

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE SOUTHERN DISTRICT OF TEXAS  
3 CORPUS CHRISTI DIVISION

4 WANDA CASTLEBERRY, § CASE NO. CA C-85-357  
5 Individually and for §  
6 the Estate and Heirs of §  
Tommy Joe Castleberry §  
7 VS. § Houston, Texas  
§ DECEMBER 4, 1986  
8 REMINGTON ARMS CO., INC. § 2:46 O'Clock A.M.

9 BEFORE THE HON. EDUARDO E. de ASES, UNITED STATES MAGISTRATE  
10

11 APPEARANCES:

12 For the Plaintiffs: Longley & Maxwell  
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proceedings recorded by electronic sound recording, transcript  
duced by transcription service.

1 THE COURT: In Cause No. C-85-357, Wanda Castleberry,  
2 Individually and for the Estate and Heirs of Tommy Joe  
3 Castleberry, Plaintiffs, against Remington Arms Company,  
4 Incorporated. Mr. Mark Kincaid for the Plaintiffs?

5 MR. KINCAID: Yes, Your Honor.

6 THE COURT: Mr. Kincaid, and Mr. David Demars for  
7 the Defendant?

8 MR. DEMARS: Yes, Your Honor, and with me as counsel  
9 is Mr. Russell Matting who's just sitting at trial table. He  
10 has not been sworn in to the Federal Court. He's a recent  
11 admittee to the Bar. I'd just asked the Court's permission  
12 to have him sit at counsel table.

13 THE COURT: Certainly.

14 MR. DEMARS: Thank you.

15 THE COURT: The hearing this afternoon is on the  
16 Plaintiff's Motion to Compel and Request for Sanctions, and  
17 the Defendant's opposition to such Motion. As you can tell  
18 from the delay in beginning your hearing, we have a number of  
19 matters that have been scheduled for this afternoon. We have  
20 some additional matters that are scheduled for later on this  
21 afternoon that may conflict with the hearing. I'm wondering  
22 then in view of that if we might be able to agree on the  
23 general areas that you wish to explore. From looking at the  
24 Plaintiff's Motion to Compel, the Plaintiff is complaining  
25 because the Defendant has not responded to the Plaintiff's

1 interrogatories and certain requests to produce. I believe  
2 that the Defendant's opposition to the Motion to Compel deals  
3 in one area with the fact that the firearms, which are the  
4 subject of the discovery, are not similar to the firearm  
5 that's involved in this lawsuit, and also that some of the  
6 interrogatories or requests for production are burdensome.  
7 Can we agree on the areas that you wish to cover before you  
8 get into the actual testimony involved in the Motion to  
9 Compel?

10 MR. DEMARS: Your Honor, I think, as the Court  
11 heard me point out, one of the big areas is the distinction  
12 between the Model 600 involved in this present action and the  
13 Model 700, which discovery is sought. That is the one large  
14 area that's -- with particular interrogatories or particular  
15 requests, there is some issues of vague and overbroad, burden-  
16 some, and there's also one area, Your Honor -- we can deal  
17 with some of these small areas first, if I may take an  
18 example. There is a request to produce all deposition tran-  
19 scripts, et cetera, or trial testimony from other trials that  
20 Remington may have been involved in. That issue does not  
21 involve any testimony by any of the experts. We have some  
22 authority. We believe it's persuasive that when there's  
23 deposition testimony and trial testimony, if we identify the  
24 trial and the case number it is equally burdensome for the  
25 Plaintiff to obtain that than from us and the federal cases

1 have held that those type of things and a case from the Eighth  
2 Circuit should be obtained by Plaintiffs and not requested  
3 from the other party. Those types of issues we could deal  
4 with one at a time, walk through the list without evidence.  
5 The evidence -- both experts are here, Your Honor. This is  
6 Mr. Kim Hutton from Remington, one of our senior engineers,  
7 and I believe Mr. Tom Butter is in the back, is retained  
8 expert in the Plaintiffs. That is where the length will  
9 come in during our hearing, during their testimony.

10 MR. KINCAID: Your Honor, given that this is  
11 Plaintiff's Motion to Compel, if I had a preference I would  
12 prefer that we get to the one key issue, the similarity versus  
13 dissimilarity at the expense of the more minor issues of who  
14 produces transcripts, because that really is the key issue  
15 whether we have requested sufficiently similar documents to  
16 dispense with the need for testimony. I think I can give the  
17 Court some very persuasive legal arguments supporting the  
18 need for no testimony. If the Court is inclined to  
19 hear testimony, then that is the single issue, whether we've  
20 requested information about guns that are just too different  
21 to be discoverable.

22 THE COURT: Mr. Demars?

23 MR. DEMARS: Your Honor, I think we heard part of  
24 that. Obviously it's their Motion. If they want to waive  
25 the presentation of the evidence, that's their prerogative.

1 I have, as we discussed in our Motion for a Continuance,  
2 specifically had this hearing set so that Mr. Hutton could  
3 testify, and by just looking at the weapons, although there  
4 are some physical differences and some appearance differences,  
5 it's going to be almost impossible for the Court to determine  
6 whether those differences rise to level where discovery would  
7 not be likely to produce admissible evidence, and I believe  
8 that we are entitled to put on such evidence. Now, whether  
9 that evidence is enough to convince Your Honor, that's a  
10 different consideration, but we are entitled. The case that's  
11 cited, and I think it's discussed some in our Motion for a  
12 Continuance, the case that is cited by counsel for the  
13 Plaintiffs for the proposition that things can be dissimilar  
14 and still discoverable, in that very case, the Court held an  
15 evidentiary hearing where physical items were presented for  
16 evidence. Now, we are here ready to present that physical  
17 evidence. On appeal, the Court said in this particular  
18 instance the items are similar enough to be discoverable.  
19 The Appellate Court did not fault the Trial Court for taking  
20 the time to actually look and hear at the evidence.

21 MR. KINCAID: Your Honor, if we're going to begin  
22 arguing the merits, I believe I am entitled to go first, it  
23 being my Motion.

24 THE COURT: Yes, well, why don't we hear the  
25 testimony first and we'll go as far as we can in listening to

1 the testimony on the issue of similarity or dissimilarity of  
2 the requested discovery efforts, and possibly while we're  
3 interrupted later on in this hearing, you two can discuss  
4 these other matters; for example, the request for similar  
5 depositions or depositions in other lawsuits. You may be  
6 able to reach an agreement concerning those matters. Very  
7 well, Mr. Kincaid, you wish to call a witness in support of  
8 your Motion?

9 MR. KINCAID: Yes, sir, Your Honor, but I believe  
10 it would aid the Court first if I might give a brief overview  
11 of what this case is about. I notice the podium has been  
12 pushed away. Where would the Court prefer that we stand?

13 THE COURT: Well, I don't know, you could stand  
14 there by your table. I think you'd be more comfortable with  
15 your notes readily available.

16 MR. KINCAID: Thank you, Your Honor. The Plaintiff's  
17 position is fairly well spelled out in the Motion to Compel  
18 and the Memorandum accompanying it. What this case involves  
19 is a defective Remington Model 660 firearm. The significant  
20 features that make that firearm defective, in our opinion,  
21 are two. First, it has a bolt lock safety -- a two-position  
22 bolt lock safety, and what that means, as you'll hear from  
23 Mr. Butters and from Mr. Hutton is that before a gun user can  
24 begin to unload the rifle, the safety has to be taken off.  
25 The gun has to be put in the fire position against the main

1 bolt lock. The bolt is locked down until the safety is taken  
2 off. We contend that is a design defect anytime you make the  
3 gun handler put the rifle in the fire position when they  
4 don't intend to fire. Accordingly, we have asked for discovery  
5 on other two position bolt lock safety designed rifles  
6 manufactured by Remington. That is the extent of our discovery  
7 is in to that design. The second defect we have alleged in  
8 this case is these guns have a documented proven tendency in  
9 a small number of these rifles to fire when the safety is  
10 released. This is a problem that exists in the Model 660.  
11 The Court may be familiar with a case and an attorney in Austin,  
12 John Coves, who was paralyzed by just such an occurrence with  
13 a Remington model. This is also a problem that has been  
14 documented by Remington's own records as occurring in the  
15 Model 700. Our firm is involved in a Model 700 case where  
16 there is one problem. So, we're not straining our neck. This  
17 is not a fishing expedition as to whether the problems might  
18 exist. These problems that are known to other Plaintiffs,  
19 known to our firm, and known to Remington, that these problems  
20 do exist in the Model 660 and the Model 700. The legal back-  
21 ground supporting our request is that to make other designs  
22 discoverable, it's not required that they be identical. I've  
23 cited the cases to the Court. Mr. Demars has attached those  
24 cases as being Texas cases. That's not entirely correct.  
25 There -- I refer the Court to the recent Fifth Circuit thing in

1 Jackson v. Firestone, involving a multi-piece rim design.  
2 The Court went to great lengths in that as to point out that  
3 the Defendant was wrong in saying that the Plaintiff only got  
4 to inquire into one type of design. And it bears another  
5 thing. These cases involved a question of admissibility,  
6 which of course if the evidence was admissible, as the Courts  
7 held it was, it would certainly be discoverable. In fact,  
8 much broader information would be discoverable. The point  
9 is, you don't have to have the products be identical. There  
10 are two avenues. If the products are similar enough -- and  
11 Mr. Butters, I believe, will testify that they are similar  
12 enough to be important in comparing the defects in the gun --  
13 then it's discoverable. But even if Remington's argument is  
14 correct and these rifles -- if the Court is convinced these  
15 rifles are entirely different, there is an entirely separate  
16 case of authority -- line of case authority that says if you  
17 have totally dissimilar designs, that information is  
18 discoverable, because if you have a design like the Model 660  
19 on the one hand that has this problem -- safety release  
20 problem, it would very relevant to find a completely different  
21 design that did not have the problem. Then you could argue  
22 to the Jury that Remington should have adopted the safer  
23 alternative. As I'm sure the Court's familiar, one way of  
24 proving product defect is to prove the existence of safer  
25 alternatives. So, it really is a no lose situation as far as



