

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

EDWARD E. MARTINEZ,
an individual,

Plaintiff,

vs.

CNH GLOBAL N.V., a Netherlands
Corporation, CNH AMERICA, LLC, a
Delaware Limited Liability Company,
CASE CONSTRUCTION EQUIPMENT,
INC., a Delaware Corporation, CASE
CONSTRUCTION, INC., a Wisconsin
Corporation, CASE NEW HOLLAND, INC.,
a Delaware Corporation, and DOES 1-X
inclusive,

Defendants.

Case No. 3:08-cv-00477

**STIPULATION TO AMEND
COMPLAINT AND ORDER**


19
20
21
22
23
24
25
26
27
28


STIPULATION TO AMEND COMPLAINT AND ORDER

Plaintiff, EDWARD E. MARTINEZ, by and through his undersigned Counsel, STEVEN F. BUS, ESQ. of the Law Offices of Steven F. Bus, Ltd., and Defendant CNH AMERICA, LLC, the only Defendant who has answered and appeared in this action, by and through its undersigned Counsel, DAVID R. GRUNDY of Lemons, Grundy & Eisenberg, pursuant to FRCP 15(a)(2), hereby stipulate to allow Plaintiff to file and serve the First Amended Complaint, a copy of which is attached. The purpose of the First Amended Complaint is to modify the claims based on information recently obtained by the Plaintiff and to remove Defendants CNH GLOBAL, N.V., CASE CONSTRUCTION EQUIPMENT, INC., CASE CONSTRUCTION, INC., and CASE NEW HOLLAND, INC. from the caption as a result

1 of their dismissal. The parties further stipulate and agree that the First Amended Complaint relates back
2 to the date of the original Complaint as provided by FRCP 15(c)(1)(B).

3
4 DATED this 14th day of January, 2009.

5
6
7 
8 STEVEN F. BUS, ESQ.
9 Law Offices of Steven F. Bus, Ltd.
10 611 Sierra Rose Drive
11 Reno, NV 89511
12 Attorney for Plaintiff

6 
7 DAVID R. GRUNDY, ESQ.
8 Lemons, Grundy & Eisenberg
9 6005 Plumas Street, Ste 300
10 Reno, NV 89509

11 Mark Oium, Esq.
12 Bret R. Landess, Esq.
13 Oium Reyen & Prior
14 220 Montgomery St., Ste. 910
15 San Francisco, CA 94104

16 Attorneys for Defendant
17 CNH AMERICA, LLC

18 IT IS SO ORDERED.

19 

20 LARRY R. HICKS
21 UNITED STATES DISTRICT JUDGE
22
23
24
25
26
27
28

Law Offices of Steven F. Bus, Ltd.
Quail Corners South
611 Sierra Rose Drive
Reno, Nevada 89511
Tel: 775-825-2700
Fax: 775-825-2755

Law Offices of Steven F. Bus, Ltd.
Quail Corners South
611 Sierra Rose Drive
Reno, Nevada 89511
Tel: 775-825-2700
Fax: 775-825-2755

1 STEVEN F. BUS, ESQ.
Law Offices of Steven F. bus, Ltd.
2 Nevada Bar #3041
Quail Corners South
3 611 Sierra Rose Drive
Reno, Nevada 89511
4 (775) 825-2700
Attorney for Plaintiff

5
6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 ***

9 EDWARD E. MARTINEZ,)
an individual,)
10 Plaintiff,)
11 vs.)
12 CNH AMERICA, LLC, a Delaware)
13 Limited Liability Company, and DOES I-X)
inclusive,)
14 Defendants.)
15 _____)

Case No. 3:08-cv-00477

**FIRST AMENDED
COMPLAINT**

16
17 Plaintiff, EDWARD E. MARTINEZ, by and through his undersigned Counsel, STEVEN F.
18 BUS, ESQ., of the Law Offices of Steven F. Bus, Ltd., hereby complains against CNH AMERICA, LLC
19 and for claims for relief, alleges as follows:

