IN THE UNITED STATES DISTRICT COURT 1 FOR THE SOUTHERN DISTRICT OF TEXAS 2 3 CORPUS CHRISTI DIVISION 4 CASE NO. CA C-85-357 WANDA CASTLEBERRY, 5 Individually and for the Estate and Heirs of 8 6 Tommy Joe Castleberry 7 Houston, Texas DECEMBER 4, 1986 VS. 8 2:46 O'Clock A.M. REMINGTON ARMS CO., INC. 9 BEFORE THE HON. EDUARDO E. de ASES, UNITED STATES MAGISTRATE 10 11 APPEARANCES: 12 Longley & Maxwell For the Plaintiffs: 13 MARK KINCAID for J. K. LONGLEY P. O. Box 12667 14 Austin, Texas 78711 15 Gary, Thomasson, Hall & Marks DAVID J. DEMARS for RICHARD A. HALL For the Defendants: 16 P. O. Box 2888 17 Corpus Christi, Texas 78403 18 KATE TREVINO Court Recorder: 19 20 PREPARED BY: 21 A WORD ABOVE 8600 Jameel, Suite 170 22 Houston, Texas 77040 (713) 690-1000

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

MR. KINCAID: Yes. Your Honor.

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

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

THE COURT: Certainly.

MR. DEMARS: Thank you.

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

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

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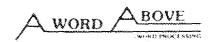
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MR. DEMARS: Your Honor, I think, as the Court heard me point out, one of the big areas is the distinction between the Model 600 involved in this present action and the Model 700, which discovery is sought. That is the one large area that's -- with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



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

MR. KINCAID: Your Honor, given that this is

Plaintiff's Motion to Compel, if I had a preference I would

prefer that we get to the one key issue, the similarity versus

dissimilarity at the expense of the more minor issues of who

produces transcripts, because that really is the key issue

whether we have requested sufficiently similar documents to

dispense with the need for testimony. I think I can give the

Court some very persuasive legal arguments supporting the

need for no testimony. If the Court is inclined to

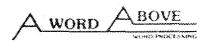
hear testimony, then that is the single issue, whether we've

requested information about guns that are just too different

to be discoverable.

THE COURT: Mr. Demars?

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



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

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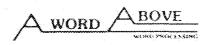
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MR. KINCAID: Your Honor, if we're going to begin arguing the merits, I believe I am entitled to go first, it being my Motion.

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

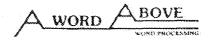


the testimony on the issue of similarity or dissimilarity of the requested discovery efforts, and possibly while we're interrupted later on in this hearing, you two can discuss these other matters; for example, the request for similar depositions or depositions in other lawsuits. You may be able to reach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

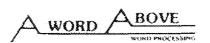
MR. KINCAID: Yes, sir, Your Honor, but I believe it would aid the Court first if I might give a brief overview of what this case is about. I notice the podium has been pushed away. Where would the Court prefer that we stand?

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

MR. KINCAID: Thank you, Your Honor. The Plaintiff's position is fairly well spelled out in the Motion to Compeland the Memorandum accompanying it. What this case involves is a defective Remington Model 660 firearm. The significant features that make that firearm defective, in our opinion, are two. First, it has a bolt lock safety -- a two-position bolt lock safety, and what that means, as you'll hear from Mr. Butters and from Mr. Hutton is that before a gun user can begin to unload the rifle, the safety has to be taken off. 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 off. We contend that is a design defect anytime you make the gun handler put the rifle in the fire position when they 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 2-3 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



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

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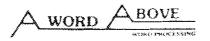
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discovery. If they're different and don't have the same problem, they're discoverable to show safer alternative. lt they're similar and have the same problem, which I submit is the case, then they are forced discoverable to show the extent of Remington's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