1 discovery. If they're different and don't have the same  
2 problem, they're discoverable to show safer alternative. If  
3 they're similar and have the same problem, which I submit is  
4 the case, then they are forced discoverable to show the extent  
5 of Remington's knowledge of the problem; to show in fact that  
6 there was a defect, and to show that the defect was a cause  
7 of the damage. The case that I think speaks directly to the  
8 issue of whether evidence is required, is Jamho v. Touchy,  
9 1983-84 case out of the Texas Supreme Court. That case involved  
10 claims of product defect and a Chevrolet model Vega. In that  
11 case, although it's not clear, as it could be from the Court's  
12 opinion, it was clear from reading the transcript that was  
13 brought to the Supreme Court, the trial court in that case,  
14 Judge Stovall in Houston had been shown by GM a model of the  
15 car in question and a model of the Corvette which Plaintiff  
16 claimed was similar enough to get discovery regarding the  
17 Corvette. GM found they were so dissimilar that they could  
18 not get discovery. GM, like Remington, argued to the trial  
19 court that, "If you could only let us show you -- if we could  
20 only present testimony to you, we would convince you how  
21 dissimilar they are." In that case, they did indeed convince  
22 the trial court that based on his visual observation, based  
23 on the testimony, they convinced the trial court that they  
24 were so dissimilar that he would not allow discovery. And  
25 the Supreme Court granted a Writ of Mandamus finding that was

1 an abuse of discretion. In doing so, the Supreme Court said  
2 and this is cited in our Memorandum, Your Honor; "The trial  
3 court, in balancing the rights of the parties, took an undul  
4 restricted view of the degree of similarity necessary for  
5 tests on other vehicles to be relevant. The automobiles need  
6 not be identical in order for tests on one to be relevant in  
7 determining whether the design of another is defective." The  
8 Court went on to say that, "Whether a safer fuel system design  
9 suitable for one vehicle is adaptable to another is a question  
10 of feasibility to be decided by the trier of fact, not a  
11 question to be resolved in ruling on discovery requests."  
12 Remington is placing this Court in a position of pre-trying  
13 the issue of whether other designs are adaptable to the Model  
14 660. That is a question that goes to the weight of the  
15 evidence at trial. The very fact that we would get to the  
16 weight of the evidence at trial indicates that it is admissible.  
17 As to the relevance of Texas authorities, I think it's well-  
18 established that the element of our cause of action are  
19 controlled by Texas law. This is a diversity case. That's  
20 why we're in Federal Court. The elements of our cause of  
21 action are set by Texas law. Those elements of a cause of  
22 action determine what evidence is relevant. Therefore, I  
23 think Texas cases are relevant. In Jackson v. Firestone,  
24 when the Fifth Circuit had a products case, had looked to  
25 Texas law to determine what evidence was relevant. And so

1 it's for that reason I've cited those cases. At this point I  
2 would object to having to present testimony to the Court on  
3 similarity or on Remington presenting evidence of dissimilarity,  
4 but if the Court is inclined to hear such evidence, at this  
5 time I would like to call John -- Tom Butters.

6 THE COURT: Well, before you do that, let me have --  
7 let me hear Mr. Demars response to your opening remarks.

8 MR. DEMARS: Your Honor, counsel for the Plaintiff  
9 has not cited several federal cases that are cited in our  
10 Memorandum, which hold -- and I can go through the list.  
11 They're cited on Pages 6 through 8 of our Memorandum, Your  
12 Honor. For example, in Utes v. General Motors, when a  
13 Plaintiff seeks to discover information on other models or  
14 designs, the request should be specifically tailored to  
15 inquire only about the products that contain the exact design  
16 feature here. And the other thing, Your Honor, that's very  
17 important for the Court to focus on here is they're not asking  
18 just to have discovery relating to the nature and description  
19 of the other design. They want every complaint, every injury,  
20 every action that involves that other design. Now, it's much  
21 different from being able to try to show the Jury, here's  
22 another design that would have been possible, they should  
23 have used, because it's better adapted for the use for which  
24 it's put. But they didn't do that, Your Honor. They want  
25 much, much broader. Basically, they want full-blown discovery

1 on the Model 700 as if that were at issue in this case.  
2 They're not asking, "Do you have other designs out there that  
3 also basically perform the same function?" That's not what  
4 they're asking, because they know that. What they're asking  
5 is not only do you have alternate designs that we may want to  
6 discuss; we want to know any claims, accidents, or injuries  
7 that have occurred using that alternate design. They want  
8 the best of both worlds. What they're saying is, "Well, if  
9 it is different, we're going to show that it's safer and  
10 different." Well, if they're saying it's safer, why do they  
11 want to know about other accidents? And why do they want to  
12 know the details of those accidents. Basically, Your Honor,  
13 it's difficult to know with the breadth of discovery in this  
14 case to respond on the Model 660 and its cousin Model, the  
15 600. But to open it up to a totally different design and  
16 model of rifle, the 700, would basically, Your Honor, make us  
17 respond in discovery in this case to two cases, and I can  
18 tell Your Honor that it's double whatever is here, and that  
19 is the huge breadth of discovery that is so burdensome and so  
20 inappropriate at this time, and I can show you -- and we have  
21 cases cited in our Memorandum, Your Honor, that talk about  
22 when you're looking for accidents and other problems related  
23 to a different design, you must be very specific in your  
24 request. The federal courts have consistently cut down the  
25 type of discovery requested in this case, because they do

1 make that second jump, Your Honor. They go not only from  
2 this design to, "Do you have any other designs," but, "While  
3 you're at it, tell us everything you know about the other  
4 design, too." It's tremendously burdensome and I think as  
5 the Court understands a little more of the detail, it'll be  
6 helpful, but this is one of the problems I have with their  
7 requests.

8 THE COURT: Let me ask you a couple of questions  
9 regarding the burdensome aspect of your opposition to the  
10 Plaintiffs discovery request. Isn't part of that burdensome-  
11 ness that you are arguing based upon the fact that they're  
12 asking for discovery such as depositions that have been filed  
13 and other lawsuits that have been filed against Remington  
14 Arms Company?

15 MR. DEMARS: That -- more than that, Your Honor.  
16 It's also in this aspect of, "Give us every correspondence,  
17 every communication you had concerning any problem with the  
18 other model." They're not saying, "Do you have another model  
19 rifle? What are the aspects of its design? What are the  
20 parameters of its design?" They're saying, "Give us that,  
21 but then go into your files and do what we also want you to  
22 do with the 600, give us every complaint you've ever had."  
23 Now, this gun has been manufactured, the Model 700 or its  
24 predecessors, since 1948. There's no time limit in any of  
25 their requests. And Your Honor, it's one thing to come in

1 and argue they are similar and they do this, but to know  
2 what's behind and what the effect is if to comply with these  
3 requests is to understand the extent of the burden.

4 THE COURT: Well, and the other question that I  
5 wanted to ask you is, isn't your argument in opposition to  
6 the Plaintiffs discovery request based upon whether or not  
7 the evidence that Plaintiffs would obtain from these discovery  
8 efforts would or would not be admissible in Court?

9 MR. DEMARS: No, Your Honor, I'm not arguing  
10 admissibility. I understand the parameters of the rule to be  
11 that -- I don't think it'll lead to the discovery of admissible  
12 evidence. I don't think an accident that happened with a  
13 Model 700 in California ten years ago is admissible in this  
14 case, and that's what they want, Your Honor. They want to  
15 show the correspondence; they want to see if there's been a  
16 lawsuit filed; they want every aspect of that accident that  
17 might have happened with a different weapon in California ten  
18 years ago. We basically, Your Honor -- they are going to  
19 make us produce documents for every action or every problem  
20 we've ever had with the Model 700, which is one of more  
21 popular weapons, Your Honor. It's unbelievable the breadth  
22 of this. That's our real problem.

23 THE COURT: All right. What's your response to  
24 Mr. Kincaid's objection to present any testimony at this  
25 hearing?

1 MR. DEMARS: Your Honor, I don't see why you should  
2 have to make a decision about the similarity or dissimilarity  
3 in a vacuum, and when you understand that there is a -- the  
4 bolt lock that they are talking about -- let me deal with  
5 that first. Both rifles do have a bolt lock. So do a huge  
6 percentage of every bolt action rifle made in this country  
7 and around the world. At one time the majority of them had  
8 bolt locks. I mean, that's like saying, "Please give us  
9 information on all cars with carburetors." That was for a  
10 long time one of the inherent aspects of the rifle. The  
11 problem here, Your Honor, and it's funny that the emphasis  
12 has been changed here in front of you, because in the Memo  
13 they stated that the real complaint about this case and the  
14 real defect is the firing of the gun when it went off of  
15 safety, and they say -- and the fact that you have to move  
16 the safety to unload the gun enhances that problem. It was  
17 an add-on. That was the first one mentioned here today. But  
18 that is the real crux of this lawsuit. If Your Honor will  
19 get a flavor for how this case will be tried, this case will  
20 be tried based upon the gun allegedly firing when the safety  
21 was moved from safe to fire without touching the trigger.  
22 That's what the lawsuit is about. If you'll hear testimony,  
23 Your Honor, you'll find that the Model 660 experienced situa-  
24 tions like that much more frequently than the Model 700 for  
25 totally different reasons, and that's why if they try to show

1 that ten years ago in California Model 700 fired when it went  
2 off safety, it is extremely unlikely that it's going to have  
3 any relevance to the Model 660, which had a particular  
4 situation in which that happened, and they know that the 660  
5 had that situation for a different reason, much more frequently  
6 than any Model 700.

