

**ORAL ARGUMENT SCHEDULED FOR FEBURARY 6, 2001**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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No. 00-5128

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**CENTER FOR AUTO SAFETY,**

Appellant,

v.

**NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *et al.*,**

Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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**JOINT BRIEF OF INTERVENOR-DEFENDANT APPELLEES  
[FINAL VERSION]**

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Karen L. Manos  
Linda A. Mayer  
HOWREY SIMON ARNOLD  
& WHITE, LLP  
1299 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
(202) 783-0800

*Counsel for Toyota Technical Center, USA, Inc.*

Erika Z. Jones  
Adam C. Sloane  
MAYER, BROWN & PLATT  
1909 K Street, N.W.  
Washington, D.C. 20006  
(202) 263-3000

*Counsel for American Honda Motor  
Co., Inc., DaimlerChrysler Corporation,  
Ford Motor Company, General Motors  
Corporation, Mercedes-Benz USA, LLC,  
Nissan North America, Inc., Volkswagen of  
America, Inc., and Volvo Cars of North  
America, Inc.*

December 14, 2000

(Additional Counsel Listed Inside)

Paul Jackson Rice  
Christopher H. Grigorian  
ARENT FOX KINTNER PLOTKIN &  
KAHN, PLLC  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 857-6000

*Counsel for Takata Inc.*

Scott T. Kragie  
Andrew W. Cohen  
SQUIRE, SANDERS & DEMPSEY L.L.P.  
1201 Pennsylvania Avenue, N.W.  
P.O. Box 407  
Washington, D.C. 20044  
(202) 626-6812

*Counsel for TRW Vehicle Safety Systems,  
Inc., TRW Inc., and Robert Bosch  
Corporation*

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), Intervenor-Defendant Appellees submit the following Certificate.

(A) **Parties and Amici.**

**Parties, Interveners, and Amici in the Court of Appeals**

Except for TRW Inc., an intervenor-defendant below and an Intervenor-Defendant Appellee in this Court, all parties, intervenors or *amici* appearing before the district court and this court are listed in the Brief for Appellant Center for Auto Safety.

(B) **Rulings Under Review.**

Reference to the ruling at issue appears in the Brief for Appellant Center for Auto Safety.

(C) **Related Cases.**

This case has not previously been before this Court or any other court, besides the court issuing the ruling under review. Intervenor-Defendant Appellees are not aware of any related cases currently pending before this Court.

## **DISCLOSURE STATEMENT OF INTERVENOR-DEFENDANT APPELLEES**

Pursuant to Circuit Rule 26.1, Intervenor-Defendant Appellees submit the following Disclosure Statement.

*American Honda Motor Co., Inc.*, a corporation organized pursuant to the laws of California, is a wholly-owned subsidiary of Honda Motor Co., Ltd. (Japan), which is a publicly-traded company. American Honda Motor Co., Inc., is a distributor of Honda motor vehicles and other Honda products.

*DaimlerChrysler Corporation*, a corporation organized pursuant to the laws of Delaware, is wholly owned by DaimlerChrysler North America Holding Corporation, a privately-held Delaware corporation. DaimlerChrysler North America Holding Corporation is wholly owned by DaimlerChrysler AG, a publicly-traded German corporation. DaimlerChrysler Corporation is a manufacturer and distributor of passenger vehicles.

*Ford Motor Company*, a corporation organized pursuant to the laws of Delaware, has no parent company. No publicly-traded companies own more than 10% of Ford shares or stock. Ford Motor Company is a manufacturer and distributor of motor vehicles.

*General Motors Corporation*, a corporation organized pursuant to the laws of Delaware, has no parent company. The following publicly-held company owns more than 10% of General Motors Corporation's stock: State Street Bank & Trust Company. General Motors Corporation is a manufacturer and distributor of transportation equipment, including motor vehicles.

*Mercedes-Benz USA, LLC* is a privately-held Delaware Limited Liability Company, which was formerly known as Mercedes-Benz USA, Inc. DaimlerChrysler North America Holding Corporation, a privately-held Delaware corporation, is the sole member of Mercedes-Benz USA, LLC. DaimlerChrysler North America Holding Corporation is wholly owned by

DaimlerChrysler AG, a publicly-traded German corporation. Mercedes-Benz USA, LLC's primary business is as an authorized distributor of Mercedes-Benz passenger cars, light trucks, and parts.

***Nissan North America, Inc.***, a corporation organized pursuant to the laws of California, is a wholly-owned subsidiary of Nissan Motor Co., Ltd. of Japan. Nissan North America, Inc. manufactures, in part, and assembles certain motor vehicles for sale in the United States, Canada, and Mexico. Nissan North America also distributes Nissan passenger cars and trucks for sale in the continental United States and Alaska, and is engaged in sales, marketing, and promotional activities.

***Robert Bosch Corporation***, a corporation organized pursuant to the laws of Delaware, is 85% owned by Robert Bosch GmbH of Germany and 15% owned by Robert Bosch International Beteiligungen AG. Both are privately held. There is no public ownership of Robert Bosch Corporation. Robert Bosch Corporation is a supplier of automotive systems, parts, and components, including, among others, airbag components and/or systems.

***Takata Inc.*** was, when this litigation commenced, a wholly-owned subsidiary of TK Holdings, Inc., which is a privately-held corporation organized pursuant to the laws of Delaware. Takata Inc. has since merged into TK Holdings, Inc. No publicly-held company owns a 10% or greater interest in TK Holdings, Inc. TK Holdings, Inc., is a supplier of automotive restraint systems.

***Toyota Technical Center, USA, Inc.***, a corporation organized pursuant to the laws of California, is the domestic affiliate of Toyota Motor Corporation, an automobile manufacturer. The following parent companies and publicly-held companies have a 10% or greater ownership

interest in Toyota Technical Center, USA, Inc.: Toyota Motor Corporation, Toyota Motor Sales, U.S.A., Inc., Denso Corporation, and Aisin Seiki Co., Ltd.

*TRW Inc.* is a corporation organized pursuant to the laws of Ohio. No publicly-held company has a 10% or greater ownership interest in TRW Inc. TRW Inc., together with its wholly-owned subsidiary, TRW Vehicle Safety Systems, Inc. is a supplier of airbag components and/or systems.

*TRW Vehicle Safety Systems, Inc.* is a wholly-owned subsidiary of TRW Inc. Together with TRW Inc., TRW Vehicle Safety Systems, Inc., is a supplier of airbag components and/or systems.

*Volkswagen of America, Inc.*, a corporation organized pursuant to the laws of New Jersey, is a direct wholly-owned subsidiary of Volkswagen Beteiligungs-Gesellschaft m.b.H, which is not a publicly-traded company, and an indirect wholly-owned subsidiary of Volkswagen AG, a German corporation. Volkswagen of America imports and distributes Volkswagen vehicles and service parts, and Audi vehicles and service parts.

*Volvo Cars of North America, Inc.*, a Delaware corporation, is a direct wholly-owned subsidiary of Volvo Car Holdings (U.S.), Inc., which is not a publicly-traded company. Volvo Cars of North America, Inc., is an indirect wholly-owned subsidiary of Ford Motor Company. Volvo Cars of North America, Inc. is an importer and distributor of Volvo motor vehicles.