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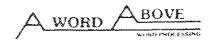
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an abuse of discretion. In doing so, the Supreme Court said and this is cited in our Memorandum, Your Honor; "The trial court, in balancing the rights of the parties, took an undulrestricted view of the degree of similarity necessary for tests on other vehicles to be relevant. The automobiles nee not be identical in order for tests on one to be relevant in determining whether the design of another is defective." The Court went on to say that, "Whether a safer fuel system design suitable for one vehicle is adaptable to another is a question of feasibility to be decided by the trier of fact, not a question to be resolved in ruling on discovery requests." Remington is placing this Court in a position of pre-trying the issue of whether other designs are adaptable to the Model That is a question that goes to the weight of the evidence at trial. The very fact that we would get to the weight of the evidence at trial indicates that it is admissible. As to the relevance of Texas authorities, I think it's wellestablished that the element of our cause of action are controlled by Texas law. This is a diversity case. why we're in Federal Court. The elements of our cause of action are set by Texas law. Those elements of a cause of action determine what evidence is relevant. Therefore, I think Texas cases are relevant. In Jackson v. Firestone, when the Fifth Circuit had a products case, had looked to Texas law to determine what evidence was relevant.

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

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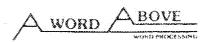
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THE COURT: Well, before you do that, let me have --let me hear Mr. Demars response to your opening remarks.

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



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

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

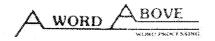
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THE COURT: Let me ask you a couple of questions regarding the burdensome aspect of your opposition to the Plaintiffs discovery request. Isn't part of that burdensomeness that you are arguing based upon the fact that they're asking for discovery such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

MR. DEMARS: That -- more than that, Your Honor. It's also in this aspect of, "Give us every correspondence, every communication you had concerning any problem with the other model." They're not saying, "Do you have another model rifle? What are the aspects of its design? What are the parameters of its design?" They're saying, "Give us that, but then go into your files and do what we also want you to do with the 600, give us every complaint you've ever had."

Now, this gun has been manufactured, the Model 700 or its predecessors, since 1948. There's no time limit in any of their requests. And Your Honor, it's one thing to come in



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

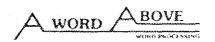
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THE COURT: Well, and the other question that I wanted to ask you is, isn't your argument in opposition to the Plaintiffs discovery request based upon whether or not the evidence that Plaintiffs would obtain from these discovery efforts would or would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

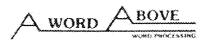
MR. DEMARS: No, Your Honor, I'm not arguing admissibility. I understand the parameters of the rule to be that -- I don't think it'll lead to the discovery of admissible evidence. I don't think an accident that happened with a Model 700 in California ten years ago is admissible in this case, and that's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

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



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



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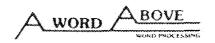
off safety, it is extremely unlikely that it's going to have any relevance to the Model 660, which had a particular situation in which that happened, and they know that the 660 had that situation for a different reason, much more frequently than any Model 700.

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

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

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

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



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

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

MR. DEMARS: Your Honor --

THE COURT: All right.

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

THE COURT: All right.

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



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

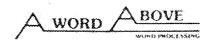
THE COURT: All right, Mr. Demars. I'm going to overrule your objection and I'll hear some testimony. How extensive it'll be, I'll leave it up to you. I think that we ought to limit the testimony as much as we can. Who was your first witness, Mr. Kincaid?

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

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

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

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



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Exhibits #1 and #2?

MR. DEMARS: No, Your Honor.

THE COURT: Very well. They will be admitted.

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

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

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

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

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

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

(The Witness is Sworn)

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

DIRECT EXAMINATION

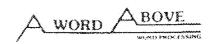
BY MR. KINCAID:

- Would you please state your name for the record? 0
- John T. Butters, known as Tom Butters. A
- Mr. Butters, what is your profession?



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1	A.	I'm a registered professional engineer in private				
2	prac	practice.				
3	Q	And in that practice have you had experience examining				
4	diff	erent model Remington firearms?				
5	Α	Yes, I have.				
6	Q	Would you list for the Court what those models have				
7	inch	ided?				
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	varia	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 o	ther companies?				
17	A	Yes, I am.				
18	Q	Have you been recognized to testify as an expert in				
19	fede	ral court regarding allegations of (inaudible) defect on				
20	Remi	ngton firearms?				
21	À	Yes, I have.				
22	Q	And was one of those cases <u>Musica</u> v. Remington in the				
23	Waco	District Court?				



What model was involved in that case?

That is correct.

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A That was a Model 700 rifle.

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

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Yes, I have.

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

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A I do.

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

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

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MR. KINCAID: Thank you, Your Honor.

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THE COURT: Go ahead, Mr. Butters.

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the same patent owned by Remington Arms Corporation.