7 THE COURT: Now, the testimony that you're offering  
8 is going to be limited to pointing out that distinctive  
9 difference between the Model 600 or 660 and the Model 700?

10 MR. DEMARS: We can easily do that, Your Honor.

11 THE COURT: All right. If the testimony is so  
12 limited, Mr. Kincaid, do you still object to it?

13 MR. KINCAID: Your Honor, I would maintain my  
14 objection because at this point Remington concedes that they  
15 have the same firearm safety release problem with the Model  
16 660 and 700. There's -- of course they could not deny that.  
17 At that point, I think I'm well over the hurdle to get an  
18 admission that we have the same type of problem. It's a  
19 defensive assertion for Remington to then argue, "Oh, but  
20 there were different reasons why we had the same problem."  
21 But to get into a product maker's files and have documenta-  
22 tion showing that they had the same problem on two different  
23 models of rifles makes those discoverable. Mr. Demars'  
24 assertion on behalf of his client that there are reasons to  
25 explain it away, that goes to the weight; that goes to the



1 question of whether it will ultimately be admissible, but as  
2 far as discovery of trying to prove that there is a defect in  
3 this rifle, showing that they've documented the same problem  
4 with the other, I think we're at the hump of discovery.

5 We're over the hump on getting those documents and letting  
6 our expert make his own evaluation of whether he sees a  
7 significant difference causing the problems in the different  
8 rifles.

9 MR. DEMARS: Your Honor --

10 THE COURT: All right.

11 MR. DEMARS: -- could I briefly respond to that?

12 THE COURT: All right.

13 MR. DEMARS: The fact that a rifle malfunctions and  
14 fires when the safety is moved from safe to off -- if you  
15 bear with me just for a minute. Let's compare it to a car  
16 failing to start. There may be a lot of reasons. It is not  
17 unique to any rifle manufactured by Remington, by Ruger, by  
18 Winchester. If the mechanism malfunctions, it can fire when  
19 the safety is moved. But if you have an automobile that a  
20 large -- a relatively large percentage will not start because  
21 the carburetor always ceases to open, is very different to  
22 having occasional car that won't start because the battery is  
23 dead. The fact that the thing happens is not proof that it's  
24 similar, and that's the oversimplistic view the Plaintiffs  
25 hope to catch us in to open up our files on both weapons, and

1 that's the problem. They'll just tell Your Honor, "Well,  
2 they've had many less, but they've had a couple times when  
3 the Model 700 spired like that, Your Honor; therefore, all  
4 two-and-a-half million 700's are open to discovery," while  
5 they know there was a specific problem with the 600's as to  
6 why that happened. And that's where we are, Your Honor.

7 THE COURT: All right, Mr. Demars. I'm going to  
8 overrule your objection and I'll hear some testimony. How  
9 extensive it'll be, I'll leave it up to you. I think that we  
10 ought to limit the testimony as much as we can. Who was your  
11 first witness, Mr. Kincaid?

12 MR. DEMARS: That was Mr. Kincaid's objection,  
13 Your Honor.

14 THE COURT: Yes, Mr. Kincaid, I'll overrule your  
15 objection.

16 MR. KINCAID: Thank you, sir. I have as my first  
17 witness Tom Butters. Before we go to that, I'd like to tender  
18 to the Court two Exhibits which were attached to our response,  
19 I've marked as Plaintiff's Exhibit #1, the Product Safety Sub-  
20 Committee Meeting Notes of October 23rd, 1978; and as  
21 Plaintiff's Exhibit #2, Product Safety Sub-Committee Meeting  
22 Minutes of January 22nd, 1980. These were produced to me by  
23 Mr. Demars and I have marked on these for the Court the  
24 significant portions, if I may tender those to the clerk.

25 THE COURT: Any objections, Mr. Demars, to Plaintiff's

1 Exhibits #1 and #2?

2 MR. DEMARS: No, Your Honor.

3 THE COURT: Very well. They will be admitted.

4 MR. KINCAID: And, Your Honor, if I may briefly  
5 explain the significance of these two documents. When John  
6 Coates was injured by a Model 600 Mohawk, a different one --

7 MR. DEMARS: Your Honor, I'm going to object to  
8 testimony by counsel as to what those Exhibits are. I don't  
9 -- you know --

10 MR. KINCAID: Your Honor, I'm merely speaking on  
11 information that's in the documents.

12 THE COURT: Well, I'll look at the documents and  
13 consider them. Call your first witness.

14 MR. KINCAID: Your Honor, at this time we would  
15 call Tom Butters.

16 THE COURT: All right, Mr. Butters, come up before  
17 the clerk and be sworn, please.

18 (The Witness is Sworn)

19 THE COURT: Come around and step into the witness  
20 box here, please, and be seated. All right, Mr. Kincaid.

21 DIRECT EXAMINATION

22 BY MR. KINCAID:

23 Q Would you please state your name for the record?

24 A John T. Butters, known as Tom Butters.

25 Q Mr. Butters, what is your profession?

1 A I'm a registered professional engineer in private  
2 practice.

3 Q And in that practice have you had experience examining  
4 different model Remington firearms?

5 A Yes, I have.

6 Q Would you list for the Court what those models have  
7 included?

8 A They've included the Model 600, the Model 760, the Model  
9 742, the Model 740, the Model 572, the Model 700, in it's  
10 variations.

11 Q Are you also familiar with the Mohawk Model 600?

12 A Yes, I am. That is included in the Model 600-660 series.

13 Q And what about a pistol referred to as the XP-100?

14 A Yes, I'm familiar with that particular pistol.

15 Q And are you also familiar with other firearms manufactured  
16 by other companies?

17 A Yes, I am.

18 Q Have you been recognized to testify as an expert in  
19 federal court regarding allegations of (inaudible) defect on  
20 Remington firearms?

21 A Yes, I have.

22 Q And was one of those cases Musica v. Remington in the  
23 Waco District Court?

24 A That is correct.

25 Q What model was involved in that case?

1 A That was a Model 700 rifle.

2 Q And have you in your experience had a chance to examine  
3 both the Model 700 and compare it to the Model 660?

4 A Yes, I have.

5 Q Could you explain for the Court -- first, let me ask  
6 you, do you find in your opinion similarities effecting the  
7 safety design or the trigger similarities of those two rifles?

8 A I do.

9 Q Would you explain to the Court what those similarities  
10 are?

11 THE COURT: Before you answer it. You may be seated  
12 while you question the witness.

13 MR. KINCAID: Thank you, Your Honor.

14 THE COURT: Go ahead, Mr. Butters.

15 THE WITNESS: Both rifles are manufactured under  
16 the same patent owned by Remington Arms Corporation. They  
17 both have a one-to-one relationship between parts in their  
18 fire control mechanism and their safety design. The parts,  
19 while not totally interchangeable, are extremely similar in  
20 appearance and totally identical in design. Each part in one  
21 fire control and safety mechanism has a corresponding part in  
22 the other safety mechanism which functions in the same way;  
23 performs the same task.

24 MR. KINCAID: Your Honor, may I approach the witness?

25 THE COURT: Sure, come up.

1 BY MR. KINCAID:

2 Q Mr. Butters, let me hand you what I've marked for  
3 identification as Plaintiff's Exhibits #4 and #5. Can you  
4 identify those documents?

5 A Yes, Plaintiff's Exhibit #4 is a patent by M. H. Walker,  
6 et al., numbered 2,514,981, dated July the 11th of 1950,  
7 covering a firing mechanism for firearms, and the other is  
8 to the same person, numbered 2,585,195, covering a breech  
9 closing mechanism for firearms, dated February 12th of 1952.

10 Q And when you say breech closing mechanism, is that the  
11 same thing as a bolt lock or a bolt action?

12 A That is the means of closing the bolt into the locking  
13 mechanism of the rifle. It is not really a -- at question in  
14 this particular lawsuit, although, it is identical between  
15 both rifles. They each have the same type of enclosure of  
16 the cartridge case head and steel members which creates a  
17 very strong and a very efficient breech closing mechanism.  
18 Both rifles have that same feature, although, that is not a  
19 part of the malfunction in this particular case.

20 Q Let me ask you, are both the Model 700 and the Model 600  
21 series manufactured under these patents?

22 A Yes, and the XP-100 as well.

23 MR. KINCAID: Your Honor, at this time I would offer  
24 Plaintiff's Exhibits #4 and #5.

25 THE COURT: Any objections, Mr. Demars?

1 MR. DEMARS: No, Your Honor.

2 THE COURT: Plaintiff's Exhibits #4 and #5 will be  
3 admitted.

4 BY MR. KINCAID:

5 Q And do you have an opinion based on your experience  
6 whether rifles manufactured under the identical patent would  
7 be similar in design?

8 A Yes, I do.

9 Q And what is that opinion?

10 A That those rifles manufactured under the same patents  
11 must necessarily be similar in design, otherwise they would  
12 not fall under the purview of those patents.

13 Q And as you're aware, our allegations in this case involve  
14 a claim that any safety that has a bolt lock feature -- any  
15 two position safety with a bolt lock feature that requires  
16 the use or to place the gun in fire position to unload is  
17 defective. Are you aware of that allegation?

18 A Yes, I am.

19 Q And is there a common design feature called a bolt lock  
20 mechanism that would be similar no matter what gun you found  
21 that bolt lock feature on?

22 A That is correct.

23 Q And why is that, Mr. Butters?

24 A Because no matter what means you use to lock the bolt in  
25 place to prevent the opening of the bolt, unless the safety

1 is placed to the fire position, must necessarily have the  
2 same effect, and that is the similarity of design details  
3 which lock the bolt handle down with the rifle bolt closed.

