UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LIBERTY FORD LINCOLN MERCURY, INC., *et al.*,	)	Case No. 1:21-cv-02085
	)	
	)	Judge J. Philip Calabrese
Plaintiffs,	)	
	)	Magistrate Judge
v.	)	Jonathan D. Greenberg
	)	
FORD MOTOR COMPANY,	)	
	)	
Defendant.	)	
	)	

SPECIAL MASTER DISCOVERY ORDER #1

This Order resolves the majority of pending discovery disputes between the parties as of this date. For ease of reference, the undersigned's rulings are summarized in the section entitled "Summary of Rulings." The undersigned's reasoning for such rulings are set forth in the section entitled "Discussion & Reasoning," which follows a section entitled "Background."

For efficiency, this Order assumes the reader's familiarity with the issues and access to the parties' submissions (some of which they submitted to the undersigned without formal filings on the Court's official docket). Every attempt has been made to achieve brevity in explaining the parties' arguments and the undersigned's rulings – all to keep costs related to the undersigned's role down.

I. Summary of Rulings

For the reasons set forth in the Discussion & Reasoning section below, the undersigned finds as follows.

Issue #	Ruling
#1 – Attorneys Eyes Only ("AEO") designations: "E-Commitment Forms" "Commitment Guide Reports ("CGRs")" "Allocation Schedule Order Bank Reports ("ASOBRs")" "Other AEO Pages" – 11,940 pages (or approximately 700 individual documents)	As to the AEO designations by Defendant for the E-Commitment Forms, CGRs, and ASOBRs, the undersigned finds that such designations are excessive and finds that the "CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER" will be adequate to protect and address Defendant's concerns. As to the "Other AEO Pages," the undersigned has scheduled a July 14, 2023 Zoom conference with the parties to begin an in-camera review of those documents.
#2 – Commercial Vehicle Allocations	Plaintiffs' request for discovery regarding commercial vehicles is hereby limited to such information that relates only to Plaintiff "Liberty Ford, Inc."
	Issues #3 and #5 are related and will be addressed together
#3 – Missing – CGRs and ASOBRs	Defendant's production of remaining CGRs and ASOBRs has been ongoing and monitored by the undersigned as discussed with counsel in various conferences and final productions and explanations are expected by July 24, 2023. Accordingly, no action is required by the undersigned as of this date. The undersigned will continue to monitor this process through the July 24 due date.

Issue #	Ruling
#5 – Cost Issue – CGRs production issues – claim for costs and "intentional conduct claim"	The undersigned finds that the record does not support any intentional conduct with respect to the CGR productions. The $2,200.00 payment by Plaintiffs to Defendant shall be considered as compliant with Plaintiffs' obligation to cover the cost of the production. As Defendant chose to employ a third party, Defendant shall be responsible for the third-party vendor payment of $3,149.76.
#4 – Inadvertently Produced Attorney-Client Documents	The undersigned finds that Defendant's redactions to the documents when the dispute first arose, as set forth in Exhibit C to the June 15, 2023 letter by Plaintiffs' counsel, are appropriate, and Plaintiffs' objections to same are overruled.

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II. Background

On May 3, 2023, the Court issued an Order appointing the undersigned as a Special Master, to address among other things pending discovery matters between the parties. (ECF No. 61.) On May 12, 2023, the undersigned conducted an initial telephone conference with counsel to determine the number of issues and the general topic areas that were in dispute between the parties. Thereafter, the undersigned, by way of emails dated May 22 and May 31, 2023, along with input from counsel, established a date and agenda for a June 12, 2023, in-person hearing on the pending matters.

In advance of the June 12, 2023 hearing, and pursuant to the request of the undersigned, the parties submitted to the undersigned a two-volume set of joint exhibits as well as position statements regarding the issues. An in-person hearing was conducted on June 12 on the record with the court reporter present at the offices of counsel for Plaintiffs, Wickens, Herzer & Panza.