THE WITNESS:

performs the same task.

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both have a one-to-one relationship between parts in their fire control mechanism and their safety design. The parts,

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while not totally interchangeable, are extremely similar in

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appearance and totally identical in design. Each part in one

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fire control and safety mechanism has a corresponding part in

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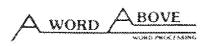
the other safety mechanism which functions in the same way;

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MR. KINCAID: Your Honor, may I approach the witness?
THE COURT: Sure, come up.

Both rifles are manufactured under





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BY MR. KINCAID:

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

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

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

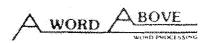
A That is the means of closing the bolt into the locking mechanism of the rifle. It is not really a -- at question in this particular lawsuit, although, it is identical between both rifles. They each have the same type of enclosure of the cartridge case head and steel members which creates a very strong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

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

A Yes, and the XP-100 as well.

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

THE COURT: Any objections, Mr. Demars?



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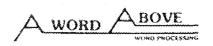
MR. DEMARS: No. Your Honor.

THE COURT: Plaintiff's Exhibits #4 and #5 will be

BY MR. KINGAID:

admitted.

- Q And do you have an opinion based on your experience whether rifles manufactured under the identical patent would be similar in design?
- A Yes, I do.
- Q And what is that opinion?
- A That those rifles manufactured under the same patents must necessarily be similar in design, otherwise they would not fall under the purview of those patents.
- And as you're aware, our allegations in this case involve a claim that any safety that has a bolt lock feature -- any two position safety with a bolt lock feature that requires the use or to place the gun in fire position to unload is defective. Are you aware of that allegation?
- A Yes, I am.
- Q And is there a common design feature called a bolt lock mechanism that would be similar no matter what gun you found that bolt lock feature on?
- A That is correct.
- Q And why is that, Mr. Butters?
- A Because no matter what means you use to lock the bolt in place to prevent the opening of the bolt, unless the safety



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

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

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

BY MR. KINCAID:

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

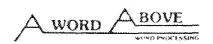
A Yes.

Q And why is that, Mr. Butters?

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

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

A Yes, I do.



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Q	Do	you	know	the	purpose	ot	that	recall?
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A Yes.

Q What was it?

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

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

MR. DEMARS: Objection, Your Honor, leading.

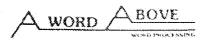
MR. KINCAID: Your Honor, I believe he just testified as to the different models that were recalled.

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

THE WITNESS: Yes, sir.

THE COURT: Would you answer it?

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



1 Mohauk 600, and the XP-100. Anything that was aligned with the 600 line, they recalled. BY MR. KINCAID: 4 Do you know what incident caused Remington to conduct 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. KINCALD: 21 Do you know what the alleged defect that prompted the Q

A Yes.

recall was?

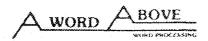
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Q What was that alleged defect?

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.

- Mr. Butters, do you know whether Remington, as part of this recall, examined other model firearms, including the Model 700?
- Yes.

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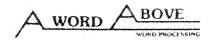
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- 13 And did they examine other model firearms including the 14 Model 700?
 - Yes, they did. Theirs and other manufacturers as well.
 - Do you know from your own knowledge and experience whether the Remington Model 700 also experiences the problem we've called firearm safety release?
 - Yes.
 - And do you have any idea of the number of other instances that have been reported to Remington of that defect in the Model 700?
 - I don't know what the total number is. I know what the total number is that I have had some acquaintance with.
 - And how many has that been, Mr. Butters?



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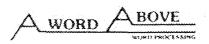
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- A If my count is correct today, based on my own personal experience, I think it's 15 or 16, something like that.
- Q And do you know whether as part of this recall relating to the defect with the Model 600 series, Remington examined firearms made by other manufacturers?
- A Yes.
- Q Did they?
- A Yes.
- Q In your experience as an expert, why would someone want to examine other firearms as Remington did?

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

THE COURT: Mr. Kincaid?

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



THE COURT: Yes, sir?

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

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

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

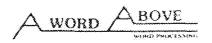
THE WITNESS: I think so, Your Honor.

THE COURT: Would you answer it?

THE WITNESS: It is my understanding that your question was whether a prudent manufacturer would examine other firearms and designs to compare them with their own unique design to determine whether or not there were improvements or changes that were necessary to be made in the manufacturer's designs. Is that the correct question?

