

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

<b>BLITZSAFE TEXAS, LLC,</b>	§	
	§	
<b>Plaintiff,</b>	§	<b>Case No. 2:15-cv-01274-JRG-RSP</b>
	§	
v.	§	<b>JURY TRIAL DEMANDED</b>
	§	
<b>HONDA MOTOR CO., LTD., ET AL,</b>	§	<b>LEAD CASE</b>
	§	
<b>Defendants.</b>	§	

**DEFENDANTS' REPLY ISO THEIR MOTION FOR LEAVE TO  
SUPPLEMENT INVALIDITY CONTENTIONS**

Defendants<sup>1</sup> submit this Reply to address issues raised in Plaintiff Blitzsafe Texas, LLC’s Opposition To Defendants’ Motion For Leave To Supplement Invalidity Contentions filed August 8, 2016. DI 131 (“Blitzsafe’s Opposition” or “Opp.”).

**I. INTRODUCTION**

The source code at issue behind these amendments to the invalidity contentions was in Blitzsafe's control since before this litigation began. In fact, Blitzsafe's attorney Cho had the source code all along. Blitzsafe had a duty to preserve relevant evidence and to conduct a reasonable investigation and produce information like this source code. Blitzsafe in fact promised to check with its counsel Cho for the requested source code. But Blitzsafe never

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<sup>1</sup> Defendants Toyota Motor Corporation, Toyota Motor Sales U.S.A., Inc., Toyota Motor Manufacturing, Texas, Inc., Toyota Motor Manufacturing Kentucky, Inc., Toyota Motor Manufacturing Mississippi, Inc., American Honda Motor Co., Inc., Honda of America Mfg., Inc., Honda Manufacturing of Alabama, LLC, Honda Manufacturing of Indiana, LLC, Hyundai Motor America, Hyundai Motor Manufacturing Alabama, LLC, Kia Motors America, Inc., Kia Motors Manufacturing Georgia, Inc., Nissan North America, Inc., and Nissan Motor Co., Ltd., (collectively, “Defendants”).

produced a single document from Cho, and never even requested the source code. In short, Blitzsafe breached its duties of collection and production, and misrepresented to Defendants the scope of its investigation. Defendants have been prejudiced thereby, and seek leave to amend their contentions to cure the prejudice.

Blitzsafe's suggestions that Defendants should have obtained the source code earlier from Mr. Fischer or Ford are misplaced, as Fischer does not have it, and the Discovery Confidentiality Order in the *Ford* case required Ford to return or destroy it at the end of that case. Rabena Reply Dec. ¶4; Reply Ex. 21.<sup>2</sup> Finally, Blitzsafe's argument that the source code is cumulative is also incorrect; it is not, as it specifically refutes Blitzsafe's prior arguments regarding this prior art.

## **II. DEFENDANTS HAVE BEEN DILIGENT**

Blitzsafe argues that Defendants were not diligent and should have obtained *Blitzsafe's* source code sooner, from a party other than Blitzsafe. E.g., Opp. at 6. Defendants were diligent when they sought Blitzsafe's code from Blitzsafe, and any delay was due entirely to Blitzsafe's failure to honor its discovery obligations.

Upon learning that the source code resurfaced in *MPH, LLC v. Ford et al.*, Defendants reasonably expected that Blitzsafe would have retained its own source code from that case. Indeed, Blitzsafe was under a legal obligation to keep that highly relevant source code at the conclusion of the *Ford* case since it prepared to sue the current Defendants just one month later.<sup>3</sup> *Trevino v. Ortega*, 969 SW 2d 950, 955 (Tex. 1998) (“...a party must preserve documents, tangible items, and information that are ‘relevant to litigation, or potential litigation, or are

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<sup>2</sup> Reply Exhibits 21-22 are attached to the Reply Declaration of John F. Rabena, Esq., filed herewith.

<sup>3</sup> The *Ford* case settled in June, 2015 (Reply Ex. 22) and Blitzsafe sued the current Defendants in July 2015.

reasonably calculated to lead to the discovery of admissible evidence...”). Blitzsafe certainly knew how relevant that source code was, and also knew that its attorney, Mr. Cho, had possession of the code. In fact, on February 25, 2015, one week after Cho received the Fischer production, Marlowe emailed Fischer to complain about Fischer having the source code. Exs. 8, 9. In that email, Marlowe also asked Fischer to immediately return any copies. Ex. 9.