After the June 12, 2023, hearing, the undersigned scheduled and conducted follow-up Zoom video conferences on Friday, June 16, 2023, and Monday, June 26, 2023. With advance notice to the parties, the Zoom conferences were recorded on the undersigned's initiative, should subsequent transcription be necessary. The primary purpose of the June 16, 2023 conference was to secure a report from Defendant's counsel as to the timing of further productions of documents and a timeline for that production. The June 26 conference was scheduled for further follow-up on the status of Defendant's additional productions and explanation

regarding the existence of certain reports. The June 26 conference was also utilized to confirm that the issues addressed in this Order were indeed at issue and ready for resolution.

In the June 26 conference, the undersigned informed the parties that the undersigned intended to issue an Order on June 30 resolving the pending items.

III. Discussion & Reasoning

This section sets forth the undersigned's reasoning for the rulings set forth in the section entitled "Summary of Rulings." Each "ruling" will not be repeated here.

The parties' position statements, referenced above in the "Background" section, are attached to this Order as Appendix I (Plaintiffs' Position Statements) and Appendix II (Defendant's Position Statements). The reader's familiarity with those statements is assumed. The parties had the opportunity to make further statements, arguments, and supplemental submissions at and after the June 12, 2023 hearing. The undersigned will reference the various submissions as appropriate and relevant.

For purposes of completeness, the undersigned reviewed all the documents submitted in the Joint Submission of the parties and discussed many of them with the parties at the June 12 hearing. As set forth during the June 12 hearing, the undersigned appreciates counsel's efforts (including support staff) in working together on the submissions. They were well-organized and thorough.

III.A – Issue #1 – Attorneys Eyes Only ("AEO") Designations

This dispute has essentially two components. First, Plaintiffs object to the use of the AEO designation of the three key reports summarized in the table below. Second, Plaintiffs object to the use of the AEO designation on pages other than those which fall under the "report" category. This latter category amounts to approximately 11,940 pages.

TOTAL NUMBER OF AEO PAGES PRODUCED NOT INCLUDING E-COMMITMENT FORMS, COMMITMENT GUIDE REPORTS, OR ALLOCATION SCHEDULE ORDER BANK REPORTS

Total Number of AEO Pages Produced		136,304
Minus Total Number of Pages of E-Commitment Forms Produced	-	4,697
Minus Total Number of Pages of Commitment Guide Reports Produced	-	28,385
Minus Total Number of Pages of Allocation Schedule Order Bank Reports Produced	-	91,282
Total Number of Other AEO Pages Produced		11,940

Table Source – attached to Mr. Theado's June 9, 2023 email at approximately 2:32 p.m. and discussed at the June 12, 2023 hearing.

III.A.1 – AEO Designations of Reports

As to the first category, Defendant is concerned that the data included in these documents could essentially be "reverse engineered" such that Plaintiffs would have access to highly confidential information of other dealers in their region within Defendant's dealer community.

Defendant also cites the fact that, in the Stipulated Protective Order, the parties specifically recognized that CGRs represented the type of information that could be designated as AEO. The Stipulated Protective Order entered into between the parties provides in pertinent part:

> Information that qualifies for RESTRICTED CONFIDENTIAL – ATTORNEYS EYES ONLY protection is (a) highly sensitive

> competitive internal Ford information that is not shared with dealers, or data that concerns the performance of other dealers that are not parties in this action, (b) payment and financial information of/for other dealers that are not parties in this action, (c) data reflecting the business decisions, practices, and strategies of other dealers; and/or (d) any other highly confidential information., which includes, but is not limited to, information about other dealers' internal business practices, competitive choices/practices, allocation figures, wholesale figures, *Commitment Guide Reports for other dealers*, any other highly sensitive competitive information of dealers who are not a party to this case, and any other information that disclosure of same would give non-producing party an unfair competitive advantage against other dealers.

(ECF No. 20; PageID #166) (emphasis added).

During the June 12 hearing, the undersigned inquired of Defendant's counsel regarding the relative risk that Plaintiffs' employees could conduct such a reverse engineering exercise. Defendant's counsel stated that there was "some risk" of Plaintiffs' ability to do so. Upon questioning by the undersigned along the lines of the nature of that risk on a spectrum of "some risk" to "high risk," counsel remained at the "some risk" end of the spectrum.