**TABLE OF CONTENTS**

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES ..... i

DISCLOSURE STATEMENT OF INTERVENOR-DEFENDANT APPELLEES..... ii

TABLE OF AUTHORITIES ..... vii

GLOSSARY ..... ix

STATUTES AND REGULATIONS ..... 1

ISSUES PRESENTED ..... 1

STATEMENT OF THE CASE..... 1

STATEMENT OF FACTS ..... 2

SUMMARY OF ARGUMENT ..... 4

ARGUMENT ..... 5

    I. THE INFORMATION IS SUBJECT TO THE CATEGORICAL RULE  
    FOR VOLUNTARY SUBMISSIONS UNDER *CRITICAL MASS*..... 6

        A. The Information Was Voluntarily Supplied to NHTSA ..... 7

        B. NHTSA Lacked Authority to Compel Responses to the Information Request..... 8

    II. THE COURT CORRECTLY CONCLUDED THAT THE APPELLEES  
    ESTABLISHED THAT THE SUBMITTERS DO NOT CUSTOMARILY  
    DISCLOSE INFORMATION OF THE KIND AT ISSUE IN THE CASE ..... 12

        A. Appellees’ Declarations and Affidavits Were Specific and Detailed ..... 12

        B. The Court Did Not Misconstrue the Applicable Disclosure Issue ..... 13

        C. CAS’s Other Customary Disclosure Arguments Are Meritless ..... 16

        D. All of the Information at Issue Is Exempt from Disclosure  
        Under *Critical Mass* ..... 19

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT SOME OF THE SUBMITTED INFORMATION CONSISTED OF TRADE SECRETS .....	21
A. The Information Is “Secret” .....	23
B. The Information Is “Commercially Valuable” .....	26
C. The Information Is “Used for the Making, Preparing, Compounding, or Processing of” Airbag Systems or Components .....	28
CONCLUSION .....	30

**TABLE OF AUTHORITIES**

**CASES**

*Center for Auto Safety v. National Highway Traffic Safety Administration*,  
93 F. Supp. 2d 1 (D.D.C. 2000) ..... *passim*

*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,  
467 U.S. 837 (1984) ..... 9

*Cottone v. Reno*,  
193 F.3d 550 (D.C. Cir. 1999) ..... 15

\* *Critical Mass Energy Project v. NRC*,  
975 F.2d 871 (D.C. Cir. 1992) (*en banc*) ..... *passim*

\* *McDonnell Douglas Corp. v. NASA*,  
180 F.3d 303 (D.C. Cir. 1999) ..... 5, 6, 19

*National Parks & Conservation Association v. Morton*,  
498 F.2d 765 (D.C. Cir. 1974) ..... *passim*

*Niagara Mohawk Power Corp. v. United States Department of Energy*,  
169 F.3d 16 (D.C. Cir. 1999) ..... 13, 15, 16

\* *Public Citizen Health Research Group v. FDA*,  
704 F.2d 1280 (D.C. Cir. 1983) ..... 5, 21, 23, 28-30

*Saco River Cellular, Inc. v. FCC*,  
133 F.3d 25 (D.C. Cir), *cert denied*, 525 U.S. 813 (1998) ..... 11

*United States v. Como*,  
53 F.3d 87 (5th Cir. 1995) ..... 14

*Worthington Compressors, Inc. v. Costle*,  
662 F.2d 45 (D.C. Cir. 1981) ..... *passim*

**STATUTES**

5 U.S.C. § 552 ..... *passim*

44 U.S.C. §§ 3501, *et seq.* ..... *passim*

44 U.S.C. § 3512 ..... 8, 11

49 U.S.C. § 30164 ..... 9  
N.J. Admin. Code. tit. 7, § 26-6.3(a)(5)(i)(4) (2000) ..... 25

**OTHER AUTHORITIES**

5 C.F.R. § 1320.3 ..... 8  
5 C.F.R. § 1320.5 ..... 8  
63 Fed. Reg. 49,958 (Sept. 19, 1998) ..... 27  
DOJ FOIA Update, Vol. XIV, No. 2, Spring 1993 ..... 10

## GLOSSARY

Appellees	-	Collectively, NHTSA, Submitters and Suppliers (defined below)
Bosch	-	Robert Bosch Corporation
Br. or CAS Br.	-	Center for Auto Safety's "Brief for Appellant" (filed Oct. 4, 2000)
CAS	-	Center for Auto Safety
DaimlerChrysler	-	DaimlerChrysler Corporation
FOIA	-	Freedom of Information Act, 5 U.S.C. § 552
Ford	-	Ford Motor Company
GM	-	General Motors Corporation
Honda	-	American Honda Motor Co., Inc.
Intervenor-Defendant Appellees	-	Collectively, the Submitters (defined below) and the Suppliers (defined below)
IR	-	The December 17, 1997 Information Request sent by the National Highway Traffic Safety Administration to the Submitters (defined below)
Mercedes-Benz	-	Mercedes-Benz USA, LLC (formerly, Mercedes-Benz USA, Inc.)
Mfrs. Reply	-	Reply of Intervenor-Defendant Submitters In Support of Cross-Motion for Summary Judgment
MY	-	Model Year
NHTSA	-	National Highway Traffic Safety Administration
NHTSA S.J. Mem.	-	Memorandum of Points and Authorities of Defendant National Highway Traffic Safety Administration in Support of its Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment
Nissan	-	Nissan North America, Inc.
OMB	-	U.S. Office of Management and Budget
PRA	-	Paperwork Reduction Act, 44 U.S.C. §§ 3501, <i>et seq.</i>

- Submitters - Collectively, American Honda Motor Co., Inc., DaimlerChrysler Corporation, Ford Motor Company, General Motors Corporation, Mercedes-Benz USA, Inc., Nissan North America, Inc., Toyota Technical Center, USA, Inc., Volkswagen of America, Inc., and Volvo Cars of North America, Inc.
- Suppliers - Collectively, Robert Bosch Corporation, Takata Inc., TRW Safety Systems, Inc., and TRW Inc.
- Takata - Takata Inc.
- Toyota - Toyota Technical Center, USA, Inc.
- Toyota Reply - Memorandum of Points and Authorities in Reply to Plaintiff's Opposition to Intervenor-Defendant Toyota's Cross-Motion for Summary Judgment and in Further Support of Toyota's Cross-Motion
- TRW - Collectively, TRW Inc. and TRW Vehicle Safety Systems, Inc.
- VWoA - Volkswagen of America, Inc.
- Volvo - Volvo Cars of North America, Inc.

## **STATUTES AND REGULATIONS**

Except for those provided in the attached addendum, all applicable statutes and regulations are contained in the addendum of the Brief for the Center for Auto Safety (CAS).

## **ISSUES PRESENTED**

1. Whether the district court correctly found that NHTSA did not compel the submissions of the information at issue in this case, which, therefore, are subject to the categorical rule for voluntary submissions established by this Court in *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) (*en banc*).

2. Whether the district court correctly found that there was no genuine issue of material fact that the Submitters do not customarily publicly disclose information of the same kind as the highly sensitive information submitted in response to the IR.

3. Whether the district court correctly found that there was no genuine issue of material fact concerning whether portions of the responses to the IR constitute trade secrets.

## **STATEMENT OF THE CASE**

This case arises from a FOIA suit brought by CAS against NHTSA in the United States District Court for the District of Columbia.<sup>1</sup> CAS sought the disclosure of highly sensitive information submitted in response to a NHTSA Information Request (IR) by DaimlerChrysler, Ford, GM, Honda, Mercedes-Benz, Nissan, Toyota, VWoA, and Volvo (collectively, Submitters). Submitters intervened in the district court as defendants, as did Bosch, Takata, and TRW (collectively, Suppliers).

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<sup>1</sup> Acronyms and abbreviations are set forth in the Glossary.

On cross-motions for summary judgment, the district court granted the motions filed by NHTSA, the Submitters, and the Suppliers, finding all of the information exempt from disclosure under Exemption 4. The court concluded that some of the information constituted trade secrets, and the remainder was voluntarily submitted to NHTSA and was of a kind that the Submitters do not customarily disclose to the public. This appeal followed.

### STATEMENT OF FACTS

In connection with NHTSA's ongoing efforts to regulate airbag performance, on December 17, 1997, NHTSA issued an IR to each of the Submitters. Coleman/JA353 ¶ 3. The IR sought "detailed information concerning air bag system design, performance, and suppliers for every make/model of vehicle [Submitters or their principals] manufactured between model year (MY) 1990 and 1998." Boehly/JA392 ¶ 58.<sup>2</sup>

A majority of the nine entities that received the IR are subsidiaries or agents of foreign manufacturers. Shelton/JA464 ¶ 4. NHTSA, which "had had considerable experience in dealing with foreign manufacturers," knew "that for the most part detailed engineering information such as that requested was not developed or maintained in the United States, but resided in the offices of the foreign parent corporation or one of its subsidiaries or affiliates." *Id.*; *see also* Haenchen/JA169 ¶ 5 (VWoA, as agent for both Volkswagen AG and Audi AG for purposes of receiving NHTSA notices and requests "considered any request served upon [it] \* \* \* as directed to both [Volkswagen AG] and Audi AG" and accordingly obtained responsive information from both companies).

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<sup>2</sup> Notably, a number of industry members, including, for example, BMW, Isuzu, and Mitsubishi, were *not* sent the IR.