BY MR. KINCAID:

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



models?

A In order to --

Q Why would you want to?

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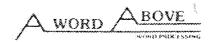
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A -- perfect their own design. I happen to be a designer and manufacturer myself, and I observe and very carefully examine my competitors and other people in my field design to determine whether or not there are some features that I may include in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

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

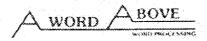
A No, I wouldn't say they're identical in every aspect. There are some dimentional differences and certain few cosmetic differences, but so far as the essential features of the design, they are identical. The resiliently mounted connector in the fire control assembly, as described in the Walker patent,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

Q Is there any dissimilarity between the Model 700 and the Model 600, the XP-100 pistol, that would allow you as an expert to simply rule out one model when you were considering the Model 6007



the Chicago matter.

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1		Ą.	Absolutely not.
2	(3	Do you have an opinion whether the designs are similar
3	•	enoug	ht where you would want to evaluate defects in each of
4	1	those	e models together?
5	ł	A	I do.
6	(Q	And what is your opinion?
7	ŀ	A	That is the design features of each are so much the same
8	1	that	they are inseparable so far as an analysis of the type
9		of ma	alfunction that is demonstrated by both these firearms.
10			MR. KINCAID: Your Honor, I pass the witness.
11			THE COURT: Very well. Mr. Demars?
1.2			CROSS EXAMINATION
L3]	BY MR	DEMARS:
L4	(Q	Mr. Butters, are you an expert for the Plaintiff in the
15		case	of <u>Musica v. Remington</u> , which is presently pending in
L6	1	Waco?	
17	1	Á : :	Yes.
18	(Q	And whose lawfirm were you retained by, sir?
L9 :	I	A.	Longley & Maxwell.
20		Q: s	Is that
21	1	A _{intern}	The one that Mr. Kincaid is a part of.
22	(Q	All right. Are you also been retained by Plaintiffs in
23		the c	case of Sifret v. Remington, which is pending in Chicago?
24		A:	There's an Offenwanger case, if that's the one, that's



- 1 Q And have you been retained in that case?
- 2 A Yes.
 - Q Have you been retained in the Alschlager case in Houston?
- A No.

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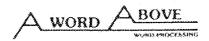
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- 5 Q How about the Morris case in Houston?
- 6 A Yes.
 - O And the Campbell case in Arkansas?
 - A Yes, but I don't think that's in Arkansas. I think that's in Alaska.
 - Q All right. And, sir, what rifle is involved in all those cases?
 - A Those are Model 700's.
 - Q All right. Have you been privy to documents that have been produced by Remington in response to discovery in each -- in those cases?
 - A Yes.
 - Q Have you had an opportunity to review such documents?
 - A I have.
 - Q As a matter of fact, you've testified that you've had an opportunity to review those documents in detail in support of your theories in those cases, haven't you, sir?
 - A Yes, sir, that's true. I found material in them that was in support of my findings.
 - Q All right. And you've had an opportunity to review all those documents, which are the type of documents being requested in this case, correct?



L A	Yes,	sir.
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- Q And those are all Model 700's?
- A That is correct.
 - Q So, as far as you know, sir, isn't it correct that every document that's being requested in this case regarding the Model 700 has been produced to you for review and inspection in these other cases?
 - A No, I do not know that. I do not know the full extent of their request for production. However, I would suspect that a great many of those documents which they wish for you to produce have already been produced in other cases.
 - Q And that would certainly be true in the Musica case, which has gone through one trial and is ready to be tried again. Isn't that correct, sir?
 - A That is correct; although, I did not have access to those particular matters that are requested at this time -- those particular documents that are requested at this time. At the time of the Musica case, Remington had not yet produced to anyone to my knowledge the volume of documentation that I received in connection with the case which you did not mention, which is Lewy v. Remington, in Missouri.
 - Q Was that a Model 700 case?
- A It was.
- Q And so in that case you've had a chance to review all those documents. Is that correct?



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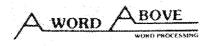
A That is correct.