Plaintiffs contend that this information would be sufficiently protected under the Stipulated Protective Order with designation of designated "Confidential – Subject to Protective Order," which carries a lesser protection than the AEO designation and, in particular, allows for access by client personnel to such information. Plaintiffs note that the data has already been anonymized to protect specific dealer identification and, moreover, the data is historical in nature, covering a defined time period ending on December 31, 2021. Plaintiffs also contend that the clients' expertise in analyzing the data contained in the anonymous

productions will assist counsel and the experts in identifying anomalies that are relevant to this dispute as opposed to anomalies that may be present because of market conditions.

Regarding the fact that CGRs are specifically identified as material that may be so designated, and that Plaintiffs agreed that a CGR was within the AEO designation, Plaintiffs contend that at the time of the negotiation of the Stipulated Protective Order, Plaintiffs had access only to a limited sample or version of a CGR regarding Plaintiffs' own data.

Based on review of all the materials submitted on this issue, and the discussion during the hearing, the undersigned finds that the wholesale AEO designation by Defendant of the various reports is too restrictive. In particular, the undersigned finds that lesser designation of "Confidential – Subject to Protective Order," coupled with the anonymized treatment related to dealer identification and the fact that there is only "some risk" of reverse engineering, will sufficiently protect the interests of Defendant and its other dealers. In hindsight, one could argue that Plaintiffs should have been a bit more diligent about understanding the CGRs before agreeing to the language utilized in the Stipulated Protective Order. Nonetheless, given that the Stipulated Protective Order was entered into in the early stages of the litigation and given the timeframe limitations that have been imposed, the undersigned finds that allowing Plaintiffs (and not just Plaintiffs' counsel) access to this information will better serve the principles of discovery so that the parties may adequately prepare their cases.

III.A.2 – AEO Designations of Other Documents

As to the category of documents that contain the AEO designation that are not the reports identified above, Plaintiffs request an in-camera review of those documents. Having reviewed some of the samples of such documents during the June 12 hearing and based on the undersigned's limited review of the index of those documents, the undersigned will conduct such an in-camera review by via a Zoom and has previously scheduled the same for Friday, July 14, 2023, a date agreed to with the input and agreement of the parties.

III.B – Issue #2 – Commercial Vehicle Allocations

In addition to the parties' position statements, the best summary of this dispute is set forth in Defendant's June 6, 2023 letter to Plaintiffs' counsel and Plaintiffs' counsel's June 14, 2023 response. (While there was an initial discussion of this issue at the June 12 hearing, Plaintiffs requested an opportunity to respond to Defendant's June 6 letter, which the undersigned permitted.)

Notwithstanding Plaintiffs' citation to multiple paragraphs of the Second Amended Complaint, the only time that commercial vehicles (including commercial fleets) are referenced is in connection with Count Six of the Second Amended Complaint, which involves only Plaintiff "Liberty Ford, Inc." (See ECF No. 29, PageID #437-442). To the extent that Plaintiffs collectively seek broad-based discovery regarding the allocation of commercial vehicles, Defendant's objection to producing that information is well-taken. However, to the extent that the discovery requests are focused on commercial vehicles and the allegations in Count Six as

they relate to Plaintiff Liberty Ford, Inc. alone, discovery should be permitted, and the parties are directed to meet and confer to revisit this issue in light of this Order.

III.C – Issue ## 3 & 5 – Missing – E-Commitments, CGRs, and ASOBRs & Cost Issue

Issues #3 and #5 have as their foundation a somewhat tortured history spanning the period mid-2022 through today. In short, that history includes multiple productions (on a rolling basis) with at least one ruling by Judge Calabrese as to the scope of production.

As to issue #3, as of the date of this Order, it appears that Defendant is making progress on the production of any outstanding reports and an explanation as to the extent to which such reports exist or are available. Plaintiffs have provided Defendant with an index to which Defendant will respond with either documents or an explanation no later than July 24, 2023.

According to Defendant's counsel, one reason for the complexity of this task is that in order to secure the information requested by Plaintiffs, Defendant's personnel must conduct an electronic search of data. In the June 16, 2023 Zoom conference, Defendant's counsel advised that completing the task would require 141 hours of effort. With the agreement of the undersigned and Plaintiffs' counsel, Defendant's counsel offered to make further inquiry on alternative effort to secure the data while maintaining the quality of the search and report back. In the June 26 Zoom conference, Defendant advised that the alternative method of gathering

the data was sufficiently accurate and that Defendant's counsel believed the results could be delivered by July 24, if not sooner.