4 Q In your experience in examining different firearms, if  
5 you were to learn that -- if you were involved in a case  
6 involving a Model 600 where the claim was made that it fires  
7 when the safety was released, would you be interested in  
8 learning whether they had the same experience with other  
9 model firearms?

10 MR. DEMARS: Objection, Your Honor, as to would he  
11 be interested.

12 BY MR. KINCAID:

13 Q Would that be relevant to your consideration as an  
14 expert?

15 A Yes.

16 Q And why is that, Mr. Butters?

17 A Because of the great similarity in design details between  
18 the various firearms that we are addressing today. The fact  
19 that there is a one-to-one relationship between critical  
20 parts of the fire control mechanism, that act in exactly the  
21 same way, so that any test or field experience on one would  
22 be relevant to malfunctions observed on the other.

23 Q Do know whether the Model 600 series firearm that's  
24 involved in this case was ever subject to a recall by Remington?

25 A Yes, I do.



1 Q Do you know the purpose of that recall?

2 A Yes.

3 Q What was it?

4 A The purpose of the recall was to replace the trigger  
5 housing assembly of the existing design in Remington Model  
6 600, 660, and XP-100 pistols, with another trigger housing  
7 assembly and fire control mechanism that had a different  
8 means of location of the parts. In other words, the first  
9 assembly had a folded sheet metal box in which the same parts  
10 were enclosed. The replacement was an adaptation of the  
11 Model 700 trigger housing assembly in which the side plates  
12 for the fire control mechanism were spaced by blocks with the  
13 side plates riveted through them.

14 Q When Remington conducted a recall that included the  
15 Model 600 and the Model 660, do you know -- is it correct  
16 then that they did not limit that recall to just those two  
17 models?

18 MR. DEMARS: Objection, Your Honor, leading.

19 MR. KINCAID: Your Honor, I believe he just testified  
20 as to the different models that were recalled.

21 THE COURT: Yes, I'll overrule your objection. Did  
22 you understand the question?

23 THE WITNESS: Yes, sir.

24 THE COURT: Would you answer it?

25 THE WITNESS: They recalled the 600, the 660, the

1 Mohawk 600, and the XP-100. Anything that was aligned with  
2 the 600 line, they recalled.

3 BY MR. KINCAID:

4 Q Do you know what incident caused Remington to conduct  
5 that recall?

6 MR. DEMARS: Objection, Your Honor, as to what is  
7 in Remington's mind why they instituted a recall.

8 MR. KINCAID: Your Honor, I'm asking him if he  
9 knows.

10 THE COURT: Yes, I'll overrule the objection. Do  
11 you know?

12 THE WITNESS: Yes, sir.

13 THE COURT: Go ahead and answer.

14 THE WITNESS: As I understand it, the precipitating  
15 incident for this particular recall was a firearms accident  
16 out of which a lawsuit arose that resulted in a settlement.  
17 This particular accident occurred to one John Coates, attorney  
18 out of Austin, Texas, when he was injured by the discharge of  
19 a Model 600 type rifle.

20 BY MR. KINCAID:

21 Q Do you know what the alleged defect that prompted the  
22 recall was?

23 A Yes.

24 Q What was that alleged defect?

25 A It was a firearm safety release wherein when the safety

1 was placed from the fire position -- from the -- correction,  
2 from the safe position to the fire position, in order to  
3 unload the rifle, because the rifle could not be unloaded  
4 with the bolt lock down and the rifle safety in the safe  
5 position, the rifle fired when it was placed to the fire  
6 mode, and this occurred due to loss of control of the sear  
7 mechanism by the triggering connector assemblies in the  
8 subject firearm.

9 Q Mr. Butters, do you know whether Remington, as part of  
10 this recall, examined other model firearms, including the  
11 Model 700?

12 A Yes.

13 Q And did they examine other model firearms including the  
14 Model 700?

15 A Yes, they did. Theirs and other manufacturers as well.

16 Q Do you know from your own knowledge and experience  
17 whether the Remington Model 700 also experiences the problem  
18 we've called firearm safety release?

19 A Yes.

20 Q And do you have any idea of the number of other instances  
21 that have been reported to Remington of that defect in the  
22 Model 700?

23 A I don't know what the total number is. I know what the  
24 total number is that I have had some acquaintance with.

25 Q And how many has that been, Mr. Butters?

1 A If my count is correct today, based on my own personal  
2 experience, I think it's 15 or 16, something like that.

3 Q And do you know whether as part of this recall relating  
4 to the defect with the Model 600 series, Remington examined  
5 firearms made by other manufacturers?

6 A Yes.

7 Q Did they?

8 A Yes.

9 Q In your experience as an expert, why would someone want  
10 to examine other firearms as Remington did?

11 MR. DEMARS: Objection, Your Honor, as to why a  
12 manufacturer would want to look at his competitor's rifle. I  
13 think if we're trying to limit this now, we're getting a  
14 little far afield.

15 THE COURT: Mr. Kincaid?

16 MR. KINCAID: Your Honor, I'm merely trying to show,  
17 we've asked for much less than all firearms. We've just  
18 asked for other two position bolt lock safeties. I think the  
19 evidence is already established that when Remington conducted  
20 their recall, they wanted to see other firearms. We've asked  
21 in the context of this case to see other Remington firearms.  
22 I think his opinion as to why it is important to look at  
23 other firearms; why a manufacturer or any gun expert would  
24 want to is relevant to knowing why those other guns are  
25 similar.

1 THE COURT: Yes, sir?

2 MR. DEMARS: Your Honor, are we being prompted not  
3 to be diligent when a problem comes to light and now we are  
4 opening up all of our files to discovery because we wanted to  
5 make sure the extent of the problem? I mean, is that we're  
6 after now?

7 MR. KINCAID: Your Honor, that hits the nail on the  
8 head. That is exactly what I'm trying to do on behalf of my  
9 client, is be diligent and determine the scope of the problem,  
10 exactly what Remington did when it examined all these other  
11 guns.

12 THE COURT: Yes, I'll overrule the objection. Did  
13 you understand the last question you were asked?

14 THE WITNESS: I think so, Your Honor.

15 THE COURT: Would you answer it?

16 THE WITNESS: It is my understanding that your  
17 question was whether a prudent manufacturer would examine  
18 other firearms and designs to compare them with their own  
19 unique design to determine whether or not there were improve-  
20 ments or changes that were necessary to be made in the manu-  
21 facturer's designs. Is that the correct question?

22 BY MR. KINCAID:

23 Q Well, I'm asking you why would anyone, a gun expert or a  
24 gun manufacturer concerned with a defect causing the guns to  
25 fire on safety release, why would they want to examine other

1 models?

2 A In order to --

3 Q Why would you want to?

4 A -- perfect their own design. I happen to be a designer  
5 and manufacturer myself, and I observe and very carefully  
6 examine my competitors and other people in my field design to  
7 determine whether or not there are some features that I may  
8 include in my own designs and manufacturing device -- manu-  
9 facturing devices that would be desired.

10 Q Let me ask you, are the Models 700 and 600 identical in  
11 every aspect?

12 A No, I wouldn't say they're identical in every aspect.  
13 There are some dimensional differences and certain few  
14 cosmetic differences, but so far as the essential features of  
15 the design, they are identical. The resiliently mounted  
16 connector in the fire control assembly, as described in the  
17 Walker patent, is a uniquely Remington feature, and is one  
18 that is at the very core of the difficulties that are being  
19 experience and have been experienced for many years with the  
20 Remington Model 600 and 700 type rifles, and including 721  
21 and 722.

22 Q Is there any dissimilarity between the Model 700 and the  
23 Model 600, the XP-100 pistol, that would allow you as an  
24 expert to simply rule out one model when you were considering  
25 the Model 600?

1 A Absolutely not.

2 Q Do you have an opinion whether the designs are similar  
3 enough where you would want to evaluate defects in each of  
4 those models together?

5 A I do.

6 Q And what is your opinion?

7 A That is the design features of each are so much the same  
8 that they are inseparable so far as an analysis of the type  
9 of malfunction that is demonstrated by both these firearms.

10 MR. KINCAID: Your Honor, I pass the witness.

11 THE COURT: Very well. Mr. Demars?

12 CROSS EXAMINATION

13 BY MR. DEMARS:

14 Q Mr. Butters, are you an expert for the Plaintiff in the  
15 case of Musica v. Remington, which is presently pending in  
16 Waco?

17 A Yes.

18 Q And whose lawfirm were you retained by, sir?

19 A Longley & Maxwell.

20 Q Is that --

21 A The one that Mr. Kincaid is a part of.

22 Q All right. Are you also been retained by Plaintiffs in  
23 the case of Sifret v. Remington, which is pending in Chicago?

24 A There's an Offenwanger case, if that's the one, that's  
25 the Chicago matter.

1 Q And have you been retained in that case?

2 A Yes.

3 Q Have you been retained in the Alschlager case in Houston?

4 A No.

5 Q How about the Morris case in Houston?

6 A Yes.

7 Q And the Campbell case in Arkansas?

8 A Yes, but I don't think that's in Arkansas. I think  
9 that's in Alaska.

10 Q All right. And, sir, what rifle is involved in all  
11 those cases?

12 A Those are Model 700's.

13 Q All right. Have you been privy to documents that have  
14 been produced by Remington in response to discovery in each --  
15 in those cases?

16 A Yes.

17 Q Have you had an opportunity to review such documents?

18 A I have.

19 Q As a matter of fact, you've testified that you've had an  
20 opportunity to review those documents in detail in support of  
21 your theories in those cases, haven't you, sir?

22 A Yes, sir, that's true. I found material in them that  
23 was in support of my findings.

24 Q All right. And you've had an opportunity to review all  
25 those documents, which are the type of documents being re-  
quested in this case, correct?