Thus, “[b]ased on the counting of foreign parents and affiliates that were reasonably expected to be involved in \* \* \* responding to the information requests separately from the domestic subsidiaries who received the requests directly from [NHTSA], [NHTSA] sent the information requests to ten or more persons.” Shelton/JA465 ¶ 6.

Each Submitter requested confidential treatment of some or all of the submitted information. The agency granted these requests. Coleman/JA353 ¶ 3. Subsequently, in March 1998, CAS filed a FOIA request for the information, which NHTSA granted in part (placing approximately 500 pages of material in its public docket) and denied in part pursuant to FOIA Exemption 4. *Id.* ¶ 4. In January 1999, CAS filed a second FOIA request for documents that had not already been released. This request was denied, and CAS filed an administrative appeal in March 1999. *Id.*/JA354 ¶ 5.

In June 1999, NHTSA determined that it would release some of the information, reconsider the exempt status of other information, and withhold the remainder. *Id.* ¶ 6. Subsequently, in August and September 1999, NHTSA released approximately 7,000 pages of additional information, some of it over the objections of the Submitters. *Id.*/JA354-356 ¶¶ 7-9.

During the course of the proceedings below, NHTSA released certain additional information. *See, e.g.*, Coleman/JA363-365 ¶¶ 18-20. Thus, by the time the district court decided the case, only the most critically sensitive information submitted in response to the IR was at issue. The categories of information that remain at issue are summarized in the district court’s opinion and in the “Joint Report Of Information For Which Exemption 4 Is Being Claimed,” which the parties submitted below. *See Center for Auto Safety v. National Highway Traffic Safety Administration*, 93 F. Supp. 2d 1, 3-8 (D.D.C. 2000); JA584.

## SUMMARY OF ARGUMENT

1. The district court correctly concluded that the information was submitted voluntarily to NHTSA. Absent OMB approval, NHTSA could not have compelled the Submitters to respond to the IR because the IR posed identical questions to ten or more persons, which triggered a requirement under both the Paperwork Reduction Act (PRA) and OMB's regulations for NHTSA to obtain OMB's approval prior to issuing the request. Because NHTSA failed to obtain such approval, it lacked authority to compel the Submitters to respond to the IR, and all such responses were voluntary.

2. The district court applied the correct standard in concluding that the Submitters do not customarily disclose to the public information of the kind at issue in the case. The Appellees provided specific, particularized declarations in support of their position, showing that they do not customarily disclose information of the kind at issue in the case and that the information adduced by CAS materially differs from the detailed, technical, and highly sensitive information submitted to NHTSA in response to the IR. Moreover, because *all* of the information at issue in the case was voluntarily submitted to NHTSA, and *none* of it is customarily disclosed to the public by the Submitters, this Court can, and should, resolve the entire appeal on the basis of the standards set forth in *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) (*en banc*).

3. Finally, the district court correctly concluded that some of the information constitutes trade secrets because that information is maintained in secrecy, is commercially valuable, is used for the making of trade commodities, and is the end product of either innovation or substantial effort.

## ARGUMENT

FOIA Exemption 4 authorizes an agency to withhold “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4).

Trade secret information is exempt from disclosure, and no further inquiry is necessary. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983).

Whether non-trade secret commercial or financial information “is protected turns in part on whether it was provided to the government voluntarily or under compulsion: if the financial or commercial information was disclosed to the government voluntarily, it will be considered confidential for purposes of Exemption 4 if it is the kind of information “that would customarily not be released to the public by the person from whom it was obtained.”” *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303, 304 (D.C. Cir. 1999) (quoting *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*en banc*)).<sup>3</sup>

Information submitted under compulsion “will be considered confidential only if disclosure would be likely either (1) to impair the government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” *McDonnell Douglas Corp.*, 180 F.3d at 305 (discussing *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)). In determining whether release of a compulsory submission will cause substantial competitive harm, consideration is given to the cost of obtaining the information by other means, such as testing, disassembly, or reverse engineering. *See Worthington Compressors, Inc. v.*

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<sup>3</sup> CAS has not challenged the court’s findings that the Submitters are “person[s]” and that the compilations of detailed technical information are “commercial.” 93 F. Supp. 2d at 15-16.

*Costle*, 662 F.2d 45, 51-52 (D.C. Cir. 1981). However, the *National Parks/Worthington Compressors* substantial competitive harm test is *not* relevant when the information was submitted voluntarily. See *McDonnell Douglas*, 180 F.3d at 305 (*Critical Mass* confined the substantial harm test to “cases of compelled disclosure”).

Based upon a painstaking review of a voluminous record and the arguments of the parties, the district court held that some of the Submitters’ information constituted trade secrets and the remainder was exempt under *Critical Mass*. (The court did not consider, and was not required to consider, whether the *trade secret* information also was exempt from disclosure under *Critical Mass*.<sup>4</sup>)

**I. THE INFORMATION IS SUBJECT TO THE CATEGORICAL RULE FOR VOLUNTARY SUBMISSIONS UNDER *CRITICAL MASS*.**

Nearly a decade ago, in a landmark decision construing the application of FOIA Exemption 4, this Court clarified the meaning of “confidential” commercial information and established a categorical rule: when information is provided to the government voluntarily, “it will be treated as confidential under Exemption 4 if it is of a kind that the provider would not customarily make available to the public.” *Critical Mass*, 975 F.2d at 872. It does not matter whether the agency *could have* compelled the information; the only issue is whether the agency *did* compel the information. Thus, the threshold question here is whether NHTSA actually compelled the Submitters to provide the airbag design information at issue. If the answer is no, and if the information is “of a kind” that the Submitters would not customarily release to the public, that is the end of the inquiry. Considerations of the risk of competitive harm from the

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<sup>4</sup> The court did not reach the issue of whether any of the information also would be exempt from disclosure under *National Parks* and *Worthington Compressors*.

release of the voluntarily supplied information are irrelevant to its eligibility for protection from disclosure under FOIA.

**A. The Information Was Voluntarily Supplied to NHTSA.**

1. As CAS concedes, the Submitters did not challenge the IR. Brief for Appellant 14 (Br. or CAS Br.). Thus, the Submitters provided exactly the sort of voluntary cooperation with the government that this Court has recognized as valuable. *See Critical Mass*, 975 F.2d at 878.

There is no rule that a submitter must first challenge a government agency's information request in order subsequently to prove that the submission was voluntary. Indeed, in *Critical Mass* itself, the nuclear industry did not challenge NRC's undisputed authority to compel production of the safety reports at issue in that case. Thus, the fact that the Submitters did not challenge NHTSA's authority to compel the information illustrates the voluntariness of the cooperation and is no infirmity to demonstrating that the submissions were not, in fact, compelled by NHTSA.

2. Likewise, and contrary to CAS's suggestion (Br. 33-34), there is no rule that a submitter must affirmatively notify an agency that it has chosen to cooperate voluntarily with an information request in order for the submitter to demonstrate later that the response was not compelled. A submitter's voluntary cooperation is evident from the lack of resistance to the request, and need not be preserved on the record as if it were an objection to an evidentiary ruling in a trial court. Here, in fact, two of the Submitters did note that they were voluntarily complying with the information request (*see* 93 F. Supp. 2d at 16 n.7), and there was no need for any of the other Submitters to have done so.

**B. NHTSA Lacked Authority to Compel Responses to the Information Request.**

The voluntariness of the industry submissions is underscored by the fact that NHTSA could not have compelled responses to the IR, because NHTSA did not comply with the procedural and substantive requirements of the Paperwork Reduction Act. The PRA requires NHTSA to obtain approval from OMB before posing identical questions to ten or more persons.<sup>5</sup> 44 U.S.C. §§ 3501, *et seq.* The PRA provides that a person may freely decline to respond to an unapproved information request if the request was subject to the PRA. *Id.* § 3512. NHTSA's IR was subject to the PRA because the agency reasonably expected the recipients to obtain responsive information from their suppliers and, in the case of the majority of the recipients, from their foreign parent or affiliate companies. Shelton/JA465 ¶ 6. Because NHTSA reasonably expected that far more than ten entities would be involved in responding to the information request, PRA approval was required. 5 C.F.R. § 1320.3(c)(4) and § 1320.5. As a consequence of NHTSA's failure to obtain PRA approval, the Submitters did not have to respond to the IR, and, therefore, they were volunteers when they did so.