As set forth in the summary of rulings, the undersigned will continue to monitor the July 24 response to assure that the task is completed in full.

As to issue #5, the record is also a bit convoluted. As an initial matter, the undersigned finds that there is no support for Plaintiffs' claim at the June 12 hearing that the manner in which Defendant completed one of the productions in response to Judge Calabrese's Order was intentionally done so in a fashion to make Plaintiffs' work more difficult. The undersigned has reviewed the citations to the transcript of a 30(b)(6) witness provided by Plaintiffs' counsel and finds that that testimony is insufficient to demonstrate an intentional effort to cause Plaintiffs difficulties. The transcript reflects that it was intentional only to the extent that the data that was sought had to be specifically identified to retrieve the same from Defendant's internal data storage.

As to the cost component, Defendant asserts that Judge Calabrese's Order gave Plaintiffs a choice of two alternative production formats, one of which, if selected by Plaintiffs, would be at Plaintiffs' cost. There is no dispute that Plaintiffs chose the production that required reimbursement of costs. Plaintiffs assert that they should be relieved of paying for those costs given the state of the production which Plaintiffs claims was inconsistent with Judge Calabrese's Order.

The total cost at issue for this dispute is $5,369.76. Of that cost, Plaintiffs' counsel has, under protest and reserving its rights, paid Defendant's counsel

$2,200.00, related to the costs incurred by Defendant's counsel. What remains unpaid is the cost of a third-party vendor retained by Defendant to assist in the production, in the amount of $3,149.76.

Given the length of this production and the various interpretations that the parties have made with respect to Judge Calabrese's Order, it is not readily apparent who is responsible for the current state of the production. As such, the undersigned finds that, in the spirit of moving things along, a ruling as set forth in Section I, above, is appropriate.

That said, going forward, the undersigned will continue to monitor closely the efforts taken by each party to prosecute and defend this case in a cost-efficient manner, and the undersigned will not hesitate to reallocate costs as appropriate. Indeed, that is why the undersigned has conducted follow-up Zoom conferences and recorded them for later transcription and will continue to follow that practice in the future to ensure an accurate record regarding the parties' conduct.

III.D – Issue #4 – Inadvertently Produced Attorney-Client Documents

During the June 12, 2023 hearing, counsel for Plaintiffs informed the undersigned that it was withdrawing its objection to the inadvertently produced documents except as to two email chains. After some discussion at the hearing regarding the nature of Plaintiffs' position, the undersigned asked counsel for Plaintiffs to set forth in writing the then-current status of its objection to those two documents. By way of letter dated June 15, 2023, Plaintiffs' counsel set forth the

objections relating to the two documents and offered a "compromise" redaction to the redaction that Defendant offered when the dispute first arose.

The undersigned gave Defendant an opportunity to respond to the June 15 letter and, on June 29, 2023, Defendant responded by letter. Defendant advised that it would not accept Plaintiffs' offer of compromise as to the two remaining documents because the two documents in question were clearly protected by the attorney-client privilege and work product doctrine.

The undersigned has reviewed the unredacted inadvertently produced documents, along with Plaintiffs' proposed compromise and Defendant's proposed redaction. Further, the undersigned has considered the arguments set forth in the parties' position statements and those contained in the respective letters sent by counsel and finds that the two documents in question are indeed privileged documents under the attorney-client and work product doctrines.

The emails by Defendant's personnel to counsel in advance of a settlement conference while the case was pending in state court clearly involve a request for legal advice from attorneys within Defendant and fall within the protections of the attorney-client privilege and work product doctrine. Given the timing and purpose of the emails (*i.e.*, communications by counsel during the course of pending litigation and as preparation for a settlement conference), Plaintiffs' reliance on the "predominant purpose" doctrine is misplaced. Accordingly, Defendant's redactions to the documents when the dispute first arose, as set forth in Exhibit C to the June

15, 2023 letter by Plaintiffs' counsel, are appropriate, and Plaintiffs' objections to same are overruled.

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Dated: June 30, 2023 Special Master: 