- Q And you have those in your possession?
- A Yes.
- Q So, basically, you are working for Mr. Longley in this case and Musica, and you have in your possession what you probably think is a fair equivalent to every document that's being requested of Remington at this time. Is that --
- A No, I did not say that.
- Q All right. What document do you believe you don't have?
- A Well, there are Product Safety Committee -- Product Safet Sub-Committee Minutes which are missing from a listing of Product Safety Sub-Committee meetings in a critical period of time just subsequent to the recall of the Model 600's for a period of some two-and-a-half, three years, or more.
- Q All right, for --
- A There are a number of other elements of documentation that are missing. Among them, the records, one F. W. Chisnall, to whom all the malfunctioning rifles that were returned over a period of time -- I say all. I would say substantially all returned.

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

MR. DEMARS: Yes, Your Honor.

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



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

THE WITNESS: Yes, sir.

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

THE COURT: Well, I'll allow you to explore that

-- that area if that's what you want to do. I believe that

you were getting some sort of a negative answer there as to

whether or not he had all of the documents that have been

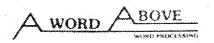
requested in this particular case, but go ahead, I'll let you

pursue that a little bit further.

MR. DEMARS: All right.

BY MR. DEMARS:

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



A Not my counsel, Mr. Demars.

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

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

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

MR. DEMARS: Yes. sir.

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

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



THE WITNESS: Probably.

THE COURT: All right.

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

MR. DEMARS: May I approach the witness?

THE COURT: Come up.

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

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

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

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

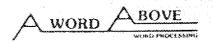
MR. KINCAID: Yes, sir, Your Honor.

THE COURT: All right.

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

BY MR. DEMARS:

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



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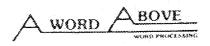
read them all out loud. If you'll review down through and see which things here that are requested as they relate to the Model 700 you have not been able to obtain in here?

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

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

A That's correct.

- Q All right. Would you please just go through here; for example, let's start looking at No. 4. All documents relating to any other complaint relating to two position bolt lock safety.
- A No, I have not seen all those.
- Q All right. What have not -- what have you not seen here?
- A I am sure that I have not seen a variety of documents that were generated in response to customer complaints and the handling of the firearms returned to Remington Rifle Company in regard to those complaints.
- Q All right. It's your testimony then, with regard to a rifle firing off safe, you have not seen a customer complaint relating to Model 700's?
- A I didn't say that. I've seen some customer complaints, but I'm sure I have not seen them all.
 - MR. KINCAID: Your Honor, if I may object. I don't



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

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

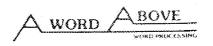
BY MR. DEMARS:

- But you have seen customer complaints relating to Model 700's firing off safety, haven't you, sir?
- Yes, I have.
- Okay. Q

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

BY MR. DEMARS:

- On No. 5, all documents relating to discontinuation of use of a two position bolt lock safety on the 700's. You've seen documents relating to that, haven't you?
- I have only seen documents which remove the bolt locking tab from the safety mechanism. I have not seen the documentation that supports the decision to move that tab.
- 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 I have -- I'm certain I have not seen them all. I have seen some. 5 Sir, would you please answer my question? 6 I thought I had, sir. I have seen some documents, but I 7 have not seen them all. 8 Do you know for a fact there are others that don't --9 that you haven't seen? 10 Yes, sir. Α 11 And how do you know that? 12 Because there are numbers that are referenced on those 13 documents that remove the holt 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

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

that they do not spontaneously occur at Remington.

THE COURT: Go ahead.

BY MR. DEMARS:

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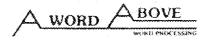
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Q Next, all documents relating to any design changes with



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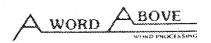
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1	regard to the 700 and the bolt lock.	Have you seen documents
2	relating to design changes, sir?	

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

- Q All documents relating to any dangers and/or hazards associated with the use of the two position bolt lock safety. Have you seen documents relating to the Model 700 series, sir?
- A Yes, I have seen some documents.
- Q Please, yes or no. Have you seen such documents?
- A I have seen some documents, yes.
- Q You have no personal knowledge that Remington failed to produce any documents that had -- that met that question, do you? You have no personal of that, do you?
- A Yes.
- Q You have personal knowledge that Remington has failed to disclose documents?
- A Yes, sir.
- Q No. 8, all documents relating to any hazards with -- associated with the use of a two position bolt lock safety device not designed or manufactured by you.
- MR. DEMARS: Your Honor, we have another objection to that.
- BY MR. DEMARS:
- Q All right. Have you seen documents relating to instructions for use in handling Model 700's?



