD

Condition:

Certain Honda and Acura vehicles operated in areas that are known for high absolute humidity may contain a driver's (frontal) airbag inflator that could produce excessive internal pressure. If an airbag deploys with excessive internal pressure, it may cause the inflator to rupture. In the event of an inflator rupture, metal fragments could pass through the airbag cushion material possibly causing injury or fatality to vehicle occupants.

Timeline:

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- Oct 10, 2013 Honda inspected the vehicle involved in the allegation of the energetic airbag deployment and confirmed the affected airbag module serial number.
- Oct 22, 2013 Honda and Takata began a joint investigation with the manufacturer of the airbag inflator.
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Ms. Nancy Lewis
July 2, 2014
Page 3

- Jan-Jun, 2014 Honda and Takata conducted part collection and analysis, focusing on the same production lot as the ruptured inflator.
- May, 2014 Takata received approval from the owner of the vehicle that experienced the inflator rupture to conduct material testing and other analysis on the parts retrieved from the vehicle.
- Jun 13, 2014 NHTSA contacted Honda to discuss the possibility of conducting a safety improvement campaign to support the ongoing investigation of the cause of energetic driver's airbag inflators, focusing on locations in the U.S. that experience high absolute humidity levels and high temperatures.
- Jun 26, 2014 Honda learned of an allegation of an energetic deployment of a driver's airbag inflator in California.

Campaign Plan:

The owners of all vehicles will be contacted by mail and asked to take their vehicle to a Honda or Acura automobile dealer. The dealer will replace the driver's airbag inflator, free of charge. Owner notification letters will reference this being conducted as a safety recall.

| | |
|--|---------------|
| The estimated date to e-mail preliminary notification to dealers: | TBD |
| The estimated date to provide service bulletin to dealers: | TBD |
| The estimated date to begin sending notifications to owners: | TBD |
| The estimated date of completion of the notification: | TBD |
| Proposed owner notification letter submission: | June 19, 2014 |
| Manufacturer's campaign number: | TBD |

Sincerely,

AMERICAN HONDA MOTOR CO., INC.



Jay Joseph
Assistant Vice President
Product Regulatory Office

JWJ:cmb

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

ANGELINA C. SUJATA,

Plaintiff,

Civil Action No. 3:15-cv-0112

vs.

TAKATA CORPORATION, TK HOLDINGS
INC., HIGHLAND INDUSTRIES, INC.,
HONDA MOTOR CO., LTD., HONDA R &
D CO., LTD., AMERICAN HONDA
MOTOR CO., INC., AND HONDA OF
AMERICA MFG., INC.,

Defendants.

PROPOSED EVIDENCE PRESERVATION ORDER

Upon consideration of the submissions by the Plaintiff and the Defendants Takata Corporation and TK Holdings Inc. (hereinafter the “Takata Defendants” or “Takata”) and Highland Industries, Inc., Honda Motor Co., Ltd., Honda R & D Co., Ltd., American Honda Motor Co., Inc., and Honda of America Mfg., Inc. (hereinafter the “Honda Defendants” or “Honda”) and having determined that good has been shown the Court hereby finds that:

1. All parties have a duty to preserve evidence that may be relevant to this action. The duty extends to documents, data, and tangible things in the possession, custody, and control of the parties to this action, and any employees, agents, contractors, carriers, bailees, or other non-parties who possess materials reasonably anticipated to be subject to discovery in this action. Counsel is under an obligation to exercise efforts to identify and notify such non-parties, including employees of corporate or institutional parties.

2. “Preservation” means maintaining the integrity of the “ruptured inflators” and “un-ruptured inflators” described herein, as well as documents, data, and tangible things reasonably anticipated to be subject to discovery under Federal Rules of Civil Procedure 26, 45, and 56(e) in this action.

3. Preservation includes taking steps to prevent the partial or full destruction, alteration, deletion, shredding, incineration, relocation, migration, or theft of the “ruptured inflators” and “un-ruptured inflators” described herein, as well as documents, data, and tangible things reasonably anticipated to be subject to discovery under Federal Rules of Civil Procedure 26, 45, and 56(e) in this action, as well as negligent or intentional handling that would make material incomplete or inaccessible.

4. This Order extends to information relevant to the subject matter involved in this action or reasonably calculated to lead to the discovery of admissible evidence under the currently operative Complaint in this case.

5. This Order is not intended to nor shall it interfere with any ongoing testing by any party or hamper any efforts by the NHTSA to coordinate testing results and complete its investigation into this related matter pursuant to its jurisdiction. This Order is only intended to preserve any recovered “ruptured inflator” evidence, as well as a sufficient initial volume of “unruptured inflators” from a representative statistical sampling of such inflators from each U.S. state for preservation in future MDL consolidated proceedings, testing by independent third parties, NHTSA, or the parties.

6. The Takata Defendants and the Honda Defendants are hereby Ordered to:

- a. Secure and preserve, in unaltered form, any and all “ruptured inflators” previously removed from accident or defective field vehicles that are currently

in the possession of the Takata and/or Honda Defendants in the U.S. and such items that originated in the U.S. that have been shipped to Japan, which are Ordered returned to the U.S.;

- b. Secure and preserve, in unaltered form, all testing data, video, photographs, test results, electronic files, and communications related to the ongoing inflator testing by the Defendants or their agents or contractors being conducted in the U.S., Japan, or any other foreign territory;
- c. Set aside and preserve 10% of all “un-ruptured” airbag inflators removed under recall proceedings or purchased from salvage yards, companies, or other used vehicle owners which are currently in the possession of the Honda and/or Takata Defendants; and
- d. Establish protocols to ensure that 10% of any additional “un-ruptured inflators” that come into the possession of the Honda or Takata Defendants after the date of this Order will be set aside and preserved until further order of the Court or agreement of the parties.

This Order shall remain in effect unless and until it is modified or superseded by ruling of this Court, the Judicial Panel on Multidistrict Litigation (“JPML”), and/or the Transferee Court to which this case may be assigned by the JPML.

SO ORDERED, this _____ day of _____, 2015.

J. MICHELLE CHILDS
United States District Judge