1 A Yes, sir.

2 Q And those are all Model 700's?

3 A That is correct.

4 Q So, as far as you know, sir, isn't it correct that every  
5 document that's being requested in this case regarding the  
6 Model 700 has been produced to you for review and inspection  
7 in these other cases?

8 A No, I do not know that. I do not know the full extent  
9 of their request for production. However, I would suspect  
10 that a great many of those documents which they wish for you  
11 to produce have already been produced in other cases.

12 Q And that would certainly be true in the Musica case,  
13 which has gone through one trial and is ready to be tried  
14 again. Isn't that correct, sir?

15 A That is correct; although, I did not have access to  
16 those particular matters that are requested at this time --  
17 those particular documents that are requested at this time.  
18 At the time of the Musica case, Remington had not yet produced  
19 to anyone to my knowledge the volume of documentation that I  
20 received in connection with the case which you did not mention,  
21 which is Lewy v. Remington, in Missouri.

22 Q Was that a Model 700 case?

23 A It was.

24 Q And so in that case you've had a chance to review all  
25 those documents. Is that correct?

1 A That is correct.

2 Q And you have those in your possession?

3 A Yes.

4 Q So, basically, you are working for Mr. Longley in this  
5 case and Musica, and you have in your possession what you  
6 probably think is a fair equivalent to every document that's  
7 being requested of Remington at this time. Is that --

8 A No, I did not say that.

9 Q All right. What document do you believe you don't have?

10 A Well, there are Product Safety Committee -- Product Safety  
11 Sub-Committee Minutes which are missing from a listing of  
12 Product Safety Sub-Committee meetings in a critical period of  
13 time just subsequent to the recall of the Model 600's for a  
14 period of some two-and-a-half, three years, or more.

15 Q All right, for --

16 A There are a number of other elements of documentation  
17 that are missing. Among them, the records, one F. W. Chisnall,  
18 to whom all the malfunctioning rifles that were returned over  
19 a period of time -- I say all. I would say substantially all  
20 returned.

21 THE COURT: Just a minute. Just a minute. Has  
22 your question been answered?

23 MR. DEMARS: Yes, Your Honor.

24 THE COURT: I don't mean to curtail your testimony,  
25 but we really need to move along and I'm afraid that when you're

1 asked a question, neither one of the lawyers is attempting to  
2 limit your response, and your response is more than is really  
3 called for. Try to answer just the question that you're  
4 being asked without elaborating on your answer. Will you do  
5 that?

6 THE WITNESS: Yes, sir.

7 MR. DEMARS: Your Honor, if we could break this  
8 examination right now, I would like to make an argument. I  
9 can finish my cross examination of him with the substantive  
10 items that I'm going to go through, and I can put Mr. Hutton  
11 on the stand. But the first thing I wanted to do for Your  
12 Honor is point out exactly what's happening here. Every  
13 document that they requested for us and wanted us to go back  
14 into our records has been produced a number of times to this  
15 expert and to this lawfirm.

16 THE COURT: Well, I'll allow you to explore that  
17 -- that area if that's what you want to do. I believe that  
18 you were getting some sort of a negative answer there as to  
19 whether or not he had all of the documents that have been  
20 requested in this particular case, but go ahead, I'll let you  
21 pursue that a little bit further.

22 MR. DEMARS: All right.

23 BY MR. DEMARS:

24 Q If I gave you a list or gave you your counsel's list of  
25 documents --

1 A Not my counsel, Mr. Demars.

2 Q All right. Well, the counsel you're working for, what  
3 they've requested in this case, could you briefly describe,  
4 without going through a history as to what they are, the  
5 volume of documents you think you have not received as compared  
6 to what you have received? Could you describe for the Court --

7 MR. KINCAID: Your Honor, I'm going to object to  
8 that question because as one of the attorneys who has prepared  
9 the request, I am very familiar with what we've asked for and  
10 what we've gotten. I don't think it's fair to ask this  
11 witness, who's not aware of what we've asked for in this  
12 case, per se, item by item, and what we've gotten to answer  
13 those questions. Those are answered in our Motion to Compel.

14 THE COURT: I think he's being asked to review the  
15 requests that have been made in this particular case to deter-  
16 mine whether or not he has in fact received those documents  
17 before. Did you understand that to be the question?

18 MR. DEMARS: Yes, sir.

19 THE WITNESS: Yes, sir, and if that is, I don't  
20 think that I can do it from this particular witness stand.

21 THE COURT: No, you're not being asked to do anything  
22 from this witness stand. The question is, could you look at  
23 a list of the documents that have been requested in this case  
24 and tell me whether or not you've already seen those documents  
25 or have those documents?

1 THE WITNESS: Probably.

2 THE COURT: All right.

3 THE WITNESS: I couldn't guarantee full accuracy,  
4 but I could guarantee some.

5 MR. DEMARS: May I approach the witness?

6 THE COURT: Come up.

7 MR. DEMARS: Your Honor, I'm going to ask the  
8 witness just to review this and limit his answer to the Model  
9 700. We admit in this case we have a duty to supply the 600  
10 series.

11 THE COURT: What is it that you're showing the  
12 witness?

13 MR. DEMARS: I am showing the witness, Your Honor,  
14 Plaintiff's First Request for Production of Documents and  
15 Tangible Things, which was filed by the Plaintiff in February  
16 of this year.

17 THE COURT: Mr. Kincaid, do you have that before  
18 you?

19 MR. KINCAID: Yes, sir, Your Honor.

20 THE COURT: All right.

21 THE WITNESS: Then, Mr. Demars, do you want me to  
22 turn to Page 3?

23 BY MR. DEMARS:

24 Q I just want you to start wherever the requests start --  
25 when they start number one at the top, and you don't have to

1 read them all out loud. If you'll review down through and  
2 see which things here that are requested as they relate to  
3 the Model 700 you have not been able to obtain in here?

4 A No. 1, of course; No. 2, No. 3?

5 Q All right. Now, these are -- again, I said with regard  
6 to the Model 700's, the No. 2 asks for any documents relating  
7 to the rifle in question. The rifle in question is not a  
8 Model 700?

9 A That's correct.

10 Q All right. Would you please just go through here; for  
11 example, let's start looking at No. 4. All documents relating  
12 to any other complaint relating to two position bolt lock  
13 safety.

14 A No, I have not seen all those.

15 Q All right. What have not -- what have you not seen here?

16 A I am sure that I have not seen a variety of documents  
17 that were generated in response to customer complaints and  
18 the handling of the firearms returned to Remington Rifle  
19 Company in regard to those complaints.

20 Q All right. It's your testimony then, with regard to a  
21 rifle firing off safe, you have not seen a customer complaint  
22 relating to Model 700's?

23 A I didn't say that. I've seen some customer complaints,  
24 but I'm sure I have not seen them all.

25 MR. KINCAID: Your Honor, if I may object. I don't

1 see how this witness or any witness can testify as to what  
2 they haven't seen. If they haven't seen them, he doesn't  
3 know what they are. I think a more appropriate question  
4 would be to ask a Remington witness what they have that they  
5 have not produced. How can this man testify as to what he  
6 hasn't seen?

7 MR. DEMARS: Your Honor, our position is, is that  
8 we have produced all -- why Mr. Butters says, "I don't think  
9 I've seen them" -- I mean, we have produced customer complaints.  
10 Now, if he thinks we're hiding something, that's his opinion.

11 BY MR. DEMARS:

12 Q But you have seen customer complaints relating to Model  
13 700's firing off safety, haven't you, sir?

14 A Yes, I have.

15 Q Okay.

16 THE COURT: I'll overrule your objection, Mr. Kincaid.  
17 Go ahead, Mr. Demars.

18 BY MR. DEMARS:

19 Q On No. 5, all documents relating to discontinuation of  
20 use of a two position bolt lock safety on the 700's. You've  
21 seen documents relating to that, haven't you?

22 A I have only seen documents which remove the bolt locking  
23 tab from the safety mechanism. I have not seen the documenta-  
24 tion that supports the decision to move that tab.

25 Q If such exists, but what I'm saying to you is, sir, that

1 you have seen documents relating to the discontinuation of  
2 bolt lock safety, haven't you?

3 A I have -- I'm certain I have not seen them all. I have  
4 seen some.

5 Q Sir, would you please answer my question?

6 A I thought I had, sir. I have seen some documents, but I  
7 have not seen them all.

8 Q Do you know for a fact there are others that don't --  
9 that you haven't seen?

10 A Yes, sir.

11 Q And how do you know that?

12 A Because there are numbers that are referenced on those  
13 documents that remove the bolt tab in question, which I have  
14 not received. There are documents that are referenced by  
15 number which I do not have.

16 Q Do you know if they exist?

17 A I do not know if they currently exist. They may have --  
18 they must have existed at some time, because I must assume  
19 that they do not spontaneously occur at Remington.

20 MR. DEMARS: Your Honor, I asked him if knows  
21 whether they exist, and he goes into explaining why -- what  
22 he thinks happened.

23 THE COURT: Go ahead.

24 BY MR. DEMARS:

25 Q Next, all documents relating to any design changes with



1 regard to the 700 and the bolt lock. Have you seen documents  
2 relating to design changes, sir?

3 A I have seen some documents relating to it, but I have  
4 not seen them all.

5 Q All documents relating to any dangers and/or hazards  
6 associated with the use of the two position bolt lock safety.  
7 Have you seen documents relating to the Model 700 series, sir?

8 A Yes, I have seen some documents.

9 Q Please, yes or no. Have you seen such documents?

10 A I have seen some documents, yes.

11 Q You have no personal knowledge that Remington failed to  
12 produce any documents that had -- that met that question, do  
13 you? You have no personal of that, do you?

14 A Yes.

15 Q You have personal knowledge that Remington has failed to  
16 disclose documents?

17 A Yes, sir.

18 Q No. 8, all documents relating to any hazards with --  
19 associated with the use of a two position bolt lock safety  
20 device not designed or manufactured by you.