ŀ	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.	
1.0	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:	

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

I have seen some such documents, yes.

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

Yes.

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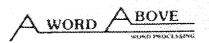
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Mr. Butters, is it fair to say that you have seen and had



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

- A Yes, I have seen some documents of that nature.
- Q And to produce them in this case, Remington would be responding to the same type of requests that it responded to before in the other Model 700 cases in which you are an expert. Is that correct?
- A Would you ask that question again?
- Q Certainly. To respond to these requests concerning Model 700 weapons, Remington would be responding to the same type of requests that has been propounded to it before in cases in which you are the expert. Is that correct?
- A Yes.

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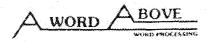
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- Q And you have those documents in your possession, correct?
- A Yes, I have some of those documents.
- Q And Mr. Longley's office has those documents also in connection with the Musica case. Is that correct?
- A I do not know what Mr. Longley's office has totally with regard to the <u>Musica</u> case.
- Q But altogether you have such documents and have them available to Mr. Longley. Is that correct?



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

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

A Yes, he is.

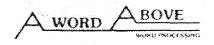
Q All right. And although he knows you have them, he has not requested them from you, has he? Is that what you're telling this Court?

A Yes, that's correct.

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

THE COURT: Mr. Demars?

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



lawfirm dealing with the Model 700 and all these documents 1 have been produced, and they -- between counsel's office and 2 Mr. Butters, they have them all. And now they want us to go 3 back through our files and take them out one at a time again 4 to produce them again, and this is, don't forget, Your Honor, on the Model 700, which is a gun we're not even saying is 6 That is the other gun. They want us to do all this 7 similar. work on the other gun, where we have produced this to this 8 law office and for review by this expert in cases where that 9 gun was at issue, and obviously, Your Honor, discovery would 1.0 be comprehensive in those cases with regard to this particular 11 12 gun:

MR. KINCAID: Your Honor --

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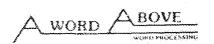
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THE COURT: You're claiming that you're surprised that Mr. Butters is an expert witness for Longley & Maxwell in other similar cases against Remington?

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

MR. KINCAID: Your Honor --

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



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to produce them again.

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

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

MR. DEMARS: Could I, Your Honor?

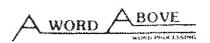
THE COURT: —— your witness? I'm going to recess this hearing briefly. Mr. Butters, you may stand down. I had a matter that was scheduled again at 3:30 and I've asked my secretary to inquire about whether or not those parties are ready, and I'm going to allow you to confer and then confer with Mr. Kincaid,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

MR. DEMARS: Thank you, Your Honor.

THE COURT: We'll be in recess.

(Recess)

THE COURT: Have you conferred?



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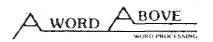
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MR. DEMARS: Yes, Your Honor. We are at this point. With regard to the Models that preceded the 700 series, the 722, 721, 725, we can reach an understanding. If we can reach understanding on the 700, we won't mind getting that together. That's not voluminous.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

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

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



MR. DEMARS: No, not to my knowledge.

MR. KINCAID: But I still have the problem, and to be honest, as I've told Mr. Demars, I'm not in a position to know we've gotten everything or Mr. Butters has gotten everything. Being outside there's just no way to verify it.

Remington is the only entity that knows what is available.

There is case law that says the fact that they choose to keep their records or a corporation chooses to keep its records in a manner that makes it difficult to retrieve, doesn't relieve them from the obligation of producing them.

MR. DEMARS: Your Honor, this is not a case -THE COURT: Excuse me. Is there a list of the
documents that Mr. Butters has?

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

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

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

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

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



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

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

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

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

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

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

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

THE COURT: Any problem with that?



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

THE COURT: All right. I think Mr. Kincaid understands that.

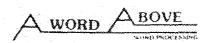
MR. KINCAID: And to the extent he finds those documents, if we could have an agreement that they would be segregated for in camera inspection. Perhaps we can discuss the general nature and determine whether that's appropriate.

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

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

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

MR. DEMARS: Just a moment, Your Honor.



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THE COURT: All right.

(Pause)

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

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

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

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

MR. KINCAID: I understand that, Your Honor.