1. CAS makes much of its argument that none of the nine recipients was obligated to obtain information from other entities. CAS Br. 29-30. This argument is baseless. First, even if CAS were correct that the IR recipients did not have to solicit responsive information from other entities, this would show that the recipients were *volunteers* when they did so, and that the resulting submissions of *voluntarily* collected data are entitled to categorical protection from public release under *Critical Mass*.

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<sup>5</sup> The submitters do not dispute that NHTSA has broad information gathering powers under its statute that authorize the collection of the information at stake here. The issue is not whether NHTSA could have compelled the IR responses; but whether NHTSA did, in fact, compel the responses. As shown below, the agency did not and, on these facts, could not have done so.

Moreover, NHTSA itself has acknowledged that it knew that much of the requested information resided overseas at a foreign parent or affiliate corporation. NHTSA therefore expected that at least some of the recipients of the IR would have to obtain responsive information from overseas entities. Shelton/JA464 ¶ 4. Under CAS's scenario, however, NHTSA addressed the majority of its requests to entities it *knew*, based upon its long experience regulating the automotive industry, would not have responsive information, and ostensibly would have been satisfied by responses providing no information at all. There is no reason to attribute such an absurd and meaningless intent to NHTSA.

2. CAS also suggests (Br. 30 n.5) that OMB's regulations are invalid to the extent they require PRA clearance when a request addressed to nine or fewer persons may reasonably be expected to be transmitted to ten or more persons. There is no reason to entertain this suggestion. OMB's construction of a statute is subject to substantial deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984). Moreover, it is an unnecessary inquiry here, because NHTSA did, in fact, direct its IR to at least ten entities. One of the IR recipients, VWoA, is the U.S. agent for two foreign manufacturers, Volkswagen AG and Audi AG, and service of NHTSA's IR on VWoA was deemed to be service on *both* of those foreign manufacturers under NHTSA's organic statute. 49 U.S.C. § 30164(b); Haenchen/JA168-169 ¶ 5. Thus, NHTSA's IR was directed to at least ten entities.

3. CAS is left with a singularly unattractive argument: a federal information request is mandatory (for *Critical Mass* purposes) if the agency *says* it is mandatory, whether or not the agency had the actual authority to compel the information, unless the recipients first engage in a costly and time-consuming challenge to the agency's authority, and unless they defer cooperation with the request until after prevailing in such a challenge. CAS Br. 31-34. Such a

litigious process cannot possibly be reconciled with the long-recognized governmental interest in “encouraging cooperation with the Government by persons having information useful to officials.” *Critical Mass*, 975 F.2d at 878 (quoting *National Parks*, 498 F.2d at 768).

As the Department of Justice explained in its post-*Critical Mass* guidance to federal agencies, “the ‘voluntariness’ of an information submission should be determined by whether the agency **exercised its authority** to require such a submission of the participants in its administrative process.” DOJ FOIA Update, Vol. XIV, No. 2, Spring 1993 at 1/JA147 (emphasis added). Here, NHTSA **had no authority** to require compliance with the IR, so the Submitters’ responses were voluntary for *Critical Mass* purposes.

4. CAS argues (Br. 34) that the Submitters could have had no expectation that their submissions would be treated as “voluntary,” so that the purposes of the *Critical Mass* doctrine do not come into play. CAS misunderstands the purposes of the *Critical Mass* categorical rule.

*Critical Mass* established a categorical rule primarily to help expedite agency and judicial consideration of those FOIA requests that involve voluntarily-supplied information. As this court explained, no previous FOIA case in this Circuit would have been decided differently had the *Critical Mass* categorical rule been applied to it. *Critical Mass*, 975 F.2d at 879. However, many of the previous cases would likely have been decided **more quickly**, with less protracted litigation, because the often extensive disputes about potential competitive harm from release could have been avoided.

Applying the *Critical Mass* categorical rule to this airbag design information thus serves both (a) the government’s interest in ensuring continued industry cooperation in the future, and (b) the Submitters’ interests in preventing unauthorized release of this highly sensitive information without incurring the added expenses of protracted litigation about competitive

harm. By contrast, CAS would have a reviewing court engage in a subjective inquiry into the expectations of private sector submitters in every individual case, an approach that defeats the purpose of objective, categorical rules.

The whole point of establishing categorical rules for FOIA cases is to lead to simpler, more predictable applications of FOIA, thereby reducing unnecessary litigation. The *Critical Mass* categorical rule asks one objective question: Did the government in fact exercise its authority to compel the information in question? Here, the answer is no.

5. CAS finally argues that the PRA is “undermined” by the district court’s ruling, because (according to CAS) the PRA contemplates that submitters will “raise PRA-based defenses *before* they submit their paperwork.” CAS Br. 35 (emphasis in original). Here again, CAS is wrong. The PRA itself provides that the “public protection” provision may be raised “at any time” during the agency’s administrative process or judicial action applicable to the information collection. 44 U.S.C. § 3512(b). There is no requirement for submitters to raise PRA defenses before submitting information to the government. *See Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 31 (D.C. Cir.), *cert. denied*, 525 U.S. 813 (1998) (submitter successfully raised PRA argument years after filing ostensibly noncompliant license application).

More importantly, CAS misses the point of the PRA analysis. The PRA merely supplies the reason why NHTSA did not, in fact, compel the Submitters’ responses. This case is not, as CAS alleges (Br. 35), an “[a]fter-the-fact litigation of PRA compliance.” Rather, the district court looked to the PRA only to answer the objective question posed by the *Critical Mass* categorical rule: Did NHTSA actually exercise its authority to compel the airbag design information at issue here? Seeing that the PRA deprived NHTSA of any authority to compel compliance with this particular information request, the district court correctly concluded that the

*Critical Mass* categorical rule protected the airbag design information, as long as it is “of a kind” that is not customarily disclosed to the public.

**II. THE COURT CORRECTLY CONCLUDED THAT THE APPELLEES ESTABLISHED THAT THE SUBMITTERS DO NOT CUSTOMARILY DISCLOSE INFORMATION OF THE KIND AT ISSUE IN THE CASE.**

As noted above, under *Critical Mass*, information is exempt from disclosure under FOIA if it is of a kind that the submitter does not customarily disclose to the public. The Appellees carried their burden of establishing the absence of a genuine issue on this point, showing that, under the applicable burden of proof, there is no reasonable basis to find that the Submitters customarily disclose information of the kind at issue.

**A. Appellees’ Declarations and Affidavits Were Specific and Detailed.**

Contrary to CAS’s assertions (Br. 23), the Appellees’ evidence on the Submitters’ customary disclosure policies and practices was particular and specific, not “conclusory and generalized.” The Submitters’ declarations established their corporate policies for protecting the confidentiality of the information submitted to NHTSA. In response to CAS’s documents, which purportedly showed that the Submitters had previously disclosed information of the same kind, NHTSA and the Submitters presented particularized, specific declarations demonstrating that the information adduced by CAS differed in kind from the information in the Submitters’ responses to the IR. *See, e.g.*, Arakawa Supp./JA574-575 ¶ 8; Boehly Supp./JA432 ¶ 52; Clark Supp./JA474-475 ¶¶ 11-15; Haenchen Additional/JA479-484 ¶¶ 4, 5, 7-13; Selke Supp./JA499 ¶ 9; Terry Supp./JA508 ¶ 18; Yakushi Supp./JA515-516 ¶ 5.

Because Appellees’ declarations amply and specifically established the absence of a genuine issue as to the Submitters’ customary disclosure policies and practices, the court did not

err in concluding that the Appellees are entitled to judgment as a matter of law on the customary disclosure issue.

**B. The Court Did Not Misconstrue the Applicable Disclosure Issue.**

CAS argues (Br. 22-25) that the district court erred by considering only whether identical information had been customarily disclosed by the Submitters, rather than whether the Submitters had customarily disclosed information *of the kind* at issue. CAS, however, has misconstrued the district court's thorough and well-reasoned decision.

In *any* FOIA case, an issue may arise as to whether information identical to that at issue in the case already is in the public domain. As this Court has held, "if identical information is truly public, then enforcement of an exemption [under FOIA] cannot fulfill its purposes." *Niagara Mohawk Power Corp. v. United States Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999). In the proceedings below, CAS submitted evidence purportedly showing that information identical to some of the information at issue in the case already was in the public domain, to which the Submitters responded by demonstrating that none of the withheld information was public.

However, in cases governed by *Critical Mass*, a separate issue arises: whether the submitter customarily discloses information of the kind at issue to the public. *Critical Mass*, 975 F.2d at 879.