21 MR. DEMARS: Your Honor, we have another objection  
22 to that.

23 BY MR. DEMARS:

24 Q All right. Have you seen documents relating to instruc-  
25 tions for use in handling Model 700's?

1 A Did I answer that question? Did I answer the previous  
2 question?

3 Q I didn't --

4 MR. KINCAID: Your Honor, he's on Request for  
5 Production No. 9, where we ask for only documents about the  
6 rifle in this case. The question --

7 MR. DEMARS: I'm sorry.

8 MR. KINCAID: And we haven't received those about  
9 the rifle in this case.

10 MR. DEMARS: Misreading, Your Honor.

11 THE COURT: Yes. Don't interrupt when he's making  
12 an objection, and I'll sustain the objection.

13 BY MR. DEMARS:

14 Q How about No. 10, all documents relating to instructions  
15 on the use and handling of two position bolt lock firearms.  
16 Have you seen such documents? Do you have such documents  
17 relating to Model 700?

18 A I have seen some such documents, yes.

19 Q Have you seen documents including complaint letters  
20 which Remington may have received which relate to accidental  
21 discharge of firearms with two position bolt lock safety  
22 devices? Have you seen documents like that relating to the  
23 Model 700?

24 A Yes.

25 Q Mr. Butters, is it fair to say that you have seen and had

1 an opportunity to review documents that have been produced by  
2 Remington in response to requests similar to these? I want  
3 to preface my question. Whether or not you believe that  
4 Remington disgorged everything it said, but have you seen  
5 documents that have been submitted in response to responses  
6 just like the ones we've read on the stand?

7 A Yes, I have seen some documents of that nature.

8 Q And to produce them in this case, Remington would be  
9 responding to the same type of requests that it responded to  
10 before in the other Model 700 cases in which you are an  
11 expert. Is that correct?

12 A Would you ask that question again?

13 Q Certainly. To respond to these requests concerning  
14 Model 700 weapons, Remington would be responding to the same  
15 type of requests that has been propounded to it before in  
16 cases in which you are the expert. Is that correct?

17 A Yes.

18 Q And you have those documents in your possession, correct?

19 A Yes, I have some of those documents.

20 Q And Mr. Longley's office has those documents also in  
21 connection with the Musica case. Is that correct?

22 A I do not know what Mr. Longley's office has totally with  
23 regard to the Musica case.

24 Q But altogether you have such documents and have them  
25 available to Mr. Longley. Is that correct?

1 A No, I have not made them available to Mr. Longley. He  
2 has not made a request for them at this time.

3 Q Is Mr. Longley aware that you have those, hasn't he?

4 A Yes, he is.

5 Q All right. And although he knows you have them, he has  
6 not requested them from you, has he? Is that what you're  
7 telling this Court?

8 A Yes, that's correct.

9 MR. KINCAID: Your Honor, if I may object further  
10 to this line of questioning, the objections filed by the  
11 Defendant to our request is that this information is not  
12 relevant. On only one request, that relating to depositions  
13 and trial testimony and exhibits from other cases, that is  
14 the only request where they said we could get it from another  
15 source. I think it's inappropriate to try to raise at this  
16 hearing an objection that we possibly could get documents  
17 Remington has generated from another third party. That's an  
18 objection, which if it ever existed, and I don't believe  
19 there's any support in the Rules of Procedure for it, has  
20 been waived by the Defendant because they did not include it  
21 in their timely objections to our Requests for Production of  
22 Documents.

23 THE COURT: Mr. Demars?

24 MR. DEMARS: Your Honor, it has just come to my  
25 attention that we're dealing with the same expert and the same

1 lawfirm dealing with the Model 700 and all these documents  
2 have been produced, and they -- between counsel's office and  
3 Mr. Butters, they have them all. And now they want us to go  
4 back through our files and take them out one at a time again  
5 to produce them again, and this is, don't forget, Your Honor,  
6 on the Model 700, which is a gun we're not even saying is  
7 similar. That is the other gun. They want us to do all this  
8 work on the other gun, where we have produced this to this  
9 law office and for review by this expert in cases where that  
10 gun was at issue, and obviously, Your Honor, discovery would  
11 be comprehensive in those cases with regard to this particular  
12 gun.

13 MR. KINCAID: Your Honor --

14 THE COURT: You're claiming that you're surprised  
15 that Mr. Butters is an expert witness for Longley & Maxwell  
16 in other similar cases against Remington?

17 MR. DEMARS: I didn't realize that all of this  
18 involved the Model 700 and all this had already been produced,  
19 Your Honor.

20 MR. KINCAID: Your Honor --

21 MR. DEMARS: And I believe the rules are flexible  
22 enough when you're discussing about burden, to allow us to  
23 show to this Court the burden on the Plaintiffs is nothing.  
24 They have them. That's what I'm trying to show, Your Honor.  
25 They already have all these documents, and now they want us

1 to produce them again.

2 MR. KINCAID: Your Honor, I can make this issue a  
3 lot shorter. If he will assure us that what we've gotten  
4 regarding the Model 700 itself, those documents, if that's  
5 all they have that would be responsive, I will stipulate that  
6 we do not require them to produce those again. That leaves  
7 at issue before the Court the Model 721, 722, 725, XP-100,  
8 Mohawk 600. We can concede the 700, if we have everything  
9 they would give us, if the Court ordered them to produce it,  
10 then we don't request that they do that again.

11 THE COURT: All right. Mr. Demars, you want a  
12 moment to confer with --

13 MR. DEMARS: Could I, Your Honor?

14 THE COURT: -- your witness? I'm going to recess  
15 this hearing briefly. Mr. Butters, you may stand down. I  
16 had a matter that was scheduled again at 3:30 and I've asked  
17 my secretary to inquire about whether or not those parties  
18 are ready, and I'm going to allow you to confer and then  
19 confer with Mr. Kincaid, Mr. Demars, and see if you can -- if  
20 you can reach an agreement regarding the production of docu-  
21 ments in this aspect.

22 MR. DEMARS: Thank you, Your Honor.

23 THE COURT: We'll be in recess.

24 (Recess)

25 THE COURT: Have you conferred?

1 MR. DEMARS: Yes, Your Honor. We are at this point.  
2 With regard to the Models that preceded the 700 series, the  
3 722, 721, 725, we can reach an understanding. If we can  
4 reach understanding on the 700, we won't mind getting that  
5 together. That's not voluminous. We don't want to waive our  
6 position which we sincerely believe in, that these are two  
7 totally different weapons and they're not together. If he  
8 wants to see drawings from a weapon that stopped manufacturing  
9 in 1948, well, that's fine. The problem with the 700, Your  
10 Honor, is that Mr. Kincaid candidly admits that he knows  
11 there's a lot of stuff been produced, but it's hard to deter-  
12 mine the -- whether it's all there or not, and he -- Mr.  
13 Kincaid asked a very good question. He said, "Well, what is  
14 the burden on your (inaudible)?" The burden is that all that  
15 -- all those things have been put back in the drawing file  
16 and the receipt file and the complaint file. They are not  
17 segregated. The only place they're segregated is the collection  
18 that Mr. Butters has. Now, what we're trying to do is somehow  
19 work out to whether Mr. Kincaid can be satisfied with that  
20 collection.

21 THE COURT: Are the documents that Mr. Butters have  
22 available to you at your request, Mr. Kincaid?

23 MR. KINCAID: Your Honor, I suppose that they would  
24 be available from Mr. Butters. They're not subject to a  
25 protective order, are they?

1 MR. DEMARS: No, not to my knowledge.

2 MR. KINCAID: But I still have the problem, and to  
3 be honest, as I've told Mr. Demars, I'm not in a position to  
4 know we've gotten everything or Mr. Butters has gotten every-  
5 thing. Being outside there's just no way to verify it.  
6 Remington is the only entity that knows what is available.  
7 There is case law that says the fact that they choose to keep  
8 their records or a corporation chooses to keep its records in  
9 a manner that makes it difficult to retrieve, doesn't relieve  
10 them from the obligation of producing them.

11 MR. DEMARS: Your Honor, this is not a case --

12 THE COURT: Excuse me. Is there a list of the  
13 documents that Mr. Butters has?

14 MR. KINCAID: That's what I asked, and what they're  
15 referring to are documents that Mr. Butters received in the  
16 Lewy case, L-e-w-y. I don't have those documents. Apparently  
17 Remington does not have a list of what was produced. That's  
18 the problem, his verification.

19 THE COURT: Well, does Mr. Butters have a list of  
20 the documents in his possession?

21 THE WITNESS: A partial list, Your Honor. There  
22 is a list of what was produced at -- by Remington's counsel  
23 in the Lewy matter, but I don't have that specific document.

24 THE COURT: Do you have that list, Mr. Demars?

25 MR. DEMARS: No, I don't, Your Honor. Your Honor,



1 we could get that list and in looking at that list, maybe we  
2 could give that to Mr. Kincaid and see -- to say this is what  
3 has been produced. This is all that's been produced. That's  
4 all we have that's responsive to these requests and contained  
5 in this list that's already been produced once. That may  
6 take care of it.

7 THE COURT: When can you submit that list to  
8 Mr. Kincaid?

9 MR. DEMARS: By the mid to end of next week, Your  
10 Honor, next Friday. It would be the 12th.

11 THE COURT: Mr. Kincaid, what's your response?

12 MR. KINCAID: If Remington will represent under  
13 oath that they are presenting to me a list of all the documents  
14 they have regarding the Model 700 that would be responsive to  
15 my request, then I will accept that list and I will work with  
16 Mr. Demars on filling in what documents are named on the list  
17 that I do not already have.

18 THE COURT: How much time do you want to -- in  
19 order to respond to the list as to whether or not the list is  
20 satisfactory and you're going to be able to give Remington  
21 then a list of additional documents that are not -- not  
22 included in their list?