THE COURT: Yes

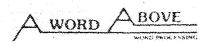
MR. KINCAID: That also leaves the Mohawk 600 rifle and the XP-100 pistol, which were included in the Remington recall, along with the rifles at issue in this case.

THE COURT: All right.

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

THE COURT: Very well.

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

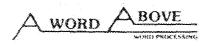


MR. DEMARS: Your Honor, now we're getting further afield. The Model 7 replaced the Model 700, and it was a hybrid between both. It was post both these rifles.

Mr. Butters is really fishing now, Your Honor. This agreement has been worked out with (inaudible), and we cannot agree to that.

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

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



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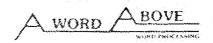
showed that the manufacturer was very attentive to cosmetic problems, very inattentive to safety problems. For that reason, we requested all problems relating to this firearm.

THE COURT: Mr. Demars?

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

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

THE COURT: This request or these requests for



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

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

> MR. DEMARS: Your Honor --

THE COURT: Yes, sir.

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

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

MR. DEMARS: Yes, sir.

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



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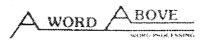
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that are going to be produced regarding other safety defects involving the same model of firearm, and then determine whether or not they wish to reurge their request or all other defects in the same model firearm. Anything else?

MR. KINCAID: Your Honor, let me check my list. (Pause)

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

THE COURT: They want to see a rifle, is that it? MR. KINCAID: Yes, and we're trying to make arrangements to allow them to do that. We have some disagreement on how that will be accomplished, but as far as seeing it, we're willing to allow them to see and examine the gun.



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

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

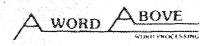
MR. KINCAID: Your Honor, we have offered and have a standing offer to make the rifle available for his inspection. Our only concern is there have been problems before with rifles that have been simply released, and I'm not in any way impugning Remington or Mr. Demars.

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

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

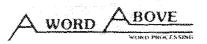
THE COURT: All right.

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



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



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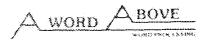
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and Mr. Longley agreed that if someone could go and carry the gun at our expense, New York was not a problem. But then he made the caveat of having Mr. Butters go and us paying Mr. Butters' expert fee.

THE COURT: Mr. Kincaid?

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



l request.

THE COURT: Can the gun be tested anywhere else?

MR. DEMARS: It would be very difficult -- much

more difficult, Your Honor. It may be more lengthy and it

wouldn't be as complete as it would be in the facilities that

we have there. And, Your Honor, I've just been informed that

Mr. Butters was up at the plant in New York two weeks ago at

another joint inspection involving another case, another

firearm where Plaintiffs paid for him to do that. Not you,

I'm sorry.

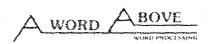
MR. KINCAID: Thank you.

THE COURT: How much is Mr. Butters' hourly fee?

Do you know?

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

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



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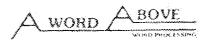
to be picking up information concerning the procedures and the results of the test. I'm going to order that the Plaintiffs produce the rifle at the Remington Arms facility in the State of New York within a reasonable period of time following this hearing. In the event that the Plaintiffs want the firearm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

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

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

I've ordered you to pay his transportation.

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



l his own plane.

THE COURT: No --

MR. DEMARS: We'll pay him --

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

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

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

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

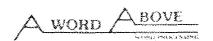
MR. KINCAID: We've never had an objection to that.

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

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

(Pause)

THE COURT: Now, I understand that you have the



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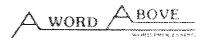
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weapon here in the courtroom and you're going to allow it to be looked at to ascertain the numbers that are necessary for the production of these documents. If you're going to put it on these tables, be sure and put something underneath it, so that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

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



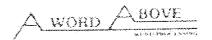
award an appropriate amount.

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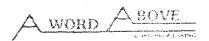
MR. DEMARS: Your Honor, that's obviously not our feeling. We've reached an accord here. We didn't even finish putting on my testimony or cross examination of Mr. Butters that we could have said that these guns are not at all discoverable. Obviously, we're making these in good faith. We flew Mr. Hutton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

THE COURT: Yes, sir.

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

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by

Lisa Tauzin 1-19-87

Lisa Tauzin Date

Lisa Tauzin 1-19-37

Witness Date

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