20 **GENERAL ALLEGATIONS**

- 21 1. Plaintiff is, and at all times mentioned herein was, an individual and a resident of the
22 County of Washoe, State of Nevada.
- 23 2. Plaintiff is informed and believes and therefore alleges that Defendant, CNH AMERICA,
24 LLC, is a Limited Liability Company formed in the State of Delaware and designed and/or
25 manufactured the Case 1102D roller which is identified in Paragraph 6.
- 26 3. The true names or capacities, whether individual, corporate, association, or otherwise,
27 of Defendants Does I-X are unknown to Plaintiff, who therefore sues said Defendants by such fictitious
28 names. Plaintiff is informed and believes and therefore alleges that each of the Defendants designated

1 herein as Does I-X either sold, maintained and/or repaired the Case 1102D roller, or otherwise are
2 responsible in some manner, and caused damages to the Plaintiff as herein alleged, that Plaintiff will
3 ask the Court to amend this Complaint to insert the true names and capacities of Does I-X when the
4 same has been ascertained and to join such Defendants in this action.

5 4. EDWARD MARTINEZ is an equipment operator employed by Highfield Construction
6 which is now Cutting Edge Construction.

7 5. On August 1, 2006, while employed by Highfield Construction, now known as Cutting
8 Edge Construction, EDWARD MARTINEZ was operating a Case 1102D roller on a sloped road.

9 6. The specific identifying markings on the Case 1102D roller reflect the number 603, the
10 number 2679 and 840218201 handwritten on the roller, F6L912 and 6270 appear on a metal plate under
11 the name of DEUTZ, Klöckner-Humboldt - Deutz AG KHD, and 4A250V and M2R660 appear at or
12 on the steering wheel.

13 7. While operating the roller, a malfunction occurred causing the hydrostatic drive system
14 to fail and the roller began to accelerate down the sloped road.

15 8. While the roller began accelerating, Plaintiff attempted to stop the roller but discovered
16 the hydrostatic drive system was not working and that there was no service or emergency braking
17 system.

18 9. The roller quickly gained speed, veering off the road and ejecting Mr. MARTINEZ from
19 the operator's seat.

20 10. As a result of his ejection, Mr. MARTINEZ sustained extensive, serious and painful
21 injuries requiring surgical intervention.

22 11. As a result of his injuries, Plaintiff has continued to have pain and suffering prohibiting
23 and/or limiting various physical activities, including employment activities, and has permanent and
24 disabling effects from his injuries.

25 12. Plaintiff is informed and believes and therefore alleges that Defendant CNH AMERICA,
26 LLC, designed and/or manufactured the Case 1102D roller with seat belts that were designed in such
27

1 a way that they could be hidden under the seat and not be seen, or not visible for other reasons, or
2 otherwise not in compliance with applicable legal requirements or guidelines, and the absence of a
3 failure to warn alerting the operator of the dangers of not using the seat belt which would have also
4 alerted the operator of the existence of seat belts, and without a service or emergency braking system
5 and placed the Case 1102D into the stream of commerce in that condition.

6 13. As a result of the necessitating and prosecuting this action, Plaintiff has incurred and will
7 continue to incur, attorney fees and costs and is entitled to recovery of the same.

8 **FIRST CLAIM FOR RELIEF**
9 **(Strict Products Liability - Design Defect)**

10 14. Plaintiff repleads and realleges each and every allegation set forth in Paragraph 1 through
11 13, inclusive, of his Complaint and incorporates the same by reference as if fully set forth herein.

12 15. Defendant CNH AMERICA, LLC, designed and/or manufactured the Case 1102D roller
13 as described in Paragraph 6.

14 16. The Case 1102D roller had a rollover protective structure (ROPS) but the seat belts were
15 designed in such a way that they could be hidden under the seat and not be seen, or not visible for other
16 reasons, or otherwise not in compliance with applicable legal requirements or guidelines, failed to have
17 a warning alerting the operator of the dangers of not using the seat belt which would have also alerted
18 the operator of the existence of a seat belt, nor did it have a service or emergency braking system in the
19 event the hydrostatic drive system failed.