23 MR. KINCAID: I would request I think 14 days after  
24 the time that we actually receive the list.

25 THE COURT: Any problem with that?

1 MR. DEMARS: No, Your Honor. The only thing I'd  
2 like to mention is that if there's something that is requested  
3 that has not been supplied that for some reason is otherwise  
4 a non-discoverable, other than simply it relates to the 700  
5 whether it's privileged, whether it's attorney work -- for  
6 some reason that there -- that it hasn't been produced, I'm  
7 not waiving those arguments.

8 THE COURT: All right. I think Mr. Kincaid under-  
9 stands that.

10 MR. KINCAID: And to the extent he finds those  
11 documents, if we could have an agreement that they would be  
12 segregated for in camera inspection. Perhaps we can discuss  
13 the general nature and determine whether that's appropriate.

14 THE COURT: We can take that up at a later time.  
15 If you'll point out specifically what documents -- or if you  
16 haven't already objected to them, on the basis of privilege  
17 or whatever. What else do we have to take up?

18 MR. KINCAID: Your Honor, that takes care of one  
19 specific model, the Model 700. I think that we may be at a  
20 point of agreeing on the other models in the 700 series, just  
21 because they're older and I understand from Mr. Demars, they  
22 don't have many documents.

23 THE COURT: Do you want some additional time to  
24 confer regarding that matter?

25 MR. DEMARS: Just a moment, Your Honor.

1 THE COURT: All right.

2 (Pause)

3 MR. DEMARS: Whatever extent there are documents  
4 still in existence, Your Honor, we'll supply them. If we have  
5 them, then we'll supply them. We can't reproduce what we  
6 don't have.

7 MR. KINCAID: Would that be the 721, 722, and 725?

8 MR. DEMARS: That's correct, Your Honor. And again,  
9 Your Honor, we are not waiving anything here for trial that  
10 these are different guns and not admissible. I want that  
11 very clear.

12 THE COURT: I think that's understood, yes.

13 MR. KINCAID: I understand that, Your Honor.

14 THE COURT: Yes.

15 MR. KINCAID: That also leaves the Mohawk 600 rifle  
16 and the XP-100 pistol, which were included in the Remington  
17 recall, along with the rifles at issue in this case.

18 THE COURT: All right.

19 MR. DEMARS: Your Honor, again, we will produce  
20 them subject to our other objections that are embodied in our  
21 response to the Motion to Compel. We will treat them as the  
22 Model 600's.

23 THE COURT: Very well.

24 MR. KINCAID: I hear from Mr. Butters the Model 7  
25 would also be -- he considers a similar firearm.

1 MR. DEMARS: Your Honor, now we're getting further  
2 afield. The Model 7 replaced the Model 700, and it was a  
3 hybrid between both. It was post both these rifles.  
4 Mr. Butters is really fishing now, Your Honor. This agree-  
5 ment has been worked out with (inaudible), and we cannot  
6 agree to that.

7 THE COURT: Well, I really don't like to hear  
8 counsel characterizing the actions of opposing counsel and I  
9 think both of you are here trying to represent your clients  
10 to the best of your ability, and I'm going to accept that as  
11 a given in this case. I'm not going to require them to  
12 produce these documents at this time concerning that last  
13 Model 7 that you just mentioned. What else do we have to do?

14 MR. KINCAID: Your Honor, also there are other  
15 documents involving the very rifle at issue in this case, the  
16 Model 600-660. In his response, Mr. Demars limited what he  
17 was willing to produce to other documents involving firearm  
18 safety release. He excluded and objected to any problems  
19 that related -- any other problems, such as inaccuracy or  
20 cosmetic defects. Our position on that is we're entitled to  
21 discovery of all problems with this firearm, because -- and  
22 we've cited to the Court the case of Interarm v. King, a gun  
23 case out of the Texas Supreme Court, where evidence in that  
24 case of how the gun manufacturer created cosmetic defects was  
25 relevant on the issue of punitive damages, because the evidence

1 showed that the manufacturer was very attentive to cosmetic  
2 problems, very inattentive to safety problems. For that  
3 reason, we requested all problems relating to this firearm.

4 THE COURT: Mr. Demars?

5 MR. DEMARS: Your Honor, there's over 250,000 of  
6 these rifles out in the market. Now, this is a serious case  
7 which involves a shooting by a gun that allegedly discharged  
8 when the safety was moved. If we have a letter from someone  
9 who said, "You know, my stock cracked in the heat of my back  
10 seat," I don't feel we should put to the burden of having to  
11 show that we might have had a cosmetic problem, that some guy  
12 wrote and said he couldn't hit the broadside of a barn with it.  
13 I mean, those types of things, Your Honor, we have given them  
14 complaints that have dealt with the accidental discharge of  
15 the weapon.

16 MR. KINCAID: Your Honor, I invite the Court to  
17 read Interarms v. King. It could not be more clear. In that  
18 case the alleged defect was a poor mechanical fit between the  
19 trigger and sear that allowed the gun to fire. The Court --  
20 not only did they get discovery of cosmetic problems. It was  
21 admitted and the Supreme Court relied on that very evidence  
22 in upholding the exemplary damage award, because the testimony  
23 showed that the company got very concerned and was very  
24 solicitous of cosmetic problems.

25 THE COURT: This request or these requests for

1 documents regarding defects is limited to the same model of  
2 firearm as is involved in this lawsuit?

3 MR. KINCAID: Yes, sir, to the extent of all problem  
4 -- we want all problems on this model firearm, the 600-660.

5 MR. DEMARS: Your Honor --

6 THE COURT: Yes, sir.

7 MR. DEMARS: -- Remington segregates problems or  
8 complaints they have with regard to safety. It's something  
9 that they take care of and make sure they have a handle on.  
10 They do not have any one place when a gun comes back in the  
11 mail with a letter saying, "My stock cracked. Please fix it  
12 or replace it." There is not central place where that is  
13 shown. It may be in our mailing records. It may be in our  
14 shipping records. They have said "all documents". Your  
15 Honor, this encompasses our shipping invoice, when we ship  
16 the corrected gun back. I mean, it's hard to imagine the --

17 THE COURT: Excuse me. You're willing to produce  
18 to Mr. Kincaid in response to his request any documents  
19 concerning safety defects of the same model firearm.

20 MR. DEMARS: Yes, sir.

21 THE COURT: All right. I'm going to order you to  
22 do that in response to the Plaintiff's request without  
23 prejudice to the Plaintiff to renew his request for any  
24 additional documents of other defects, but I would urge  
25 counsel for the Plaintiff to examine carefully the documents

1 that are going to be produced regarding other safety defects  
2 involving the same model of firearm, and then determine  
3 whether or not they wish to reurge their request or all other  
4 defects in the same model firearm. Anything else?

5 MR. KINCAID: Your Honor, let me check my list.

6 (Pause)

7 MR. KINCAID: Your Honor, finally we get to the  
8 most narrow set, and that is documents relating to this  
9 specific rifle. We have asked for instruction manuals. We  
10 have asked for all documents relating to the sale of the  
11 rifle in this case. We have been met with the objection,  
12 which I believe Your Honor is not -- it does not have merit  
13 that they cannot tell us what documents relate to this  
14 particular rifle without seeing the rifle. We've given them  
15 the model number, 660. We've given them the serial number.  
16 If we've given them the wrong number, that's going to cut  
17 against our position. That's going to be our problem. We've  
18 given them information and said, please, give this document  
19 to relate to our own gun, and they have not given us all  
20 those documents.

21 THE COURT: They want to see a rifle, is that it?

22 MR. KINCAID: Yes, and we're trying to make arrange-  
23 ments to allow them to do that. We have some disagreement on  
24 how that will be accomplished, but as far as seeing it, we're  
25 willing to allow them to see and examine the gun.

1 MR. DEMARS: Your Honor, I have a very brief response.  
2 There are codes not contained on the serial number that are  
3 on the gun that will allow us to pinpoint its date of  
4 manufacture, which will pinpoint what instruction manual came  
5 with the gun. As soon as we can see it, if we can have the  
6 normal time period to produce documents of 30 days, we'll  
7 produce it. I mean, that's just not a problem.

8 THE COURT: When can you produce the rifle for  
9 Mr. Demars to have examined by his experts?

10 MR. KINCAID: Your Honor, we have offered and have  
11 a standing offer to make the rifle available for his inspection.  
12 Our only concern is there have been problems before with  
13 rifles that have been simply released, and I'm not in any way  
14 impugning Remington or Mr. Demars.

15 THE COURT: No, and I'm not asking you to release  
16 the rifle. I'm just asking you when can you make the rifle  
17 available for his inspection?

18 MR. KINCAID: At anytime they would like to have it  
19 available in Corpus Christi. We just object to it going  
20 unattended to Ilion, New York.