Given that on February 19, 2015, Blitzsafe's attorney Cho stated to Ford's counsel that he was going to give the documents to Marlowe, and that on February 25, 2015 Marlowe demanded the immediate return of any copies of these documents from Fischer, Mr. Marlowe's Declaration stating that he never received these important documents strains credibility.<sup>4</sup>

But it doesn't matter whether Mr. Cho gave Blitzsafe the code or not. Even assuming the source code was never actually returned to Blitzsafe, whether by oversight or calculated decision to suppress evidence in future cases, Mr. Cho still *had* the source code and he was still Blitzsafe's lawyer. Accordingly, Blitzsafe's representation to Defendants that "...Plaintiff Blitzsafe Texas, LLC ("Blitzsafe") does not have the source code for the TOY/PAN products identified in your April 25th letter in its *possession, custody, or control*" (Ex. 18, p. 1) was *false*; Blitzsafe's lawyer Cho did in fact have the source code. Rabena Decl. ¶ 20. The code was therefore in Blitzsafe's "possession, custody, or control." *In re Bankers Trust Co.*, 61 F. 3d 465 (6th Cir. 1995) ("Moreover, federal courts have consistently held that documents are deemed to

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<sup>4</sup> Curiously, Blitzsafe's Privilege Log lists 17 entries in the nine-day period from the date that Mr. Cho stated that he would provide the Fischer production to Blitzsafe, until the end of February 2015. Ex. 11, pp. 126-128, entries 1314-1330. Those entries are all between Mr. Cho and Mr. Marlowe, and sometimes include Brown Rudnick attorneys. Every one of those entries is described in vague terms such as "Confidential communication rendering legal advice regarding litigation." Ex. 11, p. 126, entry 1316. Without a clearer description or an *in camera* review of these documents, it not possible for Defendants to challenge Blitzsafe's incredible representation that Mr. Cho never gave Blitzsafe back its own source code.

be within the ‘possession, custody or control’ for purposes of Rule 34 if the party has actual possession, custody or control, *or has the legal right to obtain the documents on demand.*”) (emphasis added) citing, *Resolution Trust Corp. v. Deloitte & Touche*, 145 F.R.D. 108, 110 (D. Colo.1992); *Weck v. Cross*, 88 F.R.D. 325, 327 (N.D. Ill.1980). Blitzsafe had the legal right to obtain its own documents from its own lawyer, but failed to do so.

To make matters worse, Blitzsafe’s counsel expressly represented to Defendants’ counsel that they *did* check with Mr. Cho:

We have also reached out to counsel for Marlowe Patent Holdings from the Ford and DICE cases to obtain additional materials from these cases and will supplement Blitzsafe’s document production with any responsive, non-privileged materials we obtain.

Ex. 18, p. 2. Since counsel represented that they requested the documents from Blitzsafe's counsel Cho, then how is it that Blitzsafe never produced even a single document from Mr. Cho, let alone the missing prior art source code? Defendants were reasonable to rely on Blitzsafe to abide by its duties to preserve evidence, to conduct a diligent search for relevant documents, and to conduct the searches it said it had conducted. Blitzsafe cannot now be allowed to benefit from its own discovery failures and misrepresentations.

Defendants were also reasonable to expect that Ford’s counsel would not have kept Blitzsafe’s source code after settling the litigation. In fact, the Discovery Confidentiality Order in the *Ford* case had the typical requirement that counsel return or destroy all confidential documents produced by the opposing party at the end of the case. Reply Ex. 21, ¶16. Similarly, Mr. Fischer represented that he did not retain copies of the source code after producing it in the Ford case, for fear of repercussions from Mr. Marlowe. Rabena Reply Dec. ¶ 4.

### **III. THE SOURCE CODE IS MATERIAL AND NOT CUMULATIVE**

As a fallback, Blitzsafe contends that the source code is cumulative and therefore not necessary, because Defendants and Dr. Matheson have already contended that the TOY/PAN

interfaces are invalidating prior art without the source code. In the Ford case, Dr. Matheson analyzed the prior art TOY/PAN interface *hardware* and *external signals*, and concluded based on the signal and hardware behavior, that the interface generated the claimed “device presence signal.” Ex. 4, e.g. Pars. 54-55. MPH took the position in that case, that based on certain behavior of the interface and the attached stereo, the “device presence signal” in that setup was actually being generated by the CD changer, not the interface. In particular, MPH argued:

This is proof that the *Panasonic CD changer is sending signals* to the Toyota radio and the *prior art interface is not generating a device presence signal* for maintaining the car stereo in a state responsive to processed data and audio signals.

Ex. 5 at 16.

While MPH’s logic in that case was flawed, the source code contains further evidence that makes it clear that the “device presence signal” was generated by the interface as claimed. Ex. 12, e.g., pp. 33-36. Thus, the source code is not cumulative to the external signal analysis or the hardware analysis.

#### IV. CONCLUSION

For each of the foregoing reasons, Defendants respectfully request that the Court find that Defendants have met the good cause standard required to supplement their Invalidity Contentions and grant Defendants leave to supplement their Invalidity Contentions with the materials provided in Exhibit 12.

Defendants also request any other relief that the Court deems appropriate in light of Blitzsafe’s litigation misconduct as detailed above, including reimbursement of fees and costs for having to obtain the code from third parties including Blitzsafe’s former counsel, and for having to bring this motion.

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