It was CAS, and not the district court, that confused these two issues. Thus, the court found that the Submitters do not have a custom of publicly disclosing information of the kind at issue, concluding that CAS's "customary disclosure" evidence was far less comprehensive, specific, and detailed than the actual submissions. 93 F. Supp. 2d at 18.

That the court understood the distinction between the customary disclosure and public domain issues is apparent when its opinion is read in the context of the parties' evidence and arguments. *Cf. United States v. Como*, 53 F.3d 87, 91 (5th Cir. 1995) (viewing the district court's opinion "in the context of the attorneys' argument").

The parties' briefs and evidence clearly distinguished the two issues, offering separate arguments as to each. *See* NHTSA S.J. Mem. 19-20 (discussing on page 19 whether the submitter customarily discloses information of the kind to the public, but pointing out on page 20 that NHTSA would *not* "be entitled to summary judgment if plaintiff could point to information identical to that sought to be withheld, which had become 'truly public'"); Mfrs. Reply 2, 6-10 (*Critical Mass* customary disclosure argument); *id.* at 12-16 (separately arguing that identical information is not in public domain); Toyota Reply 4 (availability of information from other sources "has nothing whatsoever to do with the analysis under *Critical Mass*"); *id.* at 5-11, 19-21 (separately arguing the two issues).

A number of the Submitters' declarants also sharply distinguished between the public domain issue and the *Critical Mass* disclosure issue. *See, e.g.*, Clark Supp./JA473-475 ¶¶ 8-16 (separately discussing CAS's *Critical Mass* and public domain exhibits); Rapaport/JA495 ¶¶ 9,10; Terry Supp./JA505-511 ¶¶ 4-31; Yakushi Supp./JA515-518 ¶¶ 4-15. By the same token, although it sometimes blurred the two issues, CAS presented documents on the issues in separately-lettered appendices.

Having carefully sifted the parties' voluminous arguments and evidence, the district court perceptively addressed the public domain and *Critical Mass* issues separately, and clearly invoked the correct standard in discussing the *Critical Mass* issue. 93 F. Supp. 2d at 17 ("The information submitted to NHTSA is totally protected under Exemption 4 if the Intervenor-

Defendants can show that they do not customarily disclose *such* information to the public.”) (emphasis added; citing *Critical Mass*, 975 F.2d at 879).<sup>6</sup> Then, *after* discussing the *Critical Mass* customary disclosure issue, the district court turned to the public domain issue, and, citing *Niagara Mohawk*, noted that “[i]n addition, Plaintiff has been unable to prove that the information it has uncovered is identical to the information provided by Intervenor-Defendants.” 93 F. Supp. 2d at 18 (emphasis added).

CAS, however, argues (Br. 25) that the citation of *Niagara Mohawk* shows that the court misconstrued the *Critical Mass* disclosure issue. CAS contends that *Niagara Mohawk* addresses *National Parks*’ substantial competitive harm test and that it was inappropriate to cite *Niagara Mohawk* because, once the court had concluded that this is a *Critical Mass* case, it had no business discussing the *Niagara Mohawk* public domain issue at all.

CAS is wrong about the scope of *Niagara Mohawk*. In *Niagara Mohawk*, this Court noted that the public domain issue was “independent of the matters discussed” elsewhere in the opinion, which included the issue of substantial competitive harm. 169 F.3d at 19. The public domain question may arise with respect to *any* FOIA exemptions. *See id.*; *see also Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) (“public-domain doctrine” invoked in Exemption 3 case). Thus, the district court had every reason to address the *Niagara Mohawk* public domain issue “[i]n addition to” the *Critical Mass* disclosure issue.<sup>7</sup>

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<sup>6</sup> In *Critical Mass*, this Court used virtually identical language in concluding that the submitter there “does not customarily release *such* information to the public.” 975 F.2d at 880 (emphasis added).

<sup>7</sup> Strikingly, CAS opens its *Critical Mass* customary disclosure argument by invoking *Worthington Compressors*’ refinement of the *National Parks* substantial competitive harm test – a test that is irrelevant in a *Critical Mass* case. *See* CAS Br. 22; *see also Worthington Compressors*, 662 F.2d at 51 (discussing application of *National Parks*’ substantial competitive harm test). (footnote continued on next page)

Accordingly, CAS's argument that the district court confused the public domain issue with the *Critical Mass* issue, and the related argument that the court should not have invoked *Niagara Mohawk* at all, are both meritless.

**C. CAS's Other Customary Disclosure Arguments Are Meritless.**

1. Selectively quoting from the district court's decision, CAS argues (Br. 25-26) that, in rejecting CAS's customary disclosure arguments, the district court (1) improperly relied on the fact that the information was submitted to NHTSA in the form of compilations and (2) erroneously concluded that CAS had pointed only to *isolated* disclosures that did not reflect a *custom* of disclosure.

CAS's characterization of the court's reasoning is erroneous. A review of what the court really said, in its entirety, makes it clear that the court did *not* improperly focus on the fact that the Submitters supplied compilations or that CAS had been able to point only to isolated disclosures. The court stated:

[I]n each instance, the disclosures which Plaintiff was able to uncover do not indicate *customary* disclosure, but only discrete disclosures to persons or agencies who require the information. Such disclosures have been limited, and have generally been accompanied by confidentiality agreements or protective orders. **Furthermore, the minimal information released to the public is very general in nature and, only an approximation of the information supplied to NHTSA.** The comprehensive and detailed compilations of information provided to NHTSA are not in the public domain. **Plaintiff has furthermore been unable to produce any evidence of public disclosure as to more than half of the remaining items in question.**

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harm test in context of case in which "the requested information is available, at some cost, from an additional source").

93 F. Supp. 2d at 18 (bold-face emphasis added; italics in original). Thus, the court’s customary disclosure finding did *not* principally rest on the fact that the information was presented as compilations or on the isolated nature of the disclosures cited by CAS.<sup>8</sup>

To the contrary, the district court principally relied on (1) the fact that CAS’s proffered information differed materially in kind from the information in the Submitters’ IR responses (noting *in addition* that CAS’s information reflected only isolated disclosures) and (2) the fact that, notwithstanding the Submitters’ specific showings of their non-disclosure policies, CAS failed to produce any evidence of customary disclosure concerning almost half of the items of information remaining in the case. The court’s conclusions were amply supported by the Submitters’ declarations, which, contrary to CAS’s unsupported assertions (Br. 26), conclusively and specifically established that, because CAS’s evidence differed materially from the information that the Submitters sent to NHTSA, CAS’s exhibits did not reflect customary disclosures of the information at issue in the case.

2. CAS also argues (Br. 24, 27) that the district court erred by failing to find that some of the information has been customarily disclosed because it is “readily observable to anyone with the product.” This argument is meritless. As NHTSA’s declarant, William A. Boehly, stated, “[t]he withheld information is highly technical design, performance and supplier information.

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<sup>8</sup> In a few instances, Submitters noted disclosures of similar information, but such disclosures were isolated, not made to the general public, and not indicative of a custom of public disclosure. *See* Clark Supp./JA474 ¶ 9 (only instance of similarity between Ford IR information and public information involved agency-compelled disclosures); Haenchen Additional/JA480 ¶ 6 (general information for first generation airbags in 1990 Audis released to dealership technicians, but subsequent material changes not disclosed); Rapaport/JA495 ¶ 9 (tether information for MY1993-1994 in response to survey); Terry Supp./JA507 ¶ 11 (GM requested confidential treatment for its disclosure of fold patterns); *id.*/JA509 ¶ 20 (GM provided supplier information in response to government inquiries, not pursuant to custom of disclosure); *id.* ¶ 22 (test information cited by CAS relates to only one model of one model year).

Questions about these categories of information obviously cannot be answered simply by looking at the inside of a passenger car, or even by disassembling the steering column and the dashboard.” Boehly/JA389 ¶ 51; *see also* Boehly Supp./JA414 ¶ 5 (“Air bag systems are largely invisible and the information at issue cannot be discerned from observation of the vehicle as sold.”); Terry Supp./JA506 ¶ 7; Yakushi Supp./JA519-520 ¶ 19.