21 THE COURT: All right.

22 MR. DEMARS: Your Honor, that does bring up the  
23 second issue that Mr. Longley and I by a letter agreed to  
24 submit to Your Honor today. We can look at the gun in five  
25 minutes here today and get the right numbers off it. However,



1 Your Honor, we have requested Mr. Longley to provide the gun  
2 for inspection and testing of a much more refined and sophis-  
3 ticated type; wherein, the gun is dismantled, looked at,  
4 test fired, et cetera. So, the place we got to was, I -- we  
5 want to do this in our plant in Ilion, New York. I agree at  
6 Remington's expense to have a representative, paralegal,  
7 investigator, whoever, of Mr. Longley's choosing to fly the  
8 gun to New York at our expense and have the gun inspected.  
9 Inspection takes a full day, maybe a day-and-a-half.  
10 Mr. Longley's response was, "Well, okay, but the real person  
11 I want there is not a paralegal, is Mr. Butters. If you will  
12 fly him there, so he can view the inspection," which he claim  
13 he has a right to, and I'm not going to dispute -- I don't  
14 mind him being there, "then we not only want you to pay his  
15 plane fare; we want you to pay his expert fees while he sits  
16 there and works for the Plaintiffs." Now, we will pay  
17 someone's plane fare to go to Ilion with the gun and to bring  
18 it back so they have no fear that it's going to get lost in  
19 transit or damaged in transit. The only thing that we don't  
20 want to do is pay Mr. Butters' hourly fee as an expert while  
21 he's working for the Plaintiff. If Mr. Butters wants to be  
22 there, he's entitled to. If he wants to carry the gun in  
23 place of the paralegal or investigator, we'll pay for one  
24 plane ticket up and back. And all we want is to be able to  
25 do it in our facility. I think that's more than reasonable

1 and Mr. Longley agreed that if someone could go and carry the  
2 gun at our expense, New York was not a problem. But then he  
3 made the caveat of having Mr. Butters go and us paying  
4 Mr. Butters' expert fee.

5 THE COURT: Mr. Kincaid?

6 MR. KINCAID: Your Honor, the basis for our position  
7 is concern about the safeguarding of the key piece of evidence  
8 in this case. Again, without impugning Remington, they're  
9 going to subject this rifle to extensive testing, and I was a  
10 law clerk for this firm. As a lawyer now, I could not myself  
11 accompany that rifle and be comfortable and certain that the  
12 things being done to it weren't altering it in some way. I'm  
13 not trained; a law clerk's not trained. There is a need to  
14 have someone like Mr. Butters who understands what is going  
15 on, supervise it to safeguard our Exhibit. If it were not  
16 for their request to examine it in Ilion, New York, this  
17 expense would not be incurred. That's why we feel it is fair  
18 to impose that expense on them. Mr. Butters would not be  
19 working for the Plaintiff on that day or to that extent if it  
20 were not for their request. It's for their convenience and  
21 for their own development of their side of the case to have  
22 the gun taken to Ilion, New York. We feel it's reasonable  
23 for us to need the gun safeguarded. It's reasonable that it  
24 would take someone familiar with firearms to supervise it to  
25 safeguard our client's interest, and that's the basis for our

1 request.

2 THE COURT: Can the gun be tested anywhere else?

3 MR. DEMARS: It would be very difficult -- much  
4 more difficult, Your Honor. It may be more lengthy and it  
5 wouldn't be as complete as it would be in the facilities that  
6 we have there. And, Your Honor, I've just been informed that  
7 Mr. Butters was up at the plant in New York two weeks ago at  
8 another joint inspection involving another case, another  
9 firearm where Plaintiffs paid for him to do that. Not you,  
10 I'm sorry.

11 MR. KINCAID: Thank you.

12 THE COURT: How much is Mr. Butters' hourly fee?  
13 Do you know?

14 MR. BUTTERS: \$70.00 an hour, Your Honor, plus  
15 expenses.

16 THE COURT: Well, it seems to me that the Defendant  
17 is entitled to examine and test this firearm, and I believe  
18 that the Plaintiffs are entitled to have some protection of  
19 what is obviously a most important item of evidence in their  
20 lawsuit. I can appreciate the fact that the Defendants would  
21 be reluctant to pay Mr. Butters experts fee and apparently at  
22 the same time be obtaining information on behalf of the  
23 Plaintiffs during the course of the testing. By the same  
24 token, obviously, the Defendants are going to have their own  
25 experts available at the time of the testing. They're going

1 to be picking up information concerning the procedures and  
2 the results of the test. I'm going to order that the Plaintiffs  
3 produce the rifle at the Remington Arms facility in the State  
4 of New York within a reasonable period of time following this  
5 hearing. In the event that the Plaintiffs want the firearm  
6 accompanied by their expert, Mr. Butters, then I'm going to  
7 direct that the Defendants pay for the transportation and  
8 expenses of the expert, and I'm also going to order that they  
9 pay a reasonable fee for the expert's time expended during  
10 the course of the inspection, and the order is made without  
11 prejudice to the Defendants to object to the reasonableness  
12 of the expenses charged by the expert, Mr. Butters, during  
13 the course of this -- of this inspection.

14 MR. DEMARS: Since we're all here, Your Honor,  
15 Mr. Butters is here, can we have -- can we get a ruling or a  
16 suggestion from Mr. Butters as to what this is going to cost?  
17 There's no need to come in again.

18 THE COURT: He said his expert fee was \$70.00 an  
19 hour, I believe, and I don't know how long your inspection is  
20 going to take. You've offered to pay his transportation.  
21 I've ordered you to pay his transportation.

22 MR. DEMARS: All right, Your Honor, I'd like to  
23 clarify one thing, excuse me. I'd like to clarify, that is a  
24 standard coach ticket on a commercial airline. Mr. Butters  
25 flies his own plane. I do not want to get a bill for him taking

1 his own plane.

2 THE COURT: No --

3 MR. DEMARS: We'll pay him --

4 THE COURT: -- no, he's not going to do that. I'm  
5 not going to order that that be done. Anything else?

6 MR. KINCAID: Your Honor, on one point, the one we  
7 addressed before, the documents regarding this gun, Mr. Demars  
8 said in five minutes they can get the numbers they need. I  
9 will allow them to look at the gun to that extent today to  
10 get those identifying numbers. So, if we could get a ruling  
11 from the Court on when they will produce then those documents  
12 relating to this gun, as far as a reasonable amount of time.

13 MR. DEMARS: Your Honor, one other thing. If when  
14 it is considered that the expense of Mr. Butters is going to  
15 be too much and we can make arrangements down here, I take it  
16 that we also have the option of having the gun produced  
17 locally without going to New York.

18 THE COURT: I don't see any reason why not.

19 MR. KINCAID: We've never had an objection to that.

20 MR. DEMARS: Your Honor, I can be done in two weeks  
21 the things with this particular gun.

22 THE COURT: I don't have a calendar here in front  
23 of me. Let's just set it for ten working days from today.

24 (Pause)

25 THE COURT: Now, I understand that you have the

1 weapon here in the courtroom and you're going to allow it to  
2 be looked at to ascertain the numbers that are necessary for  
3 the production of these documents. If you're going to put it  
4 on these tables, be sure and put something underneath it, so  
5 that we won't gouge up and tear up the counsel tables. As  
6 you undoubtedly have been able to tell, I have been running  
7 up and down the stairs of this courthouse this afternoon  
8 conducting proceedings both here on this floor and also on  
9 the third floor. I generally try to take rather detailed  
10 notes of the hearings before me, but obviously there are some  
11 rather severe gaps in the notes that I have taken in this  
12 hearing. I'm going to order you, Mr. Kincaid, to prepare an  
13 Order to reflect the rulings that I have made for the purpose  
14 of this hearing and I'm going to direct you to submit your  
15 proposed Order to Mr. Demars for his approval before it's  
16 submitted to me for my signature.

17 MR. KINCAID: Your Honor, there is one final matter,  
18 and that is a attorneys fees. I believe under Rule 37  
19 attorneys fees are awarded as a matter of course to the  
20 prevailing party, unless fees are -- unless opposition was  
21 substantially justified or whatever. I believe that Plaintiffs  
22 are leaving this hearing with substantially all the discovery  
23 requested and I would request that we'd be granted leave to  
24 submit to the Court documentation of our fees and expenses in  
25 preparing Plaintiff's Motion to Compel, and ask the Court to

1       award an appropriate amount.

2               MR. DEMARS: Your Honor, that's obviously not our  
3 feeling. We've reached an accord here. We didn't even finish  
4 putting on my testimony or cross examination of Mr. Butters  
5 that we could have said that these guns are not at all discover-  
6 able. Obviously, we're making these in good faith. We flew  
7 Mr. Hutton down from New York. This was done in good faith,  
8 Your Honor, and more than that I believe the case law is very  
9 clear that unless we have failed to comply with the Court  
10 Orders, such sanctions are not applicable. With these objec-  
11 tions were made in good faith, I feel that this hearing  
12 benefitted both sides with regard to what we have to produce  
13 from our records, and I don't feel that Plaintiffs have  
14 prevailed in such a manner as to allow them attorneys fees.

15               THE COURT: Yes, sir.

16               MR. KINCAID: Your Honor, let me clarify. I am  
17 not asking for attorneys fees as sanctions. I agree with  
18 Mr. Demars that in federal court of course there has to be  
19 non-compliance with an Order first. However, the rule pro-  
20 vides for attorneys fees not as a sanction, and I believe  
21 that we are entitled to the discovery. We did confer as the  
22 local rules require in advance trying to work these out, and  
23 were unable to. The concessions made today could have been  
24 made then and saved us this trip. They could have been made  
25 when we had the telephone conference with the Court a week ago

1 and saved us this trip. They weren't and it's strictly a  
2 matter of who bears the burden, my client or Mr. Demars'  
3 client.

4 (Tape 1 ends at this point. Nothing on Tape 2)  
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1 A WORD ABOVE

2 by

3 Lisa Tauzin 1-19-87  
4 Lisa Tauzin Date

5 L. P. [Signature] 1-19-87  
6 Witness Date

7  
8 I, Lisa Tauzin, assigned transcription manager, do affirm  
9 that the foregoing is a true and accurate TRANSCRIPT of the  
10 proceeding in the matter of WANDA CASTLEBERRY, INDIVIDUALLY  
11 AND FOR THE ESTATE AND HEIRS OF TOMMY JOE CASTLEBERRY VS.  
12 REMINGTON ARMS CO., INC. heard on DECEMBER 4, 1986 in the  
13 United States District Court, Southern District of Texas,  
14 Corpus Christi Division, on Tapes #1 and #2, Honorable  
15 EDUARDO E. de ASEs presiding, Case No. CA C-85-357 of that  
16 Court.  
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