20 17. Applicable law, including 29 C.F.R. 1926.601 and 1926.602, sets forth safety
21 requirements which required that the Case 1102D roller when designed and manufactured to have seat
22 belts be designed in such a way that they could not be hidden under the seat and not be seen, or not
23 visible for other reasons, in compliance with applicable legal requirements or guidelines or have a
24 warning alerting the operator of the dangers of not using the seat belt which would have also alerted the
25 operator of the existence of a seat belt, and a service and an emergency braking system.

26 18. Designing the seat belts in such a way that they could be hidden under the seat and not
27 be seen, or not visible for other reasons, or otherwise in compliance with applicable legal requirements

1 or guidelines, and the inclusion of a warning alerting the operator of the dangers of not using the seat
2 belt which would have also alerted the operator of the existence of a seat belt, and the addition of a
3 service and an emergency braking system were commercially feasible, would not have affected product
4 efficiency, and was within the state of the art at the time the Case 1102D roller was placed into the
5 stream of commerce and would have prevented the damages sustained by the Plaintiff.

6 19. The failure to design seat belts in such a way that they could be hidden under the seat
7 and not be seen, or not visible for other reasons, or otherwise in compliance with applicable legal
8 requirements or guidelines, to provide a warning alerting the operator of the dangers of not using the
9 seat belt which would have also alerted the operator of the existence of a seat belt, and the absence of
10 a service and an emergency braking system constituted design defects making the Case 1102D roller
11 unsafe and unreasonably dangerous in that the Case 1102D roller failed to perform in the manner
12 reasonably to be expected in light of its nature and intended function causing injuries and damages to
13 the Plaintiff.

14 20. As a direct and proximate cause of the design defects, Defendant CNH AMERICA, LLC
15 is strictly liable for any injuries and damages caused to Plaintiff.

16 21. As a further direct and proximate cause of the design defects, Plaintiff has sustained
17 extensive, serious and painful injuries requiring surgical intervention.

18 22. As a further direct and proximate cause of the design defects, Plaintiff has sustained
19 general damages in the form of current and future pain and suffering from his injuries in a sum in excess
20 of TEN THOUSAND DOLLARS (\$10,000.00), plus interest.

21 23. As a further direct and proximate cause of the design defects, Plaintiff has sustained
22 special damages in the form of medical costs and future medical costs, all in excess of TEN
23 THOUSAND DOLLARS (\$10,000.00), and lost wages and earning capacity according to proof, all with
24 interest.

25 **SECOND CLAIM FOR RELIEF**
26 **(Negligence per se/negligence/Design Defect)**

27 24. Plaintiff repleads and realleges each and every allegation set forth in Paragraph 1 through
28

1 23, inclusive, of his Complaint and incorporates the same by reference as if fully set forth herein.

2 25. Applicable law, including 29 C.F.R. 1926.601 and 1926.602, sets forth safety
3 requirements which required that the Case 1102D roller when designed and manufactured to have seat
4 belts designed in such a way that they could be hidden under the seat and not be seen, or not visible for
5 other reasons, or otherwise in compliance with applicable requirements or guidelines, reflect a warning
6 alerting the operator of the dangers of not using the seat belt which would have also alerted the operator
7 of the existence of a seat belt, and also have a service and an emergency braking system.

8 26. Defendant CNH AMERICA, LLC violated applicable law, including 29 C.F.R. 1926.601
9 and 1926.602, by failing to design seat belts in such a way that they could not be hidden under the seat
10 and not be seen, or not visible for other reasons, or otherwise in compliance with applicable legal
11 requirements or guidelines, failing to provide warning alerting the operator of the dangers of not using
12 the seat belt which would have also alerted the operator of the existence of a seat belt, and a service and
13 an emergency braking device.