Thus, far from conceding that information of the kind at issue is readily apparent to anyone with the vehicle, Appellees firmly disproved CAS’s baseless assertions. In fact, with respect to the very categories of information cited by CAS in its appellate brief (at 27) – the tear patterns and the number and location of tethers – NHTSA’s and the Submitters’ declarants conclusively established that information of the same kind could *not* be discerned through mere “physical inspection.” *See, e.g.*, Haenchen Additional/JA480 ¶ 4 (tear pattern information discernable from steering wheel or dashboard tear seams differs from information VWoA submitted in response to IR, which provides “a precise description of the number, size, and opening directions of various sections of the airbag cover upon deployment”); Terry Supp./JA507 ¶ 12 (GM’s IR response included “diagrams of the tear patterns and shows where the air bag cover or instrument panel tear initiates upon deployment, which is important to the performance characteristics of air bags”); Yakushi Supp./JA516 ¶ 7 (similar); Boehly/JA 379-380 ¶ 28; *id.*/JA384 ¶ 40 (tether information “cannot be ascertained without disassembly and inspection of all of the hundreds of air bag models covered by the information requests”); Haenchen/JA183-184 ¶ 35; Nusholtz/JA215 ¶ 16 (DaimlerChrysler’s tether information included “confidential and proprietary design drawings showing not only the number and location of tethers, but also detailed design information that would provide a competitor with sufficient information to design and build the air bag module.”); Terry/JA269 ¶ 36.

Finally, CAS cannot salvage this argument by invoking *Worthington Compressors* (Br. 22 and 27) and arguing that information of the kind at issue can be observed by inspecting deployed airbags in junk yards or by disassembling airbags. *See* CAS Br. 27; CAS Appendix. As noted above, the feasibility of obtaining information through reverse engineering, tests, or other such means is germane under the *National Parks/Worthington Compressors* substantial competitive harm inquiry, but is not relevant where the information was submitted to the government voluntarily. *See McDonnell Douglas*, 180 F.3d at 305 (*Critical Mass* confined the substantial harm test to “cases of compelled disclosure”); *Critical Mass*, 975 F.2d at 878 (in cases in which information was supplied to the government voluntarily, “information that, for *whatever reason*, ‘would customarily not be released to the public by the person from whom it was obtained’” is exempt from disclosure) (emphasis added). Thus, CAS’s efforts (in its brief and appendix) to smuggle *Worthington Compressors*’ concerns into the *Critical Mass* inquiry are nothing more than a covert attempt to subvert this Court’s *en banc* holding in *Critical Mass*.

Accordingly, CAS’s argument that much of the information at issue here has been customarily disclosed by virtue of the placement of airbags on vehicles is both factually unsupportable and legally inconsistent with *Critical Mass*.

**D. All of the Information at Issue Is Exempt from Disclosure under *Critical Mass*.**

As noted above, the district court found that certain of the information consists of trade secrets and, therefore, did not analyze whether that information also is protectable under *Critical Mass*. However, because the information was voluntarily submitted to NHTSA, and the Submitters and NHTSA established the absence of a genuine issue of material fact with respect to whether *any* of the information is of a kind that is customarily disclosed to the public by the

Submitters, this Court can, and should, hold that *all* of the information at issue in the case is exempt from disclosure under *Critical Mass*.

It also is clear that *Critical Mass* precludes the disclosure of information for which CAS failed to present any specific evidence – beyond the incredible assertion that the information was customarily disclosed because airbags are installed on motor vehicles – in rebuttal to the declarations establishing that information of the kind is not customarily disclosed to the public by the Submitters. CAS failed to offer specific evidence of customary disclosure with respect to the following companies' information:

DaimlerChrysler: IR specifications A.1.a.3, A.1.b.4, A.2.a, A.2.b, B.2, B.3, B.4, C1.b., C.1.c, C.1.d, C.1.f, C.2.b, C.2.c(1)-(4), D.1, D.2, G.1.c, G.2, and G.3;

Ford: IR specifications B.2, C.2.b, C.2.c(1)-(3), E.3, E.4, G.1.c, G.2., and G.3;

General Motors: IR specifications A.2.a, B.3, C.2.c(1)-(3), D.1, D.2, G.2, and G.3;

Honda: IR specifications C.1.c, C.1.d, C.2.b, C.2.c(4), E.3, E.4, G.1.c, G.2, and G.3;

Mercedes-Benz: IR specifications A.2.a, B.2, C.2.b, C.2.c(4), D.1, and D.2;

Nissan: IR specifications A.1.a.3, A.1.b.4, B.2, B.3, C.1.d, C.2.c(1)-(4), D.1, D.2, G.1.c, G.2, and G.3;

Toyota: IR specifications A.2.a, A.2.b, B.3, B.4, C.1.d, C.2.c(2), C.2.c(3), D.1, D.2, G.1.c, G.3;

Volkswagen of America: IR specifications A.1.b.4, A.2.a, A.2.b, B.3, C.2.b, C.2.c(1)-(4), D.1, D.2, E.3, and E.4; and

Volvo: IR specifications A.1.a.3, A.b.1.4, A.2.a, B.2, B.3, B.4, C.1.c., C.1.d, C.2.b, C.2.c(1)-(4), D.1, D.2, and E.5.

Thus, aside from its preposterous argument that the placement of airbags in vehicles discloses the so-called “physical characteristics” information, CAS failed even to attempt to raise a genuine dispute as to the material listed above. Moreover, as to the remaining information, because all of it was submitted voluntarily, and Submitters established that there is no genuine issue concerning their customary disclosure of information of the same kind, the information is entitled to categorical protection under *Critical Mass*, and the Submitters were entitled to summary judgment.

### **III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT SOME OF THE SUBMITTED INFORMATION CONSISTED OF TRADE SECRETS.**

The parties agree, as they did below, that *Public Citizen*, 704 F.2d at 1288, establishes the definition of “trade secrets” for purposes of FOIA Exemption 4. In *Public Citizen*, this Circuit defined a trade secret “as a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.” *Id.* Submitters’ responses to the IR provide detailed design and performance specifications for manufacturing airbag systems and related components, including internal testing methodologies and procedures, airbag design trends over time, and performance data associated with specific design improvements. The declarations submitted by Appellees below established that the withheld information:

(1) is maintained in secrecy, Alfredsson/JA524-525 ¶ 8; Arakawa/JA117-118 ¶¶ 8-9; Clark/JA151 ¶ 9; Eugensson/JA640 ¶ 9; Haenchen/JA172 ¶ 12; Higuchi/JA198 ¶ 12; Loersch/JA549-550 ¶ 8; Nusholtz Supp./JA488-490 ¶¶ 4-6; Peteuil/JA314 ¶¶ 5-6; Rains/JA292-294 ¶¶ 5,10; Selke/JA228 ¶ 12; Steffens/JA299-300 ¶¶ 6-7; Terry/JA258 ¶ 6; Yakushi/JA276 ¶ 11;

(2) is commercially valuable, Alfredsson/JA525-526 ¶¶ 9-10; Arakawa/JA118-119 ¶¶ 12-14; Clark/JA151-152,154 ¶¶ 11, 17; Eugensson/JA640 ¶ 10; Haenchen/JA172-176 ¶¶ 13-14, 20-21; Higuchi/JA199-203 ¶¶ 14-15, 17, 23-25; Loersch/JA550-554 ¶¶ 9, 15-16, 18-19; Nusholtz/JA207-208 ¶ 3; Peteuil/JA315-316 ¶ 9; Rains/JA293-294 ¶¶ 10-11; Selke/JA229-236 ¶¶ 15, 22-26; Steffens/JA303 ¶ 16; Terry/JA260-264 ¶¶ 13, 21, 23-25; Yakushi/JA277-281 ¶¶ 15, 20-24;

(3) is used for the making of trade commodities (*i.e.*, airbag systems), Alfredsson/JA526 ¶ 10; Arakawa/JA118-131 ¶¶ 12, 15-16, 25, 41, 52-53, 58-59; Clark/JA154 ¶ 17; Eugensson/JA161-164 §§ NHTSA Sections B, C, E(3)-(5); Haenchen/JA174 ¶¶ 15, 16; Higuchi/JA199-203 ¶¶ 17, 24-25; Loersch/JA551 ¶ 10; Nusholtz/JA208-219 ¶¶ 4, 14-16, 22; Peteuil/JA313 ¶ 2; Rains/JA292 ¶¶ 2-4; Selke/JA240-246 ¶¶ 32, 38; Steffens/JA303 ¶ 17; Terry/JA266-271 ¶¶ 30-31, 38; Yakushi/JA284-288 ¶¶ 30-31, 38; and

(4) is the end product of years of research, development, and innovation and enormous financial investments, Alfredsson/JA525,527 ¶¶ 9, 14; Arakawa/JA118-119 ¶ 12; Clark/JA157 ¶ 22; Haenchen/JA172-175 ¶¶ 13, 19; Rains/JA294 ¶ 12.

Consistently, Mr. Boehly's declaration confirmed that the withheld information is "commercially valuable" (JA377-387, 392-393/¶¶ 24, 27-47, 59), "highly technical design [and] performance" data (JA389, 392/¶¶ 51, 58), which is customarily maintained in secrecy (JA/377, 387-388/¶¶ 23, 47, 49) and represents the end product of innovation and substantial effort (JA375-376/¶ 18), and that the disclosure of the "information would assist a manufacturer's competitors in designing, developing and establishing air bag restraint systems" (JA392-393/¶ 59; *see also* JA/376¶ 19).

Carefully applying the *Public Citizen* definition, the district court concluded that “[t]he restrictive definition of ‘trade secrets’ does not cover physical or performance characteristics of air bags,” and that such airbag characteristics “are not directly related to the production process.” 93 F. Supp. 2d at 14. Accordingly, of the thirty-three items of information withheld, the district court determined that only ten meet the definition of trade secrets. CAS argues that the district court erred in applying the *Public Citizen* definition because, according to CAS, those ten items: (1) are ascertainable through other sources and therefore cannot be “secret,” (2) are no longer “commercially valuable,” and (3) do not relate to the productive process.<sup>9</sup> CAS Br. 12, 16-22. CAS is wrong on all three points.

**A. The Information Is “Secret.”**

CAS’s argument that the information is not “secret” – because it can be ascertained through physical inspection and testing – improperly confuses the “trade secrets” inquiry with the issue of whether the information is “confidential.” By its terms, Exemption 4 covers two separate and distinct categories of information: (1) trade secrets and (2) information that is commercial or financial, obtained from a person, and privileged or confidential. 5 U.S.C. § 552(b)(4). The “confidentiality” of the information is relevant only if the information is merely “commercial or financial” and not if it constitutes “trade secrets.” *Public Citizen*, 704 F.2d at 1286, 1290. “If the requested documents constitute ‘trade secrets,’ they are exempt from disclosure, and no further inquiry is necessary.” *Id.* at 1286.

Moreover, as noted above (at 5-6, 19), the availability of information from physical inspection and testing is germane only to the *Worthington Compressors* refinement of the

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<sup>9</sup> CAS does not challenge the district court’s finding that the information is the end product of either innovation or substantial effort.

*National Parks* substantial competitive harm test, which subsequently has been limited to cases of compelled submissions of information to the government. Thus, CAS's argument that the information is obtainable through physical inspection and testing is irrelevant in two respects: it does not bear upon the trade secrets inquiry, and it is not germane to a case, such as this one, in which information has been submitted voluntarily.

In any event, CAS's assertions about the availability of the information through alternative sources are unsupported by the record below and factually inaccurate. First, it is not the case, as CAS claims (Br. 9), that the engineering specifications are routinely disclosed in litigation. Nor is it true that "eight of the nine manufacturers have generally made engineering specifications available." *Id.* at 17. To the contrary, the uncontroverted declarations provided by NHTSA and the Submitters established both that (1) "the manufacturers guard these specifications carefully and do not release them in litigation except pursuant to protective orders" (Boehly/JA387 ¶ 47; *accord* Nusholtz Supp./JA489-490 ¶ 6; Arakawa/JA117-118 ¶ 8; Terry/JA258 ¶ 6; Alfredsson/JA524-525 ¶ 8; Eugensson/JA640 ¶ 9; Loersch/JA549-550 ¶ 8; Haenchen/JA172 ¶ 12), and (2) the data adduced by CAS was significantly different from the data submitted in response to NHTSA's IR (*see, e.g.*, Arakawa Supp./JA574-575 ¶ 8; Boehly Supp./JA429 ¶ 43; Clark Supp./JA475 ¶ 15; Haenchen Additional/JA483-484 ¶ 13; Nusholtz Supp./JA489-490 ¶ 6; Selke Supp./JA498 ¶ 7).

Second, neither the tear pattern nor any other item of withheld information is "plainly visible to the eye." CAS Br. 21. As the district court correctly found (and anyone who drives a modern motor vehicle would know), "air bags, and therefore their physical characteristics, are not in public view, and cannot be found simply by looking inside a car or even disassembling the steering column and dashboard." 93 F. Supp. 2d at 15.

Third, CAS underestimates the cost and difficulty of obtaining the information through physical inspection and testing.<sup>10</sup> To conduct the physical inspections CAS describes, one would have to acquire airbag modules for *all* of the hundreds of models and model years covered by the IR. *See, e.g.*, Alfredsson/JA532-545 ¶¶ 24, 26, 30, 39, 40-44, 48; Boehly/JA380-391 ¶¶ 31, 32, 35, 51, 55; Clark/JA153 ¶ 14; Higuchi/JA197, 200 ¶¶ 9, 18; Klein/JA351 ¶ 7; Loersch/JA557-570 ¶¶ 24, 26, 30, 38-43, 48; Terry/JA261 ¶ 17; Yakushi/JA277,284 ¶¶ 12, 30. In many cases, two airbag systems for each of the models and model years would be required, one for inspection and disassembly and the other for dynamic testing. *E.g.*, Steffens/JA301-302 ¶¶ 11-13. CAS acknowledges (Br. 18) that replacement airbag modules cost approximately \$200 to \$500 per module. If for no other reason than cost, it is unlikely that a dealership parts department, much less a competitor, would have replacement airbag modules for all of the vehicles and model years covered by the IR. It is also improbable that a competitor would be able to obtain replacement airbag modules – particularly for all of the models and model years covered by the IR – from a junkyard because the disposal of unspent airbag canisters is closely regulated by many state and local environmental regulations. *See, e.g.*, N.J. Admin. Code. title 7, § 26-6.3(a)(5)(i)(4) (2000) (unspent airbag canisters must be removed before disposal).

To conduct the supposedly “routine” tests CAS describes, one would need not only the airbag modules but also the vehicles or test rigs for all of the models and model years covered by the IR. *See* Arakawa/JA126-131 ¶¶ 41, 52-53, 58; Zinke/JA110-111 ¶ 18. The initial setup for

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<sup>10</sup> No fair reading of the Submitters’ position supports CAS’s contention that the Submitters did not dispute that the information can be ascertained through physical inspection or routine testing. To the contrary, the Submitters repeatedly stated that in many cases, physical inspection would not reveal the information, *e.g.*, Nusholtz/JA210 ¶ 8; Arakawa/JA129 ¶ 53; Higuchi/JA198 ¶ 11, and that replication of the remaining information would be time-  
(footnote continued on next page)

each of the tests necessary to obtain the information in items C.2.a and C.2.c, for example, would take months to prepare and cost tens of thousands of dollars, and each test would take about a day to perform, analyze, and report, and would cost over a thousand dollars. *See* Arakawa/JA128-129 ¶¶ 52, 53. Different tests would likely be required to ascertain the information reported in many of the individual sub-paragraphs of these items, as well as for each of the models and model years covered by the IR. *See, e.g.*, Haenchen/JA183-184,188-189 ¶¶ 35, 43, 44; Terry/JA266-269 ¶¶ 30, 36; Yakushi/JA284 ¶ 30. Thus, even if it were possible to obtain all of the necessary airbag modules and vehicles or test rigs for all of the models and model years covered by the IR, and to duplicate the testing conditions and procedures used by the manufacturers in compiling the withheld information, it would be extraordinarily time-consuming and expensive to do so. *See, e.g.*, Arakawa/JA123-129 ¶¶ 25, 41, 52-53; Clark/JA151-154 ¶¶ 11, 16; Haenchen/JA183-184 ¶ 35; Higuchi/JA199-200 ¶ 17; Selke/JA241 ¶ 33; Terry/JA269 ¶ 36. Moreover, some of the withheld information could not be ascertained through such means because it includes standards and specifications that are not discernable through inspection, reverse engineering, or testing. *See, e.g.*, Arakawa/JA129 ¶ 53; Clark/JA155-156 ¶ 20; Nusholtz/JA210 ¶ 8; Rains/JA294 ¶ 12; Selke/JA245-246 ¶ 38; Steffens/JA302 ¶ 14.