14 27. The conduct of Defendant CNH AMERICA, LLC constitutes negligence per se in that
15 the injuries suffered by Plaintiff were caused by the violation of applicable law, including 29 C.F.R.
16 1926.601 and 1926.602, the injuries were the type intended to be prevented by applicable law, including
17 29 C.F.R. 1926.601 and 1926.602, and the Plaintiff is in the class intended to be protected by applicable
18 law, including 29 C.F.R. 1926.601 and 1926.602.

19 28. Alternatively, the conduct of Defendant CNH AMERICA, LLC was negligent in that it
20 failed to use reasonable care in the manufacturing and design of the Case 1102D roller by failing to
21 design seat belts in such a way that they could not be hidden under the seat and not be seen, or not
22 visible for other reasons, or otherwise not in compliance with applicable legal requirements or
23 guidelines, and the absence of a failure to warn alerting the operator of the dangers of not using the seat
24 belt which would have also alerted the operator of the existence of a seat belt, and a service and an
25 emergency braking device.

26 29. As a direct and proximate cause of the negligence per se or negligence of Defendant
27
28

1 CNH AMERICA, LLC, Plaintiff has sustained extensive, serious and painful injuries requiring surgical
2 intervention.

3 30. As a direct and proximate cause of the negligence per se or negligence of Defendant
4 CNH AMERICA, LLC, Plaintiff has sustained general damages in the form of current and future pain
5 and suffering from his injuries in a sum in excess of TEN THOUSAND DOLLARS (\$10,000.00), plus
6 interest.

7 31. As a further direct and proximate cause of the negligence per se or negligence of
8 Defendant CNH AMERICA, LLC, Plaintiff has sustained special damages in the form of medical costs
9 and future medical costs, all in excess of TEN THOUSAND DOLLARS (\$10,000.00), and lost wages
10 and earning capacity according to proof, all with interest.

11
12 **WHEREFORE**, Plaintiff prays for Judgment against CNH AMERICA, LLC as follows:

13 1. For general damages in the form of current and future pain and suffering from his injuries
14 and effects from his injuries in an amount in excess of TEN THOUSAND DOLLARS (\$10,000.00),
15 plus interest;

16 2. For special damages in the form of current and future medical costs and lost wages and
17 earning capacity in an amount in excess of TEN THOUSAND DOLLARS (\$10,000.00), plus interest;

18 3. For reasonable attorney fees and costs of suit incurred herein; and

19 4. Such other and further relief as the Court deems just and proper.

20 DATED this ____ day of January, 2009.

21 /s/ Steven F. Bus
22 STEVEN F. BUS, ESQ.
23 Law Offices of Steven F. Bus, Ltd.
24 611 Sierra Rose Drive
25 Reno, Nevada 89511
26 (775) 825-2700

27 Attorney for Plaintiff

Law Offices of Steven F. Bus, Ltd.
Quail Corners South
611 Sierra Rose Drive
Reno, Nevada 89511
Tel: 775-825-2700
Fax: 775-825-2755

CERTIFICATE OF SERVICE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Pursuant to FRCP 5(b), I certify that I am an employee of THE LAW OFFICES OF STEVEN F. BUS, LTD., and that on this date I served a true and correct copy of the attached **FIRST AMENDED COMPLAINT** addressed to the following:

Case Management/Electronic Filing (CM/ECF)

David R. Grundy, Esq.
Lemons, Grundy & Eisenberg
6005 Plumas Street, Ste 300
Reno, NV 89509

Attorney for CNH America, LLC

BY U.S. MAIL: I deposited for mailing in the United States mail, with postage fully prepaid, an envelope containing the preceding document at Reno, Nevada, in the ordinary course of business.

Mark Oium, Esq.
Oium Reyen & Prior
220 Montgomery St., Ste. 910
San Francisco, CA 94104

BY FACSIMILE:

BY PERSONAL SERVICE: I personally delivered the preceding document by hand delivery to the offices at the address noted above.

DATED this ____ day of January, 2009.

/s/ Denise R. Moen
Employee