**B. The Information Is “Commercially Valuable.”**

Contrary to CAS’s uninformed assertions (Br. 12, 20), the withheld information is neither “outdated” nor “already known within the industry.”

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consuming, costly, and dangerous, Arakawa/JA120-126 ¶¶ 17, 25, 41; Clark/JA152-153 ¶13; Haenchen/JA183-184 ¶ 35; Selke/JA241 ¶ 33; Terry/JA266-269 ¶¶ 30, 36; Yakushi/JA284 ¶ 30.

1. While it is true that airbag systems have changed and are continuing to change, the evolution of the technology and design changes provides valuable insights into the manufacturers' goals, design approaches, and priorities, and would allow competitors to anticipate the manufacturers' marketing plans and future design innovations. *See, e.g.,* Alfredsson/JA525-530 ¶¶ 9, 10, 15-16, 18-19; Arakawa/JA118-119 ¶¶ 12-14; Boehly/JA377-393 ¶¶ 24, 27-47, 59; Clark/JA154 ¶ 17; Eugensson/JA640 ¶ 10; Haenchen/JA172-176 ¶¶ 13-14, 20-21; Higuchi/JA199-203 ¶¶ 14-15, 17, 23-25; Loersch/JA550-554 ¶¶ 9, 15-16, 18-19; Nusholtz/JA207-208 ¶ 3; Nusholtz Supp./JA491-492 ¶ 13; Rains/JA294 ¶ 11; Selke/JA229-236 ¶¶ 15, 22-26; Terry/JA260-264 ¶¶ 13, 21, 23-25; Yakushi/JA277-281 ¶¶ 15, 20-24.

Indeed, NHTSA sought information for model years 1990 through 1998 precisely because it recognized the significance of this design evolution to designs currently under development. *See* 63 Fed. Reg. 49,958, 49,965-66 (Sept. 19, 1998). Accordingly, it is simply not the case, as CAS asserts (Br. 20), that “pre-1998 information would be of little, if any, commercial use to a competitor.” To the contrary, disclosure of the information would allow competitors to bring enhanced products to market in a shorter cycle time than they otherwise could because the information discloses innovative developments and demonstrates which concepts are feasible for specific vehicle designs. *See* Arakawa/JA119 ¶ 14; Boehly/JA392-393 ¶ 59; Clark/JA154 ¶ 17. Consequently, disclosing the information would give the Submitters' competitors a windfall that has nothing to do with openness in Government and was not intended by Congress in enacting the FOIA. *See Worthington Compressors*, 662 F.2d at 51.

2. CAS's contention (Br. 20-22) that the information is “already known” is based on its assertion that two of the ten items of information, *i.e.*, the inflator and tear pattern, are “standard features” of airbags. However, while there may be standardization on a highly general level with

respect to such things as the tear pattern and types of inflators, there are also significant variations between manufacturers *within* the general categories. *See, e.g.*, Terry Supp./JA506 ¶ 8 (“Although there are a limited number of *categories* of \* \* \* tear patterns, there are important differences between the precise patterns used *within* each such category.”) (emphasis in original).

Even for a single manufacturer, airbag designs vary significantly from model to model. Indeed, NHTSA reported that the “responses to the Information Requests described 590 distinct driver air bag combinations of attributes and an additional 450 distinct passenger air bag combinations of attributes.” Klein/JA351 ¶ 7.

Moreover, CAS fails to note that the IR sought information about the tear pattern *during deployment*, which cannot be obtained merely by measuring components or by physical inspection, and is fundamentally different from the “standard” patterns CAS describes. *See* Boehly/JA379-380 ¶ 28; Terry Supp./JA507 ¶ 12; Yakushi Supp./JA516 ¶ 7; Haenchen Additional/JA479-480 ¶ 4.

In any event, contrary to CAS’s assertions, it was undisputed that the withheld information is *not* generally known within the industry on a model-by-model basis, even among experts in the field. *E.g.*, Arakawa/JA119 ¶ 14; Clark/JA151 ¶ 9; *cf.* Boehly Supp./JA416-417 ¶¶ 11, 12 (confirming prior statements about the value of information even where many manufacturers use a single approach, because it is not known how many or which manufacturers take a different approach).

**C. The Information Is “Used for the Making, Preparing, Compounding, or Processing of” Airbag Systems or Components.**

Notwithstanding the straightforward *Public Citizen* definition, CAS argues (Br. 16-17) that the withheld information cannot constitute “trade secrets” because it does not contain

“production plans” or “manufacturing techniques.” CAS also asserts, inaccurately, that “[t]he information would not instruct a competitor how to construct an airbag or to mimic another manufacturer’s production techniques.”<sup>11</sup> *Id.* at 16. Contrary to CAS’s crabbed interpretation, the *Public Citizen* definition is not limited to production plans and manufacturing techniques but, rather, includes the *entirety* of the “plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities.” *Public Citizen*, 704 F.2d at 1288. Nor does the definition require that the information *be sufficient by itself* to allow a competing manufacturer to duplicate the airbag performance in a particular model or to produce an airbag system. For that reason, Theodore Zinke’s declaration, upon which CAS relies, is not at all inconsistent with a determination that the withheld information contains trade secrets. Furthermore, Mr. Zinke’s contention was made without having seen any of the information, whereas the Submitters’ declarations, which consistently explain that disclosure of the withheld information *would* allow competitors to duplicate individual components of their airbag systems, were based on first hand knowledge of the actual information supplied in response to the IR. *E.g.*, Alfredsson/JA526 ¶ 10; Arakawa/JA118-131 ¶¶ 12-16, 41, 53, 58; Clark/JA155-156 ¶¶ 20-21; Eugensson/JA640, 161-164 ¶ 9, §§ NHTSA Sections B, C, E(3)-(5); Haenchen/JA174 ¶¶ 15, 16; Higuchi/JA199-203 ¶¶ 17, 24-25; Loersch/JA551 ¶ 10; Nusholtz/JA208-219 ¶¶ 4, 14-16, 22; Rains Supp./JA580-581 ¶¶ 4-5; Selke/JA240-246 ¶¶ 32, 38; Terry/JA266-271 ¶¶ 30-31, 38; Yakushi/JA284-288 ¶¶ 30-31, 38.

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<sup>11</sup> In addition, CAS unfairly chides the district court for failing to explain how the ten items “related to ‘the productive process’” (CAS Br. 7, 21), notwithstanding the fact that the district court prefaced its findings with a lengthy discussion of the *Public Citizen* definition, and explained why eighteen of the twenty-eight items were not trade secrets because they were not directly related to the production process. 93 F. Supp. 2d at 13-14.

Each of the ten items that the district court found to be trade secrets contains detailed technical information. When combined, these items provide many of the design specifications for the manufacturers' airbag systems and component parts. The un rebutted declarations and affidavits submitted below by the Appellees established that this information is part of the manufacturers' secret, commercially valuable formula for manufacturing airbag systems and components. Accordingly, the district court correctly found that the information falls squarely within the *Public Citizen* definition of "trade secrets."

### CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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Karen L. Manos  
Linda A. Mayer  
HOWREY SIMON ARNOLD  
& WHITE, LLP  
1299 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
(202) 783-0800

*For Toyota Technical Center, USA, Inc.*

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Erika Z. Jones  
Adam C. Sloane  
MAYER, BROWN & PLATT  
1909 K Street, N.W.  
Washington, D.C. 20006.  
(202) 263-3000

*For American Honda Motor Co., Inc.  
DaimlerChrysler Corporation, Ford  
Motor Company, General Motors  
Corporation, Mercedes-Benz USA, LLC,  
Nissan North America, Inc., Volkswagen of  
North America, Inc., and Volvo Cars of  
North America, Inc.*

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Paul Jackson Rice  
Christopher H. Grigorian  
ARENT FOX KINTNER PLOTKIN  
& KAHN, PLLC  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 857-6000

*For Takata Inc.*

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Scott T. Kragie  
Andrew W. Cohen  
SQUIRE SANDERS & DEMPSEY L.L.P.  
1201 Pennsylvania Avenue, N.W.  
P.O. Box 407  
Washington, D.C. 20044  
(202) 626-6812

*For TRW Vehicle Safety Systems, Inc.,  
TRW Inc., and Robert Bosch Corporation*

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